PUBLICATION

Health Care Legislation Maryland 2016 First Interim Report [Ober|Kaler]

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The bills cited and reviewed in this Report are not an exhaustive presentation of all healthcare legislation. Rather, they represent either proposed or adopted legislation that we believe are among the most beneficial, curious or awful proposals for healthcare laws. Please excuse any inappropriate irreverence in this Report all of which is motivated only by our effort to maintain the interest of the reader, starting with our first and favorite aphorism.

Homage to Mark Twain

"No man's life and property is safe while the legislature is in session."

The Turf Fights

In the 2015 legislative session, the acupuncturists failed in their bill to restrict physicians, physical therapists and chiropractors from engaging in dry needling. This year, status quo, except regulations have been promised.

In this 2016 legislative session:

HB 232 / SB 605/ Chap. 412: Athletic Trainers
This bill marked an attempt by athletic trainers to expand their scope from athletic training to work hardening and treatment of public safety workers.

Provisions of this legislation would have expanded the scope of practice of athletic trainers to include physical "conditioning" of firefighters, EMTs, police officers and other public safety workers to better meet the rigors of their jobs. Unfortunately, the bill's expanded definition of "practice athletic training" would also have allowed athletic trainers to treat and rehabilitate any public safety employee injuries. Other healthcare professions complained to the legislature that treating on-the-job injuries and rehabilitating injured workers has always been the province of physicians, physical therapists, occupational therapists, and chiropractors. These professions argued that they have the appropriate education, skill, and training to treat injuries, provide needed therapies and provide work hardening. The legislature agreed and all provisions of HB 232 that would have allowed athletic trainers to engage in treating or rehabilitating injured workers were removed from this legislation.

HB 1420, Chap. 739: Massage Therapy Board Established
This bill separated the massage therapists ("MTs") from the Board of Chiropractic Examiners and provided them with their own licensing board.

In 2008, Chiropractors, at the request of the legislature, agreed to include the licensure of MTs within the existing functions of the Maryland Board of Chiropractic Examiners ("MBCE"). The 2008 amendment renamed the MBCE to be the Maryland Board of Chiropractic and Message Therapy Examiners ("MBCMTE"),

authorized the licensure of massage therapists, described their scope of practice and provided for their membership in the MBCMTE.

The practices of massage therapy and chiropractic have a degree of similarity, but are far from coextensive. Chiropractors consented to this arrangement as an accommodation to provide assistance to MTs in organizing their profession and establishing administrative, licensing and regulatory functions and to provide a degree of oversight to MTs' scope of practice.

Neither profession was comfortable with a combined board. Chiropractors had considerable concerns in allowing MTs to sit in judgment of chiropractors in disciplinary proceedings and involvement in the adoption of chiropractic rules. MTs also did not want to be controlled by the chiropractors. Although DHMH opposed HB 1420, the legislature granted the wish of the MTs and chiropractors by creating two separate boards, but "be careful what you wish for." And why did DHMH oppose HB 1420? In part, because of its intent to first create an agency and procedures to address the growing concern with antitrust rulings by courts and the FTC.

SB 806 / Chap. 700: Naturopathic Doctor's Prescription Formulary
Naturopaths are making slow headway in asserting their scope of practice. This bill gives them a Naturopathic Formulary Council to recommend a list of those things they can prescribe, but the law will only allow recommendations on nonprescription drugs and very few legend drugs. Other healthcare professions have little to fear. Since the naturopaths were first approved as licensed professions, only six licenses have been issued.

SB 647 / HB 752 / Chap. 116: Physicians Preparing and dispensing on Physician Assistant and Nurse Practitioner Prescription
Now PAs and NPs who work with a physician can order prescriptions that may be prepared and dispensed by that physician.

Antitrust Issues: Let's Play Fair

Federal antitrust law prohibits engaging in anticompetitive activity. There is an exception for bona fide state action. However, the FTC has increasingly successfully challenged healthcare licensing boards that restrict competition without clear state authority and oversight. *See, North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

Several bills were introduced this session to attempt to protect Maryland healthcare licensing boards' authority to regulate and limit the provision of healthcare services both within and outside of the scope of the professional licenses they issue.

Each professional board claims to need unfettered authority to sanction those who it believes are providing unlicensed services within the scope of care of its licensees (or within the scope of care of its favored subspecialty within the profession). At the same time, each professional board, with equal passion, does not want another professional board to sanction its licensees when that other board believes those licensees are providing services claimed within the scope of care of the latter's licenses.

This session, most DHMH boards took the position that healthcare licensing and regulatory authority must be preserved and be compliant with antitrust law through enacting legislation to provide needed state oversight.

Members of the healthcare section proposed providing antitrust oversight through a Departmental Board of Review with authority to determine whether any individual board is trying to unfairly restrict the authority of

individuals or other healthcare providers to practice their trade or profession. DHMH and others had various proposals. No laws on this issue were passed this session, but below is one effort that was introduced and failed.

SB 1083 / *Failed*: Secretaries of Departments Supervision to Prevent Anticompetitive Action
This bill would have given the Secretary of DHMH broad and standardless authority to adopt regulations for the review of Departmental board's actions and decisions to ensure there is no violation of antitrust law.

Note: The Attorney General has been tasked with forming an advisory committee to make recommendations for the 2017 legislative session dealing with Antitrust and healthcare professional licensing issues.

SB 1032 / HB 929 / *Failed*: Prohibited Patient Referrals – Exceptions
Maryland has always had far greater restrictions on healthcare self-referral than the federal Stark law prohibitions. One of the most significant Maryland only restrictions is the Maryland definition of "In-office ancillary services." This definition eliminates "except for a radiologist group practice or an office consisting solely of one or more radiologists" the ability of any other physicians from providing their patients magnetic resonance imaging services, radiation therapy services, or computer tomography scan services. The proposed legislation might have eliminated this unique treatment. Proposals to benefit one type of practitioner while restricting another are a recurring controversy, *see* **SB 739 / HB 1422** (would have created a self-referral exception for radiation therapy in "community oncology centers").

Let's Play Nice

HB 119 / Chap. 94: Physicians Traveling With Sports Team Exempt
Physicians traveling with their teams may now lawfully provide care and treatment to team members. Until HB 119 this practice was just given a "wink."

HB 998 / SB 1020 / Chap. 461: Physicians Licensed in Another State May Receive Reciprocity
Physicians licensed in other states may now be licensed by reciprocity in Maryland, provided the other state is as graciously reciprocal as Maryland.

HB 1114 / *Failed*: Physicians License Renewal – No Grace Period
Sadly, there is no grace period for physicians who forget to renew their license on time. Serious consequences also await those practicing without a license.

HB 1220 / Chap. 136: Department of Health and Mental Hygiene - Health Program Integrity and Recovery Activities
Substantial sanctioning authority is now provided DHMH IG to punish providers who don't play nice, and by the rules. IG now has subpoena power, civil monetary penalty authority and the ability to use extrapolation in determining overpayments due Medicaid. But, the authority granted has so many caveats, limitations and conditions this bill may be more "bark than bite."

Let's Keep It Secret

HB 1160 / SB 441 / Failed: Admissibility of Board of Physician Records
Proposed that in Workers' Compensation cases a party may introduce a physician's licensing records with the Board of Physicians.

SB 981 / Failed: Patient Right to a Free Copy of Medical Record
Proposed to allow all patients one free copy of their medical record and to coordinate Maryland access and copying requirements with HIPAA. For now, the medical record remains inaccessible to those with limited means (except for MEDICAID records).

HB 724 / SB 462 / Chap. 724: Copies of Medical Records – Fees
Under this bill a hospital or healthcare provider that maintains medical records in an electronic format may charge a fee for an electronic copy of a medical record not to exceed 75% of the per page fee for copies of paper records. The bill also brings current the fees a health care provider may charge for preparation ($22.88) of a medical record and per page ($.76) for a paper copy of a medical record. The fees charged for retrieval and preparation of a medical record in an electronic format are not annually adjusted for inflation.

A fee can also be charged for postage and for "handling," but the latter term is undefined. Further, while state laws are not preempted by HIPAA to the extent they grant greater access to a patient's record, these laws are preempted to the extent they create a greater burden on patient access. HIPAA does not allow a preparation fee for a "person in interest" and there are distinctions between federal and state law on the meaning of "person in interest." Charges for costs for responding to a subpoena request are also unclear with regard to federal and state law.

The Bar Association might consider contributing to legal clarity through publishing a simple, current, comparative federal and state patient record compliance chart.

Let's Not Keep It Secret

HB 437 / SB 537 / Chap. 147: Prescription Drug Monitoring Program—Expanded Coverage and Requirements
This bill requires prescribers and all pharmacists to register with the Prescription Drug Monitoring Program (PDMP) by July 1, 2017. Prescribers and pharmacists must also request and assess prescription monitoring data about their patients in an expanded manner. Prescribers and pharmacists are subject to disciplinary action by the appropriate licensing entity for failure to comply with the bill's mandatory registration and use requirements. PDMP may review prescription monitoring data for indications of a possible violation of law or a possible breach of professional standards by a prescriber or dispenser. If indicated, PDMP may notify and provide education to the prescriber or dispenser after obtaining certain clinical guidance from the technical advisory committee (TAC). The bill also requires the Department of Health and Mental Hygiene (DHMH) to develop and implement an outreach and education plan regarding mandatory registration with PDMP and submit specified reports.

Power to the People: Access to State Records

2015 Legislation

SB 695 or Chap. 135 and HB 755 / Chap. 275: Public Information Act Amendments
Modest effort at improving access to public records. Requested information useful in disputes or disagreements with state agencies related to regulations, inspections, license applications and defense. Amends General Provisions Article, Title 4.

- Establishes a 5 member PIA-CB:
  - Duties relate to resolving disputes over costs charged. Greater authority amended out of bill. Will make recommendations on needed improvements.

- Establishes a Public Access Ombudsman:
  - Appointed by Attorney General, 4 year term.
  - Duties relate to resolving disputes over:
    - Claims of exemption, redaction, timely and complete response, overly broad requests and fee waiver per 4-206 (poor and/or in the public interest).
  - Ombudsman cannot compel compliance.
- Improves access:
  - Emphasizes access to be immediate, but not more than 30 days and notice required if more than 10 days.
  - Denial requires identification of the record withheld and the statutory basis. If a complaint is filed with the Ombudsman, then the agency must demonstrate that denial "is clearly applicable" and if denied under Part IV (discretionary list) harm from disclosure is "greater than the public interest in access."
- Appeal to Circuit Court:
  - Provides for statutory and actual damages.

SB 444 / Chap. 350: Custodians to Have a List of Immediately Available Documents
Each official custodian shall designate those public records of the governmental unit that are to be made available to any applicant immediately on request.

HB 674 / Chap. 286: State Agencies to Identify a Responsible Individual for PIA Records
Each agency shall identify and post contact information regarding who shall be responsible for PIA requests. The Attorney General shall be provided these names and list them in the Attorney General manual and website.

In 2016 there was nothing new.

Miscellaneous: Some Significant, and Some Interesting

SB 857 / HB 1267 / *Failed*: Requires hospitals and physicians to report anything of value received from a pharmaceutical company
This bill would have required reporting of even a tuna sandwich.

SB 479 / HB 869 / *Failed*: Civil Actions Damages—Catastrophic Injury
Currently, for medical malpractice actions, the cap was frozen at $650,000 for causes of action arising between January 1, 2005, and December 31, 2008, increasing by $15,000 each year beginning on January 1, 2009. For causes of action arising in 2016, the cap is $770,000. The cap applies in the aggregate to all claims for personal injury and wrongful death arising from the same medical injury, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants. However, if there is a wrongful death action in which there are two or more claimants or beneficiaries, the total amount awarded may not exceed 125% of the cap, or $962,500 in 2016.

HB 479 proposed to triple the cap in cases where catastrophic (paralysis, amputation, brain injury, reproductive) injury occurred.

HB 2 / *Failed*: McKenna's Law, Prohibition on manufacture of cedar hope chests
Proposed legislation would have banned the manufacture and sale of cedar hope chests without interior door opening mechanisms. In 2015 this bill also failed.

Sometimes industry self-regulation is good enough.

HB 1303 / SB 600 / Chap. 410: Use of Ultrasounds at Birthing Facilities
This bill specifically includes free-standing birthing centers under the general statute that allows DHMH to provide regulations for free-standing facilities in Maryland and also specifies that regulations be provided for the use of ultrasounds. The use of ultrasounds has become a sensitive issue in other states.

Death with Dignity
In 2015 there were two measures, SB 676 and HB 1021 dealing with this matter. Both were referred to summer study. A pressing need keeps waiting.

SB 418 / HB 404 / *Failed*: Richard E. Israel and Roger "Pip" Mover End-of-Life Option Act
The bill would have allowed an attending physician licensed to practice medicine in the State who follows specified procedural safeguards to prescribe self-administered medication to a "qualified individual" to bring about the individual's death. The bill defines the medical practice of prescribing such medication as "aid in dying." A "qualified individual" is defined by the bill as an adult who (1) has the capacity to make medical decisions; (2) is a resident of the State; (3) has a terminal illness with a prognosis of death within six months; and (4) has the ability to self-administer medications.

So this year, 2016, no progress. No urgency, we presume.

But as an insipid reminder of what needs to addressed, see: HB 91 or Chap. 389 : National Healthcare Decisions Day Proclaims April 16 as National Healthcare Decisions Day.

New Frontiers in Medicine-- Marijuana

Twenty other states now have a similar law.

2011 Legislation

HB 291 or SB 308: Medical Marijuana
In 2011 California and 15 states allowed it. Maryland previously allowed "need" in mitigation of criminal charges. Under this legislation need becomes an affirmative defense. Must prove a physician relationship and treatment need: pain, nausea, spasms or anything else. No public use and not more than 1 oz. Board of Physicians can't discipline doctor who provides evidence patient may receive therapeutic relief. Creates a Work Group to determine and report medical conditions to be treated; informed consent; sources of marijuana, "advice on quality and experience to be expected" grants to facilitate affordability.

2013 Legislation, Chap. 403
Created the Medical Marijuana Commission. Authorized teaching hospitals to implement a program of distribution and treatment. But, no hospital acted to implement such a program.

2014 Legislation

SB 923 and HB 881 or Chap. 256 and 240, Acts of 2014
Chap. 256 allowed "certified doctors" to recommend (not prescribe) marijuana use and licensed growers and dispensaries to fill/provide marijuana on these recommendations. Physicians provide their recommendations

for each patient to the Commission which issues identification cards to patients. The physician must identify the basis for the recommendation and provide an ongoing plan of care. Physician and spouse not permitted to have or accept gratuities from or have an interest in a grower or dispenser. Qualified patients can possess a 30 day supply, but cannot grow their own. Commission also will license up to 15 growers to plant, harvest and distribute certified marijuana. There is no limit on separately licensed dispensaries. Hospitals do not report privilege actions to Commission based on marijuana prescribing. Commission is to develop regulations to implement the provisions of this act. Draft regulations published, but not adopted until May 2015.

SB 364 or Chap. 158, 2014
Decriminalized the possession of less than 10 grams (.7 oz.) of marijuana. Curiously, the criminal penalty for paraphernalia remains—"you can smoke, but not roll it." 17 states have already decriminalized or legalized possession. Now only a fine of up to $100 for first offense possession.

Note, that the 1 oz. "medical need" complete, affirmative, defense is still available.

2015 Session

SB 517: *VETOED*
Would have decriminalized possession of paraphernalia. It failed and so while possession of small amounts of marijuana is not criminal; possession of even a marijuana pipe is.

HB 911: *Failed*
Would have decriminalized and legalized marijuana for personal possession of up to 1oz. and the right to grow a limited number of plants. Comptroller would license commercial growers and distributers.

HB 490: Cannabis Commission
Renamed the Marijuana Commission to the Cannabis Commission. Physician registry simplified. Processor added and defined. Four year initial licensure.

2016 Session

HB 104 / Chap. 474: Medical Cannabis – Written Certifications
This bill now authorizes dentists, podiatrists, nurse midwives, and nurse practitioners, in addition to physicians, to issue written certifications for medical use to qualifying patients by substituting the defined term "certifying provider" for "certifying physician."

Sadly, there is still no cannabis for anyone to prescribe, but this legislation does give us the sense of progress.

Note: As of August 15, the Maryland Cannabis Commission has named the 15 applicants that may, eventually, be granted a license, provided they demonstrate compliance with the many requirements for licensure.

Availability is still a long way into the future.

Real Social Progress—You Decide

SB 1 / HB 11 / Chap. 326: Health Insurance for In Vitro Fertilization
This bill requires coverage for a married couple seeking in vitro fertilization to obtain sperm outside the marriage, so long as the lack of spousal sperm was not a voluntary decision.

SB 278 / HB 155 / Chap. 544: Stalking
Broadens the stalking prohibition from intent to cause fear of injury to include intent to cause "emotional distress."

HB 274 / Chap. 380: Divorce on Uncorroborated Testimony
In 2015 by Chap. 353 divorce became cheap and immediate for Maryland citizens if they have a separation agreement and have no children.

This year HB 274 repealed the need for any corroborating testimony when seeking a divorce on voluntary separation.

Surely this is real progress in mental health?