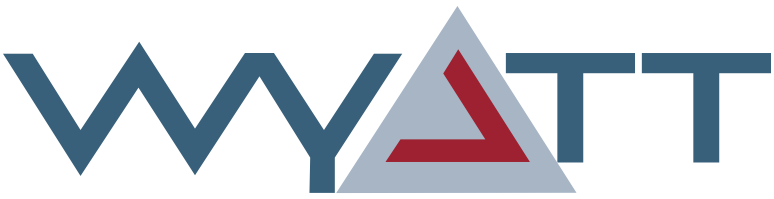
SUMMARY OF KENTUCKY HEALTHCARE LAWS

COMPILED BY MARGARET YOUNG LEVI AND LINDSAY SCOTT



WYATT TARRANT & COMBS LLP

FOREWORD

I was recently asked by a client if our health law group had a primer on the health laws unique to Kentucky. I knew we didn't, but after checking with my colleagues in the firm, it became apparent to me that we had information on nearly every area of health law. Unfortunately, it had never been neatly organized into something that we could provide to clients. So I compiled the information into this summary that we could share with clients.

Before using this text, it might be helpful for you to know a few things. First of all, being lawyers we have to have a disclaimer. The information provided in this summary is general in nature, intentionally so, and not intended to be taken as legal advice for any specific set of circumstances. The subject matter of this summary is complex and how it applies to any particular individual or organization may vary significantly depending on specific facts and situations. This summary is not intended to overview federal laws that may impact a particular situation, although it references some federal laws, but instead focuses on what is unique to Kentucky. It is also not all-encompassing—far from it. Someday, after many future editions, maybe it will be closer to all-encompassing. But health care law is constantly evolving, and in many areas, becoming more complex. Therefore, we have tried to provide a good overview of areas of regular exposure for our clients, but the laws and regulations could change the day after this publication goes to print. If you have questions about how a specific set of circumstances may be impacted by the laws and regulations highlighted in this text, you should contact a lawyer (I know a few!).

Finally, I would like to thank my colleagues for their assistance in putting this book together. Without their input, based on years of experience advising Kentucky health care clients, I could never have assembled this treatise. I am constantly reminded of how lucky I am to work with this large group of bright, collegial, and dedicated professionals. On a daily basis, we rely on hundreds of years of the group's combined experience to provide the best advice to our clients. It's a rewarding, inspiring, and, in a complex area like health care, comforting experience.

Given that this is a "first edition," I look forward to receiving your feedback on how we can make it even better in the next edition. I hope you find this summary helpful to you in providing outstanding care.

- Margaret Levi

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WYATT HEALTH CARE LAW

Wyatt's Health Care Service Team has the legal knowledge and experience to address the full spectrum of legal needs of our health care clients. Our cadre of dedicated lawyers includes seven attorneys recognized in The Best Lawyers in America, 2019 for Health Care, and a team of other attorneys with experience in virtually every niche of law that our health care clients may require.

We often work in collaboration with seasoned attorneys from Wyatt's other service teams, such as Corporate Transactions, Litigation, Real Estate and Employee Benefits to deliver the optimum combination of skills to meet our clients' needs.

Our mission is to provide the breadth and depth of legal talent to address your legal needs quickly, competently and cost-effectively, from the simplest contract to the most serious Medicare, tax or litigation matters. We understand that good legal representation includes not only sound legal knowledge, but creativity, tenacity, responsiveness and a nuanced appreciation of the many constituencies our health care clients serve.

Our Health Care Service Team is available to counsel clients on matters such as the following:

- Non-Profit Institutions and Tax Exemption Issues
- Medicare Fraud and Abuse (Including Self-Referral)
- Corporate Compliance, Audits and Self-Disclosure
- Physician Contracting
- Acquisitions, including Physician Practice and Hospital Acquisitions
- Joint Ventures
- Management and Service Contracts
- Tax-Exempt Financing
- Governance
- Antitrust
- Securities Law
- HIPAA
- Medicaid and Medicare Reimbursement Appeals
- Certificate of Need
- Academic Medical Centers
- Clinical Trials
- Community and Critical Access Hospitals
- Licensing and Certification Issues
- Health Care Construction

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ABANDONED INFANTS

- Emergency departments must admit and provide all necessary medical care, diagnostic tests, and medical treatment to any newborn infant brought to the hospital when the identity of the parents is unknown. Emergency departments must make available materials to gather health and medical information concerning the infant and the parents and offer the materials to the person leaving the newborn infant. They must clearly state that acceptance is completely voluntary and completion of the materials may be done anonymously. KRS 216B.190.

ABORTION

- KRS 311.725(1),(4): No abortion shall be performed or induced except with the voluntary and informed written consent of the woman. If a medical emergency or medical necessity compels the performance or inducement of an abortion, the physician who will perform or induce the abortion, prior to its performance or inducement if possible, shall inform the pregnant woman of the medical indications supporting the physician's judgment that an immediate abortion is necessary. Any physician who performs or induces an abortion without the prior satisfaction of the informed consent conditions because of a medical emergency or medical necessity shall enter the reasons for the conclusion that a medical emergency exists in the medical record of the pregnant woman.

- KRS 311.732: Performance of abortion for minor—medical emergencies.

ABUSE - ADULT

- KRS 209.030 requires a physician, as well as other health care providers, to report to the Cabinet for Health & Family Services ("CHFS") any knowledge regarding the occurrence of suspected adult abuse, neglect or exploitation. A physician can make such a report orally or in writing to the CHFS or local Social Services' offices. The Department for Social Services has a reporting hotline (1-800-752-6200). "Adult" is defined as a person eighteen (18) years of age or older who because of mental or physical dysfunction is unable to manage their own resources or carry out the activities of daily living or protect themselves from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services. KRS 209.020.

- Disclosures about victims of adult abuse, neglect, or domestic violence must meet the requirements of 45 CFR 164.512(c) and KRS 209.030.

ABUSE - CHILD

- KRS 620.030 requires any person, including a physician, to report to the county attorney or the Commonwealth's attorney, a local law enforcement agency or the Kentucky State Police, or the Cabinet for Health and Family Services or its designated representative when there is "reasonable cause" to believe that a child is dependent, neglected or abused or a victim of human trafficking. A victim of human trafficking is someone who has been subjected to engaging in forced labor or services or commercial sexual activity through the use of force, fraud, or coercion, except that if the victim is under the age of eighteen, the commercial activity does not need to involve force, fraud, or coercion.

- Disclosures about victims of child abuse and neglect must meet the requirements of 45 CFR 164.512(b)(1)(ii) and KRS 620.030.

- If a child in a hospital or under the immediate care of a physician appears to be in imminent danger if he or she is returned to the persons having custody, the physician or hospital may hold the child without court order, provided that a request is made to the court for an emergency custody order at the earliest practicable time, for up to 72 hours. The hospital administrator or physician must provide written notice to the custodian stating the reasons for removal/hold of the child. KRS 620.040(5).

- KRS 620.060: Courts may issue an ex parte emergency custody order for a child when it appears to the court that removal is in the best interest of the child and that there are reasonable grounds to believe the child is abused, etc. It is initially for 72 hours and may be extended or arguments heard in that time.

ADOPTION / SURROGACY ISSUES

- Adoption: KRS 199.473, KRS 199.590, 922 KAR 1:010. Birth parents must wait a minimum of 72 hours after the birth of their child before consenting to adoption. Note: The birth mother may, with appropriate written consent, release her newborn infant to her legal representative, to a family member, or into the custody of a third party. However, the infant shall not be released into the physical care, control, or custody of the proposed adoptive parent, unless a circuit court grants temporary custody or the CHFS grants approval.

- Payment for Surrogacy is not permitted: KRS 199.590(4) provides: "A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void."

ADVANCE DIRECTIVES

- Living Wills: KRS 311.625 addresses living wills and includes a sample living will form.

- Advance Directives and Pregnant Women: KRS 311.629: Notwithstanding the execution of an advance directive, life sustaining treatment and artificially-provided nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty, as certified on the woman's medical chart by the attending physician and one (1) other physician who has examined the woman, the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication.

- Advance Directive for Mental Health Treatment: KRS 202A.420 et seq.

- Power of Attorney: KRS Chapter 457. Note: A general or financial power of attorney does not provide authority to make health care decisions. The power of attorney must specifically enumerate health care as a type of decision that may be made. KRS Chapter 457 governing durable power of attorney does not apply to the power to make health care decisions (including, but not limited to, health care decisions in KRS 311.621-.643) unless the power of attorney otherwise provides.

- Do Not Resuscitate Orders ("DNR"): DNR Orders are used but are not provided for by Kentucky statutes or regulations; however, KRS 311.623(3) recognizes them and states that "notification to any emergency medical responder . . . or any paramedic . . . of a person's authentic wish not to be resuscitated shall be recognized only if on a standard form or identification approved by the [Kentucky Board of Medical Licensure ("KBML")], in consultation with the [CHFS]."

- Medical Orders for Scope of Treatment ("MOST"): An adult with decisional capacity, an adult's legal surrogate, or a responsible party may complete a medical order for scope of treatment. Parents or guardians may sign the MOST if the patient is a minor. KRS 311.6225.

AGAINST MEDICAL ADVICE ("AMA")

- If a patient insists on leaving or transferring from a facility against medical advice, the risks associated with such action should be thoroughly explained to the patient and documented in the patient's medical record. If the patient cannot make an informed decision on leaving against medical advice due to intoxication or impairment, the patient should be held until the level of intoxication is lowenough to allow for the capacity for informed decision-making. [There is no specific statutory or regulatory guidance, but rather general case law warning that a physician's duties are not absolved just because a patient "signs a form" saying he demands discharge against medical advice and assumes all risk and responsibility.]

BACKGROUND CHECKS / FINGERPRINTING

- Kentucky statutes require long-term care facilities, including nursing homes and personal care homes, to perform state-only background checks on employees before hire. KRS 216.789.

- The Commonwealth of Kentucky also offers KARES, a voluntary background check system that providers may use.

CERTIFICATE OF NEED

- The Commonwealth of Kentucky requires any "person" to obtain a certificate of need ("CON") in order to, among other things, establish a "health facility"; make certain capital expenditures; acquire major medical equipment; make substantial changes in bed capacity, a health service, or a project; or transfer an approved CON to establish a new health facility or replace a licensed facility. KRS Chapter 216B.

- CON applications must be consistent with the Kentucky State Health Plan, which is the official document that expresses the health planning policy of the Cabinet and, as defined in KRS 216B.015(28), is "the document prepared triennially, updated annually, and approved by the Governor." Since 1998, the current version of the State Health Plan has been incorporated by reference in 900 KAR 5:020, and it has been amended more or less annually.

- Kentucky CON law includes a "physician office exemption," which provides that the private offices and clinics of physicians, as well as office buildings built for or on behalf of a health facility for the exclusive use of physicians, are exempt from having to obtain a CON, unless the physicians' office requests a major medical equipment expenditure of an amount that is adjusted annually by regulation or meets the definition of an ambulatory surgical center. KRS 216B.020(2)(a), KRS

216B.015(4) and KRS 216B.015(5). Along with exemptions for private offices and clinics of physicians, dentists, and "other practitioners of the healing arts", there are additional exemptions for facilities like assisted living residences, family care homes, primary care centers, rural health clinics, community mental health centers, and group homes. KRS 216B.020(1).

- The following outpatient categories of care are exempt from CON and licensure as of July 14, 2018:
  (a) Primary care centers;
  (b) Special health clinics, unless the clinic provides pain management services and is located off the campus of the hospital that has majority ownership interest;
  (c) Specialized medical technology services, unless providing a State Health Plan service;
  (d) Retail-based health clinics and ambulatory care clinics that provide nonemergency, noninvasive treatment of patients;
  (e) Ambulatory care clinics treating minor illnesses and injuries;
  (f) Mobile health services, unless providing a service in the State Health Plan;
  (g) Rehabilitation agencies;
  (h) Rural health clinics; and
  (i) Off-campus, hospital-acquired physician practices.

CONCEALED WEAPONS ON HOSPITAL PROPERTY

- The open carry of weapons in Kentucky is protected by Article 1, Section 1, Paragraph 7 of the Kentucky Constitution.

- Kentucky law prohibits the possession of a handgun, openly or concealed, by a minor (under age 18) except in certain enumerated circumstances. KRS 527.100.

- KRS 237.110(17) permits private businesses to prohibit the carrying of concealed deadly weapons on the premises.

- KRS Chapter 237 allows concealed deadly weapons to be carried by persons age 21 and over without a license in the same locations where concealed carry license holders may carry them.

CONFIDENTIALITY OF INFORMATION

- There is no general "physician-patient" privilege in Kentucky's statutory law or Kentucky Rules of Evidence ("KRE"). Nevertheless, physicians can be disciplined by the KBML for "willfully" violating a "confidential communication" as provided in KRS 311.595(16).

- Rule 507 of the KRE explicitly recognizes a psychotherapist-patient privilege and protects communications between a psychotherapist and a person who consults the "psychotherapist" for purposes of securing a diagnosis or treatment of a mental condition. A psychotherapist may include medical doctors and psychologists engaged in the diagnosis or treatment of a mental condition; Kentucky licensed clinical social workers; and registered nurses and advanced registered nurse practitioners who practice psychiatric or mental health nursing. KRE 507 also sets forth several circumstances that may warrant an exception to the privilege (e.g., a court-ordered psychological evaluation or when mental status is asserted as a claim or defense).

- Rule 506 of the KRE explicitly recognizes a counselor-client privilege. A client, his or her guardian or conservator, or the personal representative of a deceased client, may refuse to disclose, and prevent any other person from disclosing, confidential communications with a counselor (including persons present at the direction of the counselor, including family members) that were made for the purpose of obtaining professional or crisis response services from the counselor. KRE 506 defines "counselor" broadly.

- KRS 218A.280: Patients do not have a reasonable expectation of privacy when unlawfully seeking a controlled substance from a health care practitioner. The Kentucky Controlled Substances Act under KRS Chapter 218A specifically states, "Information communicated to a practitioner in an effort unlawfully to procure a controlled substance, or unlawfully to procure the administration of any controlled substance, shall not be deemed a privileged communication."

- Pursuant to 902 KAR 20:360, abortion facilities are required to maintain the confidentiality of all patient records at all times.

- Threats of violence by a patient, see KRS 645.270.

- See also PRIVACY and DUTY TO WARN, herein.

CONSENT / SUBSTITUTE DECISION MAKING

- Hierarchy of Decisions: KRS 311.631: Hierarchy for those authorized to make health care decisions on behalf of a patient lacking decisional capacity:
    - the adult patient with decisional capacity;
    - the surrogate under an advance directive, to the extent the advance directive addresses a decision that must be made;
    - the judicially-appointed guardian of the patient, if the guardian has been appointed and if medical decisions are within the scope of the guardianship;
    - the attorney-in-fact named in a durable power of attorney, if the durable power of attorney specifically includes authority for health care decisions;
    - the spouse of the patient;
    - an adult child of the patient, or if the patient has more than one (1) child, the majority of the adult children who are reasonably available for consultation;
    - the parents of the patient; or
    - the nearest living relative of the patient, or if more than one (1) relative of the same relation is reasonably available for consultation, a majority of the nearest living relatives.

CORPORATE PRACTICE OF MEDICINE

- KRS 311.560 prohibits the unlicensed practice of medicine and osteopathy.

- KRS 274.005-274.991: Licensed individuals who can legally practice in the same partnership may form PCs and LLCs. A Professional Service Corporation ("PSC") may be formed to render only one type of professional service (and services ancillary thereto) through officers, employees, and agents licensed to render the same professional service in Kentucky, except that a PSC may render professional services within two or more professions to the extent such combination of professional

(or professional and business) purposes is not prohibited by the licensing laws. "Professional service" includes, among other services, service rendered by chiropractors, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, and optometrists. KRS 275.001-275.455. An LLC may be formed to provide one or more professional services within or outside Kentucky. Ownership and professional practice provisions generally parallel the provisions applicable to PSCs.

- There is older case law holding that corporations cannot lawfully engage in the practice of medicine. *See Kendall v. Beiling,* 175 S.W.2d 489 (Ky. 1943); *Johnson v. Stumbo*, 126 S.W.2d 165 (Ky. 1938). However, the KBML indicates that it is acceptable for the physicians to be employees of hospitals, and other arrangements have generally been approved as long as there is no layperson interference with medical decisions.

DEATH / DEATH CERTIFICATES

- Declaration of Death. KRS 446.400 provides that for all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:
  (1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or
  (2) When respiration and circulation are artificially maintained, and there is a total and irreversible cessation of all brain function, including the brain stem, and such determination is made by two licensed physicians.

- Death Certificates. KRS 213.076 addresses certificates of death.

- KRS 311.225: The physician who certifies the death of an organ donor must not participate in the procedures for removing or transplanting a part of the body of a donor of organs.

DISPOSAL OF REMAINS / AUTOPSY / UNCLAIMED BODIES

- KRS 72.020 sets forth the duty of a person, hospital, or institution finding or possessing a dead body and the duties of a coroner, law enforcement officer, embalmer, funeral director, or ambulance service.

- KRS 72.025 lists the circumstances requiring post-mortem examination to be performed by a coroner:
  (1) When the death of a human being appears to be caused by homicide or violence;
  (2) When the death of a human being appears to be the result of suicide;
  (3) When the death of a human being appears to be the result of the presence of drugs or poisons in the body;
  (4) When the death of a human being appears to be the result of a motor vehicle accident and the operator of the motor vehicle left the scene of the accident or the body was found in or near a roadway or railroad;
  (5) When the death of a human being occurs while the person is in a state mental institution or mental hospital when there is no previous medical history to explain the death, or while the person is in police custody, a jail, or penal institution, except pursuant to a sentence of death;

(6) When the death of a human being occurs in a motor vehicle accident and when an external examination of the body does not reveal a lethal traumatic injury;
(7) When the death of a human being appears to be the result of fire or explosion;
(8) When the death of a child appears to indicate child abuse prior to the death;
(9) When the manner of death appears to be other than natural;
(10) When human skeletonized remains are found;
(11) When post-mortem decomposition of a human corpse exists to the extent that external examination of the corpse cannot rule out injury or where the circumstances of death cannot rule out the commission of a crime;
(12) When the death of a human being appears to be the result of drowning;
(13) When the death of an infant appears to be caused by sudden infant death syndrome in that the infant has no previous medical history to explain the death;
(14) When the death of a human being occurs as a result of an accident;
(15) When the death of a human being occurs under the age of forty (40) and there is no past medical history to explain the death;
(16) When the death of a human being occurs at the work site and there is no apparent cause of death such as an injury or when industrial toxins may have contributed to the cause of death;
(17) When the body is to be cremated and there is no past medical history to explain the death;
(18) When the death of a human being is sudden and unexplained; and
(19) When the death of a human being occurs and the decedent is not receiving treatment by a licensed physician and there is no ascertainable medical history to indicate the cause of death.

- KRS 72.425 describes who may consent to an autopsy when the death is not a coroner's case.

- KRS 72.450 discusses the disposal of an unclaimed body and valuables found thereon.

DRIVING / DMV REPORTING ISSUES

- KRS Chapter 186 governs the issuance of driver's licenses.

- 601 KAR 13:090 sets forth the process for voluntarily reporting to the Transportation Cabinet's Medical Review Board any unsafe drivers but does not mandate reporting. HIPAA permits disclosures of protected health information to the extent that such use or disclosure is required by law (which would not apply in this situation) or if the covered entity, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public (which might apply).

- KRS 186.411: A license applicant or licensee with a seizure condition must be seizure-free for 90 days in order to obtain or maintain driving privileges. To report a driver who has experienced a seizure, submit an affidavit to the Medical Review Board.

- KRS 186.578: Sets forth the vision requirements for driving. See also 601 KAR 13:100.

DRUG CONTROL LAWS / PHARMACY REPORTING / REQUIREMENTS / DIVERSION

- Lost or Stolen Controlled Substances: KRS 218A.200 and 902 KAR 20:260(3)(2)(f) require detailed recordkeeping of controlled substances and require reporting of any lost, destroyed, or stolen controlled substances to the CHFS.

- Forged Prescriptions: KRS 217.214: A pharmacist, physician or other person authorized to dispense legend drugs may seize and retain any prescription which he has reasonable suspicion to believe is forged, altered or deceitful. If determined to be forged, altered or stolen, then must report to law enforcement and surrender prescription.

- KASPER: KRS 218A.202: Kentucky uses KASPER, a controlled substance prescription monitoring system designed to be a source of information to assist practitioners and pharmacists with providing medical and pharmaceutical patient care using controlled substance medications. Every practitioner or pharmacy which dispenses a controlled substance to a person in Kentucky, or to a person at an address in Kentucky, shall report to the CHFS through KASPER data about the dispensing of controlled substances, such as patient identifier, date, and drug. A Kentucky-licensed acute care hospital or critical access hospital shall report to the CHFS through KASPER all positive toxicology screens that were performed by the hospital's emergency department to evaluate the patient's suspected drug overdose.

DUTY TO WARN

- For mental health professional's duty to warn intended victim of patient's threat of violence and associated immunity for such disclosures, see KRS 202A.400 and KRS 645.270.

ELECTROCONVULSIVE THERAPY ("ECT")

- Kentucky's mental health advance directive allows individuals to make decisions about ECT in the event that they lack decisional capacity. KRS 202A-422.

EMPLOYEE LEASING REQUIREMENTS

- KRS 342.615 addresses registration of employee leasing companies.

FRAUD & ABUSE LAWS: ANTI-KICKBACK / PHYSICIAN SELF-REFERRAL / FALSE CLAIMS

- Anti-Kickback: The Commonwealth of Kentucky has adopted a Medicaid anti-kickback proscription similar to the federal Anti-Kickback Statute. The Kentucky anti-kickback law incorporates elements of the federal prohibition on self-referral. See KRS 205.8461.

- Self-Referral Restrictions: KRS 216.2950: Providers shall not knowingly solicit, receive, or offer any remuneration (including any kickback, bribe, or rebate) for furnishing medical assistance benefits or in return for purchasing, leasing, ordering, or arranging for or recommending purchasing leasing, or ordering any goods, facility, service, or item for which payment may be received from Medicare or Medicaid.

- Rebates: KRS 216.2950: No provider shall knowingly make, offer, or receive a payment, a rebate of a fee, or a charge for referring a patient to another provider for furnishing Medicare or Medicaid benefits. [No conduct which does not violate the federal Stark Law or federal Anti-Kickback Statute will be deemed to violate KRS 216.2950.]

- Physicians: KRS 311.595: A physician or osteopath is subject to denial, probation, suspension, or revocation of license or permit to practice in Kentucky upon proof that the physician or osteopath was given or received, directly or indirectly, from any person, firm, or corporation, any fee,

commission, rebate, or other form of compensation for sending, referring, or otherwise inducing a person to communicate with a person licensed under KRS 311.530 to 311.620 in his professional capacity or for any professional services not actually and personally rendered.

- Physicians: KRS 311.595: A physician or osteopath is subject to denial, probation, suspension, or revocation of license or permit to practice in Kentucky upon proof that the physician or osteopath was given or received, directly or indirectly, from any person, firm, or corporation, any fee, commission, rebate, or other form of compensation for sending, referring, or otherwise inducing a person to communicate with a person licensed under KRS 311.530 to 311.620 in his professional capacity or for any professional services not actually and personally rendered.

- Alcohol and Drug Counselors: 201 KAR 35:030: An alcohol and drug counselor shall not offer or accept compensation for a referral of a client.

- Chiropractors: 201 KAR 21:015: Division of any professional fee shall not be made, except upon the basis of actual services rendered and a chiropractor shall not pay or receive compensation for the referral or unlawful solicitation of patients.

- Licensed Diabetes Educators: 201 KAR 45:140: A diabetes educator shall not offer or accept payment for referrals.

- Licensed Professional Counselors: 201 KAR 36:040: A professional counselor shall not offer or accept payment for a referral.

- Marriage and Family Therapists: 201 KAR 32:050: A marriage and family therapist or marriage and family therapist associate shall not offer or accept payment for referrals.

- Massage Therapists: 201 KAR 42:060: A massage therapist shall refuse to accept gifts or benefits, which are intended to influence a referral or treatment that are purely for personal gain and not for the good of the client. A massage therapist shall, unless prohibited by law, be allowed to pool or apportion fees received with other members of a business entity in accordance with any business agreement.

- Medical Laboratories: KRS 333.240: Provides that no person shall either personally or through an agent, solicit referral of specimens to his or any other medical laboratory or contract to perform medical laboratory examinations of specimens in a manner that offers or implies an offer or rebates to a person or persons submitting specimens, other fee-splitting inducements, participation in any fee-splitting arrangements, or other unearned remuneration.

- Occupational Therapists: 201 KAR 28:140: An occupational therapist or occupational therapist assistant shall not directly or indirectly request, receive, or participate in the dividing, transferring, assigning, rebating, or refunding of an unearned fee or profit by means of a credit or other valuable consideration as an unearned commission, discount, or gratuity in connection with the furnishing of occupational therapy services.

- Optometrists: 201 KAR 5:040: An optometrist shall not give or receive a fee, salary, commission, or other remuneration or thing of value, in any manner, or under any pretext, to or from any person, firm, or corporation: (1) in return for the referral of optometric patients; or (2) in order to secure optometric patients.

- Physical Therapists and Physical Therapist Assistants: 201 KAR 22:053: A physical therapist shall disclose in writing to each patient any financial interest, compensation, or other value to be received by the referral source: (1) for services provided by the physical therapist; (2) for equipment rental or purchase; or (3) for other services the physical therapist may recommend for the patient. Unless prohibited by law, all members of a business entity shall be allowed to pool or apportion fees received in accordance with any business agreement.

- Social Workers: 201 KAR 23:080: A social worker shall not offer or accept payment or other compensation for referral of a client.

- Specialists in Hearing Instruments: 201 KAR 7:090: A specialist in hearing instruments shall not participate with other health professionals or any other person in agreements to divide fees or to cause financial or other exploitation when rendering professional services.

- Speech-Language Pathologist and Audiologists: 201 KAR 17:041: A licensee shall not offer or accept payment for a referral.

- False Claims: The Commonwealth of Kentucky does not have a state false claims law that meets the requirements for an incentive under Section 1909 of the Social Security Act. However, the Kentucky Control of Fraud and Abuse laws impose liability on persons or organizations that make or cause to be made false or fraudulent claims to the government for payment or who knowingly make, use, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid by the government. It is similar to the federal False Claims Act. See KRS 205.8451 to 205.8483 and 907 KAR 1:671.

GENDER ISSUES / SAME SEX COUPLES

- Same sex marriage is legal in Kentucky based on a 2015 Supreme Court ruling.

- A handful of cities in Kentucky have enacted Fairness Ordinances protecting LGBTQ rights and banning discrimination in housing and employment.

- Changing Gender on Birth Certificate and Driver's License: KRS 213.121: Upon receipt of a sworn statement by a licensed physician indicating that the gender of an individual born in the Commonwealth has been changed by surgical procedure and a certified copy of an order of a court of competent jurisdiction changing that individual's name, the certificate of birth of the individual shall be amended. Gender on driver's license may be changed by presenting the birth certificate.

GOOD SAMARITAN

- The Good Samaritan Act is codified in KRS 411.148 et seq.

GUARDIANSHIP / CONSERVATORSHIP

The Commonwealth of Kentucky has multiple levels of guardianship for both minors and adults as described in KRS Chapter 387:

- Full Guardianship/Full Conservator: In this category the guardian is responsible for both the personal and financial needs of the ward. A court has found the ward fully disabled and all personal and

financial rights are removed except the right to vote. The judge decides whether or not a ward retains the right to vote.

- Personal Guardian: A court finds the ward fully disabled in his/her personal affairs and appoints a personal guardian who is responsible for only personal affairs of the ward.

- Conservator: A court finds the ward fully disabled in managing his/her financial affairs and appoints a conservator who is responsible for financial or fiduciary affairs of the ward.

- Limited Guardian: A limited guardian may be appointed if the disabled person is declared partially disabled and can manage some personal needs but may require assistance with others. In this case, the court will also decide which civil rights the person can retain and which are given to the guardian. These may include the right to vote, the right to drive a car, the right to make medical decisions, and the right to determine where to live.

- Limited Conservator: A limited conservator may be appointed if the disabled person only needs help with managing some financial or fiduciary affairs. In this case, the court will also decide which civil rights the person can retain and which are given to the conservator. These may include the right to sell property and the right to sign legal documents such as checks, marriage licenses, or wills.

HIV / AIDS

- HIV/AIDS: KRS 214.625 requires that prior to a medical procedure or test to determine Human Immunodeficiency Virus ("HIV") Infection, a general consent form must be signed by the patient. This general consent form must instruct the patient that, as part of the medical procedures or tests, the patient may be tested for HIV Infection, Hepatitis, or any other blood born infectious disease if a doctor orders the test for diagnostic purposes. A separate consent form for such a test does not have to be signed by the patient, but can be part of a general consent form for the performance of medical procedures and tests. The results of such a test may only be used for diagnostic or other purposes directly related to medical treatment. Such a consent form does not have to be obtained in an emergency situation. A physician who orders the test or the attending physician is also responsible for informing the patient of the results if the test is positive for HIV Infection. If the test is positive, the physician must either provide information and counseling to the patient or refer the patient to an appropriate professional for such counseling. No test may be determined positive and no positive test result can be revealed to any person without collaborative or confirmatory tests being conducted.

INCAPACITY

- Medical Disability: A physician determines whether an individual (who is not legally disabled) has the capacity to make medical decisions.

- Legal Disability: Legal disability is defined in KRS 387.510.

INVOLUNTARY TREATMENT

- Criteria for Involuntary Hospitalization: KRS 202A.026 states that "[n]o person shall be involuntarily hospitalized unless such person is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit

from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

- 72-Hour Holds:
  - Medical: KRS 202A.031 allows an authorized staff physician of an acute care hospital to order the admission of any person at a hospital for a 72-hour emergency admission. Within 24 hours (excluding weekends and holidays) of the admission, the authorized staff physician ordering the admission of the individual shall certify in the record of the individual that in his opinion the individual should be involuntarily hospitalized. An individual admitted must be released within 72 hours (excluding weekends and holidays) unless further detained under applicable provisions of this [Act]. (Generally called 24-hour holds and 72-hour holds.)

  - Legal: KRS 202A.028 allows a court to order a 72-hour involuntary hospitalization after an exam by a qualified mental health professional.

- Involuntary Hospitalization for 60 days and 360 days: KRS Chapter 202A.051: Proceedings for 60 and 360 involuntary hospitalizations are pursuant to a verified petition in District Court.

LEGAL BLOOD DRAWS

- In June 2019, the U.S. Supreme Court concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

- Kentucky law states that a person operating or in physical control of a vehicle impliedly consents to testing of blood, breath or urine to determine alcohol content or presence of an impairing substance, if a law enforcement officer has reasonable grounds to believe a DUI violation has occurred. See KRS 189A.103.

- The process for blood draws is set forth by regulation in 500 KAR 8:030.

- Providers are not required to perform legal blood draws.

LIFE SUSTAINING TREATMENT / FUTILE CARE

- KRS 311.629 provides that a surrogate may authorize the withdrawal or withholding of artificially provided nutrition and hydration in the following circumstances:

  (1) When inevitable death is imminent, which for the purpose of this provision means when death is expected, by reasonable medical judgment, within a few days; or

  (2) When a patient is in a permanently unconscious state if the grantor has executed an advance directive authorizing the withholding or withdrawal of artificially provided nutrition and hydration; or

  (3) When the provision of artificial nutrition cannot be physically assimilated by the person; or

(4) When the burden of the provision of artificial nutrition and hydration itself shall outweigh its benefit. Even in the exceptions listed in paragraphs (1), (2), and (3) above, artificially provided nutrition and hydration shall not be withheld or withdrawn if it is needed for comfort or the relief of pain.

- KRS 311.633 addresses refusal to follow advance directives. It may allow hospitals and physicians and staff to refuse to withdraw life sustaining treatment or refuse to continue providing life sustaining treatment when futile, but the actual text of the statute does not limit the reasons why a hospital or physician may refuse to honor an advance directive. Thus, a hospital or physician may refuse to provide care it believes is futile. (Interestingly, KRS 311.633(3) does require nurses and other employees to state their objections on religious or moral grounds, which suggests that this limit could have been imposed on hospitals and physicians but was not).

- Pregnant Women: KRS 311.629: Notwithstanding the execution of an advance directive, life sustaining treatment and artificially-provided nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty, as certified on the woman's medical chart by the attending physician and one (1) other physician who has examined the woman, the procedures will not maintain the woman in a way to permit the continuing development and live birthof the unborn child, will be physically harmful to the woman or will prolong severe pain which cannot be alleviated by medication.

LIFE SUSTAINING TREATMENT - MINORS

- KRS 214.185 permits medical, dental, and other health services to be rendered to minors of any age without the consent of a parent or legal guardian when, in the professional's judgment, the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement of consent would result in delay or denial of treatment.

- Abandoned Infants: Emergency departments must admit and provide all necessary medical care, diagnostic tests, and medical treatment to any newborn infant brought to the hospital when the identity of the parents is unknown. KRS 216B.190.

- MOST: Parents or guardians may sign the MOST if the patient is a minor. KRS 311.6225.

MEDICAL ERROR REPORTING

- KRS 216B.165 generally provides that "any agent or employee of a health care facility or service" who knows or has reasonable cause to believe that patient quality of care or safety or the health care facility/service's safety is in jeopardy shall report the problem to the health care facility/service and may report the matter to the appropriate governmental agency. The statute goes on to prohibit the respective health care facility or service from subjecting the reporting agent or employee to reprisal, using or threatening to use any authority or influence tending to "discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce or discriminate" against the agent or employee who "discloses, divulges, or otherwise brings to the attention" of the facility/service the circumstances or facts of the matter.

MEDICAL RECORDS – ACCESS TO MINOR'S RECORDS

- Under HIPAA, a parent or guardian has access to a minor's records, except: (1) When the minor is the one who consents to care and the consent of the parent is not required under State or other applicable law, (2) When the minor obtains care at the direction of a court or a person appointed by the court, (3) When, and to the extent that, the parent agrees that the minor and the health care provider may have a confidential relationship, and (4) When a physician or other covered entity reasonably believes that an individual, including an unemancipated minor, has been or may be subjected to domestic violence, abuse, or neglect by the personal representative, or that treating a person as an individual's personal representative could endanger the individual, the covered entity may choose not to treat that person as the individual's personal representative, if in the exercise of professional judgment, doing so would not be in the best interests of the individual.

- KRS 214.185 allows health care professionals to provide PHI to parents/legal guardians if the following test is met: "The professional may inform the parent or legal guardian of the minor patient of any treatment given or needed where, in the judgment of the professional, informing the parent or guardian would benefit the health of the minor patient."

MEDICAL TREATMENT OVER PROTEST

- In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care services, there is no requirement that a provider obtain a previous consent. KRS 304.40-320.

- KRS 202A.426 provides that a health care provider or health care facility may override expressed refusals of treatment in an advance directive or surrogate's decision only if: (a) A court order contradicts the advance directive; or (b) There is an emergency endangering a person's life or posing a serious risk to physical health.

MEDICAL WASTE / TISSUE / FETAL REMAINS

- It is illegal to dispose of human tissue and medical waste in Kentucky landfills. The tissue must be incinerated. Hospitals are required to segregate pathological and infectious waste for incineration. Waste tissue and contaminated combustible solids shall be rendered safe by sterilization or incineration. See, e.g., 902 KAR 20:009 Sec. 27.

- Kentucky law does not mandate burial of fetal remains (unless born alive), although bills have been introduced unsuccessfully in the past.

MEDICINE, THE PRACTICE OF

- The KBML oversees the practice of medicine. KRS Chapter 311; 201 Kentucky Administrative Regulations ("KAR") Chapter 9. Generally, the "practice of medicine or osteopathy" means the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities. KRS 311.550.

- The KBML also governs certain allied health professionals (e.g., Physician Assistants and Certified Surgical Assistants).

MINORS TREATED AS ADULTS FOR CONSENT

- A minor may legally consent, without parent or guardian approval, in the following special circumstances:
    1) For the diagnosis and treatment of:
        a) Venereal disease;
        b) Alcohol abuse or addiction;
        c) Other drug abuse or addiction;
        d) Emotional disturbance from the effects of a family member's or legal guardian's alcohol or other drug abuse;
        e) Contraception;
        f) Pregnancy; and/or
        g) Childbirth.
    2) For outpatient mental health counseling to any child age 16 or older;
    3) For sexual abuse/assault examinations;
    4) If the risk to the minor's life or health is so great that treatment should be given without delay and obtaining the parent's or legal guardian's consent would result in delay or denial of treatment;
    5) If the minor is lawfully married, then the minor may make any healthcare decision for himself/herself (this does not go away if the minor gets divorced or widowed);
    6) If the minor has a child, then the minor may make any healthcare decision for both himself/herself and his/her child; and
    7) If the minor is emancipated.

- KRS 214.185: A minor cannot consent to an abortion or sterilization. A parent or legal guardian must consent although a judicial bypass may be sought.

- KRS 222.441 permits a minor who suffers from a substance use disorder or emotional disturbance from the effects of a family member or legal guardian's substance use disorder or the parent or guardian of the minor to consent to the furnishing of medical care or counseling related to the assessment or treatment of the conditions.

MISCELLANEOUS MANDATED REPORTS

- Adult Abuse: KRS 209.030: Providers must report to CHFS any knowledge regarding the occurrence of suspected adult abuse, neglect or exploitation.

- Child Abuse: KRS 620.030: "Any person" must report to the county attorney or Commonwealth's attorney or to law enforcement or CHFS when there is reasonable cause to believe that a child is dependent, neglected or abused or a victim of human trafficking.

- Communicable Diseases: KRS 214.010: Physicians must report all diagnosed communicable diseases to the local Board of Health. 902 KAR 2:020 lists the diseases that must be reported and their timeframes for reporting. Physicians must report cases of tuberculosis to the local health department. KRS 215.590.

- Controlled Substances: KRS 218A.202: Every practitioner or pharmacy which dispenses a controlled substance to a person in Kentucky, or to a person at an address in Kentucky, shall report to the

CHFS through KASPER data about the dispensing of controlled substances, such as patient identifier, date, and drug. A Kentucky-licensed acute care hospital or critical access hospital shall report to the CHFS through KASPER all positive toxicology screens that were performed by the hospital's emergency department to evaluate the patient's suspected drug overdose.

- Dog Bites: KRS 258.065: Physicians must report persons bitten by dogs, cats, ferrets, and other animals within 12 hours to the local health department.

- Domestic Violence: KRS 209A.100: Upon the request of a victim, professionals must report an act of domestic violence and abuse or dating violence and abuse to a law enforcement official. "Professional" means a physician, osteopathic physician, coroner, medical examiner, medical resident, medical intern, chiropractor, nurse, dentist, optometrist, emergency medical technician, paramedic, licensed mental health professional, therapist, cabinet employee, child-care personnel, teacher, school personnel, ordained minister or the denominational equivalent, victim advocate, or any organization or agency employing any of these professionals.

- Forged Prescription: A pharmacist, physician or other person authorized to dispense legend drugs may seize and retain any prescription which he has reasonable suspicion to believe is forged, altered or deceitful. If determined to be forged, altered or stolen, then must report to law enforcement and surrender prescription.

- Gunshots: Kentucky law does not mandate reporting of gunshot wounds. Bills mandating reporting of gun and knife wounds have been introduced several times but have not passed.

- HIV: KRS 214.010 and 214.645 require providers to report to the CHFS the names of all persons who test positive for HIV pursuant to the procedure in 902 KAR 2:020.

NEWBORN DEATH CERTIFICATE / DETERMINATION OF LIFE

- KRS 311.790 provides: "Any child which is live born after an induced termination of pregnancy shall be fully recognized as a human person under the law and a birth certificate shall be issued certifying the birth of the live-born person even though the person may die thereafter. In the event death does ensue, a death certificate shall be issued. Both the birth and death certificates shall be issued as required by KRS 213.046, 213.051, and 213.076."

NOTARY

- KRS Chapter 423 sets forth who may become a notary and how to be a notary.

- Health care employees cannot witness a patient's living will unless they are a notary.

- KRS 311.625: None of the following shall be a witness to or serve as a notary public or other person authorized to administer oaths in regard to any advance directive made under this section:
  (a) A blood relative of the grantor;
  (b) A beneficiary of the grantor under descent and distribution statutes of the Commonwealth;
  (c) An employee of a health care facility in which the grantor is a patient, unless the employee serves as a notary public;
  (d) An attending physician of the grantor; or
  (e) Any person directly financially responsible for the grantor's health care.

OB DRUG SCREENS

- KRS 214.160: Any physician who is "legally permitted to engage in attendance upon a pregnant woman" may perform a screening for alcohol or substance abuse on a pregnant woman. A physician may also administer a toxicology test to a pregnant woman within eight hours after delivery to determine whether there is evidence of alcohol, a controlled substance or a substance identified on the list provided by the CHFS. A physician may also administer to each newborn under the physician's care a toxicology test to determine whether there is evidence of prenatal exposure to alcohol, a controlled substance or a substance identified on the list provided by the CHFS. The circumstances surrounding any positive toxicology finding must be evaluated to determine if there has been abuse or neglect of an infant.

- KRS 214.160: A physician may not conduct or cause to be conducted any toxicological test on a pregnant woman without first informing the pregnant woman of the purpose of the test.

- KRS 214.160 also requires every physician who is "legally permitted to engage in attendance upon a pregnant woman" to take or direct to be taken from the woman a specimen of blood which shall be tested for the presence of hepatitis B surface antigen by a laboratory certified by the United States Department for Health and Human Services.

- Newborn Screening: KRS 214.155 and 902 KAR 4:030: Addresses heel sticks (not cord blood).

- KRS 214.175: Hospitals and health facilities licensed to provide obstetrical services, including the delivery of newborn infants, are required to participate in periodic surveys by the CHFS for the purpose of determining the prevalence of alcohol or other substance abuse among pregnant women and newborn infants. However, the result of any individual toxicology tests shall remain confidential and shall only be released in aggregate form to CHFS with the name of the hospital, patient or other patient identifiers redacted.

OPIOID PRESCRIBING / REPORTING

- Kentucky was one of the first states to pass substantial reform related to the abuse of prescription pain pills. In 2012, the Kentucky General Assembly passed House Bill 1, commonly referred to as the "Pill Mill Bill," to fight pain prescription abuse through stiffer regulation of pain management clinics and heightened regulation by licensing boards of a health provider's treatment and prescribing practices with regard to patient complaints of pain.

- KRS 218A.180: A prescription for a controlled substance in Schedule II is not valid after sixty (60) days from the date issued. A controlled substance in Schedule II cannot be refilled. A prescription for a controlled substance included in Schedules III, IV, and V cannot be filled or refilled more than six months after the date issued or be refilled more than five times, unless renewed by the practitioner and a new prescription, written, electronic, or oral shall be required. All written, facsimile, and electronic prescriptions for controlled substances shall be dated and signed by the practitioner on the date issued. A computer-generated prescription that is printed out or faxed by the practitioner must be manually signed. A prescription may be transmitted by facsimile only as specified in administrative regulations promulgated by the CHFS. Electronic prescriptions shall be created, signed, and transmitted in accordance with the requirements of federal law. All prescriptions for controlled substances shall include the full name and address of the patient, drug name, strength, dosage form, quantity

prescribed, directions for use, and the name, address and registration number of the practitioner.

- 201 KAR 9:260: Professional standards for prescribing and dispensing controlled substances.

- 201 KAR 9:270: Professional standards for prescribing or dispensing Buprenorphine-Mono-Product or Buprenorphine-Combined-with-Naloxone (i.e., Suboxone and Subutex).

- 201 KAR 20:059: Advanced Practice Nurse Practitioners may only perscribe certain controlled substances identified as having the greatest potential for abuse or diversion under a thirty (30) day supply with no refills.

- All prescriptions for controlled substances must be written on prescription blanks that provide protection from forgery. KRS 218A.204.

ORGAN DONATION

- KRS 311.225: The physician who certifies the death of an organ donor must not participate in the procedures for removing or transplanting a part of the body of an organ donor.

PEER REVIEW STATUTES

- Kentucky has had variations of a peer review privilege law for many years, but court interpretations have repeatedly hobbled its effectiveness. For example, KRS 311.377 made records of the peer review process confidential and privileged and not subject to discovery "in any civil action in any court"; yet Kentucky case law determined that the peer review privilege did not apply to protect information in medical malpractice cases. *See Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W. 2d 464 (Ky. 1998).

- A recent statute better protects peer review and makes clear that it applies in malpractice cases. KRS 311.377(2) extends privilege to "medical malpractice actions, actions arising out of review of credentials or retrospective review and evaluation,…and actions by an applicant for…staff privileges…." The privilege is available only to providers that "attest to participating in a patient safety and quality improvement initiative, including the [PSQIA]." See also 902 KAR 20:016.

PRIVACY

- Data Breach:
  - KRS 365.732: Data breach notification requirements are applicable to any person or business entity that conducts business in Kentucky and experiences a breach of personally identifiable information ("PII"). This statute specifically exempts from its requirements any person who is subject to the provisions of HIPAA.
  - KRS 61.931 et seq.: "Public agencies" (including public schools and universities) and "non-affiliated third parties" that contract with public agencies and receive PII are required to report data breaches of the PII. This statute specifically exempts from its requirements any person who is subject to the provisions of HIPAA.

- Free Copies or Specified Copying Charges for Patient Records: See KRS 422.317.

- Mental Health Or Chemical Dependency: KRS 304.17A-555: Accords patients a right of privacy in-mental health and chemical dependence records and limits an insurer's access to any such records and communications between a patient and health care provider to those necessary to determine coverage, medical necessity, appropriateness, and quality of care.

- Substance Abuse: KRS 222.271(1): Patients have a right of privacy with regard to their treatment for substance use disorders when provided by persons licensed to provide such treatment. This right of privacy for substance use disorder treatment extends to the patient's communications with his or her physician or attorney, as well as to the patient's mail, telephone and email communications.

- Mental Health Patients: KRS 210.235: All records and reports by the CHFS which directly or indirectly identify a patient or former patient seeking hospitalization in a state or regional mental health facility "shall be kept confidential and shall not be disclosed by any person" except under the circumstances set forth in the statute (e.g., patient consent, for treatment purposes, compliance with official government inquiries, a court order, etc.…). No third party to whom disclosure of a patient's mental health or chemical dependency records are made can redisclose or otherwise reveal the information disclosed, beyond the purpose for which the disclosure was made, in the absence of the patient's written consent to the redisclosure.

- Genetic Information: KRS 304.12-085: Group and individual health benefit plans and insurers, as well as disability income plan insurers, may not request or require an applicant, participant or beneficiary to disclose his or her genetic test. A group or individual health benefit plan or insurer who possesses a genetic test about a participant or beneficiary, may not disclose it without prior authorization by the participant for each disclosure.

- HIV/AIDS: See KRS 214.181 and KRS 214.625.

- Sexually Transmitted Diseases: See KRS 214.400, .410, .420, and KRS 214.990(6).

- CHFS Clients or Patients: See KRS 194A.060.

- Controlled Substance Prescriptions: See KRS 218A.280.

- Minors: See KRS 214.185.

- Pharmacy Patient Records And Counseling: See 201 KAR 2:210.

- Toxicology Test Results on Pregnant Women or Newborn Infants: See KRS 214.175.

PSYCHIATRIC TREATMENT - MINORS

- A minor may legally consent without parent or guardian approval for the diagnosis and treatment of alcohol abuse or addiction, other drug abuse or addiction, emotional disturbance from the effects of a family member's or legal guardian's alcohol or other drug abuse, and for outpatient mental health counseling to any child age 16 or older. KRS 214.185 and KRS 222.441.

- The hospitalization of minors alleged to be mentally ill, except those youthful offenders provided for in KRS Chapter 640, is governed by KRS Chapter 645. KRS 645.150 provides that no minor shall be

hospitalized involuntarily unless in the opinion of two qualified mental health professionals, at least one of whom is a physician, the minor meets the criteria set out in KRS 645.090.

- KRS 222.441 permits a minor hospitalized or treated without the minor's consent but with the consent of the parent or guardian to petition the District Court to determine whether the minor is suffering from a substance use disorder and whether the treatment is necessary for the health and welfare of the minor.

RECORD RETENTION

- Kentucky's record retention requirements are scattered throughout multiple statutes and regulations depending on the type of record or the type of entity holding the record. In other situations, providers should consider retaining records in line with relevant statute of limitations. Here is a sampling:
  - In general, hospitals must retain medical records for 6 years from the date of discharge. 902 KAR 20:016.
  - Kentucky Medicaid requires a physician office to retain medical records of a Medicaid recipient for 5 years from the date of service. 907 KAR 3:005.
  - Contracts: KRS 413.090.
  - Master Patient Index: KRS 213.146.
  - Register of Births and Deaths: KRS 213.146.
  - Mammograms: KRS 304.17-316(3).
  - Lab Tests and Specimens: 902 KAR 11:045.

REPORTING HEALTHCARE PROFESSIONALS

- KRS 311.606 requires any hospital or medical staff to report all actions taken against a licensed physician to the KBML within 30 days of the final adjudication of the action, including all pertinent documents.

- Any licensed physician who observes another physician in violation of KRS 311 must submit a written report to the KBML or to the board of the concerned hospital or medical staff of the hospital within 10 days of observing such violation or obtaining other direct knowledge of such violation.

- KRS 314.031: "It shall be unlawful for any nurse, employer of nurses, or any person having knowledge of facts to refrain from reporting to the board a nurse who is suspected of having violated any provision of KRS 314.091."

RESTRAINTS

- KRS 202A.241: All individuals transporting or holding persons under KRS Chapters 202A (Hospitalization of the Mentally Ill), 202B (Admission of an Individual with an Intellectual Disability), or 645 (Mental Health Act) must use the least restrictive level of restraint consistent with the person's needs.

- KRS 202B.060 requires regulations governing the rights of residents with an intellectual disability regarding the use of seclusion and restraints in hospitals and ICF/IDs.

- 902 KAR 020:180 governs operations of psychiatric hospitals and the use of chemical, mechanical, and personal restraints and seclusion in a psychiatric hospital or psychiatric unit of a critical access or acute care hospital.

- 902 KAR 020:160 governs chemical dependency treatment services and requires restraints be used only pursuant to KRS 202A.241 and 908 KAR 3:010.

- 908 KAR 3:010 governs patients' rights in institutional care.

- KRS 216B.175: An advanced practice registered nurse ("APRN") may perform a history and physical examination for a patient admitted to an acute care or psychiatric hospital and order and review continuation of restraints and seclusion as a health care practitioner in accordance with federal regulations.

- Advance Directives may be used to identify preferences for procedures for emergency interventions, including seclusion, restraints, or both.

RESTRICTION OF PRACTICE

- Kentucky courts generally enforce a non-compete provision unless it is unreasonable or interferes with the public interest. The courts look at the scope of the restriction, length of time, and the geographic area to see if they are reasonable or are against public policy, but most non-competes are upheld. (A former law in Kentucky limited physician non-competes to one year, but this law has since been repealed.) If an existing employee is asked to sign a non-compete, then the employee must receive some type of additional compensation in order for the non-compete to be enforceable. *Chas. T. Creech, Inc. v. Brown*, 2012-SC-000651 (Ky. 2014).

- KRS 311.597 incorporates the AMA Code of Medical Ethics. The AMA Code of Ethics Opinion 11.2.3.1 states that "covenants not to compete restrict competition, can disrupt continuity of care, and may limit access to care. Physicians should not enter into covenants that:
  (a) Unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and

  (b) Do not make reasonable accommodation for patients' choice of physician.

  Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program."

- 902 KAR 20:016 provides that a hospital must have a "medical staff" and the medical staff must develop and adopt policies or bylaws, subject to the approval of the governing authority, which must:
  (1) State necessary qualifications for medical staff membership;
  (2) Define and describe the responsibilities and duties of each category of medical staff, delineate the clinical privileges of staff members and allied health professionals, and establish a procedure for granting and withdrawing staff privileges to include credentials review; etc.

RN / NP / PA / PARAMEDICS SCOPE OF PRACTICE

- Kentucky nursing laws are found in KRS Chapter 314 (see KRS 314.011) and the scope of practice for both RNs and APRNs is further detailed in 201 KAR Chapter 20.

- The Kentucky Board of Nursing ("KBN") governs the practice of nursing. KRS Chapter 314.

- APRN is the legal licensure title for a Nurse Practitioner, Certified Nurse Midwife, Certified Registered Nurse Anesthetist, and a qualifying Clinical Nurse Specialist. APRNs are considered independent practitioners. KRS 314.195. APRNs practicing less than four years must enter into a collaborative agreement with a physician in order to prescribe nonscheduled legend drugs, and all APRNs mustenter into a collaborative agreement in order to prescribe controlled substances. KRS 314.042. The administrative regulation 201 KAR 20:057 establishes APRN scope and standards of practice.

- Kentucky physician assistant ("PA") laws are found in KRS 311.840 to 311.862. The services and procedures that may be performed by a PA and the restrictions are found in KRS 311.858. The KBML governs PAs.

- "Paramedic" is defined in KRS 311A.010. Kentucky EMTs and paramedics scopes of practice are covered in 202 KAR 7:701. The Kentucky Board of Emergency Medical Services ("KBEMS") governs paramedics.

SEARCH AND SEIZURE (PROPERTY AND BODY)

- KY Constitution Section 10 mirrors the 4th Amendment: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Exceptions apply for exigent or emergency circumstances.

- State hospital employees may be considered government actors.

STERILIZATION

- Any physician who is requested to perform a nontherapeutic sterilization must counsel the person who requests the sterilization. KRS 212.343.

- Before a physician performs a nontherapeutic sterilization, the patient must give written consent. KRS 212.345.

- Physicians must then wait 24 hours following the written consent before performing the sterilization procedure.

- KRS 214.185: A minor cannot consent to an abortion or a sterilization operation.

- For Medicaid beneficiaries, all claims for sterilization services must have a completed MAP-250 Consent Form, which must be completed by the patient at least 30 days prior to the sterilization procedure, except in cases of premature delivery and emergency abdominal surgery, in which case a 72-hour waiting period is required. The Consent Form is only valid for 180 days.

SUBSTANCE USE TREATMENT – ADULT

- Tim's Law: KRS 202A.0811-.0831: Tim's Law authorizes Kentucky District Courts to order assisted outpatient treatment for individuals who have been involuntarily hospitalized at least twice in the past 12 months, who are diagnosed with a serious mental illness, who are unlikely to adequately adhere to

outpatient treatment on a voluntary basis, and for whom court-ordered assisted outpatient treatment is the least restrictive alternative mode of treatment available and appropriate. This law is rarely used. As set out in KRS 202A.0829, the implementation of Tim's Law is "contingent upon adequate funding by any unit of state or local government or divisions thereof, special purpose governmental entity, or any other entity able to utilize funds for the purposes set forth in KRS 202A.0811 to 202A.0831. Funding may be provided through the appropriation of federal, state, or local resources or from donations, grants, gifts, or pledges from private resources."

- Casey's Law: KRS 222.430-.437: A spouse, relative, friend, or guardian of a person suffering from a substance use disorder may petition the court for 60 to 360 days of involuntary treatment for that disorder. No person suffering from substance use disorder can be ordered to undergo treatment unless that person: (1) suffers from substance use disorder; (2) presents an imminent threat of danger to self, family, or others as a result of a substance use disorder, or there exists a substantial likelihood of such a threat in the near future; and (3) can reasonably benefit from treatment.

- See also INVOLUNTARY TREATMENT. Except where the definitions or procedures conflict, all terms or procedures available under KRS Chapter 202A (Hospitalization of the Mentally Ill) also apply to KRS 222.430-437.

TELEMEDICINE / PRESCRIBING

- KRS 205.510: For Kentucky Medicaid, telehealth means the delivery of health care-related services by a Medicaid provider to a Medicaid recipient through a face-to-face encounter with access to real-time interactive audio and video technology or store and forward services that are provided via asynchronous technologies as the standard practice of care where images are sent to a specialist for evaluation. The requirement for a face-to-face encounter shall be satisfied with the use of asynchronous telecommunications technologies in which the health care provider has access to the Medicaid recipient's medical history prior to the telehealth encounter.

- KRS 205.559: Medicaid reimbursement for telehealth.

- KRS 315.310: A treating pharmacist providing telehealth must ensure informed consent of the patient and confidentiality of patient medical information.

- Telehealth Medicaid consultation coverage and reimbursement rules are set forth in 907 KAR 3:170.

- KRS 311.5975: A treating physician providing telehealth must ensure informed consent of the patient and confidentiality of patient medical information.

- KRS 311.597(1)(e): It is inappropriate to prescribe or dispense any medication in response to any communication transmitted or received by computer or other electronic means, when the licensee fails to take the following actions to establish and maintain a proper physician-patient relationship:

    1. Verification that the person requesting medication is in fact who the patient claims to be;
    2. Establishment of a documented diagnosis through the use of accepted medical practices; and
    3. Maintenance of a current medical record.

- For the purposes of this paragraph, an electronic, on-line, or telephonic valuation by questionnaire is inadequate for the initial evaluation of the patient or for any follow-up evaluation. KBML has adopted the Model Policy on the Appropriate Use of Telemedicine Technologies in the Practice of Medicine.

TRAUMA REGISTRY

- 902 KAR 28:040: Kentucky has a state trauma registry to collect data from hospitals certified as trauma centers on motor vehicle injuries and fatalities.

VIDEOING / TELERECORDING (CONSENT)

- The Commonwealth of Kentucky is a one-party consent state. It is a felony under Kentucky's eavesdropping statute to overhear or record any oral or wire communication without the consent of at least one party. KRS 526.010 and 526.020.

VIOLENCE AGAINST HEALTH WORKERS KRS

- KRS 431.015: Permits a peace officer to make an arrest or issue a citation without a warrant for a violation of KRS 508.030, assault in the 4th degree, when the violation occurs in a hospital without the officer's presence and the officer has probable cause.

DISCLAIMER: Although this Summary may be helpful in informing readers who have an interest or need for information about Kentucky's health care laws, it is not intended to be legal advice. The subject matter of this Summary is complex and how it applies to any particular individual or organization may vary significantly depending on specific facts and situations. This Summary is not intended to overview federal laws that may impact a particular situation, although it references some federal laws, but instead focuses on what is unique to Kentucky. Readers of this Summary should not rely on information in this Summary as a substitute for competent legal advice that is specific to the circumstances of the reader.

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PUBLISHED: DECEMBER 1, 2019 WWW.WYATTFIRM.COM