

To: COURT IMPROVEMENT PLAN COMMITTEE
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RE: ACCESS TO MENTAL HEALTH RECORDS OF OTHERS

I. Questions Presented and Conclusion

What is the current law in Pennsylvania regarding access to the mental health records of others? Does the Federal Health Insurance Privacy and Accountability Act (HIPAA)² include any provisions regarding access to such records?

For the reasons stated below, it appears that under both the law of the Commonwealth of Pennsylvania, and under HIPAA, information obtained from a care giver pursuant to a court ordered mental health assessment of any kind, may be made available to the parties to the proceeding to the extent relevant to the proceedings in which the assessment is ordered and obtained.

II. Regular Patient-Psychologist Relationship

The origin of the patient-psychologist relationship is often significant in determining access to the mental health records of others. If the relationship was not initiated by a government agency or the court system, then a presumption exists that all records and documents relating to that relationship are privileged. 42 Pa.C.S.A. § 5944 (1972). However, that presumption may be rebutted by showing that the patient waived such a privilege. Rosse v. Rosse, 49 Pa. D. & C.4th 438, 442 (Ct. Comm. Pl. 2000) (holding that plaintiff waived her patient-psychologist waiver by requesting alimony for her mental condition and thus putting the same at issue). On the other hand, if the patient-psychologist relationship was initiated by a

¹ Your presenters wish to express their appreciation for the excellent research assistance provided by Sabrina L. Schwager, University of Pennsylvania Law School, Class of 2007.

² Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat 1936 (1996).

government agency or the court system, then it is assumed that the patient had no expectation of confidentiality and that no privilege exists. See Matter of Adoption of Embick, 506 A.2d 455 (Pa. Super. 1986). (holding that a psychologist's testimony was admissible in a parental rights termination hearing because the parents were not actually the clients of the psychologist).

According to the Pennsylvania Judicial Code, 42 Pa.C.S.A. § 5944 (1972), no psychologist may be examined in any civil or criminal matter as to information acquired in the course of his professional services to a client without the written consent of that client. The statute also provides that the confidential relations and communications between a psychologist or psychiatrist and his client are the same as that between an attorney and a client. Id. This privilege has been held to extend not only to communications and relations between a psychologist and a client, but also between a client and a psychologist's agent. Kalenevitch v. Finger, 595 A.2d 1224 (Pa. Super. 1991) (holding that the testimony of a nurse working for psychologist is privileged; nurse was barred testifying that an injury was the result of stress and not an automobile accident).

In In re B, 394 A.2d 419 (Pa. 1978), the Supreme Court of Pennsylvania held that in a dependency trial, access would not be allowed to the records of mother's past mental health treatment. The Court ruled that the mother's right to privacy outweighed the state's interest in obtaining all information necessary to properly determine the placement of a child. Thus, even though access was sought during a dependency case, because the origin of this relationship - patient and treating doctor³ - was unrelated to the dependency proceedings, an expectation and right to privacy was assumed, and a privilege attached.

Moreover, in Commonwealth v. Counterman, 719 A.2d 284 (Pa. 1998), a wife was a witness in her husband's trial for the murder of their three children, and defendant sought access

³ While the relationship in In Re B was patient-physician, the state was seeking access to psychological records.

to the mental health treatment records of the wife/mother. While courts have held that a defendant's Sixth Amendment right to confront his accusers outweighs a victim's interest in maintaining the confidentiality of their mental health records,⁴ in Counterman, the wife was a witness and not a victim. As a result, without the Sixth Amendment concerns attendant to the records of victims, the husband was not allowed access to his witness wife's mental health treatment records.

The Mental Health Procedures Act, 50 Pa.C.S.A. § 7101 (1976), ("MHPA") also provides safeguards for those that are involuntarily treated for mental illness on an out- and an in-patient basis, as well as those that are voluntarily treated on an in-patient basis. All documents concerning persons in treatment will be kept confidential, and without the patient's written consent, will be not released or disclosed to anyone, except to (1) those also providing treatment for the patient; (2) county administrator; (3) a court in the course of legal proceedings authorized by this act⁵; and (4) where treatment is undertaken in a Federal agency. 50 Pa.C.S.A. § 7111 (1976). While courts have interpreted § 7111 broadly, the four statutory exceptions to this privilege have been construed narrowly, disallowing access to the mental health records of those covered by the MHPA. Hahnemann University Hosp. v. Edgar, 74 F.3d 456 (3d. Cir. 1996) (Holding that hospital should not produce the privileged records of two committed men accused of raping a committed woman).

III. Waiver of Patient-Psychologist Privilege

⁴ See, Commonwealth v. Lloyd, 567 A.2d 1357 (Pa. 1989) (Defendant accused of raping his nieces was allowed to view victim's psychotherapeutic records); Commonwealth v. Miller, 582 A.2d 4 (Pa. Super. 1990) (Defendant accused of indecent assault and corruption of minors allowed access to the victim's psychological reports).

⁵ Courts have held voluntary and involuntary commitment proceedings to be the only actions authorized under the MHPA. Hahnemann University Hosp. v. Edgar, 74 F.3d 456, 463 (3d Cir. 1996).

The privilege accorded the patient-psychologist relationship may be waived by the patient. In Rosse v. Rosse, 49 Pa. D. & C.4th 438, 442 (Ct. Comm. Pl. 2000), the wife filed a claim for alimony based on her mental condition. By placing her mental condition at issue in the case, the Court held that the privilege had been waived. A patient may also waive this privilege by presenting as evidence otherwise privileged communications. In Wood v. Tucker, 332 A.2d 191 (Pa. Super. 1974), the Superior Court reversed the trial court's decision holding that the patient had not waived privilege. The trial court based its decision on the fact that the confidential information in question had been presented to the judge in camera, and had not been made available to any party. The Superior Court reversed, holding that to permit evidence to be presented to the judge without making it available to the opposing party violated the other party's right to due process. If a patient chooses to introduce into evidence records that would otherwise be privileged, that patient cannot expect the attendant confidentiality to be preserved. C.f., Doe v. Ensey, 220 FRD 422, 426-28 (M.D. Pa. 2004) (Psychological evaluations conducted of Defendant Priests at the request of their employer, the Diocese and presiding Bishop, as part of the Diocesan practice of investigating accusations of sexual abuse by priests, was not protected under Pennsylvania law from disclosure in civil litigation because treatment and confidentiality are not contemplated.); M. v. State Board of Medicine, 725 A.2d 1266 (Pa. Cmwlth. Ct. 1999) (Report of psychologist employed by defendant in civil litigation to evaluate plaintiff was not privileged because plaintiff was not seeking treatment or counseling and was not examined for therapeutic purposes, and plaintiff had no reasonable expectation of privacy.)

IV. Patient-Psychologist Relationship Initiated by Government Agency or Court System

The Court in In Re B suggested that the state should have asked the mother to voluntarily submit to a psychological exam, rather than seeking access to her prior treatment records. In re

B, 394 A.2d at 486. The Court posited that, “the constitutionally protected zone of privacy would [not] bar such an evaluation because the mother would not be relying detrimentally...upon her right of privacy.” Id. Though perhaps dicta, the Superior Court has followed this line of reasoning.

In an action to terminate their parental rights, the parents challenged the ability of the psychologist assigned to them by child services to testify without their written consent. Matter of Adoption of Embick, 506 A.2d 455 (Pa. Super. 1986). The Court ruled that the parents were not actual clients of the psychologists, as they attended sessions with her “because they were asked to do so by the Agency⁶, and for the limited purpose of examination.” Id. at 500. Furthermore, the parents had no expectation of privacy or confidentiality, as they knew the psychologist would report back to at least the Agency, if not directly to the Court. The Court ruled that the privilege did not apply, as the parents had not shown that “the injury that would inure to the relationship by the disclosure of the communication... [was] greater than the benefit thereby gained for the correct disposal of litigation.” Id. at 502.

In In Interest of Bender, 531 A.2d 504 (Pa. Super. 1987), before the dependency trial, mother submitted voluntarily to the request of Lebanon County Children and Youth Services (LCCYS) to undergo a psychological exam. However, at the trial itself, she revoked her consent and objected to the testimony of the examining psychologist. The Court ruled that even if no one had explicitly informed her to what use the information from the examination would be put, “the circumstances under which the tests were requested certainly gave her notice that the results would not be kept in confidence... [as] the tests would be of no use if the results could not be disclosed to LCCYS and the court.” Id. at 505. Moreover, mother was not a client of the psychologist, as LCCYS had requested she meet with him. Thus, without a true client- *treating*

⁶ Clinton County Children and Youth Agency

mental health professional⁷ relationship and no explicitly created expectation of privacy, no privilege attached to the communications between mother and the psychologist. C.f., Doe v. Ensey, *supra*; M. v. State Board of Medicine, *supra*.

V. Health Insurance Privacy and Accountability Act (“HIPAA”)⁸

HIPAA prohibits the release of “**individually identifiable health information**”⁹ in the **care of a covered entity¹⁰ or its business associate**. This information is referred to as “**protected health information**” (PHI), and will identify an individual through such patient identifiers as name, Social Security number, telephone number, zip code or email address. This information, to be protected, must relate to the health, health care and/or payment for provision of health care for the individual, and the information must establish a “reasonable basis” for believing that the individual has been identified.¹¹ PHI covers the mental health records of patients, including but not limited to counseling and assessment as related to an individual’s physical or mental condition, in addition to prevention, diagnosis and therapy.¹² Thus, court ordered mental health “assessments” would appear to be within the meaning of PHI.

However, there are statutory exceptions to this rule, outlining permissible uses and disclosures, even as to PHI held by “covered entities.” The use and disclosure of PHI without the patient’s written consent is permitted in a number of specified instances, including (1) to the

⁷ Although we have not found any case explicitly on point, it seems likely that a court would hold that where a parent was asked to participate in a child’s mental health treatment, that parent’s disclosures to the child’s treating mental health provider, as well as the child’s, would be deemed confidential.

⁸ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat 1936 (1996).

⁹ 45 C.F.R. § 160.103 (2003).

¹⁰ A covered entity is a “health plan, a health care clearinghouse, or a health care provider who transmits health information in electronic form in connection with a transaction for which HHS has adopted a standard.”¹⁰ Thus, it appears unlikely that a court which orders a party to undergo a mental health evaluation for the purpose of ruling on a dependency petition, regarding the placement of a child or the termination of parental rights would not be considered a “covered entity” under HIPAA.

¹¹ Summary of the HIPAA Privacy Rule at 4.

¹² 45 C.F.R. § 160.103.

patient him/herself; (2) for treatment, payment and healthcare operation¹²; (3) uses and disclosures with the opportunity for the patient to agree or object to the same; (4) incidental use or disclosure¹³; and (5) the public interest and benefit of serving 12 national priority purpose. 45 C.F.R. § 164.502 (2002). One such national priority purpose is judicial and administrative proceedings.¹⁴ Thus, HIPAA permits the use or disclosure of PHI for judicial and administrative proceedings. However, it is left to the case law above to determine whether or not PHI may actually be used in a judicial or administrative proceeding.

However, while it appears that the results of a court ordered mental health assessment would include “protected health information” under HIPAA, the court which orders the evaluation and receives the report would not be a “covered entity,” and thus not subject to the Act’s restrictions on disclosure. Even if one could argue that a court was so covered, the exception for situations in which the “patient” has an opportunity to agree or object, c.f., In Interest of Bender, *supra*, and “judicial and administrative proceedings,” would seem to allow the court to disclose the information to the parties to the proceeding to the extent it was relevant for use in those proceedings. Moreover, “the denial of access to...information relevant to the trial court’s decision is violative of the process due to all litigants.” Wood v. Tucker, 332 A.2d 191, 192 (Pa. Super. 1974). Thus, it would seem that all parties have the right of access to the records of a court ordered mental health assessments.

¹² Health care operation refers to such activities as evaluating professional performance and conducting quality assessments and improvement activities.

¹³ This refers to a use or disclosure that occurs “incident to” or “as a result of” an otherwise permitted use or disclosure.

¹⁴ The other 11 national priority purposes are (1) required by law; (2) public health activities; (3) victims of abuse, neglect or domestic violence; (4) health oversight activities; (5) law enforcement purposes; (6) decedents; (7) cadaveric organ, eye or tissue donation; (8) research; (9) serious threat to health or safety; (10) essential government functions; and (11) workers’ compensation. 45 C.F.R. § 164.502 (2002).