

Confidentiality Issues with regard to Individuals who have Behavioral Health Issues

April 8, 2015

What this presentation will cover:

- a brief overview of the Illinois law regarding confidentiality with a focus on the Illinois Mental Health and Developmental Disabilities Confidentiality Act;
- a brief review of the August 2013 amendment to the Illinois Mental Health and Developmental Disabilities Confidentiality Act;
- some best practice tips for representing clients with mental or behavioral health issues.
Because of time constraints, this is not an overview of all of the ethical issues concerning confidential mental health information.

Mental Illness in the U.S.

- More than one in four American adults suffer from a diagnosable mental illness.
- About 6%, or 1 in 17, suffer from a serious mental illness.
- Mental illness is the leading cause of disability in the U.S. and Canada.
- Source: www.nimh.nih.gov

Applicable Illinois statutes with regards to confidentiality

- Illinois Mental Health And Developmental Disabilities Confidentiality Act (IMHDDCA) 740 ILCS 110 et seq.
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) 45 CFR Parts 160 and 164.
- Abused and Neglected Child Reporting Act (ANCRA) 325 ILCS 5/1 et seq.

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Applicable Illinois statutes with regards to confidentiality

- Illinois Domestic Violence Act (IDVA) 750 ILCS 60/101 et seq.
- AIDS Confidentiality Act 410 ILCS 305 et seq.
- Confidentiality of Alcohol and Drug Abuse Patient Records 42 CFR Part 2 et seq.
See: 52 Federal Register 21796, 21797

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Some Points about Confidentiality

- Confidentiality
 - Either a privilege that protects against disclosure of certain types of information; or
 - A right that protects against certain invasion of individual's privacy;
 - Neither is derived from common law.

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Confidentiality v. Privilege Generally

- Privilege
 - Exclusionary rule that exempts a person from disclosing certain confidential communications or information or from disclosing contents of confidential documents.
 - Governed by federal or state constitution, common law, statute or Illinois Supreme Court rule.
 - Can be either privileged communications or privileged information.

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Illinois law regarding confidentiality of mental health records

Main Illinois law is the Illinois Mental Health & Developmental Disabilities Confidentiality Act (Mental Health Confidentiality Act) 740 ILCS 110/1 et seq. This Act's purpose is to create a consolidated statute on confidentiality of mental health and developmental disability records.

Mental Health Confidentiality Act's General Rule (740 ILCS 110/3)

- All records and communications are confidential;
- Records shall not be disclosed except as provided by the Act;
- Not required, but therapist may keep personal notes regarding any patient therapy. (Generally such notes are not subject to discovery in any judicial, administrative or legislative proceeding.)

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Mental Health Confidentiality Act's Key Definitions (740 ILCS 110/2)

- Communications- any communication made in a presence of a therapist providing services (does not include pharmacist records).
- Records- "any record kept by a therapist or by an agency in the course of providing mental health... services to a recipient"

Therapists personal notes excluded (but they must not be disclosed to any other person except therapist's supervisor, consulting therapist or attorney.

Practice tip: don't just take their word it is a personal note- must meet certain criteria.

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Mental Health Confidentiality Act's Duty to Maintain Records

- None required by this act, but it is not a good idea for the therapist.
- Ethics codes and professional standards, however, require therapists to maintain records.

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Permissive Disclosure of Information Under the Mental Health Confidentiality Act (740 ILCS 110/4)

With informed consent

- The parent or guardian of a recipient who is under 12 years of age (110/4 (a)(1));
- The recipient if over 12 years of age (110/4(a)(2));

Permissive Disclosure of Information Under the Mental Health Confidentiality Act (740 ILCS 110/4) (Cont.)

- To parent or guardian if minor is at least 12 but under 18, if the recipient (minor) is informed and does not object and therapist does not find compelling reasons to deny such request.
 - Parent may however petition court for such access.
 - Does not prohibit parent from obtaining basic information. ((110/4(a)(3))

Permissive Disclosure of Information Under the Mental Health Confidentiality Act (740 ILCS 110/4) (Cont.)

- To attorney or GAL of minor 12 years or older in any judicial or administrative proceeding if they obtain a order granting this right. ((110/4(a)(4)).
- The guardian of a recipient who is 18 years or older. ((110/4(a)(5)).
- Attorney in fact under power of attorney or health care when the power authorizes such access. ((110/4(a)(6)).

Permissive Disclosure of Information Under the Mental Health Confidentiality Act (740 ILCS 110/4) (Cont.)

- Attorney in fact under Mental Health Treatment Preference Declaration. ((110/4(a)(7)).
- Any person in whose care and custody the recipient has been placed. ((110/4(a)(8)).

Challenging Information in the Record Under the Mental Health Confidentiality Act (740 ILCS 110/4 (c))

- Provides right to submit clarifying statement or statement disputing information in the record.
- Consumers like this provision because there are errors in the medical record.

Mental Health Confidentiality Act Disclosure Consent (740 ILCS 110/5)

- Details the format and content of the consent.
- Note can be revoked at any time.

Disclosure Without Consent

- Routine disclosures
 - To supervisor, consulting therapist, lawyer or team records custodian;
 - Peer review;
 - Attorney for therapist or hospital;
 - For the application of benefits (when otherwise unable or impossible to obtain consent) (110/6);
 - Any facility which has custody pursuant to statute or order of commitment;
 - Review of Therapist or agency; use of recipient's record (110/7);
 - Interagency disclosures (i.e. DCFS and DPH)-limited information (110/8).

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Disclosure Without Consent

- Special Exceptions
 - Civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of services received for such condition as an element of his claim or defense.
 - Very limited under the Illinois Marriage and Dissolution of Marriage Act.

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Disclosure Without Consent

- Special Exceptions
 - Court ordered examinations (110/10(a)(4))
 - For good cause shown;
 - Otherwise relevant and admissible;
 - Provided that the recipient has been adequately and effectively informed that such records will not be considered confidential.
 - Probate act to determine competency (110/10(a)(5))

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Disclosure Without Consent

- Special Exceptions
 - Fitness examinations for criminal charges. (110/10(a)(6)).
 - To initiate or continue civil commitment proceedings or to otherwise protect the recipient or other person. (110/11(ii)).
 - Petition or motion is filed under the Juvenile Court Act of 1987 and the recipient is named as a parent, guardian, or legal custodian of a minor. (110/10(a)(11)).

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Disclosure Without Consent

- Rights concerning disclosure without consent
 - *In camera* review may be requested by any interested party. (110/10(b)).
 - Therapist may assert privilege. (110/10(b)).
 - Court may limit disclosure to protect parties. (110/10(b)).

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2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- HB 1017 significantly changes the Mental Health and Developmental Disabilities Confidentiality act for the purpose of implementing a Health Information Exchange (HIE) in Illinois.
- The bill authorizes an HIE, person, therapist, facility, agency, interdisciplinary team, integrated health system, business associate, or covered entity (as those terms are defined by the Act) to use or disclose, without the recipient's consent, information from a recipient's mental health record in connection with an HIE.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- Further, that information may be used, disclosed or redisclosed, without the recipient's consent, by an HIE and its business associate for HIE purposes or other purposes allowed under the Act.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- The Illinois Health Information Exchange Authority (IHIEA) must, through appropriate rules, standards or contractual obligations which are binding upon any HIE, require that participants of an HIE provide each recipient whose record is accessible through the HIE the reasonable opportunity to expressly decline the further disclosure of the record by the HIE to third parties, except as otherwise permitted by law.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- These rules, standards or contractual obligations must:
 - Allow the recipient to revoke a prior decision to opt-out or a decision not to opt-out.
 - Provide for written notice of a recipient's right to opt-out which directs the recipient to an HIE website that contains:
 - An explanation of the purpose of the HIE
 - Audio, visual and written instructions on how to opt-out of participation in whole or in part *to the extent possible*
 - Be reviewed annually and updated as the technical options develop
 - Recipients must be provided meaningful disclosure regarding the HIE, and the recipient's decision whether to opt-out should be obtained without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- In addition, the rules, standards or contractual obligations to be established by the IHIEA must give consideration to:
 - The format and content of the meaningful disclosure;
 - The availability to recipients of information regarding an HIE;
 - The rights of recipients to expressly decline the further disclosure of the record by an HIE to third parties;
 - Enabling a recipient to expressly decline the further disclosure by an HIE to third parties of selected portions of the recipient's record while permitting disclosure of the recipient's remaining patient health information.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- The IHIEA may, in its discretion, consider the extent to which relevant health information technologies reasonably available to therapists and HIEs reasonably enable the effective segmentation of specific information within a recipient's electronic medical record and reasonably enable the effective exclusion of specific information from disclosure by an HIE to third parties and the availability of sufficient authoritative clinical guidance to enable the practical application of such technologies to effect recipient disclosure preferences.
- HB 1017 also includes provisions relating to use and/or disclosure of a recipient's record to business associates, disclosure of the existence of a recipient's record to a record locator service, and establishment and disclosure of limited data sets and de-identified information.

2013 Changes to the Mental Health Confidentiality Act (HB 1017)

- These provisions are subject to administrative rules.
- Please see hie.illinois.gov

2015 Change to the Mental Health Confidentiality Act

- Amended section 740 ILCS 110/10 to allow more information to corners to assist in there investigations.

How to Access Medical Records

- HIPAA privacy rules includes a right of individuals to request copies of there medical records. 45 C.F.R. § 164.524 (2010).

How to Access Medical Records

- Access by guardians is not a trivial matter, the federal government has encouraged patients and their representatives to download information of their Electronic Health Care record at the push of the "Blue Button."

How to Access Medical Records

- For a description of the Blue Button initiative see *Download My Data/Blue Button*
- <http://www.healthit.gov/patients-families/your-health-data>

How to Access Medical Records

- On September 13, 2013, DHS office for Civil Rights published a one sheet message about accessing one's medical records.
- This message sheet should be useful if hospitals are difficult in releasing information.
- You have a right to file a complaint under the Office of Civil Rights if the medical records are not provided.

How to Access Medical Records

- You have a right to file a complaint under the Office of Civil Rights if the medical records are not provided.

How to Access Medical Records

- Note that HIPAA defers to state law if the privacy right is stronger under state law- thus a psychiatrists' notes are still confidential.
- Also HIPAA treats personal representatives as the individuals themselves would be treated. 45 C.F.R. § 164.502(g)(1) (2010).

How to Access Medical Records

- In Illinois the default surrogate decision maker statute provides that the surrogate has the same powers as the principal with respect to medical records. 755 ILCS 40/25(e).

Practical Advice to Dealing with Impaired Clients

- Mental ability of a client is relative and on a continuum.
- Attorney/Client privilege is absolute except in certain circumstances.
- People have good days and bad days; better at certain times of the day.
- Consider alternatives such as Power of Attorney or lesser restrictive alternatives.

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More Practical Advice to Dealing with Impaired Clients

- Client's symptoms may ebb and flow- in order to confirm disability claim make sure you have documentation about behaviors when the illness is in an acute phase.
- Written information is key- that way when the illness is less acute the client can understand the information provided.

More Practical Advice to Dealing with Impaired Clients

- Don't forget the community social workers- they could provide great documentation about the client's ability to perform activities of daily living. Also they can provide support with transportation, contact issues.
- You don't have to challenge a client's belief system unless it directly interferes with the representation.

More Practical Advice to Dealing with Impaired Clients

- Because of the "shame" of mental illness some clients will deny having it. You could get this information by asking if they have a "nervous" condition or what has other doctors claim that you have.
- Relatives could be a good source of the medical history. If your client does not allow you to release information, you can still receive information from that party.

More Practical Advice to Dealing with Impaired Clients

- Just because your client is symptomatic does not mean that his/her reports of a prior working history are inaccurate.
- On the other hand, the side affects of the medications can at the very minimum cause "brain fog." If the historical record is incomplete, make sure you get information from a third party.

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