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Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

How to properly issue subpoenas for mental health records

By Scott D. Hammer

When issuing subpoenas for mental health records, attorneys must strictly follow the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq.* (hereinafter the "Confidentiality Act"). Most often attorneys issue subpoenas for "medical" records with a "Qualified HIPAA Protective Order." However, that HIPAA order usually and should always indicate the following:

> Nothing in this Order relieves any party from complying with the requirements of the Illinois Mental Health and Developmental Disabilities Confidentiality Act.

The reason mental health records are given extra protection under the law and require an "extra" step is that the courts have acknowledged the importance of maintaining the confidentiality of mental health records except in the circumstances specifically enumerated in the Confidentiality Act. The courts and General Assembly

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The 2015 Health Care Power of Attorney Act and Form: Mental health perspective deficiencies

By Daniel G. Deneen

In 2014 the Illinois legislature enacted legislation with a new Health Care Power of Attorney (HPOA) form. The legislation can be found at 755 ILCS 45/4 *et seq*. It appears that the legislation was intended to make it easier for persons to execute this form with untrained personnel at medical facilities.

The first provision of the statutory form allows the agent to "accept, withdraw, or decline treatment for any physical or *mental* condition of mine, including life-and-death decisions". The delegation is extremely broad, but the form itself does not provide parameters for consideration by the agent.

There is a statement further in the form for general instructions. However, much of the instructions only apply if the person is unconscious and does not address incapacity caused by mental illness or dementia.

The form does not mention a Mental Health Treatment Preference Declaration, so estate planners should add a provision to the statutory form concerning mental health treatment. The form or statute should have provided that a Mental Health Treatment Preference Declaration has preference over an HPOA. The form or statute should also provide that the HPOA agent will have all of the authority for administering psychotropic medication and ECT *possible* under 405 ILCS 5/2-102(a-5).

The new HPOA Act allows for placement in a mental health facility. However, in the real world a mental health facility will probably not allow placement of an objecting principal since the principal could leave by revoking the HPOA. The standard for revocation of an HPOA is far lower

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strongly believe that keeping mental health records confidential is the key to establishing a true therapeutic alliance between patients and therapists. If patients truly want to express their innermost secrets, desires and faults to a therapist, then that communication must be kept confidential for the relationship to have any therapeutic value.

As noted by the United States Supreme Court in *Jaffe v. Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L.Ed.2d, 337, 345 (1996):

> Effective psychotherapy….depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

In fact, all 50 states, the District of Columbia and federal courts recognize a psychiatrist-patient privilege, either by statute or common law. *Jaffe*, 518 U.S. 12, 116 S. Ct. 1929, 135 L.E.2d 346.

Accordingly, it is of paramount importance for attorneys seeking mental health records to read and understand the requirements of the Confidentiality Act. Over the years, the Confidentiality Act has been revised in an attempt to make it "idiot-proof." Yet, despite the recent changes in the Confidentiality Act, which make it easier than ever to obtain mental health records, most attorneys are unaware of what is required and rarely follow the Confidentiality Act.

The Confidentiality Act notes that except as provided therein, the recipient of mental health services and the therapist, on behalf and in the interest of a recipient has the privilege to refuse to disclose and to prevent disclosure of the recipient's records and communications. Section 10 of the Confidentiality Act lists a number of exceptions in which mental health records may be disclosed. One of the most common exceptions is when the recipient of mental health services introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense.

Section 10(d) of the Confidentiality Act provides specific instructions on how to issue a subpoena for mental health records:

> No party to any proceeding…shall serve a subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge or by the written consent under Section 5 of this Act of the person whose records are being sought, authorizing the disclosure of the records or the issuance of the subpoena. *No such written order shall be issued without written notice of the motion to the recipient and the treatment provider. Prior to issuance of the order, each party or other person entitled to notice shall be permitted an opportunity to be heard pursuant to subsection (b) of this Section*. In the absence of the written consent under Section 5 of this Act of the person whose records are being sought, no person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records. *Each subpoena issued by a court or administrative agency or served on any person pursuant to this subsection (d) shall include the following language: "No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of records or communications or by the written consent under Section 5 of that Act of the person whose records are being sought."*
>
> (Emphasis added).

The Confidentiality Act was recently revised to allow parties to issue subpoenas for mental health records with written consent

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of the patient. Prior to this revision, subpoenas for mental health records required a separate court order authorizing the disclosure of the mental health records and the issuance of the subpoena. Since the Confidentiality Act now allows for either a court order or a consent form to be used to obtain mental health records, attorneys may choose which way to proceed. Whichever option the attorney decides to use still requires strict compliance with the Confidentiality Act.

Using a written consent of the patient is a quicker and often easier way to obtain mental health records. However, the consent form must strictly conform to Section 5 of the Confidentiality Act.

Section 5 of the Confidentiality Act states in part:

> (a) Except as provided in Sections 6 through 12.2 of this Act, records and communications may be disclosed to someone other than those persons listed in Section 4 of this Act only with the written consent of those persons who are entitled to inspect and copy a recipient's record pursuant to Section 4 of this Act.
>
> (b) Every consent form shall be in writing and shall specify the following:
>
> (1) the person or agency to whom disclosure is to be made;
>
> (2) the purpose for which disclosure is to be made;
>
> (3) the nature of the information to be disclosed;
>
> (4) the right to inspect and copy the information to be disclosed;
>
> (5) the consequences of a refusal to consent, if any;
>
> (6) the calendar date on which the consent expires, provided that if no calendar date is stated, information may be released only on the day the consent form is received by the therapist; and
>
> (7) the right to revoke the consent at any time.
>
> The consent form shall be signed by the person entitled to give consent and the signature shall be witnessed by a person who can attest to the identity of the person so entitled.

It is important to note that standard HIPAA release of information forms do not strictly comply with Section 5 of the Confidentiality Act. Usually, HIPAA forms do not contain the calendar date on which the consent expires and the necessity of having the signature witnessed. Accordingly, attorneys must use consent forms that address the 7 requirements noted in Section 5 above.

If the attorney decides to obtain a court order, the Confidentially Act requires written notice of the motion to the recipient and the treatment provider. This written notice allows both the patient and the therapist the opportunity to be heard and object to the motion or request an *in camera* review under Section 10(b) of the Confidentiality Act. Sending written notice of the motion to both the patient and the patient's attorney (usually the plaintiff's attorney) is recommended, since patients and their attorneys do not always have the same interest in protecting the patient's mental health records. Notice to the therapist allows the therapist to object or discuss the significance of the disclosure of mental health records with the patient.

If the motion is granted and the court enters an order authorizing the disclosure of the records or the issuance of the subpoena, there is still one more step that needs to be followed. As noted above, the *subpoena itself must contain the following language*:

> *"No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of records or communications or by the written consent under Section 5 of that Act of the person whose records are being sought.*

This language simply rehashes the specific requirements of Section 10(d) of the Confidentiality Act. Mandating this language be inserted into every subpoena for mental health records acts as a "safety check" to all attorneys and a notice to all mental health providers: **Don't comply with this subpoena if it's not accompanied by a written order or by written consent.**

For attorneys, these requirements seem like another hurdle/obstacle to obtaining records in cases. However, the sanctity of mental health records demands these additional procedural steps to obtain these documents. More importantly, the Confidentiality Act provides penalties for those who do not strictly comply with the Confidentiality Act. Section 15 allows persons aggrieved by violation of the Confidentiality Act to sue for damages, including attorney's fees and costs. Section 16 mandates criminal penalties: "Any person who knowingly and willfully violates any provision of this Act is guilty of a Class A misdemeanor."

Attorneys should take note that they can be sued for violation of the Confidentiality Act if they do not follow the requirements set forth in Section 10(d).

In *Mandziara v. Canulli*, 299 Ill. App.3d 593, 701 N. E.2d, 127 (1st Dist. 1988), the First District Appellate Court held that an attorney violated the Mental Health Confidentiality Act by serving a subpoena for records without first obtaining a court order, even though the subpoena called for the records to be produced to the trial judge for an *in camera* review. The underlying case involved a husband seeking a modification of an award of custody of his children to his wife. His wife had attempted suicide and the husband filed a petition to determine the wife's fitness to retain sole custody of the children. The husband's attorney served a subpoena *duces tecum* on the records custodian at the hospital where the wife was admitted following her suicide attempt. Thereafter, the records custodian for the community hospital came to court in response to the subpoena and handed the records directly to the trial judge for his review. The judge asked the records custodian some questions and then directed his questions to the wife. The wife sued both the hospital and the husband's attorney for violation of the Confidentiality Act. The appellate court found the attorney violated the Confidentiality Act by serving a subpoena on the hospital without a court order. The court found that the subpoena violated the specific terms of Section 10(d) because the attorney served it on the hospital without first obtaining a court order.

Since attorneys can be successfully sued for failing to follow Section 10(d) of the Confidentiality Act, it would be in every attorney's best interest to learn and comply with the necessary requirements before issuing a subpoena for mental health records. ■

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than the specific standards under a Mental Health Treatment Preference Declaration.

The most objectionable flaw in the HPOA act is allowing the agent to have "complete access to my medical *and mental health records,* and sharing them with others as needed, including after I die". This broad directive includes full mental health records, possibly including therapist notes in limited circumstances. The directive would also allow access to other restricted categories under HIPAA.

For mental health records, there are no restrictions on whom the person can pass along the records to, i.e., it emasculates protections under the Mental Health Confidentiality Act. Accordingly, estate planning practitioners should make material changes to this provision.

The new form, with the exception of the overbroad provisions concerning medical and mental health records and disclosure, is better than having no health care power of attorney in effect. However, clients would be better served by a form prepared by an estate planner.

The HPOA Act with form can be found at 755 ILCS 45/4 *et seq*. <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=07550450HArt%2E+IV&ActID=2113&ChapterID=60&SeqStart=2600000&SeqEnd=-1>.

The Illinois Statutory Short Form Power of Attorney for Health Care also can be downloaded from: <http://www.isba.org/resources/poaforms>.

The author prepared a modified Power of Attorney for Health Care form and Declaration for Mental Health Treatment, which are available at <http://www.isba.org/sections/mentalhealth/newsletter/2015/05/2015healthcarepowerattorneyactandfo>. ■

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