

# Confidentiality of Mental Health Treatment Records

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# What Authority Grants Confidentiality to Mental Health Treatment Records?

- Michigan Mental Health Code (MHC)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Evidentiary privilege laws
- Occupational licensing laws for mental health professionals
- Medicare conditions of participation for hospitals
- Standards of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)
- Professional malpractice case law

# What is HIPAA?

- Comprehensive federal law
- Affects every hospital and practitioner that transmits electronic data for health care financial or administrative functions
- One aspect – privacy of individually identifiable health information (IIHI)
- Defines
  - When use/disclose IIHI
  - Individual rights
  - Administrative requirements
  - Physical, administrative and technological safeguards

# Why Does HIPAA Matter to the Office of Recipient Rights and Rights Officers?

- HIPAA pre-empts contrary state law
- Except more protective contrary state laws
- Comply with both HIPAA and state law if not contrary
- Decide where MHC falls

# Confidentiality Under the Michigan Mental Health Code

- Section 746 – records required; confidential
- Section 748 – terms of confidentiality
  - Mandatory disclosure without consent
  - Mandatory disclosure with consent
  - Qualified disclosure with consent
  - Discretionary disclosure without consent
  - Special rules for protection and advocacy system
  - Disclosure rules
  - Re-disclosure rules
- Section 748a – special rules for child abuse investigations
- Section 749 - amendment

# Section 748 – Basic Rule

Information protected by Section 748 cannot be disclosed outside of holder of record unless permitted by that section

# Who is Affected by Section 748?

- As holder of the record
  - MDCH
  - CMH
  - Licensed facility, or
  - Contract provider
- CMH holder of record for all components – Attorney General Opinion

# What is a Licensed Facility?

- *Licensed facility* – facility licensed by MDCH or an AFC
- *Facility* – residential facility for the care or treatment of individuals with serious mental illness, serious emotional disturbance, or developmental disability that is either a state facility or a licensed facility
- *Hospital or psychiatric hospital* – inpatient program operated by MDCH for the treatment of individuals with serious mental illness or serious emotional disturbance or a psychiatric hospital or psychiatric unit licensed by MDCH
- *Psychiatric unit* – unit of a general hospital which provides inpatient services for individuals with serious mental illness or serious emotional disturbance

# What Service Providers are not Affected by Section 748?

Unless under contract to MDCH or CMH:

- Offices of individual practitioners
- Out-patient mental health clinics
- Psychiatric services in ERs or med/surgical floors of general hospitals
- Psychiatric services in substance abuse programs
- Psychiatric services in nursing homes

# Comparison to HIPAA

HIPAA covers all providers and practitioners:

Hospitals

Private offices

Physicians

Social workers

Nursing homes

Freestanding clinics

Psychologists

Therapists

Provided they submit data electronically for health care financial or administrative functions:

Billing

Claims status inquiry

Health plan premium payments (for staff)

Health plan enrollment/disenrollment (for staff)

Remittance advice

Pre-authorization

After 10/16/03, all Medicare claims must be electronic, with minor exceptions

# What Information is Protected by Section 748?

- Information in the record of a recipient
- Other information acquired in the course of providing mental health services to a recipient
- Written case record
  - Paper
  - Electronic
  - Microfilm/microfiche
  - Video/audio
- “Head knowledge”
- Clinical
- Demographic
- Social, law enforcement, financial

# Who is a Recipient?

Person who receives mental health services from a facility, or a person who receives mental health services from an entity other than a facility which is operated by or under contract with MDCH or a CMH

- In-patient or out-patient
- In-patients also “residents”
  - Extra rights under Chapter 7 of MHC
- Comparison to HIPAA
  - Information covered is same

# Mandatory Disclosures Without Consent

- Order or subpoena of court of record or legislature, unless privileged
- Prosecuting attorney as necessary to participate in proceeding under MHC
- If necessary to comply with another law
- MDCH if necessary to discharge lawful responsibility
- Office of the auditor general if necessary to discharge constitutional responsibility
- Surviving spouse or close blood relatives for benefits

# Court Subpoena/Orders

- What is a court of record?
  - State – district, circuit, probate, appeals, supreme
  - Federal – district, appeals, supreme
  - Not administrative tribunals – worker's comp, social security, MESC
- Most records contain privileged information
- HIPAA permits disclosure with subpoena, but requires either
  - Protective order
  - Notice to patient
- HIPAA permits disclosure with order – no limitations

# Disclosure to Prosecuting Attorney

- Involuntary commitment proceedings
- Guardianship of developmentally disabled

Can prosecutor use for criminal case against patient?

# Necessary to Comply with Other Law

- Broad “loophole”
  - Adult abuse investigations
  - Mandatory reporting laws
    - Gunshot wounds
    - HIV diagnosis
    - Crime against recipient
- Attorney general opinion re non-custodial parent
- HIPAA has “required by law” provision

# Necessary for MDCH to Perform Duties

- Attorney General opinion re recipient SSN
- HIPAA
  - SSN is identifying info and protected

# Mandatory Disclosure with Consent

- Attorney, with consent of recipient, guardian with authority to consent, or parent with legal and physical custody
  - When would guardian lack authority to consent?
  - Legal and physical custody – what mean?
- HIPAA more liberal on surrogates
- For record entries made after 3/28/96, to adult if no guardian and no adjudication of legal incompetence
- HIPAA
  - Permits discretionary withholding, with appeal rights
  - More generous on time limits

# Qualified with Consent – Who Gives Consent?

- Recipient
- Guardian with authority to consent
- Parent with legal custody
- Court-appointed personal representative or executor
- HIPAA
  - Similar surrogates, but more liberal
    - DPOA
    - *Loco parentis*
- Refuse to deal with surrogate

# Qualified with Consent – Who Can Receive Information?

- Provider of mental health services
- Anyone else (including recipient or surrogate), unless in the written judgment of the holder the disclosure would be detrimental to the recipient or others
  - Substantial probability
  - Physical or emotional harm
  - Determined by licensed professional
  - Disclose non-detrimental portions
- HIPAA
  - No withhold except to individual

# Discretionary Without Consent

- As necessary for recipient's benefits
- As necessary for research, evaluation, accreditation, or statistical compilation
  - Not identify recipient unless
    - Essential to purpose of disclosure
    - Clearly impractical to avoid
  - Never identify if likely to harm recipient
- To a provider or public agency, if compelling need due to substantial probability of harm to recipient or others

# Comparison to HIPAA

- HIPAA not permit disclosure for benefits without authorization
- HIPAA not permit disclosure for research without authorization, unless
  - IRB or privacy board waiver
  - Limited data set
- HIPAA permits disclosure for accreditation and evaluation
- HIPAA's minimum necessary rule
- HIPAA permits disclosure to avert immediate threat

# Special Rules for Protection and Advocacy System

- Disclose records of recipient with consent of recipient, guardian with authority to consent, or parent with legal and physical custody
- Disclose records of recipient (including deceased or missing), if recipient physically or mentally unable to consent, no guardian or guardian is the state, complaint to PA or PA has reasonable cause to suspect abuse or neglect
- Disclose records of recipient who has guardian, if complaint to PA or PA has probable cause to believe immediate jeopardy, guardian not act upon offer of assistance
- HIPAA – required by law

# Disclosure Rules

- Identity not disclosed unless germane to authorized purpose
- When practicable, no other information disclosed unless germane to authorized purpose
- HIPAA minimum necessary rule

# Re-disclosure Rules

- Recipient of information not re-disclose unless consistent with authorized purpose
- HIPAA – no protection against re-disclosure

# Special Rules for Disclosures Relating to Child Abuse

- FIA caseworker or administrator directly involved in investigation
- Compelling need for mental health records or info
  - Determine whether child abuse/neglect occurred
  - Protect a minor where substantial risk of harm
- Mental health professional determine if pertinent records or information, and give to FIA within 14 days of request
- Good faith disclosure – immune from civil or administrative liability, unless
  - Gross negligence
  - Willful and wanton misconduct
- HIPAA – permitted disclosure for child abuse/neglect

# Amendment of Case Records – Section 749

- Authorized challenge of accuracy, completeness, timeliness and relevance of factual information in recipient's record
- By recipient, guardian or parent who gained access to record
- Recipient, guardian, or parent allowed to insert statement correcting or amending
- Statement become part of the record

## HIPAA:

- Individual request amendment
- Hospital accept or reject, specified grounds
- If accept, notify prior recipients of information and others at individual's request
- If reject, individual insert challenging statement, or have original request inserted

# Protection for Privileged Communications

- Sources of privilege
  - Mental Health Code Section 750
  - Physician-patient privilege
  - Psychologist-patient privilege
  - Social worker-client privilege
- Not necessarily consistent on face
- MHC subsumes all of them

# What is a Privileged Communication?

“Communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law.”

Psychiatrist

Psychiatric nurse

Music therapist

Students, trainees, aides

Family in family therapy

Group attendees in group therapy

Psychologist

Psychiatric social worker

Activities therapist

Volunteers

Pastoral care therapy

- Time nexus, not content

# Physician-Patient Privilege

## Scope of privilege

- Disclosed to physician in professional capacity
  - Necessary to enable diagnosis or treatment
- Name, fact of admission, dates of admission
- Psychologist-patient similar

# General Rule of Privilege

Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in preliminary proceedings, unless the patient voluntarily waives privilege, or privilege is deemed involuntarily waived.

- Discovery phase
- Trial phase

# Scope of Section 750

- Not limited to “recipient”
- Applies to “patient”
- Broader application than Section 748

# Voluntary Waiver of Privilege

- By patient or legal representative
- Preferably in writing

# Involuntary Waiver of Privilege

- Relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding
- Relevant to involuntary commitment or DDP guardianship, but only if patient informed that could be used
- Relevant to determination of legal competence or need for guardian but only if patient informed that could be used
- In a civil or criminal malpractice action
- Made during exam ordered by court, if patient informed that communications not privileged
- Made during court ordered treatment to render patient competent to stand criminal trial, but only relating to competency

# Special Rule for Criminal Cases

- Use privileged communications to impeach prosecution witness
- Defendant's constitutional right to cross examine

# Corollary Protections

If cannot disclose privileged communication:

- Also cannot disclose fact that patient was examined, treated, or diagnosed
- Unless is relevant to a determination by a health care insurer, health care corporation, nonprofit dental care corporation, or health maintenance organization of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits

# Malpractice and Privileged Communications

Michigan Court of Appeals case holding:

- Liable in malpractice for disclosure of privileged communications
- Possible public policy override

**The End**