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30-SPG Fam. Advoc. 22

Family Advocate  
Spring, 2008

Feature

THE HIPAA HURDLE  
The if, When, and How to Get Records Covered by the Act

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The most likely place to cross paths with the Health Insurance Portability and Accountability Act of 1996 (hereinafter “HIPAA” or “the Act”) (codified at 42 U.S.C. 1320d-1 *et. seq.* See also C.F.R. §§ 160.102 *et. seq.*) is upon entering your doctor’s office to see a placard proclaiming “Notice of Privacy Practices” in big, bold letters somewhere near the sign-in window. Whether taped, tacked, or stapled to the wall, the notice typically takes the same form: under the big, bold letters is a paragraph of fine print, impossible to read as you fumble for your insurance card.

What most of us would conclude if we could read the notice is that it is very difficult, if not impossible, to get any records from a doctor’s office. However, attorneys routinely are confronted with the need to obtain medical records related to litigants and/or collateral parties to a case at bar. Lawyers must not only navigate the various state-law roadblocks to overcoming the doctor—patient privilege, but also wrestle with the threshold need to comply with HIPAA procedures under federal law.

If you are trying to obtain mental health records, be aware of the extra considerations and procedures should HIPAA apply. If you are seeking to safeguard medical records, HIPAA potentially provides you with an initial hurdle the other side must clear before chipping away at any privilege claim you will likely make. However, HIPAA is *not* a mechanism by which to compel or disallow the production of medical records or to force or disallow their introduction into evidence. Neither does it create an additional privilege of any kind. Instead, HIPAA provides a procedure governing how qualifying medical-record keepers may disclose information.

A family lawyer seeking records from a mental health professional (MHP) in a judicial proceeding must comply with HIPAA *if* it applies to the MHP in question. This begs the question: Does HIPAA apply to *all* medical records, *all* doctors, and *all* mental health professionals? The answer is no.

HIPAA actually is narrower than it seems. The law, designed, *inter alia*, to safeguard the privacy of and control the inappropriate use of health information (*e.g.*, <http://www.hhs.gov/ocr/privacysummary.pdf>) applies only to “Covered Entities.” If the MHP in question does not meet the definition of a covered entity, HIPAA does not apply, and you need not spend any more precious time on it.

**Who and what does HIPAA cover?**

Covered entities are defined as (1) Health Plans, (2) Health Care Clearing Houses, and (3) *Health Care Providers who transmit health information in electronic form* in connection with a *transaction* under HIPAA. 45 C.F.R. §§ 160.102 & 160.103. See also <http://www.hhs.gov/ocr/privacysummary.pdf>.

Mental health professionals fall into the category of health-care providers. *Id.* However, it is crucial to remember that for a health-care provider to be covered by HIPAA, (*i.e.*, to be considered a covered entity), it *must* “transmit” health information (which must be “individually identifiable”) in *electronic format* in connection with certain *transactions* covered by HIPAA. (See 45 C.F.R. § 160.103; see also <http://www.hhs.gov/ocr/privacy-summary.pdf>). A therapist who, for example, takes payment by cash, check, or credit card and, therefore, does *not* make claims on her patient’s insurance, would arguably *not* be covered. Furthermore, just because the therapist uses e-mail or stores session notes on a computer would not bring her under the auspices of HIPAA—the definition requires transmission of identifiable health information in

electronic format for transactions covered by the Act. Given that MHPs constitute a group of health-care providers that are frequently paid in cash or its equivalent on a per-session basis, it follows that \*23 many of their relationships with patients may not be covered by HIPAA.

By understanding how the MHP conducts his or her transactional business and by developing an awareness of the factors that make a MHP a covered entity, a family law attorney can determine whether HIPAA will be an issue in discovery and possibly eliminate that issue at an early stage. Otherwise, one might be inclined to take opposing counsel's word when he or she tells you, "Due to HIPAA, I don't think you'll be able to get the psychologist's records." Worse, judges unfamiliar with the Act might just believe opposing counsel, unless you are able to educate the judge and point him or her in the right direction.

In many cases, the HIPAA issue with respect to a MHP might well begin and end with a determination that the MHP is not covered by HIPAA because his or her transactional activities do not fall within HIPAA definitions. If the MHP is not covered by HIPAA, the attorney can shift focus to the psychiatrist/psychologist/therapist—patient privilege governing mental health records, the existence and nature of which are covered by state law.

### How to get the covered records?

Some MHPs are covered entities under HIPAA, perhaps because protected health information is transferred electronically for insurance purposes. In such a case, follow scrupulously HIPAA procedures for releasing health information. On the other side of the coin, opposing counsel can closely monitor and ensure that the party seeking records has followed HIPAA procedures precisely and, in this way, delay or stave off production of potentially damaging records and delay a hearing on privilege issues.

Upon determining that the MHP is covered by HIPAA, opposing counsel may inform you that HIPAA requires a signed patient authorization before psychotherapy notes can be released (*See* 45 C.F.R. § 164.508(a)(1)). He also may tell you that his client will never sign such authorization.

Opposing counsel is only partially correct. Disclosure rules are somewhat different in the midst of a judicial proceeding. In fact, HIPAA specifies certain exceptions to the authorization requirement, and disclosure in relation to a judicial proceeding is such an exception, provided proper procedures are followed. *See* 45 C.F.R. § 164.512, in general, and § 164.512(e) specifically. *See also* 45 C.F.R. § 164.508(a)(2)(ii). (Note: § 164.512 sets forth uses and disclosures for which patient authorization is not required. Subsection (e) addresses judicial and administrative proceedings.) Thank opposing counsel for bringing the matter to your attention and file a motion or request for a qualified protective order, discussed and defined below.

Assuming the records are covered by HIPAA (*i.e.*, the MHP qualifies as a covered entity and the records qualify as "protected health information," *see* 45 C.F.R. §§ 160.102 & 160.103), the Act provides a detailed mechanism for disclosure of protected information in a judicial proceeding. *See* 45 C.F.R. § 164.512(e). These procedures can best be described as a series of hoops a lawyer must jump through and which afford the health-care provider with a paper trail amounting to a "get-out-of-jail-free card" if the patient ever tries to sue for wrongful disclosure of health information under HIPAA.

\*24 If you are lucky enough to have already obtained a court order requiring disclosure of HIPAA-protected information, you are all set. The information must be provided under 45 C.F.R. § 164.512(e)(1)(i). In the absence of a court order—but still in the context of a judicial or administrative proceeding, such as early in discovery, you can still obtain the material by two methods. The first method requires the parties to either agree to or request from the court a confidentiality agreement (a.k.a., qualified protective order, defined below). The second method requires the lawyer to demonstrate in writing to the health-care provider that reasonable efforts have been made to notify the person whose medical records are sought in connection with the litigation, that a reasonable time for objections has elapsed, and that either no objections were raised or objections were denied (or resolved in some fashion consistent with disclosure). The health-care provider may then release the records to the party seeking them. *See* 45 C.F.R. § 164.512(e)(1)(ii)(A).

The second scenario might arise in a family law case when a covered entity is subpoenaed to a deposition and requested to bring records related to one of the parties, their children, or some collateral third party. At the deposition, the lawyer would give the covered entity written documentation demonstrating that either no objections (or protective orders) had been filed, or that they had been denied or resolved in a manner consistent with disclosure. Thus, the health-care provider would be permitted to produce the records. However, this

scenario seems farfetched in a family law case where any requests \*25 for medical records (most likely those of the parties or their children) will be met with agreement or immediate opposition, resulting in a judicial determination long before the time to raise objections has lapsed. Such court hearing(s) will result in either an order calling for the disclosure or an order or stipulation amounting to a qualified protective order.

It is important to note that under HIPAA a covered entity may disclose protected health information to avert a serious health or safety issue, provided that disclosure is made to a person or entity reasonably able to prevent or lessen the damage. 45 C.F.R. § 164.512(j). Therefore, in the event of such a threat in a family law case, a MHP covered by HIPAA would arguably be allowed to make disclosures to entities such as counsel for minor children, guardian *ad litem*, law enforcement, a court-appointed custody evaluator, and/or the Department of Children and Families.

### The Qualified Protective Order

To be a bona fide “Qualified Protective Order,” the confidentiality agreement (or court order if the parties cannot so stipulate) must:

- [1] Prohibit the parties from using or disclosing health information for any purpose other than the litigation; and
- [2] Require either return to the covered entity or destruction of protected information at the end of the litigation or proceeding. *See* 45 C.F.R. § 164.512(e)(1)(v).

Interestingly, the rule about the qualified protective order appears to allow a covered entity to release protected health information *not only* upon being presented with an actual qualified protective order (either stipulated to or ordered by the court), *but also* upon receiving a written statement and accompanying documentation (*i.e.*, “Satisfactory Assurance”) that a qualified protective order has been *requested* from the court. Arguably, this could mean that the Act would allow the release of records by a covered entity merely upon a showing that the party seeking records had filed a motion with the court requesting a qualified protective order, even if that motion has not come up on the court calendar or been acted on. 45 C.F.R. § 164.512(e)(1)(ii)(B) & §164.512(e)(1)(iv)(B).

### Get documents first

Remember, your initial goal is to get the information disgorged from the covered entity by following HIPAA procedures. Only then can you get to the next step, at which you and opposing counsel will likely argue about whether the information is privileged and is admissible under state laws. HIPAA does not address where material is to be sent once it is disclosed by the covered entity. The more creative you are, the easier it will be to get the information out of the hands of the covered entity.

If the records issue is hotly contested, suggest to opposing counsel and/or the court that the records be lodged with the court and/or a third-party attorney serving a “discovery master” or interim record keeper, instead of insisting that the records be turned over immediately to the party seeking them. Opposing counsel will be more likely to agree to a qualified protective order if he or she is not convinced that doing so will automatically place reams of documents into your hands before he or she can assert any privilege-based objections. Having the court or a discovery master hold the records means that the records can easily and quickly be disseminated to you and/or your experts once the court resolves any objections opposing counsel may have. Further, your expert witnesses may base their opinions on the information in the records, even though the records themselves ultimately may not be admissible. Being as creative as possible at this early stage makes sense in terms of getting the information from the covered entity. Fighting about admissibility and/or privilege issues before the health-care provider has released the records in question is putting the proverbial cart before the horse.

At this point, it is crucial to highlight a key factor in dealing with HIPAA, namely that state law privilege and/or state law evidentiary rules ultimately will determine whether a mental health record is discovered and/or admitted into evidence and to what extent the record can be utilized by your own expert witness(es). HIPAA, as it relates to judicial proceedings, merely provides a *procedure* for the release of documents by the health-care provider (in our case, the MHP covered by HIPAA). If the procedure is followed and the health-care provider has a written paper trail establishing that disclosure was proper, then what ultimately happens to the material is no longer the responsibility of the covered entity or a concern under HIPAA.

The ultimate battle over admissibility will come, but that is a separate fight. Do not try to take up this fight at the HIPAA stage. Instead, get the material from the \*33 covered entity first and then decide how to get it into evidence or otherwise make use of it. For example, even if all parties were in agreement that mental health records were discoverable and admissible, (*e.g.*, such as when mental condition was an element of a claim or defense), the covered entity must be afforded proof that the parties agreed to and/or requested from the court the qualified protective order. *Do not* intermingle HIPAA and the ultimate question of admissibility.

### State laws govern (or might)

Again, HIPAA does not create a privilege. See *Northwestern Memorial Hospital v. Ashcroft*, 262 F.3d 923, 923-26 (7th Cir. 2004). It merely provides a procedure for obtaining records. Although, as a federal law, HIPAA would generally preempt contrary state laws, it does not supersede state law if provisions of the law are more stringent than federal law. Given that state law sets forth a myriad of variations on the doctor—patient privilege (including the privilege between MHPs and their patients) and that HIPAA does not create any privileges, state law is the only game in town when it comes to the issue of whether the information received from a covered entity ultimately is discoverable and/or admissible.

Widely recognized state black letter law provides that if a party is going to use mental state or condition (or medical condition) as an element of any claim or defense, then the party cannot assert related privileges. Thus, in a given family law case, if the opposing party places mental condition at issue, the only roadblock to getting the related records into evidence is to get the actual records from the MHP. Be sure to comply with the HIPAA procedures described above when doing so. If the opposing party will not stipulate to a qualified protective order, then the court should make an order amounting to a qualified protective order, allowing you to obtain the MHP records forthwith upon your showing that mental condition has been made an issue in the case.

Another important question controlled by state law is whether, in the specific context of a family law case, a litigant automatically puts his or her mental condition at issue by contesting custodial or parenting issues. Regardless of whether the mental state of parents is specifically enumerated by the statute or case law guiding family courts in a particular state, it often is a key factor in deciding custody and/or parenting disputes. Family courts will always be cognizant of the mental states of the respective litigants enmeshed in a custody dispute when fashioning orders.

Although a state-by-state survey of privilege law as it relates to child custody proceedings is beyond the purview of this article, it must be noted that states are by no means unified in their approach to the issue. Some states have even specifically enumerated exceptions for child custody proceedings in their respective physician—patient and/or psychotherapist—patient privilege statutes. (See box on page 24.)

Therefore, an important parallel course of action in addition to dealing with HIPAA is to determine whether and how the doctor—patient/psychotherapist—patient privilege applies in your state to the mental state of a litigant in a custody dispute. It may be that your state has some form of complete or partial statutory or case law exception as discussed above. If so, the only barrier you will face in getting the MHP records into evidence, and opposing counsel's only protection, will be HIPAA.

### Conclusion

Family law practitioners must know if and how HIPAA applies to family law proceedings, understand how to obtain records covered by the Act, and appreciate HIPAA's relationship with state laws governing privilege and the admissibility of evidence. Because of the variety of applicable state statutory and case laws, each practitioner must examine his or her own state laws to learn how they may supplement or interface with the protections provided by HIPAA.

### State Exceptions to Privilege

Connecticut has stopped short of deciding whether a divorce litigant automatically waives the psychiatrist—patient privilege by seeking custody. *Bieluch v. Bieluch*, 190 Conn. 813, 819 (1983) (specifically not deciding whether the psychiatrist—patient privilege was waived by a parent seeking custody). In many jurisdictions, courts “do not pierce the psychotherapist—patient privilege automatically in disputes over the best interests of the child, but may require disclosure only after careful balancing of the policies in favor of the privilege with

the need for disclosure in the specific case before the court.” *Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556 (N.J. 1997). See detailed discussion in *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (Md. 2000).

Other states have *statutory exceptions* to their respective doctor—patient and/or psychotherapist—patient privileges when the patient is a litigant in a child custody proceeding. See, e.g., in Massachusetts, M.G.L.A. 233 § 20B; in Alabama, Ala. R. Evid. Rule 503(d)(5); in Louisiana, LSA-C.E. art. 510(B)(2)(d); in Texas, *Smith v. Gayle*, 834 S.W.2d 105 (Tex. App.-Houston (1st Dist.) 1992); in Kentucky, *Atwood v. Atwood*, 550 S.W.2d 465 (Ky. 1976) (holding that seeking custody automatically waives psychiatrist—patient privilege); in Nebraska, *Clark v. Clark*, 220 Neb. 771, 775, 371 N.W.2d 749, 752-53 (1985) (waiver, but with limitations).

See also Missouri, V.A.M.S. 210.140 (only when related to child abuse or neglect proceedings); in Alaska, *In the Matter of D.D.S.*, 869 P.2d 160 (Alaska 1994) (exception for child-in-need-of-aid cases); in Minnesota, *Morey v. Peppin*, 353 N.W.2d 179, 183 (Minn. Ct. App. 1984) (requiring trial court to review therapy records *in camera* before disclosing them “to prevent disclosures that are irrelevant to the custody question or otherwise annoying, embarrassing, oppressive, or unduly burdensome”), *rev’d on other grounds*, 375 N.W.2d 19 (Minn. 1985).

The Indiana Supreme Court perhaps has gone further than any other in holding that the mere filing of a custody action places a parent’s mental health at issue, thus waiving the privilege for that proceeding and all subsequent custody proceedings. See *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990) (holding that party waived physician—patient privilege covering psychiatric treatment records by petitioning for custody, but that, on motion of party asserting privilege, court should review documents *in camera* for relevancy before disclosing them).

*Contra*, e.g., Florida and Maryland: Florida courts have held that a parent does not waive the psychologist—patient privilege simply by seeking custody or denying allegations of unfitness in a custody case. See *Freshwater v. Freshwater*, 659 So. 2d 1206, 1207 (Fla. Dist. Ct. App. 1995); *Mohammad v. Mohammad*, 358 So. 2d 610, 612-13 (Fla. Dist. Ct. App. 1978); *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989). In Maryland, see *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (Md. 2000) (providing detailed discussion and review of state law).

#### Footnotes

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