

# Legal Training regarding Confidentiality of Client Information and Records

## CHICAGO VOLUNTEER LEGAL SERVICES

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### OUTLINE

- I.** Illinois Mental Health and Developmental Disabilities Confidentiality Act
- II.** Mandatory Reporting – Child Abuse/Neglect
- III.** Mandatory Reporting – Elder Abuse/Neglect
- IV.** Confidentiality of Alcohol and Drug Abuse Patient Records
- V.** Points to Remember and Questions

**I. Confidentiality of Mental Health Information and Records: Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1**

**1. General Rule -- 740 ILCS 110/3**

- i.** All records and communications are confidential and shall not be disclosed except as provided in this Act.
- ii.** Not required, but therapist may keep personal notes regarding any patient's therapy. Such notes are work product and generally not subject to discovery in any judicial, administrative or legislative proceeding.

**2. Definitions**

**i. Mental Health or Developmental Disabilities Services:**

- 1.** Include but is not limited to: examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation, or rehabilitation.

**ii. Therapist:**

- 1.** A psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services, or
- 2.** Any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so.
- 3.** Includes any successor of the therapist.

**iii. “Communication” or “confidential communication”:**

- 1.** Includes fact that person is a recipient of mental health services.
- 2.** Includes any communication made to a therapist by a recipient or others in the presence of a therapist during or in connection with providing mental health services to a recipient.
  - a.** Does not generally include statements to a pharmacist. *Suarez v. Pierard*, 663 N.E. 2d 1039 (3<sup>rd</sup> Dist. 1996); *Quigg v. Walgreen Company*, 388 Ill.App.3d 696 (2<sup>nd</sup> Dist. 2009) (pharmacy was not engaged in a “therapeutic relationship”

with customer, and thus was not subject to liability under the Act).

**iv. Record:**

1. Statutory Definition: “any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided.”
2. Statutory Exception: “Record does NOT include the therapist’s personal notes IF such notes are kept in the therapist’s sole possession for his own personal use and are not disclosed to any other person, except the therapist’s supervisor, consulting therapist or attorney.” 740 ILCS 110/2 (emphasis added)
3. Alcoholism treatment is not mental health treatment within meaning of the Confidentiality Act. *Maxwell v. Hobart Corp.*, 216 Ill.App.3d 108 (1st Dist. 1991). There are some greater protections for alcohol treatment records under federal rules.

**v. Personal notes v. record**

1. Generally not discoverable
2. **NOTE:** A note is NOT personal because it was: (1) written by you; (2) hand written; or (3) because you want it to be “personal.”
3. Three categories
  - a. Information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons;
  - b. Information disclosed to the therapist by the recipient which would be injurious to the recipient’s relationships to other persons; and
  - c. The therapist’s speculations, impressions, hunches and reminders.
4. Rules
  - a. Sole possession of therapist

- b. For own personal use
- c. May only be disclosed to supervisor, consulting therapist or attorney
- d. Once a note is mixed with a record, it ceases to be a note.
- e. **NOTE:** Raw data: Generally need not be disclosed to the client or others, but must be disclosed at client's request to another psychologist.

5. Determination of whether personal notes satisfy criteria for personal notes may be made by trial court after review of the notes *in camera*. *In re Estate of Bagus*, 691 N.E.2d 401 (Ill. App.Ct. 1998).

### 3. What Records Must Be Maintained?

- i. None based on Act (but not a good idea);
- ii. Some based on individual statutes, accreditation standards, and funding source; and
- iii. All cases require records based on ethics codes and professional standards.

### 4. Disclosure of Confidential Information

- i. The following persons are entitled to request/copy/inspect recipient's record upon request: (740 ILCS 110/4)
  - 1. Parent/guardian of minor under 12:
    - (1) *In re Marriage of Markey*, 166 Ill. Dec. 392, (1st Dist. 1991): Right of a non-custodial parent to mental health records of minor child.
    - (2) *In re Marriage of Troy S.*, 319 Ill.App.3d 61 (3rd Dist. 2001). Only one parent's consent needed to release to third person.
  - 2. The recipient, if a minor over 12 or an adult.
  - 3. A parent of minor between 12 and 17 years old, if:
    - (1) Minor is informed and does not object to disclosure; *or*

(2) The therapist finds no compelling reason to withhold.

(3) NOTE: If minor does not consent, parent may still receive the following limited information without consent: current physical and mental condition, diagnosis, treatment needs, services provided and services needed. 740 ILCS 110/4(a)(3).

4. Guardian of disabled person 18 or older. 740 ILCS 110/4(a)(4)

5. Attorney or guardian ad litem representing minor 12 or older in any judicial or administrative proceeding, so long as there is a court order granting such right.

6. An agent under a power of attorney for health care or for property, when the power of attorney authorizes the access.

(1) NOTE: A Declaration under the Mental Health Treatment Preference Declaration Act generally authorizes attorney-in-fact to same right as principal to receive information regarding proposed mental health treatment and to receive, review, and consent to disclosure of medical records relating to that treatment. 755 ILCS 43/30(3).

ii. Disclosure to Other Persons with Consent.

1. Any of the persons entitled to inspect a recipient's record under 740 ILCS 110/4 (set forth above) may authorize disclosure to other persons by providing **written consent**.

2. Requirements for consent: 740 ILCS 110/5(a)(7)

(1) In writing

(2) Specifies to whom information can be released and who is releasing information

(3) Specifies information to be disclosed

(4) Reason for disclosure/consequences of non-disclosure

(5) Right to review and copy record before disclosure

(6) Right to revoke at any time

(7) Requirement of a witness, signature and date

(8) Specify time period for which consent is effective

iii. Disclosure of Confidential Information Without Consent

1. Routine

- (1) To supervisor, consulting therapist or team records custodian;
- (2) Peer Review;
- (3) Attorney for therapist or hospital (740 ILCS 110/9); *Burger v. Lutheran General* (2001);
- (4) Whether hospital or agency may talk to an employee in course of litigation where both are being sued is the subject of the Petrillo case, the Best case, and the Burger case. Consult your attorney for guidance in these situations;
- (5) Any facility which has custody pursuant to state statute or order of commitment; and
- (6) Interagency disclosure: Name, Social Security Number and information concerning services may be shared between state agencies pursuant to interagency memoranda, including with DHS funded community mental health centers. 740 ILCS 110/7.1, 7.2.

2. Special exceptions to general prohibitions on disclosure

- (1) Section 110/10(1): civil, criminal, administrative or legislative proceedings when recipient introduces his or her mental health or aspect of services received as an element of claim or defense.
  - i. Court must first conduct *in camera* examination of testimony and/or records and make specific findings as required under the Act.
  - ii. *Renzi v. Morrison*, 188 Ill.Dec. 244, 249 Ill.App.3d. 5, 618 N.E.2d. 749 (1st Dist. 1993).

Holding: Patient can recover damages from psychiatrist who testified without patient's consent as to patient's treatment and condition in custody matter involving patient's child. Psychiatrist was never appointed by the court to evaluate patient nor

was the psychiatrist subpoenaed or ordered by the court to testify. The court held that the psychiatrist violated the Mental Health Confidentiality Act by testifying in such a cooperative manner.

- iii. *Goldberg v. Davis*, 159 Ill.Dec. 213, 215 Ill.App.3d 930, 575 N.E.2d 1273 (1st Dist. 1991), *rev'd*, 176 Ill. Dec. 866, 151 Ill.2d 267, 602 N.E.2d 812 (1992).

Holding: Psychiatrist currently treating patient was ordered to provide the patient's medical records for an *in camera* review by the court in a sexual malpractice suit brought by the patient against her former psychiatrist. The Illinois Supreme Court expressly reversed the Appellate Court's holding that the patient's medical treatment could not be disclosed.

- (2) To therapist's attorney in action brought by recipient against therapist. Therapist may also testify regarding communications in such an action.
- (3) Records/communications pursuant to court-ordered examination under certain circumstances as provided in Act.
- (4) Under Probate Act to determine recipient's competency or need for guardianship.
- (5) Records/communications during treatment ordered to render recipient fit to stand trial.
- (6) To obtain benefits or in proceeding regarding validity or benefits under insurance policy so long as mental condition/treatment/services is material element of claim or defense.
- (7) Actions brought under Confidentiality Act.
- (8) Investigations and trials for homicide when disclosure relates directly to fact or immediate circumstances of homicide.
- (9) Disclosure to coroner.
- (10) Proceedings under Juvenile Court Act.
- (11) Collection proceedings for mental health services.

(12) To initiate or continue civil commitment proceedings or to otherwise protect the recipient or other person against a clear, imminent risk of serious physical or mental injury or disease or death.

i. As for proceedings under Mental Health Code, may only disclose information to state's attorney, defense attorney or to the court, but not to other doctors. *Sassali v. Rockford Memorial Hospital*, 693 N.E. 2d 1287 (Ill.App.Ct. 1998).

ii. May also disclose information to "the person or agency providing mental health services that are the subject of the proceedings and to that person's or agency's attorney." 740 ILCS 110/11(vi).

(13) Mandatory reporting of abused/neglected child under applicable law.

iv. Subpoenas for Records/Testimony

1. Must be accompanied by court order authorizing issuance of subpoena or release of information.

*Mandziara v. Canulli*, 701 N.E. 2d 127 (Ill.App.Ct. 1998) (attorney who issues subpoena for mental health records without first obtaining court order may be sued by patient in action for damages).

2. Don't ignore

3. Seek consent from client

4. In absence of consent or if disagree with consent, file motion to quash

5. Relationship with attorney

6. Federal court subpoenas

(1) *Jaffee v. Redmond*, 518 U.S. 1 (1996)

i. The federal psychiatrist patient privilege generally does apply to social workers.

- ii. A balancing test is appropriate, which means that under some circumstances disclosure will be required.
- iii. Dangerous patient exception: *United States v. Chase*, 301 F.3d 1019 (9<sup>th</sup> Cir. 2002) when threat of harm to an identified victim is serious and imminent, therapist can disclose threat.

(2) *United States v. Wettstein*, 733 F.Supp. 1212 (C.D. Ill. 1990).

- i. Holding: IRS's powers of subpoena preempt psychologist-patient privilege under Confidentiality Act, making psychologist's appointment book discoverable in IRS investigation of taxpayer for whom psychologist was performing work.

7. Requirement does not apply to abuse and neglect investigations, where court order is not required.

v. Confidentiality and New Technology

1. Communication by fax/modem/E-mail

- (1) All rules of confidentiality still apply
- (2) Disclaimer on cover sheet insufficient to protect confidentiality or to protect therapist from liability
- (3) Risk management strategies
  - i. Use fax only when truly urgent
  - ii. Do not transmit until verify receiving party actually at the machine to personally receive fax

2. Computer storage of records

- (1) All rules of confidentiality still apply
- (2) Maintain mental health records on separate data base from other records, preferably on disk, rather than on hard drive.

- (3) Recommend against on-line access to records, but if do it, have substantial security procedures.

vi. Confidentiality Within the Family/Family Therapy

1. Disclosure among family members

- (1) Cannot disclose from spouse to spouse without consent of first spouse;
- (2) Cannot disclose from parent to child without consent of parent;
- (3) May disclose from child to parent if child is:
  - i. under 12;
  - ii. over 12 and consenting;
  - iii. over 12 and objecting, but therapist does not find compelling reasons for denying access; or
  - iv. if over 12 and objecting, parent is entitled to information related to physical and mental condition, diagnosis, treatment needs, services provided and services needed.

2. To Third Parties about members of the family

- (1) May disclose information regarding adult recipient only based on written consent; and
- (2) May disclose information about minor recipient with either parent's consent if:
  - i. Minor is under 12 and no custody decree limiting right to consent.
  - ii. Minor is 12 or older, minor consents or there is no compelling reason to withhold, and parent consents and there is no custody order limiting parents' right to consent.

3. Practical considerations

- (1) Consent for *treatment* of child. Who must consent? If parents are separated, divorced or divorcing, check most

current settlement agreement or custody order. If no order is given, consent of BOTH parents is required.

(2) Maintain records of all individual sessions for each family member separately; and

(3) Black out all information in group sessions which comes from non-consenting participant.

vii. Confidentiality in Group Therapy

1. Maintain information on each individual in separate file.
2. Where group notes and information requested regarding one member, black out all other information.
3. Do not assume that participants obligated to maintain confidentiality even if they agree to do so.

viii. *Johnston et al. v. Weil et al.*, 08-2861 (396 Ill. App. 3d 781 (1<sup>st</sup> Dist. 2009)

1. 604(b) evaluations;
2. Complaints filed against social workers and other professionals;
3. Appellate Court opinion:
  - (1) Court-ordered evaluation;
  - (2) Court's witness;
  - (3) No therapeutic relationship;
  - (4) Not therapy;
  - (5) Not confidential;
4. Illinois Supreme Court has accepted the case for review.

**b. Duty to Warn/Protect**

i. Introduction

1. Doctor-patient communication historically viewed as sacrosanct and has been codified in Illinois since 1979 as an affirmative duty to protect confidentiality of patient - Section 110/1 *et seq.*

2. Prior to 1973, no recognized duty of therapist to protect potential victims from the threatened violence of therapists' patients.

ii. Duty to Warn/Protect

1. *Tarasoff v. Board of Regents*, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

(1) Underlying Facts: In 1969, a graduate student at UCLA fatally stabbed a fellow student, Tarasoff, who had rejected his advances. Prior to doing so, the student told his therapist that he intended to kill Tarasoff. The therapist warned police, who interviewed the student and released him after deciding he "appeared rational." Neither the police nor the therapist took action to warn Tarasoff.

(2) Holding: "Once a therapist determines or should have determined that a patient poses a serious danger of violence to others, he bears a responsibility to exercise reasonable care to protect the victim from danger." The court held that reasonable care could include warning the victim, the police, or "whatever other steps are reasonably necessary under the circumstances."

2. Illinois Law requires:

(1) Specific threat of violence

(2) Directed at the victim

(3) A special relationship between:

i. the victim and the patient, *Charleston v. Larson*, 297 Ill.App.3d 540 (1<sup>st</sup> Dist. 1998); or

ii. the victim and the doctor, *Kirk v. Michael Reese Hospital*, 117 Ill.2d 507 (1987).

3. Mental Health and Developmental Disabilities Confidentiality Act provides protection to therapists who disclose to protect/warn:

(1) Records *may* be disclosed when and to the extent a therapist, in his sole discretion, determines that such disclosure is necessary to "protect the recipient or other person against a clear, imminent risk of serious physical or

mental injury or disease or death being inflicted upon the recipient, or by the recipient on himself or another.” 740 ILCS 110/11(ii)

4. Mental Health and Developmental Disabilities Code creates duty to warn/protect under certain circumstances:

(1) "There shall be no liability on the part of...any person who is a physician, clinical psychologist, or qualified examiner based upon that person's failure to warn of and protect from a recipient's threatened or actual violent behavior *except where the patient has communicated to the person a serious threat of physical violence against a reasonably identifiable victim or victims.*" 405 ILCS 5/6-103 (emphasis added)

(2) Discharge of liability by "making a reasonable effort to communicate the threat to the victim and to a law enforcement agency, or by a reasonable effort to obtain the hospitalization of the patient." 405 ILCS 5/6-103(c)

(3) Duty to protect residents from each other remains:

“Nothing in this Section shall relieve any employee or director of any residential mental health or developmental disabilities facility from any duty he may have to protect the residents of such a facility from any other resident.” 405 ILCS 5/6-103

5. Risk management and the duty to warn/duty to commit

(1) Feasibility:

- i. How serious is threat?
- ii. How motivated is person to act?
- iii. Does person have capacity to commit act?
- iv. How specific is victim?
- v. How immediate is threat?
- vi. What alternative intervention?

vii. If duty to act, what action should be taken?

viii. Potential action:

1. Notify victim and police and/or attempt to secure hospitalization
2. May need to notify family, friends, caretaker, employer (be very careful about the last one).

(2) Minimizing risk

- i. Document
- ii. Supervision consultation

(3) Informed consent: need to disclose to client at start of Tx the circumstances where disclosure may and/or must occur.

(4) Intervention favored over confidentiality

- i. Abuse & neglect reporting policy evidences the preference.
- ii. Confidentiality -- vast majority of litigation around failure to act, rather than breach for acting.
- iii. But remember risks of commitment: recipient must meet standard for involuntary commitment.
- iv. Disclosure regarding criminal acts only when:
  1. Investigation of homicide and information germane to investigation; or
  2. Information of past or present criminal conduct germane to duty to warn. Other evidence of past or present criminal conduct should not be disclosed without consent or court order.

## II. Mandatory Reporting - Child Abuse/Neglect Reporting (325 ILCS 5/1)

### a. Who is an “Abused Child”?

- i. A child whose parent or immediate family member, or any person responsible for the child’s welfare, or any individual residing in same home, or paramour of parent:
  1. Inflicts, causes to be inflicted, allows to be inflicted physical injury, other than by accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss of impairment of any bodily function;
  2. Creates substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;
  3. Commits or allows to be committed any sex offense against the child;
  4. Commits or allows to be committed an act of torture upon the child;
  5. Inflicts excessive corporal punishment;
  6. Commits or allows to be committed the offense of female genital mutilation;
  7. Causes to be sold, transferred, distributed or given to child a controlled substance, except those that are prescribed in accordance with law and dispensed to the child in a manner that substantially complies with prescription.

### b. Who is a “Neglected Child”?

- i. Any child not receiving proper or necessary nourishment or medically indicated treatment including food or care not provided solely on the basis of the present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians;
- ii. Not receiving proper or necessary support or medical or other remedial care recognized under State law as necessary for the child’s well-being, or other care necessary for the child’s well-being, including adequate food, clothing and shelter;

- iii. Any child abandoned by his or her parents or other person responsible for the child's welfare without a proper plan of care;
- iv. Any child who has been provided interim crisis intervention services and whose parent, guardian or custodian refuses to permit the child to return home, and they have not made, and will not agree to, any other living arrangement;
- v. A newborn infant whose blood, urine or meconium contains any amount of a controlled substance (except substances or metabolite whose presence is the result of medical treatment administered to the mother or infant).
- vi. Not a "neglected child" if:
  1. Child left by parent or other person responsible for welfare in the care of an adult relative for any period of time;
  2. Child has been relinquished in accordance with Abandoned Newborn Infant Protection Act;
  3. Child's parent or other person responsible for welfare depends upon spiritual means through prayer alone for treatment or cure of disease or remedial care;
  4. Child is not attending school.

**c. Who is a mandated reporter? (325 ILCS 5/4)**

- i. Illinois law (Abused and Neglected Child Reporting Act):
  1. Any "physician, resident, intern, hospital, hospital administrator and personnel engaged in examination, care and treatment of persons, surgeon, dentist, dentist hygienist, osteopath, chiropractor, podiatrist, physician's assistant..."
  2. "Medical examiner, emergency medical technician, acupuncturist, crisis line or hotline personnel..."
  3. "Social worker, social services administrator, domestic violence program personnel, registered nurse, licensed practical nurse, genetic counselor, respiratory care practitioner, advanced practice nurse, home health aide..."

4. “Licensed professional counselor, licensed clinical professional counselor, registered psychologist and assistants working under the direct supervision of a psychologist, psychiatrist...
5. “Any other foster parent, homemaker or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child.”
6. Other persons including school personnel, law enforcement officers, substance abuse treatment personnel, members of the clergy, and child day care center directors are also mandated reporters.
7. Any other person not specifically listed in the Act *may* make a report if such person has **reasonable cause to believe a child may be an abused child or neglected child.** (325 ILCS 5/4)

ii. Other jurisdictions

**d. What must be reported? (325 ILCS 5/7)**

- i. The name and address of the child;
- ii. The name and address of the parents or other persons having custody;
- iii. The child’s age;
- iv. The nature of the child’s condition, including any evidence of previous injuries or disabilities;
- v. Any other information that the reporter believes might be helpful in establishing:
  1. the cause of the abuse or neglect and the identity; and
  2. the identity of the person believed to have caused the abuse or neglect.

**e. Where do you report? (325 ILCS 5/7)**

- i. By telephone to 1-800-25-ABUSE (1-800-252-2873); or
- ii. In person at the nearest Department office or by telephone to the nearest Department office.

**f. When should you report? (325 ILCS 5/7)**

- i. All reports must be made “*immediately*.”

**g. Why should you report child abuse?**

**h. Can you delegate the duty of reporting to someone else?**

- i. No.

**i. Continuing Duty After Reporting**

- i. Reporter must cooperate with investigative unit conducting investigation of report.
- ii. Reporter must provide testimony in any judicial or administrative proceeding resulting from the report, regarding any evidence of abuse or neglect or the cause thereof. (325 ILCS 5/10)
- iii. Reporter must provide *written confirmation* of the report to the appropriate Child Protective Service Unit within 48 hours of the initial report. (325 ILCS 5/7)
  1. Forms for written report are available on the DCFS website.
  2. Link to form for medical personnel:  
<http://www.state.il.us/DCFS/docs/cants4.pdf>
  3. Link to form for other mandated reporters:  
<http://www.state.il.us/DCFS/docs/cants5.pdf>

**j. Confidentiality and Reporting**

- i. “The privileged quality of the communication between any professional required to report and his or her patient *shall not apply* to situations involving abused and neglected children and shall not constitute grounds for failure to report.” (325 ILCS 5/4)
- ii. If called to testify regarding the report, no evidence shall be excluded by reason of any privilege relating to the reporter’s communications with the alleged perpetrator or the child. (325 ILCS 5/10)

**k. Other Authorized Acts**

- i. Temporary protective custody (325 ILCS 5/5). A physician treating a child may take or retain temporary protective custody of the child without the consent of the person responsible for the child's welfare if:
  - 1. The physician has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety;  
*and*
  - 2. There is not time to apply for a court order under the Juvenile Court Act for temporary custody of the child.
  - 3. The person taking temporary protective custody shall immediately make every reasonable effort to notify the person responsible for the child's welfare and shall immediately notify DCFS.
  - 4. If the physician keeps a child in his or her custody, the physician must notify the person in charge of the institution or their designated agent, who will then become responsible for further care of the child.
- ii. A petition for an order of protection may be filed by any person on behalf of an adult who has been abused by a family or household member and who, because of age, health, disability, or inaccessibility, cannot file the petition. (750 ILCS 60/201)

**l. Failure to Report (325 ILCS 5/4.02)**

- i. Any physician who willfully fails to report suspected child abuse or neglect shall be referred to the Medical Disciplinary Board for action.
  - 1. Medical Practice Act: The Board may take disciplinary action against a physician who willfully fails to report an instance of suspected abuse or neglect as required by law. (225 ILCS 60/22(A)(22))
- ii. Any dentist or dental hygienist who willfully fails to report shall be referred to the Department of Professional Regulation for action.
- iii. Any other person required to report suspected child abuse and neglect who willfully fails to report is guilty of a Class A misdemeanor (for first violation) and a Class 4 felony (for second or subsequent violation).

### **m. Potential Litigation**

#### **i. Immunity from liability for reporting. (325 ILCS 5/9)**

1. Any person participating in good faith in making a report or referral, or in the investigation of the report or referral, or in taking of photographs and x-rays, or in retaining a child in temporary protective custody, or in making a disclosure of information concerning reports of child abuse and neglect shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions, except in cases of willful or wanton misconduct.
2. The good faith of the reporter in making the report is presumed.

#### **ii. Litigation for failure to report**

1. Some courts have held that there is no private right of action for failure to report child abuse.

(1) *Varella v. St. Elizabeth's Hospital of Chicago*, 372 Ill. App. 3d 714 (1<sup>st</sup> Dist. 2007)

(2) *Doe I v. North Central Behavioral Health Systems*, 352 Ill. App. 3d 282 (3d Dist. 2004)

### **III. Mandatory Reporting - Elder Abuse/Neglect Reporting (320 ILCS 20/1)**

#### **a. What is "elder abuse"?**

- i.** Causing any physical, mental or sexual injury to an eligible adult, including exploitation of the adult's financial resources. (320 ILCS 20/2)
- ii.** An "eligible adult" is a person 60 years of age or older who resides in a domestic living situation and is, or is alleged to be, abused, neglected, or financially exploited by another individual or who neglects himself or herself.

#### **b. What is "neglect"?**

- i.** Another individual's failure to provide an eligible adult the necessities of life including, but not limited to, food, clothing, shelter or health care. (320 ILCS 20/2(g))

**c. What is “self neglect”?**

- i.** An eligible adult’s inability, due to physical and/or mental impairments, or a diminished capacity, to perform essential self-care tasks that substantially threaten his or her own health, including: providing essential food, clothing, shelter, and health care; and obtaining goods and services necessary to maintain physical health, mental health, emotional wellbeing, and general safety. (320 ILCS 20/2(i-5))

**d. Who is a mandated reporter?**

- i.** A professional while engaged in social services, law enforcement, education, the care of eligible adults, and
- ii.** Any of the occupations required to be licensed under the Medical Practice Act of 1987, the Clinical Psychologist Licensing Act, the Clinical Social Work and Social Work Practice Act, the Illinois Dental Practice Act, the Dietetic and Nutrition Services Practice Act, the Marriage and Family Therapy Licensing Act, the Naprathic Practice Act, the Nursing and Advanced Practice Nursing Act, the Nursing Home Administrators Licensing and Disciplinary Act, the Illinois Occupational Therapy Practice Act, the Illinois Optometric Practice Act of 1987, the Pharmacy Practice Act of 1987, the Illinois Physical Therapy Act, the Physician Assistant Practice Act of 1987, the Podiatric Medical Practice Act of 1987, the Respiratory Care Practice Act, the Professional Counselor and Clinical Professional Counselor Licensing Act, the Illinois Speech-Language Pathology and Audiology Practice Act, the Veterinary Medicine and Surgery Practice Act of 2004, and the Illinois Public Accounting Act.
- iii.** A person who performs the duties of a coroner or medical examiner, or a person who performs the duties of a paramedic or emergency medical technician.
- iv.** Any employee of the State of Illinois not otherwise specified by the Act who is involved in providing services to eligible adults, including professionals providing medical or rehabilitation services and all other persons having direct contact with eligible adults.
- v.** Other persons including employees of unlicensed community based facility, religious practitioners and personnel of state agencies.

**e. What should be reported?**

Ill. Dept. on Aging ([http://www.state.il.us/aging/1abuselegal/abuse\\_reporting.htm](http://www.state.il.us/aging/1abuselegal/abuse_reporting.htm)):

- i.** The alleged victim's name, address, telephone number, sex, age and general condition;
- ii.** The alleged abuser's name, sex, age, relationship to victim and condition;
- iii.** The circumstances which led the reporter to believe that the elderly person is being abused, neglected, or financially exploited, with as much specificity as possible;
- iv.** Whether the alleged victim is in immediate danger, the best time to contact the person, if he or she knows of the report, and if there is any danger to the worker in going out to investigate;
- v.** Whether the reporter believes the client could make a report themselves;
- vi.** The name, telephone number, and profession of the reporter;
- vii.** The names of others with information about the situation;
- viii.** If the reporter is willing to be contacted again;
- ix.** Any other relevant information.

**f. Where do you report?**

- i.** By telephone to the 24-hour Elder Abuse Hotline: 1-866-800-1409.
- ii.** By telephone to your local Elder Abuse Provider Agency.

**g. When should you report?**

- i.** Within 24 hours after developing reason to believe that an elderly adult has, within the previous 12 months, been the subject of abuse, neglect, or financial exploitation, and that the elderly adult is unable to seek assistance for him or herself because of dysfunction. (320 ILCS 20/4).

**h. Why should you report elder abuse?**

**i. Can you delegate the duty of reporting to someone else?**

- i.** No.

**j. Continuing Duty After Reporting**

- i. Reporter must cooperate with investigative unit conducting investigation of report.
- ii. Physician reporter must provide the elder abuse agency investigating a report access to the elderly person who is the subject of the report. (320 ILCS 20/13)
- iii. Reporter must provide testimony in any judicial or administrative proceeding resulting from the report, regarding any evidence of abuse, neglect or financial exploitation or the cause thereof. (320 ILCS 20/4.2)

**k. Confidentiality and Reporting**

- i. Confidentiality of reporter's identity
  - 1. The identity of the person making a report of alleged or suspected abuse or neglect may be disclosed only with the reporter's written consent or by court order. (320 ILCS 20/4(c))
- ii. Confidentiality of communications
  - 1. "The privileged quality of communications between any professional person required to report and his or her patient or client *shall not apply* to situations involving abused, neglected, or financially exploited eligible adults and shall *not* constitute grounds for failure to report." (320 ILCS 20/4 (a-5))
  - 2. If required to testify, no evidence shall be excluded by reason of any privilege relating to communications between the reporter and the alleged abuser or the alleged victim. (320 ILCS 20/4.2)

**l. Other Authorized Acts**

- i. Pursuing guardianship for the elderly adult.
- ii. Filing a Domestic Violence Order of Protection.
  - 1. A petition for an order of protection may be filed by any person on behalf of an adult who has been abused by a family or household member and who, because of age, health, disability, or inaccessibility, cannot file the petition. (750 ILCS 60/201)

**iii.** Seeking access to records.

1. Records concerning reports of elder abuse, neglect, financial exploitation or self-neglect shall be provided, upon request, to physicians who have before them or are treating an elderly adult whom they reasonably suspect may be abused, neglected, financially exploited, or self-neglected. (320 ILCS 20/8(3))

**iv.** Seeking an Access Order.

**v.** Seeking an Order to Freeze Assets.

**m. Failure to Report** (320 ILCS 20/4(e))

**i.** Any physician who willfully fails to report as required by this Act shall be referred to the Illinois State Medical Disciplinary Board for action.

1. Medical Practice Act: The Board may take disciplinary action against a physician who willfully fails to report an instance of suspected abuse or neglect as required by law. (225 ILCS 60/22(A)(22))

**ii.** Any dentist or dental hygienist who willfully fails to report shall be referred to the Department of Professional Regulation for action.

**iii.** Any other mandated reporter who willfully fails to report is guilty of a Class A misdemeanor. (320 ILCS 20/4(e))

**n. Potential Litigation**

**i.** Immunity from liability for reporting:

1. A person making a report in the belief that it is in the alleged victim's best interest shall be immune from criminal or civil liability or professional disciplinary action on account of making the report, notwithstanding any requirements concerning confidentiality of information with respect to the eligible adult which might otherwise be applicable. (320 ILCS 20/4 (a-7)).
2. Any person participating in the making of a report, providing information or records related to a report, assessment, or services, or participating in the investigation of a report in good faith, shall have immunity from any civil, criminal or other liability in any civil, criminal or other proceeding brought in consequence of making such report or assessment. (320 ILCS 20/4(b))

**ii. Potential employer liability (320 ILCS 20/4.1)**

1. No employer shall discharge, demote or suspend, or threaten to discharge, demote or suspend, or in any manner discriminate against any employee who makes any good faith oral or written report of suspected elder abuse, neglect or financial exploitation, or who will be a witness or testify in any investigation or proceeding concerning the report.

**iii. Failure to Report**

1. Malpractice and standard of care
2. Duty to Commit

**IV. Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2**

- a. Applicability – federal regulations apply to any information, whether or not recorded, that would identify a patient as an alcohol or drug abuser directly or indirectly, and to drug abuse information obtained by a federally assisted drug abuse program.
- b. General Rule
  - i. Disclosure is permitted only in accordance with the federal regulations and may not otherwise be disclosed or used in any civil, criminal, administrative or legislative proceedings.
  - ii. Disclosures made under the regulations are limited to information necessary to carry out the purpose of the disclosure.
- c. When Information May Be Disclosed
  - i. With written consent of patient.
    1. The regulations set forth what is required in the consent and provide a sample consent form.
  - ii. Communications directly related to patient’s commission of crime or threat to commit crime on the premises of the drug abuse program or against program personnel.

- iii. Reporting suspected child abuse and neglect to appropriate state or local authorities.
- iv. To a central registry or to a detoxification or maintenance treatment program 200 miles or less away to prevent multiple enrollment of a patient if certain conditions are satisfied.
- v. To elements of criminal justice system that have made participation in the program a condition of disposition of the criminal proceeding if information is given only to those with a need for the information and the patient has signed a written consent form.
- vi. Medical emergencies – Without patient consent, information may be disclosed to medical personnel who need the information to treat a condition that poses an immediate threat to anyone’s health and which requires immediate medical intervention.
- vii. Scientific research – For the purpose of conducting scientific research if the recipient is qualified to conduct the research and certain security requirements are satisfied.
- viii. Audits by federal, state or local governmental agency that provide financial assistance to the drug program or to a regulatory agency if records are not copied or removed.

**d. Records Must Be Disclosed When:**

- i. Disclosure is compelled by a court order and subpoena for the records.
- ii. Note: Court orders may only be issued if certain procedures are followed and certain criteria are met, depending on the circumstances.

**e. Differences From Illinois Law**

- i. Disclosure to Law Enforcement. The only disclosure allowed from drug program personnel to police is that directly related to patient’s commission of crime or threat to commit crime on the program’s premises or against program personnel.
- ii. Child Abuse. Federal rules allow the reporting of incidents of abuse and neglect, but records may not be disclosed in civil or criminal proceedings which may arise from the report of suspected abuse or neglect.
- iii. No Tarasoff Exception. Disclosure is only allowed under the federal regulations concerning the threat to commit a crime on the program’s premises or against drug program personnel.

- iv. Federal Rules Provide Greater Protection to Minors. If a minor patient acting alone has the legal capacity under state law to apply for and obtain alcohol or drug abuse treatment, written consent to disclosure may be given only by the minor patient. If state law requires parental consent to drug abuse treatment, parental consent to disclosure must also be obtained.
- v. Court orders to disclose are more difficult to obtain; court must make certain findings before ordering disclosure.

**V. Points to Remember and Questions**

- a.** JUST SAY NO!
- b.** Be very clear about the limitations of confidentiality.
- c.** Do not make promises you cannot keep.
- d.** Be aware that there are many state and federal laws regarding confidentiality that may have conflicting or inconsistent provisions regarding disclosure of records and information.
- e.** When in doubt, consult your supervisor and/or legal counsel!
- f.** Under the Confidentiality Act, the fact that someone is a recipient of mental health services is confidential information.
- g.** All mental health records are confidential...kind of. There are several ways to gain access, including waivers and exceptions.
- h.** Information shared by domestic violence or rape victims is subject to heightened protections against disclosure. Even if the court orders the information to be disclosed, the victim (or representative where appropriate) must first waive the privilege in order to disclose...unless one of the limited exceptions exists.
- i.** Inform your patients regarding the limitations on confidentiality, including the activities that may constitute waiver.
- j.** Whenever you think a situation involves ethical or legal issues, document your decision making process and your actions.
- k.** Consultation, consultation, consultation!
- l.** JUST SAY NO!



## JOSEPH T. MONAHAN

Joseph Monahan (Joe) is a co-founder of the law firm of Monahan and Cohen and an adjunct Professor of Law at Loyola University Chicago School of Law. He also taught the Psychiatry and Law class at Northwestern University College of Law for 3 years. Joe received his bachelor's and master's degree in social work from the University of Illinois in Champaign and his law degree from DePaul University College of Law.

Joe is a member of the Chicago, Illinois and American Bar Associations, National Association of Elder Law Attorneys, National Association of Social Workers and the National Association of Counsel for Children.

Joe serves on the Executive Committee of the National Association Social Workers' National Board and is the Chair of its Personnel Committee.

Joe serves as counsel to the National Private Duty Association and is a member of the Harris Bank Advisory Committee for enCircle. He represents approximately 42 hospitals in the metropolitan area and provides legal representation and advocacy to numerous outpatient mental health clinics and child welfare agencies in the state.

Joe has authored a portion of a chapter on mental health confidentiality in The Illinois Practice Series, The Law of Medical Practice in Illinois, Third Edition. He also co-authored an article on surrogate decision making that was recently published in Loyola University Chicago's Annals of Health Law Special Edition issue.

In addition to trial work, Joe is regularly hired by clients to address problems in the hospital or social service agency setting. Joe conducts audits for clients, identifies issues and works with administration to solve the issues identified by revising or creating new policies and procedures.

Joe is a frequent lecturer at seminars, in-services and professional continuing education trainings on topics concerning Mental Health, Confidentiality of Records, Guardianship, Elder Abuse and Neglect, Juvenile Issues, Ethical Issues for Social Workers, Risk Management and other topics relevant to lawyers and social service providers. He has provided trainings and seminars for the Illinois State Bar Association, Chicago Bar Association, Illinois Institute for Continuing Legal Education, National Association for Social Workers, Health Education Network, Lorman Education and many other organizations.

Monahan and Cohen's docket is reflective of the types of complex legal issues faced by Joe and other members of the firm. Currently, the docket includes the defense of a legal malpractice action which arose out of the release of certain custody reports alleged to be confidential. Monahan and Cohen won the case in the Illinois Appellate Court and will be arguing the case before the Illinois Supreme Court. The firm's docket has also recently included a medical malpractice case in which the plaintiff claimed damages based on unlawful imprisonment because the hospital allegedly did not discharge him within 5 days of his request;

numerous citations to recover and discover assets alleged to be stolen or misappropriated by relatives, friends, guardians or agents; hundreds of guardianship and decedents estate cases involving millions of dollars of assets that need to be collected and/or administered; cases alleging abuse or neglect of adults and children; special education matters in the public schools; cases in Juvenile Court concerning disputes with the Illinois Department of Children and Family Services; placement issues which concern discharge and/or admissions to or from hospitals and nursing homes; clinical issues which require ethical or legal intervention; representation of social workers, counselors and psychologists before the Illinois Department of Professional and Financial Regulation; and the prosecution and defense of civil appeals in the Illinois Appellate Court.