THE IDC MONOGRAPH:

DISCLOSURE OF MENTAL HEALTH RECORDS IN ILLINOIS: OBTAINING RECORDS IN A CIVIL PROCEEDING

C. William Busse, Jr. and Edward K. Grassé
Busse & Busse P.C.
Chicago, Illinois

Obtaining Records Protected by the Mental Health Confidentiality Act

Introduction

The sanctity of the common law physician patient privilege has long been recognized as of the utmost importance to both the patient and the physician. The law has taken great pains to ensure that this relationship is not inhibited by the fear of disclosure of the very information which is essential to proper care.

Information provided by a patient to a medical care provider for the diagnosis and treatment of a mental or psychological disorder is particularly sensitive. For this reason, Illinois has recognized a privilege regarding information contained in the records of a mental health care provider and has codified the protection against disclosure of this information in the Mental Health and Developmental Disabilities Confidentiality Act (Mental Health Act or Act) 740 ILCS 110\1 et seq.

The protection of the Act "is broader than the physician patient privilege, and all communications and records generated in connection with providing mental health services to a recipient are protected unless excepted by law."[1]

The First District Appellate Court has recognized the public policy considerations behind the Act in stating:

> The statutory privilege is a legislative balancing between relationships which society thinks should be fostered through the shield of confidentiality and the interests served by disclosure of the information in court. The legislature has determined that except for limited purposes, there is more value to encouraging and sustaining this kind of relationship. . . . The beneficent purposes of psychiatry can only be fully realized when the patient knows that what is revealed in the evaluation conferences or communications are free from judicial scrutiny.[2]

The legislature created this act to foster better care for patients by ensuring that persons receiving mental health or developmental disabilities treatment would be unfettered in their discussions with their care providers. Prior to this act, Illinois statutes only extended this privilege to treatment with "certain designated therapeutic professions" and governed "each of the professions according to different standards and . . . in an inconsistent manner." To eliminate these problems, the legislature passed this act "to consolidate the standards pertinent to confidentiality into one comprehensive law."[3]

The large amount of lawsuits involving personal injuries that are filed in Illinois every year make it imperative that defense counsel fully understand the intricacies, together with the serious consequences of any violation, of the act. It is axiomatic that a defense attorney must comply with the provisions outlined in the Act when seeking mental health records when a plaintiff has directly placed mental health into issue. This is equally true when a defense attorney is seeking records where the plaintiff has not directly placed mental condition in issue, but the material contained in those records may be critical to the defense of the litigation.

Consider a plaintiff who is injured in a traumatic event and seeks medical treatment for bodily injuries. During the course of this treatment, the plaintiff receives care for Munchausen Syndrome - a mental condition in which the plaintiff may practice self-mutilation and deception in order to feign illness. Patients suffering from this syndrome are seldom recognized as needing psychiatric treatment and are often continually treated and medicated for the physical maladies that they feign.[4]

The defense attorney may be unaware that the records regarding the treatment for Munchausen Syndrome are protected by the act. However, there may be sufficient information to presume that mental health services have been provided. If the defense attorney attempts to obtain all relevant medical records without complying with the requirements of the Act, one of two results will follow. The defense attorney may obtain an incomplete set of medical records that

About the Authors

C. William Busse, Jr. is the Vice President of the law firm of *Busse & Busse, P.C.* He has more than 18 years of legal experience handling civil jury trials and appeals. His practice focuses on the defense of various types of personal injury litigation and defense of insurance coverage litigation. Mr. Busse received his Juris Doctor in 1982 from The John Marshall Law School and a B.A. from Western Illinois University in 1975. Mr. Busse is a member of the Chicago Bar Association and is Vice Chair of the Civil Practice and Procedure Committee of the Chicago Bar Association. He also serves as co-chair of the Civil Practice Committee of the Illinois Association of Defense Trial Counsel.

Edward K. Grassé is an associate with the firm of *Busse & Busse, P.C.* He has worked in the insurance defense area for more than six years. He received his Juris Doctor from the Chicago-Kent College of Law. He received a B.S. in Political Science and in Sociology from Northern Illinois University. Mr. Grassé is a member of the DuPage County Bar Association and the Chicago Bar Association, where he serves on the Civil Practice & Procedure Committee.

omits portions of the records protected by the Act and may be critical to the defense. In the alternative, a complete set of records may be obtained in violation of the act. Consequently, the therapist or the attorney could face consequences that range from sanctions being entered in the case in chief, to the conviction of a Class A misdemeanor punishable by up to a one year incarceration.[5]

What Constitutes Mental Health

The Mental Health Act applies to the disclosure of records in many different proceedings (e.g. involuntary confinement, criminal cases, administrative matters, etc.). This article will focus solely on the disclosure of records in civil cases.

The Act states that "[a]ll records and communications shall be confidential and shall not be disclosed except as provided in this Act."[6]

The Act protects from disclosure ". . . 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" and ". . . any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient."[7] A therapist under the Act could be a ". . . psychiatrist, physician, psychologist, social worker or nurse providing mental health or developmental disabilities services. . ."[8]

It is important to note that "communication" includes "information which indicates that a person is a recipient."[9] Consequently, any notation in a medical record that a patient is receiving mental health treatment or has been referred to a mental health care provider is protected from disclosure under the Act.

The Act defines mental health services as ". . . examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation."[10] This definition encompasses records generated by many health care professionals that may not have been privileged prior to the enactment of this legislation.[11]

The Act does not define what constitutes "mental health." In making this determination, the dispositive factor is the recipient's subjective view as to the nature of the treatment.[12] The dearth of specific definitions as to what constitutes "mental health" treatment can be problematic for the defense attorney.

In *Johnson*, the plaintiff was a student at the Lincoln Christian College. After rumors surfaced that he was a homosexual, the college ordered Johnson to undergo "counseling" with Kent Paris, a therapist. During these counseling sessions, Johnson disclosed many private facts about himself. These facts were then disclosed by the therapist to the college. The college subsequently dismissed Johnson.

In seeking a dismissal of the complaint, the therapist argued that he was not a psychologist as alleged by the plaintiff and therefore, any communications between the plaintiff and himself were not protected by the act. The court held that although the therapist was not a psychologist or a psychiatrist, the therapist met the definition of a "therapist" in the Act, which includes ". . . 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."[13] (emphasis added) Clearly, these definitions encompass a broad array of treatment that may fall under the Act's protection.

Who Is Entitled to Mental Health Records

The Act defines a distinct class of persons who are entitled to a recipient's records without a court order or written consent. Section 4 provides certain persons the right to inspect and copy the recipients records. This class includes:

1. parents or guardians of a recipient under 12 years of age;

2. the recipients, if they are 12 years or older;

3. the parent or guardian of a recipient between 12 and 18, if the recipient is informed and does not object or if the therapist does not find any compelling reasons to deny access;

4. the guardian of a recipient over age 18;

5. an attorney or guardian ad litem involved in a judicial or administrative proceeding, is entitled to obtain the records if the court or administrative hearing officer has entered an order granting the attorney this right; or

6. an agent appointed under a recipient's power of attorney for health care is entitled to obtain the records.[14]

This class clearly does not include attorneys, even attorneys for the recipient in a civil matter. They must also comply with the provisions of the Act to obtain records.

(Continued on next page)

Monograph *(Continued)*

Sections 6 through 12.2 provide for other exceptions to the general rule that no records may be disclosed without consent or court order. The majority of these exceptions relate to disclosure to state agencies, police units or research boards.

Obtaining Records by Consent

Section 5 allows for the recipient to provide written consent for release of the records.

The Act allows for records or communications to be disclosed to others "only with the written consent of those persons who are entitled to inspect and copy a recipient's records pursuant to Section 4."[15] This written consent must be very specific and contain certain information.

Section 5(b) of the Act states that "[e]very consent form shall be in writing and shall specify:

(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; and

(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 should be signed by the person entitled to inspect the records and ". . . witnessed by a person who can attest to the identity of the person so entitled."[16] It is important to note that ". . . blanket consent to the disclosure of unspecified information" is invalid.[17] Additionally, pursuant to Section 14 of the Act, "any agreement purporting to waive any of the provisions of this Act is void." Once the requested information is disclosed by the provider, an additional consent form is required if additional information is needed at a later date.[18]

Waiver of Privilege

As with any privilege, this protection against disclosure may be waived by the recipient.[19] It is important to note that the privilege extends to the recipient of the treatment and not to the therapist.[20] Accordingly, a therapist who discloses records which should remain confidential could be subjected to criminal action and an action for damages under the act.[21]

The question remains open whether tendering records from recipients to their attorneys would constitute a waiver of the privilege. However, it is clear that a tender of any mental health records from the therapist directly to the plaintiff's attorney would not constitute a waiver of the privilege and may be the basis for a cause of action for damages or criminal proceedings against the therapist.

Special Circumstances

The protection against disclosure survives the death of the recipient. Section 5(e) of the Act states that ". . . records and communications shall remain confidential after the death of a recipient and shall not be disclosed unless the recipient's representative . . . and the therapist consent to such disclosure or unless disclosure is authorized by court order after in camera inspection and upon good cause shown."[22]

"The question remains open whether tendering records from recipients to their attorneys would constitute a waiver of the privilege."

One scenario that is not addressed in the Act is the situation where the mental health or developmental disabilities treatment is rendered outside of Illinois, but suit is filed in Illinois. This issue has not been addressed by any Illinois courts and the question of whether the act is applicable has no easy answer.

Obviously, a subpoena duces tecum issued by an Illinois court has no force and effect over medical care providers in other states. As such, it would seem that the disclosure of these records would not be covered under the Act. However, the Illinois legislature has established specific rules for obtaining mental health records in Illinois lawsuits. As Illinois does have jurisdiction over all attorneys and the

penalty for non-compliance with the Act can be so severe, all attorneys would be well served to obey the mandates of the Act until this issue is resolved.

Another special circumstance deals with the disclosure of raw test data. Section 3 of the Act creates a complete bar to the disclosure of psychological test material as long as there is a showing that the ". . . disclosure would compromise the objectivity or fairness of the testing process."[23] These records may not even be disclosed to the recipient. They may only be disclosed to another ". . . psychologist designated by the recipient."

This section is particularly important in the situation where the plaintiff has placed mental condition into issue and the defense has sought the advice of an expert to render an opinion as to the mental condition of the plaintiff. Neither the attorney nor any other lay person is allowed to view the raw data. The raw data must be transferred from one mental health professional to another. Therefore, defense counsel must be cognizant of the fact that although they may, pursuant to a court order, obtain the plaintiff's mental health records, they will never obtain the raw test data, unless the plaintiff designates defense counsel's expert to review the raw data or the court makes a finding that the disclosure of the raw data would not "compromise the objectivity or fairness of the testing process."[24] This latter option may well require an evidentiary hearing.

Obtaining Records in a Civil Proceeding

The Act is very specific as to which persons or entities are entitled to possession and disclosure of any record or communication regarding mental health treatment. The Act also provides a strict procedure that must be followed before any person outside the class designated in Section 4 may have access to the records.

The most common procedure used to obtain medical records is via a subpoena duces tecum. However, a defense attorney must follow certain set procedures before the subpoena can be issued. The act mandates that:

> No party to any proceeding (described in other sections), nor his or her attorney, 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, authorizing the disclosure of the records or the issuance of the subpoena.[25]

The Act also forbids any person from complying with a subpoena for records or communications unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records.[26]

The Act grants ". . . a recipient, and a therapist on behalf and in the interest of a recipient, . . . the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications."[27] This privilege to refuse and to prevent disclosure is not absolute.[28] The Act allows for certain exceptions in which the records or communications of a recipient may be disclosed to persons who would normally not have access to these records.

The first exception states that such records ". . . *may* be disclosed in a civil, criminal, or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense."[29] (emphasis added). In order for these records to be disclosed, the court in which the claim is brought[30] must conduct an in camera examination of testimony or other evidence and find that the records:

1. are relevant;
2. are probative;
3. are not unduly prejudicial or inflammatory;
4. are otherwise clearly admissible;
5. that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and
6. that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm.

The Act further mandates:

> [N]o record or communication between a therapist and a recipient shall be deemed relevant for purposes of this subsection, except the fact of treatment, the cost of services and the ultimate diagnosis unless the party seeking disclosure of the communication clearly establishes in the trial court a compelling need for its production."[31]

Clearly, the party seeking the disclosure of records protected under the Act has a heavy burden to meet. The mere

(Continued on next page)

Monograph *(Continued)*

claim of pain and suffering is insufficient to warrant the release of any records protected by the Act.[32] The Act specifically states that, ". . . in any action in which pain and suffering is an element of the claim, mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or communication."[33]

What constitutes placing "mental condition or any aspect of his services received for such condition as an element of [a] claim or defense" is quite subjective.[34] The courts have held that the ". . . plaintiff's damages [must] include an affirmative claim for mental loss."[35] citing *Webb v. Quincy.*[36] This finding involves factual determinations that can only be made on a case by case basis. Clearly, a plaintiff who claims mental injury or damage as a direct result of a defendant's actions has placed his mental condition at issue.

A complex issue arises in cases where the plaintiff is not claiming mental injury or damage as a direct result of a defendant's actions, but the plaintiff's mental health condition may be otherwise in issue. Illinois courts have reached different conclusions under similar factual scenarios.

Illinois courts have ruled that several factual scenarios are insufficient to place a person's mental condition at issue. A plaintiff pleading a lack of negligence on his part is insufficient to rise to the level of placing his mental condition at issue.[37] A claim for pain and suffering is insufficient to satisfy this requirement as is a claim for loss of society under the Wrongful Death Act.[38] The filing of a petition for adoption is insufficient.[39] Defending an involuntary commitment proceeding is insufficient.[40] Naming a mental health therapist as an expert witness is insufficient.[41] Pleading guilty to a claim of aggravated criminal sexual assault will not constitute sufficient basis under the Act.[42]

Other courts have found that under similar scenarios, a plaintiff has, in fact, placed mental condition in issue. The Fourth Appellate District has held that seeking compensatory damages is sufficient to place a party's mental condition into issue.[43] The First District Appellate Court has held that the plaintiff's condition of sobriety had been introduced into the claim ". . . as it was a central, rather than peripheral, issue and such condition had 'bear[ing] on' proximate cause and plaintiff's comparative fault.[44] However, the *Maxwell* court specifically held that treatment for alcoholism does not constitute mental health service as defined in the Act.[45] The First District Appellate Court has held that testimony that a plaintiff has suffered ". . . headaches, loss of memory, changes in comprehension and difficulties in performing daily activities" is sufficient to introduce the plaintiff's mental condition.[46]

As stated previously, in order to issue a subpoena for mental health records, a court order allowing the issuance of the subpoena must be obtained. The Act is silent as to the preliminary showing that must be made in order for the court to grant leave to issue the subpoena. Presumably, the defense must demonstrate that the plaintiff has placed mental condition at issue.

Once the defense has successfully established that a plaintiff has introduced mental condition as an issue, the court must then make the detailed findings as previously outlined. However, the records may only be disclosed to the attorneys after the court has conducted an in camera examination and has made all required findings.

"A complex issue arises in cases where the plaintiff is not claiming mental injury or damage as a direct result of a defendant's actions, but the plaintiff's mental health condition may be otherwise in issue."

In order to fully comply with the Act, the order allowing the issuance of the subpoena should specify that the records to be produced should be returned to the judge of record in the civil case. Under no circumstances should the subpoenas be made returnable to the issuing attorney or plaintiff's counsel. For the court to order otherwise would constitute a violation of the Act or be an invalid order.

Clearly, the party seeking to obtain mental health records must prove that the records are more than just relevant. This heavy burden lies with the party seeking the records to show that all of the factors set out above are met and demonstrate a compelling need for those records.

It is therefore arguable that if an attorney knows that a plaintiff has obtained treatment for a condition specified in the Act, the mere issuance of a subpoena duces tecum for these records prior to complying with the procedures outlined in the act could constitute a knowing or wilful violation of the Act.

As stated earlier, any willful or knowing violation of the Act is a Class A Misdemeanor punishable by up to a one year incarceration and can also be the subject of a claim for damages against the therapist or the attorney. Section 15 of the Act states that reasonable attorney's fees and costs may be awarded to the successful plaintiff seeking damages under the Act.

Due to the sensitive nature of the records sought to be disclosed under the Act, the Act originally provided that any order to disclose or that denied disclosure of mental health records would be considered ". . . a final order for purposes of appeal and . . . be subject to interlocutory appeal."[47] In *Almgren v. Rush Presbyterian - St. Luke's Medical Center et. al.*, the Illinois Supreme Court held that this provision was unconstitutional as a usurpation of the Supreme Court's rule-making power. Consequently, if the defense attorney's motion for leave to issue a subpoena for mental health records is denied, an appeal under Rule 308 should be considered.

It is not uncommon that records protected by the Act my be obtained inadvertently. Defense counsel may be unaware that the plaintiff has received treatment which is covered under the Act. An unknowing or unwary records custodian may disclose these records in response to a subpoena.

For instance, a plaintiff in a personal injury action complains to his doctor that subsequent to the accident that allegedly caused his injuries, he is unable to sleep, he suffers from nervousness and now complains of sexual dysfunction. His doctor, unable to find any physical basis for these complaints, refers the plaintiff to a "therapist" for a consultation. The "therapist" performs an evaluation and sends a written report to the referring physician opining that the maladies from which the plaintiff suffers are most likely caused by the plaintiff's deteriorating marital relationship. The treatment with the therapist was not disclosed by the plaintiff in responses to written discovery. In response to the subpoena, the doctor's clerk includes the report from the "therapist."

Although it is clearly a violation of the Act for the physician to disclose the materials, it is unclear whether it would be a violation of the act to receive or possess those records. To protect oneself, a defense attorney who inadvertently obtains medical records which include treatment protected by the Act should immediately seal the records and have them brought to the court for an in camera inspection and have the court make the requisite findings before proceeding any further.

Weighing Substantial Justice and Fundamental Fairness

As stated above, the plaintiff must affirmatively introduce his mental condition into issue before any records pertaining to mental health services may be discoverable. However, Illinois courts have held that under certain circumstances, this privilege will yield to fundamental fairness in the truth seeking process. It has been argued that the failure to disclose certain information prohibits a proper defense from being presented on behalf of a client and that this amounts to a denial of federal and state constitutional due process rights.

Courts have been unwilling to accept this proposition as ". . . no one has any vested right in a rule of evidence whether in a criminal or civil case, and there is no constitutional prohibition against the legislature changing it so long as it leaves to a party . . . a fair opportunity to make his defense and to submit all the facts to the jury."[48] However, a New York court has held that in a wrongful death action, "where decedent's death from a 36 story building fall was questionable as suicide, to hold physician-patient privilege not waived is to ignore realities of factual situation and to come 'perilously close' to taking defendant's property without due process of law."[49]

The Fourth District of Illinois has allowed records to be disclosed when it appeared that the Act was being used as a sword rather than a shield.[50] In *Roberts*, the plaintiff filed a F.E.L.A. claim against Norfolk following an injury he sustained while working. One of the main issues in the case was the cause of the plaintiff's disability.

The defense sought to introduce testimony from the plaintiff's psychiatrist regarding potential causes of the plaintiff's disability. The trial court ordered the disclosure of the plaintiff's psychiatric records. These records revealed that the disability which the plaintiff claimed was unrelated to the negligence of the defendant.[51]

The appellate court upheld the disclosure of the records and allowed the testimony of the psychiatrist. In so ruling, the court held that the plaintiff introduced his mental condition into evidence by seeking recovery for compensatory damages. The court felt that the testimony of the psychiatrist contradicted the testimony of the plaintiff as to the cause of his disability and allowed the psychiatrist to testify to the contents of his records. Although not couched in terms of fundamental fairness or truth, it is readily apparent from the facts that the records and testimony would have been a major blow to the plaintiff's case, if not a complete bar to recovery.[52]

(Continued on next page)

Monograph *(Continued)*

In a more recent case, the Illinois Supreme Court held that:

> [T]he interests of fundamental fairness and substantial justice outweigh the protections afforded the therapist-recipient relationship where plaintiff seeks to utilize those protections as a sword rather than a shield to prevent disclosure of relevant, probative, admissible, and not unduly prejudicial evidence that has the potential to fully negate the claim plaintiff asserted against defendants and absolve them of liability.[53]

In *D.C. v. S. A.*, D.C filed a complaint seeking recovery for injuries received when he was struck by a vehicle while crossing a street. The defense sought the disclosure of certain records from the plaintiff's treating physicians. These records revealed that the plaintiff had been referred for a psychiatric evaluation as there was an indication that he may have been attempting suicide at the time of the accident. The trial court ordered that certain records should be disclosed as they met the requirements of the Act in that they were relevant, probative, etc.[54]

On appeal, the defense argued that the plaintiff had introduced his mental condition into issue by pleading his lack of negligence and by pleading the negligence of the defendant. The Supreme Court held that the plaintiff's allegation of a lack of negligence was insufficient to introduce his mental condition into the lawsuit. Similarly, seeking recovery in negligence against a defendant was insufficient to place his mental condition into issue.[55]

In spite of this finding, the court ruled that the records should be disclosed in the interest of fundamental fairness. The court recognized that records protected under the Act should not be disclosed unless the plaintiff places mental condition into issue. However, the court felt that the plaintiff's refusal to disclose or to authorize disclosure of this information was being used as a sword rather than a shield. This lead the court to conclude that the ". . . interests of justice demand that we tip the balance in favor of disclosure and truth."[56]

Although the plaintiff had not introduced mental condition into issue, the court felt that disclosure of these records was appropriate, primarily because the records met the six requirements listed in Section 10 of the Act relating to relevancy, etc.[57]

Interestingly, the court did not overrule the holding of *Roberts*.[58] The court's holding is clear that the mere filing of a complaint based on negligence is insufficient to introduce a plaintiff's mental condition into issue. As every complaint based on negligence seeks compensatory damages, this would seem to rebuke the holding in the *Roberts* case. However, the court did not overrule *Roberts* but simply cited to the *Roberts* case parenthetically in its discussion.

The *Roberts* and *D.C.* cases have two major similarities which may help explain the reasons for this discrepancy. Both claims could have been completely barred by the introduction of the mental health evidence, and the disclosure met all of the requirements of 10(a)(1) with the exception of placing mental condition into issue.

"In ruling on the disclosure of records that may be protected by the Act, the courts must strike a delicate balance between the right of a patient to confide in a therapist in an open and unfettered manner and the need for defendants to discover sensitive information that may be critical to their defense."

A cogent argument could be made by defense counsel that mental health records or communications should be the subject of an in camera inspection if there is a good faith basis that the records or communications may lead to a complete defense of the claim. This would hold true if the records could be a bar to recovery based on liability as well as damages.

Conclusion

The Illinois legislature has taken great pains to protect the confidentiality of records that are generated by a therapist during the course of treatment for a mental disorder, or treatment relating to a developmental disability. In ruling on the disclosure of records that may be protected by the Act, the courts must strike a delicate balance between the right of a patient to confide in a therapist in an open and unfettered

manner and the need for defendants to discover sensitive information that may be critical to their defense.

The Act's failure to define "mental health," and the broad definition of who may qualify as a therapist, are problematic for defense counsel who seek to obtain mental health records in an effort to provide a vigorous defense for their clients. Equally troubling are the draconian consequences of a wilful violation of the Act.

When a defense attorney becomes aware that treatment was given to a plaintiff that may be protected under the Act, the initial attempt to obtain the records should be in the form of a request for the plaintiff to execute a written consent for the voluntary disclosure of the protected information. If the plaintiff will agree to execute a written consent, much time and effort will be saved attempting to obtain the requisite orders through court appearances to obtain the records via a subpoena duces tecum. It is important that the consent form complies with the seven requirements of 740 ILCS 110/5b) (See sample consent form)

If the plaintiff will not consent to the release of the protected information, the defense must begin the two tiered process of obtaining the records by subpoena. Defense counsel should never attempt to issue the subpoena without first obtaining a court order allowing him to do so.

The Act is silent on the burden of proof or any findings that are required by the court to issue an order granting the defense leave to issue its subpoenas. Nevertheless, the defense attorney should be prepared to argue that, in good faith, he believes that the records contain information that could lead to admissible evidence.

Once leave has been granted to issue the subpoena, the subpoena should be made returnable to the presiding judge for the in camera inspection and should never be made returnable to any of the counsel of record.

The Act speaks in terms of what is required for the "disclosure" of protected records. The actual disclosure is made after the defense attorney has demonstrated sufficient evidence and the court makes the six required findings. The defense counsel should be prepared to make a showing that each of the six requirements for disclosure has been met. (See sample order). This should not be difficult when the plaintiff claims that, as a result of the defendant's conduct, he has incurred some form of mental health treatment. The situation becomes more difficult when the plaintiff has not directly placed his mental condition into issue.

In this instance, the defense attorney may have to make a showing that the mental health treatment is in some way related to the liability issues in the case or that in accordance with the Illinois Supreme Court's holding in *D.C v. S.A*, substantial justice and fundamental fairness outweigh the protections of the therapist-patient relationship. This is a difficult burden. The Supreme Court has left the door open for defense counsel to, at a minimum, request an in camera inspection if there is a good faith basis to believe that the records may be a complete bar to recovery.

CONSENT FORM

To: Physician
Address

Re Caption
Court No.:

File No.:

Pursuant to 740 ILCS 110/1 et seq., I have the right to copy and inspect records and communications pertaining to my mental condition or treatment. I hereby authorize you and any person associated with you, to release to [name and address of firm or attorney] or any representative of [firm], any and all information which may be requested regarding my mental condition and treatment rendered by you therefore, unless otherwise protected by law. I also hereby give permission, to allow them, or any physician or psychologist appointed by them, to examine any other records or data which you may have regarding my mental condition or treatment and any and all bills and invoices related to the above, unless otherwise protected by law.

The failure to disclose these materials may result in legal proceedings seeking an order of contempt to be brought against you.

This consent is valid until _____, _____. This consent may be revoked by the undersigned, in writing, at any time.

Dated this day of , _____.

(Name of Recipient)

(Continued on next page)

IN THE CIRCUIT COURT
OF _____ COUNTY, ILLINOIS

JOHN DOE)
)
Plaintiff,)
)
v.)
)
JANE DOE)
)
Defendant.)

ORDER

This cause coming before the court on the motion of the defendant, pursuant to 740 ILCS 110/10(a), to discover records pertaining to the mental health of the plaintiff. Due notice being given and the court being fully advised, it is hereby ordered that:

This court, having conducted an in camera inspection of [list all records] and hearing of all relevant evidence, hereby finds that the plaintiff has placed his/her mental condition into issue.

This court further finds that the records of _____ are:

1. relevant;
2. probative;
3. not unduly prejudicial or inflammatory; and
4. are otherwise clearly admissible.
5. The court further finds that there is no other satisfactory evidence of the facts sought to be established and
6. that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm.

Further, the court finds that there is a compelling need for the disclosure of these records as _____.

The court further directs these providers to produce a copy to_____.

ENTERED

_____
Judge

Endnotes

1 *People v. Kaiser*, 239 Ill. App. 3d 295, 301, 606 N.E.2d 695, 699, 179 Ill. Dec. 863, 867. (Ill. App. 2 Dist. 1992)

2 *In re Marriage of Lombaer*, 200 Ill. App. 3d 712, 722, 558 N.E.2d. 388, 393, 146 Ill. Dec. 425, 430 (Ill. App. 1 Dist. 1990)

3 *Ill. Sen.*, Transcripts of Floor Debate on Mental Health and Developmental Disabilities Confidentiality Act, 80th Gen. Assembly, (June 29, 1978).

4 Taber's Cyclopedic Medical Dictionary, 12th ed., Clayton L. Thomas, M.D., 1973

5 740 ILCS 110/16; 730 ILCS 5/5-8-3

6 740 ILCS 110/3(a).

7 740 ILCS 110/2(7) and (1)

8 740 ILCS 110/2(9)

9 740 ILCS 110/2(1)

10 740 ILCS 110/2(3)

11 Although the Act includes pharmaceuticals, the Third Appellate District has held that pharmacists are not encompassed by the provisions of the Act. *Suarez v. Pierard*, 215 Ill. Dec. 525, 278 Ill. App. 3d 767, 663 N.E.2d 1039 (Ill. App. 3 Dist. 1996).

12. *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 501 N.E.2d 1380, 103 Ill. Dec. 842 (Ill. App. 4 Dist. 1986)

13. 740 ILCS 110\2

14. 740 ILCS 110/4(a)

15. 740 ILCS 110/5(a)

16. 740 ILCS 110/5(b)

17. 740 ILCS 110/5(c)

18 740 ILCS 110/5(c)

19 *Bland v. Dept. of Children and Family Services*, 141 Ill. App. 3d 818, 490 N.E.2d 1327, 96 Ill. Dec. 122 (Ill. App. 3 Dist. 1986) (reh'g denied).

20 *Goldberg v. Davis*, 215 Ill. App.3d 930, 575 N.E.2d 1273, 159 Ill. Dec. 213 (Ill. App. 1 Dist. 1991) (rev'd on other grounds)

21 740 ILCS 110\15 and 16

22 740 ILCS 110/5(e)

23 740 ILCS110\3(c)

24 740 ILCS110\3(c)

25 740 ILCS 110/10(d)

26 *Id.*

27 740 ILCS 110/10(a)

28 *Goldberg v. Davis*, 151 Ill. 2d 267, 277, 602 N.E.2d 812, 817, 176 Ill. Dec. 866, 871

29 740 ILCS 110/10(a)(1)

30 In the case of an administrative hearing, the petition to obtain these records must be brought to the court to which an appeal or other action for review of an administrative determination may be taken. 740 ILCS 110/10(a)(1)

31 740 ILCS 110/10(a)(1)

32 *Id.*

33 *Id.*

34 *Id.*

35 *Thiele v. Ortiz*, 165 Ill. App. 3d 983, 992, 520 N.E.2d 881, 888, 117 Ill. Dec. 530, 537 (Ill. App. 1 Dist. 1988)

36 *Webb v. Quincy*, 73 Ill. App. 2d 405, 219 N.E.2d 165 (Ill. App. 4 Dist. 1966) (reh'g denied).

37 *D.C.*, 178 Ill. 2d at 564, 687 N.E.2d at 1039, 227 Ill. Dec. at 557

38 *Thiele*, 165 Ill. App. 3d at 993, 520 N.E.2d at 888, 117 Ill. Dec. at 537

39 *Bland*, 141 Ill. App. 3d 818, 490 N.E.2d 1327, 96 Ill. Dec. 122

40 *Sassali v. Rockford Memorial Hospital*, 296 Ill. App. 3d 80, 693 N.E.2d 1287, 230 Ill. Dec. 536 (Ill. App. 2 Dist. 1998)

41 *Roberts v. Norfolk and Western Railway Co.*, 229 Ill. App. 3d 706, 719, 593 N.E.2d 1144, 1153, 171 Ill. Dec. 324, 333 (Ill. App. 4 Dist. 1992)

42 *People v. Sagstetter*, 127 Ill. Dec. 200, 177 Ill. App. 3d 982, 532 N.E.2d 1029 (Ill. App. 2 Dist. 1988)

43 *Roberts*, 229 Ill. App. 3d 706, 593 N.E.2d 1144, 171 Ill. Dec. 324

44 *D.C.*, 178 Ill. 2d at 566, 687 N.E.2d at 1040, 227 Ill. Dec. at 557-8, citing *Maxwell v. Hobart Corp.*, 216 Ill. App.3d 108, 115, 576 N.W.2d 268, 159 Ill. Dec. 599 (Ill. App. 1 Dist. 1991)

45 *Id.*

46 *Reda v. Advocate Health Care*, 316 Ill. App.3d 1115, 738 N.E.2d 153, 250 Ill. Dec. 189 (Ill. App. 1 Dist. 2000)

47 740 ILCS 110/10 (b)

48 *People v. Love*, 310 Ill. 558, 563, 142 N.E.204 (1923) (reh=g denied)

49 *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 317, 398 N.E.2d 517, 522, 422 N.Y.S.2d 911, 916 (1979)

50. *Roberts*, 229 Ill. App. 3d 706, 593 N.E.2d 1144, 171 Ill. Dec. 324

51 *Id.*

52 *Id.*

53 *D.C.*, 178 Ill. 2d at 570, 687 N.E.2d at 1041, 227 Ill. Dec. at 559

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Roberts*