Beyond HIPAA: Solving the Puzzle of Properly Acquiring Mental Health Records in Litigation

The mental health of certain plaintiffs can easily become an issue worthy of discovery. For example, plaintiffs with prior mental health treatment may blame an accident for their post-accident psychiatric injuries. Sometimes the plaintiff’s mental health may have actually played a role in the accident itself, such as in a suspected suicide.

Unlike criminal defense attorneys seeking to establish an insanity defense, civil defense attorneys perhaps too often overlook the potential importance of mental health records in civil litigation. Even though the records are important, they are not easy to get in Illinois. The Illinois Mental Health and Developmental Disabilities Confidentiality Act (Act) contains significant obstacles to disclosure and discovery. Defense counsel who are aware of the difficulties may dodge the issue. Doing so, however, may be a missed opportunity. Moreover, even attorneys who seek them must understand the perils that come with unwittingly pursuing mental health records without following the proper procedure. This article will provide a basic overview of the Act to assist counsel representing those seeking to obtain such records in civil litigation.

The Mental Health and Developmental Disabilities Confidentiality Act

“Formidable” is an apt description of the challenge counsel face when seeking the disclosure of the plaintiff’s mental health information without the plaintiff’s consent. The Health Insurance Portability and Accountability Act (HIPAA) limits the circumstances under which a healthcare provider can disclose health information without the patient’s consent. While HIPAA generally preempts inconsistent state laws, it permits states to pass more stringent laws that protect an individual’s health information from disclosure.

Illinois, like most states, passed a law that establishes more stringent standards for disclosure with regard to mental health records. The Mental Health and Developmental Disabilities Confidentiality Act provides for the confidentiality of such information and lists narrow exceptions under which mental health records and communications between a patient and his or her physician may be disclosed. The stringent disclosure standards protect the confidentiality of such records with the goal of encouraging people to seek needed treatment. The Act, which took effect in 1979, applies retroactively to records and communications made prior to its adoption.

According to the Act, “[a]ll records and communications shall be confidential and shall not be disclosed except as provided in this Act.” Some terms within the Act take on a much narrower meaning than their common everyday use.
To navigate the Act it is important to become familiar with the definitions of key terms. The definitions can be found in Section 110/2.

“Record” is “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.” A “communications” made confidential under the Act is “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.” A “communication” includes the mere fact that a person is receiving mental health treatment. The Act uses the terms “recipient” to refer to the patient whose records are at issue and “therapist” as the medical professional from whom confidential information is sought. A “therapist” need not be a psychologist or psychiatrist, but can be any physician or even a physician’s employee.

Furthermore, the Act only prohibits disclosure from “those persons entering into a therapeutic relationship with clients.” A pharmacist performing a routine transaction or questioning a customer about her mental condition and treatment does not engage in such a relationship. The Act’s provisions are construed strictly and the courts are directed to “zealously guard against erosion of the confidentiality privilege” when presiding over anyone seeking nonconsensual release of mental health records.

The Act is given teeth by section 110/15. Section 110/15 creates a cause of action for damages, injunction, and fees and costs for violations of the Act. Section 110/16 makes it a Class A misdemeanor to “knowingly and willfully” violate any provision of the Act. Records and communications may be disclosed in an action brought under this provision so long as it is not used for any other purpose.

Consent

Of course, the recipient patient can consent to the disclosure of mental health information if the consent is in writing. Predictably, an all-purpose “form” authorizing the blanket disclosure of mental health information is specifically forbidden by the Act. Similarly, “only information relevant to the purpose for which disclosure is sought may be disclosed.” For example, in Goldberg v. Davis, a mental health patient’s testimony at a disciplinary hearing brought against her psychiatrist for alleged sexual misconduct with her only constituted a waiver of records to the extent they showed the fact of her sexual relationship with the psychiatrist and did not open the door to disclosure of all prior records of her mental health treatment. A person who obtains the proper consent may not redisclose the information without the recipient’s specific consent.

Moreover, a therapist may assert a privilege “on behalf and in the interest of the recipient” notwithstanding the express consent of the recipient. Under such circumstances, the court may require that the therapist establish in an in camera hearing that disclosure is not in the recipient’s best interest.

Waiver Exception

Importantly, section 10(a) of the Act provides that both the patient and therapist have “the privilege to refuse to disclose and to prevent the disclosure of the recipient’s record or communications.” The Act then lists several specific exceptions to this evidentiary privilege.
Section 10(a)(1) of the Act provides the first exception, which applies to any civil or criminal proceeding in which the recipient waives the privilege. Under Section 10(a)(1), mental health records and communications may be disclosed if the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense.\(^{29}\)

Once the recipient places his mental health at issue in the case, the court must conduct an *in camera* examination to determine if the proffered evidence is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible.\(^{30}\) But there is more. The court must then conduct a balancing test and find that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by the evidence and 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.\(^{31}\)

Only the recipient patient can open the door by making his mental condition an element to his claim or defense.\(^{32}\) A plaintiff’s mental condition is usually introduced by the type of damages alleged. In general, merely suffering a physical injury to the brain, such as a stroke or other brain trauma, does not by itself, implicate a mental condition.\(^{33}\) In *Reda v. Advocate Health Care*, the Illinois Supreme Court reversed the trial court’s order granting the disclosure of the plaintiff’s mental-health records when the plaintiff alleged he suffered a stroke following a botched knee replacement surgery.\(^{34}\) The supreme court stated that if it were true that a neurological injury is synonymous with psychological damage, then “in every case in which the plaintiff claimed damages stemming from a physical injury to the brain, the door to discovery of the plaintiff’s mental health records would automatically open, and the limited exception in section 10(a)(1) of the Act would effectively eviscerate the privilege.”\(^{35}\)

The privilege under the Act also cannot be waived merely by stating a claim for loss of society.\(^{36}\) Likewise, claiming pain and suffering as an element of damages does not waive the privilege.\(^{37}\) However, an exception can arise in claims where pain and suffering is alleged, “if the recipient or a witness on his [or her] behalf first testifies concerning the record or communication.”\(^{38}\) This has been interpreted recently to mean that a Rule 213(f) disclosure may suffice as testimony concerning the record or communication.\(^{39}\)

In *Deprizio v. MacNeal Memorial Hospital Assn.*, the plaintiff sued her doctors and hospital after suffering injury from a lithium overdose as a patient.\(^{40}\) The defendants filed a motion to compel production of records regarding the plaintiff’s psychological care after the plaintiff disclosed three experts, pursuant to Rule 213(f), who would testify about her reduced level of cognitive functioning.\(^{41}\) In affirming the trial court’s order to disclose the records, the appellate court held that “[r]equireing the trial court to wait for live testimony before finding the Act’s privilege waived not only proves inefficient, but is an illogical interpretation of the Act.”\(^{42}\)

**Fundamental Fairness Exception**

Another exception exists for fundamental fairness. In such cases, if the information sought might absolve the defendant from liability, fundamental fairness may require the disclosure of records even if the recipient has not waived his privilege under the Act.

The Act’s clear mandate that only the *recipient* can introduce his mental condition as an element of his claim or defense has, at times, proved unjust in its application. In *Maxwell v. Hobart Corp.*, the Appellate Court, First District, upheld the trial court’s order and found that a food service worker who injured his hand in a waste machine introduced his condition for purposes of the Act.\(^{43}\) In *Maxwell*, the plaintiff’s blood alcohol level at the time of the accident...
The appellate court found that the plaintiff’s condition of sobriety had been introduced into the claim because it was a central, rather than peripheral, issue.

In *D.C. v S.A.*, the Illinois Supreme Court discredited the *Maxwell* decision and reiterated that “relevancy and centrality” are not decisive of whether a recipient has introduced his mental condition as an element of his claim or defense. *D.C. v. S.A.* involved a traffic accident during which the plaintiff, a pedestrian, was struck on the highway by a car driven by the defendant. During discovery, the defendant requested the plaintiff’s mental health records. The plaintiff, citing section 10(a)(1) of the Act, objected.

The plaintiff’s medical records revealed that, upon his discharge from the hospital following the accident, his doctor referred him for a psychiatric evaluation. His doctor indicated that plaintiff was being referred because plaintiff might have been attempting suicide at the time of the accident. After an *in camera* inspection of the relevant records, the trial court found that by alleging that he was exercising due care for his own safety, the plaintiff introduced his mental condition by simply filing suit.

On appeal, the Illinois Supreme Court began by finding that “under the terms of section 10(a)(1) something more is required for the introduction of a condition as an element of a claim even concerning those pertaining to liability.” It further held that, given the circumstances of the case, and the clear language of section 10(a)(1), the plaintiff did not introduce his mental condition as an element of his claim.

Nevertheless, the Court proclaimed, “[u]nder the circumstances presented here, fundamental fairness commands that the privilege yield.” The Court concluded that “the interests of fundamental fairness...overweigh the protections afforded the therapist-recipient relationship where [a] plaintiff seeks to utilize [the] protections [of section 10(a)(1)] 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.”

To date, the judicially constructed “fundamental fairness” exception to the Act’s confidentiality privilege has not been challenged. It is clear that, in order for this exception to be used, there must be some evidence that the recipient-plaintiff is seeking to hide information that would exculpate the defendant.

**Relevance**

Once the recipient’s mental condition is placed at issue, and the privilege is deemed waived, the court must determine if the evidence is admissible under the remaining elements of Section 10(a)(1). Although relevance is a separate inquiry for the trial court to determine, the Act specifically provides that the party seeking disclosure must establish a compelling need for the records or communications if they go beyond the mere fact of treatment, the cost of services, and the ultimate diagnosis. Criminal defendants who raise the insanity defense are specifically excluded from this provision.

Although the fact of treatment, cost of services, and ultimate diagnosis of the recipient are technically considered a “record” or “communication,” this limited information may be disclosed under certain circumstances without the recipient’s consent.

**When Recipient is Deceased**

The protections afforded a recipient under section 110/10(a)(1) are slightly less restrictive when the recipient is deceased. Section 110/10(a)(2) sets out the circumstances in which mental health records or communications may be measured.

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disclosed in a civil proceeding brought by a party on behalf of or as a beneficiary of the recipient after the recipient has died.61 Under this section, “the recipient’s physical or mental condition” must be introduced as an “element of a claim or defense by any party claiming or defending through or as a beneficiary of the recipient.”62 In addition, the court must find, after in camera examination, that the evidence is “relevant, probative, and otherwise clearly admissible; and that other satisfactory evidence is not available regarding the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from any injury which disclosure is likely to cause.”63

Under this provision, when compared with section (a)(1), no consideration must be given by the trial court as to whether the evidence is “unduly prejudicial or inflammatory.” Additionally, with regard to the court’s balancing test, alternative evidence of the recipient’s mental condition that is not privileged must be “demonstrably unsatisfactory as evidence of the facts sought to be established” if the recipient is still living. Alternatively, after the recipient’s death, “other satisfactory evidence is not available regarding the facts sought to be established.”64 Such language in the Act seems to require a higher level of proof as to the sufficiency of the alternative non-privileged evidence when the recipient is still living.

Use by the Therapist to Support a Defense

Section 10(a)(3) provides a more limited exception in civil cases, regardless of whether the recipient is living, or not, where the recipient is suing the therapist.65 Under such circumstances, records or communications may be disclosed by the therapist to his attorneys, but are not ipso facto admissible at trial. Rather, the therapist may “testify as to such records or communication in any administrative, judicial or discovery proceeding.”66

Records or Communications From and For Use in a Court-ordered Exam

The Act also permits the nonconsensual disclosure of mental health records and communications made in the course of an examination ordered by the court for good cause shown.67 The recipient must be a party to the proceeding and the records must be relevant and otherwise admissible.68 Similarly, prior mental health records and communications can be disclosed to a court-appointed therapist for use in determining the recipient’s fitness to stand trial.69 The records, however, must have been made within 180 days of the court-appointed examination.

Proceeding Involving Validity or Benefits Under An Insurance Policy

Records may be disclosed over the objection of the recipient to an insurance company when a dispute arises over whether or not the recipient lied on his application for life insurance.70 This exception also applies when the issue involves the validity of benefits under a health, disability, or accident policy.71

Subpoena Procedure

Section 10(d) of the Act sets forth the procedure for obtaining such records or communications by subpoena, as follows:
No party to any [civil proceeding], 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 or by the written consent under Section 5 of this Act of the person whose records are being sought, authorizing the disclosure of the records or the issuance of the subpoena.72

It is important for counsel pursuing such records with a consent to ensure that the consent contains all of the specifications provided by Section 5(b): (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; and (7) the right to revoke the consent at any time. The signing of the consent form must also be witnessed.73

In situations where counsel is pursuing records with a consent, it is advisable to also include a subpoena. Otherwise, court enforcement will not be an option in the event the therapist ignores the consent. The fact that a plaintiff could communicate revocation of the consent without defense counsel’s knowledge also makes reliance on a consent alone problematic. Notwithstanding Section 10(d)’s allowance for a subpoena supported by a consent rather than an order, defense counsel should be warned that plaintiff’s counsel might attempt to argue that Section 10(a) still requires the court’s in camera examination and findings discussed above for the records and communications to be “disclosed in a civil … proceeding.”74

Without the written consent, “no person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records.”75 Moving counsel must take great care in both obtaining and drafting the order. Moving counsel should consider filing the motion under seal, with redactions, or with some guidance from the court to keep the sensitive information out of the public court file.

Any order attached to a subpoena pursuant to Section 10(d) must be obtained with written notice of the motion to the recipient and the treatment provider.76 In other words, counsel must provide proper advance notice to both the recipient of the mental health care and the provider of the treatment. Prior to issuance of the order, each party or other person entitled to notice shall be permitted an opportunity to be heard, including a request for an in camera review of the record or communication to be disclosed.77 A treatment provider may contest entry of the order or the breadth of the order even against the wishes of the treatment recipient on the basis that it would not be “in the best interest of the recipient.”78

Moving counsel must be prepared to establish that disclosure is relevant and probative, that disclosure will not be unduly prejudicial or inflammatory, that disclosure is admissible, evidence other than that within the confidential record is “demonstrably unsatisfactory,” and 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.”79 Section 10(a)(1) provides that “no 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.”80 Moving counsel must be ready to convince the court as to why disclosure of more than just the simple basics of the treatment is necessary. A recipient of mental health services waives the confidentiality of her records only if she affirmatively places her own mental condition at issue.81
The Order (or the consent) should detail exactly what material is to be disclosed, exactly where it is to be sent, and exactly who will be permitted access. Much like drafting a protective order involving trade secrets, defense counsel should consider drafting the order to include permitted disclosure to attorneys, experts, consultants, other treating physician deponents, officers, directors, and insurers of named parties where appropriate. Making the records returnable to a copy service is not advisable. The order should include a finding that the movant has demonstrated good cause for discovery of the subject confidential records. It is also helpful to draft the order in such a way that it contemplates any necessary depositions of mental health treatment providers.

Importantly, to be valid, each subpoena issued by a court or served on any person pursuant to Section 5(d) of the Act must include the following language:

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

Beware of Civil Actions and Criminal Penalties for Violations of the Act

Section 15 of the Act provides “[a] person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief” and further “[r]easonable attorney’s fees and costs may be awarded to the successful plaintiff in any action under this Act.” Section 10(d) prohibits all “persons” from complying with an improperly served subpoena. A cause of action exists against a therapist who improperly discloses the confidential material. Similarly, a cause of action exists against an attorney who causes subpoenas to be served for mental health records without following the numerous strictures of the Act. Moreover, Section 16 of the Act provides “[a]ny person who knowingly and willfully violates any provision of this Act is guilty of a Class A misdemeanor.”

Conclusion

The Mental Health and Developmental Disabilities Confidentiality Act is a clear statement from the General Assembly about the importance of keeping mental health records and communications confidential. The Act makes use of HIPAA’s preemption exception that allows states to pass more stringent confidentiality laws. Exceptions to the Act are very narrow. As such, defense counsel should take great care in making sure all steps are met under the Act when seeking this type of information in litigation. Noncompliance could result in civil or criminal penalties. Additionally, because the Act calls for a court order prior to a subpoena as well as an in camera review after the records are released, counsel should necessarily be prepared to argue that the recipient has opened the door by introducing his mental condition, and display to the court the need for the records, and that no other non-privileged evidence will do. Even if the court denies the request for disclosure, clients are likely to appreciate the attempt.
Defence counsel may be called upon to prevent disclosure of such records when representing health care providers in an array of contexts. The task of protecting mental health records from disclosure (or failing to protect records from disclosure as a therapist) is outside the scope of this article. Depending on their purposes, readers may also benefit from familiarizing themselves with related laws including 405 ILCS 5/1-100, et seq., the “Mental Health and Developmental Disabilities Code” and 45 CFR §§ 160 and 164.

Deprizio v. MacNeal Memorial Hospital Association, 2014 IL App (1st) 123206, ¶ 16; Reda v. Advocate Health Care, 199 Ill. 2d 47, 60 (2002); Norskog v. Pfiel, 314 Ill. App. 3d 877 (1st Dist. 2000).

See 45 CFR Parts 160 & 164.

45 CFR § 160.203(b).

740 ILCS 110/1 et seq.

Id.

Sangirardi v. Village of Stickney, 342 Ill. App. 3d 1, 16 (1st Dist. 2003).


740 ILCS 110/3(a).

Id. 110/2.

Id.

Id.

Id.

Id.; see also People v. Robert P., 354 Ill. App. 3d 1051, 1060 (3d Dist. 2005).


Quigg, 388 Ill. App. 3d at 703.


People v. Campobello, 348 Ill. App. 3d 619, 627 (2d Dist. 2004).

740 ILCS 110/16.

Id. § 110/10(a)(8).

Id. §110/5(b).

Id. §110/5(c).


Goldberg, 215 Ill. App. 3d at 942.


740 ILCS 110/10(b).

Id.

Id.
Id. §110/10(a).

Id. §110/10(a)(1).

Id.

Id.

Norskog, 314 Ill. App. 3d at 883.

Reda, 199 Ill. 2d at 58.

Id.

Id.

Id.

Reda, 199 Ill. 2d at 56.

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

Deprizio, 2014 IL App (1st) 123206, ¶ 27.

Id. ¶ 3.

Id. ¶¶ 5, 8.

Id. ¶ 28.


Id. at 109.

Id. at 115.


Id. at 555.

Id.

Id.

Id.

Id.

Id. at 556.

Id. at 566.

Id. at 567.

Id. at 568.

Id. at 570.

See Deprizio, 2014 IL App (1st) 123206, ¶ 30; People v. Gemeny, 313 Ill. App. 3d 902, 911-912 (2d Dist. 2000); Reda, 199 Ill. 2d at 62.

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

Id.
See 740 ILCS 110/11(iv) (disclosure necessary to collect sums or payment for services rendered); 740 ILCS 110/11(vii) (when necessary to comply with the requirements of the federal census); 740 ILCS 110/11(viii) (when necessary to prevent harm when the recipient has made a specific threat of violence); 740 ILCS 110/11(ix-xii) (in accordance with certain Acts involving sex offenders, crime victims, and abused or disabled adults).

740 ILCS 110/10(a)(2).

Id.

Id.

Id. §110/10(a)(1)-(2).

Id. §110/10(a)(3).

Id.

Id. §110/10(a)(4).

Id.

Id. §110/10(a)(6).

Id. §110/10(a)(7).

Id.

Id. (emphasis added)

Id. §110/5(b).

Id. §110/10(a)(1).

Id.

Id. §110/10(d).

Id.

Id. §110/10(b).

Id. §110/10(a)(1)

Id. (emphasis added).

Sassali v. Rockford Memorial Hospital, 296 Ill. App. 3d 80, 83 (2d Dist. 1998).

740 ILCS 110/10(d).

Id. §110/5.

Sassali, 296 Ill. App. 3d at 82.
About the Authors

N. Drew Kemp is an associate at Thompson Coburn LLP. He is a trial attorney and practices product liability, FELA litigation, and toxic tort defense. Mr. Kemp obtained his law degree from the University of Missouri in 2013.

Howard L. Huntington is a partner at Bullaro & Carton, P.C. in Chicago. He focuses his practice on construction, product liability, commercial, business, public entity, civil rights, and transportation litigation. He has defended a wide variety of high-stakes matters in Illinois and Indiana. He serves on the IDC Local Government Committee and is a member of various other associations, including Defense Trial Counsel of Indiana. Mr. Huntington has defended municipalities and public entities in Title VII discrimination cases, Section 1983 public employee cases, employment contract, and other matters in both Illinois and Indiana. He received a B.A. in political science from the University of Illinois at Urbana-Champaign and his J.D. from Chicago-Kent College of Law. He is AV rated by Martindale-Hubbell.

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