

APPENDIX "A" - 42 C.F.R., PART 2

Federally funded (in whole or in part, i.e., direct or indirect services or funding) alcohol and drug treatment information is confidential but may be disclosed without client consent, by court order, if the Court finds:

1. The disclosure is necessary to protect against an existing threat to life or serious bodily injury, (this includes child abuse and neglect and verbal threats;
2. The disclosure is necessary in connection with the investigation or prosecution of an extremely serious crime;
3. The disclosure is necessary in connection with litigation or other administrative proceedings in which the patient offers testimony or other evidence of the confidential communications.

42 C.F.R., Part 2 § 2.63 (October 1999)

An order entered by a Court under these regulations in a civil proceeding must:

1. Result from an Application;
2. Be served upon the Patient;
3. Allow for a written response;
4. Come out of a hearing process that protects the patient from unnecessary disclosure of confidential information prior to the ruling;
5. Come out of a hearing that is held in private unless the patient requests that it be public;
6. Contain findings that good cause exists for the disclosure and that:
 - a. Other ways of finding out the information are not available or would not be effective; and
 - b. The public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services;
7. An order authorizing disclosure must:
 1. Limit disclosure to only those portions of the records which are essential to fulfill the objective of the order;
 2. Limit disclosure to those persons whose need for information is the basis for the order; and
 3. Include such other measures as are necessary to limit the disclosure for the protection of the patient, the physician-patient relationship and the treatment services (i.e., prohibition of re-disclosure; sealing of files, etc.)

42 C.F.R., Part 2 § 2.64 (October 1999)

APPENDIX "B"

**SUBTITLE E. SPECIAL PROVISIONS RELATING TO MENTAL ILLNESS AND MENTAL
RETARDATION**

CHAPTER 611. MENTAL HEALTH RECORDS

§ 611.001. Definitions

In this chapter:

(1) "Patient" means a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction.

(2) "Professional" means:

(A) a person authorized to practice medicine in any state or nation;

(B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or

(C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

§ 611.002. Confidentiality of Information and Prohibition Against Disclosure

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

(c) This section applies regardless of when the patient received services from a professional.

§ 611.003. Persons Who May Claim Privilege of Confidentiality

(a) The privilege of confidentiality may be claimed by:

(1) the patient;

(2) a person listed in Section 611.004(a)(4) or (a)(5) who is acting on the patient's behalf; or

(3) the professional, but only on behalf of the patient.

(b) The authority of a professional to claim the privilege of confidentiality on behalf of the patient is presumed in the absence of evidence to the contrary.

§ 611.004. Authorized Disclosure of Confidential Information Other than in Judicial or Administrative Proceeding

(a) A professional may disclose confidential information only:

(1) to a governmental agency if the disclosure is required or authorized by law;

(2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient;

(3) to qualified personnel for management audits, financial audits, program evaluations, or research, in accordance with Subsection (b);

(4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs;

(5) to the patient's personal representative if the patient is deceased;

(6) to individuals, corporations, or governmental agencies involved in paying or collecting fees for mental or emotional health services provided by a professional;

(7) to other professionals and personnel under the professionals' direction who participate in the diagnosis, evaluation, or treatment of the patient;

(8) in an official legislative inquiry relating to a state hospital or state school as provided by Subsection (c);

(9) to designated persons or personnel of a correctional facility in which a person is detained if the disclosure is for the sole purpose of providing treatment and health care to the person in custody;

(10) to an employee or agent of the professional who requires mental health care information to provide mental health care services or in complying with statutory, licensing, or accreditation requirements, if the professional has taken appropriate action to ensure that the employee or agent:

(A) will not use or disclose the information for any other purposes; and

(B) will take appropriate steps to protect the information; or

(11) to satisfy a request for medical records of a deceased or incompetent person pursuant to Section 4.01(e), Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes).

(b) Personnel who receive confidential information under Subsection (a)(3) may not directly or indirectly identify or otherwise disclose the identity of a patient in a report or in any other manner.

(c) The exception in Subsection (a)(8) applies only to records created by the state hospital or state school or by the employees of the hospital or school. Information or records that identify a patient may be released only with the patient's proper consent.

(d) A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. This subsection does not apply to a person listed in Subsection (a)(4) or (a)(5) who is acting on the patient's behalf.

§ 611.0045. Right to Mental Health Record

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health

and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.

(d) The professional who denies access to a portion of a record under this section shall redetermine the necessity for the denial at each time a request for the denied portion is made. If the professional again denies access, the professional shall notify the patient of the denial and document the denial as prescribed by Subsection (c).

(e) If a professional denies access to a portion of a confidential record, the professional shall allow examination and copying of the record by another professional if the patient selects the professional to treat the patient for the same or a related condition as the professional denying access.

(f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.

(g) A professional shall delete confidential information about another person who has not consented to the release, but may not delete information relating to the patient that another person has provided, the identity of the person responsible for that information, or the identity of any person who provided information that resulted in the patient's commitment.

(h) If a summary or narrative of a confidential record is requested by the patient or other person requesting release under this section, the professional shall prepare the summary or narrative.

(i) The professional or other entity that has possession or control of the record shall grant access to any portion of the record to which access is not specifically denied under this section within a reasonable time and may charge a reasonable fee.

(j) Notwithstanding Section 159.002, Occupations Code, this section applies to the release of a confidential record created or maintained by a professional, including a physician, that relates to the diagnosis, evaluation, or treatment of a mental or emotional condition or disorder, including alcoholism or drug addiction.

(k) The denial of a patient's access to any portion of a record by the professional or other entity that has possession or control of the record suspends, until the release of that portion of the record, the running of an applicable statute of limitations on a cause of action in which evidence relevant to the cause of action is in that portion of the record.

§ 611.005. Legal Remedies for Improper Disclosure or Failure to Disclose

(a) A person aggrieved by the improper disclosure of or failure to disclose confidential communications or records in violation of this chapter may petition the district court of the county in which the person resides for appropriate relief, including injunctive relief. The person may petition a district court of Travis County if the person is not a resident of this state.

(b) In a suit contesting the denial of access under Section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access.

(c) The aggrieved person also has a civil cause of action for damages.

§ 611.006. Authorized Disclosure of Confidential Information in Judicial or Administrative Proceeding

(a) A professional may disclose confidential information in:

(1) a judicial or administrative proceeding brought by the patient or the patient's legally authorized representative against a professional, including malpractice proceedings;

(2) a license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(3) a judicial or administrative proceeding in which the patient waives the patient's right in writing to the privilege of confidentiality of information or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(4) a judicial or administrative proceeding to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(5) a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, except that those communications may be disclosed only with respect to issues involving the patient's mental or emotional health;

(6) a judicial proceeding affecting the parent-child relationship;

(7) any criminal proceeding, as otherwise provided by law;

(8) a judicial or administrative proceeding regarding the abuse or neglect, or the cause of abuse or neglect, of a resident of an institution, as that term is defined by Chapter 242;

(9) a judicial proceeding relating to a will if the patient's physical or mental condition is relevant to the execution of the will;

(10) an involuntary commitment proceeding for court-ordered treatment or for a probable cause hearing under:

(A) Chapter 462;

(B) Chapter 574; or

(C) Chapter 593; or

(11) a judicial or administrative proceeding where the court or agency has issued an order or subpoena.

(b) On granting an order under Subsection (a)(5), the court, in determining the extent to which disclosure of all or any part of a communication is necessary, shall impose appropriate safeguards against unauthorized disclosure.

§ 611.007. Revocation of Consent

(a) Except as provided by Subsection (b), a patient or a patient's legally authorized representative may revoke a disclosure consent to a professional at any time. A revocation is valid only if it is written, dated, and signed by the patient or legally authorized representative.

(b) A patient may not revoke a disclosure that is required for purposes of making payment to the professional for mental health care services provided to the patient.

(c) A patient may not maintain an action against a professional for a disclosure made by the professional in good faith reliance on an authorization if the professional did not have notice of the revocation of the consent.

§ 611.008. Request by Patient

(a) On receipt of a written request from a patient to examine or copy all or part of the patient's recorded mental health care information, a professional, as promptly as required under the circumstances but not later than the 15th day after the date of receiving the request, shall:

(1) make the information available for examination during regular business hours and provide a copy to the patient, if requested; or

(2) inform the patient if the information does not exist or cannot be found.

(b) Unless provided for by other state law, the professional may charge a reasonable fee for retrieving or copying mental health care information and is not required to permit examination or copying until the fee is paid unless there is a medical emergency.

(c) A professional may not charge a fee for copying mental health care information under Subsection (b) to the extent the fee is prohibited under Subchapter M, Chapter 161.

APPENDIX “C” - TEX. R. CIV. EVID.510

General Rule of Privilege

1. Communication between a patient and a professional is confidential and shall not be disclosed;
2. Records of the identity, diagnoses, evaluation or treatment of a patient which are created or maintained by a professional are confidential in and shall not be disclosed;
3. Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Tex.R.Civ.Evid 510(b) (1) (2) (3)

Who May Claim Privilege

1. The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf;
2. The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

Tex.R.Civ.Evid 510(c) (1) (2)

Exceptions:

1. In malpractice or license revocation actions;
2. Patient's written waiver;
3. Collection of fees;
4. Communications made in court-ordered examinations after the party making them has been informed they are not privileged.
5. When the issue is relevant to the physical, mental or emotional condition of the client and it is being relied upon as part of the claim or defense;
6. In an abuse or neglect proceeding concerning either conduct or the cause(s) thereof.

Tex.R.Civ.Evid.510(d)

APPENDIX "D"

Abrams v. Jones., 35 S.W. 3rd 620 (Tex. 2000)

When the uncontradicted opinion of a child's psychologist establishes that disclosure of confidential mental health information to a parent would be harmful to the child, the records are protected from disclosure under 611.045 (b) Tex. Health and Safety Code. This confidentiality supercedes a specific decree or modification order and §153.073 of the Texas Family Code. It also reflects an intent of the legislature to recognize that parents do not always act on behalf of or for the benefit of these children.

APPENDIX "E"

CAUSE NO. 2003-00000

IN THE INTEREST OF

JANE SMITH

CHILD

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

MOTION TO QUASH

COMES NOW, JILL HOWARD and files this Motion to Quash the Subpoena and Subpoena Duces Tecum issued by John Smith ("Respondent") and in support thereof would respectfully show in the Court the following:

I.
FACTS

On April 14, 2003 Movant was served with a Subpoena to appear and a Subpoena Duces Tecum to bring documents (*to Court, to deposition or administrative hearing*) that are confidential and protected from disclosure by federal and state laws, rules and regulations. Movant seeks protection from the forced disclosure of confidential, privileged and protected health information.

II.
A. RECORDS PERTAINING TO ALCOHOL AND DRUG ABUSE TREATMENT
(42 CFR, Part 2)

Movant received subpoena to produce records related to alcohol and drug abuse treatment which is funded directly or indirectly by the federal government. All such records are confidential and federal regulations require the following prior to the issuance of the subpoena:

- a. Notice to the facility or treatment provider;
- b. Notice to the patient;
- c. A confidential court hearing (unless the patient requests that it be public);
- d. Court approval of the subpoena.

42 C.F.R., Part 2 §2.64

Respondent failed to provide the prior notice or secure the prior Court approval. The mandatory good cause finding was not made. The required finding that other ways of discovery of

the information are not available or would not be effective was not made. The required finding that the public interest and the need for disclosure outweigh the potential injury to the patient, the physician -patient relationship and the treatment services was not made. **42 C.F.R., Part 2 §2.63**

Since Respondent failed to comply with the foregoing requirements (and actually committed a misdemeanor for not getting court approval prior to issuance and service of the subpoena) the subpoena should be quashed.

In addition, prior to mandatory the disclosure of these confidential records, the Court must:

1. Limit the disclosure to only those portions of the records which are essential to fulfill the objective of the order;
2. Limit disclosure to those persons whose need for information is the basis of the order; and
3. Include such other measures as are necessary to limit the disclosure for the protection of the patient, the physician-patient relationship and the treatment services (i.e. prohibition of re-disclosure, sealing of files, etc.) **42 C.F.R., Part 2 §2.64**

Since this has not occurred, the subpoena should be quashed.

[AND/OR]

B. MENTAL HEALTH RECORDS (CH. 611 TEX. HEALTH AND SAFETY CODE)

Movant has determined that release of information requested in the subpoena would be harmful to the patient's physical, mental or emotional health. Movant, having made such a determination, cannot be compelled to disclose any such records. **Tex. Health and Safety Code §611.045(b); Abrams v. Jones 35 S.W. 3rd 620 (Tex. 2000).**

[AND/OR]

C. MENTAL HEALTH PROVIDER/PATIENT PRIVILEGE (TEXAS RULES EVIDENCE 510)

Confidential Communications between a MHP and a client are confidential and shall not be disclosed absent some exceptions to the privilege **TRE 510(b)**. On March 1, 1998, the SAPCR exception to the privilege was repealed. The only applicable exception is if the information is relevant to a claim or defense of litigation. **TRE 510 (d) (5)**. The competing public policies of the need for full disclosure and the need for confidentiality have been resolved in favor of the

confidential relationship. **Gaynier v. Johnson**, 673 S.W. 2d 899 (Tex. App. - - Dallas 1984, no writ); **Wade v. Abdnor**, 635 S.W. 2d 937 (Tex. App. - - Dallas 1982, writ dismissed).

Simply making claim regarding the condition is not sufficient. **Dossey v. Salazar**, 808 S.W. 2d 146 (Tex. App. - - Houston, [14th Dist] 1991, original proceeding).

Private medical and mental health records should not become a matter of public record or public knowledge solely because a person either seeks redress or defends in court. **R.K. v. Ramirez**, 887 S.W. 2d 836, 839-840 (Tex. 1994). Relevance alone cannot be the test. If it was, the intent of evidentiary privilege would be circumvented. **R.K. v. Ramirez at 842**. Just because a condition may be relevant, does not mean that it is relied upon and the trial court has the heavy responsibility to look beyond the mere assertion that a patient's condition is arguably relevant. The Court must use great care when permitting discovery of such sensitive information, should redact or delete matters outside the scope of the exception and prevent any disclosure beyond that which is necessary. **R.K. v. Ramirez, at 842, 844**.

[AND/OR]

D. DISCOVERY RULES AND RECORDS OF PARTY

Movant has asserted and continues to assert a privilege and objects to the disclosure of (*describe records*) and requests a hearing and an *in camera* inspection. **Tex. R. Civ. P. 193.3; 193.4 (for depositions 199.6)**

[AND/OR]

E. DISCOVERY RULES AND RECORDS OF NON-PARTIES

Movant is required to protect the confidentiality of these records. **Tex. R. Civ. P. 196 (c)(3)**. See also **Tex. Health and Safety Code. §611.002 and §611.003**. Notice of Discovery was not served upon the non-party at least ten (10) days prior to the issuance of the subpoena. **Tex. R. Civ. P. 205.2**

[AND/OR]

F. DISCOVERY LIMITATIONS

The Subpoena was served later than 30 days prior to the end of the discovery period (**Tex. R. Civ. P. 205.3**).

[AND/OR]

Notice of the subpoena was not provided to Movant whose records are being requested. **Tex. R. Civ. P. 205.3 (c)**.

Accordingly, the subpoena should be quashed.

[AND/OR]

G. STATE LAW REQUIRES DELETIONS AND POTENTIAL DISTORTIONS OF THE RECORDS

Movant would show that state law requires the MHP to delete from the records, all references to other persons who do not consent to the disclosure. **Tex. Health and Safety Code §611.0045 (g)**. The deletion of all references to all other persons distorts the purpose, intent and meaning of the records and provides the court with inaccurate and incomplete information.

[AND/OR]

H. PROTECTED HEALTH INFORMATION UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (“HIPAA”)

On December 20, 2000 **Executive Order No. 13181**, imposed the balancing test of **42 CFR, Part 2 §2.63** on all protected health care information. Supported by the Health Insurance Portability and Accountability Act of 1996, **42 U.S.C 1320d, et seq.** and the regulations issued thereunder at **45 CFR, Part 160**, Movant is required to refuse to honor the subpoena because:

1. There was no court order accompanying the subpoena compelling the disclosure;

[AND/OR]

2. Movant has not received satisfactory assurance that reasonable efforts have been made by Respondent to ensure that the individual who is the subject of the protected health information has been given notice of the request.

[AND/OR]

3. Movant has not received satisfactory assurances that reasonable efforts have been made to secure a qualified protective order prohibiting the parties from using or disclosing the protected information for any purpose other than the litigation and

requiring the return to Movant or the destruction of the records (and all copies) at the end of the litigation. **45 CFR §164.512**.

While HIPAA does not lessen the stricter requirements of state law, it does preempt all lesser protections and all other provisions of state law that conflict with the federal law. **45 CFR, Part 160.201 and 202.**

The subpoena is overly broad and seeks psychotherapy notes which have been maintained separately from other records and which are therefore protected under HIPAA **(164.501)** While federal law restricts the disclosure of psychotherapy notes, this does not exclude medication prescription and monitoring, counseling session start and stop time, the modalities and frequencies of treatment furnished, results of clinical test and any summary of the following items: diagnosis, functional status, the treatment plan symptoms, prognosis, and prognosis to date. This information has been offered and will be provided. However, Respondent asserts the disclosures will be incomplete **(164.501)**

[AND/OR]

I. CLINICAL SUMMARIES

Under **Tex. Health and Safety Code §611.0045 (h)** and **45 CFR, Part 164.501**. Movant offered to prepare a clinical summary or narrative of the otherwise confidential and protected health information. Movant's offer was refused. Accordingly, Movant requests that the subpoena be quashed. In the alternative, if some disclosure is ordered, Movant requests that it be made in summary or narrative form.

**III.
FEES AND EXPENSES OF MENTAL HEALTH MHP**

Furthermore, as a covered entity, Movant is entitled to recover the costs of copying, supplies, labor costs, postage and the cost of the summary or explanation. **45 CFR, Part 164.524**. Accordingly, Movant requests an award of reasonable fees and expenses

WHEREFORE, PREMISES CONSIDERED, Movant prays that the subpoena to be quashed, in whole or in part as requested herein. Movant requests an award of reasonable attorneys fees and expenses. Movant prays for general relief.

Respectfully submitted,

WILLIAM B. CONNOLLY & ASSOCIATES

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ATTORNEY FOR MOVANT

NOTICE OF HEARING

A hearing on the foregoing Motion to Quash Subpoena has been set on the 17th day of April, 2003, at 9:00 o'clock a.m., in the _____ Judicial District Court, Harris County, Texas.

William B. Connolly

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Quash was forwarded to _____, via certified mail, postage prepaid, messenger delivery or facsimile transmission, return receipt requested on this the _____ day of April, 2003.

William B. Connolly

APPENDIX "F"

CAUSE NO. 2003-00000

IN THE INTEREST OF

JANE SMITH

CHILD

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

RESPONSE IN OPPOSITION TO MOTION TO QUASH

COMES NOW, JOHN SMITH, Respondent (“Respondent”) to JILL HOWARD’S Motion to Quash and files this Response in Opposition to Motion to Quash in support thereof would respectfully show in the Court the following:

I.
FACTS

On April 14, 2003 Respondent served Movant, Jill Howard with a subpoena. Movant has refused to provide such records, in whole or in part. The records sought are either not privileged and confidential, the confidentiality has been waived, the proper procedures have not been followed and restriction on the availability of these records violate state and federal law.

II.

A. RECORDS PERTAINING TO ALCOHOL AND DRUG ABUSE TREATMENT
(42 CFR, Part 2)

This disclosure is necessary to protect against an existing threat to life or serious bodily injury, including child abuse and neglect. If the patient intends to take the witness stand and speak to any fact issue or opinion which relates in anyway to the confidential information being withheld, the information should be disclosed.

Good cause exists for the disclosure because

- a. Other ways of finding out the information are not available or would not be effective; and
- b. The public interest and need for disclosure outweigh the potential injury to the patient physician-patient relationship and the treatment services.

[AND/OR]

B. MENTAL HEALTH RECORDS (CH. 611 TEX. HEALTH AND SAFETY CODE)

Movant did not follow the procedures set forth in **Tex. Health and Safety Code §611.045** or **Abrams v. Jones, 35 S.W. 3d 620 (Tex. 2000)**. Respondent was never contacted relative to the denial of the records.

[AND/OR]

C. MENTAL HEALTH PROVIDER/PATIENT PRIVILEGE (TEXAS RULES EVIDENCE 510)

The information is relevant to the claims and defenses in this child custody litigation. How could the mental health of the parties not be in issue in a custody proceeding? Petitioner, Jane Smith has been the recent subject of mental health treatment. While the SAPCR exception to confidentiality for parent child relationship action was repealed from **TRE 510** in March 1998, the comments place the exception into the relevant to the claims or defense section. Furthermore, the SAPCR exception to confidentiality still exists under **Chapter 611 of the Health and Safety Code. §611.006(a)(6)**.

[AND/OR]

D. DISCOVERY RULES AND RECORDS OF PARTY

While an in camera inspection is authorized, it should not be used as a method to shield highly relevant information from trier of fact. **TRCP193.3;193.4 (for depositions 199.6)**

[AND/OR]

E. DISCOVERY RULES AND RECORDS OF NON-PARTIES

Although Respondent may have inadvertently failed to give the required notice to the non-party, the fact is that Movant has offered her objections in a timely fashion and asserted any privilege she felt proper. Thus, the purpose of the rule has been fulfilled. It makes no sense to Quash the subpoena, just to have the process start all over again. To rule otherwise would be to endorse unnecessary expense and delay. **Tex. R. Civ. P. 205.2**

[AND/OR]

F. DISCOVERY LIMITATIONS

Respondent has diligently pursued discovery in this case. A request for Production was served upon Petitioner, Jane Smith pursuant to **Tex. R. Civ. P. 196**. No objections to these records were made. **Tex. R. Civ. P. 193**. Even though Jane Smith has constructive possession of these records (obtainable by release) they were not produced. **Tex. R. Civ. P. 192.3(b) and 192.7 (b)**. All objections were waived **Tex. R. Civ. P. 193.2 (e)**. The responses that were made were delayed at Petitioner's request. Ultimately the disclosures that were made were incomplete and Respondent sought the discovery from the third parties. Petitioner should not be allowed to obstruct discovery, then use the law as a weapon for the exclusion of relevant information.

[AND/OR]

G. STATE LAW REQUIRES DELETIONS AND POTENTIAL DISTORTIONS OF THE RECORDS

In previous efforts to deal with the family problems, Respondent actually provided Movant with information about the patient. These records are not confidential. **Tex. Health and Safety Code §611.0045(g)**. Furthermore, if certain information has to be deleted and as a result the meaning of the records become distorted, an "in camera" inspection of all of the information is warranted. **TCRP 193.3; 194.3**. Distortion should not be an excuse for exclusion of otherwise very relevant information. The professional can explain all such distortion at deposition and/or trial but should not be allowed to hide information that precludes discovery of information that will guide the court on decisions affecting the best interests of the child.

[AND/OR]

H. PROTECTED HEALTH INFORMATION UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 ("HIPAA")

Respondent secured a court order authorizing and compelling the disclosure and/or believed it to be unnecessary due to Respondent's compliance with the following sections.

[AND/OR]

2. Respondent provided satisfactory assurance to Petitioner and to Movant that reasonable efforts have been made to protect confidential information. In this regard, Respondent has provided both Petitioner and Movant with written assurance that the information is being sought for the purpose of this litigation only and that all records would be returned, destroyed or sealed with the District Court if admitted into evidence. Movant has proposed that a qualified protective order be issued pursuant to **45 CFR, Part 164.512** and the offer has been refused.

Because of the length time needed to secure a hearing, Respondent has pending a request for qualified protective order. **45 CFR, Part 164.512(1)(ii)(B); (iv) and (v)**.

[AND/OR]

The parent/guardian has the right to this information pursuant to the **Tex. Health and Safety Code 611.004(a)(4)**. This information is not protected by HIPAA. If the protected health information of a minor is sought by a parent, guardian or person acting in *loco parentis* the federal preemption of state law does not apply **45 CFR, Part 160.202 (s)**.

[AND/OR]

This relationship has been the subject of much controversy within the family. Respondent is seeking conservatorship as a result of incidents of repeated intoxications, domestic violence and/or abuse and neglect of the children. Accordingly, these records are not protected under the provisions of HIPAA. **45 CFR, Part 164.502**.

[AND/OR]

The public policy of this state it to allow a state district court with access to any and all relevant information that would assist in the determination of what orders would be in the best interest of the child. Psychotherapy notes are frequently the most important source of information and the only method the professional has to provide accurate testimony. The simple assertions of privilege and/or separation is not a sufficient response under **45 CFR, Part 164.501**. Respondent request that Movant be required to prove all elements of the qualified privileges and protections under HIPAA.

[AND/OR]

I. CLINICAL SUMMARIES

Respondent believes there is a valid public policy behind the protection of health information. However, it is totally inappropriate and incorrect to interpret these protections to allow a professional to determine the relevance and admissibility of information in a custody proceeding. To allow a professional to protect their own client, put a favorable spin on the actual records, create subjective after the fact summaries from contemporaneous objective and subjective entries, and avoid examination on highly relevant subject areas, gives the professional power to usurp the authority of this court and charge Movant money for the ability to distort the evidence. Both **Tex. Health and Safety Code §611.0045(h) and 42 CFR, Part 164.501** were designed, in part, to prevent the professional from having to disclose the detailed notes to the Client. The Court must

assess the importance and relevance of all of the records, on a case by case basis, so that the proper decision can be made on this issue.

III. FEES AND EXPENSES OF MENTAL HEALTH MHP

Petitioner failed to object or disclose this information upon proper discovery request. Respondent has been forced to a great deal of additional legal expense to attempt to secure information which Petitioner could have provided by signing a Release of Confidential Information. Furthermore, the facts of this case provide exceptions to the applicability of HIPAA. Accordingly, Respondent requests the Court to assess all expenses, if any can be ordered in this case, against Petitioner.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Motion to Quash be denied, in whole or in part, as requested herein. Respondent requests an award of reasonable attorneys fees and expenses. Respondent prays for general relief.

Respectfully submitted,

WILLIAM B. CONNOLLY & ASSOCIATES

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State Bar No. 04702400

ATTORNEY FOR MOVANT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response in Opposition to Motion to Quash was forwarded to _____, via certified mail, postage prepaid, messenger delivery or facsimile transmission, return receipt requested on this the 21st day of April, 2003.

William B. Connolly