

**MENTAL HEALTH PROFESSIONALS
AND THE CHANGING EVIDENCE
RULES:
BEST INTEREST, PROTECTED
HEALTH INFORMATION AND HIPAA**

Presented at
Houston Bar Association
Family Law Section Meeting
June 4, 2003

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MENTAL HEALTH PROFESSIONALS AND THE CHANGING EVIDENCE RULES: BEST INTEREST, PROTECTED HEALTH INFORMATION AND HIPAA

by **William B. Connolly**

I. **INTRODUCTION**

When competing valid public policy issues clash in the political arena the end result is statutory or regulatory enactments which either obstruct disclosure or protect confidentiality, depending upon your perspective. The judge or jury in a suit affecting the parent-child relationship (“SAPCR”) believe that as fact finders, they should have access to all relevant information in making a conservatorship determination. Likewise, a parent in need of medical, psychiatric, psychological, counseling or alcohol or drug rehabilitation services wants to be able to trust his/her health care providers. They firmly believe that it is critically important that they should be able to disclose and confide complete and thorough details of their lives, conditions and issues without having this same information subsequently used against them in a courtroom. The compelled disclosure of information, believed to be confidential, is viewed as betrayal. This betrayal can be compounded if the disclosure is forced by the Court at the behest of the very person who is the subject of the relationship or issues which precipitated the treatment in the first instance. For example, if a client goes to Mental Health Professional (“MHP”) complaining of an alcoholic spouse who engages in domestic violence, what better way is there to drive a wedge in the sometimes delicate therapeutic relationship than to allow the abusive spouse to force the therapist to court and have the Judge force the adversarial disclosure of entrusted confidences against the treatment and legal interests of the client.

In a culture where divorce is prevalent, we are at a crossroads of two (2) valid and conflicting public policies, i.e. therapeutic confidentiality versus full disclosure in suit affecting the parent- child relationship.

II. **THERAPEUTIC RELATIONSHIPS, CONFIDENTIALITY** **AND THE DETERMINATION OF HARM**

When one or both of the parties in a SAPCR are or have been involved in some form of treatment or therapy, parenting issues are usually involved. When there are no releases from family or the children or an adult parent or guardian for the children, a myriad of issues arise for the MHP and for the parents. As an example, under the professional ethical requirements of a Marriage and Family Therapist, the **family** is the client and in the absence of a comprehensive release, information should not be disclosed. Furthermore, when, in the MHP’s professional opinion, the disclosure and

release of this information will be harmful to the physical, mental or emotional health of their Client, refusal to disclose is a duty. Persistence in the attempts to secure these records by the other parent could present the MHP with additional support for the belief that the seeking parent wants the right to use the other party's therapeutic work as ammunition in the SAPCR and that would be harmful to the client and her family.

The history and last clinical contact with the client whose records are being sought may provide the MHP with questions regarding the ability of that client to make healthy choices relative to disclosure. These choices sometimes include the execution of a release without ascertaining the contents of the records. Furthermore, when the MHP is not a current treating professional for either of the parties and the MHP has no current or other tangible evidence that these parties have moved beyond their last presenting condition and history, it tends to force an opinion that the disclosure and adversarial use of the information would be harmful. In an effort to provide guidance or assistance, attached hereto is a form Motion to Quash with choices of different arguments which can be made.

III. **RECORDS PERTAINING TO ALCOHOL** **AND DRUG ABUSE TREATMENT**

Federal law and related regulations require that records pertaining to alcohol and drug abuse treatment (funded directly or indirectly by the Federal government) are confidential and have strict standards which have to be met prior to the authorization of any disclosure. **42 CFR, Pt. 2 (1999)**. These regulations require, after notice to the facility and patient, a confidential Court hearing and prior Court approval, before a subpoena is to be issued or served and makes non-compliance a misdemeanor. **42 CFR Pt. 2 § 2.64** A good cause finding is required prior to the disclosure and the Order must be very limited and protective, and must include a finding that other ways of finding out the information are not available and would not be effective. A summary of the requirements of **42 CFR, Pt. 2** is attached hereto as **Appendix "A."**

IV. **MENTAL HEALTH RECORDS - STATUTORY CONFIDENTIALITY**

In 1991, and subsequently, by amendments in 1993 and 1995, the Texas Legislature created and amended **Chapter 611.001, et seq., of the Texas Health and Safety Code** which contains provisions that authorizes a Mental Health Professional (hereinafter called "Professional" or "Movant") to claim the privilege on behalf of client. (**Appendix "B"**) This statutory scheme contains several distinctions from Rule 510 of the Texas Rules of Evidence ("**TRE 510**"). The pertinent provisions generally at issue are as follows:

§ 611.002. Confidentiality of Information and Prohibition Against Disclosure

(a) Communication between a patient and a professional, and records of the identify, 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.

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

§ 611.003. Assertion of Confidentiality

A MHP may claim the privilege on behalf of the patient. **§ 611.003(3)** There is no requirement that the patient consent to or agree with the claim of privilege being exercised on their behalf by the MHP. **§ 611.004; § 611.006 and § 611.0045** The repeatedly permissive language of Chapter 611 provides that the MHP **may**, but is not required, to disclose otherwise confidential information. **§ 611.004(a) and § 611.006** reflects a clear legislative intent that the MHP does not have to disclose the information if the MHP makes a determination under **§ 611.045** that the release of such information would be **harmful to the patient's physical, mental or emotional health. § 611.0045(b)**. When these records and treatment of the parties, otherwise firmly believed to be confidential, become the source of controversy, it usually means that the intended adversarial use of this information places each of the parties (**and the children**) in substantial risk of mental and emotional harm.

To support the MHP's right to refuse disclosure, (as distinguished from **TRE 510**), the Legislature imposed a specific procedure under **§611.045** which additionally provides as follows:

1. The Professional controls the scope and duration of the denial. **§611.045(b)**;
2. The Professional must give the records to another professional that is "treating" the patient for the same or a related condition. **§611.045(e)**;
3. The Professional must delete confidential information about any persons other than the patient who has not consented to the release. **§611.045(g)**;
4. If a summary or narrative is requested, it must be provided by the Professional. **§611.045(h)**;
5. The Professional is entitled to a reasonable fee **§611.045(i)**; (See also **Tex. R. Civ. P. 177a**)

If the Court appoints an MHP, the Court, in determining the extent of subsequent disclosure, is required to limit the availability of patient disclosed information and impose appropriate safeguards to prevent unauthorized disclosure § 611.006(b).

V.
TEXAS RULES OF EVIDENCE 510

In determining the admissibility of matters at trial, the Texas Supreme Court promulgated **Rule 510 of the Texas Rules of Civil Evidence** ("TRE") in 1984, and amended it again in 1998. (**Appendix "C"**) The rule applies when MHP is a professional under this Rule and one or both of the parents are patients. **TRE 510(a)(1)(2)**. Unless some exception exists, these records are confidential and shall not be disclosed **TRE 510(b)**. The pertinent exceptions are when a waiver exists, **TRE 510 (d)(2)** and when the disclosure is relevant in any suit affecting the parent-child relationship. **TRE 510(d)(6)**. On March 1, 1998, the SAPCR exception was deleted by the Texas Supreme Court. However, the commentary to the Rule change indicated the reason was because **510(d)(7)** (i.e. when relevant to the claim or defense) covers the same subject matter for the deletion. This comment takes the Rule beyond its original intended scope and does not factor in the existence of a therapeutic relationship where assurances were given the patient that the information was to be confidential. In this regard, **Section 510(d)(7)** was originally put into the Rule because of personal injury and other types of lawsuits. SAPCR suits were treated separately. This comment sets the stage for the conflict between Chapter 611 of the Health and Safety Code and Rule 510 of the Texas Rules of Civil Procedure.

VI.
CONFLICT BETWEEN CHAPTER 611 AND
RULE 510 AND SUPPORTING CASE LAW

The normal perceptions of the judicial function in SAPCR litigation are in the middle of a conflict between **TRE 510(d)(6)** and **Tex. Health and Safety Code § 611.045**. Some of the significant distinctions are as follows:

	<u>STATUTE</u>	<u>RULE</u>
1.	Most recent act (1993)	Less Recent Rule (1998)
2.	Contains Permissive Exceptions of "may" disclose in court on other administrative proceedings	Provides for exceptions in <u>court proceedings</u> .
3.	Leaves harm determination to the Professional	Leaves a relevance determination to the Court

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|----|--|---|
| 4. | Contains Procedural Methods for Protection of Confidential Information | Does not contain a procedural method for claiming a privilege or assertion of confidentiality |
| 5. | Irrespective of harm determination requires deletion of all material related to others | Leaves a relevance determination to the Court |

While the Rules of Evidence are not discovery, they have been applied in a way that affects discovery and the only specific case law on **§611.0045 Tex. Health and Safety Code** that would assist in the determination of this conflict favors the professional. **Abrams v. Jones, 35 S.W.3d 620 (Tex. 2000). (Appendix “D”)**

The post **Rule 510** statutory scheme is clearly infused with the legislature’s intent to provide Professionals with the right of determining the issue of patient harm over the judicial issue of relevance. **There would be no need for the legislature to codify the right of a professional to refuse disclosure, unless it intended to leave such a determination to the Professional.**

I.
HISTORY AND PURPOSE OF PRIVILEGED COMMUNICATIONS

There were no privileged communications at common law. The general mental health privilege was enacted in 1979 as **Article 5561h V.A.T.S.** As recently as 1982, there was no exception to confidentiality in suits affecting the parent-child relationships. **In the Interest of T.L.H., 630 S.W.2d 441 (Tex. App. -- Corpus Christi 1982, writ dism’d.)** **Article 5561h** was repealed and replaced with TRE 510. Subsequently, The Dallas Court of Appeals addressed these concerns in the case of **Gaynier v. Johnson**. The analysis is informative:

"To determine the intent of the Supreme Court in promulgating this rule, we look to the history of the mental health information privilege. There is no common law privilege against compelled disclosure of communications between a mental health professional and a patient/client. As a matter of policy, at common law, society’s interest in the ascertainment of truth was deemed to be more important than its interest in maintaining confidentiality within professional relationships."

"The Texas legislature created a privilege for mental health information before it created a physician-patient privilege. We distinguish the medical relationship where a person needs only to relate physical symptoms to his physician, from the relationship established for psychotherapeutic treatment where the very nature of the consultation requires free and complete disclosure of all thoughts and feelings of the patient."

"... as to the competing interest of full disclosure and the need for confidentiality in mental health treatment, the Texas Legislature has reconciled the conflict in favor of the confidential relationship. Wade v. Abdnor, 635 S.W. 2d 937 (Tex. Civ. App. - Dallas 1982, writ dismissed)"

Gaynier v. Johnson, 673 S.W.2d 899, 903, 904 (Tex. App. - Dallas - 1984, no writ)

In Gaynier Defendants argued that 510 TRE prohibited trial disclosure not discovery. The Dallas Court of Appeals disagreed with the concept that pre-trial disclosure to the parties or their attorneys was permissible.

"We hold that the disclosures prohibited by rule 510 apply to everyone, and not just to juries...."

"... The purpose of this privilege is to facilitate effective mental health treatment. A patient must be able to rely upon the fact that when he or she enters the professional's office and begins treatment, his or her communications are confidential and are not discloseable to anyone beyond the narrow legislative exceptions."

Gaynier v. Johnson, 673 S.W.2d 899, 904 (Tex. App.- Dallas - 1984, no writ)

In 1985, the Texas Supreme Court examined the privilege and its purpose:

"... The justification for this privilege lies in the policy of encouraging the full communication necessary for effective treatment of a patient by a psychotherapist. ... The protection against disclosure of confidences is primarily erected to protect the patient against an invasion of his privacy."

Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985)

This Court also gave great deference to the distinction between an offensive and defensive use of privilege and discussed that an offensive use of the privilege lies outside the scope of TRE 510.

In Dossey v. Salazar, the 14th Court of Appeals in Houston held:

"If a plaintiff could gain access to a defendant's mental health information merely by making a claim regarding the condition, patients would be deterred

from ever seeking such emotional guidance, and this violates the very nature of psychological/psychiatric treatment which requires free and complete disclosure of all thoughts and feelings of the patient."

Dossey v. Salazar, 808 S.W.2d 146, 148 (Tex. App. - Houston [14th Dist.] 1991, original proceeding)

In **Cheatham v. Rogers, 824 S.W.2d 231 (Tex. App. - Tyler, 1992, no writ)**, the Tyler Court of Appeals permitted the discovery of the mental health history of a psychologist who recommended restricted access by a parent. While it extended the pre-Chapter 611 breath of **TRE 510(d)(6)**, it also concerned information relative to a non-party professional expressing an opinion on the issue to be tried. **Tex. R. Civ. P. 701-705**. A more difficult situation arises when the confidentiality issue involves information about the parties and the MHP offers no opinion on the conservatorship or other parent-child questions.

Prior to enactment of Chapter 611 of the Health and Safety Code, an *in camera* inspection and a decision by the Court was one avenue available to the trial court. **Smith v. Gayle, 834 S.W.2d 105 (Tex. App. - Houston [1st Dist.] 1992, no writ)**. The Court could determine the matters not to be relevant or, if relevant, limit the re-disclosure to protect the confidentiality as much as possible. After enactment of Chapter 611 and certainly after the decision of the Texas Supreme Court in **Abrams v. Jones**, the redaction of all information on other people and non-disclosure after a determination of harm has been made have been turned into duties.

The whole purpose of a MHP's refusal to disclose confidential information should be to prevent the offensive use of privilege. **Easter v. McDonald, 903 S.W.2d 887 (Tex. App. - Waco, 1995, Pet. ref'd)**.

In 1994, the Texas Supreme Court dealt with confidentiality and traced its history and purpose:

"Neither the physician-patient privilege nor the mental health privilege existed at common law. **Ginsberg v. Fifth Court of Appeals, 686 S.W. 2d 105, 107 (Tex. 1985)**. However, every state has adopted one or both of these privileges in some form. ... The basis for the privileges is twofold: (1) to encourage the full communication necessary for effective treatment, **Ginsberg, 686 S.W.2d at 107**, and (2) to prevent unnecessary disclosure of highly personal information. ... The latter purpose reflects an understandable desire to maintain privacy. We recognize that 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)

The Court must make the relevance determination.

"... Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex. R. Civ. Evid. 401. But relevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude the discovery and admission of relevant evidence under prescribed circumstances."

R.K. vs. Ramirez, at 842

In doing an *in camera* inspection, the Court must limit the disclosures.

"Another interpretation might focus on the relevance of the condition itself to any party's claim or defense. However, just because a condition may be "relevant" to a claim or defense does not mean a party "*relies upon* the condition as a *part* of the party's claim or defense." Because relevance is defined so broadly, virtually any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. We reject this alternative as well."

R.K. vs. Ramirez, at 842

"... We stress that the highly personal nature of this information places a heavy responsibility on the trial court to prevent any disclosure that is broader than necessary. ... Trial courts must use great care when permitting discovery of such sensitive information, and should redact or delete those portions of medical and mental health records that concern matters beyond the scope of the exception. Consistent with the standards set out in Texas Rules of Civil Procedure 76a and 166b(5), trial courts should use their authority to prevent the unwarranted invasion of personal, constitutional, or property rights."

R.K. vs. Ramirez, at 844

In spite of this legislative and appellate history our trial courts still fall back upon the parent-child relationship rationale and compel the disclosure of this privileged and confidential information.

VIII.
TREATMENT PROCESS RELATIVE TO THE CLIENT(S)

Under Texas law, notes are taken by a MHP for the specific purpose of assisting the MHP in guiding the patient through the recovery process. The notes are prepared for and intended only to be used by the MHP, in a therapeutic context. Their scope and purpose are for healing. **The legal use of specific information, taken out of context (without the interpretation of the MHP), for the direct or indirect use in an adversarial context would generally be considered to be harmful to the patients. These psychotherapy notes are protected under HIPPA. (see Section XI, p. 16)**

The therapeutic process traverses many boundaries. Statements taken out of context from this process are very likely to be misunderstood and misused. Some recorded notes would convey objective and subjective information which would cause any person reading the same to believe the entries mean exactly the opposite of what was discussed in session. Similarly, when the statute mandates deletion of all information on all other persons who have not signed releases, the patient's records could become distorted and (in some cases) would necessarily be interpreted incorrectly. Of particular concern is the use of otherwise confidential information for the purpose of personal betrayal and personal attacks.

The therapeutic process may be devoted to releasing emotional traumas for the purpose of resolving the traumas and healing the patient and their interpersonal relationships. **In the view of many MHPs, any use of this information, in an adversarial context, has to be harmful to the patients and their children.**

Additionally, there may be serious issues concerning each party's family of origin. To allow this material to be given to attorneys for adversarial purposes, to be used against the patients, as leverage in a legal proceeding involving children, is considered by many abhorrent to the therapeutic process, and would likely be internalized as a betrayal. Many believe that the traumatic effects would be of both an intrapsychic and systematic nature. It would be like giving the goldfish to the cat and asking the cat to take care of and protect the fish.

In situations where the parents have each experienced judgment problems in the past, a parent's persistence in trying to get copies of these records, regardless of either the content of the records or objections by the MHP, raises serious additional questions about the parent's judgment.

In this context, it is not difficult to understand the position of many MHP's that the disclosure of this material to anyone outside of the therapeutic relationship, will be harmful. A relevancy determination does not necessarily include a harm analysis. While the Court is trained to determine issues of relevancy, the Court is not trained on the impact and harm which could be caused by the misuse of such material.

IX.
NON-HARMFUL DISCLOSURES CONSISTENT WITH STATUTE

It is the work and training of the MHPs to do such a harm determination and Chapter 611 of the Health and Safety Code was designed to permit this process. The process of determining harm is not always about denial of access to information. Rather, it is about the degree, manner and method of disclosure. The statute contemplates that there is not a fundamental right to all of the records. If the MHP feels that such a release would be harmful, the MHP (not the parties, attorneys or court), is the person that decides who gets what information and the manner of its communication.

The information contained in the records is not always relevant to the determination of the facts in issue. Even so, the harm determination can supersede the relevance determination.

The following alternatives are available to the MHP, parties and Court and permit the exchange of some information, without damaging the parties:

1. Preparation of a narrative or summary by the MHP, as set forth in the statute;
2. A Court Ordered a psychological/custody evaluation that allows the Court Appointed MHP to make limited clarification inquiries of MHP relative to the summary;
3. After the mandatory redactions, arguably, some form of *in camera* inspection that permits substantial redaction of objectionable material; and

While many feel that the MHP (especially a MHP aligned with one party to the litigation) should not have the power to hide otherwise very relevant information, the competing public policy interests now apparently favor the shield of confidentiality. The implementation of such procedures will provide the patients the significant protections contemplated by the statute and, at the same time, not deprive them of the opportunity to address areas of specific concern in the parent-child litigation context.

X.
JUDICIAL DISCRETION ON DISCOVERY, *IN CAMERA*
INSPECTION AND LEGAL RIGHT TO REFUSE TO DISCLOSE

The Texas Rules of Civil Procedure distinguish discovery issues relative to parties and non-parties. A party may assert a privilege from disclosure and object to disclosure. **Tex. R. Civ. P. 193.3.** The party must designate that a withholding has been made, the request to which it relates and the privilege asserted. The party seeking discovery can request a specific description and specific assertion of privilege. At a hearing on the privilege, the party asserting the privilege must present evidence (by testimony or affidavit served at least seven (7) days prior to the

hearing - the Court can shorten or lengthen time) necessary to support the objection or privilege. The Court can determine that an *in camera* inspection necessary and documents are to be produced to Court in a sealed wrapper. **Tex. R. Civ. P. 193.4.** A similar procedure exists relative to depositions. **Tex. R. Civ. P. 199.6.**

The issue becomes more difficult when the production of records is sought from non-parties. A principal yet unresolved question is whether there is a distinction between “**a statutory right of confidentiality**” and a “**privilege**” under the Rules of Evidence. Expect that further difficulties will arise as the federal rules under HIPAA are subjected to interpretation by the Courts. (see XI below)

The Health and Safety Code requires, without a determination of harm, the deletion of all references to other persons who do not consent to the disclosure. **Tex. Health and Safety Code 611.0045(g).** Accordingly, a major distortion of records occurs if anything a party says about the other party, the child or anyone else has to be deleted. Furthermore, when requesting medical and mental health records from non-parties, the Rules specifically require compliance with confidentiality laws. **Tex. R. Civ. P. 196(c)(3).** Additionally, it is not enough to just subpoena the records from the non-party. A party must follow the requirements of **Tex. R. Civ. P. 205.1 et. seq.** These Rules require:

1. A Notice of Discovery is to be served on the non-party at least ten (10) days before the subpoena. **Tex. R. Civ. P. 205.2**
2. A reasonable time for response but no later than 30 days prior to the end of the discovery period. **Tex. R. Civ. P. 205.3**
3. If the request is for the medical or mental health records of another non-party, that notice must also be provided to the non-party whose records are being requested. **Tex. R. Civ. P. 205.3(c)**

The Rules of Procedure and Health and Safety Code clearly favor the protection of mental health records from disclosure. It appears that a statutorily based determination of harm by a MHP not only trumps a judicial determination of relevance but would also preclude the whole process of an *in camera* inspection.

XI.

THE HIPAA PRIVACY REGULATIONS

In 1996 Congress enacted the Health Insurance Portability and Accountability Act. The purpose of HIPAA was to combat fraud and abuse, encourage electronic health care transactions and **to create a national patient record privacy standard**. This Act (**known as HIPAA**) left final regulatory or authority to the Department of Health and Human Services (DHHS). On December 20, 2000, President William J. Clinton issued Executive Order No. 13181. The executive order prohibits the use of protected health information in civil, criminal or administrative investigations that are not related to health oversight matters except when the balance of relevant factors weighs clearly in favor of its use. In other words, the protected health information may not be used unless the public interest and the need for disclosure clearly outweigh the potential for injury to the patient, the physician patient relationship and to the treatment service. The principal purpose of **Executive Order No. 13181** was to protect the privacy of protected health information and promote trust in the health care system. This would be accomplished by improving the quality of health care by fostering an environment where patients could feel more comfortable in providing their health care MHPs with accurate and detailed information about their personal health. The Executive Order incorporates the intent of HIPAA and the DHHS regulations authorized by the statute and cross-references its applicability to health-care plans, health care providers and health care clearinghouses.

While its principal effect is to allow investigative access for purposes of investigation of medicare and other health care system fraud, the scope of HIPAA and the regulations impact and apply to any health care plan, clearinghouse or healthcare provider who transmits any health information in electronic form in connection with a covered health care transaction **42 U.S.C. 1320d-1**. Executive Order No. 13181 survived the regulatory purge that followed the end of the Clinton Administration, became final after all modifications on August 9, 2002, **and the regulations have an effective compliance date of April 14, 2003**.

These radical changes create new privacy standards, supercede state law in many circumstances **and impose extensive new requirements on all health care providers**.

The consequence for non-compliance with the regulations can be a DHHS audit or substantial fine and imprisonment. Providers and other covered entities should probably expect that future linkage to federal funding could be jeopardized for non-compliance. Additionally, enterprising parties and creative attorneys could make arguments for damages and ; for the exclusion of otherwise admissible records or testimony as a consequence of non-compliance. The regulation can be found at **45 CFR, Part 160** or at **<http://www.hhs.gov/ocr/regtext.html>**.

Given the scope of the statute and the size of the regulations each type of enterprise will have different treatment. Accordingly, each provider, enterprise, and facility should seek the assistance that they need for compliance.

I. APPLICABILITY

Pertinent to this paper and presentation, the regulations apply to the following health care providers:

1. A health care provider who transmits any health information in electronic form of a covered transaction; **160.102**

A health care provider includes:

- A. A business associate of a health care provider; **160.103**
- B. Direct treatment providers (direct relationship); and **164.501**
- C. Indirect treatment providers who provided health care on a the orders of another health care provider. **164.501**

Health care is defined as care, services, or supplies related to the health of an individual. **160.103**

Health care includes, but is not limited to, the following:

1. Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
2. Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

A health care provider is a provider of medical or health services and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.

160.103

The scope of the regulations encompass health care operations, including, but not limited to:

1. Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment; **164.501**

The regulations are designed to prevent disclosure of health information unless consent or authorization is given, an exception exists or disclosure is otherwise required to be made.

Health information is generally defined as any information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

160.103

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

1. Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
2. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) that identifies the individual; or
 - (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

164.501

Disclosure means the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information. **164.501**

The scope of HIPAA and the regulations is extensive and as it covers health plans, health care clearinghouses, group health plans, health care providers, health insurance issuer, and Health Maintenance Organizations. **160.103**

A health care provider or other covered entity which either provides treatment, and either maintains or uses individually identifiable health information may not use or disclose protected health information except as permitted by the regulations. **164.502**

Treatment is defined as the provision, coordination, or management of health care and

related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another. **164.501**

Use means with respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information. **164.501**

II. PERMITTED USES AND DISCLOSURES **164.502**

Use and disclosure of the protected health information is permitted:

1. To the individual;
2. Pursuant to and in compliance with a consent to any out treatments, payment or health care operations;
3. Without consent, if consent is not required to carry out treatment, payment or health care operations (**except psychotherapy notes**); and,
4. Pursuant to an agreement. **164.502**

Disclosure is required:

1. To an individual on proper request;
2. To the secretary of DHHS in a compliance investigation.

A covered entity must make reasonable efforts to limit improper disclosure of protected health information to only the minimum necessary to accomplish the intended purpose of the use disclosure or request. **164.502**

The regulations cover the health information of deceased individuals and covered entities must treat personal representatives of adults, emancipated minor and unemancipated minors as if they are the individual.

164.502

In abuse, neglect and endangerment situations, disclosure can be withheld, irrespective of the requirements of state law, when a covered entity has a reasonable belief that a personal representative has:

1. subjected an individual to domestic violence, abuse, neglect; or
2. disclosure to a personal representative could endanger the individual; and
3. in the exercise of MHP judgment, the covered entity decides that disclosure to the personal representative is not in the individual's best interest.

164.502

[Note See: Abrams v. Jones, 35 S.W. 3rd 620 (Tex. 2000). (Appendix "D")]

Whistle blowers are also protected from retaliation.

***** Since the act and ensuing regulations are intended to be extensive in scope, they include mental health records. While psychotherapy notes are protected, this does not mean that all psychotherapy records are excluded from the required disclosure. Psychotherapy notes are protected if they are maintained in separate files from the other records. 164.501**

Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. ** 164.501**

If a covered entity is required by law to disclose health care information **it must be under a legal mandate that compels disclosure.** These mandates include but are not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand.

164.501

III. PREEMPTION OF STATE LAW 160.201

The federal law and rules, to the extent contrary to State law, preempts state law. In this regard, the state law is contrary if it is impossible to comply with both State and Federal requirements or the state law defeats the purpose of the federal law and rules. State law can be more stringent but cannot prohibit required federal disclosures. Furthermore, state law can permit greater client access and record amendment procedures than federal law, but federal law cannot preempt a state law that authorizes or prohibits disclosure of prohibited information about a minor to a parent, guardian or person acting *in loco parentis* of a minor.

160.202

In short, in the absence of exceptions, a covered entity **may not** use or disclose protected health information.

Affiliates can disclose between each other and with all affiliated entities.

IV. CONSENT TO USE OR DISCLOSURE OF PROTECTED INFORMATION

A. General Rule

Prior to the use or disclosure of protected information to carry out treatment, payment or health care operations, the patient's consent is required. **164.506**

B. Exceptions

Prior consent is not required if:

1. It is an indirect treatment relationship;
2. It is an emergency treatment situation;
3. Treatment is required by law, and an attempt is made to secure the consent;
4. Consent is inferred from circumstances, but language barriers prevented the consent from being acquired. **164.506**

Consent for one entity is not consent for others and all unsuccessful attempts to obtain consents must be documented. **164.506**

C. Consents can be made a condition precedent to treatment or enrollment in a health plan. **164.506**

D. Revocation of consents must be in writing and are effective except to the extent reliance has been given to consent and action taken upon it. **164.506**

E. A consent must be in plain language and;

1. Inform the individual of the intended disclosure that may be made to carry out treatment, payment or health care opinions;
2. Must refer the individual to the required notices and inform the individual of their right to review notices prior to signing the consent;

3. If the right to revise privacy practices has been reserved, a notice that the change of practices may occur and how the individual can obtain revised notices;
4. **State that:**
 - A. **The individual may request restrictions on use and disclosure;**
 - B. **The covered entity does not have to agree to the restrictions; and**
 - C. **If the covered entity agrees with the restriction, it is binding.**
5. State that an individual has the right to revoke consent, in writing, except to the extent that there has been reliance upon it;
6. Be signed and dated. **164.506**

A consent is defective if it lacks any element above or if it has been revoked.

A provider or covered entity that receives conflicting consents must rely upon the most restrictive consent. Conflicts may be resolved by obtaining a new written consent or an oral consent documented in the individuals' file. **164.506**

If one party to a joint consent revokes consent, the provider or covered entity must inform the other entities as soon as practicable. ** Note: This would create a revoked or conflicting consent situation as set forth above. **164.506**

V. AUTHORIZATION REQUIRED FOR USE OR DISCLOSURE 164.508

Use or disclosure of protected information is prohibited without a valid authorization.

1. **Psychotherapy Notes. Except for the transition period, a specific authorization is required before there is any use or disclosure of any psychotherapy notes, except,**
 - A. **To carry out treatment, payment or health care operations (with consent or within the without consent exceptions)**
 - B. **For use of the psychotherapy notes by the covered entity for treatment;**
 - C. **For use by the covered entity for training purposes;**

- D. For use by the covered entity to defend a legal action or other proceeding brought by the individual. 164.508**

VI. AUTHORIZATION REQUIRED

A. Limitations

An authorization is not valid if the expiration date has passed or the conditional event has already occurred, it has incomplete parts, has been revoked or the covered entity knows that any material information in the authorization is false.

164.508

All authorizations relative to disclosure or use of the psychotherapy notes must be stand alone documents and cannot be combined with any other authorization.

164.508

A health plan or other covered entity cannot restrict enrollment or eligibility for benefits on the provision of an authorization unless it is research related treatment (with separate authorization) or it is for the purpose of determining plan eligibility, enrollment determination or risk rating determinations.

164.508

****** Enrollment in a health plan or eligibility for benefits cannot be conditioned on the provision of or authorization to obtain psychotherapy notes. **** 164.508**

B. Required Elements

A valid authorization under this section must contain at least the following elements:

1. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;
2. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;

3. The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure;
4. An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;
5. A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how the individual may revoke the authorization;
6. A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by this rule;
7. Signature of the individual and date; and
8. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual. **164.508**

Agree or Object Provisions

164.510

A facility must advise an individual of its' intent to use identifying information and allow the individual to authorize or object to the disclosure of the following information on the individual to persons who ask for the individual by name:

1. Name;
2. Location in the facility;
3. Condition described in general terms that does not describe specific medical information;
4. Religious affiliation.

Without going into details, the regulations set up reasonable standards for exception based permitted disclosures, objections, consents, emergencies and disclosures based upon reasonable inferences and the exercise of MHP judgment. **164.510**

VII. USE AND DISCLOSURE FOR WHICH CONSENT, AUTHORIZATION AND OPPORTUNITY TO AGREE OR OBJECT IS NOT REQUIRED: 164.512

A. Uses and Disclosures Required by Law

Limited and relevant disclosure and use is permitted when it is required by law. Some of these circumstances include, public health activities such as aversions of serious threats to health or safety or reports of child abuse or neglect to a public health authority or other appropriate government authority; or of abuse, neglect or domestic violence; if the individual agrees; or the

provider, in the exercise of MHP judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims. 164.512

B. Judicial or Administrative Proceedings 164.512

1. Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (1)(v) of this section.

(iii) For the purposes of paragraph (1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

- (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or**
- (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.**

(v) For purposes of paragraph (1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

- (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and**
- (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.**

(vi) Notwithstanding paragraph (1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (1)(ii) of this section without receiving satisfactory assurance under paragraph (1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (1)(iv) of this section.

2. Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that

otherwise permit or restrict uses or disclosures of protected health information. **164.512**

Accordingly, in addition to the state and federal law requirements of:

1. 42 CFR, Part 2 (**Appendix “A”**)
2. Texas Health and Safety Code - Chapter 611.001 et seq. (**Appendix “B”**)
3. Texas Rules of Civil Procedure - 510. (**Appendix “C”**)
4. Abrams v. Jones, 35 S.W. 3rd 620 (Tex. 2000). (**Appendix “D”**)

effective April 14, 2003, we have pre-emptive federal regulations to the extent the regulations are more stringent than state law against disclosure, designed provide greater client access and amendment rights, than state law; a covered entity would find compliance with both state and federal law impossible or a provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Act.

VIII. OTHER REQUIREMENTS RELATIVE TO USES AND DISCLOSURES OF PROTECTED HEALTH INFORMATION **164.514**

All covered entities must reasonably ensure that these standards are met. This means that the persons or classes who need access to the protected information are identified and separated, as needed, by categories of information needed and reasonable efforts used to limit access to just this persons or classes. Disclosures must be in the form of developed criteria and must be limited to that which is minimally necessary to achieve the purpose of the disclosure and which review requests for disclosure on an individual basis in accordance with the developed criteria.

This means that use or disclosure of an entire medical record is not permitted unless the entire record is that which is reasonably necessary to accomplish the purpose of the use, disclosure or request.

IX. PRIVACY NOTICES **164.520**

An individual has the right to adequate notice of the use and disclosure of protected health information that may be made, the individual’s rights and the provider or other entity’s duties.

- I. Required Elements. The covered entity must provide a notice that is written in plain language and that contains the elements required by this paragraph.
 - I. Header. The notice must contain the following statement as a header or be otherwise prominently displayed: **THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED**

AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

2. Uses and disclosures. The notice must contain:
 - A. A description, including at least one example, of the types of uses and disclosures that the covered entity is permitted by this subpart to make for each of the following purposes: treatment, payment, and health care operations.
 - B. A description of each of the other purposes for which the covered entity is permitted or required by this subpart to use or disclose protected health information without the individuals written consent or authorization.
 - C. If a use or disclosure for any purpose described in paragraphs (1)(ii)(A) or (B) of this section is prohibited or materially limited by other applicable law, the description of such use or disclosure must reflect the more stringent law.
 - D. For each purpose described in paragraph (1)(ii)(A) or (B) of this section, the description must include sufficient detail to place the individual on notice of the uses and disclosures that are permitted or required by this subpart and other applicable law.
 - E. A statement that other uses and disclosures will be made only with the individual's written authorization and that the individual may revoke such authorization. **164.520**

3. Individual rights. The notice must contain a statement of the individuals rights with respect to protected health information and a brief description of how the individual may exercise these rights, as follows:
 - A. The right to request restrictions on certain uses and disclosures of protected health information, including a statement that the covered entity is not required to agree to a requested restriction;
 - B. The right to receive confidential communications of protected health information;
 - C. The right to inspect and copy protected health information;
 - D. The right to amend protected health information;
 - E. The right to receive an accounting of disclosures of protected health information; and
 - F. The right of an individual, including an individual who has agreed to receive the notice electronically, to obtain a paper copy of the notice from the covered entity upon request.

4. Covered entities duties. The notice must contain:
 - A. A statement that the covered entity is required by law to maintain the privacy of protected health information and to provide individuals with notice of its legal duties and privacy practices with respect to protected health information;
 - B. A statement that the covered entity is required to abide by the terms of the notice currently in effect; and
 - C. For the covered entity to apply a change in a privacy practice that is described in the notice to protected health information that the covered entity created or received prior to issuing a revised notice, a statement that it reserves the right to change the terms of its notice and to make the new notice provisions effective for all protected health information that it maintains. The statement must also describe how it will provide individuals with a revised notice.
5. Complaints. The notice must contain a statement that individuals may complain to the covered entity and to the Secretary if they believe their privacy rights have been violated, a brief description of how the individual may file a complaint with the covered entity, and a statement that the individual will not be retaliated against for filing a complaint. **164.520**
6. Contact. The notice must contain the name, or title, and telephone number of a person or office to contact for further information. **164.520**
7. Effective date. The notice must contain the date on which the notice is first in effect, which may not be earlier than the date on which the notice is printed or otherwise published. **164.520**

These notices must be provided on the date of the first service delivery by e-mail, personal delivery or other reasonable means, after the compliance date by delivery to the individual at the service site and posted at the service site. If the covered entity has a web site, notices must be posted there as well. **164.520**

An individual has the right to request restrictions on use and disclosure of

protected information. A covered entity does not have to agree to the restrictions but if it does agree, it must abide by the restriction except to the extent that it would restrict previously relied upon consents, authorizations or required disclosures. **164.522**

Individuals have a right of access to inspect and obtain copies of their protected health information except for some items, including, but not limited to, psychotherapy notes, information compiled in reasonable anticipation of or for use in a civil, criminal or administrative action or proceeding or if the information came from someone other than the healthcare provider under the promise of confidentiality and access would be reasonably likely to reveal the source of the information. **164.524**

If a covered entity denies access to records (except as indicted above) the individual can request a review of the denial. The denial must be based upon the MHP judgment of a licensed health care MHP that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person. If access is denied the individual has a right to have that decision reviewed by a licensed health care MHP designated by the covered entity and who did not participate in the original decision to deny. The provider or other entity must permit the requests for access and must respond within 30 days (60 days for off site records) either granting access or a written denial. The covered entity **must** provide access, inspection and copying in designated record sets. If it is maintained in electronic form, the records should be produced in the form requested, even if electronic. **164.524**

If the individual agrees in advance to a summary or explanation rather than the records themselves, such a summary or explanation is permissible if the fees are covered by the agreement. For a summary or explanation, a covered entity may charge for copying, supplies and labor costs, postage and the cost of the summary or explanation. **164.524**

If access is partially denied, then the other requested information that does not fit the denial, should be released along with a written denial stated in plain language; notice of review rights and notice of how an individual can complain to the Secretary of the DHHS relative to the denial. If the covered entity does not have the information but knows where it is, disclosure of who has the information is required. **164.524**

Each covered entity must document the designated record sets which are accessible and which employee has the responsibility for it. **164.524**

X. AMENDMENT OF PROTECTED HEALTH INFORMATION

Each individual also has a right to seek amendments of protected health information and the covered entity must reply within 60 days. A covered entity has the right to one possible 30 day extension. **164.526**

The covered entity must make accepted amendments to the protected health information, identifying the location of the amended information and appending or otherwise providing a link to the amendments. Once the amendment is made, the individual and all prior recipients must be given the corrected information. If the amendment requested is denied, a written denial in plain language, must be provided, the individual must be given a right to submit a written statement to be included in the record or the individuals right to have the amendment request and the denial put into the records. **164.526**

The covered entity may rebut the amendment in the records. **164.526**

XI. ACCOUNTING OF DISCLOSURES **164.528**

The individual may also request an accounting of all prior disclosures of protected health information. The accounting is limited to six (6) years, must be responded to within 60 days, and must include:

- (i) The date of the disclosure;
- (ii) The name of the entity or person who received the protected health information and, if known, the address of such entity or person;
- (iii) A brief description of the protected health information disclosed; and
- (iv) A brief statement of the purpose of the disclosure that reasonably informs the individual of the basis for the disclosure; or, in lieu of such statement:

(A) A copy of the individuals written authorization; or

(B) A copy of a written request for a disclosure. **164.528**

If an accounting is requested, the covered entity must respond within 60 days. The first accounting in any 12 month period must be provided without charge. **164.528**

Each covered entity must designate a privacy official, and a contact person or office; must train all members of its' workforce on the policies and procedures before the compliance date; must have, in place, appropriate administrative, technical and physical safeguards to protect the privacy of protected health information; must have an established complaint process; must have and apply appropriate sanctions against employees who have failed to comply with the privacy policies and procedures; must investigate the harmful effects of any improper disclosure; must refrain from any intimidating or retaliatory

acts stemming from either compliance or complaints of noncompliance; and must not require individuals to waive their rights. 164.530

XII. PENALTIES FOR NONCOMPLIANCE

In addition to a DHHS audit,

- I. General Penalty - Not more than \$100.00 per violation - not to exceed \$25,000.00 annually;
 - II. Specific Penalty - Wrongful Disclosure
 - A. A person who knowingly obtains or disclosures protected information shall be fined not more than \$50,000.00 and imprisoned for not more than one year or both;
 - B. If committed under false pretenses, a fine of not more than \$100,000.00 and imprisoned for not more than five years, or both; and
 - C. If committed with the intent to sell, transfer or use the protected information for commercial advantage, personal gain or malicious harm, a fine of not more than \$250,000.00 and imprisoned for not more than 10 years, or both.
- 42 U.S. §1320 d-6**

XII. COSTS AND EXPENSES OF MHP

Chapter 611 of the Health and Safety Code and Rule 177a of the Texas Rules of Civil Procedure contemplate the compensation of the MHP for preparing and/or providing records in any form. The MHP "may charge a reasonable fee" for reviewing the records and determining what to release. **§ 611.045(i)** Accordingly, the MHP should request the Court to order the parties to pay reasonable fees and expenses. There is not a specific provision relative to the issue of attorney's fees.

XIII. CONCLUSION

Contrary to regular practice, the law starts with a presumption of confidentiality rather than the presumption of full disclosure. The party seeking the disclosure has the burden to overcome the presumption. If the records are withheld, the MHP then has the burden. The records are made for the MHP. They are not made and kept for use as weapons by attorneys as agents for an estranged spouse to inflict harm on the very person the therapist has assisted in a confidential relationship. Case law and the statutory scheme protect the records and testimony from involuntary disclosure. A client that has revealed their innermost thoughts and feelings faces the ultimate in betrayal if these

thoughts and feelings are subsequently used against them in an adversarial proceeding involving their children.

In the competing worlds of public policy (full disclosure vs. the right to confidential mental health care), the court has many ways to secure the same or similar information. While it may serve in some cases to provide the parties and court with less information, a different choice would encourage people who need and want help to not get it and in some ways rewards those who may need help but don't want it. In other words, if the spouse not seeking help can attack a spouse (as ill, weak or less capable as a parent) who sought the assistance of a MHP, to not do so would seem contrary to conventional legal practice. If the records are being offensively used, **(i.e., the MHP shielding the records would also be attempting to testify in favor of the spouse whose records are being shielded)** the result should be in favor of disclosure. Are the best interests of a child served if parents can do these things to each other, if a parent discontinues therapy, or refuses needed help? It may be an easier task to allow the betrayal than it is to find out the information from other sources, but that does not make it right. In order to demonstrate the complexity of these compelling public policy issues a Motion to Quash (**Appendix "E"**) and a response in Opposition to Motion to Quash (**Appendix "F"**) are attached and offered as guides in handling these different issues.

Historically, there has been a tendency to disregard the confidentiality of health information in SAPCR because of considerations of best interests of the child. In the post romantic considerations of an adversarial divorce, feelings of betrayal can run deep if trust relationships can be damaged or destroyed by the forced disclosure of confidential communications. On the other hand, if a parent truly believes that the spouse has disclosed conditions, thoughts, feelings or behaviors to a MHP that impacts the spouse's abilities to assume a specific conservatorship role, exercise specific periods of possession or assume specific rights or duties and they are prohibited from gaining access to all relevant information in unaltered form, they suffer great distress if access to this information is denied. Finally, the MHP that just wishes to provide clinical services can get drawn into an adversarial battle, be attacked, challenged and suffer the loss of clinical relationships and income. Each, in their own way feel like pawns in a strategic game that encompasses issues for beyond the individual rights of privacy and confidentiality.

The changes required by HIPAA are extensive and cover a wide range of operations from large to small. Additional protections are to be in place so that even a state law subpoena does not automatically allow a party in a judicial proceeding to obtain records, irrespective of state law requirements. Parties seeking the records must either enter a Qualified Protective Order; provide satisfactory assurances of reasonable efforts of notice; or obtain an actual court order, after notice of hearing and an opportunity for the individual who is the subject of the use or disclosure to object and be heard.

A mental health provider, who becomes very knowledgeable with these regulations will be at a significantly greater advantage than most trial lawyers seeking protected health information records. These changes clearly protect segregated psychotherapy notes and should settle, once and for all, the age-old questions of who owns the notes and why they should be protected.

APPENDIX "E"

CAUSE NO. 2003-00000

IN THE INTEREST OF	§	IN THE DISTRICT COURT
	§	
JANE SMITH	§	HARRIS COUNTY, TEXAS
	§	
CHILD	§	_____ 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:

1. Notice to the facility or treatment provider;
2. Notice to the patient;
3. A confidential court hearing (unless the patient requests that it be public);
4. 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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State Bar No. 04702400

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