HINSHAW

Newsletters

The Statutory Privilege against Disclosure of Mental Health Records and the Opioid Crisis

December 21, 2017

The Statutory Privilege against Disclosure of Mental Health Records and the Opioid Crisis

The current opioid epidemic has been declared the deadliest drug crisis in American history. According to the NIH National Institute on Drug Abuse, more than 90 Americans die every day of an opioid overdose. The Center for Disease Control and Prevention estimates that the total "economic burden" of prescription opioid misuse in the United States is $78.5 billion a year, including the cost of healthcare, lost productivity, addiction treatment and criminal justice involvement. Opioids are affecting all aspects of American life.

Given the surge in the misuse of and addiction to opioids, it should be no surprise that many plaintiffs in personal injury actions or plaintiff's decedents in wrongful death actions are afflicted with drug addiction. Evidence of drug abuse may be relevant in defending a personal injury action on both liability and damages. As a result, the discovery of mental health records in defending personal injury actions—including medical negligence claims—is increasingly prevalent.

Practitioners should be aware that mental health records cannot be obtained by merely serving a notice of a records deposition and subpoena on a custodian pursuant to Supreme Court Rule 204(a)(4). The Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq*. ("the Act") provides a statutory privilege against the disclosure of mental health records. The premise of the Act is that parties have an expectation that communications to physicians, psychiatrists and therapists will not be shared with anyone else. The Act carefully maintains the confidentiality of mental health records except in specific circumstances which are expressly enumerated in the Act. As noted by the Illinois courts, those seeking the non-consensual release of mental health information face "a formidable challenge" and must demonstrate that the Act authorizes the disclosure. Under the statute, the recipient of mental health services or a therapist on behalf of the recipient can refuse to disclose and prevent the disclosure of the recipient's record or communication.

In addition, the Act applies to all records or communications. Even the fact that a person received treatment is confidential. Thus, a plaintiff in discovery can assert the privilege against disclosure. This makes it difficult to learn whether the plaintiff has had mental health treatment which might be beneficial to the defense of the case. As a result, defense counsel needs to be aware of the issues in investigating the plaintiff's background, employment history and medical treatment records. For example, in defending a medical malpractice action, Hinshaw lawyers discovered that plaintiff's decedent abused prescription drugs via a FMLA request found in her personnel file. In the same case, a family member testified without objection by plaintiff's counsel that the decedent struggled with prescription drug abuse for many years. In another medical malpractice case, reference to the decedent's opioid addiction was found in the treating orthopedic surgeon's medical records. With this knowledge, the next step was to demonstrate that the Act authorized the disclosure by filing a Petition seeking a court order authorizing release of the mental health records at issue.

Failure to comply with the Act can subject the offending party and his attorney to civil liability. This issue was recently addressed by the court in *Jane A. Doe v William McCarthy, LLP, et al.*, 2017 IL App.(2d) 160860 (December 8, 2017). In *Doe*, plaintiff alleged that defendants violated the Act by disclosing to persons—including the public—without her consent and without following the procedures specified in the Act, facts pertinent to plaintiff's mental health status and treatment. On appeal, the court held that the absolute litigation privilege did not provide a shield for a party charged with a violation

of the Act. The court stated that the Act itself plainly creates a private right of action. Section 15 of the Act states, "any person aggrieved by a violation of this Act may sue for damages, and injunction, or other appropriate relief." 740 ILCS 110/15 (West 2016). Section 3(a) states that "all records and communications shall be confidential and shall not be disclosed except as provided in this Act." 740 ILS 110/3(a) (West 2016). The court further noted that in accordance with Section 10, the Act applies "in any civil, criminal, administrative, or legislative proceeding." 740 ILCS 110/10 (West 2016). The court reasoned that the plain language of various provisions of the Act indicates that the legislature intended to control all releases of the material it makes confidential in all types of proceedings and that a safeguard against improper disclosure is a civil action.

A thorough understanding of Section 10 of the Act is required in order to comply with its provisions. A party seeking the non-consensual release of mental health records needs to file a petition with the court and give notice to both the recipient of the services and the holder of the records. These persons are entitled to an opportunity to be heard. The petition should set forth the factual basis supporting the argument that disclosure falls within and is authorized by Section 10(a)(1) of the Act. First, the petition should demonstrate that plaintiff has introduced his mental condition or any aspect of his services received for such condition as an element of his claim or defense. Generally, Illinois courts have expressed discomfort about the non-consensual release of mental health information. In *Reda v Advocate Health Care,* 2002 W.L. 254101 (Ill), the Illinois Supreme Court found that the patient did not place his mental condition at issue merely by claiming damages for a neurological injury of a stroke or other brain damage, nor did his wife by alleging loss of consortium. Ultimately, the court held that plaintiff did not waive the statutory privilege against disclosure of his mental health records provided by the Act. Second, the court found that the fact that the hospital and doctors placed the patient's mental condition at issue in their theory of the case could not waive the patient's statutory privilege. Finally, the court found that the fundamental fairness exception to the mental health therapist-patient privilege did not apply in the case so as to require disclosure of the records in discovery.

In addition, the petition should allege that the evidence is relevant, probative, not unduly prejudicial or inflammatory and otherwise clearly admissible; that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interest of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm. (740 ILCS 110/10 (a)(1)). Before a disclosure is made, the court conducts an in-camera review of the record or communications to be disclosed.

The Act further provides that no party or his attorney shall serve a subpoena seeking to obtain access to mental health records or communications under the Act unless the subpoena is accompanied by a written order authorizing the disclosure of the records or the issuance of the subpoena. Also of note, the Act requires that the subpoena include the following specific language "No person shall comply with the subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of a subpoena and the disclosure of records or communications." (740 ILCS 110/10 (d))

In summary, close attention to and compliance with the provisions of the Act is required in order to obtain the evidence and avoid civil liability.

The Hinshaw Health Care Bulletin Blog Highlights

Since the last edition of the Health Care Newsletter, our health care blog has published several posts, including:

- *Illinois Appellate Court Decision in Wrongful Death Case Creates Adverse New Precedent for Handling Discovery Requests in Med Mal Cases*
- *OCR Issues Guidance on How Providers May Share Information under HIPAA in Response to the National Opioid Crisis*