Legal and Ethical Issues in Behavioral Health

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Objectives

- Overall Objective:
  To prevent your patient’s legal problems from becoming your legal problems.
Objectives

Topics:
- Review of rules regarding privacy/access to behavioral health patient records
- Responding to subpoenas, court orders or law enforcement
- Maintaining ethical boundaries
- Treatment of Children/Adolescents
- Case study
Objectives

- Take Home Message:
- The rules governing professional conduct don’t change during legal proceedings;
- Nothing in the law is at odds with your professional standards
State Law

- State confidentiality laws impose a general duty to maintain the privacy of health care information

- Two exceptions in all laws:
  - Patient Consent
  - Court Order authorizing and requiring disclosure
PRIVACY

State Law

Most laws also have additional exceptions:

- §19-11-95 (Psychologist, LPC, LMFT, LPES, LMSW, LISW, Clinical Nurse Specialist):
  - Intention of patient to commit crime/harm
  - Necessary to collect fee
  - Defend provider from charge of misconduct
  - “confidences necessary to promote care”

- §44-22-90 (Commitment records):
  - In emergency, to prevent harm
  - Involuntary commitment proceedings
  - Between facility staff
What other laws?
PRIVACY

State:
§16-3-1640 (Child Victim); §63-7-310, 330 & 420 (Child Abuse/Neglect); §63-19-2010 (DJJ); §63-7-2600 (Termination of Parental Rights); §63-9-780 (Adoption); §63-11-1350 (Continuum of Care); §44-22-100 (DMH); §44-115-10 (Physicians); §44-20-340 & 760 (DDSN)
State (continued):

§44-29-135 & 136 (Sexually Transmitted Disease); §44-53-140 (Treatment for Controlled Substances /Evidence); §44-6-90&170 (HHS); §44-41-60 (Abortion); §44-6-170 &180 (Medically Indigent); §44-7-2590 (Handicapped Infants & Toddlers); §44-31-20 (TB); §44-29-135 (Venereal Disease); §43-35-20,25,35&540 (Vulnerable Adults)
PRIVACY

FEDERAL LAWS

- HIPAA
  - Health Insurance Portability & Accountability Act of 1996

- 42 C.F.R. Part 2
  - Federal regulations governing the confidentiality records of alcohol and drug abuse programs.
What other laws?
PRIVACY vs. PRIVILEGE

- No therapist-patient privilege recognized in State law.
- However, a therapist-patient privilege may be recognized by the federal rules of evidence, which apply in proceedings in federal court.
Mary Lu Redmond, a police officer, received counseling from a licensed clinical social worker after she shot and killed Ricky Allen. Allen’s Estate sued Redmond and municipality for damages. The lawyer for the Estate sought access to the notes from Redmond's counseling. Redmond's counsel resisted asserting the conversations were protected against involuntary disclosure by a psychotherapist-patient privilege. The District Court judge rejected the argument, but the therapist’s notes were not released. The judge instructed the jury that they could presume that the contents could have been unfavorable to Redmond. The jury awarded monetary damages.
The 7th Circuit Court of Appeals found that Federal Rule of Evidence 501 provided a basis to recognize a psychotherapist-patient privilege in federal civil litigation.

Appealed to U.S. Supreme Court
In a 7-2 decision, written by Justice John Paul Stevens, the Court ruled that Federal Rule of Evidence 501 protects the conversations between Redmond and her therapist from compelled disclosure. The Rule recognizes a "psychotherapist-patient privilege."
Who Has to Comply With HIPAA?

A Covered Entity must comply

Covered entity means:

(1) A health plan;
(2) A health care clearinghouse;
(3) A health care provider who transmits any health information in electronic form in connection with a standard transaction.
The Privacy Rule sets standards for **uses** and **disclosures** that are authorized or required and what rights patients have with respect to their health information.

The Privacy Rule applies to protected health information in any form.
Protected Health Information (PHI) is individually identifiable health information that contains unique features or details by which the individual can be identified.

Treatment, Payment and Health Care Operations (TPO) are common uses of PHI for which HIPAA does not require an authorization.
HIPAA Terminology

- **Disclosure** means the release, transfer, provision of access to, or divulging of information outside the entity holding the information.

- **Business Associate** is a person or entity that performs a function that requires the creation, use or disclosure of PHI on behalf of a CE but is not considered part of the workforce.
What is 42 C.F.R. Part 2?

The federal regulations governing “confidentiality of alcohol and drug abuse patient records.” It implements the federal law on this topic. Drug and alcohol treatment and prevention programs have been covered by these regulations and law for 30 years.
Alcohol and Drug Confidentiality? A&D "Program"?
“Program”

(Federal Regulations 42 CFR Part 2):

1) Federally assisted (e.g. Medicaid, Medicare, tax exempt status) program, and

2) Represents itself as and provides, alcohol/drug abuse diagnosis, treatment, or referral for treatment.

2) If the entity is a “Program”, then all of its records are covered by 42 CFR Part 2.

3) If the entity is not a “Program”, then its records are not covered, even if they contain A&D diagnosis, history, etc.
42 CFR Part 2 is stricter than most other confidentiality laws (e.g., HIPAA) requiring:

- Specific Court Order, or
- Valid Signed Authorization, or
- Report of a Crime on Premises, or
- Report of Child Abuse/Neglect or
- Emergency

HIPAA, while less restrictive, does give patient more control over own information.
“A patient or the guardian of a patient has access to his medical records, and a person subject to a proceeding or receiving services pursuant to this chapter has complete access to his medical records relevant to this commitment…”

Sec. 44-22-110, *South Carolina Code of Laws*
PRIVACY

ACCESS TO RECORDS

“The patient has the right to access information contained in his or her clinical records within a reasonable time frame. The hospital must not frustrate the legitimate efforts of individuals to gain access to their own medical records…”

42 CFR §482.13(d)(2)
Patients or guardians of patients may be refused access to:

- Information provided by a 3rd party under assurance of confidentiality
- Information which the attending physician deems in writing to be detrimental to the patient’s treatment

Sec. 44-22-110(B), *South Carolina Code of Laws*
Providers may not withhold information from patient except:
- Information about another person to prevent harm to that person;
- Inspection could likely endanger the life or physical safety of patient or another;
- Information obtained under promise of confidentiality.

HIPAA privacy regulations §164.524
PRIVACY
Case Studies
PRIVACY

Case Studies

- The case of Dr. Hedgepath
  - S.C. Board of Medical Examiners v. Hedgepath, 480 S.E.2d 724 (1997)

- The case of Dr. England

- LLR cases
RESPONDING TO SUBPOENAS

- Subpoena: Latin for “under penalty”
- Generally evokes negative emotions
- Can be intimidating and anxiety producing
RESPONDING TO SUBPOENAS

- **Civil** (Common Pleas, Family or Probate Court)
- **Criminal** (General Sessions, Magistrate or Municipal Court)
- **Administrative** (State agency, eg. Department of Labor, Licensing and Regulation)
RESPONDING TO SUBPOENAS

PURPOSE OF SUBPOENAS

- COMMANDS the person or entity named to do one (or two) of three things:
  - **Appear** in Court
  - **Appear** at a deposition
  - **Produce** documents or records
RESPONDING TO SUBPOENAS

DUTY TO RESPOND

NEVER IGNORE A SUBPOENA
RESPONDING TO SUBPOENAS

SUBPOENA IN A CIVIL CASE

- **Reasons for Objection/non-party**
  - Not reasonable time to comply
  - Travel > 50 miles from home county
  - Requires disclosure of protected info
  - Undue burden or expense
  - Seeks unretained expert opinion
RESPONDING TO SUBPOENAS

SUBPOENA IN A CIVIL CASE

- Objection to a subpoena by a non-party may be made to issuing party w/in 14 days.
- Objection by “timely motion” to Court.
- Court may:
  - Quash
  - Modify
  - Condition
RESPONDING TO SUBPOENAS

SUBPOENA IN A CIVIL CASE

- OK for non-party to ignore subpoena commanding production of records and/or appearance at a deposition > 50 miles from home county
- No excuse for ignoring subpoena commanding appearance in court regardless of distance
RESPONDING TO SUBPOENAS

SUBPOENA IN A CIVIL CASE

- When basis for objection is privacy:
  - Advise and consult with patient
  - Contact attorney issuing subpoena
  - Document actions
RESPONDING TO SUBPOENAS

Subpoena for Records subject **ONLY** to HIPAA

- HIPAA Privacy regs do permit disclosure upon “satisfactory assurances”
  - Requestor made a reasonable effort to provide written notice of request to patient;
    - or
  - Requestor has obtained a “qualified protective order”
RESPONDING TO SUBPOENAS

- Social Workers, Professional Counselors, LMFTs, Psychologists disclosures are governed by S.C. Code Ann. § 19-11-95.
- Subpoenas from attorneys in civil litigation are not listed and, therefore, a subpoena alone is generally NOT sufficient to make disclosure.
- Generally patient authorization or a court order needed before disclosure.
RESPONDING TO SUBPOENAS

SERVICE of CIVIL SUBPOENAS

- Method:
  - Personal Service
  - Home Service ("suitable age and discretion")
  - Certified or registered, return receipt, restricted delivery

- Time/Notice Requirements
- Fees
RESPONDING TO SUBPOENAS

ENFORCEMENT OF CIVIL SUBPOENAS

- ENFORCEABLE BY CONTEMPT
RESPONDING TO SUBPOENAS

SUBPOENA IN ADMINISTRATIVE PROCEEDING

- Generally the same considerations apply as exist for civil subpoena
- Any objections should be put in writing to the person pursuing the subpoena
- To enforce an administrative subpoena, the agency will have to apply to a Court or Administrative Law Judge
Law Enforcement Requests and Warrants
RESPONDING TO SUBPOENAS

LAW ENFORCEMENT REQUESTS AND WARRANTS

- Requests for information
  - Disclosures incident to preventing harm
  - DMH only: “necessary to cooperate”

- Search Warrants

- Arrest Warrants
RESPONDING TO SUBPOENAS

SUBPOENA IN A CRIMINAL CASE

- Subpoenas in criminal cases will generally only be used to command appearance or production of documents before the Court.

- If privacy is an issue, attempt to advise and consult client in advance and inform attorney issuing subpoena.
Sex, Money, & Drugs
Disciplinary Actions of SC Social Work, Counselor, & Psychology Licensing Boards
## Violations by Professional Groups

**Source:** [http://www.llr.state.sc.us/](http://www.llr.state.sc.us/)

<table>
<thead>
<tr>
<th>Type of violation</th>
<th>Social Work</th>
<th>Counselors &amp; Therapist</th>
<th>Psychology</th>
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<tr>
<td>Sexual misconduct</td>
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<td>Impaired professional</td>
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<tr>
<td>Fraud</td>
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Professional Ethics

BOUNDARY ISSUES

- Critical to stay within your professional role
- Be friendly but not friends (inc. Facebook)
- Be supportive but don’t provide support
- Know yourself
  - Sex, Money and Drugs
- Risks: Job, liability, license, career
AGE OF MAJORITY

“Child” means a person under the age of eighteen.

--Sections 63-1-40; 44-24-10, *South Carolina Code of Laws*
Treatment of Minors

CONSENT TO TREATMENT

- Minors age 16 or 17
- may consent to any health services
- from a person authorized by law to render the particular health service
- “and the consent of no other person shall be necessary unless such involves an operation”
Treatment of Minors

CONSENT TO TREATMENT

- Minors of any age
- may receive health services of any kind
- when services are "deemed necessary"
- by a person authorized by law to render a particular health service
- unless such involves an operation
Treatment of Minors

CONSENT TO TREATMENT

- Miscellaneous
  - Married minors of any age may consent for themselves or their children
  - Unmarried minors who have a child may consent to health services for their child
  - Any consent given by a minor valid under law when given is not subject to later disaffirmance
Treatment of Minors

CONSENT TO TREATMENT

WHOSE CONSENT?
- Under age 16, Parent or “guardian”
- 16 or 17, consent by patient alone
- Is 16/17 year old patient’s consent the only consent which is effective?
  - 42 CFR Sec. 2.14(b)
  - State law: Sec. 63-5-30, South Carolina Code of Laws
Treatment of Minors

DIVIDED CUSTODY

…the mother and father have equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or any other matter affecting the minor.”

Sec. 63-5-30, South Carolina Code of Laws
DIVIDED CUSTODY

“Each parent, whether the custodial or noncustodial parent of the child, has equal access and the same right to obtain all educational records and medical records of their minor children and to participate in their children’s school activities unless prohibited by order of the court.”

Sec. 63-5-30, South Carolina Code of Laws
Treatment of Minors

ACCESS TO RECORDS

“The patient has the right to access information contained in his or her clinical records within a reasonable time frame. The hospital must not frustrate the legitimate efforts of individuals to gain access to their own medical records…”

42 CFR §482.13(d)(2)
LIMITING ACCESS TO RECORDS

- Providers may withhold information in certain limited circumstances:
  - Information about another if hospital determines inspection would cause harm;
  - Inspection could endanger the life or safety of another;
  - Information obtained under promise of confidentiality.
LIMITING ACCESS TO RECORDS

- Providers may not withhold information from patient except:
  - Information about another person to prevent harm to that person;
  - Inspection could likely endanger the life or physical safety of patient or another;
  - Information obtained under promise of confidentiality.

HIPAA privacy regulations §164.524
DIVIDED CUSTODY

- Absent a provision in a Court Order limiting or restricting the authority of the non-custodial parent, the non-custodial parent retains his or her parental rights.
Treatment of Minors

ABUSE AND NEGLECT ALLEGATIONS

- “Reason to believe that a child’s physical or mental health or welfare has been or may be adversely affected by abuse or neglect.”

- Mandatory reporting by all categories of health care providers, among others.

Sec. 63-7-310, *South Carolina Code of Laws*
ABUSE AND NEGLECT ALLEGATIONS

- If suspected perp is child’s parent, guardian or “person responsible for child’s welfare” report is made to county DSS or to law enforcement.

- If suspected perp is someone other than parent, guardian prcw, report only to law enforcement.
Treatment of Minors

Abuse and Neglect Allegations

- **Whitner v. State, 492 S.E.2d 777 (SC 1997)**
- Pregnant woman/viable fetus
- Abusing an illegal substance v. behavior which is not illegal but may pose a risk of harm to a viable fetus, such as drinking alcohol.
Treatment of Minors

Abuse and Neglect Allegations

- Illegal substance v. legal but risky conduct.
- "Reason to believe that a child’s physical ... health ... has been or may be adversely affected by abuse or neglect."
- "Child abuse or neglect" or "harm" occurs when the parent ... engages in acts or omissions which present a substantial risk of physical or mental injury to the child.
Treatment of Minors

Abuse and Neglect Allegations

- DSS and LE must keep reporters’ identity confidential;
- Reporters’ are immune from liability if report is made in good faith;
- Potential penalty for failure to report: Misdemeanor/up to $500 fine/6 mo. imprisonment
Treatment of Minors

ABUSE AND NEGLECT ALLEGATIONS

- Even if one or both parents are the subject of an allegation of child abuse or neglect, unless there is a court order limiting the accused parent’s authority, the parent(s) may continue to exercise their parental rights—including access to the child’s medical record.
ABUSE AND NEGLECT ALLEGATIONS

Orders granting custody to DSS usually contain a provision authorizing DSS to give consent to medical care and providing that DSS may obtain child’s medical records.
ABUSE AND NEGLECT ALLEGATIONS

- Orders granting custody to DSS usually do not contain provisions limiting the rights of the parents, other than their custody rights.

- Mental health providers treating child in DSS custody should request and review copy of the court order.
Mental Health Providers
In the Legal System

THE ROLE OF THE TREATMENT PROVIDER

- Always stay within professional boundaries as a provider
- Avoid becoming an advocate for, or defender of, your patient
- Resist the urge or decline the request to taking sides in legal disputes
Mental Health Providers
In the Legal System

THE ROLE OF THE TREATMENT PROVIDER

- Rules governing professional conduct don’t change during legal proceedings
- Maintain objectivity and the appearance of neutrality
Mental Health Providers
In the Legal System

THE ROLE OF THE TREATMENT PROVIDER

- If your neutrality and objectivity are compromised, so is credibility as a witness.
- Worse, you may make negligent errors (McCormick v. England).
- Worse, still, you may make ethical errors (S.C. Board of Medical Examiners v. Hedgepath).
Mental Health Providers in the Legal System

THE ROLE OF THE TREATMENT PROVIDER

- Custodial or non-custodial, absent court order parent(s) maintain authority to authorize release of records
- Provider does have discretion to limit/deny access in limited circumstances
- Any limits and reasons must be documented in patient’s record
Mental Health Providers in the Legal System

THE ROLE OF THE TREATMENT PROVIDER

- Decisions about passes or limitations on access must be based on reasonable clinical or administrative judgment.

- Legal proceedings are generally not a reason to limit access, but do need to consider allegations of improper treatment in making a decision.
Mental Health Providers
In the Legal System

Case Study

The Case of Elian G.
“Papá!”

The raid.
The reunion.
The fallout.

Elian González being seized at 5:15 a.m., April 22. Five hours later he is reunited with his dad outside Washington.
THE END

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