

HIPAA and Michigan Law A Sampler Of Mental Health Preemption Issues And Still Open Questions

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I. Starting Point:

There is no easy way to do this. We cannot identify a “batch” of Michigan laws that we know Covered Entities should follow even though they are different from HIPAA without looking at the individual laws. In the mental health area, this is particularly challenging, for the reasons outlined below.

II. Issues that frequently arise under the Michigan Mental Health Code where the Final Rules defer to State law because it is more restrictive or where the Final Rules and Michigan law are different but compatible so that Covered Entities can comply with both at the same time.

A court subpoena is enough to require disclosure by a Covered Entity without patient authorization under the Final Rule, but not enough under Michigan law. Examples

MCL	Final Rules	Subject
330.1143a	160.203(b), 164.512(a)(2)1 64.512(e)	Confidentiality of Mental Health Peer Review Records
330.1748(5) (a)	164.512(e)	Information Privileged by law may not be disclosed pursuant to a subpoena

The Final Rule Defers To State Law When Disclosure to Parents of a Minor Patient Is Not Allowed.

MCL	Final Rules	Subject
330.1707	162.202(2), 164.203(b)	Minor can consent to outpatient treatment for 14 sessions or up to 4 months, whichever occurs first, without parental consent or knowledge. At that point, patient must consent

		to notifying parent(s) or therapy stops. Statute contains some exclusions – pregnancy termination and psychotropic drugs-- and exceptions during the initial 14 session/4 month period --disclosure allowed, if there is a compelling need to disclose because of the probability of harm to the minor or another individual and minor notified of intent to disclose.
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Michigan Law and the Final Rule are generally compatible in the area of Reporting so that both the Rule and State Law Apply.

330.1707(5) 333.1723	164.512(a)(1) 164.512((b)(1)(ii)	Reporting Suspected Child Abuse and Neglect or Criminal Abuse
330.1700(a)	164.512(a)(1) 164.512(b)(i)(ii) 164.512(c)	Reporting Suspected Criminal Abuse
330.1723	164.512(b)(1)(i) 164.512(b)(i)(ii) 164.512(c)	Disclosure for Health Oversight Activities

Summary: In general then, life does not change for the Michigan health lawyer too much in some familiar areas. There may, however, be two sets of details.

III. The Bigger and More Difficult Problems: Having to decide what terms like “medical record,” “therapeutic notes,” and “mental health” mean in order to apply the Final Rule and Michigan law.

“What is a medical record?” and other obscure questions relating to mental health services.

A. Under Michigan Law.

There is not an obvious or single definitive answer to the question of what constitutes a mental health medical record under the Michigan Mental Health Code. Here is what we know and what we do not:

Section 1746 of the Mental Health Code provides:

“A complete record shall be kept current for each recipient of mental health services. The record shall at least include information pertinent to the services provided to the recipient, pertinent to the legal status of the recipient, required by this chapter or other provision of law, and required by rules or policies.” MCL 330.1746. (Emphasis supplied.)

Only two sections in the Code prescribe medical record entries:

- ❖ MCL330.1740(2) -- when restraints used, consideration of less restrictive measures must be documented in the medical record, and
- ❖ MCL 330 1717 -- documentation of parental and guardian consent to ECT must be documented in the medical record.

The Mental Health Code does not contain a definition of “mental health services” either. The word “service” is used in MCL 330.1746 quoted above and only the word “Service” is defined:

“Service means a mental health service.” MCL 330.1100d(1).

The Code’s definition of “Mental Health professional” in MCL 330.1100b(14) helps to some degree, because it lists the mental health professions one by one. They are: M.D.s and D.O.s, psychologists, RNs, certified and other social workers, registered social work technicians, and licensed professional counselors and marriage and family therapists.

To describe and define the services that are “mental health services,” MDCH has not been particularly active promulgating Rules pursuant to the Administrative Procedures Act either.

Instead, MDCH has spelled out much of its Mental Health Code program in its waiver requests to first HCFA and now the Center for Medicare and Medicaid Services and in its contracts with Michigan’s CMHSPs – the County mental health agencies, organizations and authorities – and with substance abuse coordination agencies, to provide General Fund mental health services and Medicaid Managed Specialty Supports and Services.

Those interested in detailed information about these services can consult the MDCH for complete information. I have excerpted certain pertinent text from contract documents in the new MDCH Contract. Persons interested in reading them may e-mail me at the following address: Elkinsb@millercanfield.com.

B. In the Final Rule

The picture is more in focus, but not crystal clear, on the federal side. In the Final Rule, the disclosure rules are different, depending on whether the information sought is kept as part of the Medical Record, or separate from it in the form of “Psychotherapy Notes.”

“Medical record” is a term used frequently but not defined in the Final Rule.

- ❖ The definition of “designated record set” in Final Rule 164.501 defines “record” as “any item, collection, or grouping of information that includes protected health information and is maintained, collected, used or disseminated by or for a Covered Entity.” 164.512(b)(i)(ii); and,
- ❖ Reading the individual access rule, we learn that the medical record is assumed to contain PHI. See Final Rule 164.524.

The most useful place to turn to decide what constitutes the core of a medical record is the definition “Psychotherapy Notes” in Final Rule 164.501 and what that definition excludes:

“Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record. (Emphasis supplied)

“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 terms: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. (Emphasis again supplied.)

Covered Entities need to know what the term “Psychotherapy Notes” excludes, because what the term “includes” can be disclosed without a patient authorization only in the following very limited circumstances:

“Notwithstanding any provision of this subpart, other than the transition provisions in Section 164.532, a Covered Entity must obtain an authorization for any use or disclosure of psychotherapy notes, except:

“(i) To carry out the following treatment, payment, or health care operations:

(A) Use by the originator of the psychotherapy notes for treatment;

(B) Use or disclosure by the Covered Entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family or individual counseling, or

(C) Use or disclosure by the Covered Entity to defend itself in a legal action or other proceeding brought by the individual, and”

required disclosures to the individual and the Secretary of DHHS under the Final Rule other disclosures required by law. See Final Rule 164.508(2).

With this heavy lifting behind us, consider one additional problem, which I will raise in a hypothetical:

During discovery, a third party seeks the records of sessions that “look like, sound like and feel like” group therapy, but are undertaken by members of the workforce or a Covered Entity as part of case management or similar programs. What position does the entity take?