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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: AN ANALYSIS OF THE IMPACT OF THE HIPAA PRIVACY RULE ON ILLINOIS MENTAL HEALTH PROVIDERS

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This article reviews the privacy requirements set forth in the Privacy Rule of the Health Insurance Portability and Accountability Act (“HIPAA”) which became effective April 14, 2003 and compares them to the Illinois Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA), which generally imposes more stringent requirements than the Privacy Rule for the protection of mental health patients’ privacy. Thus, Illinois health care providers who provide mental health or developmental disabilities services should not experience a significant burden in complying with the Privacy Rule, as they are already practicing in compliance with MHDDCA’s restrictions on uses and disclosures of mental health information.

INTRODUCTION

HIPAA Preemption of State Law

HIPAA was passed in 1996 to (1) ensure health insurance portability; (2) combat health care fraud and abuse; (3) encourage electronic transactions between health care providers; and (4) establish national privacy standards (the “Privacy Rule”).¹ The Privacy Rule explicitly

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provides that any requirement that is contrary to a provision of state law generally preempts that law unless the state law is “more stringent” than the Privacy Rule requirement.² A state law is “more stringent” than the Privacy Rule when it meets one or more of the following criteria: (1) the law prohibits or restricts a use or disclosure that otherwise would be permitted by the Privacy Rule; unless the Privacy Rule would grant access to the individual who is the subject of the information; (2) the law gives the individual who is the subject of the information greater rights of access or amendment; (3) the law affords the individual who is the subject of the information greater rights of access to information about a use or disclosure of such information or rights or remedies available to the individual; (4) the law narrows the scope or duration of an authorization given by an individual who is the subject of the information, increases the privacy protection attached to information that is disclosed; or reduces the coercive effect of the circumstances surrounding the granting of permission; (5) the law provides for the retention or reporting of more detailed information or for a longer period of time; or (6) with respect to any other matter, the law provides greater privacy protection for the individual who is the subject of the information.³ Because MHDDCA in most instances imposes more stringent requirements for the protection of mental health records, mental health providers in Illinois already should have in place practices that, in most instances, comply with the Privacy Rule.

The Privacy Rule

The Privacy Rule establishes national ground rules for the use and disclosure of protected health information (“PHI”). Health plans and health care clearinghouses (such as billing companies) are covered entities that must comply with the Privacy Rule’s use and disclosure restrictions as of April 14, 2003.⁴ Most health care providers are also covered entities. Specifically, any health care provider who submits or

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¹Health Insurance Portability and Accountability Act of 1996, PUB. L. NO. 104-191, 110 Stat. 1936 (1996).

²45 C.F.R. § 160.203 (2003).

³*Id.* § 160.202.

⁴45 C.F.R. § 160.102(a); § 164.534 (2003). But note that “small” health plans have until April 14, 2004 to comply. *Id.* § 164.534.

receives any of the following financial and/or administrative transactions electronically is a covered entity:

- health care claims or equivalent encounter information;
- health care payment and remittance advice;
- coordination of benefits;
- health care claim status;
- enrollment and disenrollment in a health plan;
- eligibility for a health plan;
- health plan premium payments;
- referral certification and authorization;
- first report of injury; and
- health claims attachments.⁵

Mental health providers that do not engage in one or more of these electronic standard transactions are exempt from compliance with the Privacy Rule.⁶ For example, a provider that submits only paper bills to patients and does not participate in any health plan provider networks that require electronic claims submissions would not be a covered entity and, therefore, would be subject only to the terms of MHDDCA. If, however, the same provider practices in more than one setting (e.g. private office and hospital clinic) and a single electronic standard transaction is submitted in his or her name, as opposed to the name of the private practice or hospital, the provider will be subject to the Privacy Rule from that moment forward with respect to all aspects and settings of his or her practice.⁷

The Privacy Rule mandates that covered entities may not use or disclose PHI for purposes other than treatment, payment or health care operations without securing an authorization, except as explicitly permitted by the Privacy Rule or required by law.⁸ Also, with the exception of disclosures to another health care provider for treatment, disclosures required by law, and research pursuant to an authorization or Institutional Review Board approval, disclosures must be limited to

⁵45 C.F.R. § 160.102; § 160.103 (2003).

⁶The use of facsimiles or e-mail to transmit mental health information does not automatically render a provider subject to the Privacy Rule; the electronic transmission must be made in connection with a standard transaction. 45 C.F.R. § 160.102(a)(3) (2003).

⁷The determination of whether or not a provider is a “covered entity” often is quite technical, particularly when a provider maintains a private practice and a facility-based practice. Counsel experienced in HIPAA and the Privacy Rule should be consulted if a provider has any doubt about whether or not he or she is subject to the Privacy Rule.

⁸45 C.F.R. § 164.502(a) (2003).

the “minimum necessary” to accomplish the intended purpose of the disclosure or use.⁹

MHDDCA

Regardless of coverage under the Privacy Rule, every mental health provider in Illinois is covered by MHDDCA. MHDDCA affords broad protection for mental health records and treatment information. The Illinois Supreme Court recently affirmed the General Assembly’s intent to maintain rigorous protections for mental health information, stating: “When viewed as a whole, [MHDDCA] constitutes a ‘strong statement’ by the General Assembly about the importance of keeping mental health records confidential.”¹⁰ MHDDCA restricts all uses and disclosures of mental health records and communications unless authorized in the statute. It provides that all records¹¹ and communications¹² between an individual and a mental health care provider¹³ are confidential and shall not be disclosed except as explicitly permitted.¹⁴

THE PRIVACY RULE – GENERAL PROVISIONS

Defined Terms

Protected Health Information. PHI is defined as “individually identifiable health information,” whether oral or recorded in any medium, created or received by a health care provider or plan that relates to a past, present, or future physical or mental condition.¹⁵ Information that either identifies an individual or includes enough

⁹*Id.* § 164.502(b).

¹⁰*Norskog v. Pfiel*, 755 N.E.2d 1, (Ill. 2001) (citing *Mandziara v. Canulli*, 299 Ill. App. 3d 593, 599 (Ill. App. Ct. 1998)).

¹¹“Records” are any documents kept by a mental health provider or agency concerning the individual and the services provided. 740 ILL. COMP. STAT. 110/2 (West 1997).

¹²“Communications” include any communications made during or in connection with treatment. *Id.*

¹³Mental health providers are referred to in the MHDDCA as “therapists,” the definition of which encompasses psychiatrists, physicians, psychologists, social workers, nurses, and others “not prohibited by law” from providing such services. *Id.*

¹⁴*Id.* But, note that the MHDDCA’s restrictions on disclosure do not apply to insurance companies writing life, health or accident insurance. Specifically, insurance companies may still obtain general consents from their clients for the release of their medical records for underwriting purposes. *Id.* 110/5(f).

¹⁵45 C.F.R. § 160.103 (2003).

information for a potential identification constitutes “individually identifiable health information.”¹⁶

HIPAA Permitted Disclosures

With notice. Health care providers may use or disclose most PHI for treatment, payment or health care operations.¹⁷ Although not required by the Privacy Rule, most uses and disclosures will be accompanied by an informed consent.¹⁸ Examples of “health care operations” include quality assessment, protocol development, case management, certification and accreditation activities, and “related functions that do not include treatment.”¹⁹

With authorization. Uses and disclosures of PHI for purposes other than treatment, payment and health care operations must be preceded by an authorization.²⁰ Additionally, disclosures of psychotherapy notes, as opposed to merely the record of treatment, in most instances must be accompanied by an authorization²¹

With notice and an opportunity to agree or object. Health care providers may use and/or disclose PHI for certain other purposes without consent or authorization when the individual is notified of the proposed uses or disclosures and is given the opportunity to orally agree or object, provided the use or disclosure is for a limited purpose.²² For example, a mental health provider may disclose limited PHI to an individual’s family member or close friend involved in treatment or payment for treatment.²³ These disclosures, however, must be limited to the “minimum necessary” to explain the treatment the individual is receiving or assist with payment for such treatment.²⁴

Without authorization or an opportunity to agree or object. A health care provider also may use or disclose PHI without authorization

¹⁶*Id.* Covered entities may “de-identify” health information by removing 18 enumerated identifiers so it is no longer subject to HIPAA’s restrictions on uses and disclosures. *Id.* § 164.514(b).

¹⁷45 C.F.R. § 164.502(a)(1)(ii) (2003).

¹⁸45 C.F.R. § 164.506(b) (2003).

¹⁹*Id.* § 164.501.

²⁰*Id.* § 164.508(a).

²¹*Id.* § 164.508(a)(2). The Privacy Rule sets forth limited exceptions to the general prohibition on using and disclosing psychotherapy notes, which exceptions include use by the therapist who made the notes for treatment, use in therapist training programs that involve supervision, and the use by the therapist who made the notes to defend against malpractice claims.

²²*Id.* § 164.510.

²³45 C.F.R. § 164.510 (2003).

²⁴*Id.* § 164.502(b).

or an opportunity to agree or object when required by law, for public health activities (such as to public health authorities), when a covered entity has reason to believe an individual is a victim of abuse, neglect, or domestic violence, for health oversight activities, for judicial and administrative proceedings, for law enforcement purposes, to coroners and medical examiners, for organ donation purposes, for research purposes, to avert a serious threat to health or safety, and/or for specialized government functions (such as military and veterans activities).²⁵

HIPAA Required Disclosures

As covered entities, mental health providers are required to disclose PHI without first obtaining an authorization in two limited situations. First, if an individual requests access to his or her PHI, the provider most often must provide access to such PHI.²⁶ Second, a mental health provider must comply with requests for access to PHI made by the Secretary of the U.S. Department of Health and Human Services in connection with an investigation of the provider's compliance with HIPAA and the Privacy Rule.²⁷

Rights of Individuals Under the Privacy Rule

In addition to restricting uses and disclosures of PHI, the Privacy Rule grants individuals many new rights regarding their own PHI. Included in these rights are the right to access PHI, the right to restrict disclosure of PHI to others, the right to request amendment to PHI, the right to receive an accounting of PHI disclosures made over a six year period, and the right to file a complaint about allegedly inappropriate uses or disclosures of their PHI.

Right to access. Individuals have a right to access much of their own PHI for inspection and copying, but this right of access to PHI is

²⁵*Id.* § 164.512.

²⁶45 C.F.R. § 164.502 (2003); § 164.524(a)(2) (2003). In certain situations, such as when an individual requests access to psychotherapy notes or PHI that the mental health provider or another health care provider deems inappropriate for review by the individual, the mental health provider is not required to comply with the request for access. See "Individual Rights" *infra* for a more thorough discussion of individual rights and a mental health provider's duties with respect to such rights.

²⁷45 C.F.R. § 164.502(a)(2) (2003). As is the case with any regulatory investigation, mental health providers should seek assistance from counsel before responding to any request for information.

not absolute.²⁸ A mental health provider may deny access to PHI without affording the individual the right to have the decision reviewed in limited circumstances, such as when the provider practices in a correctional center, when the PHI is subject to the federal Privacy Act, and when the PHI was obtained from someone other than a health care provider under a promise of confidentiality.²⁹ Similarly, a mental health provider may temporarily suspend access to PHI when the PHI was obtained pursuant to a research protocol that includes treatment, provided the individual agreed to the denial of access when consenting to participate in the research protocol and the provider ensures that the right of access will be restored upon completion of the research.³⁰

In other situations, a mental health provider may deny access to PHI, provided that the individual is given an opportunity for outside review of the denial.³¹ For example, if a mental health provider reasonably determines that disclosure of requested PHI would endanger the safety of the individual or another person, the request may be denied.³² If the requested PHI references another person who is not a health care provider, a mental health provider may deny access if he or she reasonably determines that disclosure could substantially harm that person.³³ Additionally, a personal representative of an individual who is receiving treatment may be denied access to the individual's PHI if the mental health provider reasonably determines that disclosure could cause substantial harm to the individual or another person.³⁴ In each of these situations, the individual or his or her personal representative must be given the right to have the denial reviewed by another health care provider.³⁵

Right to Restrict Disclosure. The Privacy Rule also grants individuals the right to request that a covered entity restrict disclosures of their PHI for purposes of treatment, payment and health care operations or to family members or close friends.³⁶ It is important to

²⁸*Id.* § 164.524(a)(1). Of significant importance to mental health providers is the limitation on this right to exclude access to psychotherapy notes. *Id.* Similarly, individuals do not have a right to access certain categories of PHI, such as litigation work product or information subject to the Clinical Laboratory Improvements Amendments of 1988. *Id.*

²⁹*Id.* § 164.524(a)(2).

³⁰45 C.F.R. § 164.524(a)(2) (2003).

³¹*Id.* § 164.524(a)(3).

³²*Id.* (a)(3)(i).

³³*Id.* (a)(3)(ii).

³⁴*Id.* (a)(3)(iii).

³⁵45 C.F.R. § 164.524(a)(4) (2003).

³⁶*Id.* § 164.522(a)(1)(i).

recognize that mental health providers and other covered entities are not required to agree to these restrictions.³⁷ Once the restriction is agreed to, however, the PHI may not be used or disclosed in violation of the restriction, except in emergencies.³⁸ Similarly, a restriction is not effective to prevent a provider from using or disclosing the restricted PHI for a purpose that does not require the individual's prior authorization.³⁹

Right to Request Amendment. The Privacy Rule grants individuals the right to request amendment of their records containing PHI.⁴⁰ In many situations, a mental health provider does not need to accommodate the request. For example, if the PHI that is the subject of the request was not created by the mental health provider, the individual should be directed to seek amendment from the originator of the record.⁴¹ Similarly, if the individual requests amendment of PHI that was not used by the mental health provider to make decisions related to diagnosis or treatment, the individual does not have a right to have such PHI amended.⁴² If the mental health provider determines that the PHI or record is accurate and complete, he or she may deny the request to make an amendment.⁴³ Lastly, if the PHI that is sought to be amended would not be available for inspection under the Privacy Rule, it is likewise not available for amendment.⁴⁴

Right to an Accounting. Individuals have a right receive an accounting of certain disclosures of their PHI made during the previous six years.⁴⁵ Exceptions from this requirement include disclosures for treatment, payment and health care operations, disclosures for a facility's directory, disclosures that were made pursuant to an authorization, disclosures made for national security or intelligence purposes, disclosures to correctional institutions or law enforcement officials, and disclosures of information that has been sufficiently de-identified to no longer render it PHI.⁴⁶ Essentially, if an individual has

³⁷45 C.F.R. § 164.522(a)(1)(ii) (2003).

³⁸*Id.* (a)(1)(iii).

³⁹*Id.*

⁴⁰*Id.* § 164.526(a).

⁴¹*Id.* (a)(2).

⁴²45 C.F.R. § 164.526(a) (2003).

⁴³*Id.* (a)(2)(iv).

⁴⁴*Id.* (a)(2)(iii).

⁴⁵45 C.F.R. § 164.528 (a)(1)(2003). An individual does not have a right to receive an accounting of disclosures made prior to April 14, 2003. *Id.*

⁴⁶*Id.*

reason to know that the disclosures have been made, they do not need to be included in the accounting.

Right to Challenge Uses or Disclosures. An individual has the right to challenge uses or disclosures of their PHI by filing a complaint with the mental health provider or with the Secretary of Health and Human Services (“HHS”).⁴⁷ A mental health provider must have a mechanism in place to receive and review oral and written complaints, and must document the disposition, if any, of such complaints.⁴⁸

Privacy Notice

The Privacy Rule requires mental health providers and other covered entities to provide individuals with notice of the permitted and required uses and disclosures of their PHI and of the individual’s rights, as listed above, and the covered entity’s legal duties regarding PHI.⁴⁹ This document, commonly referred to as a “Privacy Notice,” must be written in plain language, and must contain a description of the typical uses and disclosures that the mental health provider may make for treatment, payment and health care operations, a description of the permitted and required disclosures that the provider may make without an authorization, and a statement that other uses and disclosures will only be made with the individual’s revocable written authorization.⁵⁰ Also, if a mental health provider plans to use PHI for reasons unrelated to treatment, payment, or health care operations, such as to contact individuals to provide appointment reminders or other related health information, then the Privacy Notice must include a separate statement so stating.⁵¹

More importantly, if any disclosures of PHI permitted or required by the Privacy Rule are actually limited by a more stringent state law, then the appropriate description in the Privacy Notice must reflect the disclosures as permitted or required by the state law.⁵² For example, as will be discussed more fully in this article, because MHDDCA imposes more stringent restrictions on uses and disclosures of mental health information, the Privacy Notice used by Illinois mental health providers should reflect only those uses permitted and required by MHDDCA.

⁴⁷45 C.F.R. § 164.520 (b)(vi) (2003).

⁴⁸*Id.* § 164.530 (d)(1).

⁴⁹45 C.F.R. § 164.520 (a) (2003).

⁵⁰*Id.* § 164.520 (b)(1)(i-ii).

⁵¹*Id.* (b)(1)(iii).

⁵²*Id.* (b)(1)(ii)(C).

Covered mental health providers must furnish a copy of the Privacy Notice to individuals no later than the date of first service after April 14, 2003 or as soon as reasonably possible if the individual is first seen following an emergency.⁵³ Except in emergency situations, providers must make good faith efforts to obtain written acknowledgments of an individual's receipt of the Privacy Notice and document such efforts if acknowledgment is not obtained.⁵⁴ The Privacy Notice must be available at a provider's office for individuals to request to take with them and posted in a prominent location.⁵⁵ Also, if a mental health provider maintains a website, the Privacy Notice must be prominently posted and available for download.⁵⁶

USES AND DISCLOSURES OF MENTAL HEALTH INFORMATION

Like the Privacy Rule, MHDDCA entitles individuals to access their mental health records and prohibits all other disclosures, with few enumerated exceptions, without informed consent.⁵⁷

Permission to Use or Disclose Mental Health Information *HIPAA Authorization*

Disclosures for purposes other than treatment, payment and health care operations require a more detailed authorization under the Privacy Rule. Specifically, the Privacy Rule requires the following elements of valid authorizations:

- An identification of the agency or person to whom the disclosure will be made;
- An identification of the agency or person who is authorized to make the disclosure;
- A description of the purpose of the disclosure;
- The nature or a description of the information to be disclosed;
- An expiration date or expiration event; and

⁵³45 C.F.R. § 164.520 (c)(2)(i) (2003).

⁵⁴*Id.* § 164.520 (c)(2)(ii).

⁵⁵*Id.* § (c)(2)(iii).

⁵⁶*Id.* § (c)(3)(i).

⁵⁷740 ILL. COMP. STAT. 110/5 (West 1998).

- A signature of the individual and date of signature (if the authorization is signed by a personal representative, a description of the representative's authority also must be provided).⁵⁸

A valid authorization also must include specific statements to place the individual on notice of the following: he or she has the right to revoke the authorization at any time;⁵⁹ the provider may not condition treatment on whether or not the individual signs the authorization;⁶⁰ and the potential for the information to be disclosed to a third-party is no longer protected by the Privacy Rule.⁶¹

MHDDCA Consent for Disclosures

Most disclosures of mental health records must be accompanied by a detailed consent.⁶² MHDDCA refers to a document giving such "consent for disclosures." MHDDCA prohibits blanket consent for unspecified purposes and provides that advance consent is only valid when both the information to be disclosed and the duration of validity are specified.⁶³ MHDDCA requires eight elements in a valid consent for disclosures:

- An identification of the agency or person to whom the disclosure will be made;
- A description of the purpose of the disclosure;
- The nature of the information to be disclosed;
- The right to inspect and copy the information to be disclosed;
- The consequences of a refusal to consent, if any;

⁵⁸45 C.F.R. § 164.508 (c)(1) (2003).

⁵⁹*Id.* § 164.508 (c)(2)(i).

⁶⁰*Id.* (c)(2)(ii). This applies in certain situations such as when the treatment is provided in connection with a research protocol in which the individual is participating, or the mental health provider is evaluating the individual for the sole purpose of creating PHI that will be disclosed to a third party.

⁶¹*Id.* (c)(2)(iii). For example, if the individual authorizes the disclosure to his or her employer, the PHI no longer would be protected by HIPAA when it is received by the employer unless the employer was a "covered entity."

⁶²740 ILL. COMP. STAT. 110/5 (West 1998). Note that the MHDDCA consent requirements relate solely to obtaining an individual or personal representative's consent for certain disclosures of their record. This "consent for disclosure" requirement should not be confused with the law's general requirement that health care providers must obtain an individual's informed consent before treatment, except to the extent that health care providers use the same form to obtain "consent for disclosures" and informed consent.

⁶³*Id.* (c).

- An expiration date (if no expiration date is given, a consent for disclosures will expire automatically on the day after the consent is received by mental health provider);
- An indication that the individual may revoke the consent at any time; and
- A signature of the individual who is the subject of the record (or his or her representative) and a signature of a witness.⁶⁴

MHDDCA's "consent for disclosures" requirements are more stringent than the Privacy Rule in several respects. First, the forms must inform individuals of their right to inspect the information to be disclosed. Although the Privacy Rule affords individuals of this right at all times, mental health providers in Illinois must include a statement to this effect in all consents for disclosures. Similarly, mental health providers cannot overlook the requirement that a third party witness the individual's signature on the consent form.⁶⁵

The MHDDCA requirements also are more stringent than the Privacy Rule in that they prohibit entities in receipt of an individual's record from re-disclosing any information, while the Privacy Rule would require an authorization to inform the individual that once information is disclosed, it is no longer subject to the Privacy Rule's restrictions on uses and disclosures.⁶⁶

The only core element of a valid authorization that is not already required by MHDDCA relates to authorizations that are signed by somebody other than the individual who is the subject of the PHI. In these situations, the Privacy Rule requires an identification of the person authorized to sign the form.⁶⁷ Thus, "consent for disclosures" forms used by covered mental health providers must be amended to include an identification of such authorized persons.

Recommendation – "Consent for disclosures" forms already being used by covered mental health providers should satisfy the Privacy Rule's authorization requirements. The only possible change that may need to be made is to add language identifying the authority of the individual authorizing the disclosure if he or she is not the subject of the information. Also, despite the Privacy Rule's requirement for

⁶⁴*Id.* (b).

⁶⁵740 ILL. COMP. STAT. 110/5 (b) (West 1998); 45 C.F.R. § 164.508 (c)(1)(vi) (2003).

⁶⁶740 ILL COMP. STAT. 110/5(d) (West 1998); 45 C.F.R. § 164.508 (c)(2)(iii) (2003).

⁶⁷45 C.F.R. § 164.508 (c)(1)(ii) (2003).

notification that disclosed information is subject to re-disclosure, such re-disclosure is actually prohibited by MHDDCA. Thus, covered providers should now inform individuals that the information that is the subject of the disclosure may be subject to re-disclosure, except to the extent such re-disclosures are prohibited by state law.

Opportunities to Agree or Object Prior to Use or Disclosure

The Privacy Rule permits uses and disclosures of PHI for limited purposes (such as to family members or for use in a facility directory) without first obtaining an individual's written authorization, if the individual is notified of the proposed disclosure and has an opportunity to agree or object orally. MHDDCA has no comparable provision allowing a mental health provider to presume an anticipated use or disclosure is permitted because an individual did not object.

Recommendation – Disclosures that would be permitted under the Privacy Rule without written authorization still require written consent in conformity with MHDDCA “consent for disclosures” requirements. A mental health provider may not presume that an individual has implicitly consented to such disclosures because he or she did not object when advised that the disclosures might occur.

Uses or Disclosures without Permission

Uses or Disclosures Permitted by the Privacy Rule

The Privacy Rule allows covered mental health providers to make certain disclosures and uses of PHI without first obtaining an individual's consent or authorization.⁶⁸ The specific uses or disclosures of PHI that may be made without an authorization are as follows:

- as required by law;
- to public health authorities;
- to report suspected abuse, neglect or domestic violence;
- for health oversight activities (such as for audits, licensure, and investigations);
- in connection with judicial or administrative proceedings (see discussion *infra*);
- for law enforcement purposes;
- to convey information about decedents to coroners, medical examiners, and funeral directors;
- for research purposes (see discussion *infra*);

⁶⁸45 C.F.R. § 164.512 (2003).

- to avert a serious threat to an individual or the public safety;
- for specialized government functions; and
- for workers' compensation purposes.⁶⁹

Uses and disclosures of PHI that are not identified in the list above must be accompanied by a valid authorization. Uses and disclosures for an enumerated purpose may be made absent an authorization, but the scope of PHI disclosed must be limited to only that PHI which is necessary to achieve the purpose of the disclosure.

Uses and Disclosures Permitted by MHDDCA

Like the Privacy Rule, MHDDCA outlines specific situations in which a mental health provider may disclose an individual's records to a third party without first obtaining the individual's consent.⁷⁰ Also similar to the Privacy Rule, MHDDCA specifically provides that disclosures of mental health records without consent for purposes other than those explicitly outlined are not permitted.⁷¹ The enumerated purposes are:

- In connection with an individual's application for benefits (only if it is not possible to secure the individual's consent prior to disclosure);
- To exchange information among State agencies, departments, institutions, or facilities that are rendering services to the individual and/or have custody of the individual;
- To furnish information to a State agency charged with overseeing the services provided to developmentally disabled individuals;
- To third parties participating in the provision of services;
- In connection with peer review activities (if such information is de-identified);
- To a mental health provider's attorney or advocate;
- To the Institute for Juvenile Research and the Institute for the Study of Developmental Disabilities;
- To state authorities in connection with a pending investigation of suspected abuse or neglect;
- To comply with state laws;

⁶⁹*Id.*

⁷⁰740 ILL. COMP. STAT. 110/6-12.2 (West 1979).

⁷¹*Id.* 110/5(a) (West 1998).

- In connection with civil, criminal, or other proceedings;
- To assist in the provision of emergency medical care; and
- To assist in the collection of amount due and owing for care provided to the individual.⁷²

Recommendation – Covered providers in Illinois should experience no change in their practices regarding unauthorized disclosures. All unauthorized disclosures permitted by the MHDDCA are also permitted by the Privacy Rule. Permitted disclosures that are enumerated by the MHDDCA, but not the Privacy Rule, arguably fall into the Privacy Rule’s general allowance for uses and disclosures made without individual authorization when such uses and disclosures are made for purposes related to an individual’s treatment, payment for such treatment, the health care operations of the covered provider, or when required by law. MHDDCA prohibits all uses and disclosures of mental health records without an individual’s written permission unless specifically enumerated therein; however, it is, in some respects, more stringent than the Privacy Rule, and any permitted disclosures set forth in the Privacy Rule that are not similarly reflected in MHDDCA will not be available to Illinois mental health providers.

There are four categories of such disclosures that are permitted by the Privacy Rule, but are not similarly allowed under MHDDCA: (1) disclosures to public health authorities; (2) disclosures for workers’ compensation purposes; (3) disclosures for peer review purposes; and (4) disclosures for research. With respect to the first two categories of disclosures, if a mental health provider cannot secure an individual’s authorization for such disclosures, the party requesting such information will need to present a court order or valid subpoena in order for the mental health provider to comply with the request. Mental health records may be disclosed for peer review purposes only after identifiable data has been removed. As will be discussed more thoroughly below, MHDDCA does not permit the disclosure of identifiable patient information for clinical research purposes, thus mental health providers cannot disclose patient records for research purposes absent written consent from the individual or his/her guardian.

⁷²740 ILL. COMP. STAT. 110/6-12.2 (West).

Use and Disclosure of Psychotherapy Notes

Treatment of Psychotherapy Notes Under the Privacy Rule

Recognizing that psychotherapy notes often contain highly sensitive information, the Privacy Rule provides that use or disclosure of such notes most often must be accompanied by a valid authorization.⁷³ There are few exceptions to the Privacy Rule's authorization requirement for a release of psychotherapy notes.

First, the only uses and disclosures of psychotherapy notes that may be made without an authorization are: a) use of the notes by the mental health provider for treatment purposes; b) use by a health care organization at which the individual receives treatment for its own training programs; or c) use by the mental health provider or facility to defend against a legal action brought by the individual.⁷⁴

Next, psychotherapy notes may be disclosed without authorization, as required, to assist with a HHS investigation, to a health oversight agency with respect to oversight of the mental health provider, to coroners and medical examiners for purposes of identification, or to avert a serious and imminent threat to an individual or to the public.⁷⁵ The Privacy Rule prohibits all other disclosures of psychotherapy notes, including disclosures requested by the individual who is the subject of the notes.

Personal Notes under MHDDCA

MHDDCA explicitly excludes from the definition of "records" personal notes kept by a mental health provider, if such notes are maintained in a file separate from the individual's record.⁷⁶ Therefore, mental health providers' notes are not subject to disclosure to a third party, nor are they subject to discovery in a judicial or administrative proceeding.⁷⁷ MHDDCA defines personal notes as information disclosed to a mental health provider in confidence and on the condition that it would never be disclosed; information disclosed to a mental health provider that could be injurious to the patient's

⁷³45 C.F.R. § 164.508(2) (2003). The Privacy Rule defines psychotherapy notes as notes that are recorded in any medium by a mental health care provider documenting or analyzing the contents of conversation during a counseling session and are separated from the rest of an individual's medical record.

⁷⁴45 C.F.R. § 164.508(2)(i) (2003).

⁷⁵*Id.* (2)(ii) (2003).

⁷⁶740 ILL. COMP. STAT 110/2 (West 1997). See *infra* for a discussion of the MHDDCA's added protections for mental health providers' notes.

⁷⁷*Id.* 110/3 (West 1990).

relationships with others; and a mental health provider's speculations, impressions, hunches, and reminders.⁷⁸ MHDDCA allows a mental health provider to keep his or her personal notes separate from a patient's record, and thus the general provisions in MHDDCA regarding disclosure or use of an individual's "record" do not apply to mental health providers' personal notes. Notes will become part of the "record" only after disclosure to a third party, except in the case of disclosure to a mental health provider's supervisor, a consulting mental health provider, or a mental health provider's attorney.⁷⁹ Both the Privacy Rule and MHDDCA allow for disclosure of notes in legal actions by the individual against the mental health provider.⁸⁰

Recommendation – Both the Privacy Rule and MHDDCA recognize the importance of protecting mental health providers' personal notes as privileged work product. Thus, mental health providers should keep separate files for each patient: one file for their "personal notes" and one for the patient's "record." MHDDCA is a bit more stringent in its protection of notes in that disclosures are only permitted in legal actions against a mental health provider, to mental health providers' supervisors, to consulting mental health providers, or to mental health providers' attorneys. Thus, MHDDCA's protections continue to govern the disclosure of personal notes, as long as mental health providers file their notes separately from an individual's record. Covered mental health providers should experience no change regarding permitted disclosures of their personal notes.

Use and Disclosure in Civil, Administrative and Criminal Matters ***Disclosures Permitted by the Privacy Rule***

The Privacy Rule permits covered providers to disclose PHI in response to court orders, provided that the disclosure is limited to only the information authorized in the order.⁸¹ The Privacy Rule also permits disclosures in response to subpoenas or discovery requests if the provider receives satisfactory assurance that reasonable efforts were

⁷⁸740 ILL. COMP. STAT 110/2 (West 1997).

⁷⁹*Id.* MHDDCA explicitly provides that a disclosure of a mental health provider's personal notes to any other person automatically renders the notes part of the individual's record.

⁸⁰*See In re Estate of Bagus*, 294 Ill. App. 3d 887, 891 (2d. Dist. 1998) (holding that the privilege of confidentiality for mental health provider notes belongs to the patient; thus, a mental health provider cannot assert this privilege and refuse to produce his notes for discovery).

⁸¹45 C.F.R. § 164.512(e)(1)(i) (2003).

made to notify the individual of the requested disclosure, or the provider receives satisfactory assurance that reasonable efforts were made to secure a qualified protective order.⁸² Notwithstanding the above requirements imposed on persons issuing a subpoena or making a discovery request, mental health providers may take it upon themselves to provide notice to the individual or seek a qualified protective order before complying with the subpoena or discovery request.⁸³

Disclosures Permitted by MHDDCA

MHDDCA allows for disclosure of an individual's records or communications without permission in civil, criminal and administrative proceedings where the individual's mental condition or services received are an element to the individual's claim or defense, but only after the court finds during an *in camera* inspection that the information is relevant and probative.⁸⁴ With the exception of criminal proceedings in which an individual claims a defense of insanity, nothing except the fact of treatment, the cost of services and the ultimate diagnosis shall be disclosed unless the party seeking disclosure establishes relevance of other evidence in a trial court.⁸⁵ Before any disclosures are made, any interested party (not necessarily a party to the proceedings) may request an *in camera* review of the information to be disclosed for a determination of relevance.⁸⁶

Most importantly, MHDDCA prohibits parties from serving subpoenas for mental health records without first obtaining a court order, and also prohibits providers from responding to subpoenas that are not accompanied by a court order.⁸⁷ Illinois courts have been vigilant in enforcing this requirement for court orders in civil proceedings. For example, the First District Appellate Court held that a mental health provider could be liable under MHDDCA for testifying in a divorce proceeding, even though the trial court judge "let" him testify, because mental health provider appeared voluntarily and not

⁸²*Id.* (e)(1)(ii). The Privacy Rule contains very technical specifications that must be adhered to when responding to a subpoena requesting PHI. At least initially, attorneys may not be familiar with the increased efforts they must make. Therefore, mental health providers should be prepared to request proof that the party issuing the subpoena has satisfied its burden before disclosing PHI.

⁸³*Id.* (e)(1)(iv).

⁸⁴740 ILL. COMP. STAT. 110/10(a)(1) (West 2001).

⁸⁵*Id.*

⁸⁶*Id.* 110/10(b).

⁸⁷*Id.* 110/10(d).

pursuant to a subpoena or court order.⁸⁸ Also, in 1998 the same court found that an attorney violated MHDDCA by serving a subpoena for mental health records without first obtaining a court order.⁸⁹

Recommendation – The requirements set forth in the Privacy Rule and MHDDCA pertaining to disclosures of mental health information in connection with civil, criminal, or administrative matters are largely the same. In short, both the Privacy Rule and MHDDCA allow an individual to authorize the disclosure in writing. Where an individual refuses to authorize the disclosure, both the Privacy Rule and MHDDCA restrict mental health providers from complying with the request until presented with a valid court order. Therefore, mental health providers should not experience a change in practices when confronted with requests for mental health records made by third parties in connection with civil, criminal, or administrative matters.

Use and Disclosure for Research⁹⁰

Permitted Disclosures Under the Privacy Rule

Although the Privacy Rule allows disclosures of PHI for limited research purposes without obtaining an authorization from the individual who is the subject of the information, it does not include clinical research as a permitted disclosure.⁹¹ Permitted purposes include: (a) research conducted pursuant to Institutional Review Board (“IRB”) or Privacy Board approval of waiver of authorization;⁹² (b) review of information conducted in preparation of research;⁹³ and (c) research on decedents’ information.⁹⁴ In the alternative, covered mental health providers may disclose “de-identified” PHI for research

⁸⁸Renzi v. Morrison, 618 N.E.2d 794, 797 (Ill. App. Ct. 1993).

⁸⁹Mandzaira v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998).

⁹⁰HHS’s Federal Policy for the Protection of Human Subjects (generally referred to as the “Common Rule”) and the FDA’s Protection of Human Subjects Regulations govern the majority of biomedical and behavioral research in the United States. While these regulations include some privacy protections for participants, their primary purposes lie in assuring that all research is predicated by informed consent and is performed ethically.

⁹¹45 C.F.R. § 164.512(i) (2003). See *supra* for discussion regarding HIPAA’s requirements for valid authorizations.

⁹²*Id.* The Privacy Rule defines a “Privacy Board” as a board that has members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol on the individual’s privacy rights and related interests. It would include at least one member who is not affiliated with the researchers, the organization sponsoring the research, or any person who is affiliated with such entities, and would not have any member participating in a review of privacy compliance who has a conflict of interest with the research subject to the review. *Id.*(i)(B).

⁹³*Id.* (ii).

⁹⁴*Id.* (iii).

purposes without satisfying an exception as de-identified health information is no longer subject to the Privacy Rule's disclosure restrictions.⁹⁵

IRB/Privacy Board Waivers. In promulgating the Privacy Rule, HHS recognized that many research projects and protocols cannot be accomplished with de-identified health information, and that obtaining valid authorizations may not be feasible in every circumstance.⁹⁶ Accordingly, covered mental health providers may seek IRB or Privacy Board approval for a waiver or alteration to the authorization requirement.⁹⁷ IRBs and Privacy Boards may grant waivers where the use or disclosure poses only minimal risk to the individual's privacy, the research could not practicably be conducted without the waiver or alteration, and the research could not practicably be conducted without access to the PHI.⁹⁸

Reviews Preparatory to Research. Covered mental health providers may make disclosures for research purposes without first obtaining written authorization where the researcher seeks solely to review PHI to prepare a research protocol, provided that the researcher does not remove or copy any PHI from the covered provider's record storage location and the PHI sought is necessary for the research purposes.⁹⁹

Research on Decedents' PHI. Covered providers are not required to obtain authorizations from a decedent's personal representatives for

⁹⁵*Id.* § 164.514(b). The Privacy Rule identifies 18 data elements that must be removed from PHI in order to be de-identified: (1) name; (2) geographic identifiers smaller than a state (except for initial three digits of zip code in most areas); (3) all elements of date, except year; (4) telephone numbers; (5) facsimile numbers; (6) e-mail addresses; (7) social security numbers; (8) medical records numbers; (9) health plan beneficiary numbers; (10) account numbers; (11) certificate/license numbers; (12) vehicle identifiers and serial numbers; (13) medical device identifiers and numbers; (14) URLs; (15) IP address numbers; (16) fingerprints and other biometric identifiers; (17) full face photographic images (and other comparable images); and (18) any other unique characteristic. Alternatively, PHI that contains one or more of these identifiers may be rendered "de-identified" if an individual with statistical expertise determines that the likelihood of re-identification by the recipient is very small.

⁹⁶See *Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule*, U.S. DEP'T HEALTH & HUM. SERVS., NIH Publication no. 03-5388, available at http://privacyruleandresearch.nih.gov/pdf/HIPPA_Booklet_4-14-2003.pdf.

⁹⁷45 C.F.R. § 164.512(i)(1)(i) (2003). Such requests may be approved in whole or in part. *Id.* See also U.S. DEP'T HEALTH & HUM. SERVS., *Privacy Boards and the HIPAA Privacy Rule*, available at http://privacyruleandresearch.nih.gov/pdf/privacy_boards_hipaa_privacy_rule.pdf for further discussion of Privacy Boards under HIPAA.

⁹⁸45 C.F.R. § 164.512(i)(2)(ii) (2003).

⁹⁹*Id.* (i)(1)(ii).

research-related disclosures, provided that the researcher assures the provider that the use or disclosure is sought solely for research on the PHI of decedents and that the PHI sought is necessary for the research purposes.¹⁰⁰

MHDDCA Permitted Disclosures.

The only research-related disclosures MHDDCA permits without a consent for disclosure are those to reviewing agencies for their research purposes.¹⁰¹ Such reviews are not analogous to clinical research; thus, MHDDCA is significantly more stringent in its privacy protections regarding uses and disclosures for research purposes because all such disclosures require consent. Consent may be given by the individual who is the subject of the information or, in certain circumstances, a parent, guardian, attorney or *guardian ad litem*, or an agent appointed under a power of attorney for health care or property.¹⁰²

Recommendation – Because MHDDCA is more stringent, the exceptions set forth in the Privacy Rule to the authorization requirement for research-related disclosures are inapplicable to research involving the use of records maintained by mental health providers in Illinois. Thus, all uses and disclosures of mental health records for research purposes must be preceded by a valid consent for disclosure pursuant to MHDDCA.¹⁰³

Use and Disclosure of Decedents' Information

Use and Disclosure of Information Under the Privacy Rule

The Privacy Rule affords decedents the same privacy rights regarding their PHI as living individuals, with the exception of uses and disclosures for certain research purposes.¹⁰⁴ Also, covered providers may disclose PHI about a deceased individual to law enforcement where the covered provider believes such death may have been caused by criminal conduct.¹⁰⁵ Lastly, covered providers may disclose a

¹⁰⁰*Id.* (i)(1)(iii). Covered entities may also request documentation from the researcher regarding the death of the individuals whose PHI is sought. *Id.*

¹⁰¹740 ILL. COMP. STAT. 110/7(a) (West 1993). However, personally identifiable data must be removed prior to such disclosures, and personally identifiable data may only be disclosed pursuant to a consent for disclosure. *Id.*

¹⁰²740 ILL. COMP. STAT. 110/4(a) (West 1996).

¹⁰³See *supra* pp. 15-16 for a discussion of MHDDCA requirements for valid consent for disclosures.

¹⁰⁴45 C.F.R. § 164.502(f) (2003). See *supra* for a summary of HIPAA's requirements regarding disclosures of decedents' PHI for research purposes.

¹⁰⁵*Id.* 164.512(f)(4).

decedent's PHI to coroners, medical examiners and funeral directors for limited purposes.¹⁰⁶

Use and Disclosure of Records Under MHDDCA

In Illinois, mental health records remain confidential after an individual's death.¹⁰⁷ A mental health provider may disclose records and communications only when both the mental health provider and the decedent's personal representative consent to such disclosure or when authorized per a court order.¹⁰⁸ Similar to the Privacy Rule, MHDDCA allows a mental health provider to disclose records and communication to a coroner if such information is necessary to determine the individual's cause of death, provided that the information disclosed is limited to only that which relates to the factual circumstances of the cause of death *and* the death occurred in a mental health facility.¹⁰⁹

Recommendation – Mental health providers should continue their current practices regarding disclosures of decedents' information, as MHDDCA is more stringent, and thus governs in this matter.

INDIVIDUAL RIGHTS WITH RESPECT TO MENTAL HEALTH INFORMATION

Many of the rights afforded to individuals by the Privacy Rule are present in a similar form in MHDDCA. For example, both the Privacy Rule and MHDDCA permit the individual to access and copy his or her information upon request.¹¹⁰ The scope of the rights varies, however, between the Privacy Rule and MHDDCA. The Privacy Rule grants this right to all individuals regardless of age, but permits the provider to deny the request for access where he or she determines such access is not in the best interest of the individual.¹¹¹ MHDDCA grants access to individuals over the age of 12, but does not allow the provider to limit the access provided.¹¹² Therefore, the Privacy Rule will supersede MHDDCA with respect to the category of individuals who have access to their information, by affording access to individuals at any age. The Privacy Rule will not, however, supercede the right in MHDDCA to

¹⁰⁶42 C.F.R. § 164.512(g).

¹⁰⁷740 ILL. COMP. STAT. 110/5(e) (West 1998).

¹⁰⁸*Id.*

¹⁰⁹*Id.* 110/10(10) (West 2001).

¹¹⁰45 C.F.R. § 164.524 (2003); 740 ILL. COMP. STAT. 110/4(a)(2) (West 1996).

¹¹¹45 C.F.R. § 164.524(a) (2003).

¹¹²740 ILL. COMP. STAT. 110/4 (West 1996).

access all records and communications unless there is some potential danger that might result from accessing such information.

Similarly, the Privacy Rule grants individuals the right to request an accounting of most disclosures of PHI that are made without authorization or knowledge.¹¹³ Although MHDDCA requires the compilation of a log of all disclosures of mental health records and communications made without consent, it does not require the dissemination of the log to the individual upon request.¹¹⁴ Therefore, covered mental health providers should be prepared to provide a copy of the log to the individual receiving treatment upon request.

The Privacy Rule affords each individual the right to request amendment of certain information maintained by a covered mental health provider.¹¹⁵ If the provider does not accommodate the request, the individual may require the inclusion of a statement of disagreement in his or her record going forward.¹¹⁶ MHDDCA allows individuals to request modification of any information they believe is inaccurate or misleading, to submit a written statement concerning any disputed or new information, and to require the inclusion of such statement with the record.¹¹⁷ Like the Privacy Rule, a mental health provider is not required to amend an individual's record upon request.¹¹⁸ Therefore, covered mental health providers should not experience a significant change in their practices with respect to amendments of health information.

Lastly, the Privacy Rule gives each individual the right to request a restriction of certain uses or disclosures of PHI or to ask to receive communications from the provider in a confidential manner.¹¹⁹ A provider is not required to accommodate the request unless disclosure of PHI by standard means would endanger the life or safety of the individual.¹²⁰ As MHDDCA does not contain a similar provision, covered mental health providers should be prepared to receive and respond to requests for limitations on uses and disclosures of records and communications.

¹¹³45 C.F.R. § 164.528 (2003).

¹¹⁴740 ILL. COMP. STAT. 110/13 (West 1979).

¹¹⁵45 C.F.R. § 164.526 (2003).

¹¹⁶45 C.F.R. § 164.526(d)(2) (2003).

¹¹⁷740 ILL. COMP. STAT 110/4 (c) (West 1996).

¹¹⁸*Id.*

¹¹⁹45 C.F.R. § 164.522 (2003).

¹²⁰*Id.*

PERSONAL REPRESENTATIVES AND ACCESS TO MENTAL HEALTH INFORMATION

If for any reason an individual is unable to authorize a disclosure, or exercise an individual right, the Privacy Rule and MHDDCA both recognize persons with legal authority to act on behalf of individuals as personal representatives.¹²¹

Adults and Emancipated Minors. The Privacy Rule provides that a person who, under applicable law, has authority to act on behalf of an individual who is an adult or emancipated minor in making decisions related to health care shall be treated as the individual for all purposes under the Privacy Rule, provided the person's actions are consistent with the scope of his or her authority.¹²² MHDDCA similarly extends the rights of adults and emancipated minors who receive mental health treatment to guardians and individuals appointed under a power of attorney for health care or property.¹²³ Therefore, covered mental health providers should not experience any change in their current practices concerning the provision of access to persons authorized to make decisions for adults and emancipated minors.

Unemancipated Minors. The Privacy Rule provides that parents and guardians of minors may exercise rights on behalf of the minor except in situations where the minor can lawfully consent to such health care treatment, no other consent is required, and the minor has not requested or agreed that his parent or guardian be treated as his personal representative.¹²⁴ Notwithstanding that fact, the Privacy Rule permits a covered provider to disclose health information to a parent or guardian if such disclosure is permitted by state law and the provider determines that such disclosure does not conflict with the interests of the minor.¹²⁵

MHDDCA addresses minors in two categories: those under age 12, and those between 12 and 18.¹²⁶ Parents and guardians of children

¹²¹The MHDDCA recognizes the following as authorized representatives of recipients older than 12: parents or guardians of recipients under 12; parents of minors older than 12, subject to exceptions; guardians of adult recipients; attorneys or guardians *ad litem* for minors; and agents appointed under a power of attorney, while the Privacy Rule simply recognizes persons with authority to act on behalf of recipients under applicable law. 740 ILL. COMP. STAT 110/4(a) (West 1996); 45 C.F.R. § 164.502(g)(1) (2003).

¹²²45 C.F.R. § 164.502(g)(2) (2003).

¹²³740 ILL. COMP. STAT 110/4(a)(4), (a)(6) (West 1996).

¹²⁴45 C.F.R. § 164.502(g)(3) (2003).

¹²⁵45 C.F.R. § 164.502(g)(3)(ii) (2003).

¹²⁶740 ILL. COMP. STAT 110/4(a) (West 1996).

younger than 12 have complete authority to access a minor's records and authorize or prohibit disclosures of such information.¹²⁷ When the minor is between 12 and 18, however, the parent or guardian may exercise similar authority only if the minor is informed of the disclosure and does not object, or if the provider finds no compelling reason to deny access or authority.¹²⁸

Because the Privacy Rule explicitly defers to state law on this issue when such disclosures are deemed to be in the best interest of the minor, covered mental health providers generally should refer to the provisions in MHDDCA addressing rights of parents and guardians of minors.

Deceased Individuals. The Privacy Rule permits disclosure of a deceased individual's information to a person who, under applicable law, has authority to act on behalf of such individual or his or her estate, provided the disclosure is consistent with the representative's authority.¹²⁹ MHDDCA similarly contains an exception to the general prohibition on disclosing mental health information, which allows disclosure of records and information to an executor, administrator, or other person who has authority under state law to act on behalf of a deceased individual if the provider consents to the disclosure or a court orders such a disclosure.¹³⁰ Therefore, covered mental health providers should experience no change in their current practices concerning disclosures of records or communications following an individual's death.

Abuse, Neglect, Endangerment Situations. The Privacy Rule allows a covered provider to refuse to treat a person as the personal representative of an individual if the provider, in his or her best professional judgment believes that the individual has been subject to abuse, neglect or violence by the person or that treating such person as the personal representative could endanger the individual.¹³¹ MHDDCA does not contain similar language prohibiting access to parents, guardians, or persons with powers of attorney when not in the best interest of the individual. Since refusal of access would be in the best interest of the individual, a covered mental health provider should

¹²⁷*Id.* 110/4(a)(1).

¹²⁸*Id.* 110/4(a)(3).

¹²⁹45 C.F.R. § 164.502(g)(4) (2003).

¹³⁰740 ILL. COMP. STAT 110/5(e) (West 1998).

¹³¹45 C.F.R. § 164.502(g)(5) (2003).

comply with the Privacy Rule when he or she has reason to believe failure to do so could harm the individual.

PRIVACY NOTICE

Where the Privacy Rule requires dissemination of a Privacy Notice before making any disclosures and/or uses of an individual's PHI in connection with treatment, payment and health care operations, MHDDCA would allow for uses and disclosures for similar purposes without such notice. Thus, because the Privacy Rule is more stringent in its privacy protections regarding these routine disclosures and uses, all covered mental health providers must provide individuals with a Privacy Notice pursuant to the Privacy Rule.¹³² The Privacy Notice cannot describe any anticipated action that is not permitted by MHDDCA or any other state law that is more stringent.¹³³

CONCLUSION

Although the Privacy Rule imposes significant restrictions on the use and disclosure of PHI, the vast majority of such restrictions are contained in some form in MHDDCA. Therefore, Illinois mental health providers who are subject to the Privacy Rule should not experience a significant additional compliance burden.

¹³²If a mental health provider practices in a hospital or other institutional setting where the individual looks to the entire facility for treatment, as opposed to the provider individually, it is possible that the provider and the facility will develop and distribute a single Privacy Notice to all individuals. 45 C.F.R. § 164.501; § 164.520(d) (2003).

¹³³See 45 C.F.R. § 164.200 (2003) *et seq.* See also *supra* for a discussion of the Privacy Rule and preemption of state law.