

**HIPAA COW
PRIVACY NETWORKING GROUP**

USE AND DISCLOSURE OF PSYCHOTHERAPY NOTES POLICY

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State Preemption Issues:

Section 51.30 Wis. Stats. addresses disclosure of and access to “treatment records,” which are records concerning individuals who are receiving or have received services for mental illness, developmental disabilities, alcoholism or drug dependence. Section 51.30(1)(b) addressing treatment records does not address/include notes or records maintained for personal use by a treating provider if they are not available to others. If section 51.30 is read to include psychotherapy notes in the treatment record, the individual has a limited right to access that information. (Sections 51.30(4)(d)1. and 2. provide for an individual’s access to the treatment record subject to restrictions.) However, regarding disclosures of psychotherapy notes, HIPAA would preempt much of section 51.30 because HIPAA is generally more stringent regarding such disclosures without authorization (or without informed consent under section 51.30). In addition, HIPAA “authorization” requirements are more stringent and comprehensive than the State of Wisconsin’s “informed consent” requirements in section 51.30(2).

Purpose: To provide guidance to healthcare organizations in the management, retention, and disclosure of psychotherapy notes.

Background: HIPAA and State of Wisconsin law differ with respect to releasing mental health information. HIPAA concentrates on psychotherapy notes, which is a more narrow focus than Wisconsin law, which addresses mental health treatment records. Under Wis. Stat. § 51.30(1)(b), “treatment records” do not include notes or records maintained for personal use by an individual providing treatment services for the state, county or treatment facilities if such notes are not available to others. HIPAA defines “psychotherapy notes” as described above. There is no

mention about those notes being available to others, though if the notes are separate from the medical record, one might assume that HIPAA's definition of psychotherapy notes is similar to the notes described in, and excluded from, Wisconsin's definition of treatment records.

Consequently, one could assume that State of Wisconsin law does not cover psychotherapy notes, and when it comes to those notes, providers should follow HIPAA guidelines for disclosure. Psychotherapy notes would not be considered part of the patient's legal health record/designated record set. Other information contained in a person's mental health treatment record would be subject to state law under Wis. Stat. § 51.30, which requires providers to get a patient's written informed consent except in limited circumstances. Providers should consult Wis. Stat. § 51.30(4)(b) to learn about those limited circumstances.

Definition

Under the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), *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.¹

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

Policy Statements:

- 1. Patient Access to Psychotherapy Notes:** Even though the patient has a right to access his/her protected health information maintained in the legal health record, the patient does not have a right to access psychotherapy notes as they are not considered part of the legal health record/designated record set. Therefore, [ORGANIZATION] is not required to fulfill a patient's request for access to psychotherapy notes.² However, [ORGANIZATION] must inform the patient of this limitation on access if the request will not be fulfilled.
- 2. Patient Authorization Required:** If the [ORGANIZATION] chooses to disclose psychotherapy notes, a patient's written authorization for disclosure of psychotherapy notes is required. Of note, [ORGANIZATION] is not required to disclose psychotherapy notes pursuant to an authorization (disclosure is permissible). NOTE: In the State of Wisconsin, psychotherapy notes are not included in the definition of treatment records. For specific requirements of authorizations involving psychotherapy notes, see [ORGANIZATION's] policy [POLICY ON PATIENT AUTHORIZATIONS].
- 3. Patient Authorization Not Required:** [ORGANIZATION] is not required to obtain an authorization for the following examples of uses or disclosures of psychotherapy or as stated in 45 CFR 164.512.

¹ 45 CFR 164.501 (2000).

² See Preemption Section above regarding patient access to psychotherapy notes under Wisconsin law.

- A. To carry out the following treatment, payment or health care operations:
 - i. Use by the originator of the psychotherapy notes for treatment;
 - ii. Use by the [ORGANIZATION] for our 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
 - iii. Use by the [ORGANIZATION] to defend ourselves in a legal action or other proceeding brought by the patient.
- B. In response to the federal Department of Health and Human Services investigations to determine [ORGANIZATION'S] compliance with HIPAA privacy rules;
- C. To comply with the State of Wisconsin and federal law;
- D. To assist in oversight of the originator of the psychotherapy notes;
- E. To help coroners/medical examiners in the examination of deceased persons;
- F. To address serious public health or safety concerns. Special restrictions apply to disclosures made to law enforcement to identify or apprehend an individual who has admitted participation in a crime that [ORGANIZATION] reasonably believes may have caused serious harm to the victim. Specifically, [ORGANIZATION] may not disclose health information, including psychotherapy notes, if [ORGANIZATION] learned of the individual's participation when he or she requested or received treatment, counseling or therapy to affect the propensity to commit such a crime.³

Applicable Regulations/Standards:

45 CFR § 164.508(a) (2) (2002)
45 CFR § 164.512 (2002)
45 CFR § 164.501 (2000)
Wis. Stat. § 51.30 (2000)
Federal Register, Volume 67, Number 157

Resource:

OCR FAQ: Does the HIPAA Privacy Rule permit a covered entity to disclose psychotherapy notes to or through a health information organization (HIO)?

Answer: Yes, provided the covered entity has obtained the individual's written authorization in accordance with 45 C.F.R. § 164.508. See 45 C.F.R. § 164.501 for the definition of "psychotherapy notes." With few exceptions, the Privacy Rule requires a covered entity to obtain individual authorization prior to a disclosure of psychotherapy notes, even for a disclosure to a health care provider other than the originator of the notes, for treatment purposes. For covered entities operating in an electronic environment, the Privacy Rule does, however, allow covered entities to disclose protected health information pursuant to an electronic copy of a valid and signed authorization, as well as to obtain HIPAA authorizations electronically from individuals, provided any electronic signature is valid under applicable law.

³ 45 CFR 164.512(j)(2)(i) & (ii) (2000).

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http://www.hhs.gov/ocr/privacy/hipaa/faq/health_information_technology/558.html

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05/11/2015	Nancy Davis, MS, RHIA, CHPS – Ministry Health Care Chrisann Lemery, MSE, RHIA, CHPS, FAHIMA – Pavestone Health Solutions	Privacy Networking Group	Added clarification and simplification of statements. Added OCR Reference
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