

Ethics Opinion

100412

FACTS: A non-profit state-wide legal organization represents clients with mental health issues in their efforts to obtain social security benefits. To effectively advocate, the organization has their client/patient sign what it believes is a Health Insurance Portability and Accountability Act (HIPAA) compliant release that asks for psychotherapy notes. The client/patient is aware that the organization is asking for these and that the organization may potentially submit the material to the tribunal. HIPAA specifically recognizes that there are situations where those with mental impairment are not served by seeing their psychotherapist's notes and provides the means for a health care provider to protect against disclosure to the patient (subject to exceptions, identified further below). See also, Montana Uniform Health Care Information Act, MCA 50-16-501 et seq., and 50-6-801 and specifically M.C.A. § 50-16-542; See also MCA 53-21-165 and 166. The organization was recently denied psychotherapist notes by a mental health services provider asserting that the Montana Rules of Professional Conduct mandate that the client/patient have access to all information in their attorney's file and that the attorney cannot prevent access to the notes by the client/patient. The organization disagrees, explaining that it needs the information to advocate for the client/patient's social security benefits. The organization's attorneys explain to their clients that it is within their attorney's rights to keep the psychotherapy notes from the client/patient. To date, keeping the records from the client/patient has not been an issue because the issue is explained to the clients and the clients accept that it is in their best interest not to see their psychotherapy notes.

QUESTION PRESENTED: When representing a client in a social security matter, does an attorney have a right to withhold a client's psychotherapy records from a client under the Montana Rules of Professional Conduct?

SHORT ANSWER: In this limited context, yes. The Committee accepts as an assumption that there are regulatory procedures within HIPAA that define the restrictions surrounding

psychotherapy notes. Subject to those procedures, an attorney may take such action on behalf of the client as is impliedly authorized to carry out the representation—including restricting access to psychotherapy notes. Further, a client is not entitled to the complete attorney file, particularly if there is language in the attorney fee agreement--to which the client agrees--setting forth that the client is not entitled to a specific portion of the file.

DISCUSSION:

The general rule is that clients are entitled to their attorney's file upon termination of their relationship with an attorney. There are, however, some limited exceptions to this general rule and what a client is entitled to in connection with litigation. For example, a lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer. A discussion of these limitations is found in Ethics Opinion 950221. The regulatory mechanisms of HIPAA provide tight restrictions on access to psychotherapy records—for the patient and for the patient's attorney. Notably, however, the HIPAA regulations concerning psychotherapy notes specifically provide for discovery of the notes in judicial and administrative proceedings, with restrictions. See, e.g. 45 CFR 164.508 and 164.512(e). The HIPAA regulatory system recognizes the reality that psychotherapist's notes may be discoverable and used in litigation just as other health care information is used.

The Montana Rules of Professional Conduct strike a similar balance. There is no mandate in the Rules of Conduct that require disclosure of psychotherapist's notes obtained by the attorney on a client's behalf. As the information moves from the psychotherapist to an adjudicator, there are filters that can be put in place to protect a patient/client from this most sensitive information. Montana Professional Conduct Rule 1.16 (d) provides that upon termination of representation a lawyer shall take steps to the extent reasonably practicable to protect a client's interests. Included within those is the obligation to surrender papers and property "to which the client is entitled." Neither the HIPAA regulations nor the Montana Uniform Health Care Information Act nor Rules of Professional Conduct provide an entitlement to a client of their psychotherapist's notes.

Lawyers routinely act as custodians, conduits, and safe keepers of clients' property, including

client files. Lawyers have a duty to deliver and account for a client's property, including the file. The duty is triggered when the lawyer's custodial obligations have come to a close and the client is entitled to take possession. But the Rules of Professional Conduct also set forth several common-sense exceptions to the prompt disbursement requirement: (1) when the agreement with the client provides otherwise; (2) when the rule states otherwise (most notably, when there is a legitimate dispute as to ownership of the property); and (3) when otherwise permitted by law. The “when otherwise permitted by law” exception encompasses the protections addressed in the HIPAA regulations.

Montana Professional Conduct Rule 1.2 addresses the scope of representation and allocation of authority between a lawyer and client. Rule 1.2(a) provides in part that a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4 on communication, shall consult with the client as to the means by which they are to be pursued. The rule also provides that “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

The organization in the facts presented here can include specific language in their attorney-client representation agreement that there are limitations on access to psychotherapy notes. The agreement can further explain that the lawyer is bound to follow the constraints imposed by state and federal law pertaining to health care records, and that the constraints override the client’s access to the notes. If the attorney explains the limitations on their responsibilities to the client in this fashion, the client has no claim to the restricted portion of the file upon termination of the representation. In addition, the organization can enter a separate agreement with the mental health facility, providing that psychotherapy notes will not be released to the client/patient. Case law and other state’s ethics opinions are clear that if a lawyer has an agreement with a non-client regarding disposition of funds or property, the lawyer must honor that agreement.

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