



HIPAA, Minnesota's Health Records Act, and Psychotherapy Notes

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Table of Contents

Acknowledgements	1
Introduction	2
HIPAA, Minnesota’s Health Records Act, and Psychotherapy Notes: Overview for Providers	3
Background	3
What’s in a Medical Record?	3
HIPPA Standard	3
Minnesota Standard	3
HIPAA, Minnesota’s Health Records Act, and Psychotherapy Notes: Legal Overview	4
Legal Obligations	4
Psychotherapy Notes Defined	4
HIPAA Standard: <i>Right of Access</i>	4
Minnesota Standard: <i>Patient Access</i>	4
Preemption Analysis	5

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Introduction

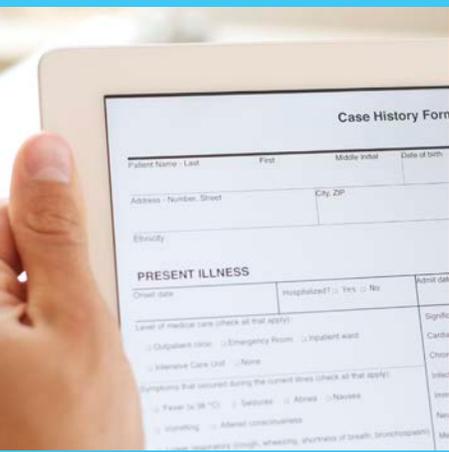
In 2014, the Minnesota Department of Health (MDH), in consultation with the e-Health Advisory Committee convened the Minnesota e-health Privacy and Security workgroup to provide materials and resources to health and health care providers to aid in implementing more robust privacy and security programs throughout the state . Over the course of several meetings with key stakeholders, the Workgroup identified the need to clarify the differences in Minnesota law with respect to the patient’s right of access to mental health records under the Health Insurance Portability and

Accountability Act (HIPAA) Privacy Rule This overview document is intended for mental health and behavioral health providers and is the Minnesota Department of Health’s summary legal analysis of the difference between HIPAA and the Minnesota Health Records Act when it comes to the disclosure of psychotherapy notes .

Additional resources and guidance for providers and privacy officers are available online at www.health.state.mn.us/facilities/privacy/index.html.

HIPAA, Minnesota's Health Records Act, and Psychotherapy Notes

Overview for Providers



Background

Patient access to psychotherapy notes¹ in Minnesota may cause confusion among providers because of the unique interaction of federal and state law where state law wins .

- **Federal law** (HIPAA Privacy Rule) allows a mental health professional to share psychotherapy notes, at the provider's discretion, with patient consent . In recognition of the sensitivity of this information, HIPAA requires that this consent be captured on a form only documenting the consent to release psychotherapy notes .
- **Minnesota law** is more stringent than HIPAA with respect to the rights of individuals² . In Minnesota, patients have the right to view or release all parts of their medical record and psychotherapy notes are part of that medical record that can be viewed or released .The added protection of the notes inclusion in the medical record is to assure greater access for patients to all of their protected health information .

What's in a medical record?

Much of the confusion stems from the differences in definition of what constitutes a medical record .*Even if psychotherapy notes are kept in a separate file, in Minnesota, they are considered to be part of the medical record. This is to ensure that patients have full access to complete information about their health.*

Though this difference in definition of what is included in medical record may cause some alarm, in practice, these notes are rarely accessed . Minnesota does allow for the use of clinical judgment in the release of all medical records, such that if the release could cause harm to the patient or others, they can be withheld from the patient's view .³

HIPAA standard.

Psychotherapy notes are specifically excluded from a patient's general right to access or inspect their own medical records under HIPAA's Privacy Rule . If mental health professionals wish to disclose the psychotherapy notes, they are generally permitted to do so, but must receive the patient's authorization .⁴

Minnesota standard.

Minnesota's Health Records Act gives patients access to "complete and current information possessed by that provider concerning any diagnosis, treatment, and prognosis" and does not distinguish psychotherapy notes from other medical records⁵

¹ Under HIPAA, psychotherapy notes are recorded by a health care provider who is a mental health professional that: 1) document or analyze the contents of conversations during a counseling session; and 2) are separated from the rest of the patient's medical records (45 C .F.R . § 164 .501) .

² If HIPAA and a state law differ as to patient access to medical records, HIPAA says that the law that gives the patients more access is the law that the covered entities within the state should follow (45 C .F.R . § 160 .203(b)) . Minnesota allows a patient to access all of their medical records without any restrictions as to psychotherapy notes (Minn . Stat . § 144 .292, subd . 2)

³ Minn . Stat . § 144 .292, subd . 7 (provider can withhold records if detrimental to the physical or mental health of the patient, or is likely to cause the patient to inflict self-harm, or to harm another) .

⁴ 45 C .F.R . § 164 .524(a) and 45 C .R . § 164 .508(a)(2) (HIPAA is silent, but may require that the provider allow a patient to view the psychotherapy notes before any authorization for disclosure) .

⁵ Minn . Stat . § 144 .292, subd . 2 .



While the two laws are generally in alignment, there is a difference between HIPAA and the Health Records Act when it comes to psychotherapy notes.

Legal Obligations

Mental health professionals in Minnesota need to be aware of—and comply with—both the compliance obligations imposed by the Health Insurance Portability and Accountability Act (HIPAA) and its regulations, as well as those imposed by the Minnesota Health Records Act. While the two laws are generally in alignment, there is a difference between HIPAA and the Health Records Act when it comes to psychotherapy notes.

Psychotherapy Notes Defined.

Notes recorded by a health care provider who is a mental health professional that:

- 1) Document or analyze the contents of conversations during a counseling session; and
- 2) Are separated from the rest of the patient's medical records. (45 C.F.R. § 164.501).

HIPAA Standard: *Right of Access.*

Under HIPAA's Privacy Rule, a mental health professional is not required to disclose psychotherapy notes to a patient. In fact, psychotherapy notes are specifically excluded from a patient's general right to access or inspect their own medical records. If a mental health professional ever wishes to disclose the psychotherapy notes, however, they are permitted to do so, but must first receive the patient's authorization (45 C.F.R. § 164.524(a)).*

There are only three instances in which a mental health professional does not need patient authorization to use or disclose psychotherapy notes under HIPAA:

- Use by the provider for treatment;
- Use or disclosure for certain training purposes; or
- Use or disclosure to defense in a legal action. (45 C.F.R. § 164.508(a)(2)).

Minnesota Standard: *Patient Access.*

Minnesota's Health Records Act gives patients broader rights when it comes to accessing mental health records because it does not distinguish psychotherapy notes from other medical records. Minnesota law requires that a provider give a patient "complete and current" information concerning *any* diagnosis, treatment or prognosis that relates to the patient upon request. (Minn. Stat. § 144.292, subd. 2). A client also has the right to *access and consent* to release records related to psychological services under administrative rules governing psychologists (Minn. R. 7200.4710).

Minnesota has created an exception, however, that gives providers the discretion to withhold health records (including psychotherapy notes) if the provider believes that

Because Minnesota provides the right for a patient to access all of their medical records (without any restrictions as to psychotherapy notes), Minnesota mental health professionals should be aware that their patients will be able to access any psychotherapy notes that relate to that patient.

“the information is detrimental to the physical or mental health of the patient, or is likely to cause the patient to inflict self harm, or to harm another”

(Minn. Stat. § 144.292, subd. 7) .

Minnesota also has a “Duty to Warn” statute that places a provider under a duty to disclose protected information to “predict, warn of, or take reasonable precautions to provide protections from, violent behaviors.” This duty arises when a patient has communicated a specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim . If this occurs, a provider *must* make reasonable efforts to communicate the threat to the potential victim or to law enforcement .*(Minn. Stat. § 148.975, subd. 2) .*

Preemption Analysis.

If HIPAA and a state law differ as to patient access to medical records, HIPAA says that the law that gives the patients more access is the law that the covered entities within the state should follow *(45 C.F.R. § 160.203(b))* . Because Minnesota provides the right for a patient to access all of their medical records (without any restrictions as to psychotherapy notes), Minnesota mental health professionals should be aware that their patients will be able to access any psychotherapy notes that relate to that patient .