

Responding to Evaluee Requests for Fitness-for-Duty Evaluation Records When the “Client” Controls Record Release: Caught Between (take your pick): the Board of Psychology and the Law of Contract; a Rock and a Hard Place; the Devil and the Deep Blue Sea (and on and on)...

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So you're a forensic psychologist who does fitness for duty evaluations and you have contracts with insurance companies, colleges, agencies and other organizations to perform evaluations of their employees. And, as is often the case, the contract you have, which was probably drafted by the other party, specifically states that the contracting company controls the records of the evaluations, such that you are not free to provide them to the evaluees (who are, after all, “evaluees” and not your “clients” – the contracting companies are the “clients”).

And so you perform one of these evaluations and the evaluee sends you a written request for records pursuant to California state law. The client company has its own reasons for refusing to release the records, which you nicely explain to the evaluee, who, in a fit of pique, files a complaint against you with the California Board of Psychology (“BOP”), which, in turn, sends you a letter indicating that California law requires that you provide a copy of the records within 15 business days from the written requestⁱ and reminds you of the dire consequences you may already face for failure to comply with the lawⁱⁱ.

Consider the following questions: when you perform a fitness for duty evaluation are you providing health care services? Is the evaluee your patient? Is the resulting evaluation part of a health care record? For the answers, read on.....

When Performing Forensic Evaluations, are Psychologists “Health Care Providers”?

Yes. Under California law, licensed psychologists are regarded as “health care providers.” *Health & Safety Code* Section 123105(a)(7) states:

123105. As used in this chapter:
(a) “Health care provider” means any of the following:
(7) A psychologist licensed pursuant to Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

Are Recipients of Services of Psychologists Considered to be “Patients”?

Yes. Under California law, people who receive services of a health care provider are considered “patients”:

CA Health & Safety Code Section 123105(c) states:

"Patient" means a patient or former patient of a health care provider.

Are Psychologists’ Forensic Records Considered “Health Care Records”?

Under California law, records created by psychologists would be considered “health care records”:

(d) "Patient records" means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient.

But Aren’t Records of Forensic Evaluations Something Other than Health Care? Doesn’t *HIPAA*ⁱⁱⁱ Have Anything to Say About This Problem?

HIPAA does, indeed, have something to say about this problem. *HIPAA (Code of Federal Procedure)* says:

CFR Sec. 164.524: Access of individuals to protected health information.

(a) Standard: Access to protected health information. (1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set, ***except for***:

(i) Psychotherapy notes;

(ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding (emphasis added)

So it would seem that *HIPAA* excludes records created for use in the legal system from patient access. Two questions then arise: 1) are fitness for duty records created in “reasonable anticipation” of legal actions?; and 2) does *HIPAA* actually control in California? The answer to the first question is likely to be “no,” as fitness for duty evaluations are most frequently performed without ensuing legal actions (although we know of no specific data bearing on this question).

As to the second question, the California Office of Health Information Integrity (<http://www.ohi.ca.gov/calohi/Home.aspx>) review of patient access to records issues supports California law over federal law, as California law is more protective of patient privacy than federal law. Thus, California law probably preempts HIPAA in this respect and affords patients access to their records.

Isn't There Any Case Law That Deals With These Issues?

Now that you mention it, the good news is that there is one case that we have found that speaks directly to this issue, but the case is from Nevada, and, as a result of the case, Nevada now holds that evaluatees are "patients" and that they have a right of access to their records.

Patient - A "patient" in the physician-patient relationship is one "who consults or is examined or interviewed by a physician for the purpose of diagnosis or treatment." In *Cleghorn v. Hess*, 109 Nev. 544, 853 P.2d 1260 (1993), a broad interpretation of the term "patient" was adopted by the court, consistent with the legislature's intent. In this specific case, the term "patient" extended even to those members of a union who were examined by a psychologist to determine suitability for employment and no other reason. Clearly the definition reaches beyond the traditional view of a sick or injured person being treated by a physician. NRS 49.215.

Since *Cleghorn v. Hess* is Nevada law, it is not necessarily controlling in California, but there's little doubt but that an evaluatee who launches a legal assault on a psychologist who refused to release fitness for duty record would cite *Cleghorn v. Hess* to support his/her claim. Note that the Court's finding in this Nevada case is consistent with our reading of California law, above.

So Have You Guys Actually Seen BOP Actions Against Psychologists Who Inform Evaluatees That They Aren't Free To Release Records Without Authorization From The "Client"?

We have seen at least four cases in the past two years involving BOP letters to psychologists who refused to release records to evaluatees because of threats by "clients" to sue the psychologists for breach of contract. In none of these cases did the BOP file an "accusation" against the psychologists, but for different reasons in each case. In one case, the psychologist retained an attorney who convinced the "client" that it wouldn't be able to contract with any other psychologists to do these evaluations if it sued for breach of contract – that action simply would be too dangerous to future psychologists as agents of the company. In another, the psychologist had contacted CPA for consultation and was told that he could not release the records. That act of consultation and the reality of the restrictive records-release clause in the contract protected him. In the third and fourth cases, the psychologists took the risks of releasing the records without involving attorneys and the "clients" took no action (whew!).

Would It Help If These Record-Release Restrictions Were In The Psychologists' Informed Consent Documents?

Of course it would help!! No guarantees, but it certainly is the standard of care to provide information like this in an informed consent document and to be certain that the evaluatee understood it.

Summary And Recommendations

In our view, the contracts that are signed by psychologists who perform fitness for duty evaluations should all be reviewed for the presence of restrictive records-release clauses. Psychologists should try to negotiate those clauses before signing and fully consider the implications of agreeing to such contracts. Like most agreements, these contracts are negotiable. A BOP defense of "but I didn't feel like I could negotiate that" is a challenging argument to make and, frankly, not much of a defense.

Further, evaluators who do agree to such contracts should clearly have statements in their informed consent documents that state this issue and ensure that evaluatees "knowingly and intelligently" consent before performing the evaluation. A knowing and intelligent waiver includes providing the evaluatee with enough information that would enable the evaluatee to make an informed choice. This might involve clearly documenting/discussing the nature of the evaluation and the recommendations it could produce, how the recommendations might be used, etc. How do you know how much information you need to provide? Consult, consult, consult.

In addition, psychologists confronted with evaluatee demands for these types of records are best advised to seek consultation from colleagues and/or attorneys before deciding which courses of action to take. The stakes are very high. Remember that requests for health care records require a response within a specified period of time, so it is best to act immediately and not wait until the eleventh hour, at which point your options might be curtailed by law and/or schedule.

Finally, psychologists might wish to support legislation to classify forensic evaluations as non health care services. The *HIPAA* position may also be helpful, but is not likely to be helpful enough, by itself, to influence the legislature to classify forensic evaluations as non-health care services. Joining forces with other disciplines in which forensic practitioners face these issues might also be in order. We all have a stake in molding the laws that govern our professions.

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¹ CA Health & Safety Code Section 123110(b):

Additionally, any patient or patient's representative shall be entitled to copies of all or any portion of the patient records that he or she has a right to inspect, upon presenting a written request to the health care provider specifying the records to be copied, together with a fee to defray the cost of copying, that shall not exceed twenty-five cents (\$0.25) per page or fifty cents (\$0.50) per page for records that are copied from microfilm and any additional reasonable clerical costs incurred in making the records available. The health care provider shall ensure that the copies are transmitted within 15 days after receiving the written request.

² CA Health & Safety Code Section 123110(i):

Any health care provider described in paragraphs (4) to (10), inclusive, of subdivision (a) of Section 123105 who willfully violates this chapter is guilty of unprofessional conduct. Any health care provider described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 123105 that willfully violates this chapter is guilty of an infraction punishable by a fine of not more than one hundred dollars (\$100). The state agency, board, or commission that issued the health care provider's professional or institutional license shall consider a violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate.

ⁱⁱⁱ The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (P.L.104-191) [HIPAA] was enacted by the [U.S. Congress](#) in 1996.