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Alternative Dispute Resolution Section of the State Bar of Michigan

HIPAA and the Disclosure of Mental Health Records in Facilitative Mediation

— by Robert P. Tremp and Lee Hornberger

This article reviews a situation which highlights the potential of a conflict in the procurement and use of mental health information at a facilitative mediation involving permanency placement of an abused or neglected child. Since the Supreme Court Administrative Office is very interested in the use of facilitative mediation for the permanent placement of abused or neglected children, this is not an isolated issue. A number of community mediation services are actively involved in this process.

"The question of whether communication is legally privileged is a question of law."

Consider the following:

- A juvenile matter under the jurisdiction of the Probate Section of the Family Court; the juvenile was removed from the mother's care and control and the mother's parental rights were suspended; this suspension resulted in the inability of the mother to consent to the release of any medical information regarding her child.

- The child has been placed in a foster care home by the Department of Human Services.

- The Probate Court and attendant laws have a general goal to reunite children with their parent or parents.
- Probate Court referred the child to the Community Mental Health Program; the child has attended a number of sessions with a social worker who is bound by the confidentiality laws of the Mental Health Code; the child was initially and continually advised that any communications between the child and the social worker were strictly confidential and would not be disclosed without proper release.

- The child has an appointed guardian; the juvenile and/or the guardian has an attorney; the Department of Human Services has a case worker that is monitoring the case; and the foster care person is also involved.

- The Probate Court wishes to have an evaluation made regarding potential visitations with the child and the child's mother; the Probate Court issues an order to turn over the social worker's case notes and to testify, if necessary, regarding the aforesaid potential visitations; the visitation program is a first step for a possible reunification of the child with the child's mother; the Probate Court orders that the matter be referred to mediation under principles and guidelines of facilitative mediation. MCR 2.410-.411 and 5.143(A).

- The social worker requests a waiver before either giving any testimony, appearing at any mediation session, or releasing any mental health records; the mother, because of her status of the suspension of her parental rights, cannot give the waiver; the guardian *ad litem* refuses to consent

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to the waiver as she feels if items discussed with the social worker by the child were revealed it would damage the relationship with the mother.

- As stated, there is in existence a Probate Court order directing that the mental health material and/or testimony be made available to the court, to the facilitative mediation process and the Department of Human Services.

- The social worker complies with the Probate Court order without a release.

Was the social worker's providing mental health information regarding her client without a release in violation of federal or state law and/or should the mediator refuse to proceed or consider any mental health records and/or disclose any mental health records without a sufficient release or waiver?

The question of whether communication is legally privileged is a question of law. Mental Health Code, MCL 330.1748(1); and MRE 501. The Mental Health Code also provides that information made confidential by this section shall be disclosed only pursuant to a court order, court subpoena, or a legislature subpoena, **unless the information is privileged by law**. MCL 330.1748(5)(a). The emphasized portion is significant.

The Mental Health Code also provides that information may be released if a consent is obtained from the recipient, the recipient's guardian with authority to consent, the parent with legal custody of a minor recipient, or the court-appointed personal representative or executor of the estate of the deceased recipient. MCL 330.1748(6).

"While disclosure is authorized pursuant to a court order, court subpoena, or a legislature subpoena, this curtailment of confidentiality is immediately qualified by the limitation 'unless the information is privileged by law.'"

The Code also provides that information may be disclosed at the discretion of the holder of the record, if it is necessary for the recipient to apply for or receive benefits or if it is necessary for the purpose of outside research, evaluation, accreditation, or statistical compilation, or to a provider of mental or other health services or a public agency, if there is a compelling need for disclosure based upon a substantial probability of harm to the recipient or other individuals. MCL 330.1748(7).

The Mental Health Code deals with the confidentiality of mental health records in a case of suspected child abuse or neglect. MCL 330.1748a. It is the general rule that mental health information, in the possession of a community mental health agency, and/or one of its social workers, cannot be disclosed without the consent of the recipient. That rule is qualified by enumerated exceptions. However, none of those exceptions are applicable to this situation.

While disclosure is authorized pursuant to a court order, court subpoena, or a legislature subpoena, this curtailment of confidentiality is immediately qualified by the limitation "unless the information is privileged by law." MCL 330.1748(5)(a). Information privileged by law includes information which is impressed with the physician-patient privilege, MCL 600.2157, social worker-client privilege, MCL 333.18513, psychologist-patient privilege, MCL 333.18237, and professional counselor-client privilege, MCL 333.18117.

The legislature could have, had it chosen to do so, declared that the mental health records of a minor, adjudicated a delinquent, in proceedings before the family division, are not confidential. Because the legislature specified various specific exceptions to the general rule of confidentiality, but did not mention any such exception for juvenile court proceedings, it may reasonably be inferred that the legislature intended no such exception. It is a maxim: *expressio unius est exclusio alterius*. In other words, the express mention, in a statute, of one thing, implies the exclusion of other, similar things not mentioned. *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971).

The federal Health Insurance Portability and Accountability Act (HIPAA) which was written to enhance, rather than curtail, confidentiality of medical information, preempts only less stringent - - not more stringent - - state regulation.

The acquisition, storage, and dissemination of medical information is extensively regulated by the Federal Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d, *et seq*, and implementing regulations at 45 CFR 164.500, *et seq*. The class of so-called HIPAA "covered entities" includes a "health care provider." 42 USC 1320d (3). HIPAA-protected individually identifiable health information includes any information, including demographic information collected from an individual, that is created or received by a health care provider and relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, and identifies the individual. 42 USC 1320d(6).

HIPAA declares that it is a federal felony to make an unauthorized disclosure of individually identifiable health information. The penalty is, in the absence of malice or the pursuit of commercial gain, a term of imprisonment of up to one year, a $50,000 fine, or both. Where the improper

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acquisition, or delivery, of individual health information is found to be either malicious, or made in pursuit of profit, the penalty is a term of not more than ten years imprisonment, a fine of not more than $250,000, or both. 42 USC 1320d(6).

The purpose of HIPAA is "protecting a patient's right to the confidentiality of his or her individual medical information," which constitutes "a compelling federal interest." *Crenshaw v MONY Life Ins Co*, 318 F Supp2d 1015, 1028 (SD Cal 2004).

HIPAA is a partially preemptive statute. In other words, to some extent it preempts contrary state and local law. To some extent, it is expressly non-preemptive. And, as will be seen below, to some extent it incorporates state law by express reference.

In general, HIPAA requirements supersede any contrary provision of state law, including a provision of state law that requires medical or health plan records, including billing information, to be maintained or transmitted in written rather than electronic form. 42 USC 1320d-7. A HIPAA standard, requirement, or implementation specification that is contrary to a provision of state law preempts the provision of state law. 45 CFR 160.203. This preemption rule does not apply if the provision of state law relates to the privacy of individually identifiable health information and **is more stringent** than a HIPPA standard, requirement, or implementation specification.

More stringent means, in the context of a comparison of a state law provision and a HIPAA requirement, a state law that meets one or more of the following criteria:

(1) the state law prohibits or restricts a use or disclosure where otherwise permitted, except if the disclosure is:

  (i) Required by the Secretary of Health and Human Services in connection with determining whether a covered entity is in compliance; or
  (ii) To the individual who is the subject of the individually identifiable health information.

(2) With respect to the rights of an individual who is the subject of such health information, regarding access to or amendment of such information, permits greater rights of access or amendment.

(3) With respect to information to be provided to an individual who is the subject of such information about a use, a disclosure, rights, and remedies, provides the greater amount of information.

(4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of such information, for use or disclosure of such information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission.

(5) With respect to record keeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.

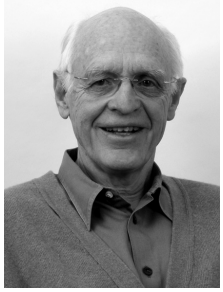
(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of such information. 45 CFR 160.202(2).

The 45 CFR 160.203 phrase "relates to the privacy of individually identifiable health information," means, with respect to a state law, that the state law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way. 45 CFR 160.202.

The HIPAA preemption provision was discussed in *National Abortion Federation v Ashcroft*, 2004 US Dist LEXIS 1701 (ND Ill 2004). *National Abortion* involved a situation where Illinois law precluded enforcement of a subpoena duces tecum, and a court order, directed to Northwestern University, purporting to require disclosure of records identifying abortion recipients. *National Abortion* held that the Illinois Medical Privacy Law was not preempted by HIPAA.

"The HIPAA which was written to enhance, rather than curtail, confidentiality of medical information, preempts only less stringent—not more stringent—state regulation."

The HIPAA preemption provision was also discussed in *United States ex rel Stewart v The Louisiana Clinic*, 2002 US Dist LEXIS 24062 (ED La 2002). *Stewart* was a False Claims Act suit alleging Medicaid fraud. The plaintiff requested production of the medical records of non-party patients. The defendant, citing Louisiana law, sought a protective order to redact all information that would reveal the identities of the patients. Granting the defense motion for a protective order, in pertinent part, the court held that



Robert P. Tremp is a graduate of the University of Detroit School of Law. He practiced law for 45 years. He is now retired from the active practice of law and now only serves as a mediator in civil and domestic facilitative mediation. He plans on performing mediation for permanent placement of abused and neglected children. Mr. Tremp was the past chairperson for the Senior Lawyer Section and is now serving his second term on the State Bar ADR Council.

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"HIPAA protected individually identifiable health information includes any information, including demographic information collected from an individual, that is created or received by a health care provider and relates to the past, present, or future physical or mental health …of an individual…."

Louisiana law, more stringent than federal law, with respect to medical privacy, was not preempted by HIPAA. *See also, Kalinoski v Evans*, 377 FSupp2d 136 (D DC 2005).

Moreover, HIPAA regulations preclude unauthorized disclosure to a person standing *in loco parentis* because they incorporate the confidentiality provisions of the Mental Health Code by reference. 45 CFR 164.502, 45 CFR 164.502(g)(3), 45 CFR 164.502(g)(3)(ii)(B), and the Mental Health Code, MCL 330.1748(6).

In conclusion, since Michigan has a more stringent provision regarding the release of mental health information, the Michigan law should be applied in a court order or subpoena under HIPAA without a release is not sufficient to disclose mental health records in the above fact situation. Moreover, as stated above, HIPAA regulations preclude unauthorized disclosure to a person standing *in loco parentis* because they incorporate the confidentiality provisions of the Mental Health Code by reference. The mediator should not proceed in utilizing the subpoenaed information without a release or waiver. The social worker, likewise, should not have produced the documentation without a release or waiver.

Ask the Neutral

Dear Mediator,

In a recent mediation session, a party told me in caucus, "I'm so angry at [the other party] that I could kill him." What should a mediator do in this situation?

Dear Questioner:

Unless it is absolutely clear that the party is just venting frustration, I would take a statement like that seriously. That is not a statement I hear regularly from parties. I would ask, "Should I tell [the other party] to leave right now?" to gauge the seriousness of the statement. If the threatening party backs off immediately and I believe they have not made a real threat after all, I might still question them in a way such as "Were you serious?" to test it out. If the threatening party says they were serious, or says I should tell the other party to leave, or if I believe it was serious, I would absolutely take action.

I would let the other party know about the threat and have them leave immediately, holding the threatening party in the office for 10-15 minutes, and terminate the mediation. In my family mediation Agreement to Mediate, I list threats of violence or actual violence as an exception to confidentiality. It might be a good idea to add that to all Agreements to Mediate. It is important to hold the threatening party in the office, so that the other person has a chance to get away.

If I or they thought they were in immediate danger, I would help the party being threatened to make a Safety Plan, involving ideas of where to go to be safe and ideas of legal, medical and family contacts to call. I request that they call me when they get to a safe place so that I know they are there.

From this list of actions, it is no doubt clear why mediation must be terminated at this point. I would certainly no longer be neutral.

If the mediation is between parties who have a long-standing relationship, or an intimate relationship, I would want to have done screening for violence prior to the mediation. In these cases I almost always meet separately with parties first, and ask a series of questions to elicit the dynamics of the relationship and assess violence or abuse between the parties before agreeing to bring the parties together. For family mediation cases, SCAO has put out several domestic violence screening protocols on the Office of Dispute Resolution (ODR) website. ()
They are very good tools, and I use them.

One of the questions on the protocol asks whether threats and attempts at violence have occurred in the past. In a case where there have been prior threats, attempts or actual violence, I would most likely not mediate the case. If it appeared that there was no fear of continuing violence or threats on the part of the other party, I might mediate the case if there were attorneys present and/or if the mediation were done in separate rooms. If the threatening party has access to firearms, I would additionally require that the parties go through metal detectors.

In short, Dear Questioner, the issue of threats is worth taking very seriously. One mistake could be very costly.

Zena D. Zumeta
Mediation Training and Consultation Institute

Inspiration and Insight: the 2005 Annual Meeting

— by Dale Ann Iverson and Tracy Allen

On Thursday September 8, 2005, the ADR Section convened its Annual Meeting for the second time as a free-standing event from the State Bar Annual Meeting. Originally envisioned as a way to deliver more opportunities for substantive programming and fellowship with colleagues, this year's meeting delivered! Council members were particularly happy to welcome many who had not previously attended an annual meeting.

Mediation Pointers from Bob Creo

The program began at 4 pm Thursday with a 2-hour interactive session lead by mediator and arbitrator Robert Creo. Bob continued the next day to expand on theory and practice in mediation. Teaching points and messages from Bob and the audience included:

- Mediation is a process, not an event. It is asymmetrical, particularly in comparison to the notion of "equality" that forms a foundational hallmark of a theoretically perfect judicial system. The concept of mediator neutrality is best described as a myth. It creates a tension with mediator transparency, authenticity and engagement—critical elements of humanizing the mediation experience.
- Mediators trade on "mediator capital" in the course of a mediation. Its part of how we humanize the experience and why people are persuaded to adjust positions, needs and interests, to reach resolution. Being courageous enough to expose mediator transparency and authenticity allows us to re-invent ourselves as conflict resolvers and peacemakers, in every dispute.
- There are many bargaining models but basic training and negotiation techniques really only focus on the traditional "auction" approach. Not only does it not usually work in early stages of negotiation, it is not a "one size fits all" model. Mediators must be adept at fitting the negotiation model to the strategies, style and resistance of the ones doing the negotiation.
- Similarly, relationships (or the lack of them) among the disputants also drive the mediation process and model. Mediators must be willing to tailor-make the process, content and events of a mediation to fit the unique characteristics of the particular conflict and participants before them.

Arbitration Panel

The program on Thursday concluded with a panel discussion on arbitration. Panel members Bob Creo and Lynwood Beekman shared perspectives from their very different practice environments. In a range of personal injury and commercial disputes, Bob observed that arbitration has become an extension of the courtroom, and that as a result he finds it increasingly important to maintain boundaries in his role as mediator and arbitrator, to the extent that he would decline to serve in both roles in the same case.

In contrast, in his work in special education, Lynwood finds himself frequently helping parties through mediation to fashion arbitration processes that can be as informal as the parties choose. Lynwood finds himself comfortable with changing roles from mediator to arbitrator in those circumstances where he has had ample opportunity to help parties understand the differences in his roles and to build their trust.

George Bashara Award

After a lively dinner with friends and colleagues, attendees enjoyed the presentation of Section awards. The Council recognized one of its own in the presentation of the George Bashara Award to Susan Hartman for her exceptional contributions to the section, particularly over the last year. Cited were Susan's leadership in re-creating bylaws that now reflect the Section's growth and development, her work supporting the Best Practices Action Team as they analyze developments in ADR throughout

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the country; and her work making recommendations to the council for further action in the legislature, in our courts, and in our work.

Nanci S. Klein Award

Section Chair Dick Hurford announced the creation of the Nanci S. Klein Award recognizing exemplary programs, initiatives and leaders in the field of community dispute resolution. The award was posthumously awarded to its namesake, former council member and Executive Director of the Oakland County Dispute Resolution Center. Nanci's contributions were reflected upon throughout the Annual Meeting by many.

Distinguished Service Award

Finally, the Section's award for distinguished service to the field of ADR was awarded to Lynwood S. Beekman of Special Education Solutions, L.L.C. Lyn was recognized most notably for his commitment to building a culture among the stakeholders in special education that will promote ADR, including mediation and arbitration, and foster self-determination for students, families and schools in addressing the needs of all students.

Election of Officers and New Members

On Friday, the Section's Annual Meeting continued with a brief Business Meeting in which the By-Law amendments were approved. The officers approved for the 2005-06 program year are Alan Kanter, Chair; Barbara Johannessen, Chair-Elect; Tony Braun, Treasurer; and Susan Hartman, Secretary. In addition to these individuals, the following members were elected to the Executive Committee: Chuck Judson and Donna Craig. Of interest to everyone were the elections to the Council: Cathy Jacobs, Craig Hupp, Jim Vlasic, and Bob Tremp were re-elected for a second term; Gene Esshaki, Kelly Reed, and Robert Lee Wright were elected to new 3-year terms; and Naomi Woloshin was elected to a 1-year term. Departing from the Council are Marcia Ross and Asher Tilchin. The Council especially wishes to thank Asher for two terms of service, including a stint as Secretary of the Executive Committee.

A short paper was presented by Bill Weber, on the result of research efforts by Mary Bedikian and Bill Weber on the practices and history of the development of mediation in other states. In Florida, one of the earliest court-annexed mediation states, the quasi-public, quasi-private Dispute Resolution Center administers the court program. In several of the states with active, successful programs, Bill said, the Chief Justice of the Supreme Court took a lead role early in formulating plans. Keep tuned to the ADR Newsletter for further information on states with special programs or history.

Report on Best Practices

The Meeting ended on the high note of Bob Creo's reviewing and using examples to apply his concepts of mediator authenticity, transparency, and engagement. For instance, engagement is engagement to the process, and involves, only secondarily, forming an evaluation of the parties' cases. When you mediate, however, you have your own experience and your own evaluation of the case to contend with. These factors come into play whether consciously or unconsciously, when you convey demands and offers. It is wise to be aware of your own evaluations, and if not to convey them directly, at least to acknowledge to yourself that they exist.

Mediation can be a solitary business but one should not view it as a lonely business. Coming together for fellowship, sharing our experiences and learning from like-minded colleagues, not only expands our minds, it opens our hearts. Together we create inspiration and can feel part of a band of heroes and champions, making a meaningful contribution to each other and to society.

Upcoming Mediation Trainings

General Civil

Ann Arbor: **October 21-23, November 4-6**
Training sponsored by Dispute Resolution Center
Contact: Kaye Lang, 734-222-3745,

Plymouth: **October 27-29, November 4-5**
Plymouth: **April 20-22, May 12-13, 2006**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org/mediation, or call 1-877-229-4350.

Lansing: **April 2006**
Training sponsored by Dispute Resolution Center
Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Domestic Relations

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **November 30, December 1-2, 7- 8**
Training sponsored by Mediation Training and Consultation Institute:
Register online at www.learn2mediate.com, or call 1-800-535-1155

Plymouth: **January 24-29, 2006**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org/mediation, or call 1-877-229-4350.

Guardianship/ Family Caregiver Mediation Training

Ann Arbor: **October 17-19**

Training sponsored by The Center for Social Gerontology (TCSG) and PeaceTalks

Contact: Penny Hommel, TCSG Co-Director, (734) 665-1126, or Susan Hartman, PeaceTalks. (734) 623-8255,

Advanced Mediation Training

Mediators on court rosters are required to obtain 8 hours of advanced mediation training every two years. MCR 2.411(F)(4); MCR 3.216(G)(3).

Petoskey: **October 14** – "Ten Ways Mediators Could Get Sued" Trainer: Anne Bachle Fifer
Training sponsored by Northern Community Mediation
Contact: Jane Millar, 231-487-1771

Troy: **December 1** – "Mindfulness Mediation"
Trainer: Daniel Bowling, co-author of "Bringing Peace Into the Room"
Training sponsored by Oakland Mediation Center
Call 248-338-4280

Daniel Bowling is a mediator, trainer, and co-author, with David Hoffman, of *Bringing Peace Into the Room: The Personal Qualities of the Mediator and Their Impact on Conflict Resolution* (Jossey-Bass, 2003). Based in Sausalito, California, he has mediated a wide variety of disputes, and teaches Negotiation at Hastings Law School in San Francisco, and Advanced Mediation and Public Policy Dispute Resolution at Osgoode Hall Law School, York University in Toronto. He was the first executive director of the Association for Conflict Resolution (ACR). Most recently, he was a senior mediator and director of the Washington DC office of RESOLVE, Inc., a public policy consensus-building organization.

This 8-hour training will focus on developing an authentic approach to mediation, helping mediators to become aware of their own strengths and weaknesses, and to tune their own unique qualities for effective practice.

The ADR Newsletter

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The ADR Newsletter is published by the ADR Section of the State Bar of Michigan. The views expressed by contributing authors do not necessarily reflect the views of the ADR Section Council. This newsletter seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:

Benjamin Kerner at (313) 965-1920, fax: (313) 965-1921 or Anne Bachle Fifer: at (616) 365-9236, fax: (616) 365-9346

www.michbar.org/adrs/home.html.

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2. Attend ADR Section seminars at a reduced cost.
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4. Learn about mediation training programs being offered in the state.
5. Receive the optional Membership Certificate, suitable for display, at an additional cost of $8.

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306 Townsend
Lansing, MI 48933-2083

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