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## **Selected Texas Law**

### **Affecting the Practice of Psychology: Revised**

*This is an updated and revised article that originally appeared in the Texas State Board of Examiners of Psychologists' Fall 1998 Newsletter.*

#### **I. Release of Mental Health Records: Chapter 611, Texas Health and Safety Code**

##### **A. In general, a psychologist owes the patient a legal duty of confidentiality under §611.002**

1. In general, psychologists owe a legal duty of confidentiality to a patient that includes communications between the patient and the psychologist and records of the identity, diagnosis, evaluation, or treatment created by the professional. There is no time limit to this obligation. The term "records" is defined by the Board at Board rule 465.1. The term "patient" is defined as the individual who received the services, regardless of who or what entity paid the bill for the services.

#### **2. Exceptions:**

a. A psychologist may release records to the patient (or someone else legally entitled to act for the patient as listed in 611.004) when the patient submits a written request for release of records. The consent to disclosure is revocable. A waiver may have an expiration date; but in the absence of an express expiration date, there is no legal time after which consent expires.

b. In the recent case, *Thapar v. Zezulka*, the Supreme Court of Texas determined that there is no duty for a mental health professional to warn a potential third party victim of a threat made by their patient. If a professional decides to reveal a threat made by the patient concerning harm to himself or to a third party, and that harm appears to be imminent, disclosure can only be made to the appropriate officials listed in 611.004(a)(2). However, professionals who choose to disclose threats are not immune from civil liability for improper disclosure of confidential communications. This is true even if the disclosure was made in good faith. While there are circumstances where a patient's right to confidentiality may be legally compromised, it will be incumbent on the mental health professional to show why the disclosure was permissible and made pursuant to the exception stated in 611.004(a)(2).

c. A psychologist may also release records, notwithstanding 611.002, to:

- i. a governmental agency if required or authorized by law, 611.004(a)(1);
- ii. qualified personnel for management audits, program evaluations, or research or due to an official legislative inquiry if the identity of the patient is not revealed, 611.004(a)(3) and (8);

- iii. the parent or legal guardian of a minor child or the person is declared incompetent, 611.004(a)(4);
- iv. the patient's personal representative if the patient is deceased, 611.004(a)(5);
- v. collect payment or reimbursement for services rendered, 611.004(6);
- vi. to other mental health professionals, personnel who are under the professional's direction, and are involved in the treatment of the patient, 611.004(7),(9), and (10);
- vii. in accordance with 4.01(e), Medical Liability and Insurance Improvement Act of Texas;
- viii. or, in a judicial or administrative proceeding that falls under one of the exceptions listed in 611.006.

3. Unauthorized release of confidential records is a violation of Texas law and the Board's professional rules and subjects the psychologist to a civil action for damages. This means that a patient can file a separate civil action against a psychologist in addition to any complaint filed with this Board.

**4. Release of Information concerning the HIV Positive Status of a Client.**

This information, if acquired by the psychologist pursuant to a therapist/client relationship, is confidential pursuant to 611.002, unless specifically excepted by 611.004. Acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus infection (HIV) are considered "reportable diseases" under Title 2, Chapter 81, Section 81.041(e) of the Texas Health and Safety Code.

a. Under §81.942(e)(9), health professionals are required to report to the local health authority or the Texas Department of Health a suspected case of any reportable disease if a report has not been already made by another health professional, dentist, physician, or someone in charge of a lab, clinic, or blood bank or similar type facility. The report shall include all information known concerning the person who has or is suspected of having the disease. Section 81.046 ensures that the records and reports are confidential and may not be released to the public pursuant to a subpoena or an open records request.

b. In all other cases, a psychologist may not inform any other individual or entity of a client's HIV status that the psychologist learned of through a confidential communication from a client unless some provision of 611.004 permits release of the information.

**B. In general, a psychologist MUST release a patient's records upon written request by the patient. Section 611.0045, Texas Health and Safety Code.**

1. **Exception:** 611.0045 permits the psychologist to refuse by providing a refusal in writing to the client/patient within **15** days after receiving the request. The written response must include:

- a. A description of the portion or portions being withheld; and
- b. The reason the records are being withheld; and
- c. The duration of time that the denial is in effect; and
- d. A statement signed by the psychologist stating that having access to the records would harm the patient's physical, mental or emotional health.

2. Even if the records are withheld from the patient, the psychologist **must** release the records to any other mental health professional that the patient is seeing for treatment.
3. If the patient re-requests, the psychologist must repeat all of the steps in “1” each and every time s/he refuses to release the records to the patient.
4. The psychologist must place a copy of the written statement of refusal in the patient’s file.
5. Commingled records concerning another individual that has not authorized release of records should be deleted as to that portion of the records before releasing the remaining mental health records to a patient.
6. Statements contained in a patient’s records made by another individual about the patient may **not** be deleted nor can the identity of the person making the statements or the identity of a person responsible for the commitment of a patient.
7. Upon receipt of the written request from a patient to examine or copy all or part of the mental health records, the psychologist has fifteen (15) days to make the information available or provide a copy or inform the patient (preferably in writing) that the information does not exist or can not be found. Texas Health and Safety Code, Section 611.008.
8. Failure to comply with a written request for records is a violation of the law, a violation of the Board’s professional rules and subjects the psychologist to civil action for damages. Under Board rules, a licensee may not refuse to comply with a request due to non-payment for services. However, under Board rule 465.22, a psychologist may charge a reasonable fee for retrieving or copying this information.

**C. Test Data (raw data). Board Rule 465.22(c)(5)**

1. Test data is defined by the Board as “testing materials, test booklets and protocols used in testing to generate test results.” Test data is distinguishable from test reports and test results.
2. Test data is not part of a patient’s mental health records and is not subject to release to the patient pursuant to a demand by the client/patient. Attorney General Letter Opinion 97-073.
3. Test data must be released to another qualified mental health provider upon presentation of a release signed by the patient authorizing the release of mental health records or test data.
4. Test data must be released pursuant to a court order to whomever the order requires release.

**D. Duty of mental health professional to respond to subpoena for mental health records.**

1. Texas Health and Safety Code, Section 611.006(a)(11). Psychologists must respond to subpoenas for mental health records even if the subpoena is not accompanied by a release signed by the patient. Under the new Texas Rules of Civil Procedure, subpoenas may now be issued by the clerk of the court, a deposition officer (usually the stenographer), or a licensed attorney.
2. But, Attorney General Letter Opinion DM 96-102, states that a psychologist may withhold records that are protected by the therapist/patient privilege of Texas Rule of Evidence 510. The privilege belongs to the patient and may only be raised on behalf of the patient. The psychologist has no right to confidentiality. If you receive a subpoena, let the patient and/or the patient’s attorney know so the client can raise any privileges before the judge presiding over the case. If the judge finds a privilege, s/he will issue an order that some or all

of the records are not subject to subpoena. If there is any question about what to do, always consult an attorney of your own choosing.

3. Test data as defined by Board rule 465.22(c)(5) is not part of the patient's mental health records and is not subject to subpoena. However, it must be released pursuant to an order issued by a judge.

## **II. Texas Family Code: Special Issues Concerning the Parent/Child Relationship and Psychologists.**

- A. A child, or minor, is any person under the age of 18 years of age unless the child is emancipated by a court order or a legally valid marriage.
- B. Consent to Medical, Dental, Psychological, and Surgical Treatment. Family Code, Chapter 32; Subchapter A.
  1. Section 32.001—Ability of Non-parent to Consent to Psychological Treatment of Minor Child. In general, a parent or legal guardian must consent to treatment. The statute allows certain other individuals such as grandparents, aunts/uncles, and adult siblings to consent if the parent or guardian is unavailable. However, a non-parent or guardian may not consent to any type of treatment for which a parent/guardian has indicated that the parent/guardian would not give their consent.
  2. Section 32.002—Form of Consent Required Prior to Treatment of Minor Child. (Statute speaks only to medical treatment, but probably applies to psychological treatment as well.) Must have name of child, one or both parents and name of any managing conservator or guardian of child; name of person giving the consent and that person's relationship to the child, a statement of nature of treatment, and date treatment is to begin.
  3. Section 32.003—Child's Ability to Consent to Psychological (and other types of) Treatment.
    - a. 32.003(a): Children who are:
      - i. On active duty with U.S. Armed Services; or
      - ii. Sixteen years or older and living apart from the parents and managing their own financial affairs, regardless of the source of their income, may consent to psychological, medical, surgical, and dental treatment; or
      - iii.. Consenting to examination or treatment for drug or chemical addiction or dependency, or any other condition directly related to drug or chemical use may consent to psychological treatment without the consent of a parent.
    - b. An unmarried child with actual custody of a biological child can consent to psychological, medical, surgical or dental treatment for that child.
    - c. A psychologist treating a child without parental consent in reliance on this statute may take the child's written statement as proof that the child qualifies to consent to treatment.
    - d. A psychologist who treats a child under this section has the right to inform parents or managing conservator of the treatment even if the child does not consent to disclosure.
    - e. The psychologist is not liable to parent for treating child without consent unless/he is negligent in provision of services.
  4. Section 32.004—Child's Ability to Consent to Psychological (and other types of)Counseling:

- a. Types of counseling Child Can Consent to:
    - (1) suicide prevention;
    - (2) chemical addiction or dependency;
    - (3) or sexual, physical, or emotional abuse.
  - b. Under this section a psychologist who genuinely believes a child may be suffering from the afflictions listed in 9a) of this section may:
    - i. Counsel child without consent of parent; or
    - ii. Counsel child and then tell the parent even if child does not consent to disclosure; or
    - iii. Rely on child's written statement that child has capacity to consent to treatment without parental consent.
  - c. A psychologist cannot counsel a child based on the child's consent if the child is under court order that prohibits child from consenting.
  - d. A psychologist who counsels a child is not liable to the child's parents for counseling without parental consent in reliance on this statute unless the psychologist engages in willful misconduct or negligence.
  - e. If a psychologist treats a child without parental consent, then the psychologist can not obligate the parent to pay for the services provided to the child.
5. Section 32.005—Psychologist can examine a child without the consent of the child or a parent or guardian if there are reasonable grounds to believe the child's mental or physical condition has been adversely affected by abuse or neglect.
- a. Statute allows examination, not treatment.
  - b. Psychologist can not examine a child 16 or older without the child's consent and can not examine any child for whom consent is prohibited under court order.
6. All of the above mentioned sections refer to a child's ability to consent to treatment or counseling and a parent's right to be informed of treatment even if he child does not want the psychologist to inform the parent. The Family Code does not address the child's ability to consent to release of mental health records. However, it is probable that the following inferences can be made:
- a. If a child has been emancipated by a court, marriage, or has the legal capacity to consent to treatment under this section, that child would be able to consent to or refuse to consent to the release of his/her own mental health records.
  - b. If the psychologist has decided to inform the parent that the child has received counseling or treatment, that probably means that the parent has the right to demand access to the child's records of the treatment or counseling as well.

**C. Rights of Parents and Other Conservators to Consent to Treatment of Child and Access to Child's Records. Family Code, Chapter 153.**

1. **In general, psychologists may rely on a parent’s assertion that s/he has the right to consent to psychological treatment and/or to access to their child’s records. However, if the parents get into a dispute about their respective rights or any other time that a psychologist becomes unsure about a parent’s rights concerning a minor—it is time to ask for, and read, the decree before taking further action.**
2. Types of Conservators:
  - a. Conservator: A conservator has some type of legal right in regard to a minor child. Usually these rights will be specified in the court decree.
  - b. Managing conservators have the right to possession of the child and to consent to routine medical, dental, psychological treatment. Sections 153.131 through 153.138 list the rights and duties that only a managing conservator has unless a decree or court order states otherwise.
  - c. Possessory conservators have the right to visitation of the child and have the right to access to most medical, dental, psychological and school records concerning the child. Possessory conservators also usually have the right to consent to emergency medical, dental and psychological treatment that occurs while the possessory conservator has the child in his/her possession. (Please note: the process whereby a possessory conservator sneaks a child off to a psychologist to get a secret evaluation done during visitation to support a motion to change custody is not “emergency psychological treatment.”) Texas Family Code, Section 153.074 lists rights that a possessory conservator may exercise only when the child is actually in the possession of the conservator. Sections 153.192 through 153.193 list rights and duties that a parent possessory conservator has to a child. Only a court order or decree can limit these rights.
  - d. There is now a legal presumption in Texas that both parents be named as joint managing conservators. If both parents are appointed as joint managing conservators, the decree will usually appoint one of the parents, more often the mother, as the person with superior rights as to possession of the child, deciding where the child will attend school, who the child’s doctor shall be, etc. Also, most decrees will specify that in a joint managing conservatorship, the parent with actual possession at the time has the right to make certain decisions while s/he is in legal possession of the child. However, many older decrees appointed one parent as the managing conservator and the other parent as possessory conservator.
  - e. Sections 153.071 through 153.076 of the Family Code list the rights and duties any parent automatically has concerning a minor child if appointed a possessory or managing conservator unless the decree or court order specifically limits those rights.
3. **Access to mental health records.** The general rule is that both the possessory and managing conservator have the right to access to their children’s mental health records, **unless the decree specifically states otherwise. Only a court order or decree can limit these rights. Please note, this means that unless the decree says the possessory conservator does not have the right to access the child’s records, the managing conservator cannot order the psychologist to refuse to release the child’s records to the possessory conservator. The consent of the managing conservator is not required by the psychologist before the psychologist can release the records to the possessory conservator. If both parents are appointed as managing conservators, either parent may have access to the records without the consent of the other.**
4. Other miscellaneous provisions in the Texas Family Code concerning access to records:
  - a. Section 153.371. Rights and duties of non-parent appointed as sole managing conservator.

b. Section 153.377. Access to a child's psychological records by non-parent possessory conservator.

c. Section 161.104. Right of designated managing conservator pending court appointment in parental rights termination cases.

**D. Investigation of Report of Child Abuse or Neglect. Family Code Chapter 261.**

1. Subchapter A. 261.001. Defines what child abuse and neglect is under the law.

2. Subchapter B. 261.101-261.109. Imposes the duty to report.

a. **Who:** chapter 261 imposes the duty to report upon licensed psychologists or anyone else who has reason to believe that a child's physical or mental health has been or may be adversely affected by abuse or neglect as defined by Section 261.001. A psychologist must report any child abuse s/he learns of even if it is from a client in a confidential relationship. It does not matter if the victim or the perpetrator is your client. The psychologist must make the report. The report cannot be delegated to another person.

b. **When:** Within 48 hours.

c. **To Whom:** Local law enforcement, Texas Department of Protective and Regulatory Services, (TDPRS) or state agency if abuse occurs in state facility.

d. **How:** The Texas Family Code does not specify the manner in which the report is made. As such, it appears that a psychologist may call, write, or go to the proper authority in person to make the report. TDPRS has a hotline.

e. **What:** Name and address of child, name and address of custodian of child, any other pertinent information concerning the abuse or neglect.

3. Provides the reporter with immunity from tort liability for reporting (as long as the report was made in good faith) and from liability for breaching client-psychologist confidentiality by reporting; makes non-reporting a criminal offense.

4. **Why?** It is a Class B misdemeanor if you fail to report. It is also a violation of the Board's rules of practice.

**III. Texas Human Resource Code, Chapter 48. Duty to Report Abuse, Exploitation, Neglect of Elderly or Disabled Person.**

A. Section 48.036. Requires a mental health professional having a reasonable belief that an elderly or disabled person is in a state of abuse, exploitation or neglect to report to the Department of Protective and Regulatory Services. Report can be made orally or in writing and must be made immediately.

B. Section 48.0361. Failure to report suspected abuse, exploitation or neglect is a criminal offense and a Class A misdemeanor.

C. Section 48.0385. Gives the Department or a state agency investigating the report the right to access records concerning the abused person, including psychological records.

D. Section 48.0385. Gives the Department or a state agency investigating the report the right to access records concerning the abused person, including psychological records.

E.. Section 48.039. Person reporting or providing information and records pursuant to an investigation is immune from liability for violating confidentiality, tort liability, or other civil action, as long as person was acting in good faith.

F. Section 48.042. Specific procedure for cases involving Texas Department of Mental Health and Mental Retardation facilities

#### **IV. Duty to Report Sexual Exploitation by a Mental Health Services Provider. Civil Practice and Remedies Code, Chapter 81.**

- A. Psychologists who learn during the course of providing services to a patient that the patient has been sexually exploited by any mental health provider have a legal duty to report that knowledge. Section 81.006 creates a legal obligation that mental health service providers, including psychologists, report other mental health professionals who sexually exploit patients and former patients.
1. The psychologist must report the allegations to both the licensing agency with jurisdiction over the mental health provider who is alleged to have committed the exploitation and the district attorney of the jurisdiction where the exploitation took place.
  2. The report must be made within thirty (30) days of obtaining the knowledge.
  3. Reporter must inform victim of the reporter's duty to report and ask victim if the victim wishes to remain anonymous. Statute requires reporter to give the name of the reporter, the name of the victim unless anonymity was requested, and to express suspicion that sexual exploitation has taken place. (In discussing anonymity, remind the patient that if s/he remains anonymous, no one is going to be able to punish the violator or stop the violator from harming more victims.) Statute does **not** specifically require reporter to give the name of the person who is alleged to have committed the exploitation. Board can require the reporter to give name as part of the psychologist's duty to avoid harm to patients.
  4. If the victim is a minor child, report as child abuse as required by Texas Family Code, Chapter 261 as previously explained in section II, D of this article.
  5. **Failure to Report.** A mental health professional who fails to report sexual exploitation is guilty of a Class C misdemeanor and subject to disciplinary action by his/her own licensing board. Section 81.006(e).
  6. The reporter is immune from criminal and civil liability resulting from filing the report, so long as the report is made in good faith.

#### **V. Texas Penal Code.**

**Section 22.011, Sexual Assault.** Sexual exploitation of a present or former mental health patient is a criminal offense. Section 22.011(b)(9) states that if a mental health provider causes a patient or former patient to submit to sexual contact as defined in 22.011(a) by exploiting the patient or former patient's emotional dependency, that mental health provider is guilty of Sexual Assault, a second degree felony, punishable by imprisonment. It is also grounds for revoking the provider's professional license.

*This outline is for informational purposes only. It is not intended to substitute for legal advice nor are its contents guaranteed to be accurate.*

Article revised and updated by

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## **Informed Consent for Services**

Most mental health ethics codes and standards of practice advocate that clients be provided with certain essential information concerning proposed services so that the clients can make informed decisions about whether or not to consent to those services. Several parts of previous Board rule 465.36, Code of Ethics, addressed the information which should be contained in informed consent documents. With the extensive revision to Chapter 465 Rules of Practice, that information has been summarized and placed in two rules: 465.11 Informed Consent/Describing Psychological Services and 465.1 Definitions, section (4) Informed Consent. These rules clearly require licensees to provide essential information to clients concerning proposed psychological services and obtain client consent.

Client information can be provided in a number of different formats. Many sources, including attorneys, advocate the use of a client contract or at the least a brochure describing services and office practices.

What follow are the Board's main informed consent rules. These rules highlight essential points of informed consent and are not meant to limit other information practitioners might wish to provide clients. Licensees should also be aware of unique circumstances requiring additional informed consent. Other

Board rules generally address these issues (as an example, informing clients about the use of supervisees which is covered in Board rule 465.6 Listings and Advertisements).

Part of the Board's mission is to educate. It is hoped these revised rules on informed consent will not only reduce complaints to the Board but, more importantly, contribute to better communication in one's practice and better service outcomes for the public.

### 465.1

- (4) "Informed Consent" means consent by the patient, client and other recipients of psychological services only after the patient, client or other recipient has been made aware of the purpose and nature of the services to be provided, including but not limited to: the specific services; possible side effects of the services, if applicable; alternative choices to the services, if applicable; the possible duration of the services; the confidentiality of and relevant limits thereto; all financial policies, including the cost and methods of payment; and any provisions for cancellation of and payments for missed appointments; and right of access of the patient, client or other recipient to the records of the services.

**465.11. Informed Consent/Describing Psychological Services.**

- (a) Licensees obtain informed consent concerning all services they intent to provide to the patient, client or other recipient(s) of the psychological services prior to initiating the services, using language that is reasonably understandable to the recipients unless consent is precluded by applicable federal or state law.
- (b) Licensees provide appropriate information as needed during the course of the services about changes in the nature of the services to the patient, client or other recipient(s) of the services using language that is reasonably understandable to the recipient to ensure informed consent.
- (c) Licensees provide appropriate information as needed, during the course of the services to the patient, client and other recipients and afterward if requested, to explain the results and conclusions reached concerning the services using language that is reasonably understandable to the recipient(s).
- (d) When a licensee agrees to provide services to a person, group or organization at the request of a third party, the licensee clarifies to all of the parties the nature of the relationship between the licensee and each party at the outset of the service and at any time during the services that the circumstances change. This clarification includes the role of the licensee with each party, the probable uses of the services and the results of the services, and all potential limits to the confidentiality between the recipient(s) of the services and the licensee.
- (e) When a licensee agrees to provide services to several persons who have a relationship, such as spouses, couples, parents and children, or in group therapy, the licensee clarifies at the outset the professional relationship between the licensee and each of the individuals involved, including the probable use of the services and information obtained, confidentiality, expectations of each participant, and the access of each participant to records generated in the course of the services.
- (f) At any time that a licensee knows or should know that he or she may be called on to perform potentially conflicting roles (such as marital counseling to husband and wife, and then witness for one party in a divorce proceeding), the licensee explains the potential conflict to all affected parties and adjusts or withdraws from all professional services in accordance with Board rules and applicable state and federal law.
- (g) When persons are legally incapable of giving informed consent, licensees obtain informed consent from any individual legally designated to provide substitute consent.
- (h) When informed consent is precluded by law, the licensee describes the nature and purpose of all services, as well as the confidentiality of the services and all applicable limits thereto, that he or she intends to provide to the patient, client, or other recipient of the psychological services prior to initiating the services using language that is reasonably understandable to the recipient(s).