

CONFIDENTIALITY OF TREATMENT RECORDS

THE LAW

Confidentiality:

Each patient shall... "Have the right to **confidentiality of all treatment records...**"
§ 51.61(1)(n), Wis. Stats. [Emphasis added.]

Access to Records by Persons Other Than the Patient:

" *Confidentiality of records.* Except as otherwise provided in this chapter and ss. 905.03 and 905.04, all treatment records shall remain confidential and are **privileged to the subject individual**. Such records may be released only to the persons designated in this chapter or ss. 905.03 and 905.04, or to **other designated persons with the informed written consent** of the subject individual as provided in this section..."
§ 51.30(4)(a), Wis. Stats. [Emphasis added.]

[NOTE: There follows in sec. 51.30(4)(b) a list of **31 exceptions** to the requirement for written informed consent, as well as special limitations on access to drug and alcohol treatment records.]

"*Destruction, damage, falsification or concealment of treatment records.* **No person** may do **any** of the **following**:

1. Intentionally **falsify** a treatment record.
2. **Conceal** or **withhold** a treatment record with **intent to prevent** its **release** to the subject individual under par. (d), to his or her guardian appointed under ch. 880 or to persons with the informed written consent of the subject individual **or with intent to prevent** or **obstruct** an **investigation** or **prosecution**.
3. **Intentionally destroy** or **damage** records in order to **prevent** or **obstruct** an **investigation** or **prosecution.**" § 51.30(4)(dm) Wis. Stats. [Emphasis added.]

" GRIEVANCES. **Failure to comply** with any provisions of this section may be **processed as a grievance** under s. 51.61(5). However, use of the grievance procedure is **not required before bringing any civil action** or filing a criminal complaint under this section.
§ 51.30(8), Wis. Stats. [Emphasis added.]

"ACTIONS FOR VIOLATIONS: DAMAGES: INJUNCTION. (a) **Any person**, including the state or any political subdivision of the state, **violating this section** shall be **liable** to any person damaged as a result of the violation for such damages as may be proved, together with **exemplary damages of not more than \$1,000** for each violation and such **costs and reasonable actual attorney fees** as may be incurred by the person damaged. A custodian of records incurs **no liability** under this paragraph for the release of records in accordance with this section **while acting in good faith.**

(b) In any action brought under par. (a) in which the court determines that the violator acted in a manner that was **knowing and willful**, the violator shall be liable for such **damages** as may be proved together with **exemplary damages of not more than \$25,000** for each violation, together with **costs and reasonable actual attorney fees** as may be incurred. It is not a prerequisite to an action under this subsection that the plaintiff suffer or be threatened with actual damages.

(c) An individual **may bring an action to enjoin any violation** of this section or to compel compliance with this section, and may in the same action **seek damages** as provided in this subsection. The individual may recover **costs and reasonable actual attorney fees** as may be incurred in the action, if he or she prevails."

§ 51.30(9), Wis. Stats. [Emphasis added.]

"PENALTIES: (a) Whoever does any of the following may be **fined** not more than **\$25,000** or **imprisoned** for not more than **9 months**, or **both**:

1. **Requests** or obtains confidential information under this section **under false pretenses**.
2. **Discloses** confidential information under this section with the knowledge that the disclosure is unlawful and not reasonably necessary to protect another from harm.
3. Violates sub. (4)(dm)1., 2. or 3. [*Destruction, damage, falsification or concealment of treatment records.*]

(b) Whoever **negligently** discloses confidential information under this section is subject to a forfeiture of not more than \$1,000 for each violation.

(bm) Whoever **intentionally** discloses confidential information under this section, knowing the information is confidential, and discloses the information for **pecuniary gain** may be **fined** not more than **\$100,000** or **imprisoned** not more than **3 years and 6 months**, or **both**."

§ 51.30(10), Wis. Stats. [Emphasis added.]

"DISCIPLINE OF EMPLOYEES. **Any employee** of the department, a county department under s. 51.42 or 51.437 or a public treatment facility **who violates this section** or any rule promulgated pursuant to this section may be subject to **discharge or suspension without pay**."

§ 51.30(11), Wis. Stats. [Emphasis added.]

[NOTE: The above includes **only a portion of sec. 51.30**, Stats., which should be read in its entirety by anyone handling patient records.]

" EMPLOYEE ORIENTATION. Directors and program directors shall ensure that persons whose regular duties include requesting, distributing, or granting access to treatment records are **aware of their responsibility to maintain the confidentiality** of information protected by this chapter and of the criminal and civil liabilities for violations of s. 51.30, Stats.

DHS 92.11, Wis. Admin. Code [Emphasis added.]

[FURTHER NOTE: See also full **Chapter DHS 92**, Wis. Admin. Code, which codifies Sec. 51.30, Wis. Stats.]

[NOTE: The federal Health Insurance Portability and Accountability Act of 1996 (**HIPAA**) took effect on **February 14, 2003**. Any questions involving confidentiality of treatment records should be reviewed by the facility's HIPAA **Privacy Officer**.]

[Note: See also the **Records Access** and **Records Corrections** sections of this digest.]

DECISIONS

1. A hospital had a **release of information** allowing them to share information about the patient's care **with her family**. However, **they released records** to the family that the **patient did not want released**. The **hospital acknowledged** they had exceeded the scope of the release of information they had and **implemented a procedure** to ensure that this **error did not occur again**. **Nothing can undo the error**, but the hospital's **actions were the proper remedy** under the circumstances. That is all the grievance process can do. The **patient could still take the hospital to court if she wished**. This matter was considered resolved. (Level III decision in Case No. 97-SGE-01 on 5/27/97)
2. Subsection 51.30(4)(b)5 allows **access without consent** "...to qualified staff members of the department... as is necessary to determine progress and adequacy of treatment..." Thus the **State Grievance Examiner** is allowed to **obtain otherwise confidential records** without the informed consent of the complainant. (Level IV decision in Case No. 98-SGE-02 on 1/22/99.)
3. A **methadone clinic** involved **17 different staff** members in a **multi-disciplinary team** meeting to discuss a patient's alleged dose-splitting. This team meeting **included staff** who had **no involvement** with the patient and had **no "need to know"** the treatment information about this client. The patient provided no release of information. This process **violated the patient's right to confidentiality** of his treatment information. (Level III decision in Case No. 99-SGE-02 on 5/17/00. Appeal to Level IV by the patient was dismissed since the Level III decision was in his favor.)
4. A patient **claimed a breach of confidentiality** by her therapist in a phone conversation with her mother. It was found that the **mother initiated the call** because of her concerns for her daughter and that the **therapist was careful not to divulge** any information about the daughter's treatment. The mother asked the therapist not to tell the daughter about the phone call. The therapist could not promise that she would not divulge that the mother called, but eventually decided not to inform the daughter. Her reasons for making that decision were documented. **No breach** of the daughter's **confidentiality** was found. (Level III decision in Case No. 00-SGE-02 on 6/17/00, upheld at Level IV.)

5. A client received services from an agency contracted by the county. He felt that the **provider releasing information, without his consent**, to an **evaluator** who was completing a vocational assessment **violated his confidentiality**. The evaluator was from a local university who had no official connection to the county's service delivery system. However, by mutual agreement all the parties, including the client, he was to do a comprehensive vocational evaluation the client. At a later meeting with the parties, the client found out that county staff had shared specific information about his mental health history but had not obtained a release from him to do so. Other "consents to disclose confidential information" were on file, but there was **no release** of information relative to the staff's involvement in the evaluation process. Was the verbal sharing of any information with the evaluator was permissible? Any information about the client's mental health history and treatment would constitute "treatment record" information within the meaning of confidentiality laws. But the staff's very presence at the meeting was an identification of sorts that the client was receiving services from the county. Did the presence of the staff at the meeting and the client's lack of objection at the time to any information shared provide an implied consent on his part? Was any information shared covered by some other exception to the requirement for an informed written consent? It was concluded that this evaluation was akin to a "second consultation" and not provided as a routine "purchase of service" resource for county staff. Thus, it did not readily fit into one of the exceptions to the confidentiality law wherein there would be a pre-existing purchase of services contract between the county and a provider. Further, the section of DHS 94 that addresses a "second consultation" notes that the person doing the consultation can review the client's treatment record. By the **staff member's un-objected-to presence**, the client may have provided an **implied consent**, but that this was a "close call" in terms of the technical confidentiality requirements. Since the vocational evaluation was set up by mutual agreement of all parties, there likely was an expectation of open sharing of treatment information to assist the evaluation process. Nonetheless, it would have been **best practice** for the service providers to have a **clearly written release of information** from the client that would specify who all could be part of the information sharing process. There was insufficient evidence to find a rights violation. When **outside evaluations** occur, there should be **clear documentation** of the evaluator's legal status in terms of that person's right to access treatment information. For example, is it being done under a purchase of services agreement, as a second opinion/ consultation, or via a specific release of information that clarifies who can provide treatment information, and what type, to the evaluator. (Level III decision in Case No. 00-SGE-01 on 6/29/01.)
6. Generally, **information** from a patient's treatment records **cannot be released** without the client's **written informed consent**. But there are **exceptions** to confidentiality laws allowing for release of information without a patient's consent. One such exception stems from a 1988 Wisconsin Supreme Court decision in the **Schuster** case. In that case, the Wisconsin Supreme Court said that mental health therapists had a "**duty to warn**" any person who may be the specific target of a threat of harm. The patient was angry with a particular person and expressed that anger to his therapist. He did not think that he had specifically threatened to harm that person. However, if anger is

expressed in a way that is assessed as threatening toward another person, there is little choice on the part of a mental health therapist but to share that information with a person who may be the target of potential harm. In this situation the **threat** was **passed on**, but no other treatment information was shared. That **disclosure** was **not a violation** of the client's right to confidentiality of his records. (Level III decision in Case No. 00-SGE-12 on 8/6/01.)

7. A patient, who had complained about her therapist and physician, expressed concerns about the **confidentiality** of her involvement in the **grievance procedure** and any follow-through that had occurred with her provider. She alleged that the entire staff of the service provider knew about her complaints. The director of the service provider noted that the record keeping system for grievances was entirely separate and that **only staff with a "need to know"** are **given access** to or information about the filing of grievances. Only a select group of management and treatment staff were aware of this patient's grievances and information about them was not available to others. It was found that the **confidentiality** of this grievance **was honored** and no rights violation occurred. (Level III decision in Case No. 00-SGE-03 on 9/12/01.)
8. A patient wanted to **bring a friend** to her **therapy sessions**. The service provider agreed that there are times that it may be appropriate, especially if the person is a primary support person for the client. Bringing another person to a therapy session **requires a signed release** from the patient. Since the requested remedy was provided, this issue was considered resolved. (Level III decision in Case No. 00-SGE-03 on 9/12/01.)
9. A patient complained that his **therapist** allegedly **asked him if his wife was having an affair**. He **responded** that **he would kill her and her boyfriend**. He also threatened to kill the therapist. The therapist discussed this with her supervisor and was instructed that she **had a duty to warn the wife of the threat**. The therapist informed the wife and the police. When the police questioned the husband, he threatened to harm them, too. These threats led to his emergency detention. The therapist's actions were appropriate under the circumstances. She **did have a duty to warn** where **threats were made about immediate harm to specific people**. (Level III decision in Case No. 01-SGE-06 on 10/18/01.)
10. A service recipient asked a **temporary receptionist** for a grievance form. The temp **asked other staff** where the **complaint forms** were. The case manager heard about the request and asked the individual to come to her office to discuss her concerns. The grievance she wanted to file, however, was about her case manager. There was no evidence that anyone tried to talk her out of filing a complaint, nor any indication of reprisal, retaliation or discrimination because of her grievance. There was no violation of her right to file a complaint. The **temp** asking other staff where the grievance forms were **did not violate her right to confidentiality**. (Level III decision in Case No. 01-SGE-05 on 11/29/01.)

11. A patient's mother complained that her **daughter's doctor** violated her daughter's confidentiality. The Level I Client Rights Specialist did not address this issue in his written response. The **failure to address** this issue was a **violation of the right** to have the **grievance fully investigated**. (Level III decision in Case No. 01-SGE-02 on 12/10/01.)
12. A patient's mother complained that her daughter's doctor violated her daughter's confidentiality by **reading things from her records** during a **meeting** between the doctor, the **patient and her parents**. The parents had the **same right of access** to her records **as the daughter** had under §51.30(5)(b), Stats. Therefore there was **no violation** of confidentiality. (Level III decision in Case No. 01-SGE-02 on 12/10/01.)
13. The law states that, "A **patient** or a **person acting on behalf of a patient**" may **file a complaint**. It was a violation of the complainant's rights when a Level I Client Rights Specialist **refused to investigate** her allegation that her **ex-husband's right** to confidentiality **had been violated**. (Level III decision in Case No. 01-SGE-02 on 12/10/01.)
14. A **therapist informed a woman** that her **former husband was in counseling**. She had been unaware of that. The **disclosure violated** her ex-husband's **right to confidentiality**. (Level III decision in Case No. 01-SGE-02 on 12/10/01.)
15. Patients have the **right to involve their spouses** in their **home-visit treatment sessions** unless their participation is contraindicated for treatment reasons. The service provider should either allow such participation or explain to the patient why it is contraindicated. The patient would have to **sign a release of information** to allow the **spouse to be present** during treatment sessions. (Level III decision in Case No. 01-SGE-09 on 3/27/02.)
16. Sec. 51.30(4)(e), Stats., **requires** that, when **records are released**, "a **notation** shall be made in the records by the custodian thereof that includes the following: the name of the person to whom the information is released; the identification of the information released; the purpose of the release; and the date of the release". **Handwritten notes in the margin** of records request documents, due to their brief nature, are **unlikely** to satisfy all the requirements of this statute. Subsequent to April 14, 2003, entities releasing records must also comply with the even more stringent federal Health Information Portability and Accountability Act (**HIPAA**). (Level IV decision in Case No. 02-SGE-04 on 9/19/03, overturning the Level III.)
17. A mother believed a **therapist acted unprofessionally** in working with her daughter by **not reporting** various **risky behaviors** in which her daughter was engaged. The therapist was aware that her daughter tried to commit suicide, purposely cut herself many times, used illegal drugs, and engaged in underage sex with multiple partners. The mother thought the therapist should have reported all these incidents to proper authorities. She requested disciplining the therapist – including possible license revocation. The records indicated that the suicidal ideation expressed by the daughter

was taken seriously. Appropriate referral resources were immediately offered to her parents. The daughter was also placed on a medication for depression. For the next seven subsequent sessions the therapist inquired about and documented the daughter's present mental status and thoughts of suicide or dying. Each entry includes some statement indicating that she was asked if she was seriously contemplating suicide or hurting herself. She responded that she was not having thoughts about suicide or hurting herself over the following months. Therefore, her right to prompt and adequate treatment was met. The therapist was **not obligated** to initiate social services **intervention** into her family life, **or to notify any other authorities**. (Level III Decision in Case No. 03-SGE-02 on 12/26/03.)

18. A mother complained that her **daughter's therapist reported sexual abuse** to the county **social worker**. The therapist learned that a teacher at her daughter's home school had touched the young woman inappropriately. The therapist reported the allegations to the county social worker. The county Social Services department then got the **police involved**. The police came to the home school to arrest the teacher. This situation was stressful for both mother and daughter. The incident met the legal definition of **sexual abuse**. Since she was a **minor**, law **mandates the reporting** of the allegation. The therapist's actions were professional and appropriate. (Level III Decision in Case No. 03-SGE-02 on 12/26/03.)
19. There is legal precedence for the "**duty to warn** or protect," though in Wisconsin it is not defined by statute. The precedent is from the courts, and is outlined in the 1988 Wisconsin Supreme Court case **Schuster v. Altenberg**, and in subsequent literature. This case, similar to many that preceded it, establishes a **duty** on the part of **psychotherapists** to take "some **reasonable**" **action** to prevent **foreseeable harm** to third parties who are injured by those being treated by the psychotherapists. This state precedent parallels federal precedent, **Tarasoff v. Regents of the University of California**, which was a 1976 California case decided by the U.S. Supreme Court. (Level III Decision in Case No. 03-SGE-02 on 12/26/03.) [Note: In a 2010 decision, the Wisconsin Court of Appeals for District 1 held that, while there may be a "duty to warn", it **does not create an exception** to the confidentiality statutes allowing for release of **written records**. *Milwaukee Deputy Sheriff's Association, et al v. City of Wauwatosa*, 2010 W. App 95 (2010)]
20. A mother was concerned about the way her **daughter's underage sexual activity** was handled in treatment. The therapist learned she had engaged in sexual activity with multiple partners. While it is true that a minor cannot legally consent to sexual activity, the relationships the minor was engaged in were not against her will, the relationships were with other minors who she was dating, and thus were not considered to be abuse. There was thus **no cause to violate the daughter's confidentiality** by reporting this matter to outside authorities. (Level III Decision in Case No. 03-SGE-02 on 12/26/03.)
21. A form called "**Consent for Release of Information – Patient Assistance Program**" is used by a service provider and is presented to all patients who **receive medications** through the Patient Assistance Program. This form is to aid patients in filling out the

paperwork necessary to receive medications through the Patient Assistance Programs offered by pharmaceutical companies. The release allows service provider staff to help patients fill out all the information required on the application, and it allows staff to send the applications to the pharmaceutical companies (or their contracted agencies) for the patients. Without this consent, patients would need to fill out and mail the application form themselves. This is not possible in its entirety, as their physicians prescribing number is not available to be known by patients and must come from the service provider. **If a patient refuses to sign** this consent form, the individual **may not be denied services** by the provider, and patients may elect to fill out and send the application to the Patient Assistance Program on their own. In this case, the service recipient chose not to sign the release, and this did not negatively effect his treatment because he was able to handle the paperwork himself. This resolved the concern as it applied to him. However, he expressed concern about the form for other patients' confidentiality. Over 700 patients receive medications from this provider and approximately 75% of those patients receive their medications through a Patient Assistance Program, which resulted in over \$300,000 worth of medications being disbursed to patients at no cost to them in the last year through that agency. **Many of these clients do need assistance** in filling out the paperwork to maintain these free medication services. It was determined that the **consent form** in question is a **useful and important tool** for those individuals to maintain their psychiatric treatment services. While this person's concern for their confidentiality is admirable, the allegation that this form violates their confidentiality is unfounded, and the limitations on the types of information that can be released does protect patients' confidentiality and allows the provider to facilitate their clients' participation in the PAP. (Level III Decision in Case No. 03-SGE-08 on 7/14/04.)

22. The **confidentiality rights** of a client at a methadone clinic were **violated** when she was **called by her first and last name in the waiting room**. The appropriate and professional way to address her would be to only use her first name when other clients are present. The clinic remedied this confidentiality breach by conducting a staff In-service on confidentiality. (Level III decision in Case No. 04-SGE-02 on 12/20/04)
23. In order to **protect** a client's **confidentiality**, it is **not appropriate to discuss** confidential or personal matters **on a speakerphone** in a **cubicle workplace environment**. Speakerphone use during conference calls should be restricted to constructed office space or conference rooms that offer reasonable degrees of privacy. Here, the speakerphone use in question was appropriately conducted in a constructed office with a closed door. (Level III Grievance Decision in Case No. 04-SGE-07, affirmed at Level IV on 8/15/05)
24. If a county is **contracting with a mental health center** to provide inpatient treatment for a client, **they can share confidential client information** they have with the center **without the client's consent**. It did not violate the client's confidentiality here where the information shared was something the client had objected to as being inaccurate. The client had other means of trying to correct the information at issue. (Level III Grievance Decision in Case No. 04-SGE-07, affirmed at Level IV on 8/15/05)

25. A county **case manager disclosed information** about complainant to the Wisconsin **Department of Transportation (DOT)** via a “Driver Condition or Behavior Report” (DOT form MV 3141). The information disclosed on the DOT form **included his diagnosis and a summary of concerns and observations about his safety as a driver**. The disclosure of confidential treatment information to the DOT without his written informed consent was made **under the “duty to warn”**. Given the extensive records and documentation, legal precedents for the “duty to warn,” and the county’s HIPAA Policy Manual on this topic, it was concluded that the disclosure did not violate his right to confidentiality. Rather, it was a **valid exercise of professional judgment**. (Level III Decision in Case No. 08-SGE-10 on 1/9/09)
26. When there is a **disclosure of information about a client from the client’s friends, family, or other persons** in the community to a therapist or other treatment provider, it is **appropriate for the mental health professionals to neither confirm nor deny the client’s involvement in services**. However, it is generally acceptable for a treatment provider to listen to and/or read any information that is provided to them about a client, so long as they do not confirm or deny that person’s participation in treatment. (Level III decision in Case No. 08-SGE-12 on 6/29/09)
27. If a client’s **father** were to **ask his daughter’s therapist general questions** based on his own observations and concerns, **and get general feedback** about what the therapist believes would be appropriate mental health recommendations for the behavior he described, that in and of itself **would not be a violation of confidentiality** rules. It would only be a violation if the therapist provided specific treatment information about the client that was learned or obtained in the course of providing services to the client. (Level III decision in Case No. 08-SGE-12 on 6/29/09)
28. A patient complained about a nurse practitioner **violating his confidentiality** and his right to dignity and respect by in the manner in which she talked to him in a hallway. The **evidence, records, and witness reports did not provide sufficient evidence** to show that it was **more probable than not** that his right to confidentiality or his right to be treated with dignity and respect were violated. It was determined that the client’s **burden of proof had not been met**. (Level III decision in Case Nos. 09-SGE-07 & 09-SGE-10 on 3/18/10)
29. In a break room, an **employee of a hospital asked another employee** with the same last name as the client **if she knew the client**. The asker **had seen the client cashing checks for gambling money at a bar**. There was no evidence that the asker knew that the client was a patient of that hospital. The person asked gave a non-committal response. A third employee, who did know the client, was concerned about the client’s gambling issues, so called the client and informed her of the conversation. The information discussed in the break room was related to the client’s treatment; however, it **was not observed or obtained “in the course of providing services”**. The observed behavior **occurred in a public place**, outside the course of treatment and, as such, **was not confidential treatment information**. There is **no “reasonable**

expectation of privacy,” regarding observed behavior in public places. There may have been poor judgment exercised by the employees, but it was not a violation of the client’s confidentiality. (Level III decision in Case No. 09-SGE-11 on 4/05/10)

30. A former client of an outpatient methadone clinic complained that he was **not allowed to use a cell phone** even though staff used them. The restriction of cell phone use on program premises was not arbitrary. The clinic has to **ensure that patients’ confidentiality is protected. Cell phones can and have been used to record and then post to the Internet video of patients in the clinic.** Staff are also prohibited from using cell phones there. If staff were not following that directive, the matter would need to be addressed by program administration since it would not amount to a patient rights violation unless evidence was provided that staff were illicitly video recording clients at the clinic. (Level III decision in Case No. 10-SGE-13 on 3/03/11)
31. A patient alleged that her right to confidentiality of her treatment records was violated when her **husband was informed of her discharge from an inpatient unit, contrary to her expressed wishes.** Evidence showed that her **husband was called prior to the submission of her Request for Discharge form, which included her wish that family not be informed of her discharge.** Since the evidence was conflicting and since the call was placed before the form was submitted, no violation of the patient’s right to confidentiality was found. (Level III decision in Case No. 16-SGE-08 on 5/26/2017)

[Document last updated: 07/17/2018. Digesting in progress for cases decided after 2013]