

Resource Document on Psychotherapy Notes Provision of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule

This resource document was prepared by the Committee on Confidentiality with revisions by the Council on Psychiatry and the Law.

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- *APA Operations Manual*.

Background

The *Final HIPAA Privacy Rule* defines psychotherapy notes as an official record, created for use by the mental-health professional for treatment, "recorded in any medium...documenting or analyzing the contents of conversation during a private counseling session or a group, joint or family counseling session that are **separated from the rest of the individual's medical record...**" 45 C.F.R. § 164.501 (65 Fed. Reg. at 82805) (emphasis added).

The Rule does not protect psychotherapy notes when defending a malpractice suit brought by a patient or for satisfying documentation requirements of a licensing authority because it allows disclosure without authorization for these purposes. Save for very few other exceptions (1), **"psychotherapy notes" cannot be disclosed to anyone without the patient's specific authorization. Furthermore, such authorization cannot be compelled for payment, underwriting, or plan enrollment** (emphasis added).

The Rule states that psychotherapy notes do not include:

"medication prescription and monitoring,
counseling session start and stop times,
the modalities and frequencies of treatment furnished,
results of clinical tests and any summary of the following items:

diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." 45 C.F.R. § 164.501 (65 Fed. Reg. at 82805)

This information would be included in the patient's general treatment record, and would be available for care, payment and healthcare operations, restricted by the "minimum necessary" provision for payment and healthcare operations (2).

Enforcement of the Final Rule will begin April 2003. The regulatory language (cited above) appears to provide strong protection for psychotherapy communications, and as HHS intended, to be consistent with the Supreme Court's reasoning in *Jaffee v. Redmond* (3). Unfortunately, some ambiguity regarding the scope of the intended protection arises due to some imprecise language appearing in the preamble to the Rule (not in the operative text of the Rule itself) in which psychotherapy notes are incorrectly likened to narrowly-defined "process notes."

[Note: "process notes" is an imprecise term for which there is no universally accepted meaning; however, "process notes" are not generally used to document treatment, or to be part of the official patient record (4)]. The APA is concerned that the strong protection for psychotherapy information intended by the Rule could be eroded by an unduly narrow interpretation based solely on the misleading use of the phrase "process notes" in the preamble.

Recommendation: Based on the profession's ethical standards, reason and experience, it is the view of the APA that the legally operative text of the Rule provides heightened privacy protection for psychotherapy notes that include some or all of the following information when documented by the treating psychiatrist, not disclosed to anyone other than the psychiatrist who created the note, and kept separately from the rest of the treatment record:

- Intimate personal content or facts
- Details of fantasies and dreams
- Process interactions
- Sensitive information about other individuals in the patient's life
- The therapist's formulations, hypotheses, or speculations
- Topics/themes discussed in therapy sessions

This kind of information is not typically needed by anyone other than the treating psychiatrist to care for the patient, and is not needed for payment or healthcare operations. Psychotherapy notes, so defined, would serve to document and analyze the therapy, and may not be used by or disclosed to persons other than the psychiatrist who created them (save for limited exceptions—see footnote 1), without the patient's written authorization to do so. The information contained in these notes would then be afforded the higher protection provided by the Rule.

At this time, the APA suggests that members use the more inclusive definition of psychotherapy notes (delineated above) to document psychotherapy. In doing so, these notes about communication in psychotherapy, when kept separately from the rest of the record and not disclosed to anyone, would remain private under the Rule. Psychiatrists should also consider the patient's clinical state, the treatment setting, the security of the record, and relevant state law, when documenting psychotherapy.

Because the Rule's definition of psychotherapy notes is still subject to interpretation, it is possible that legal challenges will occur and the issue may ultimately be resolved in court. This resolution may come in the context of an appeal of an enforcement action involving a provider or other covered entity under the Rule. The APA is committed to advocating for the stronger, broader interpretation of the psychotherapy notes provision because it protects the privacy necessary for quality psychotherapeutic treatment, and because it strongly believes that this is what the Rule was intended to accomplish.

Footnotes

1. The HHS Rule permits disclosure of psychotherapy notes, without a patient's authorization, to coroners (to determine cause of death), an oversight agency (to investigate the therapist), HHS (to investigate privacy rule violations), psychotherapy trainees (for teaching purposes), and the patient (allowed but NOT required). It also permits disclosure of the patient's danger to self/others if imminent.
2. See APA Position Statement, 12/01, "Guidelines for Minimum Necessary Information for Third-Party Payment for Psychiatric Treatment".
3. Jaffee concludes, "we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected..."
4. This highlights the tension between the language of the preamble and the text of the Rule; such ambiguities have historically been resolved in favor of the regulatory language, which generally has the force of law.