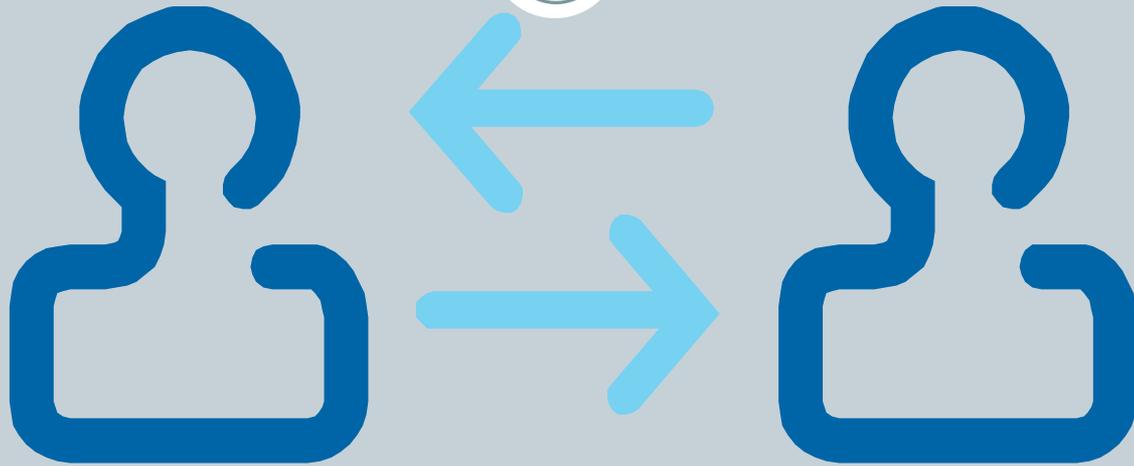


Court Dependents Sharing Confidential Mental Health Information

1



The Panel

2

- ❖ Jessie Conradi Slafter, Mental Health Attorney & Social Worker, East Bay Children's Law Offices
- ❖ Miruni Soosaipillai, Senior Deputy County Counsel, Alameda Office of the County Counsel
- ❖ Juan Taizan, JJ/CFS Health Services Director
Child and Young Adult System of Care
Alameda County Behavioral Health Care Services

Overview

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-  **Big Picture: A Statewide Issue**
-  **Confidentiality and Privilege**
-  **Consent to treatment**
-  **Authorization to Release Information**
-  **Alameda County Information Sharing Protocol**

Objectives

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-  UNDERSTAND THE DIFFERENCE BETWEEN CONFIDENTIALITY AND PRIVILEGE
-  UNDERSTAND LAWS REGARDING CONSENT FOR TREATMENT
-  UNDERSTAND HOW TO LEGALLY SHARE CONFIDENTIAL INFORMATION
-  UNDERSTAND HOW TO SHARE INFORMATION WITH THE COURT
-  UNDERSTAND WHO CAN GIVE PERMISSION FOR THE RELEASE OF INFORMATION

Juvenile Dependency Court Process

5



Statewide Issue

6



Confidentiality and Privilege

7

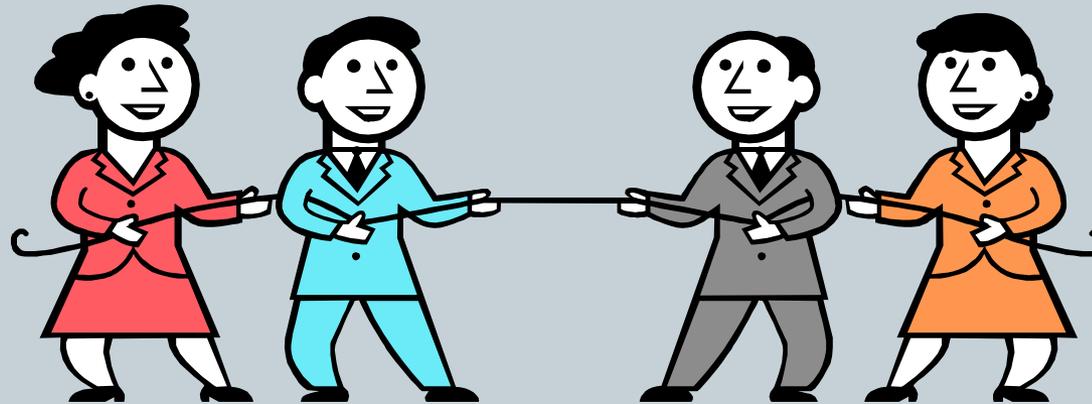
Two independent legal barriers may limit a health care provider's ability to share medical/mental health information:

- **Confidentiality Statutes**
- **Provider-Patient Privilege**



Confidentiality vs. Information Sharing

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Factors That Shape How Much Is and Is Not Shared

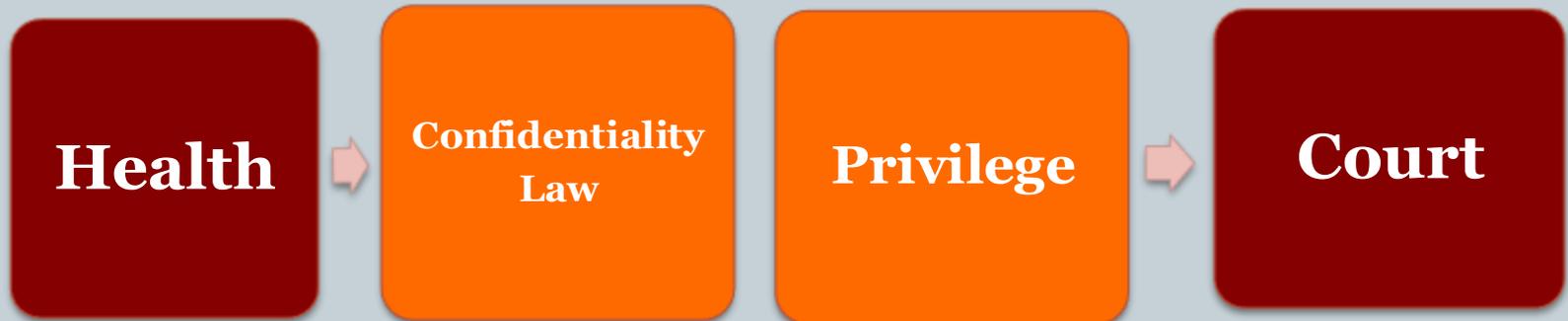
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- Ethical and Professional Practice Standards
- Confidentiality laws and privilege
- Local Practice and Relationships
- Protocols, forms and orders



Confidentiality and Privilege: When does the Evidence Code come into play?

10



What is a confidential communication that cannot be introduced as evidence in court without a waiver of privilege?

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- Confidential communication between patient and psychotherapist as defined by CA Evidence Code section 1012 is:
 - information obtained by an examination of the patient;
 - information transmitted between a patient and his psychotherapist in the course of that relationship, and in confidence;
 - a diagnosis made;
 - and the advice given by the psychotherapist in the course of that relationship.
- Between patient and physician. Evid 992

Who can be present with the client without breaking privilege?

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- People v. Gonzalez (2013) 56 Cal.4th 353 at 374, 375
 - “...the privileged nature of confidential communications is not lost when, for example, a therapist discloses such communications to his or her personal secretary or to other office staff or consults with other therapists...” (i.e., an interpreter could be present during sessions or a therapist could provide a diagnosis to an insurance company without breaking the privilege)
 - ✦ The text of Evidence Code 1012 referring to third parties “to whom disclosure is reasonably necessary for the . . . accomplishment of the purpose for which the psychotherapist is consulted” was not intended to give a third party (such as the court) the authority to obtain confidential information over the client’s objection
 - ✦ If the court orders therapy – it does not mean the court is automatically privy to those disclosures without a **waiver of privilege** by the client or the client’s attorney

Who Holds the Privilege?

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Welfare & Institutions Code section 317(f):

- If the child is 11 years or younger
 - Counsel holds privilege
- If the child is 12 years or older and if capable of informed consent
 - Child is presumed to hold privilege. Counsel must assert on client's behalf unless waived by client.
- Therapist is always required to invoke privilege unless waiver is provided by child or child's counsel
- Therapist should encourage the youth to consult with legal counsel before waiving privilege

Privilege: Psychotherapist-Patient

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- Prevents disclosure of confidential communications in court.
- Covers testimony as well as records and anything else that may be used as evidence in a legal proceeding, including CWW reports.
- While patient holds the privilege, providers are required to raise the privilege on behalf of their clients – unless the client says otherwise. Evid 1015
- May not apply to prevent CWW from sharing with the Court general information about participation and progress.

Confidentiality and Evidentiary Privilege

15

- Statutory exceptions to confidentiality law may allow or require health care providers to share medical information with child welfare workers, probation, and court, but
- Providers' ability to disclose still may be limited by the psychotherapist-patient or physician-patient privilege

Mental Health Treatment

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CONSENT FOR TREATMENT THROUGH THE STAGES OF A DEPENDENCY PROCEEDING

CONSENT: General Rule

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General Rule for Youth under Court Jurisdiction:

- Parent maintains right to consent for care unless court order specifically states otherwise. *WIC 361, 369(f), 726.*
- Court has authority to consent or to give consent rights to the child welfare worker. *WIC 369(a)-(c)*
- Minors, 12 years or older, maintain their rights to consent to mental health treatment or counseling services. *Health & Safety Code § 124260(b)(1); Family Code § 6924(b).*

In Addition:

- Additional persons may consent in certain circumstances
- Special rules for certain services, such as psychotropic medications, and in certain circumstances

Who May Consent to Treatment

18

- For services *not* under a Medi-Cal program:
- Notwithstanding any other provision of law to the contrary, a minor who is 12 years of age or older may consent to mental health treatment or counseling services if, in the opinion of the attending professional person, the minor is mature enough to participate intelligently in the mental health treatment or counseling services. *Health & Safety Code § 124260 (b)(1); see also Welfare & Institutions Code § 14029.8*

Who May Consent to Treatment

- For services under a Medi-Cal program:
- A minor who is 12 years of age or older may consent to mental health treatment or counseling on an outpatient basis, or to residential shelter services, if both
 - (1) The minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services or residential shelter services **AND**
 - (2) The minor (A) would present a danger of serious physical or mental harm to self or to others without the mental health treatment or counseling or residential shelter services, or (B) is the alleged victim of incest or child abuse. *Family Code § 6924(b)*

Detention & Disposition Recommendation For Court to Order Related to WIC 369

20

The Child Welfare Worker may authorize routine medical, dental, surgical, mental health or other remedial care for the child if the parent/guardian is unable or unwilling to authorize the treatment. The Child Welfare Worker may provide medical information to those persons authorized by law. The parents/guardians are advised that pursuant to *WIC § 369*, *Health and Safety Code § 123116*, and *Civil Code § 56.106*, the court hereby issues an order granting certain requests for release of information by the minor's mental health service provider. The parents/guardians may not authorize the release of mental health information about the minor unless the court finds specifically that allowing the parents/guardians to have that authority would not be detrimental to the minor.

Who May Consent to Treatment Within first 48 Hours

21

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
First 48 hours after child is taken into custody but before filing of petition	Yes.	Yes. The court may order mental health treatment if the parent objects.	<p>Yes, unless parent objects. A social worker may consent to mental health treatment <u>upon the recommendation of the attending healthcare provider</u>.</p> <p>The social worker shall notify the parent or guardian of the care needed before it is provided, and if the parent or guardian objects, the care can only be given upon court order. <i>Welfare and Institutions Code § 369(a)</i>.</p> <p>Consent for treatment is not required for mental health assessments up to 30 days at the Assessment Center pursuant to Alameda County Local Rule 5.508. After completion of the mental health assessment, if ongoing mental health services are recommended, a written recommendation shall be submitted to the court and authorization will be obtained based on the stage of the case.</p>	<p>Yes, if child is 12 years or older and if the child, in the opinion of the attending professional person is mature enough to participate intelligently in the mental health treatment or counseling.</p> <p><i>H&S Code § 124260(b)(1); Family Code § 6924(b)</i></p>	No.	No.

Who May Consent to Treatment Filing Petition to Disposition

22

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
Filing of Petition through Disposition Hearing	Yes, unless the court finds that there is no parent capable or willing to authorize care or treatment. <i>Welfare & Institutions Code § 369(b)</i>	Yes, with written recommendation from provider. If there is no parent capable or willing to authorize care or treatment, the court, upon written recommendation from the Assessment Center mental health clinician or Child Welfare Worker may make an order authorizing the performance of necessary mental health treatment for the minor. <i>Welfare & Institutions Code § 369(b)</i>	Yes, with court authorization. A social worker may consent to mental health treatment if the court orders that the Social Worker may authorize treatment by licensed practitioners after finding that there is no parent capable or willing to authorize treatment.	Yes, if child is 12 years or older and if the child, in the opinion of the attending professional person is mature enough to participate intelligently in the mental health treatment or counseling. <i>H&S Code § 124260(b)(1); Family Code § 6924(b)</i>	No.	No.

Who May Consent to Treatment Post Disposition

23

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
Post Disposition Hearing including permanent planned placements	Yes, unless the court finds that there is no parent capable or willing to authorize care or treatment. <i>Welfare & Institutions Code § 369(c)</i>	Yes. If the court finds that there is no parent or guardian capable or willing to authorize mental health treatment, the court may authorize the social worker to consent to the necessary care. <i>Welfare & Institutions Code § 369(c)</i>	Yes, if unable to obtain parental consent. A social worker may consent to mental health treatment if the court orders that the Social Worker may authorize treatment by licensed practitioners after finding that there is no parent capable or willing to authorize treatment. <i>Welfare & Institutions Code § 369(c)</i>	Yes, if child is 12 years or older and if the child, in the opinion of the attending professional person is mature enough to participate intelligently in the mental health treatment or counseling. <i>H&S Code § 124260(b)(1); Family Code § 6924(b)</i>	No.	No.

Who May Consent to Treatment

24

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
Post .26 -- Legal Guardian Appointed	No.	No.	No.	Yes, if child is 12 years or older and if the child, in the opinion of the attending professional person is mature enough to participate intelligently in the mental health treatment or counseling <i>H&S Code § 124260(b)(1); Family Code § 6924(b)</i>	No.	Yes, Legal Guardian can provide consent.
Post Termination of Parental Rights	No.	Yes.	Yes.	Yes, if child is 12 years or older and if the child, in the opinion of the attending professional person is mature enough to participate intelligently in the mental health treatment or counseling <i>H&S Code § 124260(b)(1); Family Code § 6924(b)</i>	No.	Yes, if a prospective adoptive parent ("in loco parentis")

Who May Consent to Treatment Psychotropic Medications

25

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
Consent for Psychotropic Medications for Dependent Youth in Out-of-Home Care (post-disposition and after removal)	No, unless the juvenile court makes a specific written order delegating the authority to a parent upon making findings on the record that the parent poses no danger to the child and has the capacity to authorize psychotropic medications. <i>Welfare & Institutions Code § 369.5(a)</i> *Parent may object in writing via the JV-222.	Yes, after CWW submits JV-220	No.	Juvenile Court must approve any request for medication (JV220), but minor retains right to refuse medications. <i>Welfare & Institutions Code § 16001.9(a)(5)</i> The minor may comment to the court via the JV-218	No, but the child's attorney may object in writing to the court via the JV-222.	No, but the care provider may object in writing via the JV-222.

Who May Consent to Treatment Psychotropic Medications

26

STAGE OF CASE	PARENT	COURT	CHILD WELFARE WORKER	CHILD	CHILD'S ATTORNEY	CARE PROVIDER
Consent for Psychotropic Medications for Dependent Youth Living In-Home with a Parent or Guardian	Yes.	No.	No.	No.	No.	Legal Guardian may provide consent.

Mental Health Information Sharing & Confidentiality

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**WHEN IS A RELEASE NEEDED
TO SHARE INFORMATION
RELATED TO A
DEPENDENT MINOR?**

**HOW IS THE SHARED
INFORMATION USED IN COURT?**

Legal Parameters

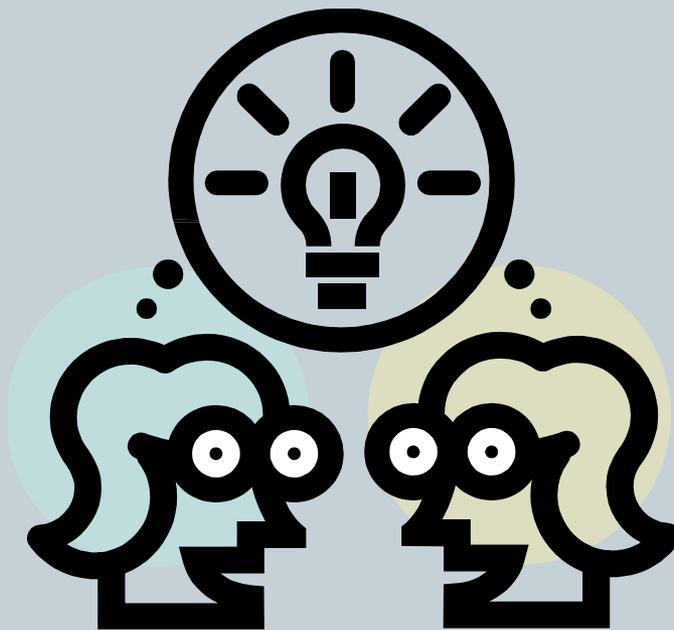
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- HIPAA
- Civil Code
- Health & Safety Code
- Welfare and Institutions Code
- Family Code
- Penal Code
- Evidence Code
- Case Law



Sharing Without A Signed Release

29



DO YOU NEED A RELEASE FOR COMMUNICATION?

30

Flow of Information

CWW to MH
Provider

NO, a release is not needed.

The mental health provider may be given a verbal summary of the information in the child welfare worker's file, but not copies of the documents. *Welfare & Institutions Code § 827 (a)(1)(K).*

DO YOU NEED A RELEASE FOR COMMUNICATION?

31

Flow of Information

MH Provider to Parents/LGs

First, for a **child out of home**, the therapist cannot release information to the parents unless the court made a finding that it would not be detrimental to the child. *CA H&S Code § 123116(a)* (Note that the therapist may still deny parents' request. *H&S Code § 123116(d)*)

If the court has made that finding, then YES a release is needed from the minor 12 years or older. *CA Civil Code § 56.11(c)*

YES for a **child in home** 12 years or older. *CA Civil Code § 56.11(c)*

NO for a **child in home** under 12 years old.

DO YOU NEED A RELEASE FOR COMMUNICATION?

32

Flow of Information

MH Provider
to Foster
Parents

YES, from the child if the child is 12 or older.
NO, a release is not needed for children under 12 when the provider determines that the disclosure of medical information concerning the diagnosis and treatment of a mental health condition of a minor is reasonable necessary to assist in coordinating the treatment and care of the minor. The information shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law. A foster parent is a person who is “legally authorized to have custody or care of the minor.” *CA Civil Code § 56.103(e)(1);(h)(1)-(2)*

DO YOU NEED A RELEASE FOR COMMUNICATION?

33

Flow of Information

MH Provider
to MH
Provider
(When child
is not
conserved)

NO, a release is not needed.

Without first obtaining an authorization, a mental health provider may disclose medical information to other providers engaged in providing direct mental health care services to the child for purposes of diagnosis or treatment.

CA Civil Code §§ 56.10(c)(1)

DO YOU NEED A RELEASE FOR COMMUNICATION?

34

Flow of Information

MH Provider to
Child's Attorney

NO, a release is not needed.

For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel shall have access to all records with regard to the child maintained by a health care facility, as defined in § 1545 of the Penal Code, health care providers, as defined in § 6146 of the Business and Professions Code, a physician or surgeon or other health practitioner, as defined in former § 11165.8 of the Penal Code, as that section read on 1/1/00, or a child care custodian, as defined in former § 11165.7 of the Penal Code, as that section read on 1/1/00. *CA Welfare & Institutions Code § 317(f)*

DO YOU NEED A RELEASE FOR COMMUNICATION?

35

Flow of Information

MH Provider to
CASA

NO, a release is not needed upon presentation of the CASA worker's order of appointment.

CA Welfare & Institutions Code § 107.

Because the CASA must report the results of his/her investigation to the court, the provider may refuse to disclose confidential communications to the CASA by claiming privilege including, but not limited to, when the provider determines that disclosure would have a detrimental effect on the provider's professional relationship with the minor or the minor's physical safety or psychological well-being. *CA Welfare & Institutions Code § 104; CA Evidence Code § 1014(c), 1015.*

DO YOU NEED A RELEASE FOR COMMUNICATION?

36

**Flow of
Information**

**Does A Mental Health Professional Need
An Authorization To Release Confidential
Information?**

MH Provider to
Others
(including FFA
social workers)

YES, a release is needed.

DO YOU NEED A RELEASE FOR COMMUNICATION?

37

Flow of Information

MH Provider to
Child Welfare
Worker

YES, from the child if the child is 12 or older.

NO, a release is not needed for a child under 12 when the provider determines that the disclosure of medical information concerning the diagnosis and treatment of a mental health condition of a minor is reasonably necessary to assist in coordinating the treatment and care of the minor. The information shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law. *CA Civil Code § 56.103(e)(1)&(h)(1)-(2)*. [Psychotherapy notes are specifically not included in this limited disclosure. *CA Civil Code § 56.103(e)(2)*.]

YES, a release is needed for disclosure of any confidential information beyond the scope of *CA Civil Code § 56.103(e)(1)*.

Court's Need for Information

38

What information needs to be provided to the Court via the Child Welfare Worker?

What happens with shared information about a Dependent of the Court?

Is all information shared with the CWW released to the Court?



Court's Need for Information: Circumscribed Information

39

- Information sufficiently circumscribed to protect the child's confidential communications. *Kristine W.* dealt only with a “letter that gives a general idea of whether or not the client is making progress.”
- Information that is NOT part of a “confidential communication”
- If a CWW or a therapist believes the therapist should provide more information to the court, s/he should seek a waiver of privilege from minor's counsel or from the minor (age 12+) with the advice of counsel.

Court's Need for Information

40

- Information provided by the therapist to the CWW should **not** always go directly to court
- During therapist-CWW communications, therapist should tell CWW if the information being provided is privileged and even though the CWW may be entitled to it under 56.103, if the information will be used in court, a waiver of privilege is needed from the child or the child's attorney.
- If CWW is unsure as to whether it can be disclosed to the court, CWW may:
 - Ask child who is 12 or older for waiver of privilege (with advice of counsel)
 - Ask child's attorney for waiver of privilege

Therapists' Letters to the Court

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- Therapist should not submit letter to CWW for use in court without permission of the child (12 years or older with advice of counsel) or the child's attorney (children under 12).
- If there is a disagreement about whether information in the letter is privileged, a hearing can be held.

Therapists' Letters to the Court Regarding Category 5 Eligibility

42

- Category 5 of AB12 (Extended Foster Care) requires verification of a medical condition by a health care practitioner stating that the NMD cannot participate in other eligibility criteria for AB12.
- Health care practitioner's letter for Category 5 should be addressed to the CWW, state that the youth is unable to participate in activities in Categories 1-4 due to their medical condition.
- “To the extent possible, verification for all 5 conditions should be obtained in a manner that respects the nonminor dependent’s privacy.” *NS v. Superior Court (2016) 7 Cal.App.5th 713, 723* citing ACL 11-61.
- Letter may also state, “this information is shared pursuant to Cal. Civ. Code 56.103 and does not constitute a waiver of privilege.”
- Non-minor dependent is privilege holder, but health care practitioner should encourage client to consult with their attorney.

SUMMARY CHART: Who Has Authority To Sign A Release Of Confidential Mental Health Information?

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Authorized Person	Medical Information Concerning Mental Health of the Minor
Parents or Legal Guardian	No, if the child is 12 years or older. No, for children under 12 years who are placed out of home, unless the Juvenile Court has granted that authorization to the parents upon a finding that giving the authorization would not be detrimental to the child.
Child Welfare Worker	No
Child	Yes, if the child is 12 years or older and consented or legally could have consented.
Child's Attorney	No, but request for court authorization is sent to child's attorney
Juvenile Court Judge	Yes, by court order, if the court has previously ordered the performance of treatment and/or there is no parent or guardian willing or available to authorize the release.
Foster Parent	No
Relatives	No
Group Home Staff	No
LPS Conservator of the minor	Yes

What happens when a mental health provider needs a release and the parent has not been given authority by the court to authorize the release of information?



Procedure for Requesting Court Orders for Release of Information

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In any case where the minor's mental health service provider determines it is necessary to speak with a person not otherwise authorized* to receive confidential mental health information, a request shall be made to child's attorney to secure a court order authorizing the release of information, using this [form](#).

* If a minor consented or legally could have consented to treatment, only the minor may authorize release of information.

REQUEST FOR AUTHORIZATION TO RELEASE INFORMATION

PROVIDER AGENCY NAME:

REQUEST MADE BY:

To be completed by Minor's Mental Health Service Provider:

Instructions:

- Complete all items on this form. You must contact the Child Welfare Worker ("CWW").
- In the limited circumstances where the Juvenile Court granted the parent the right to release information, you must make attempts to contact the parent(s)/guardian. If there are two parents you must make reasonable attempts to contact both of them. See Attachment A.
- Complete your agency's standard Release of Confidential Information form that is used to obtain authority or consent for disclosure of confidential health information and attach it to this request.
- Send this request and your agency's Release of Confidential Information form to the child's attorney in the juvenile court proceedings. The attorney will only sign this form.

1. Child's Name: _____ DOB: _____

2. This is a request to share information with: _____

Relationship of this person/entity to child: _____

3. The Authorization for Disclosure of health information is in the interest and welfare of the child because:

4. CWW: _____ CWW Phone #: _____

Date CWW Notified: _____ CWW Response: (circle one) AGREE DISAGREE

5. The child was informed about this request.

The child's response was AGREEABLE NOT AGREEABLE

The child was not told about this request

If the child did not agree with the request to release information, or was not told about the release please explain why the information should be released and why the youth was not informed.

6. Have you been provided with a court order finding it would not be detrimental to the minor for the parents to have the right to consent to the release of information (not the usual case)?

Yes. If yes, then complete Attachment A.

No.

Date: _____ Print Name of Person Completing Form: _____

Relation to the Child: _____ Signature: _____

To be completed by Child's Attorney:

I am not opposed to this Request for Authorization to Release Information, and release of confidential information concerning the child is authorized pursuant to the court order dated _____ (copy of Court Order is attached).

I am not opposed to this Request for Authorization to Release Information if it is limited as follows:

_____ and am attaching the court order dated, _____, to authorize only the release of information as specified above.

I am opposed to this Request for Authorization to Release Information and release of confidential information to _____ is NOT authorized.

Date: _____ Name of Child's Attorney: _____

Child's Attorney's Signature: _____

ROI Hypotheticals

Discussion Questions

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- Does the mental health provider need a release to talk to the child welfare worker?
- What information from the mental health provider is not privileged and can be shared with the Court?
- What information from the mental health provider is privileged?
- What information can the mental health provider share with the child welfare worker without a release?
- What else can be done in the best interest of the child?

Questions

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