TREATMENT - - RIGHT TO SECOND OPINION

THE LAW

"Any patient who does **not agree** with all or any part of his or her treatment plan shall be **permitted** a **second consultation** for review of the treatment plan as follows:

(a) An **involuntary patient** may request a second consultation from **another staff member** who is **not directly providing treatment to the patient**, and the treatment facility shall make the designated staff member available at **no charge** to the patient; and

(b) **Any patient** may, **at his or her own expense**, arrange for a second consultation from **a person** who is **not employed** by the **treatment facility** to review the patient's treatment record.

(c) **Service providers may pay** for some or all of the costs of any second consultation allowed under sub. (b). Service providers **may** also **enter into agreements** with **other service providers** to furnish consultations for each other's clients."

DHS 94.09(3), Wis. Admin. Code [Emphasis added.]

"Each **inpatient and residential treatment facility** that administers medications shall have a **peer review committee or other medical oversight mechanism** reporting to the facility's **governing body** to ensure proper utilization of medications." DHS 94.09(9), Wis. Admin. Code [Emphasis added.]

DECISIONS

1. 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 of 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 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 is 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 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.)

2. In general, the **treatment decisions** of professionals are afforded “**due deference**” by peers and by the courts. However, if a treatment decision “**departs from professional judgment**”, the patient’s right to treatment may have been violated. A second opinion is usually necessary to see if a professional exercised his or her judgment in a professional manner. A “departure from professional judgment” may be evinced in any of three ways: a) where the evidence suggests that the professional exercised **no judgment at all**; b) where the **individual was not qualified** to make the judgment; or c) where a decision was **made on an impermissible basis** (e.g., as “punishment”). (Level IV decision in Case No. 02-SGE-04 on 9/19/03.)

3. There must be **sufficient evidence** to show it was **more probable than not** that a **doctor departed from professional judgment** in his prescribing medication to a patient after a phone call with her. Such evidence would have to come in the form of a **second opinion** from a professional of equal or greater standing than the doctor. Where there was **no such evidence** presented during the Level III review, the **finding of a rights violation** will be

overturned. (Level IV decision in Case No. 02-SGE-04 on 9/19/03, overturning the Level III.)

4. An outpatient client **disagreed with** her therapist assigning her an Axis II Borderline Personality Disorder **diagnosis**. A **diagnosis** is ultimately a **professional opinion** and **given "due deference"**. The client had the right to obtain a second opinion from a different therapist. (Level III Grievance Decision in Case No. 05-SGE-12 on 5/16/06)

5. A complainant had the opportunity to challenge the diagnosis reached by an independent outpatient clinician in the ongoing legal proceedings where that diagnosis was presented in court. She **could have obtained a second opinion** from a different psychologist and presented that as a **rebuttal**. The **diagnosis** was the **clinician's opinion**, which **cannot be challenged** in the **grievance process**. (Level IV decision in Case No. 06-SGE-09 on 9/27/06)

6. A patient had several complaints that stemmed from her alleged misdiagnosis by one of the provider's doctors. The patient was diagnosed with bi-polar II, which allegedly caused her severe problems. The patient was entitled to seek a second opinion from another doctor within the provider. Further, the patient has the right to seek an outside medical opinion at her own expense. The second opinion should be reviewed by the provider and documentation should be made as to the results of the review. The patient sought a second opinion and obtained three letters supporting a different diagnosis. One of the second opinions was from the doctor who authored the bi-polar disorder entry in the DSM-IV, who **opined that it was absolutely clear that the diagnosis was in error.** The patient told the provider's doctor that bi polar disorder may run in her family and that the medication to treat bi-polar disorder was effective for her. It was held to be **equally likely that the diagnosis of bipolar disorder-II was an accurate or an inaccurate diagnosis.** Thus the patient did not meet her burden of proof to show that it was more likely than not that an inappropriate treatment decision was made. The provider did not violate the patient's right to adequate treatment. (Level III decision in 12-SGE-0006 decided on 11/14/2012)

7. A patient requested that a provider find him a second doctor after he decided that his relationship with his first doctor had been undermined by a breakdown in trust. The provider indicated that they did not have a doctor who could take him as a permanent client because of travel issues, but they did provide a temporary second doctor. The provider did not have an alternate doctor whose availability matched the client's location and needs. **The patient's right to a second opinion was not violated because the patient was provided with the second doctor's evaluation. It is not a violation when a provider does not have staff with adequate time to take on a new case when a client requests an alternate doctor**. (Level IV decision in 14-SGE-0001 decided on 12/22/2014)

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