


## LEGAL AND ETHICAL ISSUES IN EMPLOYEE ASSISTANCE PROGRAMS

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Northern Illinois Chapter Employee Assistance Professionals Association (NIEAPA)  
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## Part I: Legal Issues

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## TOPICS COVERED IN PART I

- **Confidentiality and Privacy Legal Discussion**
  - Confidentiality Laws
  - Exceptions to Confidentiality
  - FOID
  - Telehealth
- **EAP in Practice**
  - Records
  - Case Law Examples – discussion of issues
  - Interstate Practice Issues

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## Laws that Impact Your Practice

- Illinois Mental Health and Developmental Disabilities Confidentiality Act;
- Illinois Mental Health and Developmental Disabilities Code;
- Child Abuse and Neglect Reporting Act;
- Juvenile Court Act: abuse and delinquency proceedings;
- Adult Protective Services Act (new law);
- EAPA Code of Ethics;
- Practice-specific Code of Ethics (i.e. NASW Code of Ethics);
- Illinois AIDS Confidentiality Act;
- Illinois Probate Act;
- Federal Affordable Care Act;
- Federal law HIPAA;
- Federal drug and alcohol regulations; and
- Illinois Alcoholism and Other Drug Abuse and Dependency Act

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## Confidentiality

- Confidentiality involves balancing of numerous factors:

legal standards +  
ethical standards +  
right to confidentiality



disclosure in  
certain situations  
(i.e. duty to warn)

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## Confidentiality

- Importance of understanding these laws affecting EAP practitioners:
  - risk of civil liability
  - licensure
  - ethical standards
  - improving your EAP practice

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**Illinois Mental Health and Developmental Disabilities Confidentiality Act**

- **General Rule – 740 ILCS 110/3**
  - Legislative change effective Jan. 1, 2016 re: therapeutic relationship
- **Definitions – 740 ILCS 110/2**
  - Mental Health or Developmental Disabilities Services
  - Therapist
  - Communication or Confidential Communication
  - Record (discussion re: personal notes)
- **Subpoenas and Authorizations**
- **HIPAA**
- **Liability for Improper Disclosure**

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**Exceptions – Important Situations**

- **Abused and Neglected Child Reporting Act, 325 ILCS 5/4**
- **Adult Protective Services Act, 320 ILCS 20/1**
- **Duty to Warn / Protect, caselaw**
- **FOID (firearm, conceal and carry) (see next slide)**

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**FOID**

- **Mandatory Reporting**
- **What to Report**
  - Clear and Present Danger
  - Developmental Disability
  - Admission and Discharge
- **Who Must Report**
  - Physicians, Clinical Psychologists, and Qualified Examiners
  - Mental Health Facilities

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**FOID**

- **When to Report**
  - Within 24 Hours
  - Within 7 days
- **How to Report**
  - Website



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**FOID**

- **Practical Considerations**
- **Reporting Requirements Apply to Individuals with Developmental or Intellectual Disabilities (DD/ID)**
- **Reporting Requirements Apply to Minors**
- **Immunity**
- **Exceptions**
- **Practical Scenarios**

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**Telehealth and Telepsychiatry**

- **Emerging and Growing**
- **Issues and Considerations**
  - Platforms (e.g. Skype)
- **Telehealth in Illinois**
- **Medicaid**
  - Payment
  - Requirements
- **Private Insurance**
- **Parity**

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**Records**

- Illinois court looked to the substantive law protecting the content of the records to determine disclosure of records from an EAP. **Maxwell v. Hobart Corp., 216 Ill. App. 3d 108 (1st Dist. 1991).**
  - Mental health services – Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, et seq.
  - Drug and alcohol - 42 C.F.R. Part 2; Illinois Alcoholism and Other Drug Abuse and Dependency Act, 20 ILCS 301/30-5

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**Oleszko v. State Comp. Ins. Fund**

- 243 F.3d 1154 (9th Cir. 2001)
- **Facts:** Plaintiff sought the disclosure of communications between other employees and the defendant's EAP in an attempt to show a pattern of discrimination and retaliation, the basis of her lawsuit.
- **Issue:** The counselors of the EAP were unlicensed and the court was tasked with deciding whether the psychotherapist-patient privilege protected the records and communications.
- **Holding:** The psychotherapist-patient privilege applied to protect the information from disclosure.

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**Oleszko**

- **Points from the Decision:**
  - Confidentiality recognized as a key component of the EAP.
  - EAPs play an important role in increasing access to mental health treatment.
  - EAPs help employees who would otherwise go untreated to get assistance.
  - The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment.
  - EAPs assist those who could not otherwise afford psychotherapy.
  - EAP personnel serve as a primary link between the troubled employee and psychotherapeutic treatment.
  - EAP personnel are part of the "mental health team."

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## Powell v. Department of Justice

- **Facts**
  - Charles A. Powell, Jr. was employed with the Department of Justice as a computer operator.
  - On August 31, 1994, Powell learned that his shift was changing, which meant that he would not be able to care for his wife's 84 year old grandmother.
  - When Powell was unable to resolve his issues with the shift change with his supervisor, Powell called EAP counselor Heather Kocher.
  - Powell immediately expressed his frustration and anger with management and union officials whom he believed were responsible for his shift change.
  - During the conversation, Powell said that he wanted to kill five specifically identified individuals at his work.
  - According to Kocher, Powell had calmed down by the end of their telephone conversation.
  - On January 13, 1995, the DOJ terminated Powell's employment. Powell appealed his termination.

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## Powell

- **EAP Counselor's Actions**
  - Asked the employee to see her the next day and not go to work
  - Did not contact the police
  - Called only 2 of the 5 employees named by Powell and left a message on the answering machine of a third

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## Powell – Issues Presented

- **Confidentiality**
- **Duty to Warn/Threats/Clear and Present Danger**
- **Dual Relationship/Commitment**

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## Confidentiality

- **Whether the conversation between Powell and the EAP counselor were confidential**
- **Case was decided before *Oleszko***
- **Board analyzed whether Powell had an expectation of confidentiality**
  - Looked at the fact that the employer advertised its EAP as “extending confidential assistance for personal and/or family problems.”
  - It encouraged employees to take advantage of the resources available through the program.
  - it specifically provided that the program was “authorized by laws which protect the privacy of the individual and confidentiality of records,” and that “an employee’s job security shall not be affected” by requests for counseling or referral assistance.
- **Powell signed a waiver authorizing the deciding official to speak with the EAP counselor**

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## Duty to Warn/Threats/Clear and Present Danger

- **Duty to Warn**
  - Illinois law requires:
    - Specific threat of violence
    - Directed at the victim
    - Special relationship
  - Mental Health Code
  - Confidentiality Act

- **Feasibility**
  - How serious is threat?
  - How motivated is person to act?
  - Does person have capacity to commit act?
  - How specific is victim?
  - How immediate is threat?
  - What alternative intervention?
  - If duty to act, what action should be taken?

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## Duty to Warn

- **Potential action**
  - Notify victim and police and/or attempt to secure hospitalization
  - May need to notify family, friends, caretaker, employer (be very careful about the last one).
- **Minimizing risk**
  - Document
  - Supervision consultation
- **Informed consent: need to disclose to client at start of treatment the circumstances where disclosure may and/or must occur.**

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## Duty to Warn

- **Intervention favored over confidentiality**
  - Confidentiality – vast majority of litigation around failure to act, rather than breach for acting.
  - But remember risks of commitment: recipient must meet standard for involuntary commitment.
- **Disclosure regarding criminal acts only when:**
  - Investigation of homicide and information germane to investigation; or
  - Information of past or present criminal conduct germane to duty to warn. Other evidence of past or present criminal conduct should not be disclosed without consent or court order.

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## Clear and Present Danger

- FOID – requirement to report
- Any person whom a physician, clinical psychologist, or qualified examiner determines to pose a “clear and present danger” to himself, herself or others.

**A Person who:**

- communicates a serious threat of physical violence against a reasonably identifiable victim; or
- poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner; or
- demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior, as determined by a physician, clinical psychologist, qualified examiner, school administrator, or law enforcement official.

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## Dual Commitment

- **EAPA Code of Ethics 2.2: EA professionals may not disclose a client’s clinical information to a client company representative without a signed release of information form.**

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**Consultations with Management**

- **Hypothetical situation:** Supervisor is concerned about Employee's behavior and job performance. Supervisor contacts the EAP to discuss how to best address performance and behaviors issues with Employee. Based on the conversation with the EAP, Supervisor implements a performance improvement plan. Employee ultimately is terminated. In the following lawsuit, Employee subpoenas the EAP records, seeking the conversation between Supervisor and EAP.
- **Legal Issue:** Are the records and communications from the conversation between the EAP and Supervisor confidential and thus privileged from disclosure?

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**Consultations with Management**

- **Analysis**
  - What laws, rules, agreements, or the like protect this conversation?
  - Personal Note?
    - Confidentiality Act – must meet definition
    - The conversation between the EAP and the Supervisor was "information disclosed to the therapist (EAP) by other persons (Supervisor) on condition that such information would never be disclosed to the recipient (Employee) or other persons."
    - Expectations should be set at the outset of the conversation or relationship agreement between the EAP and the employer/company that such conversations "would never be disclosed to the recipient or other persons."

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**Powell**

- **Board's decision:**
  - Found that Powell was an employee wanting to talk about his frustration with the EAP counselor rather than someone who intended to make a true threat
  - Was "particularly troubled" by the employer's use of the employee's conversation with the EAP counselor as the basis for his termination

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## Interstate Issues

- **Licensure of EAP Professional**
  - Law not clear
  - Conservative Approach: counselor should be licensed to practice in the state where the client resides
- **Location of Services**
- **Records**

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## Location of Services

- Counseling is considered to have taken place where the client is located.
- Records are governed by the laws of the state where the services took place.



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