

June 5 2006

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CLERK OF THE SUPREME COURT  
STATE OF MONTANA

June 1, 2006

Mr. Ed Smith  
Clerk of the Montana Supreme Court  
Room 323, Justice Building  
215 N. Sanders  
P.O. Box 203003  
Helena, Montana 59620-3003

RE: Model Access Rules, Commentary.

Dear Mr. Smith:

After reviewing the Model Access Rules per the announcement made May 30, 2006, the Montana Psychological Association is quite concerned that these Rules work counter to the intended purposes for which they have been drafted. It is our opinion that the Model Access Rules potential impacts via medical records and testimony, as stated; works counter to the purposes espoused, endangers public safety ultimately, infringes on privacy substantially, and may well undermine all provider relationships that involve privacy rights and interests in a profound and irrevocable manner.

We have specific concerns that the following purposes appear to contravene themselves unless there is further thoughtful consideration on these matters: 4. Contributes to public safety, 5. Minimizes the risk of injury to individuals, 6. Protects individual privacy rights and interests, 7. Protects proprietary business information and 11. Does not unduly burden the ongoing business of the judiciary.

As the statement in 4.60 outlines at the bottom of page 34, the introduction of medical records and related work products into this access system works against many of the purposes outlined above.

- "1. Medical records; *State v. Nelson*, (1997) 283 Mont. 231, 242, 941 P.2d 441, 448. These records may include descriptions or analysis of a person's DNA or genetic material, biometric identifiers, psychological evaluations, examination, diagnosis, evaluation or treatment records and photographs. In addition to court files in connection with a specific case, such information may also be found jury questionnaires (see discussion below);..."

It is our opinion that compromising the nature of "...psychological evaluations, examination, diagnosis, evaluation or treatment records..." presents a danger to the public and does not contribute to public safety. In addition, promoting unlimited access to these records increases the likelihood of injury to individuals, violates privacy rights and interests, exposes proprietary business information and will ultimately burden the ongoing business of the judiciary in appeals to have this material suppressed, etc.

A danger to the public exists in providing unlimited access to psychological evaluations that were intended for a professional audience in a specific context. These evaluations are sensitive materials that contain nomenclature and professional communications that a lay audience typically does not readily appreciate and often misinterprets. On many occasions, evaluations of this nature, like examinations, diagnoses, evaluation or treatment records require the explanation of the professional who crafted them, or another professional of equal training and experience to avoid misinterpretations and misunderstandings that cause unintended, iatrogenic, harm. Although it is understood that these materials are intended for judiciary purposes, there is ample opportunity for members of the public to access these materials under the proposed system and misinterpret these materials. This point goes directly to Purposes 4 and 5.


Regarding Purpose 6., privacy rights and interests, while often these materials are subpoenaed, they may not be presented and when they are presented these materials are brought in within a specific context and intent. If these materials are made public, then the entire purpose of privacy rights and interests generally are compromised. This may also have an unintended affect on the public's trust in the professionals that produced these documents, and whom may have never envisioned these documents to be party to a legal proceeding. At this point in time, many healthcare consumers are reticent to be forthcoming for fear that their private information will become part of a large public database which is not easily bounded despite the advent of HIPAA.

Purpose 7 addresses proprietary interests, and while in the majority of cases this would not likely be contravening variable; with regard to psychological evaluations this may well hold true. Psychological instruments are the tools of this trade, and by their very nature some instruments, and their intended uses, are kept private in order to provide a reliable and valid measure of the individual's functioning in a number of domains. Moreover, many forms used are protected by copy write laws. By providing public access to these evaluations, and the testimony regarding the nature of these instruments, the proprietary interests of the discipline and specific publishers may be significantly undermined.

Regarding Purpose 11, we would simply share that it is our lay perception that this public record may engender as many, if not more, burden on the business of the judiciary.

These are our concerns about these matters, and we understand that by and large our membership is not composed of attorneys who fully understand the implications of this proposal. We would encourage this body to further consult with Montana's Board of Psychology on these matters as well, and would be more than happy to supply a representative group of licensed psychologists to discuss these concerns further.

Sincerely,



Terri Mockel, Executive Director  
For the Board of Directors:

Sandra Micken, PhD, President  
Bill Patenaude, PhD, President Elect  
Vincent River, PhD, Treasurer  
Donna Zook, PhD, Secretary

Barton Evans, PhD, Member at Large  
Patrick Davis, PhD, Member at Large  
Duff Gerrish, PhD, Member at Large  
Gyda Swaney, PhD, Diversity Coordinator