
Confidentiality 101 for Recovery Housing Providers: How to Comply with the Law and Protect Your Residents

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Agenda

- Introduction
- Objectives
- HIPAA, Part 2, State Law Protections, and Recovery Housing Standards
- Responding to Requests for Information
- Best Practices
- Questions

Disclaimer

This presentation is prepared for general informational purposes only. It is not intended and should not be used for specific legal advice in a specific factual situation. Questions about the legal issues discussed in these materials should be presented to knowledgeable legal counsel with respect to any given factual situation before deciding on a specific course of action.

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Introduction

- Who we are
- What is BMD?
- Who are you?
 - Recovery housing AND SUD treatment?
 - Just recovery housing?

Objectives

- Learn how to comply with federal and state confidentiality requirements for substance use disorder records and protected health information.
- Understand how best to respond to requests for resident information.
- Understand what information can be disclosed when requested by law enforcement or a court of law.
- Understand how to respond to a subpoena request.

HIPAA

HIPAA - Privacy

- The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that:
 - Protects the privacy of patient information
 - Provides for the security of protected health information (PHI)
 - Requires “minimum necessary” use and disclosure by anyone with access
 - Specifies patient rights to approve access and use of their medical information
- HIPAA seeks to balance the need for disclosure in certain situations with the privacy rights of patients.

HIPAA - When to disclose?

- In general, a covered entity may only use or disclose PHI if (1) the HIPAA Privacy Rule specifically permits or requires it; or (2) the individual who is the subject of the information gives authorization in writing.
 - Under the Privacy Rule, HIPAA has an exception for disclosure of PHI if a provider receives a subpoena and it is signed by a judge.
- Important: If a state law is more protective of the patient, then it will apply instead of HIPAA; if a state law is less protective than HIPAA, then HIPAA will apply.

HIPAA – uses and disclosures for which an authorization is *not* required (45 CFR 164.512)

- A covered entity may disclose PHI without an authorization:
 - When there is a reasonable belief that a patient is a victim of abuse, neglect, or domestic violence to the extent required by law (45 CFR 164.512(c));
 - In the course of any judicial or administrative proceeding in response to an order of a court or in response to a subpoena or discovery request that is *not* accompanied by a court order if:
 - The covered entity receives satisfactory assurance that reasonable efforts have been made to ensure the patient has been given notice of the request *or* a qualified protective order has been sought. (The covered entity can also pursue patient notification or protective order.) (45 CFR 164.512(e))
 - For a law enforcement purpose to a law enforcement official (45 CFR 164.512(f))...
 - (May not disclose if the information is learned through a request for therapy or during therapy.)

HIPAA – Psychotherapy Note Exception

- HIPAA affords special protection to psychotherapy notes.
- Psychotherapy notes should not include:
 - Medication prescription and monitoring
 - Duration of encounter
 - The modalities and frequencies of treatment furnished
 - Results of clinical tests
 - Any summary of diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date
- Psychotherapy notes **MUST** be kept separate from the client's medical record.
 - Separate means stored in a different location—different-colored paper in the same chart is **NOT** considered separate

Psychotherapy Note vs. Progress Note

- Different Purposes
 - Progress Note: Reflect communications between client and all members of care team and help practitioners maintain continuity of care
 - Psychotherapy Note: Help practitioners recall what a client said during a private treatment session
- Progress notes **ARE** required to be kept in the patient's medical record
- They're treated like regular medical records, so clients, practitioners, members of the client's care team, insurers, and courts have the legal right to view them

Time Out - What is a subpoena?

- A subpoena is a call for testimony or records (deuces tecum)
- They can come from many sources like
 - law enforcement officers,
 - attorneys,
 - court clerks,
 - judges, and
 - administrative agencies.

**[REDACTED] COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION
COURTHOUSE, [REDACTED], Ohio 45801**

STATE OF OHIO

PLAINTIFF

CASE NO. [REDACTED]

vs.

[REDACTED]

DEFENDANT

**SUBPOENA DUCES
TECUM**

TO:

[REDACTED]

[REDACTED]

**YOU ARE HEREBY COMMANDED TO PRODUCE DOCUMENTS AND TANGIBLE ITEMS AS
FOLLOWS:**

Any and MEDICAL I PSYCHOLOGICAL records for:

[REDACTED]

FROM 01/01/20 THROUGH 11/31/23 • INCLUSIVE (ELECTRONIC COPY PREFERRED)

**You shall comply with this subpoena by appearing with the documents or tangible objects
at the office of the [REDACTED] County Public Defender at [REDACTED] [REDACTED] on the
following date and time: [REDACTED] AT 2:00PM**

[REDACTED]
Assistant Public Defender

[REDACTED] County Public Defender

[REDACTED]

Witness my hand and seal of said Court this

_____ day of _____, 20_____.

[REDACTED]

By: _____ Deputy

HIPAA COMPLIANT AUTHORIZATION FOR THE RELEASE OF PATIENT
INFORMATION PURSUANT TO 45 CFR 164.508
and RELATED SECTIONS OF 45 CFR PART 2

TO THE FOLLOWING HEALTHCARE PROVIDER:

TO THE ADDRESSEE OF THE SUBPOENA

Name _____

Street Address _____

City _____

State _____

Zip Code _____

RE: Patient Name: _____

Date of Birth: _____

Social Security Number _____

I authorize and request the disclosure of all protected information for the purpose of review and evaluation in connection with a **criminal case**. I expressly request that the designated record custodian of all covered entities under HIPAA identified above disclose full and complete protected medical information including the following:

1. All medical records, meaning every page in my record, including but not limited to: office notes, face sheets, history and physical, consultation notes, inpatient, outpatient and emergency room treatment, all clinical charts, reports, order sheets, progress notes, nurse's notes, social worker records, clinic records, treatment plans, admission records, discharge summaries, requests for and reports of consultations, documents, correspondence, test results, statements, questionnaires/histories, correspondence, photographs, videotapes, telephone messages, and records received by other medical providers. This includes *Psychotherapy notes* and notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session.

2. All physical, occupational and rehab requests, consultations and progress notes. All disability, Medicaid or Medicare records including claim forms and record of denial of benefits.

7. I understand the information to be released or disclosed may include information relating to sexually transmitted diseases, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus (HIV), and alcohol and drug abuse. I authorize the release or disclosure of this type of information.

8. This protected health information is disclosed for the following purposes: **FOR THE USE BY MY ATTORNEY AND EXPERTS FOR EVALUATIONS, DEFENSES AND MITIGATION.**

9. **RELEASE OF PSYCHOLOGICAL INFORMATION:** I am an adult individual over the age of eighteen (18) years, hereby authorize the release to my attorney as set forth herein, any and all psychiatric and/or medical records and confidential information which it has in its possession concerning any and all treatment, treatment plans, medical history, confidential information and psychiatric records of my condition(s). I specifically release said person(s) or institution(s) from any and all medical and legal obligations to protect otherwise confidential medical and psychiatric information.

I hereby request this release for the purpose of permitting the above person(s) or institution(s) to inform my designee of the nature, cause and treatment of my psychiatric condition, and to discuss any otherwise confidential information related to my condition(s). I also request that my designee be informed of any medication that I have been prescribed and the reasons for such prescription, as well as any side effects caused by the medication.

THIS PART OF THE RELEASE SHALL EXPIRE ONLY UPON MY WRITTEN AUTHORIZATION.

10. **CONSENT FOR THE RELEASE OF CONFIDENTIAL ALCOHOL OR DRUG TREATMENT INFORMATION:** The Undersigned authorizes any ALCOHOL/DRUG PROGRAM that has provided services to me to disclose any and all information regarding the same to my hereinafter named attorney. The purpose of the disclosure authorized herein is to assist my attorney in pending criminal matters for both defense and possible mitigation.

I understand that my alcohol and/or drug treatment records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 Code of Federal Regulations (CFR) Part 2, and the Health Insurance

Public Defender

or

Assistant Public Defender

County Public Defender's Office

I understand the following: See CFR §164.508(c)(2)(i-iii):

- a. I have a right to revoke this authorization in writing at anytime, except to the extent information has been released in reliance upon this authorization.
- b. The information released in response to this authorization may be re-disclosed to other parties. [§]
- c. My treatment or payment for my treatment cannot be conditioned on the signing of this authorization. [§]

Any facsimile, copy or photocopy of the authorization shall authorize you to release the records requested herein. This authorization shall be in force and effect until five years from date of execution at which time this authorization expires.

Signature of Patient

Date

Things to look for on the Subpoena

- What authority issued the subpoena, a court or agency?
- What type of case is it - civil or criminal?
- Who are the parties in the case? Is the patient a party?
- Who signed the subpoena?
- What information is asked for - the whole patient file or information specific to an event or injury?

HIPAA - disclosures for law enforcement purposes, continued (45 CFR 164.512(f))

- For a law enforcement purpose to a law enforcement official (45 CFR 164.512(f))...
 - Pursuant to process as otherwise required by law
 - Limited information for identification and location purposes
 - Victims of a crime
 - Decedents
 - Crime on premises
 - Reporting crime in emergencies
- (May not disclose if the information is learned through a request for therapy or during therapy.)

42 CFR Part 2

42 CFR Part 2

42 CFR Part 2 is a federal law that:

- Protects patient records created by federally assisted programs for the treatment of substance use disorder (SUD).
- Prohibits law enforcement's use of SUD patient records in criminal prosecutions against patients, absent patient consent or a court order.
 - A subpoena is not good enough if not ordered by a court!
- Prohibits the disclosure of SUD treatment records without patient consent, other than as statutorily authorized.

Part 2 vs. HIPAA

Both Part 2 and HIPAA protect patient privacy by setting limits on how patient information can be shared and disclosed, but:

- 42 CFR Part 2 is stricter than HIPAA.
- Unlike HIPAA, Part 2's privacy protections follow the records even *after* they are disclosed.
 - So, the recipient of the records is also bound by Part 2's privacy and security requirements (even if the recipient is not a Part 2 provider).
- 42 CFR Part 2's rule only places privacy restrictions on SUD treatment records. HIPAA applies to many types of PHI, well beyond SUD information.

Part 2 – Statutory Authorizations

Part 2 permits the disclosure of information without consent under certain circumstances:

- To law enforcement if there is a crime on Part 2 premises or against Part 2 personnel and the disclosure is directly related to a patient's commission of the crime and are limited to the circumstances of the incident;
- Notifications to medical personnel in a medical emergency and written consent cannot be obtained;
- Notifications to law enforcement if an immediate threat to the health or safety of an individual exists;
- Reports of child abuse and neglect; or
- Court ordered disclosures signed by a judge.

42 CFR Part 2 Court Orders

Part 2 court orders are Part 2-specific:

- The purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by Part 2.
- This order DOES NOT compel disclosure; that requires a subpoena.

Examples

1. A Part 2 provider receives a subpoena for records.
 - The person may not disclose unless a court of competent jurisdiction enters an authorizing order specific to Part 2.
2. A Part 2 court order is entered, but the provider does not want to make the disclosure.
 - If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, the provider may refuse to make the disclosure.
 - Upon the entry of a valid subpoena or other compulsory process, the provider must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions.

IN THE COURT OF COMMON PLEAS
██████████ COUNTY, OHIO

FILED
JUL 19 2023
Common Pleas Court

In re Grand Jury Investigation

* CASE NO. ██████████
*
* Judge ██████████
*
*
* ORDER TO PRODUCE
* RECORDS
*

On motion of the prosecuting attorney, and for good cause shown, ██████████
██████████ is hereby Ordered to produce the records pertaining to the patient
referenced in the attached Grand Jury Investigation Subpoena to law enforcement as
listed in the grand jury subpoena.

This disclosure should be limited to the law enforcement officers named on the
grand jury subpoena and limited to the patient's location to aid law enforcement with
apprehending the patient for his extremely serious crime.

It is further Ordered that the attached Motion to Produce Medical Records, Order
to Produce Medical Records, as well as the attached Grand Jury Subpoena should be filed
under seal and are not to be opened without further order from the court.

IT IS SO ORDERED.



JUDGE ██████████

IN THE COURT OF COMMON PLEAS
██████████ COUNTY, OHIO

JUL 13
Common Ple
██████████

In re: Grand Jury Investigation

*
*
*
*
*
*
*

CASE NO. ██████████

MOTION FOR
MEDICAL RECORDS

Now comes the State of Ohio, and hereby moves this Court to issue an Order to produce information relevant to the patient's location that is contained in the records at ██████████ to Det. ██████████ and USMS ██████████ so that the patient can be apprehended on his extremely serious crimes including Aggravated Robbery with a deadly weapon.

The patient for which information is sought in the attached sealed grand jury subpoena has been indicted for Aggravated Robber committed with a knife on ██████████ ██████████, is under investigation based on DNA evidence and other information that link him to another aggravated robbery offense that occurred on ██████████ and for an aggravated murder that occurred on ██████████.

Law enforcement needs the information relevant to the patient's location that is contained in ██████████ records to apprehend the fugitive patient on his outstanding felony violent warrants and to further the investigation. Therefore, the State moves this Court to Order ██████████ to comply with the sealed grand jury subpoena attached.

Respectfully submitted,



██████████
Assistant Prosecuting Attorney



COURT OF COMMON PLEAS,
██████████ County, Ohio



In re Grand Jury Investigation

Case No. ██████████

Plaintiff,
VS.

This subpoena is issued upon application of the:

Plaintiff Defendant Prosecution

Defendant,

Type of Subpoena:

Civil/Criminal Duces Tecum Grand Jury

STATE OF OHIO

██████████ COUNTY, SS:

To the Email _____ of ██████████ You are hereby commanded to subpoena the person named below.

Name: ██████████ Address: ██████████

City: Columbus, State Ohio Zip Code 43213 Phone Number _____

You are hereby commanded to appear before the Grand Jury _____ in the county building located at

██████████ in said ██████████ County, Ohio, on ██████████ Time: 9:00 AM, in ██████████ OH to

testify as a witness in a certain case pending in said court on behalf of the Prosecution

- Attend and give testimony at the trial, hearing, or disposition on the date, time, and at the place specified above.
- Attend and produce books, papers, documents, or other objects as specified at a trial or hearing on the date, time, and at the place specified above.

Description of or other items to be produced:

Please provide Officers ██████████ and Det. ██████████ with all title 2 HIPPA information relevant to the patients location for patient ██████████

This patient has an active arrest warrant for an extremely serious crime.

Please do not disclose the existence of this request or investigation for an indefinite time period. Any such disclosure could impede the criminal investigation and therefore be a violation of Ohio law.

In lieu of personal appearance, you may e-mail the records ██████████

██████████ County, Ohio
FILED
██████████
Common Pleas Court
██████████

Why is Part 2 compliance so important?

- Part 2 programs must have in place formal policies and procedures for the security of records to prevent unauthorized uses and disclosures of patient identifying information, or they will be on the hook for expensive criminal fines.
- Additionally, a breach of privacy of information protected by Part 2 can lead to civil and criminal consequences for patients, including loss of employment, housing, and/or child custody.
- Therefore, it is crucial to know the law and its exceptions!

When Patients Lack Capacity

- **Adult patients that lack capacity:** If a patient lacks the capacity to manage their own affairs, a consent to disclose may be given by the guardian or other person authorized under state law to act on the patient's behalf.
- **Deceased patients:** Written consent or a court order are required to disclose the information of a deceased patient. For written consent, the executor, administrator, or other personal representative appointed under applicable state law may sign. If there is no such appointment, consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

State Law Protections

Provider/Patient Privileges

- A privilege is a **legal** protection that prevents providers from being compelled to reveal in court private information about their patients.
- Privilege ensures patients can fully disclose confidential information to their providers in order to receive the highest quality treatment available.
- Important: A confidential communication between the provider and the patient is afforded privilege *only when the communication is made during a professional relationship.*

Provider Privileges Under Ohio Law

- Physician/advanced practice registered nurse/dentist-Patient Privilege (ORC 2317.02(B))
- Psychologist-Patient Privilege (ORC 4732.19)
- Nurse-Patient Privilege (not codified in Ohio)
- BH professionals (ORC 2317.02)
 - Person licensed under Chapter 4757. of the Revised Code as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant
 - School guidance counselor who holds a valid educator license from the state board of education as provided for in section [3319.22](#) of the Revised Code

Standards of Ethical Practice and Professional Conduct: Clients of Services

Counselors, social workers, and marriage and family therapists shall have a primary obligation to protect the client's right to confidentiality as established by law and the professional standards of practice. Confidential information shall only be revealed to others when the clients or other persons legally authorized to give consent on behalf of the clients, have given their informed consent, except in those circumstances in which failure to do so would violate other laws or result in clear and present danger to the client or others. Unless specifically contraindicated by such situations, clients shall be informed and written consent shall be obtained before the confidential information is revealed. (OAC 4757-5-02(D)(1))

Recovery Housing Standards

Ohio Standards

- An element of operating a recovery home is allowing for residents to have a reasonable expectation of confidentiality.
- As a recovery housing operator, it is your responsibility to understand what requirements you have with your associated funding sources.
- If you or your organization provide treatment services, partner with treatment services providers, provide health care services or partner with health care services providers, you may be subject to legal requirements regarding how resident information can be collected, stored and shared.
- All residents should feel safe and comfortable living in the home and participating in recovery activities, peer support and working on their recovery goals.

Ohio Standards

- All housing sites affiliated with ORH have been inspected and found to provide a standard of living that meets Ohio Recovery Housing (ORH) standards and the National Association for Recovery Residences (NARR) standards.
- Some of the standards required of housing sites are to:
 - Provide a safe, homelike environment that meets NARR Standards.
 - Maintain an alcohol- and illicit-drug-free environment.
 - Honor individuals' rights to choose their recovery paths within the parameters defined by the residence organization.
 - **Protect the privacy and personal rights of each resident.**

Ohio Confidentiality Standards

- Your confidentiality policy should outline:
 - What the operator will do to ensure resident information is private.
 - At minimum, keep resident records in a locked cabinet with access restricted to designated individuals and password protected computer
 - What expectations are for residents with regards to privacy and confidentiality
 - If your house has agreements concerning releases of information with health care professionals, ensure that you read these agreements carefully and that you have a confidentiality policy that is consistent with your agreements

Responding to Requests for Information (Subpoenas, etc.)

Request for PHI about a BH client on parole

- If the client consents to the provider sharing their PHI → sharing is permissible under HIPAA, Part 2, and privilege (and ethics) laws
- If the client does not consent to the provider sharing their PHI → do regular HIPAA, Part 2, privilege analysis
- Remember: a person who is on parole and who has agreed to participate in a Part 2 program as a condition of parole shall consent to the release of records and information relating to the progress of treatment, frequency of treatment, adherence to treatment requirements, and probable outcome of treatment. (ORC 5119.27(D))
 - Such release of information and records shall be limited to the court or governmental personnel having the responsibility for supervising the person's parole.

Request for PHI about a crime committed on the provider's premises

Under Part 2

- Part 2 permits Part 2 programs to make limited disclosures of SUD treatment records to law enforcement to report a crime or threat of a crime committed on the program premises or against program personnel. The disclosure must be limited to the circumstances of the event, the patient's name, address and last known whereabouts. (42 CFR 2.12(c)(5))
 - Any follow up information may only be disclosed with patient consent or a court order.
- Also, privilege laws protect communications between providers and patients.
- Think about what "on the premises" means if you have different types of licensed or certified settings.

Request for PHI in custody case

Parents with joint legal custody both have decision-making rights, including the ability to authorize the release of PHI. A parent with sole legal custody is the only parent with decision-making rights.

- In a divorce, a parenting plan or court order may otherwise limit the rights of parents (e.g., access to a minor child's PHI).

Request for PHI regarding suspected abuse or neglect

Victims of abuse

- Under Part 2, Part 2 programs that have received Part 2 patient information can make reports to law enforcement about an immediate threat to the health or safety of an individual or the public if patient-identifying information is not disclosed.

Patient as alleged abuser

- Part 2 permits the disclosure of SUD treatment records to law enforcement without written consent to investigate or prosecute patients suspected of committing an “extremely serious crime,” including child abuse and neglect.
- Warrants and subpoenas are *not* sufficient to compel disclosure of Part 2 protected records. A disclosure may only be made with a valid court order that meets the criteria in 42 CFR § 2.65.

Best Practices

What must your consent contain?

Part II is the strictest and it requires:

- In writing.
- Name of the patient.
- Name part 2 program(s), entity(ies), or individual(s) permitted to make the disclosure.
- How much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed.
- The name(s) of the individual(s) or the name(s) of the entity(-ies) to which a disclosure is to be made.
- A statement must be included on the consent form that the patient confirms their understanding that, upon their request and consistent with this part, they must be provided a list of entities to which their information has been disclosed pursuant to the general designation (see § 2.13(d)).
- The purpose of the disclosure. In accordance with § 2.13(a), the disclosure must be limited to that information which is necessary to carry out the stated purpose.
- A statement that the consent is subject to revocation at any time.
- The date, event, or condition upon which the consent will expire if not revoked before.
- The signature of the patient.
- The date on which the consent is signed.

Practice Tip: Redisdisclosure

- Currently, when Part 2 providers disclose information pursuant to a signed consent, they must include a written statement that the information cannot be re-disclosed.
 - Also, persons who receive records directly from a Part 2 provider and who are notified of the restrictions on re-disclosure of the records are bound by Part 2.
- New Part 2 rule will change redisdisclosure requirements (not effective until 2026)
 - Allows HIPAA covered entities and business associates that receive records under this consent to redisdisclose the records in accordance with the HIPAA regulations.
 - But these records cannot be used in legal proceedings against the patient without specific consent or a court order, which is more stringent than the HIPAA standard.

Answering Subpoenas: Best Practices

- Do not ignore the subpoena.
- Immediately upon receipt of a subpoena, inform all necessary employees of the need to retain the records requested.
- Answer the subpoena promptly (most require a response within 14 days).
- Remember, a subpoena does not relieve you of your obligations to protect confidential information.
 - Contact the client/patient, let them know that you have received a subpoena, and ask if they are willing to provide written authorization for the information to be released. If not, seek a subpoena + protective order or court order (required under Part 2)
 - Send a copy of the subpoena to the client and their attorney, if authorized by the client to do so.
 - In the case of child abuse/neglect, the obligation is for all practical purposes dissolved for most professionals.
- Review the information being requested very carefully.
- Document all communications/actions (phone calls, emails, letters, consultations) pertaining to the subpoena.

Questions?

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