

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

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LISTEN. SOLVE. EMPOWER.



LISTEN. SOLVE. EMPOWER.

INTRODUCTION

Who we are

What is BMD?

Who are you?

- Recovery housing AND SUD treatment?
- Just recovery housing?



AGENDA

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

OBJECTIVES

- Understand what information can be disclosed when requested by law enforcement or a court of law.
- 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.

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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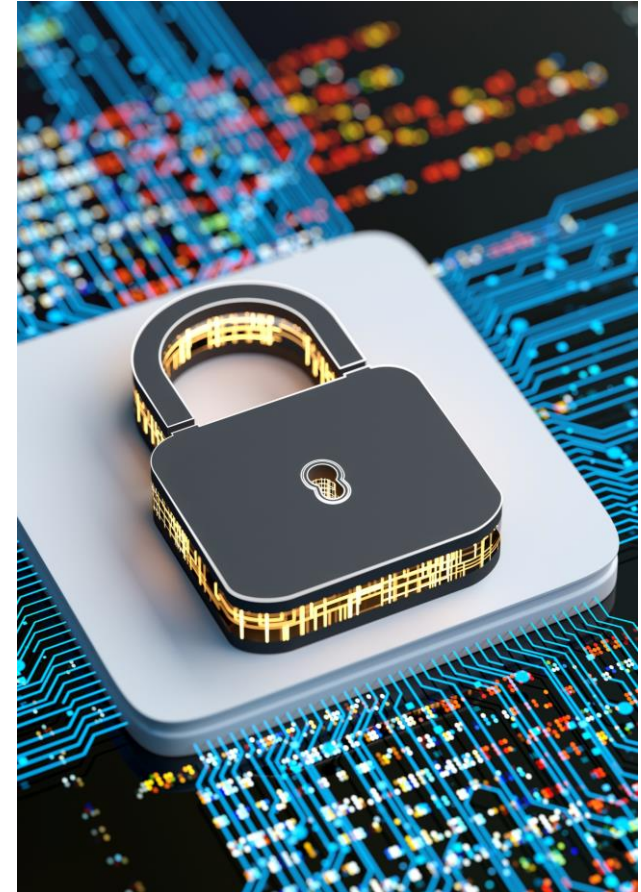


HIPAA



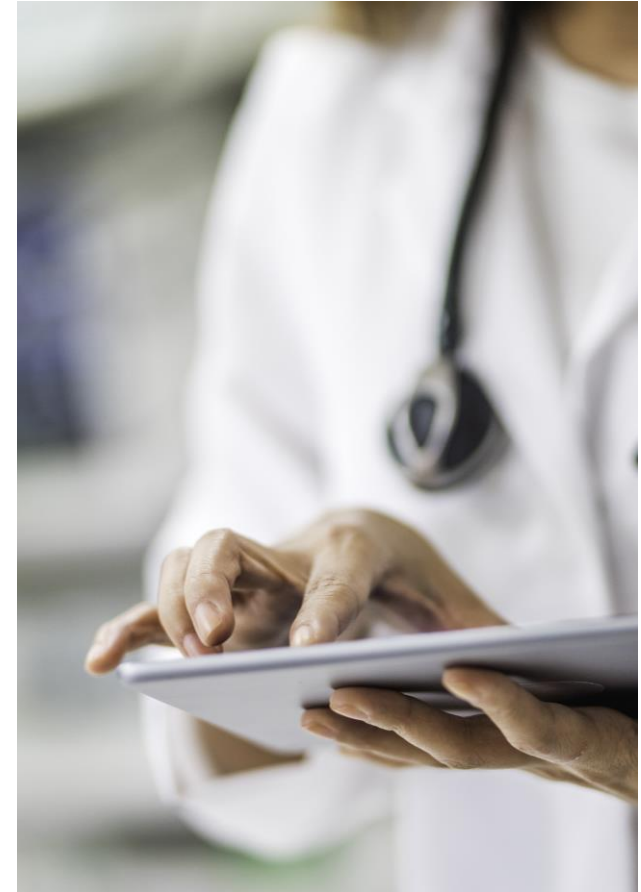
HIPAA - PRIVACY

- 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.
- 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

- When 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.)

TIME OUT – Court Order vs. Subpoena



1

A **court order** is a direction issued by a court or judge requiring a person to do or not do something.

2

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 (e.g., ICE).

PLAINTIFF

■■■■■■■■■■

**SUBPOENA DUCES
TECUM**

Any and MEDICAL I PSYCHOLOGICAL records for:

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

 day of , 20 .

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

Court Orders and Subpoenas

What should you be looking for?



- Do you have a court order AND a subpoena?
- If no court order, are you reasonably certain the client has been notified of the request to release their records? Is the patient a party? Has there been a release?
- If not, is there a protective order?
- What information is being requested - the whole patient file or information specific to an event or injury?

HIPAA – Uses and Disclosures

- Disclosures for Law Enforcement-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.)

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

42 CFR PART 2



42 CFR PART 2

A federal law that:

- Protects patient records created by federally assisted programs for the treatment of substance use disorder.
- 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:

- Part 2 is stricter than HIPAA.
- Unlike HIPAA, Part 2's privacy protections follow the records even *after* they are disclosed.
- Part 2's rule only places privacy restrictions on SUD treatment records. HIPAA applies to many types of PHI, well beyond (and including) SUD information.

CONSENT UNDER PART 2

Part 2 consent requires:

- Name of the patient.
- Name of the 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 SUD information that may be disclosed.
- The name(s) of the individual(s) or the entity(-ies) to which a disclosure is to be made.
- A statement that the patient confirms their understanding that, upon their request, 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.

PART 2 – Statutory Authorizations

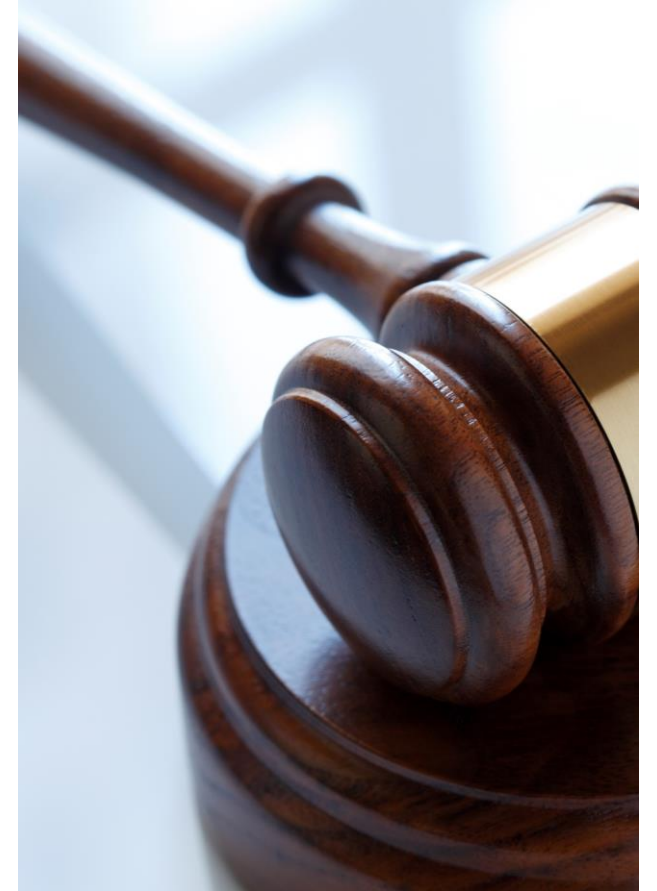
Part 2 permits the disclosure of information *without* patient/client consent under certain circumstances:

- 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 is limited to certain information;
- 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 or the public exists;
- Reports of child abuse and neglect; or
- To investigate or prosecute the patient for an extremely serious crime and the disclosure is court ordered.

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.
- **IMPORTANT:** Part 2 restricts the use of records and testimony in civil, criminal, administrative, and legislative proceedings against patients without patient consent or a court order.



42 CFR PART 2

New Part 2 rules took effect on April 15, 2024, and more closely align Part 2 to HIPAA.

- **SUD Counseling Notes**

- Creates a new definition, SUD Counseling Notes, that increases protection for counseling notes kept separate from the patient's record.

- **Patient Consent**

- Allows one single consent for all future uses and disclosures for treatment, payment, and health care operations.
- Allows HIPAA-covered entities and business associates that receive records under this consent to redisclose the records in accordance with the HIPAA regulations.

- **Uses and Disclosures**

- Permits disclosure of records *without* patient consent to public health authorities, provided that the records are de-identified.

EXAMPLES

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.

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
[REDACTED] COUNTY, OHIO

FILED
JUL 19 2023
Common Pleas Court

In re Grand Jury Investigation

* CASE NO. [REDACTED]
*
* Judge [REDACTED]
*
* ORDER TO PRODUCE
* RECORDS
*

On motion of the prosecuting attorney, and for good cause shown, [REDACTED]
[REDACTED] 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 [REDACTED]

IN THE COURT OF COMMON PLEAS
COUNTY, OHIO

Common Pleas

In re: Grand Jury Investigation

CASE NO. [REDACTED]

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 [REDACTED] to Det. [REDACTED] and USMS [REDACTED] so that the patient can be apprehended on his extremely serious crimes including Aggravated Robbery with a deadly weapon.

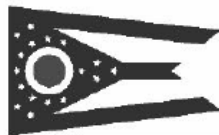
The patient for which information is sought in the attached sealed grand jury subpoena has been indicted for Aggravated Robber committed with a knife on [REDACTED], is under investigation based on DNA evidence and other information that link him to another aggravated robbery offense that occurred on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

Law enforcement needs the information relevant to the patient's location that is contained in [REDACTED] 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 [REDACTED] to comply with the sealed grand jury subpoena attached.

Respectfully submitted,



[REDACTED]
Assistant Prosecuting Attorney



COURT OF COMMON PLEAS,
County, Ohio



In re Grand Jury Investigation

Plaintiff,
VS.

Defendant,

Case No. [REDACTED]

This subpoena is issued upon application of the:

☐ Plaintiff ☐ Defendant ☒ Prosecution

Type of Subpoena:

☐ Civil/Criminal ☐ Duces Tecum ☒ Grand Jury

STATE OF OHIO

County, SS:

To the Email of [REDACTED] You are hereby commanded to subpoena the person named below.

Name: [REDACTED] Address: [REDACTED]

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

[REDACTED] in said County, Ohio, on [REDACTED] Time: 9:00 AM, in [REDACTED] 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 [REDACTED] and Det. [REDACTED] with all title 2 HIPPA information relevant to the patients location for patient [REDACTED]

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 [REDACTED]

County, Ohio
FILED
Common Pleas Court

SUD COUNSELING NOTES

- The 2024 Part 2 rules created a new definition, SUD Counseling Notes.
- SUD Counseling notes are clinician's notes analyzing the conversation in a counseling session that the clinician voluntarily **maintains separately** from the rest of the patient's treatment and medical record and that require specific consent from an individual and cannot be used or disclosed based on a TPO consent.
 - Part 2's analogue to the HIPAA protections for psychotherapy notes.

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 who 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 as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, marriage and family therapist, independent marriage and family therapist, social work assistant, or school guidance counselor

Standards of Ethical Practice and Professional Conduct: Clients



- 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



RECOVERY HOUSING 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.

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 - EXAMPLES



REQUEST FOR PHI

ABOUT A CRIME COMMITTED ON A 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

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.

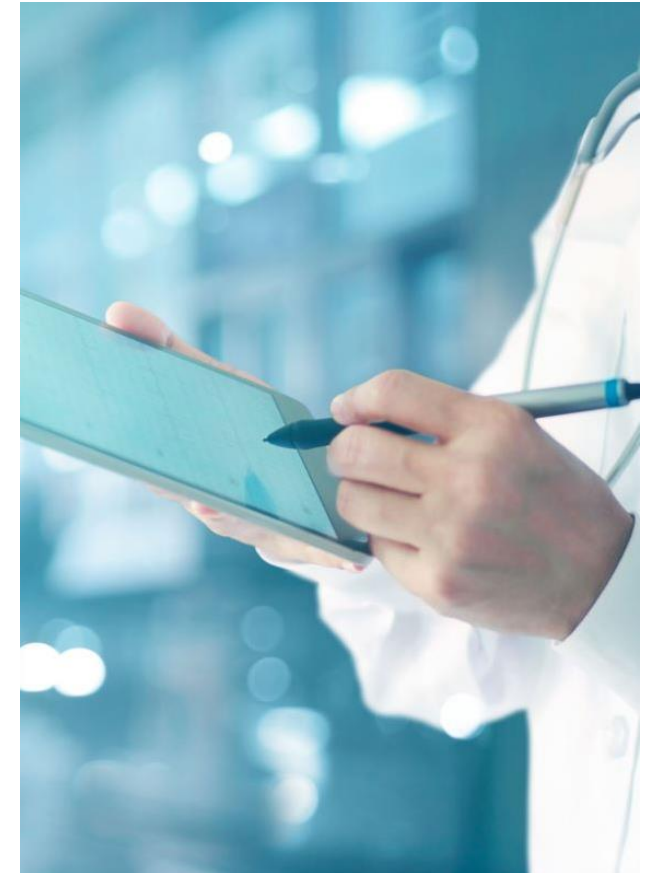
Patient or Alleged Abuser

- 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.

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.



BEST PRACTICES



ANSWERING SUBPOENAS

- 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)



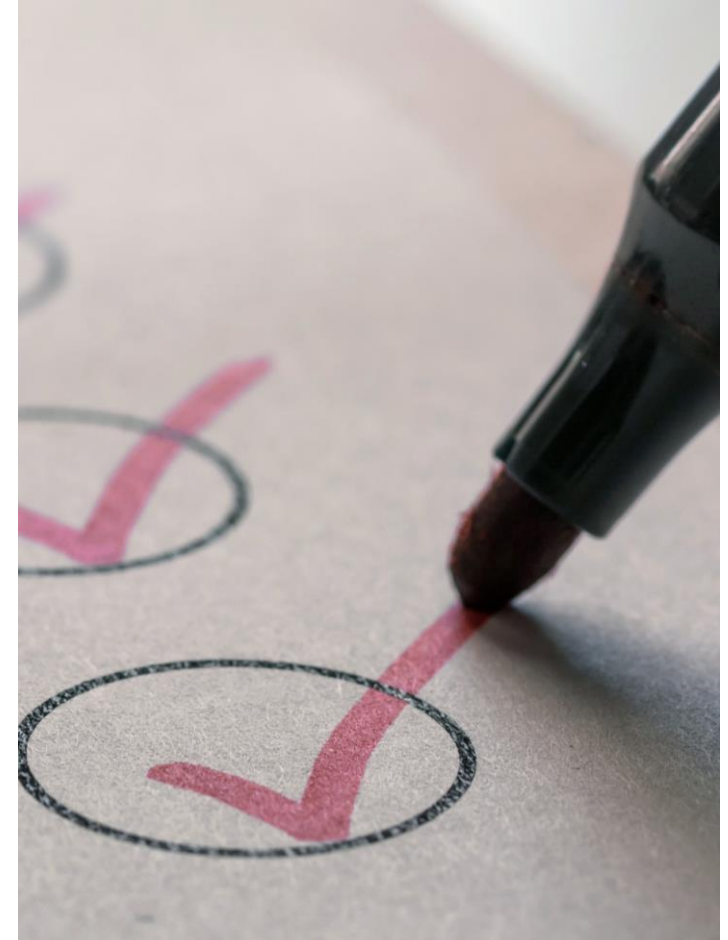
ANSWERING SUBPOENAS CON.

- 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.



PRACTICE TIP: REDISCLOSURE

- 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.
- New Part 2 rule will change redisclosure requirements (not effective until 2026)
 - Allows HIPAA covered entities and business associates that receive records under this consent to redisclose 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.





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QUESTIONS?





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