Specially Protected Records

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This publication from the OMA’s Medical-Legal Department is intended to inform our membership about recurring legal issues in the day-to-day practice of medicine. If you have any questions, or if you would like us to address a particular issue in future publications, please contact Gwen Dayton, JD, OMA General Counsel (gwen@theOMA.org) or Annabel Lucas, JD, OMA Health Policy Specialist (annabel@theOMA.org).

Disclaimer: We hope this information is helpful to you, but it does not constitute formal legal advice, nor does it create an attorney/client relationship with the reader.

Specially Protected Records

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Specially Protected Records

State and federal law impose special protections on some kinds of medical records that policymakers deem more sensitive than others. This edition of the Legal-Regulatory Briefing will discuss these special protections and what kind of permission is required to disclose these records.

Background

HIPAA: Notably, the HIPAA privacy regulations do not impose special privacy protections on particular types of medical records, except for psychotherapy notes. This meant that under HIPAA, all information held in the medical record is subject to the same rules of use and disclosure. This Member Guidance addresses psychotherapy notes in the Mental Health section.

Other federal law: While HIPAA does not mention it, other federal law regulates drug/alcohol records. These regulations will be discussed in this document.

Oregon law: Contrary to HIPAA, Oregon law provides extra protection for some sensitive records. As more protective of patient privacy than the HIPAA privacy regulations, Oregon protections remain good law despite HIPAA’s lack of protection for these records. This document will explain these regulations.
Specially Protected Records

**Mental Health:** Mental health records in Oregon are protected through ORS 179.505. This is an amazingly complicated statute that boils down to saying that health care providers who are providing care pursuant to a public contract may only disclose medical records as allowed by the statute.

What the laws says is disclosure of "written accounts" of "health care service providers" require authorization unless an exception applies or unless otherwise permitted or required by state or federal law or by an order of the court.

The first question is whether a physician is a “health care service provider” Health care service provider” means:

- Medical personnel or other staff employed by or under contract with a public provider to provide health care or maintain written accounts of health care; or
- Units, programs or services designated, operated or maintained by a public provider

**“Public provider?”** Public provider includes a number of entities such as correctional facilities and publicly funded programs that treat persons with mental illness, drug or alcohol problems. It also includes public and private entities that contract with community mental health or developmental disabilities programs to provide services, or a program or service providing treatment by appointment that is contracted or approved by DHS or the Oregon Health Authority to provide mental health or drug/alcohol treatment.

So, if a physician is providing mental health care to a patient and that care is covered by a community mental health program or Medicaid (run through DHS or the Oregon Health Authority) disclosure of the account of that care likely is covered by the statute.

**Written account?** A written account means individually identifiable health information in a medical record.

**What is “mental health” information?** The statute does not define “mental health.”

**What can be disclosed without authorization by a health care service provider?**

- Medical emergency
- Scientific research
- Audit and evaluation
- Information indicating clear and immediate danger to others
- Child abuse records
- To State to defend legal action
- By a treating provider to officers or employees of that provider, its agents or cooperating health care services providers who are currently acting within the official scope of their duties to evaluate treatment programs, to diagnose or treat or to assist in diagnosing or treating an individual when the written account is to be used in the course of diagnosing or treating the individual.
- Government payers

**What if authorization is required?**

- Statute says what must be in authorization form
- State model form works (included in OMA Medical-Legal Handbook)
- Personal representative may sign

**Can I obtain authorization or specially protect mental health records even if it is not required?** Definitely.

**I don’t qualify as a health care service provider subject to the statute. What rules apply to me?** You must adhere to the HIPAA privacy rules as you would for other medical records.

**Speaking of HIPAA...Psychotherapy Notes:** HIPAA defines psychotherapy notes as a quite limited subset of the medical record, including just notes recorded by a mental health professional in the performance of the official duties of the professional that document or analyze the contents of conversation during a counseling session.

- Authorization is required for disclosure of psychotherapy notes, even for treatment, payment and health care operations.
- Psychotherapy notes must be maintained separately from the rest of an individual’s medical record. This means they would not be part of the individual’s designated record set that would be routinely disclosed.
- Oregon law (ORS 179.505) mirrors the HIPAA restriction on disclosure of psychotherapy notes.
- State model authorization form does not have a check box for psychotherapy notes
**Genetic Information:** Disclosure of genetic information requires authorization unless an exception applies, but there are lots of exceptions.

*Genetic information* means “Information about an individual or an individual’s blood relative that is derived from a genetic test”. ORS 192.531.

- Genetic information does not include:
  - Family history
  - Clinical diagnosis of a genetic or heritable condition, if not derived from a genetic test.

**Exceptions to authorization requirement**
- Disclosures for treatment, payment and health care operations (not including underwriting)
- Law enforcement purposes (identification, investigation)
- Court order
- As authorized by statute to establish paternity
- Medical diagnosis of relatives of decedent
- Identification of body

**Examples of when authorization is required**
- For litigation. A subpoena alone is not sufficient
- Life insurers
- Employers

**Required authorization form**
- The law requires use of the state model form (included in the OMA Medical-Legal Handbook)

**HIV:** Authorization generally required for disclosure of the identity of a person who has taken an HIV test and the test results, but there are notable exceptions.

**Exceptions:**
- Emergency treatment
- Notification in cases of substantial exposure, without disclosing identity of person who is source of exposure
- Reporting to public health authorities
- Notification related to anatomical gifts

**Disclosures for treatment, payment and healthcare operations?**
There is an interesting quirk in the law here. Oregon administrative rules allow disclosure of an HIV test, positive or negative, for treatment, payment or healthcare operations. (OAR 333-012-0270). Because of the way the rule is written v. the statute, however, it appears that the statute prohibits disclosure of a negative HIV test for these purposes, only allowing disclosure of a positive test. ORS 433.045(3). The statute controls over the rule, so current Oregon law allows disclosure of a positive HIV test for treatment, payment or health care operations but a negative test requires authorization. This result was unintended by the regulators and OMA is working to fix the problem.

**When authorization is required:** Authorization to release HIV test results must contain:
- The statement that the HIV test result and HIV diagnosis may be released;
- The specific purpose for which the HIV result and HIV diagnosis may be released;
- Those to whom the HIV result and HIV diagnosis may be released;
- The specific time period during which the release may occur; and
- The date of the authorization, and the signature of the individual giving authorization.

The State Model Form contains a place to specifically authorize disclosure of HIV/AIDS information

**No Redisclosure:**
- Redisclosure requires written authorization of tested individual. Those who disclose HIV information must label the information as not subject to redisclosure.

**Disclose pursuant to subpoena?**
- Likely not. Law says: “No person shall disclose or be compelled to disclose the identity of any individual upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except as required or permitted by federal law, the law of this state or any rule, including any Department of, Human Services rule…”
- Some argue a subpoena is a “required by law” disclosure and thus does not require authorization
- Safest course is to require patient authorization
**Drug/Alcohol Records:** Both state and federal law restrict disclosure of drug/alcohol records

**Oregon Law:**

“Public Provider:” If you are providing drug/alcohol treatment as a public provider (see Mental Health discussion above), disclosures of the written account of the treatment is subject to the rules that apply to mental health information.

**Authorization required for Treatment Facility:** Written records for patient in a drug and alcohol “treatment facility” may not be disclosed without authorization. “Treatment facility” means:

- Outpatient facilities, inpatient facilities and other facilities the Department of Human Services (now Oregon Health Authority) deems suitable, which may provide diagnosis and evaluation, medical care, detoxification, social services or rehabilitation for alcoholics or drug-dependent persons and which operate as a general hospital or state hospital, hostel, foster home, clinic or other suitable form. ORS 430.399(5); ORS 430.306(9)

**Federal Law**

**Authorization required for records held by federally assisted drug abuse program**, whether or not recorded, unless the patient is incompetent. Applies to information that:

- Would identify a patient as an alcohol or drug abuser;
- Is drug abuse information obtained by a federally assisted drug abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

Program means:

- An individual or program (other than a general medical care facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or
- An identified unit within a general medical facility which holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment.
- Medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers.

**Federally Assisted? (Yes, you are federally assisted if you take Medicare or Medicaid)**

- Conducted by a U.S. department or agency, either directly or by contract
- Licensed, certified registered or given authorization by a U.S. department or agency
- Supported by funds of any department or agency of the U.S. 42 CFR sec. 2.12(b)

**Exceptions to authorization requirement:**

- Medical emergency
- Communication between a program and an entity providing services to a program such as data processing, bill collecting, laboratory analyses, legal or other professional services
- Research
- Audit and evaluation
- Reports of suspected child abuse and neglect, but only reports
- Crime on premises or against program personnel
- Court order but only if:
  - Is necessary to protect against an existing threat to life or of serious bodily injury;
  - Is necessary for investigation or prosecution of an extremely serious crime;
  - The patient offers testimony in an administrative or a litigation proceeding.

**Notable non-exceptions:**

- Continuing medical care
- Subpoena

**No Redisclosure:** A disclosure made with patient consent must be accompanied by a written statement prohibiting redisclosure.

**Form of Authorization:**

- Federal law specifies authorization. (42 CFR sec. 2.15(a))
- State model form intended to meet these requirements and has place to specifically authorize disclose of drug/alcohol information.

**Scenario:** A family physician (not someone providing care in a treatment facility) notes in the medical record that the patient presents with possible illegal drug use. No referral is made for drug treatment. Is this notation specially protected? No. What if the physician refers the patient for treatment; should that information be protected? Yes. Referrals for treatment are protected.
**Minors**

**HIPAA**: The HIPAA privacy rules say a covered entity may disclose to a child’s personal representative. The parent serves as the personal representative of the child and may receive records unless:

- State law does not require the consent of the parent for the provision of a particular health care service and the minor consents;
- A court authorizes someone else to make decisions on behalf of the minor;
- When a parent agrees to a confidential relationship between the physician and the child;
- When a physician or other covered entity reasonably believes the child has been subjected to abuse or neglect by the parent or that treating the parent as the personal representative could endanger the child. Emphasis added; OCR HIPAA Privacy. Personal Representatives, December 2, 2002, revised April 3, 2003

**When minors may consent to treatment (Oregon Law):**

- General medical, hospital, surgical and dental care: A minor who is 15 years of age or older may consent to hospital care, medical or surgical diagnosis or treatment by a physician, nurse practitioner or dentist. ORS 109.640
- Birth control information: A physician or nurse practitioner may provide birth control information and services to a person of any age. ORS 109.640.
- Venereal disease: A minor who may have come into contact with any venereal disease may give consent to the furnishing of hospital, medical or surgical care related to the diagnosis or treatment of a venereal disease reportable to the health authorities. ORS 109.610(1)
- Blood donation: A minor 16 years of age or older may consent to donate blood. ORS 109.670
- HIV testing: A minor may consent to HIV testing in the same way as for treatment for venereal disease. ORS 433.045(5)

**If a child consented to treatment the child may authorize disclosure.** But…

**You may disclose to parents without child’s consent**: The Office for Civil Rights also says a covered entity may disclose a child’s PHI to the parents as expressly permitted or required by State or other law.

Oregon Law allows disclosures to parents

General:

- A hospital or any physician, nurse practitioner or dentist may advise a minor’s parents or legal guardian of the care, diagnosis, or treatment or the need for treatment. ORS 109.650

Mental Health/Chemical Dependency:

- A physician or other health professional may “advise” the parent of a minor of a mental health or chemical dependency diagnosis or treatment if doing so will serve the best interests of the minor's treatment. ORS 109.680
- A treatment provider must “involve” the parents in a minor child’s mental health or chemical dependency treatment before the end of treatment unless the minor has been sexually abused by the parent or the minor is emancipated. ORS 109.675
- The director of an inpatient alcohol or drug treatment facility must notify the parents or guardian of a minor who is admitted or referred to the facility.

**If a child consents to care, can I bill the parents?**

Yes, under the analysis above. Billing the parents inevitably will result in disclosure of the child’s protected health information to the parents but HIPAA and Oregon law allow this. You should, however, disclose as little information as possible to accomplish your purpose. Also, if you promised the child not to disclose to the parents, you should honor that promise and not bill.

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**Upcoming OMA Events**

**Don't Miss OMA's Patient Safety Convocation on Oct. 8, Fall Forum on Oct. 9**

**Patient Safety Convocation is CME Accredited!**

Join the Oregon Medical Association for the 2010 Patient Safety Convocation and Fall Political Forum, Oct. 8 and 9 at OMA headquarters in Portland. Back by popular demand, a day-long Patient Safety Convocation will kick off the weekend on Friday, Oct. 8. *Physicians participating in the Patient Safety Convocation will earn 5.5 hours of CME credit.*

The Fall Forum on Saturday, Oct. 9 will provide an opportunity to hear from state and national political leaders and experts, who will discuss a variety of issues that matter to Oregon physicians. Visit [www.theOMA.org](http://www.theOMA.org) for more information and to register for the Patient Safety Convocation and the Fall Forum. Be sure to complete the separate registration forms for each event.
OMA’s Practice Roundtable Meets in Portland and Bend in October

The Practice Roundtable is comprised of members and practice managers who meet regularly with OMA’s Medical-Legal team to discuss challenging legal and regulatory issues that physicians and managers face every day. Upcoming Roundtable meetings include:

- **Portland:** Thursday, Oct. 14, 8:30-10:30 am; OMEF Conference Center (OMA Headquarters)
- **Bend:** Friday, Oct. 29, 12:00-2:00 pm; St. Charles Health System (Room F) *In-person participation for the Bend Roundtable will be limited to the first 10 registrants. A teleconference line will be available for other participants.*

Visit [www.theOMA.org/PracticeRoundtable](http://www.theOMA.org/PracticeRoundtable) for online registration and upcoming dates. Participation is free for OMA members and their staff.

Medical-Legal Workshops You Won’t Want to Miss in October

Contracting with health plans and managing employees are just two of the many complex challenges you face when running a medical practice. Join OMA for these essential medical-legal workshops geared to help physicians and key staff better understand and prepare for these issues:

**Employment Law Boot Camp**
*October 18, 8:30 am - 12:30 pm*
Oregon Medical Education Foundation Conference Center
11740 SW 68th Parkway, Portland

You don’t have to be an HR pro to get important information you can use in your practice right now. Led by an employment law attorney, this updated boot camp will provide practical management training and techniques for medical professionals, supervisors, office managers and HR professionals. The training will empower participants to deal with the tough issues they face when managing employees.

Visit [www.theOMA.org/EmploymentLaw](http://www.theOMA.org/EmploymentLaw) for more information and online registration.

**Health Plan Contracting**
*October 22, 8:00 am - 5:00 pm*
Oregon Medical Education Foundation Conference Center
11740 SW 68th Parkway, Portland

In the past few years, contracting with insurance companies has become both more complex and more economically important to physicians. Many seemingly innocuous contract terms can have devastating effects on the physician practice. To have a greater impact on the contracting process, physicians and their office managers/ administrators must be equipped with the tools necessary to deal directly with the insurance companies. This program is designed to help physicians, administrators and office managers obtain more favorable contracts and assure that companies are adhering to the payment terms and conditions of those contracts.

Visit [www.theOMA.org/HealthPlanContracting](http://www.theOMA.org/HealthPlanContracting) for more information and online registration.