FGI November Webinar Transcript
Confidentiality – HIPAA & 42 CFR Part 2
November 8, 2024

Michelle Day: [00:00:00] Good afternoon, everyone, and welcome to the Fletcher Group Rural Center of Excellence's webinar series. Today's session is scheduled to run from 2 p. m. to 3 p. m. Eastern Standard Time. My name is Michelle Day, and I am your moderator for the session, along with Janice Fulkerson and Erica Walker. A couple of brief housekeeping items, and then we'll begin. You entered today's session on mute and your video was off and will remain so for the entirety of the webinar. Your chat feature is located at the bottom right of your screen. Use the drop down feature to communicate with either the panelists only or panelists and attendees. Please direct all questions regarding the webinar content to the Q&A section.

Be advised that this meeting is being recorded and will be available to you on our website once it has been transcribed. You can access our website at www. fletchergroup. org. Also, at the conclusion of [00:01:00] today's session, there will be a short survey regarding the webinar content. Your participation in that survey is greatly appreciated and will only take a few moments to complete.

Our presenters today are Daphne Kackloudis and Jordan Burdick with Brennan Manna Diamond. Daphne helps implement successful business and practice strategies by navigating the dynamic and constantly evolving healthcare regulatory, legal, and public policy environment. Daphne has decades of experience in and around state government. Daphne graduated Cum Laude from Capital University Law School and with honors and with distinction from Indiana University.

Jordan is a health care attorney with experience advising clients on matters concerning state scope of practice and prescriptive authority laws, HIPAA compliance, and Medicare and Medicaid reimbursement. She routinely works with federally qualified health centers, medical [00:02:00] providers, and trade associations, advising them on applicable state and federal regulations. Jordan also has experience drafting and reviewing business associate agreements and independent contractor agreements. Daphne, Jordan, the floor is yours.

Daphne Kackloudis: All right. Thank you for that introduction. Uh, let's see if, oh, that's not working. Can we maybe click on, oh, give us one second while we figure out what's going on. Oh, there we go. Okay, that's good. Okay, we did it. There we are. Thank you for that nice introduction and, um, I'm gonna have to change that because when you say decades of experience, it makes me sound very old, but I wrote it so I can't fault you for that. Um, thanks for having us, Jordan and I are excited to be back at the Fletcher Group and with you all today. The, um, topic of our presentation, as you can see, um, is confidentiality, specifically compliance with, [00:03:00] um, HIPAA and 42 CFR Part Two, um, as it relates to, um, your responsibility as a provider. Um, and. Um, the goals that, that you should be thinking of when you are responding to requests for information, um, all of the sort of backdrop of confidentiality.

Um, so you already heard about Jordan and me. We're health care attorneys. We spend all of our time thinking about the kinds of things, in fact, more time than you would think, thinking specifically about, um, The topics we're addressing today. Um, I don't think we actually said this in the introduction, so, um, it's good to hear it because we'll need to change this. Jordan and I, um, also spend a lot of our time with behavioral health provider clients, um, and

recovery housing clients as well. Um, so we're attorneys. We spend all of our time thinking about the kinds of things we'll be talking about today. We look forward to sharing some of the information with you and to your questions at the end of the presentation.

Um, Brennan Manna and Diamond is a mid sized full service law firm. [00:04:00] So we're actually headquartered in Akron, Ohio. Jordan and I are in Columbus, Ohio, the Columbus, Ohio office. Um, we have other offices throughout Ohio and in Florida and Colorado and Arizona as well. Um, when we do this presentation or an iteration of this presentation in person, we ask so that we can see by show of hands, um, the kind of, uh, providers or operators you are. You can't do that today, so we'll just sort of put the question out into the universe, um, but really, we're trying to communicate to you that we understand that some of you provide both recovery housing and SUD treatment. Some of you provide just recovery housing, and I imagine that probably there aren't any of you that just provide SUD treatment, but perhaps, um, that is the case as well.

We know that, um, that, you know, if you've seen one recovery housing program and one SUD treatment program, you've seen just one, um, and we, um, understand that there are nuances to the types of information we'll share today. So again, looking forward to your questions. Um, and our marketing folks [00:05:00] fix this presentation up very nicely for us.If Jordan and I, uh, create a presentation, it's very boring. So, um, thank you and they put this cute little dog on the slide and it does make me smile, so I hope it does the same for you. Um, next slide please. Oh, I'm sorry Jordan, I got it. I forgot. Here we go. Um, so we've already done the introduction. Uh, in a minute we'll review our objectives.

We're going to spend all of our time talking about HIPAA and Part Two. Um, that's not true. A tiny, a little bit of time talking about state law protections and recovery housing standards, but the majority of the time talking about HIPAA and Part Two. Um, really in the context of responding to requests for information and we'll share best practices and answer your questions. These are the objectives for today. Um, understanding what information can be disclosed when requested by law enforcement or a court of law. Learning how to comply with federal and state confidentiality requirements for SUD records and protected health information. And understanding how best to respond to requests for information, um, for your residents and sometimes for your, patients or clients as well.

[00:06:00] Uh, we're lawyers, so we of course have to give you a disclaimer. This disclaimer says, in short, we are lawyers, but we may not be your lawyers, um, or at least yet. Uh, so please, um, take the information we share today as educational, uh, background information, not, um, direct legal advice from us to you. Okay.

So first we'll talk about HIPAA, the Health Insurance Portability and Accountability Act. Um, HIPAA, as you know, is probably the most well known patient privacy law in existence, um, for you all that provide, um, SUD, uh, treatment as well. Um, 42 CFR Part 2, of course, is another one. Um, HIPAA became effective in the mid 90s, uh, as you know, I lived through it, um, and created national standards to protect, protect sensitive patient health information and information from being disclosed about a patient's consent or knowledge. HIPAA generally protects the privacy of patient information and provides for the security of

protected health information or PHI. [00:07:00] We'll use PHI probably throughout this presentation. HIPAA seeks to balance both the need for disclosure in certain situations, right?

We, there's the need to disclose and share protected health information or PHI so that we can, you know, do all the things that, um, healthcare does, pay bills, um, submit claims, uh, make referrals so it balances the need for disclosure with privacy rights of patients. Um, there needs to be a mechanism for sharing PHI appropriately within the healthcare system and even outside of it in many instances. Um, but we need to ensure that we're not inappropriately disclosing information about patient's health and treatment. HIPAA applies to covered entities. As you know, covered entities include health plans or health insurance companies, healthcare clearinghouses, uh, like Change Healthcare. I'm sure you've heard about that.

Um, and healthcare providers that conduct certain healthcare transactions electronically, like billing insurance or, um, maybe processing a referral authorization. [00:08:00] Behavioral health treatment providers are HIPAA covered entities. You probably know that. Uh, recovery homes. themselves, if not, um, also providing treatment, or if treatment is not being provided there, are not HIPAA covered entities. But some entities that provide recovery housing services, we know, also provide substance use disorder treatment services, and or medical services, and HIPAA does apply to those parts of the entity. So, we want to make sure that you have clearer in your head as we do, that HIPAA, um, does not apply to recovery homes, um, that are just recovery homes.

Um, HIPAA does apply to SUD treatment providers and mental health, um, service providers as well. Okay, so generally, covered entities may only use or disclose PHI if the HIPAA Privacy Rule specifically permits or requires it. which means that there's a HIPAA exception, or if the [00:09:00] individual gives written authorization.

A signed HIPAA compliant release is ideal to ensure that the release of information is compliant. We'll talk in a few minutes about several of the situations when HIPAA requires or permits disclosure, even if the patient did not authorize disclosure. The most common exception, uh, for disclosure without um, authorization is what's called the TPO Exception. The TPO Exception allows healthcare organizations to use and share, uh, PHI for treatment, payment, and operations, TPO, without patient authorization. Um, the exception exists. As we mentioned, as I mentioned a little while ago, to facilitate efficient healthcare services, to share information among members of the care team, to process claims.

If, if we couldn't share PHI, um, for purposes of just sort of moving the healthcare system along and had to get authorization, um, every time something needed to be shared, as you can imagine, it would be an administrative nightmare. Um, also [00:10:00] important to note, just sort of keep this in the back of your mind, is that if your state's law related to confidentiality of PHI is stricter than HIPAA and more protective of patient information, then that state law will actually supersede HIPAA, um, where the state law is more, um, stringent and more protective of patient's information.

Um, so there might be instances when state law requires you to maintain confidentiality even though HIPAA says it would otherwise be okay to share. Um, and one example of that is a

professional or ethical, um, privilege law. Okay, so as I said, one way that PHI can be appropriately shared is when a patient, is with a patient's authorization. In the next few slides, we'll talk about situations where the HIPAA Privacy Rule requires or permits a covered entity to disclose PHI without a patient's authorization. Um, it's pretty technical. Uh, you can sort of get the summary on the slides. I'm going to use more words, but just sort of keep these slides in mind.

So first, under HIPAA, a [00:11:00] provider may disclose PHI to a government authority authorized by law to receive reports of abuse or neglect, including a social service or protective agency like CPS. So let me go back as I interrupted myself. Under HIPAA, a provider may disclose PHI to a government authority authorized by law to receive reports of abuse or neglect

about a person the provider reasonably believes to be the victim of abuse, neglect, or domestic violence. The victim must agree to the disclosure, or the provider may disclose PHI without the victim's authorization if the provider believes the disclosure is necessary to prevent serious harm to the victim or other potential victims, or if the victim is unable to agree to due to their incapacity. So example, a provider believes their patient is the victim of domestic violence and shares their name and address with the police department fearing that the patient is in imminent danger. That would meet this exception. There's also an exception for disclosure of PHI if the covered entity is issued [00:12:00] a court order as part of a court case or a hearing.

Or, if the covered entity receives a subpoena or discovery request that's not accompanied by a court order, but only if the covered entity receives satisfactory assurance that reasonable efforts have been made to ensure the patient has been given notice of the request. We're going to get into this later, so just keep these words in the back of your mind for now. Or, if the court issues a Qualified Protective Order. Um, and that makes sense, uh, for reasons we'll talk about later. I won't get into it now. Um, if your patient is, or client, is a party to the lawsuit, so for example, a plaintiff or defendant, then they really are considered to be on notice that their information

may be shared, uh, but you can't just go sharing it willy nilly for the reasons we'll talk about, um, in a little while. Oh, we'll talk about it now, in fact. Um, so here's some legal jargon that we think is important for you to understand [00:13:00] the difference and truthfully, you know, Jordan and I are health care lawyers, so the first couple of times we helped clients, um, respond to requests for information through a court order or a subpoena. I had to educate myself. We're not trial lawyers, not litigators. So, um, but for responding to requests for information like the kind we'll talk about today, we wouldn't have known the difference either. So as I said a minute ago, one way a covered entity may disclose PHI without an authorization from a patient is in response to a court order.

Number one, or, in response to a subpoena that's not accompanied by a court order, but only if you, the covered entity, receive a satisfactory assurance that reasonable efforts have been made to notify the patient that their information might have been shared, or if the court issues a qualified protective order, um, ensuring that that information won't be disclosed.

A court order is the direction issued by a court or a judge requiring a person to do something. In this case, it's to release client records. So the court is saying [00:14:00] new entity must release the records of this person. The subpoena is the request for that person to testify or produce records. So the subpoena comes not always from a judge, it could come from a prosecutor, it could come from an attorney that seeks a subpoena through a court, But the subpoena is just saying, Hey, we would really like Jordan to testify about, um, her treatment of Bob.

Um, and then the court order is the direction that the court issues to say yes, organization that employs Jordan, you shall submit these documents. And a protective order is just what it sounds like. It's an order by the court to protect confidential information. So all of this means that if a HIPAA covered entity like a treatment provider receives a court order to share a client's PHI, it must share the records. If a HIPAA covered entity receives a subpoena without a court order. It must share the records, but only if that covered entity is assured that the patient whose information they're going to [00:15:00] share has been notified that their information is going to be shared or if there's a Qualified Protective Order that, that otherwise protects the information from being shared.

Okay, let's move on. So this is an example. Um, we actually took this example from a client. We redacted it, although there wasn't much I mean, it's public record anyway, but we still redacted it. This is a subpoena, Duces Tecum, which is a fancy Latin word that means a request for a covered entity to produce documents.

So you can see here, if you are able to read it, that this request is to produce medical and psychological records for approximately a four year period of time for the client or patient who's named here, but whose name you can't see. And it was submitted by a county public defender. You can see that the subpoena comes sometimes just from a regular old attorney, happens to be an attorney employed by the county, but it's just a regular old attorney. And this is [00:16:00] actually, this accompanied that subpoena. This is actually a release of information that accompanied the subpoena. So there's no court order here. Um, but a release that went with the subpoena, and that obviously indicates that the patient or client is aware of the records request because they're, they've signed the, um, the release.

Um, Individuals or entities that request, um, information from covered entities rarely provide the release pro, like this proactively, and even if they do, it's not always right, sometimes it's too broad. So you really need to have, uh, you really need to read them closely. And maintaining the confidentiality of your patient's records is an important task. It's your obligation. Um, but this is actually a pretty good release because it's both HIPAA and Part 2 compliant, which we'll, um, talk about in a minute. I'm sorry that it went dark in here. Our lights are on a timer and they always go out at very inopportune times. This is the second page or a subsequent page of the same release.

And just some more information by way of example, we want you to [00:17:00] have a good idea of what these kinds of things can say. You can see here that the release advises the client what kind of their information might be shared. So you can see here, for example, information related to STIs and how it might be used, for example, by the attorney and experts for the client's defense. Okay, so what should you be looking for? When you receive

a subpoena, don't assume, first of all, that you must respond. We have lots of clients, although fewer, I think, now than we used to, that get a subpoena. They turn around and produce exactly what's written on the subpoena. We always instruct you to take the time to analyze each request individually, and honestly, if you have an attorney, shoot the subpoena to the attorney for their review.

Oftentimes, Jordan, who does most of this work, will call the requesting attorney, particularly if it's a subpoena for someone to show up and testify as opposed to just giving documents. But in that case as well, [00:18:00] Jordan will call The prosecutor or the attorney and just sort of, you know, talk to them and say, Hey, is it really necessary for us to show up? Do you really need all this information? And a lot of times she can get, uh, the subpoena washed or thrown out, um, or, you know, some other type of response to the subpoena just by talking to the attorney. And you can do that, too. The other question is, when you get a subpoena, do you have a court order, too?

Do you have a court order and a subpoena? If you don't have a court order, then you have to be reasonably certain that the client's been notified of the request to release their records, or you need to have a, um, a protective order. If not, then you can't proceed. Um, and then also you should know, you should look at the subpoena to see what information is being requested. Oftentimes we get these requests and you know there are like check boxes for the type of information that they want and they're all checked. You know, all information from the beginning of time for this patient. Um, you really need to respond as specifically as possible. HIPAA has a [00:19:00] requirement for you to disclose the minimum necessary, um, the minimum information necessary for you to fulfill the request.

Okay, back to HIPAA. Um, and disclosures of PHI that can be made without a patient's authorization. We just did that sort of brief interlude on subpoenas and court orders, but now we're back to, um, that list of situations where you can disclose information without, um, needing a patient or client's authorization.

PHI might be released without a client's authorization if the information being sought is being sought by a law enforcement official, for a law enforcement, for a law enforcement purpose and one of these situations, um, applies. The disclosure is required by law. So, for example, mandatory reporting of child abuse or the disclosure is in response to a request for information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. Um, but you can only release the name and address, date and place of birth, social security number, [00:20:00] blood type, uh, type of injury, date and time of treatment, date and time of death, and a description of distinguishing physical characteristics. You cannot release DNA or dental records. Um, another situation is when the disclosure is in response to a request for information about an individual who is suspected to be the victim of a crime.

If the individual agrees, or if the law enforcement official represents that such information is needed to determine whether a violation of the law has occurred. Um, also if the official can't wait until the individual can agree and the disclosure is deemed to be in the best interest of the individual and won't be held against them.

Uh, another situation where disclosure without authorization for a law enforcement purpose is permitted is if the disclosure is about an individual who has died for the purpose of alerting law enforcement of the death. Also, the covered entity believes in good faith that the PHI constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

And [00:21:00] lastly, that the covered entity is providing emergency health care in response to a medical emergency and the disclosure is necessary to alert law enforcement to the commission in nature of the crime. Keep in mind that another law or privilege, which we'll talk about later, as I said earlier, may restrict the information you're able to provide, even if the exception is valid.

So if you have some state law that is more protective of patient information, then that may prevent you from releasing information, even if HIPAA would otherwise permit it. So you also have to be looking at your state law. Okay, um, another brief interlude, uh, I'll be talking for another couple of slides. I'm going to turn it over to Jordan. Um, HIPAA offers special protection for psychotherapy notes, which are provider's notes that contain the contents of conversations that the provider has with the client during the course of treatment. Um, they help the practitioner recall what a client said during a private treatment session and are generally deemed to be of little or no value to [00:22:00] others, including insurance companies.

So it's not a diagnosis. It's not something that, for example, an insurance company needs to process a claim. It's really the practitioner's sort of present sense impression of what they're hearing when the client is talking and the, and the counselor is jotting down notes, like maybe sort of, um, notes to themselves to think later about what could be causing this or how to, you know, make recommendations for treatment. But it's just for the purpose of helping that practitioner recall what the client said during therapy. Normally under HIPAA, a patient has the right to consent to the sharing of their PHI, as we talked about, in their medical and psychological records, um, that the covered entity maintains. Um, including sharing their progress notes.

However, for psychotherapy notes specifically, the privacy rule requires a covered entity to obtain a patient's written authorization, written authorization, before disclosing the psychotherapy notes. And even if a patient authorizes disclosure of the provider psychotherapy notes, the provider, the [00:23:00] practitioner themselves can decline to produce their psychotherapy notes. Importantly, in order to exercise a psychotherapy note exception, in other words, in order to keep those notes confidential, then notes must be kept separate from the client's medical record. Separate means stored in a different location. It does not mean you've got a physical file and progress notes are red and psychotherapy notes are white.

It means you've got to keep them separate. If a provider combines the psychotherapy notes and the progress notes into one record, then they forfeit the psychotherapy note exception that is afforded by HIPAA. Um, therefore, it's crucial that you understand the difference between the two types of nodes and that you maintain a separate record for the psychotherapy notes. And, um, surprising to us, perhaps not surprising to you, um, we regularly deal with providers that don't know that there's a psychotherapy note exception, don't store their psychotherapy

notes separate and don't even understand the difference between a progress note and a [00:24:00] psychotherapy note. Um, but you can see here, we did a little breakdown of the, of the differences.

There's different purposes, right? The purpose of a progress note is that it reflects conversations between a client and all members of the care team to main continuity of care, right? It's nothing, um, uh, uh, sort of specific to the individual practitioner. The psychotherapy note, however, helps that practitioner recall what the client said to them during the sessions together. HIPAA actually tells you what a progress note includes. It includes assessment and diagnosis, treatment modality and frequency, session start and stop times, the topics discussed. Um, the interventions that the practitioner recommends, medication monitoring, test results, and summaries of functioning symptoms, prognosis, and progress to date.

So these are just things that you would kind of insert into the record. Um, progress notes are required to be kept in the patient's medical record and treated like regular medical records. Um, so clients, practitioners, members of the client's care team, insurance companies, [00:25:00] courts, um, have the legal right to view them. But that's different than a psychotherapy note, which, as we talked about, can, should be kept separately, um, so that you can maintain that confidentiality if you so choose. All right, I'm going to turn it over to Jordan for a few slides to talk about Part 2.

Jordan Burdick: Thank you. Okay, perfect. Thank you. So we've been in the HIPAA universe. We're now going to switch gears to another federal privacy law, um, that applies to substance use disorder services only. In HIPAA, and that is 42 CFR Part 2. Okay, so Part 2, you've probably heard about it. Part 2 is a federal law that protects patient records that are created by 1. federally assisted programs, or 2. the treatment of substance use disorder, which we'll refer to as SUD throughout this presentation. Federally assisted programs are providers that hold themselves out as providing SUD services and that receive federal [00:26:00] funding, so that's Medicaid primarily, Medicare, TRICARE, etc.

The purpose of Part 2 is to ensure that a patient that receives treatment for a substance use disorder is not made more vulnerable than an individual with a substance use disorder who does not seek treatment. We want to incentivize people to seek treatment, right? And this law helps to do that. If you do not provide SUD treatment services, you do not have to comply with Part 2.

So if you're only a recovery home, you're providing no clinical treatment services, you do not need to comply with Part 2. Or if you don't get federal funds. If you do provide SUD treatment services and are a Part 2 provider, you need to comply with Part 2 at your treatment locations and also in your recovery homes if SUD services are provided in the home. So there are some SUD services, as you probably know, that are permitted to be provided in the community or in the home. If those services [00:27:00] are provided in the recovery home, then Part 2's protections may apply depending on the facts of the situation.

Daphne Kackloudis: And if I could interject, I was thinking about this earlier. Jordan and I have, uh, sort of defaulted any more to, particularly for our clients that have both SUD treatment and recovery housing operations, to analyzing everything as it Part Two applies. Um, and responding to requests of information as such, and then letting the requesting entity push back on us and say, no, Part 2 doesn't apply in that circumstance, um, because it really affords the, the client the most, um, protection.

Jordan Burdick: Definitely. Thank you. Um, high level, here are some parameters of Part 2. So we're going to form the scaffolding of the law. First, under Part 2, law enforcement cannot use SUD patient records in criminal prosecutions against patients. unless they either obtain the patient's [00:28:00] consent or they have a Part 2 court order. And Part 2 is specific court orders that we'll get into in a few slides that are different from court orders under HIPAA. Also under Part 2, a subpoena alone is not good enough to authorize disclosure of SUD treatment information if not ordered by a court. Also, Part 2 prohibits the disclosure of SUD treatment records without patient consent other than as authorized by law, and there are some notable exceptions that we'll touch on in a few slides.

Okay. Okay, let's take a second and contrast Part 2 and HIPAA. So, Part 2 is stricter than HIPAA, but it's also more narrow. Unlike HIPAA, Part 2's privacy protections follow the records, even after they are disclosed. So, practically, this means that a recipient of Part 2 records is also bound by Part 2's protections, even if [00:29:00] that recipient is not a Part 2 provider. Also, Part 2's rule only places privacy restrictions on SUD treatment records. HIPAA, in contrast, applies to many types of PHI, well beyond SUD treatment information.

Watch that one, it should not be there. Oh yeah, it really is. What's the presentation about technical difficulty? Okay, so this slide outlines the requirements for a Part 2 consent. A Part 2 consent to be valid requires every element that's listed on this slide. I won't name them all because there's a lot as you can see, um, but some important ones are the name of the patient. Duh, that makes sense, right? The Part 2 program. The information that is to be disclosed pursuant to this release, and who the information will be disclosed to.

Daphne Kackloudis: Do you, um, [00:30:00] Jordan, oftentimes review consent forms that are incomplete?

Jordan Burdick: I do, yeah. So, the citation for all of this information I know off the top of my head, which is embarrassing, um, but it's 42 CFR Section 2.31, and we'll share that with Erica, um, if you ever need to actually get into the Code of Federal Regulations and look at the Part 2 regulations, that section lists everything that's here on this slide. But to be compliant, you really do need to have everything on this slide, which it's a lot, so cross referencing and having a good resource document for consent is important.

Okay, so like HIPAA, Part 2 prohibits the disclosure of SUD treatment information and records without patient consent in a few limited circumstances. For example, You can disclose SUD treatment information to law enforcement if there is a crime on your premises or a crime is committed against [00:31:00] personnel that worked for you, and the disclosure to law enforcement is directly related to the circumstance of the incident. In this case, though,

you can only disclose the patient's name, address, and last known whereabouts, and then a brief description of what happened to law enforcement. So your disclosure is pretty narrow in this circumstance. You can also disclose SUD treatment information and a Part 2 participant's identity.

So you can disclose that they're actually in SUD treatment, um, to medical personnel in a medical emergency if you obtain, if you cannot obtain written consent from the client. You can also disclose to report child abuse or neglect, or to investigate or prosecute the patient for the commission of an extremely serious crime if that disclosure is court ordered. So here, to use their treatment information against them, them being a patient, you need a court order. Note too that, [00:32:00] um, as I said, Part 2's crime on premises exception is much more limited than HIPAA's. The disclosure has to be limited to the circumstance of the incident, and you can only disclose the patient's name, their address, and their last known whereabouts.

Next slide, please. Okay, we've made it. Part 2, Court Orders. We gave you a prelude a few slides back. So, we now know that Part 2 prohibits law enforcement's use of SUD treatment records in a criminal prosecution against a patient, absent their consent or a court order. A subpoena plus reasonable assurances that the patient has been notified is not good enough under Part 2, like it is under HIPAA. You'll recall under HIPAA that records can be released with a subpoena and without a court order, there are reasonable assurances. It's not so under Part 2. Court orders under Part 2 are also more specific than those under HIPAA. The court must issue an order that limits [00:33:00] disclosure to those parts of the patient's record that are essential to fulfill the objective of the order, and they must limit disclosure to who needs to know and include other limiting measures as necessary.

So, in this case, courts will assess a few factors. They'll look at whether the crime involved is extremely serious. They don't define what extremely serious means, but we presume that to include murder, for example, that seems pretty serious to us, rape, um, you know, dangerous felonies. The next factor is whether there is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution of the patient.

Um, three, are there other ways of obtaining this information that would be effective or would not be effective? Four, the potential injury to the patient, to the provider's relationship with the patient, [00:34:00] and to the ability of the Part 2 program to provide services if this information is disclosed. And whether that piece effectuating, you know, good clinical treatment of these people is outweighed by the public interest in the need for the disclosure of their substance use disorder treatment information.

Once there is a Part 2 there still needs to be a subpoena that will ask for specific information. So, to sum all that up, it's a lot of words, but under Part 2, you'll need the court order and you'll need the subpoena. Okay, so in this past spring, April of 2024, there were some notable Part 2 changes. Which was part of the federal government's overall, um, realignment of Part 2 with HIPAA. So the federal government says we know providers that are bound by both sometimes have difficulty, um, complying with both, right, because [00:35:00] there's notable differences between the laws.

So we want to change Part 2 in some significant ways to better align with HIPAA, make it easier for providers to comply with both laws. So, all the changes that are articulated on this slide were intentional to bring Part 2 into closer alignment with HIPAA. There are three buckets of changes, which we've described on this slide. First, we have SUD counseling notes. So, the Part 2 changes in 2024 created a new definition, SUD counseling notes, which mirrors HIPAA psychotherapy notes, which Daphne talked about a few slides ago. and increases protection for counseling notes that are kept separate from the patient's record. Our second bucket is patient consent.

So now under Part Two, a patient can execute one single consent for all future uses and disclosures for treatment, payment, and operation. So that's the TPO language. [00:36:00] Also, covered entities and business associates that receive records under a Part 2 consent are permitted to redisclose those records in accordance with the HIPAA regulations.

Daphne Kackloudis: Jordan, can I ask you a question about TPO? Under Part 2, is, is there a TPO exception like there is for HIPAA?

Jordan Burdick: There's not.

Daphne Kackloudis: So if, um, a, an SUD treatment provider is asked to share PHI for TPO purposes, under Part 2, they can't do that without a written authorization.

Jordan Burdick: Yeah. So unlike HIPAA, where you don't need a consent from the patient to share information pursuant to TPO releases, or TPO information rather, under Part 2, you do need that release at the outset. So that's one key difference.

Daphne Kackloudis: And under the old rules, you had to get an authorization each time you wanted to release.

Jordan Burdick: Yeah for every release. So, if I wanted to disclose SUD treatment [00:37:00] information to a patient's insurer, and then the next day disclose SUD treatment information to another provider of that same patient, I needed two separate releases. One for the payment disclosure and one for the treatment disclosure. Now, though, the patient, their first day, can sign a TPO release and that will be good enough for all of these future disclosures. And that is a good segue to our last bucket, which is uses and disclosures. Um, and the Part 2 changes now permit disclosures of records without patient consent to public health authorities.

So another disclosure exception was added. Okay, let's look at some practical examples. So first, a Part 2 provider receives a subpoena for records. Okay, this is a simple one, right? We know that the provider cannot disclose these records unless a court enters an authorizing order that is specific to Part 2 or there's a patient consent.[00:38:00]

Okay, the second example. A Part 2 court order is entered but the provider does not want to make the disclosure, which happens a lot, right? Providers want to protect their patients, and

they don't want this sensitive information disclosed if it doesn't have to be. In this situation, if there's no subpoena, or a subpoena has been squashed, or has expired, then the provider may refuse to make the disclosure, right? Because a subpoena isn't enough alone, and we know that. But, if there is a subpoena, and a valid, and we know now that there's a valid court order as well, per the facts, then the provider has to disclose. Um, unless there's a legal defense to the process, other than the confidentiality restrictions.

Also important is that when responding to a subpoena, a Part 2 program cannot even confirm whether an individual patient is or was a patient at one of its facilities without that patient [00:39:00] consenting to that information or a court order. So a patient's identity is protected by Part 2. Also, something specific to Ohio law that we wanted to share since we're Ohio attorneys.

Daphne Kackloudis: And you might look for it in your state as well. I don't know, maybe it's common. We don't know.

Jordan Burdick: Yeah, definitely consult your state laws to see if there's something similar. Um, but it's permissible for Part 2 entities to disclose information about a patient to those individuals within the criminal justice system who have made participation by the patient in a Part 2 program a condition of their parole or release from custody. If, one, the disclosure is made only to those individuals within the criminal justice system who have a need to know that information in connection with their duty to monitor the patient. So this could be a prosecuting attorney who is withholding charges against the patient if they complete parole. This is their parole or probation officer. [00:40:00] And then two, the patient has signed a written consent. So, like Daphne said, check your state law and see if there's similar language in your own state.

Daphne Kackloudis: It kind of is common sense, right, because the client is saying, okay, as a condition of my parole, I agree to participate in this program, so they've already acknowledged their participation, and they will sign this form, and that's kind of a quid pro quo.

Jordan Burdick: Okay, here is an example of a court order to produce records. You can see here that the order limits who can see the information to law enforcement officers that are named on the subpoena and the type of information. They're seeking here the patient's location to aid law enforcement with apprehending that patient, and we have the buzzword extremely serious crime, which is language you'll see on a court order a lot of times.Next slide, please.

Daphne Kackloudis: Anything you want to share about GAL? We've been getting some of those.

Jordan Burdick: Yeah, we have been getting a lot of requests related to guardian ad [00:41:00] litems. And we go through the same parameters that we would with any other subpoena that we receive. So we will normally contact the GAL. We will see what type of information they're requesting. We'll review the subpoena. We'll see if an exception applies.

Um, and we'll try to facilitate a conversation between the provider and the GAL when it's legally permissible.

Daphne Kackloudis: And the court order names the GAL and also type of information they can get.

Jordan Burdick: The subpoena will normally have the type of information and then the court order that appoints the GAL in that case to render a custody determination will be attached to the subpoena normally.

And sometimes it's not. And in that case then we reach back out and we request the court order. Okay, and then here's the motion from the court that resulted in the court order. Um, you can see here that the prosecutor asked the court to order release of records. It says the patient was involved in a keyword extremely serious crime. Um, magic words. And the [00:42:00] motion is just in search of the patient's location, in this example.

Daphne Kackloudis: So you can tell, I mean this is a good one, because you can tell the court so narrowly, um, ordered the sharing of information just enough to find the person, apprehend the person, but not so much that they're compromising that person's, um, participation in Part 2 treatment.

Jordan Burdick: Okay, and here is the subpoena because again, to bring the point home, you need the court order and the subpoena.

Daphne Kackloudis: So all this stuff is kind of together.

Jordan Burdick: Yep. Okay, so we touched on this a bit earlier, but I want to expound on SUD counseling notes because they're very important for providers and this information is crucial. So as we've been saying, the Part 2 changes that took effect earlier this year sought to align Part 2 with HIPAA. In doing that, part two came up with an analog to psychotherapy note. SUD counseling notes are [00:43:00] defined as a clinician's notes that analyze the conversation in a counseling session that the clinician voluntarily maintains separately from the rest of the patient's treatment and medical record.

And these notes require specific consent from a patient before a provider can disclose them to anyone. Important here, um, too, is that SUD counseling notes cannot be used or disclosed based on a TPO consent. So as we were talking about earlier, now under Part 2, a patient can come in and on their first day of treatment, when they're filling out all their intake forms, they can fill out a TPO release. Okay, that permits the provider then to make disclosures pursuant to TPO, um, for many things. However, these SUD counseling notes cannot ever be disclosed pursuant to that release. You need a separate, specific release from the patient that, um, specifically outlines the SUD counseling notes as information to be disclosed to a third party.

[00:44:00] Okay, so we know compliance with Part 2 is important, but why? Well, the law is trying to balance the interests of law enforcement with the need for SUD patients to get

treatment and to stay healthy. Um, if Part 2 didn't exist, the things that are spoken about in treatment and disclosed to providers, which oftentimes could incriminate patients or make them vulnerable to law enforcement, could freely be accessible and used against them. Breaching patient privacy and violating Part 2, though, is serious and has serious consequences for patients and providers, which makes compliance and understanding the law of utmost relevance. Specific consequences for violating Part 2 are expensive penalties, um, and no provider wants that, so knowing the law here is worthwhile.

Daphne Kackloudis: And, you know, we often tell our clients that when [00:45:00] you're responding to requests for information, and you're dealing with law enforcement directly, it's okay to say as a provider, I have a legal obligation to protect this information and to ensure that I'm only sharing with you the minimum amount of information necessary for you, law enforcement, to do your job and only in those circumstances authorized or required by law. And you don't have to be a jerk about it, but you do have a legal obligation and bad things can happen if you don't, um, fulfill your obligation. So you can use that. And we say that when we're talking about enforcement because oftentimes they just don't know.

Jordan Burdick: Exactly. You might encounter frequently that law enforcement that you're dealing with have never heard of Part 2. Um, we sure do. And in that case, I think it's absolutely appropriate to point them in the direction of the law, to share your obligation under federal law, and make sure that your patients are protected.

Okay. What about when patients lack [00:46:00] capacity? Who consents when patients can't? Well, when adult patients lack capacity to manage their own affairs, their guardian or another person that is authorized by state law can consent on their behalf to disclosure of their information. For deceased patients, it's a little different. There's either going to be a court order or written consent from that person's administrator or personal representative, um, and we'll need that consent. or that court order to disclose any of their information. If consent can't be obtained that way, then the decedent's spouse, or if they don't have a spouse, a responsible member of their family, may consent on their behalf. And at this time, I'll turn it back over to Daphne to discuss state law protections.

Daphne Kackloudis: Okay, thanks Jordan. Let me check our time. All right, we're doing okay. We'll move. I'll move swiftly. Um, patient's privacy and health information, as I mentioned earlier, is also protected by state law. We're going to discuss those [00:47:00] protections in more detail, specifically using Ohio as an example because we live here and we need to pick a state to use. Um, we understand that you obviously live in different states, your laws might be different, but the takeaway here is check your state law, um, to find out what kind of, um, requirements you need to think about. So, state law provides for certain types of provider patient privileges that protect providers.

Tongue twister. Um, from being compelled to testify about information the patient disclosed to them when the communication was made during the course of the professional provider patient relationship. The goal, of course, again, is to afford protection to patients who disclose information in the course of treatment. If that protection didn't exist, no one would want to share with their counselor or their therapist, um, information that is probably necessary for them to share for their treatment and their growth and their wellness. Um, not affording that

protection would frustrate the purpose of treatment. So providers and patients must be free to share crucial information that relates to the [00:48:00] physical health and emotional wellbeing of the patient.

Here's something important to think about. Communications made during the professional relationship are protected, right? So not like you see your therapist at the grocery store and you share some like deep dark secret. That is not protected. It's information that's shared during the course of treatment. The privilege referred to the client's legal right not to disclose confidential information in a legal proceeding when they are not a party. So it's the client's privilege. Privilege is a stronger protection than confidentiality. Whereas confidentiality is a legal and ethical requirement placed on the provider or the practitioner that restricts them from sharing client information with third parties outside of a courtroom or legal proceeding, that is.

Okay, so here are some examples under Ohio law. Again, we just use it as an example. Ohio recognizes the provider privileges you see on this slide. We're not going to spend much time here. Your state might have similar privileges, additional privileges, or different privileges, but these are kind of standard ones. Again, this is Ohio law, just as an [00:49:00] example, behavioral health professionals have ethical obligations to their clients. As you know, Ohio law, for example, protects confidentiality between counselors, social workers, and marriage and family therapists and patients. It requires those professionals to not reveal patient information unless the patient authorizes disclosure.

There are exceptions, of course, to patient provider confidentiality, but unless the law specifies otherwise, clients must be informed and their written consent must be obtained before confidential information is revealed. Okay, that was like a brief side trip to, um, some ethical state requirements. Uh, now we're going to do another brief side trip to recovery housing standards.

Um, recovery housing residents, of course, so we've been talking thus far about SUD treatment, but recovery housing residents are also entitled to confidentiality and privacy in their treatment and in their homes. Um, we've spent a lot of time talking about state and federal laws that keep healthcare and SUD treatment information confidential. [00:50:00] Additionally, an element of operating a recovery home is ensuring residents have a reasonable expectation of confidentiality and privacy. Um, as a recovery housing operator, it's your responsibility to understand what requirements you might have, maybe from state law or requirements from some funding source.

So that's your obligation to know what those requirements are. Um, or maybe you have recovery housing certification regulations in your state. Um, if you or your organization also provide treatment services, or if you partner with treatment service providers, you provide health care services, or partner with the health care services provider, you also might be subject to legal requirements regarding how resident information can be collected.

We think about this a lot. So, you know, for example, a recovery housing operator oftentimes receives information that is PHI if shared by a covered entity, but if the recovery housing

operator is [00:51:00] not a covered entity also, it has different requirements than HIPAA, but there are still expectations, obviously, for you, the recovery housing operator, to maintain that information confidentially.

And ultimately, the goal of all of those standards is for residents to feel safe and comfortable living in the home and participate in the recovery activities and working on the recovery goals. Recovery homes should have confidentiality policies and procedures. You should follow those procedures, um, and you should distribute and communicate the policies to all of your staff and also to your residents.

Transparency is, um, it's a good thing. You should absolutely train your staff on how to maintain information confidentially. Um, and to communicate to your residents that their information is being, um, maintained confidentially, that you take it seriously. Um, your confidentiality policy should outline what the operator will do to ensure resident information is private, um, and what expectations are for residents with regard to [00:52:00] privacy and confidentiality, because you've got, you know, more than one person, obviously, oftentimes living in a home, so there's an obligation for them as well to maintain information confidentially. Okay, back to Jordan. She's going to do a few examples of requests for information and how to respond.

Jordan Burdick: Awesome. Thank you. Okay. We will try to go through these quick, but there's some good examples here and a lot of important information.

Daphne Kackloudis: Oftentimes taken from real situations that we've dealt with for clients.

Jordan Burdick: Definitely. Okay. Here's the first one. Brandon lives in a recovery house. Brandon is stabbed allegedly by another resident. During their investigation, the police ask the recovery residence for the name, address, and clinical diagnoses of the perpetrator. Should the operator provide this information to law enforcement?

Well, if the recovery resident is a regular HIPAA covered entity, meaning the provider bills for non SUD treatment [00:53:00] services that are rendered in the home, HIPAA does allow the provider to disclose to law enforcement, PHI, including diagnoses, that the provider believes in good faith constitutes evidence of criminal conduct that occurred on their premises.

In contrast, if the recovery resident is instead a Part 2 provider and is offering SUD treatment, then Part 2 permits disclosure to law enforcement, but more narrowly. The operator is only permitted to describe the circumstances of what happened and provide the patient's name, address, and last known whereabouts. So in this example, the operator could say they were fighting and the alleged perpetrator pulled a knife and stabbed Brandon. The provider cannot disclose Brandon's diagnosis under Part 2 though. If the residence is a recovery housing residence only and not also a place where treatment is provided, then the residence must follow its confidentiality [00:54:00] policies, but it's not bound by HIPAA or Part 2.

What about if the perpetrator called the recovery residence and told the mental health counselor over the phone that he stabbed Brandon because Brandon would not share the TV remote with him? Should the counselor disclose this confession to the police? Well, this is more complicated, but we'll use Ohio as an example. Based on Ohio law and ethical obligations of behavioral health providers, it does not appear that a counselor that receives this call would be required to report the contents of the call to law enforcement unless they felt that the perpetrator was an active threat to himself or others. And in that case, duty to warn laws and mandatory reporting laws set by the state would apply. And we really do encourage you to consult those laws and know them because they could apply in a situation like this.

Daphne Kackloudis: Can I make a recommendation that we skip ahead to best practices so we can leave some time for questions? I'll get us there. We're going to do this in like [00:55:00] 60 seconds or less, this and the next slide or two. Um, and you can see it. Oops. You can see on the slide here, um, subpoena all the time we get a call. Immediately upon receipt of the subpoena, tell all of the people who need to know and know and more, um, to retain all the information that are, information for the records that are requested because we don't want you destroying anything. That is called spoliation and that's a bad thing. Answer the subpoena promptly, Remember that you have a requirement to maintain information confidentially.

So, analyze the request of the subpoena. Make sure all of the elements of the subpoena and the court order are completed appropriately. Make sure if there's a release, that the release is completed appropriately. Sometimes we'll get a release that was signed two years ago, and it's, it's important. expired and so you need to get a new release. [00:56:00] So make sure that you are really looking at all of these requests for information, um, very closely. Um, I don't think there's anything more here that we need to talk about and I know there are probably questions so we can move on to

Erica Walker: Thanks so much, ladies. This has been so informative. Been many, many times throughout my career I wish I had this specific training. One question that I have in the Q&A is that they received a request um, for information from, uh, Children and Family Services and that, um, sorry, they say that a particular state statute, Kentucky 164.512, gives, um, this operator permission to release Part 2 protected records due to it being an investigation about child abuse.

[00:57:00] Her understanding is that state law cannot override protections provided by Part 2. Is she required to release the requested records without a court order or signed release?

Daphne Kackloudis: It's a couple of things. The first thing is that if the state law is more protective of client information, then that state law will apply. It sounds like in this case, it's not more protective. But it also sounds like the state law might mirror the Part 2 exception, the federal Part 2 exception, to share information, um, if there's a suspicion of child abuse. So, I can look for it as uh, we're answering the next question to see exactly what it says, um, but I would check and see the, I, it's probably that the state law mirrors the federal law, in which case, um, if there is a suspicion of child abuse, a threat to a child, then disclosure of information, the minimum amount necessary, is probably permissible.

Erica Walker: Thank you so [00:58:00] much. These are the tough things we run into in the field that it's very difficult. And to this end, and I'm kind of having this question in my mind now, if you're a small operator, for example, who gets a request like this and you really don't know what to do, you don't have a legal department or an attorney, is there anywhere that they can turn as kind of a free resource to try to get clarification on these types of issues?

Daphne Kackloudis: The law.

Jordan Burdick: Yeah, I would say go into the actual Part 2 regulations in the Code of Federal Regulations. So if you just Google 42 CFR Part 2, that'll take you right there. Um, SAMHSA has some really good resources on Part 2, specifically the exceptions that permit disclosure and court order information. Um, I'm trying to think what else.

Daphne Kackloudis: Uh, HHS's website has good information on HIPAA, tons of information on HIPAA, much less on Part 2. [00:59:00] Sometimes, you know, we, for example, we write client alerts and articles and stuff like that on a lot of topics. And so do other law firms, so sometimes you can get some good practical guidance just by Googling it.Of course, you'll want to make sure that whatever you're reading is applicable in your state. You can also reach out to your, obviously, if you have a NARR affiliate in your state, they might have information. Another great resource is a behavioral health provider trade association in your state. In Ohio, it's the Ohio Council of Behavioral Health Providers.

They might have some good resources for you. You know, you can always go to the law and it's really clear. The exceptions and the requirements are really clear. What is not at all clear, of course, is how to apply those. And that's, you know, what we spend a lot of our time thinking about is how to apply that to real scenarios. Because it's never neat and tidy. And I did look, by the way, and there is [01:00:00] a specific exception under Part 2 to report child abuseand neglect..

Erica Walker: Great information and I'm glad some of the resources I had looked up prior to the webinar today just in preparation were some of the HHS and SAMHSA resources that you mentioned. So I'll put those in the chat for everybody. I'll also put the NARR, the main NARR website. So I hope those things are helpful, and I know we are at the top of the hour, but Jordan, Daphne, I can't thank you enough. This has been so informative, and for all of our attendees today, this webinar recording and the slide deck itself will be on our website and on our YouTube channel next week. Thank you all again, and if you've please take a few minutes for attendees to complete our quick survey at the end. We greatly appreciate it. Daphne and Jordan, thanks again.

Daphne Kackloudis: Thank you.

Jordan Burdick: Thanks for having us. [01:01:00]

Erica Walker: All right. Have a great day.