



Privacy & Integrated Behavioral Health

Special Considerations Under HIPAA & Part 2




Health care that revolves around you.

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Marshall Preddy
Associate General Counsel & Privacy Officer
Lone Star Circle of Care

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Psychotherapy Notes

Sharing Psychotherapy Notes in an Integrated Behavioral Health Environment




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Sharing Information under HIPAA

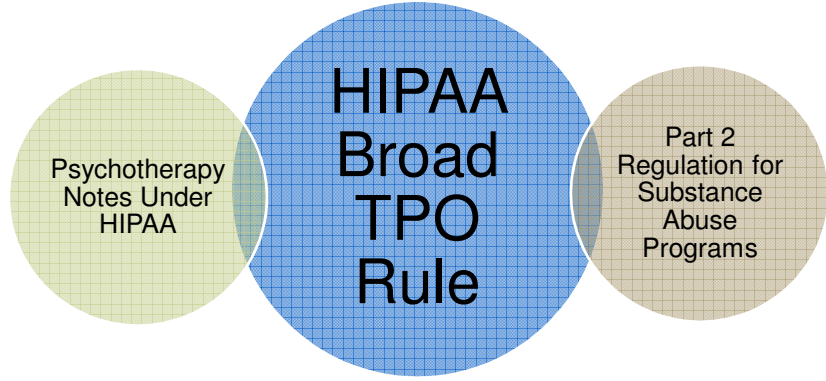
General Rule: No patient Authorization required when covered entities use or disclose protected health information within the entity or disclose PHI another covered entity for:

- Treatment
- Payment
- Health Care Operations



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Two Important Exceptions to HIPAA's TPO Rule



Psychotherapy Notes Under HIPAA

HIPAA Broad TPO Rule

Part 2 Regulation for Substance Abuse Programs



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Psychotherapy Notes (45 CFR 164.501)

Notes that are...

- 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; and
- that are separated from the rest of the individual's medical record.



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Psychotherapy Notes

Do not include:

- medication prescription and monitoring,
- counseling session start and stop times,
- the modalities and frequencies of treatment furnished,
- results of clinical tests, or
- Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.



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Final Privacy Rule, issued December 28, 2000

- ❑ Psychotherapy Notes are often referred to as “process notes,” distinguishable from “progress notes,” “the medical record,” or “official records.”
- ❑ These process notes capture the therapist's impressions about the patient, contain details of the psychotherapy conversation considered to be inappropriate for the medical record, and are used by the provider for future sessions.
- ❑ Often kept separate to limit access, even in an electronic record system, because they contain sensitive information relevant to no one other than the treating provider. These separate “process notes” are what we are calling “psychotherapy notes.”



65 FR 82622, 82623

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Final Privacy Rule, on integrated mental health services

- ❑ Comment: One commenter noted that the public mental health system is increasingly being called upon to integrate and coordinate services among other providers of mental health services and they have developed an integrated electronic medical record system for state-operated hospitals, part of which includes psychotherapy notes, and which cannot be easily modified to provide different levels of confidentiality.
- ❑ Another commenter recommended allowing use or disclosure of psychotherapy notes by members of an integrated health care facility as well as the originator.



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Final Privacy Rule, on integrated mental health services

Response: The final rule makes it clear that **any notes that are routinely shared with others**, whether as part of the medical record or otherwise, are, by definition, not psychotherapy notes, as we have defined them.

To qualify for the definition and the increased protection, the notes must be created and maintained for the use of the provider who created them i.e., the originator, and must not be the only source of any information that would be critical for the treatment of the patient or for getting payment for the treatment. The types of notes described in the comment would not meet our definition for psychotherapy notes.

65 FR 82623



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HIPAA Use and Disclosure Rules for Psychotherapy Notes

Authorization **always** required except for:

- use by the originator of the psychotherapy notes for treatment;
- use by covered entity for certain training situations
- use or disclosure to defend against legal action by the individual
- requests from the Secretary of HHS
- disclosures required by law
- health oversight activities (of the originator)
- disclosures about decedents to coroners and medical examiners
- to prevent or lessen a serious and imminent threat to the health or safety of a person or the public



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HIPAA Use and Disclosure Rules for Psychotherapy Notes

Authorization **is** required to share with other providers (even providers who work for the same entity). Authorization cannot be combined with another authorization (e.g., sharing other kinds of PHI).

However, there is **no access right or obligation** to share Psychotherapy Notes with the individual or their representative

Note: Regardless of whether it meets Psychotherapy Notes definition, under state and federal law, BH professional can refuse to share mental health records with a patient if disclosing the information would be harmful to the patient's physical, mental, or emotional health.



Do you want to have Psychotherapy Notes in IBH model?

Pros

- Don't have to disclose to individual (unless a summary or narrative is requested)
- More robust protections under state and federal law

Cons

- Can't share with other providers, even within the same organization
- Require hard firewall in the EMR if kept electronically
- Management, security, and compliance become more difficult, especially when records are kept separate from medical record.



Recommendations for dealing with Psychotherapy Notes

- ❑ Avoid creating or maintaining HIPAA-defined Psychotherapy Notes.
- ❑ Unify BH and medical records. **Reap the benefits of the integrated model** and avoid compliance headaches.
- ❑ Encourage your BH providers NOT to keep separate “process” notes for themselves. **Put it in the medical record.**
- ❑ **Be transparent** with patients. They will have access to their integrated medical record unless there’s potential harm.
- ❑ Update your policies and the Notice of Privacy Practices to make clear your **BH notes are part of the medical record** and routinely shared among appropriate personnel.
- ❑ Maintain appropriate role-based access restrictions in EMR. **Only providers who need the information** should have access to BH information.
- ❑ **Minimum necessary** still applies outside treatment context.



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When Partnering with a BH Provider...

- ❑ **Communicate** with your partner about how and whether they create or maintain Psychotherapy Notes.
- ❑ Consider having contracted BH providers **document in a single shared medical record.**
- ❑ If there are separate Primary and BH medical records, create clear policies **identifying information to be routinely shared** among providers.
- ❑ Again, **be transparent with patients about how & why information is being shared.** Include this in the Notice of Privacy Practices.
- ❑ If the BH provider does keep info meeting definition of Psychotherapy Notes, **authorization is needed.**



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Part 2 Regulations

Substance Abuse Program Information in the Integrated Behavioral Health Environment



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42 CFR Part 2

- ❑ Prohibits **federally assisted**
- ❑ Substance-abuse treatment **programs** from disclosing
- ❑ Without the patient's consent (elements are not same as HIPAA)
- ❑ Information that "would **identify a patient as an alcohol or drug abuser.**"

Does this apply to all healthcare providers that have substance abuse information?

No.

You must be a "program."



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What is a “program”? 42 CFR § 2.11

A program is:

- a) An individual or entity or an identified unit of a general medical facility that “**holds itself out** itself out as providing, and provides, alcohol or drug abuse **diagnosis, treatment or referral for treatment,**” OR
- b) 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.

This is meant to exclude providers for whom substance abuse treatment and referrals are **incidental** to their regular practice.



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How does Part 2 affect disclosure of health information?

For service lines, units, or specific personnel **primarily concerned with treating substance abuse**, sharing of patient information is greatly restricted.

Unlike HIPAA there’s no **Treatment, Payment, or Healthcare Operations** exceptions for disclosures without authorization.

Instead, to share without patient consent, you either need to:

- be a program that **shares administration** with the receiving entity; or
- have a **Qualified Service Organization Agreement (QSOA)**—**analogous to a Business Associate Agreement (BAA)**



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Shared Administration 42 CFR § 2.12(c)(3)

- ❑ When a substance use disorder unit **is a component of** a larger behavioral health program or of a general health program,
- ❑ **specific information** about a patient arising out of that patient's diagnosis, treatment or referral to treatment
- ❑ can be exchanged **without patient consent** among the Part 2 program personnel and
- ❑ administrative personnel who, **in connection with their duties**, need to know the information.

from the Substance Abuse And Mental Health Services Administration (samhsa.gov)



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Sharing with a Qualified Service Organization (QSO)

A QSO a person or organization that provides services such as:

- ❑ as data processing, bill collecting, dosage preparation, laboratory analyses, or
- ❑ legal, medical, accounting or other professional services; or
- ❑ services to prevent or treat child abuse or neglect, including training on nutrition and child care and individual and group therapy



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Without Shared Administration, QSOAs are Required

A QSOA is a written agreement, wherein the QSO acknowledges:

- ❑ that by **receiving, storing, processing** or otherwise dealing with any patient records from the Part 2 program, **it is fully bound by the Part 2 regulations**; and
- ❑ if necessary, **will resist in judicial proceedings** any efforts to obtain access to patient records, except as permitted by these regulations.



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When Consent is Required...

You need a Part 2 compliant consent that similar to HIPAA, **except:**

- ❑ Must have a statement that information cannot be re-disclosed without consent unless permitted by federal law
- ❑ Thus, if you want multiple parties to receive the information, they must all be named on the consent.

This is why segmentation of records can be critical.

- ❑ HIPAA information can be re-disclosed without consent, Part 2 data cannot.
- ❑ Information you receive from a Part 2 provider also needs to be segmented because it cannot be re-disclosed



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Are you a Part 2 program?

Analyze your service offerings carefully. Do you:

- Receive federal assistance?
 - Includes even private-pay clinicians who use a controlled substance (e.g., benzodiazepines, methadone or buprenorphine) for detoxification or maintenance treatment of a substance use disorder
- Advertise or characterize your services as substance abuse treatment or referrals?
- Notify other providers that you are available to receive such referrals?
- Have providers who primarily treat such cases?



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If you have Part 2 units or providers...

- Your model is important**
 - Fully integrated / shared administration? (no consent required, but you need tight access procedures)
 - Partnering or contracting for BH services (need QSOA)
- Segregation of substance abuse treatment** information is necessary
 - Even if you have shared administration **disclosure and re-disclosure** rules are highly restrictive
 - you will need **policies** and/or **technical access controls** that prevent unauthorized access and disclosure
- Still **covered by HIPAA**, so include information in Notice of Privacy Practices
- Seek legal counsel!** (do not rely on me or this presentation ☺)



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