

HIPAA v. Ohio Law: How to Comply with Both

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WHERE IT BEGINS...

Let's look at these real life scenarios...

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

* * * * * CIVIL CASE SUBPOENA * * * * *

Plaintiff
vs.

Case No. _____

Defendant

Judge

TO: _____ (Name)
_____ (Address)
_____ (City-State-Zip)

YOU ARE HEREBY COMMANDED TO:

_____ ATTEND AND GIVE TESTIMONY AT A (TRIAL) (HEARING) (DEPOSITION) ON THE DATE, TIME AND AT THE PLACE SPECIFIED BELOW.

_____ ATTEND AND PRODUCE (DOCUMENTS) (TANGIBLE THINGS) AT A (TRIAL) (HEARING) (DEPOSITION) ON THE DATE, TIME AND AT THE PLACE SPECIFIED BELOW.

_____ PRODUCE AND PERMIT INSPECTION AND COPYING, ON THE DATE AND AT THE TIME AND PLACE SPECIFIED BELOW, OR ANY DESIGNATED DOCUMENTS THAT ARE IN YOUR POSSESSION, CUSTODY OR CONTROL.

_____ PRODUCE AND PERMIT INSPECTION AND COPYING, TESTING OR SAMPLING, ON THE DATE AND AT THE TIME AND PLACE SPECIFIED BELOW, OR ANY TANGIBLE THINGS THAT ARE IN YOUR POSSESSION, CUSTODY OR CONTROL.

_____ PERMIT ENTRY UPON THE FOLLOWING DESCRIBED LAND OR OTHER PROPERTY. FOR THE PURPOSES DESCRIBED IN CIVIL R. 34(A)(3) ON THE DATE AND AT THE TIME SPECIFIED BELOW DESCRIPTION OF LAND OR PREMISES.

_____ DAY _____ DATE _____ TIME _____

PLACE _____

DESCRIPTION OF ITEMS TO BE PRODUCED: _____

1202910

GRAND JURY SUBPOENA

(Criminal Rule 17)

RECEIVED FOR FILING
02/09/2016 10:07:36
NATHAN K. BYRD, CLERK

THE STATE OF OHIO

PRECIPE

GJS 1202910

Cuyahoga County

Case Number:

INVEST

To the Sheriff of Cuyahoga County:
You are hereby commanded to summon:
CUYAHOGA COUNTY CO ROBERT TRIOZZI
2079 E 9TH ST
CLEVELAND, OH 44115-1302

DEFENDANT: IN RE INVEST

*** PERSONAL SUBPOENA *** DUCES TECUM: IN LIEU OF APPEARANCE, PLEASE PROVIDE THE FOLLOWING DOCUMENTS:

1. THE COMPLETE PERSONNEL FILE OF SHARON SOBOL JORDAN;
 2. ANY AND ALL REQUESTS FOR REIMBURSEMENT OF EXPENSES, MILEAGE OR COSTS SUBMITTED BY OR ON BEHALF OF SHARON SOBOL JORDAN, INCLUDING BUT NOT LIMITED TO ANY WITHDRAWN REQUESTS;
 3. ANY AND ALL ELECTRONIC OR PAPER RECORDS OF ACCESS LOGS FOR SHARON SOBOL JORDAN DOCUMENTING PARKING LOT ACCESS IN ANY PARKING FACILITY OWNED, MAINTAINED, OPERATED BY, OR USED BY CUYAHOGA COUNTY;
 4. ANY AND ALL "MYHR" OR OTHER TIMEKEEPING RECORDS FOR SHARON SOBOL JORDAN;
 5. ANY AND ALL REQUESTS FOR LEAVE BY SHARON SOBOL JORDAN, INCLUDING BUT NOT LIMITED TO VACATION TIME, COMP TIME, SICK TIME, OR ANY OTHER FORM OF LEAVE;
 6. ANY AND ALL PAYMENTS MADE TO SHARON SOBOL JORDAN, INCLUDING BUT NOT LIMITED TO SALARY PAYMENTS, BONUS PAYMENTS, REIMBURSEMENT PAYMENTS, OR ANY OTHER FORM OF MONETARY PAYMENT.
- SUBPOENA SATISFIED BY PROVIDING THE REQUESTED RECORDS TO INV. ROBERT DUNSMONK, 1200 ONTARIO ST., 8TH FLOOR, CLEVELAND, OHIO 44113, 216-443-7600, RDUNSMONK@PROSECUTOR.CUYAHOGACOUNTY.OH.O; SUBPOENA ISSUED BY APAS M. MEYER, J. GUTIERREZ, AND PAUL SOUCIE.

TO THE WITNESS

YOU ARE HEREBY required to attend, under penalty of law, before the COURT OF COMMON PLEAS, at the 3rd floor, Corrick Tower - Justice Center, 1200 Ontario Street, in the City of Cleveland, within and for said County, on the 15th day of February, 2016, at 09:00 a'clock A.M., to testify before the GRAND JURY in all and singular such matters and things which you may know in a certain action in court pending, and then and there to be determined.



WITNESS, NATHAN K. BYRD, Clerk Court of Common Pleas and the seal of said Court, in Cleveland, Ohio, this 9th day of February, A.D. 2016.

NATHAN K. BYRD, Clerk

by

Nathan K. Byrd

Your office: Hello, how can I help you?

Police officer: Hello, I'm from the Jackson Township Police Department and I need to see records related a John Smith who may have received treatment at your office recently



Your office: Hello, how can I help you?

USPS OIG Inspector: Hello, I'm from the Office of Inspector General from the United States Postal Service. I need to visit your office next week and speak to Dr. Allen regarding a John Smith that Dr. Allen treated in the past.



POP QUIZ: SO...WHAT DO YOU DO??

- A. Cooperate with request because it sounds scary and official, and you wouldn't want to get in trouble for not cooperating
- B. Review HIPAA and see if the request fits into exception that would allow your practice to disclose the information
- C. Review HIPAA and Ohio law to see if the request fits into an exception under both laws

THE ANSWER IS...

C. Review HIPAA and Ohio law to see if the request fits into an exception under both laws

SOUNDS COMPLICATED, RIGHT?

Let's demystify the process by reviewing HIPAA and Ohio law

HIPAA Overview

HIPAA =

- The Health Insurance Portability and Accountability Act of 1996
- Privacy and Security rules are 45 CFR Parts 160 and 164
- The Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009
- Omnibus Rule, 78 FR 5566 (Jan. 25, 2013), effective on March 26, 2013 and imposed a September 23, 2013 compliance date

HIPAA addresses the standards that most providers, health plans, or healthcare clearinghouses must implement if they conduct certain health care administrative transactions electronically, including claims, eligibility, or remittance; also applicable to business associates



PHI

- 1) Created, received, or maintained by a CE or BA, *and*
- 2) Identifies an individual's past, present or future medical condition, whether physical, mental health or other condition; or
Relates to the provision of health care to an individual;
or
Relates to the past, present or future payment for the individual's procurement of healthcare services; *and*
- 3) Identifies the individual or reasonably can be said to identify the individual



What is PHI?

1. Names
2. All geographic subdivisions smaller than a state, including street address, city, county, and some zip code information
3. All elements of dates (except year) for dates directly related to an individual, including dates of birth, admission, discharge, and death
4. Telephone numbers
5. Fax numbers
6. E-mail addresses
7. Social security numbers
8. Medical record numbers
9. Health plan beneficiary numbers
10. Account numbers
11. Certificate/license numbers
12. Vehicle identifiers and serial numbers, including license plate numbers
13. Device identifiers and serial numbers
14. Web Universal Locators (URLs)
15. Internet Protocol (IP) address numbers
16. Biometric identifiers, including finger and voice prints
17. Full face photographic images and any comparable images
18. AND any other unique identifying number, characteristic, or code

Remember: PHI is confidential regardless of the format!

- Clinical and billing records
- Letters, documents
- Conversations
- E-mails
- Text messages
- Voice mail messages

45 C.F.R. §160.103



Disclosure of PHI

- Disclosure—The release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information
- Disclosure includes: affirmative verification of another person's communication, and communication of any information on an identified individual

45 C.F.R. §160.103

- A Covered Entity (and Business Associate) may use or disclose PHI only as follows: (i) to the individual or his/her authorized representative; (ii) for treatment, payment, healthcare operations, or otherwise in compliance with the rules; and (iii) incident to a use or disclosure that is otherwise permitted or required by the rules



Common HIPAA Exceptions

Law enforcement

- To report PHI to a law enforcement official reasonably able to prevent or lessen a serious and imminent threat to the health or safety of an individual or the public.
- To report PHI that the covered entity in good faith believes to be evidence of a crime that occurred on the premises of the covered entity.
- To alert law enforcement to the death of the individual when there is a suspicion that death resulted from criminal conduct.
- When responding to an off-site medical emergency, as necessary to alert law enforcement to criminal activity.
- To report PHI to law enforcement when required by law to do so (such as reporting gunshots or stab wounds).
- To comply with a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or an administrative request from a law enforcement official
- To respond to a request for PHI for purposes of identifying or locating a suspect, fugitive, material witness or missing person, but the information must be limited to basic demographic and health information about the person.

Public Health Activities

- Public health authorities authorized by law to collect or receive such information for preventing or controlling disease, injury, or disability and to public health or other government authorities authorized to receive reports of child abuse and neglect;
- Entities subject to FDA regulation regarding FDA regulated products or activities for purposes such as adverse event or tracking of products
- Individuals who may have contracted or been exposed to a communicable disease when notification is authorized by law;
- Employers, regarding employees, when requested by employers, for information concerning a work-related illness or injury or workplace related medical surveillance

Research

Health Oversight Activities

Abuse, Neglect, Domestic Violence



Great, but what about state law?

Limited Preemption of State Law

- The general standard: if a state law or another law is more protective of the patient, then it takes precedence over HIPAA
- If state laws is “contrary” to HIPAA
 (“Contrary” = impossible to comply with both)
- State law can be more stringent (with limited exceptions)
 “More Stringent” = use or disclosure is prohibited or restricted where it would be permitted under the Privacy



Here's the problem: Turk v. Oiler

- Mr. Turk was under investigation for illegally carrying a concealed weapon and having a weapon while under disability
- Cleveland Clinic received a grand jury subpoena seeking medical records for Mr. Turk and the hospital disclosed the records
- Mr. Turk sued the Clinic for invasion of privacy and civil rights violations
- Clinic argued that HIPAA permits a disclosure in response to a grand jury subpoena
- BUT the court found that the HIPAA exception was not a defense because Ohio law does not make an exception to the physician-patient privilege for grand jury subpoenas.

...Even if the disclosure may be permitted under HIPAA, providers **MUST** comply with Ohio Physician/Patient privilege requirements and Ohio law as they are more stringent!



OHIO LAW

Ohio Privacy Laws Involving PHI

- ❑ Ohio Revised Code (ORC) 2317.02(B) – Physician-Patient Privilege
 - Application to other clinicians (e.g. APRN, dentist)
 - Few exceptions (e.g. certain crimes, malpractice claims)
- ❑ ORC 5122.31 – Disclosure of Psychiatric Treatment Information
- ❑ ORC 2317.422 – Authentication of Medical Record at Trial
- ❑ ORC 119.09 – Authority of Administrative Agencies
- ❑ ORC 149.43 – Public Records
- ❑ ORC 3701.243 – Disclosure of HIV Test Results or Diagnosis
- ❑ ORC 5119.27 - Disclosure of Alcohol and Drug Treatment Information
- ❑ ORC 3701.741 – Medical Records Fees
 - Note: Requests by the individual under HIPAA subject to HIPAA fee limits.



HIPAA v. Ohio Law

Type of Disclosure	Ohio Law	HIPAA	Conflict
Disclosure to another provider	Yes, if the other provider or third party owes a duty of confidentiality to the patient (<i>Neal v. Corning Glass Works Corp.</i> (S.D. Ohio 1989), 745 F.Supp. 1294, 1297)	Yes, for treatment, payment, and health care operations (45 CFR 164.501)	Possibly- the nature of the parties and disclosure request must be carefully scrutinized
Subpoena or discovery request	No, unless accompanied by a court order, patient authorization, or provider is otherwise authorized by Ohio law to release the records	Yes, pursuant to the requirements at 45 C.F.R. § 164.512(e)	Yes - if the disclosure is not otherwise permitted under Ohio law or by court order or patient authorization, provider must comply with Ohio law

Subpoenas and court orders must be signed by a judge.



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Type of Disclosure	Ohio Law	HIPAA	Conflict
Public health authority	<ul style="list-style-type: none"> To report certain diseases (ORC 3701.25, 3707.06) To evidence compliance with the Medicare balance billing prohibition (ORC 4769.05-4769.07) 	<p>For public health activities if the public health authority is authorized by law to (i) collect/receive the information for purposes of preventing or controlling disease, injury, or disability or, (ii) receive reports of child abuse or neglect (45 C.F.R. 164.512(b)(1)(i), (ii))</p>	<p>No - if the public health authority is authorized by Ohio law to receive the information provider may disclose the information.</p>
Government authority	<ul style="list-style-type: none"> To a public children services agency or a municipal or county peace officer to report suspected child abuse or neglect (ORC 2151.421) To the county department of human services to report suspected elderly abuse or neglect (ORC 5101.61) To the county board of mental retardation and developmental disabilities to report suspected abuse or neglect of persons with mental retardation or developmental disabilities (ORC 5123.61(C)) 	<ul style="list-style-type: none"> For public health activities if the government authority is authorized by law to receive reports of child abuse or neglect (45 C.F.R. 164.512(b)(1)(ii)) To report abuse, neglect, or domestic violence pursuant to the requirements at 45 C.F.R. 164.512(c) 	<p>No - if the government authority is authorized by Ohio law to receive the information provider may disclose the information.</p>

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Type of Disclosure	Ohio Law	HIPAA	Conflict
<p>Law enforcement official</p>	<ul style="list-style-type: none"> To report certain injuries including gunshot wound, stab wound, serious physical harm reasonably caused by violent offense, burns (ORC 2921.22(B)(E)) To report felony was or is being committed (ORC 2921.22(A)) To report a death (ORC 2921.22(C)) To determine the presence or concentration of alcohol and/or a drug of abuse pursuant to a criminal investigation or proceeding (ORC 2317.02(B)(2), 2317.022) To report suspected abuse or neglect of persons with mental retardation or developmental disabilities (ORC 5123.61(C)) 	<ul style="list-style-type: none"> If required by law In compliance with and as limited by a, (i) court order or court-ordered warrant; (ii) subpoena or summons issued by a judicial officer; (iii) grand jury subpoena; or (iv) administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law (45 CFR 164.512(f)(1)(ii)(A)-(B)) To identify or locate a suspect, fugitive, material witness, or missing person and the disclosure is limited (45 CFR 164.512(f)(2)) To identify an individual who is or is suspected to be a victim of a crime, other than victims of abuse, neglect, or domestic violence pursuant to the requirements at 45 CFR 164.512(f)(3) To law enforcement of the death of an individual if it is suspected that such death may have resulted from criminal conduct pursuant to the requirements at 45 CFR 164.512(f)(4) Information that is believed in good faith to constitute evidence of criminal conduct that occurred on the premises (45 CFR 164.512(f)(5)) In response to a medical emergency, other than a medical emergency on the premises or resulting from abuse, neglect or domestic violence, if necessary to alert law enforcement to the commission and nature of a crime; the location of such crime or of the victim(s); and the identity, description, and location of the perpetrator (45 CFR 164.512(f)(6)) Regarding an inmate or individual in lawful custody to a correctional institution or a law enforcement official for the provision of health care to such individuals; the health and safety of such individual or other inmates; the health and safety of the officers, employees, or others at the correctional institution; the health and safety of persons responsible for the transporting or transfer of inmates; law enforcement at the correctional institution; and the administration and maintenance of the safety, security, and good order of the correctional institution (45 CFR 164.512(k)(5)) <div data-bbox="738 1078 1271 1329" style="border: 1px solid black; background-color: #4a86e8; color: white; padding: 10px; margin-top: 10px;"> <p>Certain crimes, felonies, death, concentration of alcohol/drug in a person, and abuse.</p> </div>	<p>Yes</p>

So, what can you do?

1. Evaluate the request under both HIPAA and Ohio law
2. If the disclosure is proper under both, then disclose the records.
3. If the disclosure is not authorized under applicable law, then:
 - Require a valid patient authorization
 - Require a court order signed by a judge
 - Motion to Quash



Takeaways

- ❑ Check your Notice of Privacy Practices for appropriate language.
- ❑ Educate your staff about the potential conflicts.
- ❑ Ensure your Privacy Officer is knowledgeable on these conflicts.
- ❑ Consult with your attorney when in doubt.



HIPAA and COVID-19

- ❑ OCR's Exercising Enforcement Discretion for telehealth
- ❑ Potential Pitfalls
 - Still exercise reasonable judgment—providers should still provide their “side” in a private setting
 - Consent language in telehealth visits
 - BAA language for telehealth platform vendors
- ❑ Expiration date of “relaxed” enforcement



Q&A

If you have a question, please post that in the Question box in the webinar. We will do our best to respond during the presentation. If we don't get to your question, we can follow up with you after the webinar is over.

THANK YOU FOR ATTENDING.

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