

HIPAA POLICIES AND PROCEDURES: PRIVACY

PRIVACY STANDARDS

When Authorizations are Required and What is Required of Authorization Forms

As a general rule, the Practice shall require an authorization for any use or disclosure of PHI not otherwise permitted under these *HIPAA Policies and Procedures* or by law.

HIPAA contains additional standards for uses and disclosures of PHI for three specific purposes:

1. Psychotherapy Notes—The Practice shall obtain an authorization for *any* use or disclosure of psychotherapy notes, except for:
 - a. The use by the originator of the psychotherapy notes for treatment;
 - b. The use or disclosure of the psychotherapy notes by the Practice for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling if the Practice personnel (i.e., the student, trainee, or practitioner in mental health) being trained also participates in the diagnosis, evaluation, or treatment of the patient;
 - c. The use or disclosure of the psychotherapy notes by the Practice to defend itself in a legal action or other proceeding brought by the individual (i.e., the subject of the PHI);
 - d. The disclosure of the psychotherapy notes when it is required by the Secretary of the Department of Health and Human Services to investigate or determine the Practice's HIPAA compliance;
 - e. The use or disclosure of psychotherapy notes when it is required by law, to the extent required by the law, if the use or disclosure complies with and is limited to the relevant requirements of such law;³⁶
 - f. The disclosure of psychotherapy notes when it is to a health oversight agency for oversight activities authorized by law with respect to the oversight of the originator of the psychotherapy

³⁶ See 45 C.F.R. § 164.512(a) for more information on the requirements of this provision.

notes (if the use or disclosure is also permitted or required under state law);³⁷

- g. The disclosure of psychotherapy notes when it is to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law (if the disclosure is also permitted or required under state law);³⁸ or
- h. The disclosure of psychotherapy notes to medical or law enforcement personnel if the Practice believes in good faith that the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the disclosure is to a person reasonably able to prevent or lessen the threat (if the disclosure is further limited consistent with the requirements of Texas law).³⁹

2. Marketing Activities—The Practice shall obtain an authorization for any use or disclosure of PHI for marketing purposes, except for:

- a. Face-to-face communications made by the Practice to an individual; or
- b. A promotional gift of nominal value provided by the Practice.

³⁷ For guidance on whether a particular use or disclosure is permitted or required, the Practice should consult its retained legal counsel. See 45 C.F.R. § 164.512(d) for more information regarding appropriate disclosures concerning health oversight activities.

³⁸ For guidance on whether a particular use or disclosure is permitted or required, the Practice should consult its retained legal counsel. Note that if the Practice also performs the duties of a coroner or medical examiner, it may use psychotherapy notes for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law (if such use is also permitted or required under state law).

³⁹ Note TEX. OCC. CODE § 159.004, which states that “an exception to the privilege of confidentiality in a situation other than a court or administrative proceeding, allowing a disclosure of confidential information by a physician exists only with respect to the following:… (2) medical or law enforcement personnel, if the physician determines that there is a probability of: (A) imminent physical injury to the patient, the physician, or another person; or (B) immediate mental or emotional injury to the patient.” This Texas law is more restrictive than HIPAA in certain respects (i.e., narrows the permissibility of the disclosures and the class of persons to whom the disclosures may be made). Texas HIPAA Covered Entity physicians must comply with requirements of **both** HIPAA and other federal and Texas law in order to make a proper disclosure. For more information on how to properly disclose information under this provision, the Practice should seek the advice of its retained legal counsel. Also see TEX. HEALTH & SAFETY CODE § 611.004(a)(2), which applies to certain mental health records.

If the marketing involves financial remuneration, as such term defined in paragraph (3) of the definition of marketing, to the Practice from a third party, the authorization must state that such remuneration is involved.⁴⁰

3. Sale of PHI—The Practice shall obtain an authorization for any Sale of PHI.⁴¹ Such authorization must state that the disclosure will result in remuneration to the Practice.

Other state and federal laws may provide additional protections and further restrict the use and disclosure of certain information constituting PHI. Such information includes:

1. Alcohol and Drug Abuse Information—PHI constituting alcohol and drug abuse information is subject to additional federal protections under 42 C.F.R. Part 2, and further restrictions on the use and disclosure of such information may apply if the Practice constitutes a Part 2 Program—i.e., a program that receives federal funds and provides substance abuse diagnosis and treatment or referral for treatment—or if the Practice receives a patient record directly from a Part 2 Program. Under Part 2 regulations, most disclosures of patient identifiable alcohol or drug abuse information (including for most treatment, payment, and health care operation purposes), require the patient’s specific written consent to be obtained. Additionally, Part 2 regulations require that each disclosure with the patient’s written consent be accompanied with the following written statement:

“This information has been disclosed to you from records protected by Federal Confidentiality Rules (42 C.F.R. Part 2). The Federal Rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general Authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal Rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.”

⁴⁰ Note that if the use or disclosure falls within the definition of “marketing” as such term is defined by state law (see TEX. HEALTH & SAFETY CODE § 181.001(b)(4)), the additional state law requirements set forth in TEX. HEALTH & SAFETY CODE § 181.152 may apply. The Practice shall comply with all applicable state and federal law.

⁴¹ See 45 C.F.R. §§ 164.508(a)(4) and 164.502(a)(5)(ii); see also TEX. HEALTH & SAFETY CODE § 181.153 (for Texas law on sale of PHI).

For more information on the requirements of Part 2, the Practice should consult with its retained legal counsel.

2. HIV/AIDS Test Results— Tex. Health & Safety Code § 81.101, *et seq.* restricts the release or disclosure of HIV/AIDS test results. For most disclosures, Texas law requires the patient’s prior written authorization, specifically authorizing the release of the same.
3. Genetic Information—Genetic information is protected by the Genetic Information Nondiscrimination Act as well as Chapter 546 of the Texas Insurance Code, Chapter 21 of the Texas Labor Code, and Chapter 58 of the Texas Occupations Code. Under most circumstances, a patient authorization for release of genetic information is required.
4. Mental Health Records—Tex. Health & Safety Code § 611.001, *et seq.* contains additional protections for mental health records. Under most circumstances, a patient authorization for release of mental health records is required.

If a Practice workforce member is unsure whether an authorization is required for a particular use or disclosure of PHI, the workforce member shall contact the Privacy Officer for consultation.

In order to be valid, HIPAA authorizations must be written in plain language and shall include each of the following elements:

1. A description of the information to be used or disclosed identifying the information in a specific and meaningful fashion;
2. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;
3. The name or other specific identification of the person(s), or class of persons, to whom the Practice may make the requested use or disclosure;
4. A description of each purpose of the requested use or disclosure;⁴²
5. An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;

⁴² The statement “at the request of the individual” is a sufficient description of the purpose when an individual initiates the authorization and does not, or chooses not to, provide a statement of the purpose.

6. A statement adequate to place the individual on notice of his or her right to revoke the authorization in writing and a description of how the individual may revoke the authorization;
7. A statement placing the individual on notice of the Practice's ability or inability to condition treatment, payment, enrollment, or eligibility for benefits on the authorization;
8. A statement placing the individual on notice that the information disclosed may be subject to re-disclosure by the recipient and no longer be protected by HIPAA;
9. The individual's signature and date of signature; and
10. If signed by a personal representative of the individual, a description of the representative's authority to act for the individual.

The Practice shall not rely on invalid authorizations. An authorization will be deemed invalid if:

1. The expiration date has passed or the expiration event is known by the Practice to have occurred;
2. The authorization was not filled out completely;
3. The authorization is known by the Practice to have been revoked;
4. The authorization contains material information known by the Practice to be false; or
5. The authorization violates prohibitions regarding compound authorizations and/or conditioning of authorizations.

The Practice shall not permit authorizations for the use or disclosure of PHI to be combined with any other document to create a compound authorization, except as follows:

1. An authorization for the use or disclosure of PHI for a research study may be combined with any other type of written permission for the same or another research study;
2. An authorization for a use or disclosure of psychotherapy notes may only be combined with another authorization for a use or disclosure of psychotherapy notes; or

3. An authorization, other than for psychotherapy notes, may be combined with another authorization except when the Practice conditions treatment on the provision of one of the authorizations.

The Practice shall not condition treatment on the provision of an authorization, except as follows:

1. The treatment is research-related and the authorization is for the use or disclosure of PHI for such research; or
2. The treatment is solely for the purpose of creating PHI for disclosure to a third party and the authorization is for the disclosure of PHI to such third party.

Authorizations may be revoked in writing at any time except to the extent that the Practice has already taken action in reliance of the authorization or the authorization was obtained as a condition of obtaining insurance coverage.

The Practice shall document and retain all signed authorizations and provide all individuals signing authorizations with a copy of such authorization. Documentation and retention shall be consistent with the Policy on Documentation and Retention. See HIPAA POLICIES AND PROCEDURES: PRIVACY; ADMINISTRATIVE SAFEGUARDS; Documentation and Retention, above.