

## **What's So Special About Mental Health Records?**

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It is not unusual for government agencies or attorneys to want health care records for investigations or various legal proceedings. (It is also not unusual for them to request the records for a hearing in the next couple of days, but that is an issue for a separate article.) In these situations it is important for everyone to recognize that a community mental health center's records are usually going to be considered "mental health records", which makes them distinctive from general health records. As a result, a Center's records are subject to important protections that may not be fully appreciated by agencies and attorneys.

This article will address the common situation of how to respond to a Subpoena for a Center patient's health records. This is often done with a Subpoena Duces Tecum, which means a demand for an appearance by a person and a requirement that they bring designated records. Sometimes the person named in the Subpoena is simply the records custodian, and sometimes it is the treating clinician. It is important to realize that the clinician's testimony of treatment interaction with the patient is considered the revelation of "health records", so this article covers both the typical health records as well as a clinician's testimony.

Sometimes the cover letter accompanying the Subpoena will state that the agency or attorney is complying with the requirements under HIPAA so that the health care provider should promptly comply with the Subpoena. However, HIPAA provides that it is subservient to State law when the State law is more protective of the patient's privacy rights than HIPAA. That is what guides your response because Indiana law is more stringent in its protections for patients relating to "mental health records". (Drug and alcohol treatment records are more complicated and will be the subject of a separate article.) It can be intimidating when the Subpoena is issued by a local prosecutor or the Medicaid Fraud Control Unit, but they are also bound to follow the stricter procedural requirements under Indiana law.

"Mental Health records" are governed by Indiana Code 16-39-2 and 16-39-3, and a Center is not permitted to produce such records absent the patient's express authorization or a special "Court Order". The "Court Order" is something issued by a Court following detailed procedures and consideration of important factors. A "Subpoena", even one issued in conjunction with an active legal proceeding, is not such a "Court Order". Most attorneys and Courts are cooperative once they are informed about the special statutory procedures protecting mental health records and the requirement for more than just a Subpoena. It is important to respond promptly and to document your communications with the agency or attorney sending the Subpoena in case they want to keep pushing for the records without the patient's authorization or Court Order. If necessary, documenting your communications will be helpful if you need to seek formal Court protection.

Responding promptly to Subpoenas seeking health records and testimony should be part of a protocol so that you can document a rapid and timely response. Most agencies and attorneys

will be cooperative when they learn about the constraints on Centers relating to the production of mental health records.

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