

Disclosure of Patient Information to Law Enforcement: Common & Complex Scenarios

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Objectives

- ▶ **Learn how to handle and anticipate scenarios** involving law enforcement requests for or collection of patient information
 - Blood draws
 - Body cameras
 - Requests for interviews and discharge information
 - Subpoenas
 - Duty to warn
- ▶ **Understand the questions** that need to be assessed to determine what legal requirements apply
- ▶ **Assess need for process changes** to aid in compliance



Applicable Laws

- ▶ **Federal:**
 - 45 CFR Part 164, Subsection E (HIPAA Privacy Rule Regulations)
 - 42 CFR Part 2 (Substance Use Disorder Confidentiality Regulations)
- ▶ **State:**
 - Wis. Stat. 146.82 (General Medical Records)
 - Wis. Stat. 51.30 (Mental Health Treatment Records)
 - Wis. Stat. 146.816 (HIPAA Harmonization)
 - Wis. Stat. 343.305 (Blood Draws)
 - Wis. Admin. Code DHC Ch. 92 (Regulations for Confidentiality of Treatment Records)

DISCLAIMER: This is not an exhaustive list of laws that may apply. Other laws may be implicated by the specific facts and circumstances. You are always urged to consult legal counsel. The focus is not on emergency detention procedures.



Why Facility Type Matters

- ▶ **What kind of facility it is will dictate what law applies and what can be disclosed**
- ▶ **Hospital Emergency Department (No mental health/substance use disorder services)**
 - HIPAA (baseline)
 - As preempted by more stringent applicable law (e.g., Wis. Stat. Ch. 146)
- ▶ **Mental Health Treatment Facility (No substance use disorder services)**
 - PLUS any preemption under applicable law (e.g., Wis. Stat. 146.816 and 51.30)
- ▶ **Substance Use Disorder Treatment Facility**
 - PLUS any preemption under applicable law (e.g., 42 CFR Part 2)
- ▶ **Mixed-use facilities** – Facilities that provide mental health and/or substance use disorder services in addition to other general medical services will have to evaluate which laws will apply based on the facts and circumstances surrounding the particular situation.
 - What is the status/relationship of the patient to the facility – what services are being provided?
 - What part of the facility is at issue (e.g., unit, department, building)?
 - What is the information being sought and how was it obtained by the facility?

Scenario 1: Flintstone in the ED

- ▶ **Ambulance brings Fred Flintstone into Emergency Department. Fred is unresponsive after crashing his Footmobile into a parked car.**
- ▶ **The police arrive at the Emergency Department and request to draw his blood for a blood test.**
 - What potential legal issues does that raise?
 - Do you let them?

Scenario 1: Flintstone in the ED

- ▶ **Ambulance brings Fred Flintstone into the Emergency Department. Fred is injured after crashing his Footmobile into a parked car.**
- ▶ **The police arrive at the Emergency Department and ask Fred to submit to a blood test. Fred yells “NO!” The police then request the provider to draw his blood.**
 - What potential legal issues does that raise?
 - Do you let them?
 - What if he quits yelling and extends his arm?

Scenario 1 Variations: Flintstone in the ED

- ▶ **Using a medical blood draw for forensic purposes** – what if the police ask for a specimen your ED has drawn?
- ▶ **Body cameras worn by the police** – what are the special considerations?
 - No law addressing this topic yet in Wisconsin.
 - Policies and procedures: What are adequate safeguards? What are options available?



Scenario 2: Flintstone as an Inpatient

- ▶ **Police contact a health care provider to find out whether Fred Flintstone is a patient currently at the facility.**
 - What if it's a phone call versus in-person request?
 - What kind of information can be released about a patient's status?
 - What if the police want to be notified of the patient's discharge?
 - What if he is an inpatient in your behavioral health unit?



Top Bases For Disclosing Patient Presence

- ▶ **Patient authorization**
 - Must be in writing and legally compliant
- ▶ **Facility Directory Information upon request (Limited Information)**
 - Cannot disclose if patient has objected
 - Cannot disclose that patient is an SUD patient
- ▶ **Locating a Suspect, Fugitive, Material Witness, Missing Person or Victim**
 - BEWARE: different processes apply if victim – generally consent required
 - Cannot disclose that patient is an SUD patient
- ▶ **Crime on the premises exception**
 - Exists in some form under each of the referenced laws, but scope may differ
 - Workforce member as victim
- ▶ **Mandated Reporting (Required by Law)**
 - Exists in some form under each of the referenced laws (e.g., child abuse and neglect), but scope may differ
- ▶ **Duty to Warn (Discussed Later)**
 - Exists in some form under each of the referenced laws, but scope may differ



Special Considerations

- ▶ **First determine what laws apply and which are most restrictive.**
- ▶ **Required versus permissive?**
 - Do you have to versus do you want to?
- ▶ **Records versus Identity?**
 - State laws focus on actual records and less on verbal communication of identity.
- ▶ **Minimum necessary (Best Practice)**



Scenario 3: Flintstone's Threats at Discharge

- ▶ **Before Fred is discharged, Fred asks for a prescription for controlled substances. Your practitioners do not write it. Fred becomes angry and says "They'll be sorry". Your practitioners tell you they feel threatened.**
 - What do you do?
 - What if Fred says he will "shoot the whole place up"?
 - What if Fred then says he has a firearm at his home 12 miles away?
 - Does the facility type matter?



Scenario 3 Variations: Flintstone's Threats at Discharge

- ▶ **Before Fred is discharged he tells his therapist that all his problems are because of his ex, Wilma. He says "all women deserve to pay". The therapist feels uncomfortable about this statement. Is the therapist obligated to warn anyone about it?**
 - What if Fred specifically says "Wilma and her new beau deserve to pay"?
 - What if Fred says this to a staff member who is not a therapist?
 - Does the facility type matter?



Scenario 4: Flintstone Post-Discharge

- ▶ **A provider is served with a subpoena for medical records about Fred Flintstone.**
 - Who issued the subpoena?
 - What kind of information is sought?
 - Is a prohibition on re-disclosure notice required?
 - Does the facility type matter?

Summary of Key Facts

- ▶ **What kind of facility is it?**
- ▶ **Who is requesting the information?**
- ▶ **What type of information is being requested?**
- ▶ **Do you have a patient authorization?**
 - Is it valid?
- ▶ **What is the status of the patient:** victim, in custody, an inmate, or otherwise legally detained?
- ▶ **Is the disclosure permissive or required?**



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