

Overdose Fatality Review Teams: Nonmember Observation

How can we include nonmember professional observers?

Response

Individuals who are not members of the OFR team (such as professionals from other communities, medical professionals, or other individuals who may have information relevant to the review of a particular decedent’s case) can attend OFR team meetings. However, the OFR team must ensure that:

1. Proper mechanisms are in place to allow the team to validly redisclose information about the decedent to nonmembers; and
2. Observers have signed a confidentiality agreement that expressly acknowledges that they are prohibited from redisclosing any information shared during the OFR team meeting.

For each type of information that an OFR team anticipates disclosing during an OFR team meeting at which observers will be present, the OFR team should:

1. Determine the applicable law covering redisclosure of that type of information.
2. Ensure that data-sharing agreements, if any, between the OFR team and the entity providing the information at issue appropriately cover redisclosure to observers.
3. Ensure that confidentiality/nondisclosure agreements appropriately cover their ability to receive, use, and redisclose information discussed at the meeting.

Working through these issues may be challenging for an OFR team. Teams may need to discuss the various options with the legal department in the agency that houses the team, or the team may decide to only disclose deidentified information.

PRACTICE TIP

If an OFR team plans for nonmember observers to attend a meeting, the team must work through a series of issues regarding the types of information that will be disclosed at the meeting.

Record Type, Applicable Laws, and Actions

Behavioral Health Records	Medical Records	Educational Records	Child Services Records	Other Records
<ul style="list-style-type: none"> • Applicable Law: 42 CFR Part 2 (for Part 2 records) • Applicable Law: HIPAA (for all other records) • Action: Acquire consent signed by authorized representative (for Part 2 records) • Action: Abide by HIPAA requirements for redisclosure (for all other records) • More Information: Behavioral health records scenario 	<ul style="list-style-type: none"> • Applicable Law: HIPAA • Action: Abide by HIPAA requirements for redisclosure • More Information: Medical records scenario 	<ul style="list-style-type: none"> • Applicable Law: FERPA, state law, and school policy • Action: FERPA does not prohibit redisclosure; check state law or policy • More Information: Educational information records scenario 	<ul style="list-style-type: none"> • Applicable Law: CAPTA and state laws • Action: Abide by CAPTA and state laws regarding redisclosure • More Information: Child services records scenario 	<ul style="list-style-type: none"> • Applicable Law: Specific state laws • Action: Review law and/or contact local attorney for state-specific information

Additional Discussion

Laws governing redisclosure of information to nonmember observers

Redisclosure of information to nonmember observers during an OFR team meeting is governed by one or more of the following four sources:

- 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 for Part 2 records.
- The Health Insurance Portability and Accountability Act (HIPAA) for medical or behavioral health records from a HIPAA-covered entity that do not contain Part 2 records but do contain protected health information (PHI).
- Other federal laws addressing non-health-related information (such as the Family Educational Rights and Privacy Act [FERPA] or the Child Abuse Prevention and Treatment Act [CAPTA]).
- State or local laws covering the redisclosure of any of the above types of information.

Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

PRACTICE TIP

In cases where no PHI or Part 2 records are disclosed to observers, in written or oral form, prior to or during an OFR team meeting, HIPAA does not limit disclosure to non-team members.

Due to the passage of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in March 2020, 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 now differ in how redisclosure of Part 2 records is treated.¹ Pursuant to 42 U.S.C. § 290dd-2, once the OFR team has initially obtained a decedent's Part 2 records, the team may redisclose those records in accordance with HIPAA regulations (see below for more detailed information regarding redisclosure under HIPAA).² Under the current version of 42 C.F.R. Part 2, however, once the OFR team has initially obtained the decedent's records, the team must obtain the consent of the decedent's personal representative or other authorized individual in order to redisclose the Part 2 records.³ With that in mind, OFR teams should draft consent forms that include a redisclosure provision that will allow the team to redisclose the information without having to obtain further consent.

Medical Records and Protected Health Information

The analysis is more complicated with respect to health records that fall under HIPAA. HIPAA's limits on the disclosure of information pertain only to PHI. Health information that is deidentified is not PHI, and HIPAA's disclosure limitations do not apply to such information.⁴ Thus, in cases where all health information reviewed by and discussed during an OFR team meeting is deidentified, HIPAA does not limit the disclosure of that information to non-team member observers.

If an OFR team traditionally shares PHI during team meetings, however, the analysis is different. HIPAA only applies to "covered entities." If an OFR team is not considered a HIPAA-covered entity, the team is not governed by HIPAA once it has received PHI and can redisclose that information to non-team members without violating HIPAA disclosure provisions.^{5,6} Alternatively, if the OFR team is deemed to be a HIPAA-covered entity, it must abide by all of the HIPAA requirements for redisclosure of PHI to non-team members and outside observers during OFR team meetings. Those requirements are dependent on who the observers are and, if they themselves are covered entities under HIPAA, the purpose of the disclosure.⁷

PRACTICE TIP

Disclosing Part 2 Records to Observers

As a practical matter, developing appropriate consent-to-redisclosure forms for Part 2 records under 42 C.F.R. Part 2 (as it exists on May 1, 2021) is difficult. The consent forms must name either a specific individual or a specific organization to receive the redisclosure.

PRACTICE TIP

If PHI will be disclosed to nonmember observers, HIPAA's redisclosure requirements depend on who the observers are and if those observers are HIPAA-covered entities.

Non-Health Information (Education or Child/Family Services Records)

OFR teams will also need to overcome any constraints upon redisclosure of non-health-related information (*i.e.*, education or child and family services records) that are contained in other applicable federal laws as well as any state or local confidentiality laws that might apply to both PHI and other non-health records of the decedent. The OFR team should also ensure that any data-sharing agreements entered into between the OFR team and an entity providing information regarding a decedent appropriately cover redisclosure to both team and non-team member observers.

Signed Confidentiality Agreement

Finally, the OFR team should require any non-team member attending an OFR team meeting to sign a confidentiality or nondisclosure agreement prior to participating in or attending any OFR team meeting. The agreement should specify all of the requirements for keeping information shared during the meeting confidential and should prohibit the redisclosure or other use of such information.

Definitions

Behavioral health records: Medical records that address mental health and/or substance use disorder (SUD).

Deidentified information [45 C.F.R. § 164.514(a)]: Health information that neither identifies nor provides a reasonable basis to identify an individual. Deidentified information is not individually identifiable health information.

HIPAA-covered entity [45 C.F.R. § 160.103]: Health plan, health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

Part 2 program [42 C.F.R. §§ 2.11 and 2.12(b)]: Individual or entity that holds itself out as providing, and actually provides, assessment, treatment, or referral to treatment for SUD and receives federal assistance (as defined by regulation). Most SUD treatment providers qualify as Part 2 programs.

Part 2 records: Behavioral health records that include information about SUD treatment provided by a Part 2 program, in particular, records that identify a person as having, having had, or having been referred for treatment of an SUD.

PHI [45 C.F.R. § 160.103]: Subject to a few exceptions, PHI is individually identifiable health information that is maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.

¹ The CARES Act requires the Secretary of Health and Human Services (HHS) to amend 42 C.F.R. Part 2 no later than March 2021 so that it comports with the revisions to 42 U.S.C. § 290dd-2. As of May 2021, however, HHS has proposed no such amendments. Until any proposed amendments are finalized, patients and providers may follow either the more restrictive consent-to-disclose requirements of 42 C.F.R. Part 2 or the looser provisions of 42 U.S.C. § 290dd-2.

² 42 U.S.C. § 290dd-2(b)(1) (West 2020).

³ 42 C.F.R. § 2.32(a)(1) (“The federal rules prohibit you from making any further disclosure of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 CFR Part 2.”)

⁴ HIPAA’s Privacy Rule allows a covered entity to use and disclose information that neither identifies nor provides a reasonable basis to identify an individual. U.S. Department of Health and Human Services, “Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule,” last updated November 6, 2015, <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html>.

⁵ Whether the OFR team would be considered a “covered entity” for purposes of redisclosure under HIPAA is a question for officials within the agency where the team is housed.

⁶ As one example, an OFR team might have access to PHI—even if not considered a “covered entity”—where a state statute expressly authorizes an OFR team to request and receive health records from a medical provider.

⁷ A couple of examples showcase the convoluted nature of this determination. What if the outside observer is a family member of the decedent? In this case, the family member is not a HIPAA-covered entity, and so the OFR team cannot share PHI with him/her, except where the family member is the personal representative of the decedent. In such case, PHI can be disclosed, and the personal representative can give written or verbal consent to share the PHI with other non-covered entity observers. However, what happens if the observer is a pain management specialist who qualifies as a HIPAA-covered entity? One covered entity (the OFR team) could share PHI with another covered entity (observer) without patient authorization, but only for the treatment activities of the recipient. Does consulting on a fatality review count as treatment activities?