

# BARRY COUNTY COMMUNITY MENTAL HEALTH AUTHORITY POLICY AND PROCEDURE MANUAL

Policy: 3-N Responding to Subpoenas and Legal Requests	Application: BCCMHA Staff and Providers
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## PURPOSE

To define the limits and procedures for responding to subpoenas that will maintain confidentiality and compliance with the Michigan Mental Health Code and Administrative Rules.

## POLICY

The court or other entity that issues a subpoena or order and the Attorney General's Office, when involved, shall be informed if subpoena or ordered information is privileged under a provision of law. Privileged information shall not be disclosed unless disclosure is permitted because of an express waiver of privilege or because of other conditions, which, by law, permit or require disclosure. Furthermore, BCCMHA will not release information related to the purpose of peer reviews. It is not public record and is not subject to court subpoena.

A subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case, is different from a court order. Before responding to the subpoena, the provider should receive evidence that there were reasonable efforts to:

1. Notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or
2. Seek a qualified protective order for the information from the court.

An attorney representing a recipient may review records only upon presentation of identification and the recipient's consent or a release executed by the parent or guardian will be permitted to review the record on the provider's premises. An attorney who has been retained or appointed to represent a minor pursuant to an objection to hospitalization of a minor will be allowed to review the records. [R 330.7051(4)(a)]

Absent a valid consent or release, an attorney who does not represent a recipient shall not be allowed to review records, unless the attorney presents a certified copy of an order from a court directing disclosure of information concerning the recipient to the attorney. [R 330.7051(4)(b)]

An attorney will be refused information by phone or in writing without the consent or release from the recipient, or if the request is accompanied or preceded by a certified copy of an order from a court ordering disclosure of information to that attorney. [R 330.7051(4)(c)]

The Executive Director will be notified of any and all subpoenas.

## PROCEDURES

BCCMHA staff receiving a subpoena or court order shall immediately inform their supervisor, Recipient Rights Officer, and Medical Records. The Recipient Rights Officer will notify the Executive Director.

### **SUBPOENA**

The validity of the subpoena shall be checked to ensure that it includes the following elements:

1. Properly identified client name.
2. Signature of the attorney or county clerk. (This signature may be rubber stamped, typed or printed.)
3. Title of court in which the matter is pending.
4. Title of action in which the person is expected to testify.
5. Case number assigned by the court.

Subpoena's must be served at least 2 days prior to the trial deposition. The following items must accompany the subpoena:

1. A properly executed consent. It must include the name of the person to whom disclosure is to be made.
2. The purpose of the information requested by the subpoena
3. The specific information requested
4. A signature from the client and/or guardian
5. Date of subpoena
6. The signature of one witness

Witness fees and mileage should also accompany the subpoena.

All information in a customer file is released with a valid court order except documents from other medical/mental health professionals and hospitals (both private and state hospitals) stamped confidential.

If the party submitting the subpoena has failed to comply with any of the above requirements, they will be notified and the reason why the request cannot be processed will be specified.

### **COURT ORDERS**

The validity of the court order shall be checked to ensure that it includes the following elements:

1. Properly identified client name.
2. Signature of the county clerk. (This signature may be rubber stamped, typed or printed.)
3. Title of court in which the matter is pending.
4. Title of action in which the person is expected to testify.
5. Case number assigned by the court.

All information in a customer file is released with a valid court order except documents from other medical/mental health professionals and hospitals (both private and state hospitals) stamped confidential.

Materials/information requested by the court order which is deemed damaging to the client as determined by the primary case holder must be sent; however, the court should be made aware of the damaging content in a cover letter accompanying the information.

Materials deleted (based on item 2 above) must be listed in the cover letter as missing documents with the reason(s) given for deleting this information.

Once the primary case holder has reviewed the file and completed the cover letter, the file and letter will be returned to Medical Records to release the information and bill for the file search and copies, and completion of the client's disclosure log to whom disclosure was made, and applicable law with a statement material are to be used for the stated purpose and may not be further disclosed or copied.

The originator of the subpoena/court order shall be informed by BCCMHA Medical Records that the requested information is made privileged by the Mental Health Code and/or 42 CFR Part 2 and may not be disclosed without proper authorization which is either:

1. A valid consent executed by the client; or
2. An order from the presiding judge/court after hearing testimony on the privileged nature of the information

In consultation with Administration and Recipients Rights, the person(s) receiving the subpoena shall disclose privileged communications upon request:

1. When the privileged communication is relevant to a physical or mental condition of the client, which the client has introduced as an element of his or her claim or defense in a civil or administrative case or proceeding or which, after the death of the client, has been introduced as an element of his or her claim or defense by a party to a civil or administrative case or proceeding.
2. When the privileged communication is relevant to a matter under consideration in a commitment proceeding, but only if the client was informed that any communications could be used in the proceeding.
3. In actions, civil or criminal, against the psychiatrist or psychologist or malpractice.
4. When the communications were made during an examination ordered by a court, prior to which the client was informed that communication would not be privileged, but only with respect to the particular purpose for which the examination was ordered.
5. When the communications were made during treatment, which the client was ordered to undergo to render them competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the client to stand trial.
6. When other law supersedes the Mental Health Code or 42 CFR Part 2 such as staff's requirements under Public Acts 519, 32, and 372 to report their knowledge of suspected abuse or neglect of adult and minor recipients of service.

Information shall be provided to private physicians or psychologists appointed by the court or retained to testify in civil, criminal, or administrative proceedings as follows:

- (a) A physician or psychologist who presents identification and a certified copy of a court order, appointing the physician or psychologist to examine a recipient for the purpose of diagnosing the recipient's present condition shall be permitted to review, on the provider's premises, a record containing information concerning the recipient. Physicians or psychologist will be notified before the review of records when the records contain privileged communication which cannot be disclosed in court under section 750(1) of the act. [R 330.7051(5)(a)]
- (b) The court or other entity that issues a subpoena or order and the attorney general's office, when involved, shall be informed if subpoenaed or ordered information is privileged under provision of law. Privileged information shall not be disclosed unless disclosure is permitted because of an express waiver of privilege or because of other conditions that, by law, permit or require disclosure. [R 330.7051(5)(b)]

A prosecutor may be given non-privileged information or privileged information which may be disclosed pursuant to section 750(2) of the act if it contains information relating to participation in proceedings under the act, including all of the following:

1. Names of witnesses to acts, which support the criteria for involuntary admission;
2. Information relevant to alternatives to admission to a hospital or facility; and
3. Other information designated in policies by the governing body.

[R 330.7051(6)(a-c)]

If required by federal law, BCCMHA will grant a representative of Disability Rights Michigan access to the records of all of the following:

1. A recipient, or other empowered representative, has consented to the access.
2. A recipient, including a recipient who has died or whose whereabouts are unknown, if all the following apply:
  - a. Because of mental or physical condition, the recipient is unable to consent to the access.
  - b. The recipient does not have a guardian or other legal representative, or the recipient's guardian is the state.
  - c. Disability Rights Michigan has received a complaint on behalf of the recipient or has probable cause to believe based on monitoring or other evidence that the recipient has been subject to abuse or neglect.
  - d. A recipient who has a guardian or other legal representative, if all of the following apply:
    - i. A complaint has been received by the protection and advocacy system if there is probable cause to believe the health and safety of the recipient is in serious and immediate jeopardy.
    - ii. Upon receipt of the name and address of the recipient's legal representative, Disability Rights Michigan has contacted the representative and offered assistance in resolving the situation [MHC1748(8)/RR Standard F18].
    - iii. The representative has failed or refused to act on behalf of the recipient.

## **REFERENCES**

BCCMHA

Michigan Department of Health and Human Services

Michigan Mental Health Code

CMS

HIPAA

Office of Recipient Rights

Office of Civil Rights

Public Health Code Article 6

SOAHR Administrative Rules (R 325.14302 to 325.14306)

42 CFR Part 2