BHRS Legal Updates: WEBINAR

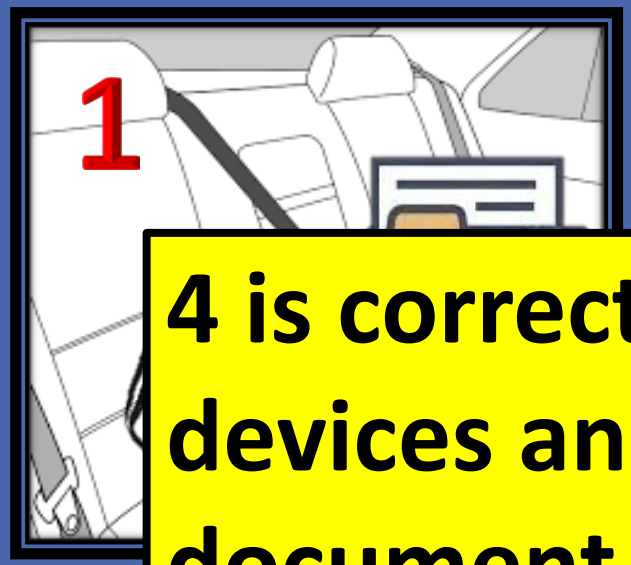
Presented by BHRS Quality Management

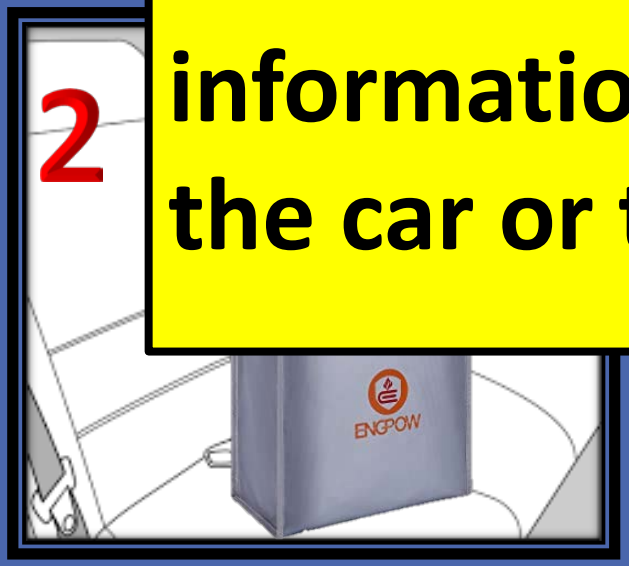
Last updated
5.19.2020

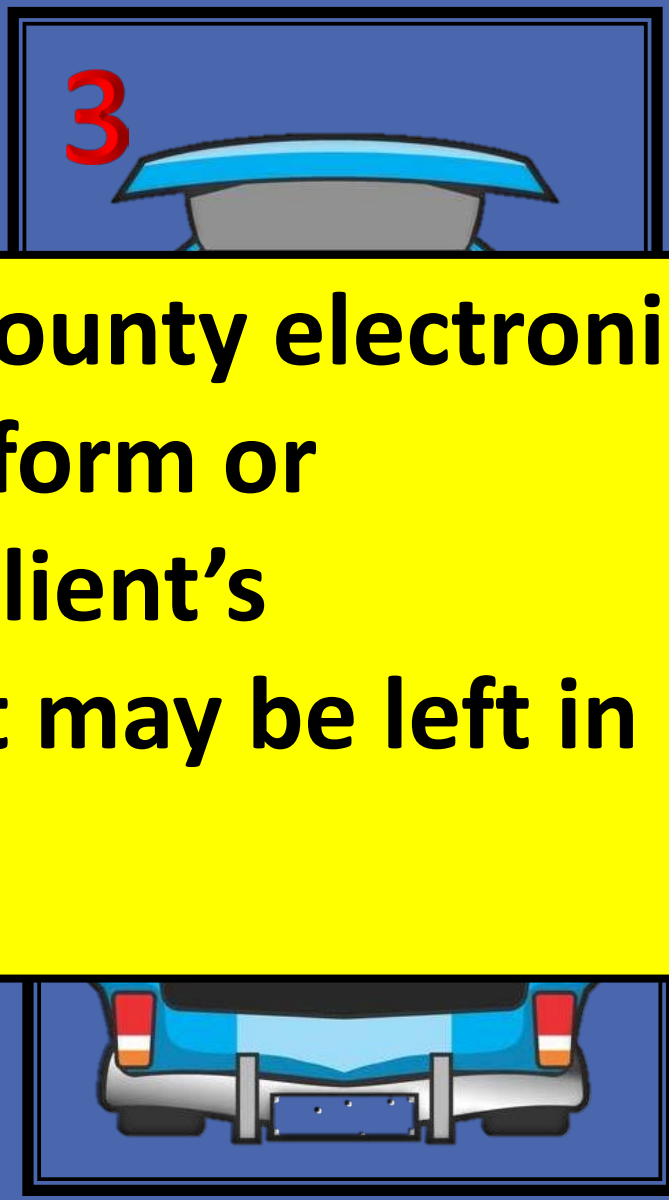
A Word About Confidentiality

- **Talking about clients on your cell phone**
  - Be aware of who is around you
  - Less is more
- **Talking to clients in public places**
  - Public places are not appropriate for big deep conversations or therapy.
- **Running in to a client in a public place**
  - Only acknowledge the client if they acknowledge you first. Don't say how you know the client or share anything with other people.
- **Taking confidential information out of the office**

Which of the items below is OK to leave in your car, unattended?







4 is correct: No county electronic devices and any form or document with client's information on it may be left in the car or trunk.

REPORTING BREACHES TO QM

POLICY: CRITICAL INCIDENT REPORTING: 93-11- POLICY
https://www.smchealth.org/bhrs-doc/critical-incident-reporting-93-11

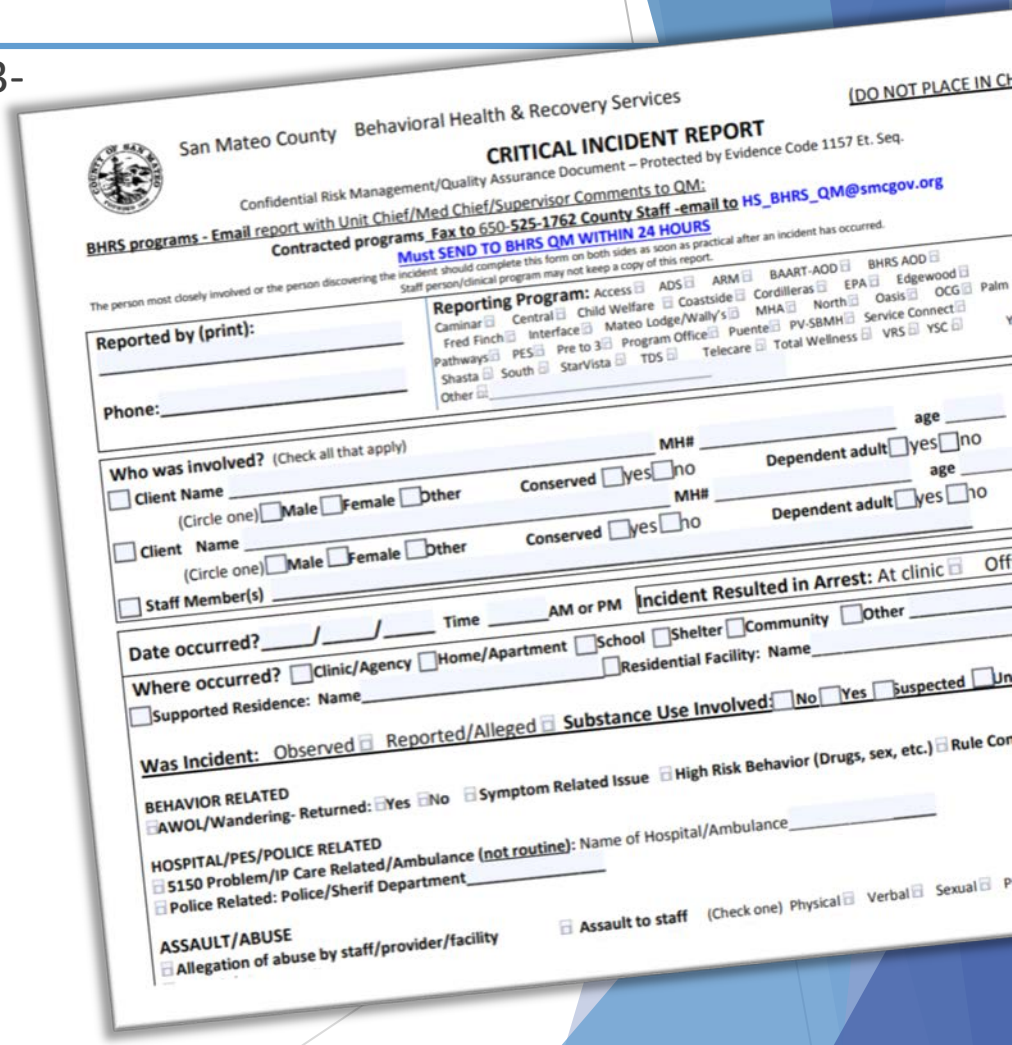
CRITICAL INCIDENT FORM

1. The person most closely involved or the person discovering the incident completes the IR form as soon as possible after an incident *within 24 hours, send to supervisor.

2. Unit Chief/Med Chief/Supervisor adds Comments, send to QM ASAP.

3. EMAIL the Incident Report to BHRS QM within 24 hours of when incident occurs HS_BHRS_QM@smcgov.org

Send via secure email if outside of BHRS


San Mateo County Behavioral Health & Recovery Services

CRITICAL INCIDENT REPORT

Confidential Risk Management/Quality Assurance Document – Protected by Evidence Code 1157 Et. Seq.

BHRS programs - Email report with Unit Chief/Med Chief/Supervisor Comments to QM:
Contracted programs Fax to 650-525-1762 County Staff -email to HS_BHRS_QM@smcgov.org
Must SEND TO BHRS QM WITHIN 24 HOURS

Reported by (print):

Phone:

Reporting Program: Access, ADS, ARM, BAART-AOD, BHRS AOD, Caminar, Central, Child Welfare, Coastside, Cordilleras, EPA, Edgewood, Fred Finch, Interface, Mateo Lodge/Wally's, MHA, North, Oasis, OCG, Pathways, PES, Pre to 3, Program Office, Puente, PV-SBMH, Service Connect, Shasta, South, StarVista, TDS, Telecare, Total Wellness, VRS, YSC, Other

Who was involved? (Check all that apply)
Client Name ____ MH# ____ age ____
(Circle one) Male Female Other Conserved yes no Dependent adult yes no
Client Name ____ MH# ____ age ____
(Circle one) Male Female Other Conserved yes no Dependent adult yes no
Staff Member(s) ____

Date occurred? ____/____/____ Time ____ AM or PM Incident Resulted in Arrest: At clinic Off
Where occurred? Clinic/Agency Home/Apartment School Shelter Community Other ____
Supported Residence: Name ____ Residential Facility: Name ____

Was Incident: Observed Reported/Alleged Substance Use Involved: No Yes Suspected Un

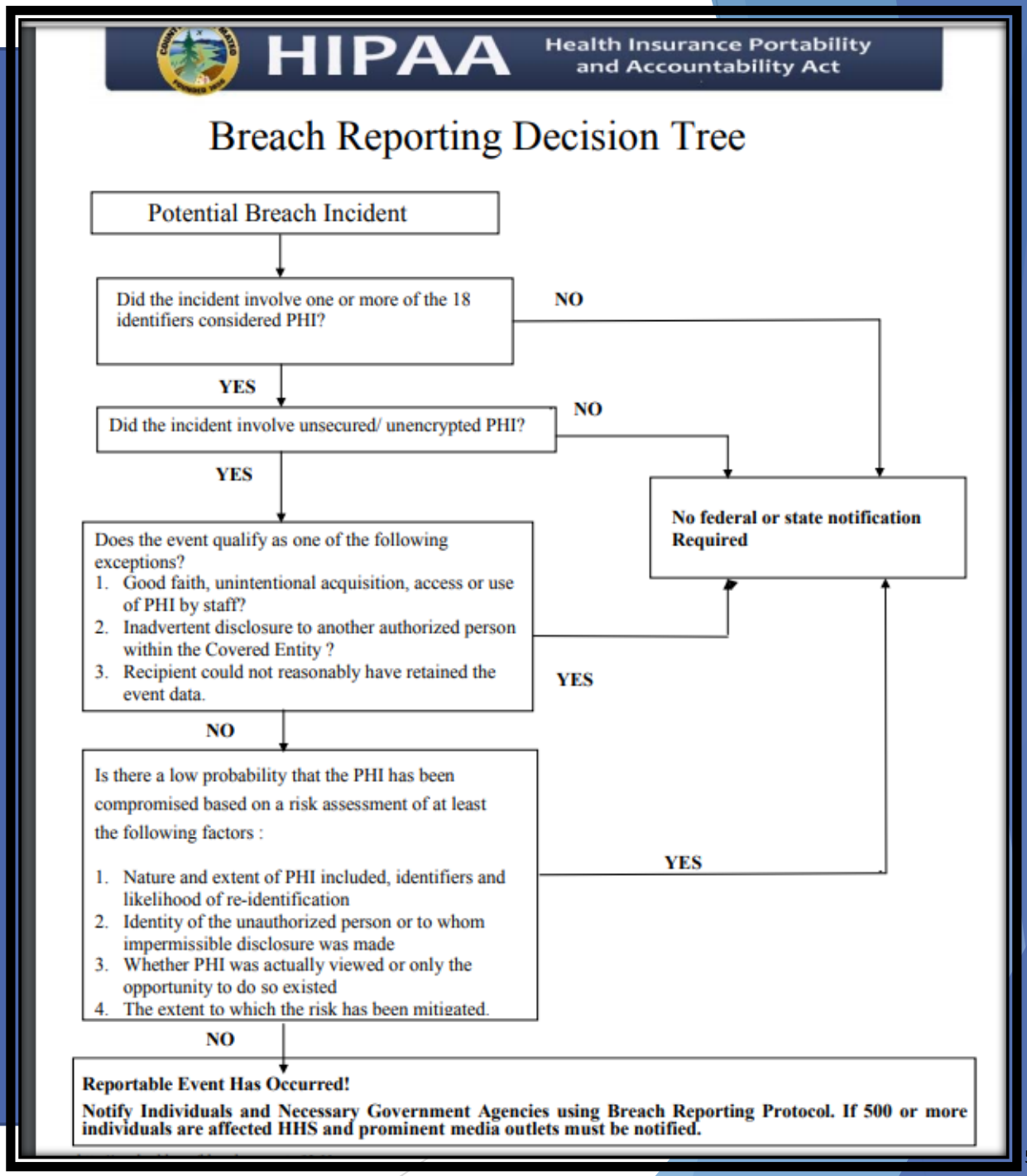
BEHAVIOR RELATED
AWOL/Wandering- Returned: Yes No Symptom Related Issue High Risk Behavior (Drugs, sex, etc.) Rule Con

HOSPITAL/PES/POLICE RELATED
5150 Problem/IP Care Related/Ambulance (not routine): Name of Hospital/Ambulance ____
Police Related: Police/Sherif Department ____

ASSAULT/ABUSE
Allegation of abuse by staff/provider/facility Assault to staff (Check one) Physical Verbal Sexual P

QM REPORTS to DHCS & Health and Human Services (HHS)

Even for contractors, QM is required to report- not the contractor or staff



BHRS must report breaches of SS# within 24 hours to DHCS

The following 18 identifiers are considered Protected Health Information (PHI)

1. Names;
2. All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes;
3. All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death;
4. Telephone numbers;
5. Fax numbers;
6. Electronic mail addresses;
7. Social security numbers;
8. Medical record numbers;
9. Health plan beneficiary numbers;
10. Account numbers;
11. Certificate/license numbers;
12. Vehicle identifiers and serial numbers, including license plate numbers;
13. Device identifiers and serial numbers;
14. Web Universal Resource Locators (URLs);
15. Internet Protocol (IP) address numbers;
16. Biometric identifiers, including finger and voice prints;
17. Full face photographic images and any comparable images;
18. Any other unique identifying number, characteristic, or code.

Examples of Unsecured and Unencrypted PHI

1. A nurse mistakenly faxes medical records to a wrong number.
2. A pharmacist gave the wrong prescription to a patient.
3. A staff member sends an unencrypted email containing patient information to the wrong email account.
4. A doctor reports a stolen laptop that was password-protected, but not encrypted. Records including personal information about patients: names, medical record numbers, and health treatment were on the laptop. The laptop was stored overnight in an employee's car, which was parked in front of her house.
5. A manager lost an unencrypted USB thumb drive containing patient information including patient names, medical record number, birthday, blood type, blood test results, brief medical history, and physician's name.

Document Services to Clients

- Legal & Ethics
- Standards of Client Care & Safety
- Revenue-Billing

Document Services to Clients

The medical record documents your treatment of the client.

It is a tool to communicate to other providers both to your own treatment team and to outside providers.

At times the medical **record may end up being shared with**

- The client and/or the client's family
- The clients family upon death
- It may be subpoenaed in a legal proceeding
- Other providers may request a copy
- Auditors

Think about how the note might sound if reviewed in a Court hearing.

Document Services to Clients

Be Factual

- What did you see and hear? What did the client say? How did they appear and behave?
- Use quotes whenever possible. Do not use slang terms.
- Describe using “as evidenced by” followed by what you observed. For example, “Client appeared depressed as evidenced by making no eye contact, speaking in a low voice and crying.”
- What did you do (interventions)? How did the client respond? What is the ongoing plan?

Document Services to Clients

Things to look out for

- Notes longer than one page.
- Feelings or critical opinions about other professionals – these should NEVER be in a progress note.
- Personal feelings, non-clinical opinions about the client and/or family, or any type of criticism or judgment – these should **NEVER** be in a progress note.

TIPS FOR WRITING LETTERS

YOU MAY WRITE LETTERS FOR YOUR CLIENTS AT TIMES

11 p

Common Types of Letters

Clearance letter for a client who wants to join the Airforce

Social Security

Immigration

Summary of treatment letter

Jury Duty excuse letter for a caregiver

Family Court Clearance letter

Letter to support client to remain in stable housing

Letter of support is being requested by Lawyer in a case of unlawful eviction.

Letters for emotional support animal – for travel, for apartment

Letters that state if parent is ready/not ready to regain/maintain custody of their child

Letters regarding advocating for disability benefits/services

Letters BASIC GUIDELINES

SEND IT TO QM

Make sure that you have a release of information authorization

1. The letter should be about 1 page (2 TOPS)
2. It should be just the facts
3. AVOID making predictions about the future
4. Usually write the letter to "To whom it may concern" and give the letter to the client
5. Add your contact information- use letterhead

Things that you might include:

1. The type of services provided (individual, group, family, case management etc..), to whom (child, parent etc.…), the length of time the client has been seen.
2. The general areas of treatment/DX If appropriate addressed (i.e. trauma, depression, anxiety…)
3. A statement about the recommended course of treatment (number of treatment sessions per week and length of treatment, etc..) which can include the parents involvement in the clients treatment.
4. General statements about the progress of your work with the client.

Sample Emotional Support Animal

Date

To Whom it May Concern,

(Name) is under my professional care for treatment of a medical condition. I have prescribed an emotional support animal as part of the treatment program developed for (Name). The presence of this emotional support animal is necessary for (Name's) mental health. I am a licensed (Title). My license number is (xxxxx).

Please allow (Name) to be accompanied by their emotional support animal.

Signature

Provider printed name & title

CONSENTING FOR TREATMENT

15p

Times to Renew Consents

- At admissions
- Client status changes: turns 18, gets/or ends being conserved Youth now consenting for their own treatment: Minor Consent

Minor Consent

Health and Safety Code § 124260

[A] minor who is 12 years of age or older may consent to [outpatient] mental health treatment or counseling services if, in the opinion of the attending professional person:

> the minor is mature enough to participate intelligently in the mental health treatment or counseling services.

***The minor cannot consent to medication, however they can attend a consultation appointment for medication. Should it be determined that it may be prescribed, consent from "qualified relative" adult is needed.

Family Code 6924(b) – permits minors 12 & older to consent to mental health treatment/counseling on an outpatient basis if:

1. The minor is, in the opinion of the treating professional, mature enough to participate intelligently in the services

AND

2. The minor is "at risk" because he/she:

a) would present a danger of serious physical or mental harm to self or others without the treatment **OR** b) is the alleged victim of incest or abuse

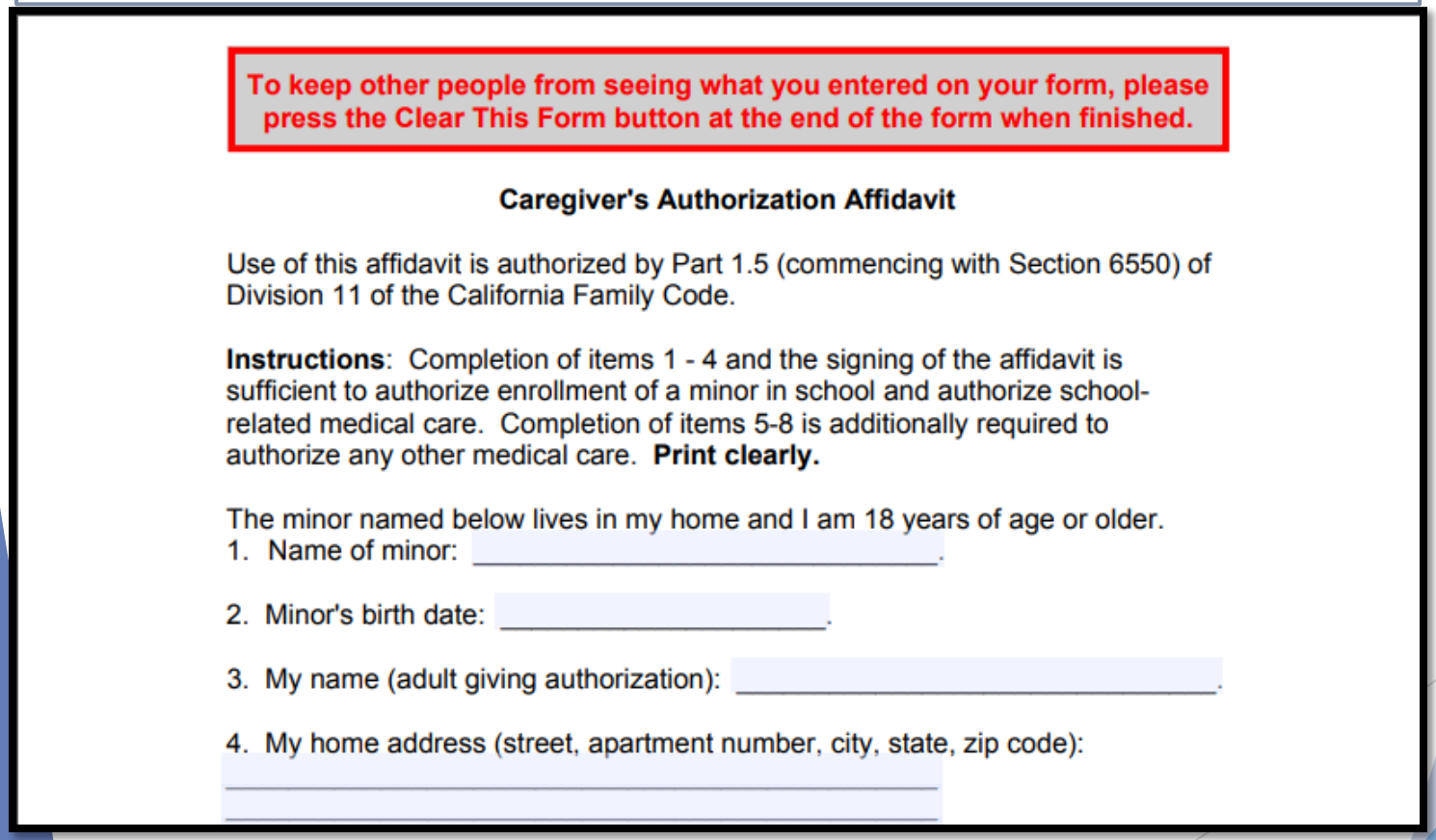
Special Situations

- **Child is adjudged a dependent child:** When a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment, subject to further order of the court. Welfare & Institutions Code 362 (a)

- **Temporary custody** – probation officer may consent to emergency care after attempting to reach parent (W&I 739)

Non-Parent Caregiver Authorization

The child is “living with” the caregiver that is a “qualified relative” and the parent is unavailable to sign consents, the relative fills out this form



To keep other people from seeing what you entered on your form, please press the Clear This Form button at the end of the form when finished.

Caregiver's Authorization Affidavit

Use of this affidavit is authorized by Part 1.5 (commencing with Section 6550) of Division 11 of the California Family Code.

Instructions: Completion of items 1 - 4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. **Print clearly.**

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____.
2. Minor's birth date: _____.
3. My name (adult giving authorization): _____.
4. My home address (street, apartment number, city, state, zip code):

_____

_____

PART 1.5. CAREGIVERS [6550 - 6552]
https://www.courts.ca.gov/documents/caregiver.pdf
https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=11.&title=&part=1.5.&chapter=&article=

THINGS TO KEEP IN MIND

SHARING INFORMATION

Exchange of Information Guide

https://www.smchealth.org/bhrs-policies/confidentialityprivacy-protected-health-information-phi-03-01

San Mateo County Behavioral Health & Recovery Services

EXCHANGE of INFORMATION: Guide for Sharing

BHRS Policy 03-01, Attachment G added March 13, 2013

The following guide is designed to assist staff members answer the question **"May I share this client's information with the Agency or Person who is asking?"**

SECTION I This section applies to **all MH staff members** (working in either an AOD or MH setting), including **AOD staff working as part of a MH team** within BHRS (i.e., billing under a MH treatment program).

When asked for information about a client receiving MENTAL HEALTH services.	
For MH clients/programs: If you are asked to share PHI, other information, or to confirm if the person is a client, by or for	**May the Mental Health Provider release this client's PHI, or talk with the requestor about the client, WITHOUT a signed Consent to Release Information?**
Treatment of shared client	**Yes**, consent is not required for treatment providers.
Payment – for mental health services	**Yes**, consent is not required for information needed to pay for claimed services.
Operations – QM, Audits	**Yes**, consent is not required for operations such as QM, audits, approved

Access to the Record

Adult patients, and minors who COULD have or DID consent to their own care, have a right to ACCESS their own record (45 CFR 164.524)

Only exception is concern that access will cause **death or serious physical harm** to the patient or some other person, or if the information in the record was shared in confidence by a family member. Refusing access to the record must be documented and the client must be informed of this decision.

Parents' right to access their minor child's record

Health & Safety Code 123115 – limits parents' right to access when:

1. Minor **could have** or **did** consent to the care

2. Regardless of discipline, when there is only parental consent (minor consent not possible), parental access can still be limited if provider fears:

- Harm to therapeutic relationship
- Harm to minor's emotional well-being
- Harm to minor's physical well-being

Special Situations with Children

- **Client consent is not required to share information when the client is in dependency and has an attorney and it is that attorney who is requesting the information. W&I 317(f) covers this:**
- (f) Either the child or counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to consent, which shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of age, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergyman-penitent privilege. If the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it.
- Counsel shall be the holder of these privileges if the child is found by the court not to be of sufficient age and maturity to consent.
- For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner, as defined in former Section 11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case that are maintained by state or local public agencies.
- All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request.

Access to the Record

Q: Who may access a deceased person's medical records?

A: The patient's designated personal representative or the legal executor of his or her estate has a right under law to access the records. These are the only people who by law have a right to view or copy the records.

If the patient died without naming a personal representative or executor, state law determines who by default possesses the right. States often establish a hierarchy of persons based on their relationship to the deceased person. Typically this begins with an adult member of the immediate family, such as a spouse, child, or sibling

https://library.ahima.org/doc?oid=103866#.Xrr4gdVKiCg

Sharing Information

- Minimum Necessary – always applies
- May share information vs. Must share information
- May & Should -Allowed uses/disclosures of Protected Mental Health Information Treatment, Payment, Operations (TPO)
- Must-Mandatory Disclosures of Protected Health Information

Main Policy: https://www.smchealth.org/bhrs-policies/confidentialityprivacy-protected-health-information-phi-03-01

Disclosure to Coroner & Death Review

AB 2119 – Disclosure to Coroner (Eff. 1/1/17)
Permits the disclosure of health and mental health information when requested by a medical examiner or forensic pathologist

AB 2083 – Disclosures to Child Death Review Team (eff. 1/1/17)
Clarifies that health care providers can disclose confidential medical and mental health information to an interagency child death review team that is investigating a child's death. (See Penal Code 11174.32)

Multiple Disciplinary Teams (MDT)

Successful collaboration requires information sharing.

Get permission in writing from the individual at the same time you offer services at the beginning.

Two "types" of MDTs:

Type 1 – all members of team = healthcare providers

Type 2 – mixed team = includes healthcare +

social services + criminal justice + schools +

housing + food + legal + other assistance

Type 1 – MDTs Privacy laws that allow sharing for “treatment purposes”

HIPAA (all disciplines) - Provider may share with other providers for “treatment purposes” – 45 CFR 164.506 (see 45 CFR 164.501 for broad definition of “treatment purposes” but also look at “more stringent” state and federal laws

- Civil Code 56.10(c)(1) (physical health) - Disclosure permitted for “diagnosis and treatment” of the patient
- Health & Safety 120985 (HIV test results) – May be documented in chart and may be disclosed to patient’s healthcare providers
- Welfare & Institutions Code 5328 (a)(1) (mental health) - Disclosure permitted to provider who has “medical or psychological responsibility for the care of the patient”
- 42 CFR §2.12(c)(3) (SUD) - Disclosures allowed among providers WITHIN the SUD program only for diagnosis, treatment, or referral for treatment – OTHERWISE YOU NEED WRITTEN CONSENT

Type 2 – MDTs and privacy law barriers (that can be resolved with authorization!)

For example, Whole Person Care seeks to provide services to a group of individuals defined by:

- Social service needs: food, shelter, clothing, GED/job training, driver's license/ID, unresolved legal issues (e.g., outstanding warrants), medical insurance, SSI, veterans' benefits, transportation, etc.
- Frequent 911 callers
- Frequent visits to Emergency Departments (ED's)
- Frequent re-admissions to Hospitals
- Frequent arrests
- Unresolved mental health, substance use, medical and dental problems

Best solution: get written authorization!
Sharing (without authorization) for "Treatment" under more stringent CA and federal laws

CMIA - Civil Code 56.10(c)(1) (physical health) – The information may be disclosed to providers of health care, health care service plans, contractors, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient.

LPS - Welfare & Institutions Code 5328 (a)(1) (mental health) – In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his or her guardian or conservator, shall be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the **medical or psychological responsibility for the patient's care.**

42 CFR Part 2 (SUD) – disclosures allowed among members of the treatment team WITHIN the SUD program only

Who owns the right to privacy?

The chart is the property of the provider/county/agency, **but the client has rights to access the chart.**

The individual who provides consent to medical care normally has the right to access to the record and authorize its release (this is parent/legal guardian in cases where minor consent does not apply)

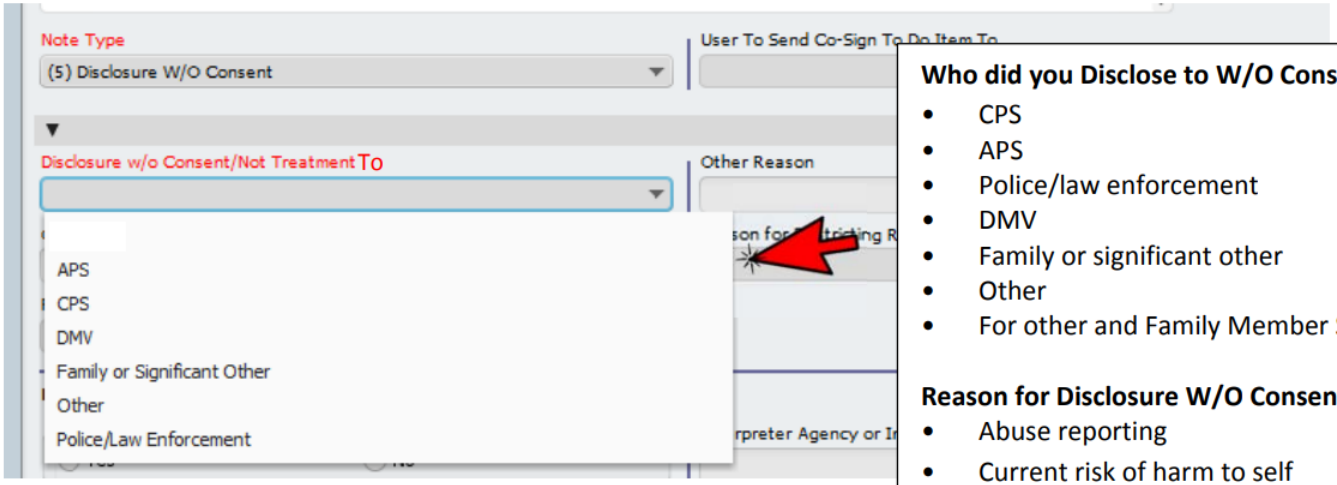
Under Medical confidentiality laws, **when minors have a right to consent they control the record and release it to third parties (including the parent),** even if the parent also consents to the care and/or knows about the care.

If a minor, under the age of 12, has an attorney: That attorney has a right to access the records in the same way the minor would have, had the minor been of age to consent**. If the minor is 12 or older, a determination must first be made re whether that minor can provide consent to release of the records.**

Who owns the right to privacy?

If minor has been removed from physical custody of his or her parent, parent cannot access or release the **mental health** record unless the Court has reinstated that right (W&I 5328.03); presumably they also lose the right to consent to mental health care

Disclosures & Progress Notes



Who did you Disclose to W/O Consent/Not Treatment To

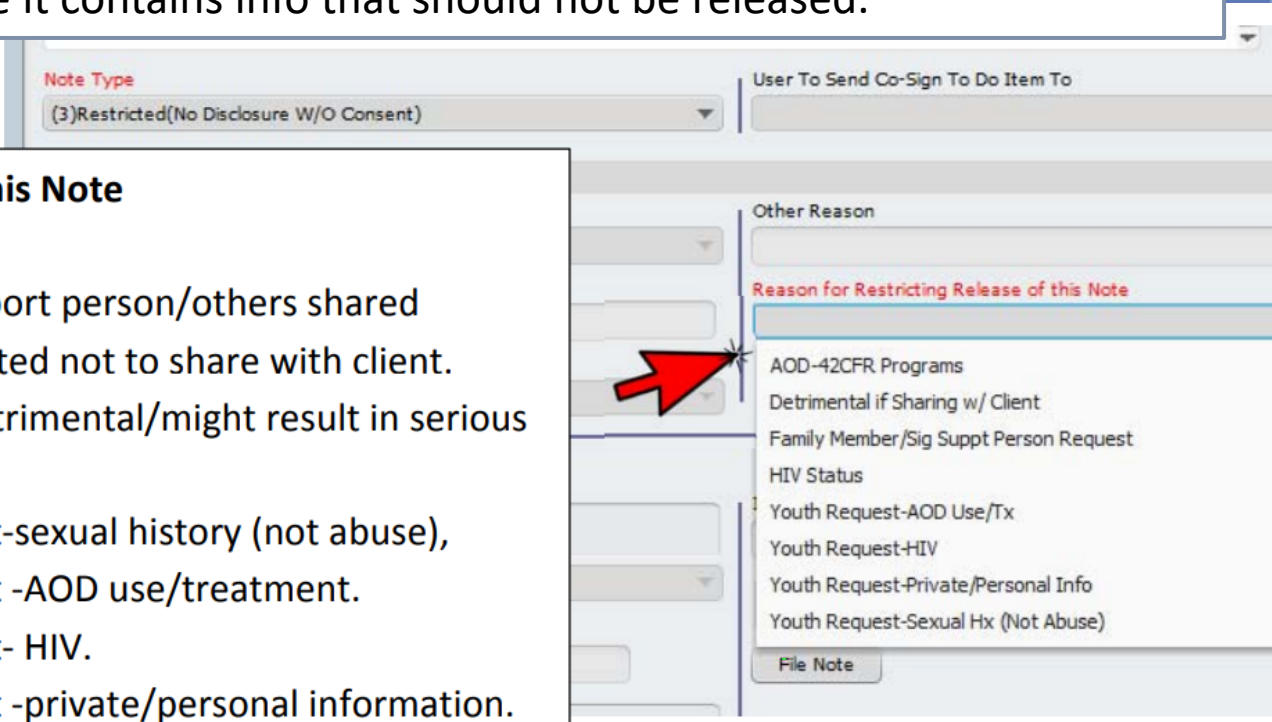
- CPS
- APS
- Police/law enforcement
- DMV
- Family or significant other
- Other
- For other and Family Member State Name of Person

Reason for Disclosure W/O Consent/Not Treatment

- Abuse reporting
- Current risk of harm to self
- Current threat of harm to others/duty to warn/protect
- Death reporting
- Gravely Disabled
- Health concern/ Mandated report
- Lapses of consciousness
- Urgent safety/crisis situation
- Welfare check
- Other
- For other reason_____

Restricting Progress Notes

Restricting notes (what it means, when to restrict, protocol for releasing restricted notes). Restricting the note does not block access. Anyone with Avatar access the can see the note. The restriction is a “flag” or reminder to review the note for appropriateness prior to releasing the chart in case it contains info that should not be released.



Reason for Restricting Release of this Note

- HIV status
- Family member/significant support person/others shared confidential information but requested not to share with client.
- Sharing with client would be detrimental/might result in serious risk of harm to client or others.
- Youth client's request to restrict-sexual history (not abuse),
- Youth client's request to restrict -AOD use/treatment.
- Youth client's request to restrict- HIV.
- Youth client's request to restrict -private/personal information.

SUBPOENAS

Subpoena or Court Order

- **In most cases even with a subpoena you still need a consent from the client to share information or testify in count.**
- **When in doubt, advocacy in favor of patient privacy is the best policy.**
- CA law (W&I Code 5328(f)) and case law that only permits us to submit charts directly to the Court pursuant to Court order, or alternatively, to an attorney when there is a subpoena plus authorization from the patient. *Riverside County v. Superior Court,* 42 Cal.App.3d 478 (1974)
- 42 CFR Part 2 - applies to any substance use disorder treatment program records that you have created or received from other SUD providers.
- http://www.health-law.com/blogs-National-Leaders-in-Health-Law,Subpoenas-for-mental-health-records

Subpoena or Court Order What to do?

As soon as you receive the Subpoena or Court Order email it to HS_BHRS_AKS_QM@smcgov.org

QM will ask you to talk to your client about the request

- Does the client want you to share the record or to testify?
- Get a signed consent form, scan the consent into Avatar, and also send it to QM

If the client **does not** want you to share:

- QM will send a letter to the attorney
- You still may need to attend court- QM & county counsel with advise you

If the client **wants you** to share:

- Records request and you have a consent you will- QM will assist in following the required procedure
- If the request is to testify – QM will connect you will county counsel

Thanks for Attending!

Send your questions to HS_BHRS_ASK_QM@smcgov.org