



### Sources of Regulation for Confidentiality and Release of Information Include:



- Alabama Administrative Code
- Alabama Code
- Alabama Rules of Evidence (re: privileges)
- Federal law and regulations

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### Getting a Handle on the Rules:



- *General principles of Confidentiality of Medical and Other Records;*
- *When and to whom records can be released;*
- *Mandatory disclosure requirements;*
- *Exceptions; and*
- *Necessary documentation.*

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### Getting a Handle on the Rules:



- *Responding to Subpoenas and Court Orders;*
- *Law Enforcement authority to obtain information; and*
- *Privileges that protect disclosure of information*

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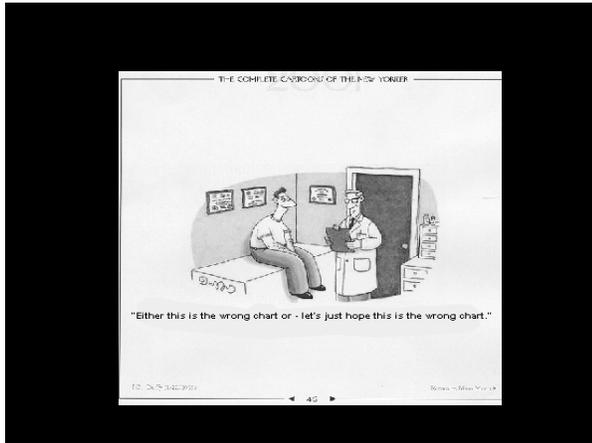
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**What Does The Admin. Code Require?**

- *The Admin Code will state the type of records required to be kept.*
  - *Example # 1: Sec. 420-5-1-.02 provides that Nursing Homes "shall keep adequate records, including procedure schedules, histories, results of examination, nursing notes, records of tests performed and all forms required by law."*
- *The Admin Code will state that the records are confidential.*
  - *Example # 1: Sec. 420-5-1-.02(8)(g) provides that such records and information regarding patients shall be confidential. Access to these records shall be determined by the governing authority of the facility. Inspectors for licensure shall be permitted to review medical records to determine compliance with these Rules."*

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**What Does The Admin. Code Require?**

- *Example # 2: The Admin Code provides for confidentiality of records in Assisted Living Facilities in Sec. 420-5-4-.05(1)(e):*
  - *Protects resident's information from unauthorized disclosure.*
  - *Those who may review records include:*
    - *Employees of Ala. Dept. of Public Health;*
    - *Local ombudsman (with resident's or guardian's written consent);*
    - *Physicians who need the records to render good medical care to the resident; and*
    - *The resident or his or her legal guardian may grant permission to any other individual to review the resident's confidential records by signing a standard release.*

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## What Does The Admin. Code Require?

- *Example # 3: The Admin Code provides for confidentiality of records in Nursing Homes in Sec. 420-5-10-03(35).*

*The facility must keep confidential all information contained in the resident's records, regardless of the form or storage method of the records, except when release is required by transfer to another health care institution; law; third party subpoena; or the resident.*

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## What Other Medical Records Does Alabama Law Require Be Kept Confidential?

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## Medical Records Regarding Sexually Transmitted Diseases



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## Medical Records Regarding Sexually Transmitted Diseases

- All information, reports, and medical records concerning persons with sexually transmitted diseases shall not be subject to public inspection or admission into evidence in any court except commitment proceedings. (Ala. Code Sec. 22-11A-22)
- Violation of this provision is a Class "C" misdemeanor. (Ala. Code Sec. 22-11A-38)

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## What Are The Rules About Confidentiality of Substance Abuse Records?

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## Substance Abuse Records:

- Records of the identify, diagnosis, prognosis, or treatment of any substance abuse patient shall be confidential. (42 U.S.C. Sec. 290dd(2))
- Rule applies to patient records made in connection with the performance of any program relating to substance abuse education, prevention, training, treatment, rehab, or research conducted, regulated, or assisted by any department or agency of the United States.
- Records may only be disclosed to medical personnel in a bona fide medical emergency, to qualified personnel for scientific research, management/financial audits, or program evaluation (without identifying the patient), or by court order.

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Are There Any Other Records Or Communications Related To The Delivery Of Medical Services That Alabama Law Requires Be Kept Confidential?

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Alabama Recognizes Several Privileges That Protect Communications From Disclosure



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## Confidential Communications

- Psychologist/Psychiatrist-Patient Privilege;
- Department of Mental Health/Retardation Privilege;
- Attorney-Client Privilege;
- Quality Assurance Privilege;
- Peer Review Privilege;
- Counselor-Patient Privilege; and
- Social Worker Privilege

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## Psychiatrist-Patient Privilege



THE COMPLETE CAROONS OF THE NEW YORKER

Charles Beckett (1974/2011)

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## Psychologist/ Psychiatrist-Patient Privilege

- Confidential communications between licensed psychologists/psychiatrists/psychological technicians, and patients are protected to the degree that attorney-client communications are protected.
- The patient has the right to refuse to disclose and prevent others from disclosing confidential communications made for the purpose of diagnosis or treatment of a mental condition.
- The privilege also covers notes or records made by the professional.

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## Psychologist/ Psychiatrist-Patient Privilege

- The purpose of the privilege is to encourage the patient to make full disclosures to the treating professional without fear or hesitation that it will lead to humiliation or embarrassment in order to promote more effective mental health treatment.
- There are several exceptions to the privilege; however, the Alabama Supreme Court refused to recognize a general exception to the psychiatrist-patient privilege where the issue of a party's mental condition is raised in a civil proceeding. *Ex parte Pepper*, 794 So. 2d 340 (Ala. 2001)

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## Psychologist/ Psychiatrist-Patient Privilege Exceptions

- For communications relevant in proceedings to hospitalize a patient for mental illness;
- For court ordered examinations of the mental/emotional condition of a witness; and
- For communications concerning breach of duty arising out of the psychotherapist/patient relationship.

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## Waiver Of The Privilege

- ONLY the patient can waive the privilege by "objectively manifest[ing] a clear intent not to rely on the privilege."
- Examples:
  - By attaching medical records to a deposition, the patient waives the privilege as to any information contained in those records, but not as to records regarding later treatment or the deposition of the psychotherapist.
  - By making disclosures about the privileged communication in the presence of a third party.

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## Ala. Dept of Mental Health/Retardation Employee Privilege

- Employees of the ADMHMR shall not be required to disclose information regarding the treatment of any patient unless a court orders disclosure for the promotion of justice. (Ala. Admin. Code Sec. 580-1-1-.10(2) and Ala. Code Sec. 22-50-62)

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## Attorney-Client Privilege




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## Attorney-Client Privilege

- The only privilege that can be invoked to exclude evidence in certain child abuse proceedings is the attorney-client privilege. (Ala. Code Sec.26-14-10).
- No other privilege (spousal, psychiatrist-patient) make be invoked to exclude evidence in such proceedings.

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Quality Assurance Privilege:



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Accreditation & Quality Assurance Privilege:

- This includes any information furnished to a panel formed or appointed to evaluate the qualifications or performance of a healthcare provider.
  - *"All accreditation, quality assurance, credentialing, and similar materials including written reports, records, correspondence, and other materials, shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review." (Alabama Code Sec. 22-21-8)*

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Peer Review Privilege:



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### Peer Review Privilege:

- Decisions, opinions, actions, and proceedings rendered or entered by any utilization review committee consisting of physicians or surgeons, and the purpose of which is to evaluate or review the diagnosis or treatment of the performance of medical services, shall be privileged. (Alabama Code Sec. 34-24-58)

- The burden of proving that such a privilege exists is on the person or entity asserting the privilege.

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### Counselor-Patient Privilege:

- A patient may refuse to disclose and prevent others from disclosing a confidential communication made for the purpose of rendering counseling services. (Ala. Code § 34-8A-1 to -23 (1975); Ala. Code § 15-23-41 (1975))
- Communications between a client and a licensed professional counselor or a certified counselor associate, and between a victim of sexual abuse or family violence and a victim counselor are covered by the privilege.

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### Counselor-Patient Privilege Definitions:

- A "patient" is one who for the purposes of securing professional counseling services consults with a licensed professional counselor or a certified counselor associate. Or, is a person who consults with a victim counselor after sexual assault or family violence.
- A "counselor" is a person who holds him/herself out to the public by any title or description incorporating the words "licensed professional counselor" or "licensed counselor" who offers counseling services.
- A "counselor associate" is a person certified by the Ala. Bd. Of Examiners and Counseling to offer services under the supervision of a licensed counselor.
- A "confidential communication" is one that is not intended to be disclosed to anyone other than the counselor in furtherance of the counseling services.

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### Application of the Counselor-Patient Privilege:

- The privilege may be claimed by the patient, patient's guardian or conservator, or personal representative of a deceased patient.
- The victim counselor privilege is only applicable in criminal proceedings.
- An exception exists for the counselor privilege in hospital commitment proceedings. *See Ala. R. Evid. 503A(d)(1) and advisory committee's notes; See Ala. R. Evid. 503A(d)(5).*

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### Social Worker Privilege:

- **Although the U.S. Supreme Court has extended the federal psychotherapist privilege to include licensed social workers, no statute or rule in Alabama recognizes a social worker-client privilege.** *See Jaffe v. Redmond*, 518, U.S. 1 (1996). *See also* Charles W. Gamble, *McElroy's*, 5th Ed. 2000 Supp. § 414.01(2)(c).
- **The Alabama Court of Civil Appeals has refused to recognize such a privilege.** *Phillips v. Alabama Dept. of Pensions and Security*, 394 So. 2d 51 (Ala. Civ. App. 1981).
- **Although there is no state privilege, Alabama courts have considered the regulation providing confidentiality of a social worker's records when weighing whether to allow for discovery of mental health records.** *See In re Sealed Case*, 381 F.3d 1205, 2004 U.S. App. Lexis 18340, \*27-31.

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### **What Causes of Action Exist for Improper Release of Confidential Information?**

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## Causes of Action:

- Invasion of Privacy
  - The unwarranted appropriation or exploitation of one's personality, publicizing one's private affairs with which the public has no legitimate concern, or wrongful intrusion into one's private activities in such a manner as to cause mental suffering, shame, or humiliation.
- Defamation
  - An intentional, false communication, either published or publicly spoken that injures another's reputation or good name.
- Breach of Confidential Relationship
  - Breach of qualified duty of a party to a confidential relationship not to reveal confidences obtained through the relationship.

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## Causes of Action:

- Violation of Statutory Confidentiality Requirement
  - Violation of any statutory duty imposed on a party to keep certain records or information confidential and not to release such records and information to the public.
- Violation of Implied Contract
  - Violation of any duty under any implied contract may occur when two parties enter into a confidential relationship in which a duty requires one party to keep all personal information disclosed by the other party to him.

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## Strategies to Avoid Unintended Release of Medical Records

- Who has access to medical records?
- Do all individuals who have access to medical records really need it?
- What measures are in place to prevent former employees from accessing electronic medical records?
- How secure are electronic medical records?

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## What Can Possibly Go Wrong?



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## What Is Required To Properly Release Medical Records?

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## Consent To Release Medical Records:



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### Consent To Release Medical Records:

- Any patient may authorize a healthcare provider to release his or her records to other parties or institutions.
- If the patient authorizes the release of records, the healthcare provider may assert a defense of waiver against a claim of confidentiality.
- The healthcare provider must comply with certain requirements for the release of information to be proper.

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### Requirements For Proper Consent:

- The person requesting the release has legal authority to do so.
- The authorization accurately identifies both the person authorizing the release and the person or entity receiving the records.
- The records to be released are clearly specified.
- There is no valid legal authority which prohibits the release of information requested.

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### Requirements For Proper Authorization Form:

- The patient's name;
- The date of authorization;
- The name of the provider or other third party receiving the information;
- A specific description of the records to be released;
- Clear language authorizing the release of information; and
- Signature of patient authorizing release or of a person authorized to act on the patient's behalf with a clear description of the person's authority.

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Are There Occasions  
When Disclosure of  
Medical Conditions Is  
Required By Law?

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Mandatory Disclosures:

- Notifiable Diseases – physicians, nurses, dentists, medical examiners, hospital administrators, nursing home administrators, lab directors, school principals, and day care center directors are responsible for reporting suspected cases of notifiable diseases or health conditions. (Ala. Code Sec. 22-11-A-2, Ala. Admin Code Sec. 420-4-1-.04 and .07).

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Mandatory Disclosures Include Vital Statistics:



"Fill out this tag and attach it to your big toe."

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What Documentation Is Required By Law For Health Care Providers?

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What Do I Need To Know To Properly Respond To A Subpoena?

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Types of Subpoenas

- A subpoena is a command to appear at a certain time and place to give or provide testimony upon a certain matter.
- A subpoena *duces tecum* is a court process compelling production of certain documents or things that are relevant in a judicial proceeding and are in the possession of the person to whom the subpoena is directed.

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## Limitations of Subpoenas

- A party or attorney responsible for a subpoena's issuance must not impose an undue burden or expense upon the subpoenaed party.
- A person commanded to produce and permit inspection of documents may make a written objection and serve it on the other party.
- If a written objection is made, the party upon whom the subpoena is initially served does not have to produce what is requested unless the court so orders.

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## Quashing A Subpoena:

- A court may quash or modify a subpoena if the subpoena: (1) fails to allow reasonable time for compliance; (2) requires one to travel more than 100 miles from his residence or place of employment; or (3) requires disclosure of privileged or other protected matters and no exception or waiver applies.

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## Subpoena Procedure:

- A party seeking issuance of a subpoena for production of documents must serve upon every other party a notice of its intent to serve the subpoena within at least fifteen (15) days from the service of the notice, but the court may allow a shorter or longer notice time.
- The notice may be served without leave of court upon the expiration of thirty-five (35) days after service of the summons and complaint.
- A party may serve an objection to the issuance of a subpoena for production or inspection within ten (10) days of the service of the subpoena notice. Then, the party serving the subpoena notice must move for an order compelling discovery under Alabama Rules of Civil Procedure 37(a) with respect to any objection.
- If an objection is timely served, the clerk shall cause the subpoena to be issued upon the expiration of fifteen (15) days from the service of the subpoena notice.
- Failure by any person without adequate excuse to obey a subpoena may subject a person to possible contempt of court proceedings.

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What Should I Consider Before Responding To Any Type Of Document Request?

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Considerations:

- Determine the type of records being requested (mental health, medical, financial etc.)
- Determine who is making the request and whether the person has authority.
- Determine whether the duty of confidentiality or any privilege protects the record from disclosure.
- Determine whether to respond, move for a protective order, or move to quash.

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Motion for Protective Order/Motion to Quash

- A motion to quash or for a protective order may be necessary, in some instances, to show that the person or the facility is resisting an improper attempt to gain access to confidential information.
- A protective order provides the facility and its employees with judicial protection from claims that either the facility or its employees acted improperly in releasing information subject to the protective order.

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Questions?



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