

LEGAL CONSIDERATIONS

“Let me not be understood as saying that there are no bad laws, nor that grievances may not arise for the redress of which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be replaced as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed.”

-Abraham Lincoln

As public entities created by legislation and governed by statute, Boards must comply with myriad state and federal laws in virtually every area of their existence and operations. This chapter addresses some of the legal concepts and requirements with which Board directors should become especially familiar.

Purpose and Authority

Ohio’s Community Mental Health (CMH), Alcohol and Drug Addiction Services (ADAS) and Alcohol, Drug Addiction and Mental Health (ADAMH) Boards were created pursuant to the Mental Health Act of 1988 (Senate Bill 156) and the Alcohol and Drug Addiction Services Act (House Bill 317). The statute that governs the creation, authority and activities of ADAMH/ADAS/CMH Boards is in Chapter 340 of the Ohio Revised Code. Section 340.011(A) states that Chapter 340 is to be interpreted to accomplish all of the following:

1. Establish a unified system of treatment for mentally ill persons;
2. Establish a community support system available for every alcohol, drug addiction and mental health service district;
3. Protect the personal liberty of mentally ill persons so that they may be treated in the least restrictive environment;
4. Encourage the development of high quality, cost effective and comprehensive services, including culturally sensitive services;
5. Foster the development of comprehensive community mental health services, based on recognized local needs, especially for severely mentally disabled children, adolescents and adults;
6. Ensure that services provided meet minimum standards established by the director of mental health or the department of alcohol and drug addiction services;
7. Promote the delivery of high quality and cost-effective alcohol and drug addiction services;
8. Promote the participation of consumers of mental health services and alcohol and drug addiction services in the planning, delivery and evaluation of these services.

Establishment of Boards

ADAMH Boards: An alcohol, drug addiction and mental health service district is required to be established in any county or combination of counties having a population of at least fifty

thousand to provide alcohol and drug addiction and mental health services. With the approval of the Directors of Mental Health and Alcohol and Drug Addiction Services, any county or combination of counties having a population of less than fifty thousand may establish such a district. Districts comprising more than one county are known as joint (or multi) county districts (Ohio Revised Code Section 340.01(B)).

CMH and ADAS Boards: As part of the Alcohol and Drug Addiction Services Act of 1989, the Board of County Commissioners in alcohol, drug addiction and mental health service districts comprised of a county with a population of two hundred fifty thousand (250,000) or more as of October 10, 1989, were given the option to establish a separate alcohol and drug addiction services board and a separate community mental health services board as the entities responsible for providing services in that service district. At that time, seven service districts decided to pursue this option, and those Boards remain separate today.

Pursuant to the Ohio Revised Code, a community mental health board has all the powers, duties and obligations of a board of alcohol, drug addiction and mental health services with regard to mental health services, and an alcohol and drug addiction services board has all the powers, duties and obligations of a board of alcohol, drug addiction and mental health services with regard to alcohol and drug addiction services.

Relevant State Law

There are numerous Chapters of the Ohio Revised Code (ORC) and the Ohio Administrative Code (OAC) that Boards should be familiar with and must comply with when applicable. The following are the most pertinent Chapters:

- 340** Alcohol, Drug Addiction and Mental Health Services Boards
- 3793** Ohio Department of Alcohol and Drug Addiction Services
- 5101** Ohio Department of Job and Family Services (sections pertaining to state Medicaid laws)
- 5119** Hospitalization of the Mentally Ill
- 5122** Ohio Department of Mental Health

See the Appendix for a table of contents for each of these sections. Additionally, the text of these laws can be found on the Association's website – www.oacbha.org - in the "Behavioral Health Laws" section.

Ohio Ethics Laws

Ohio's ethics laws are intended to prevent public officials and employees with potential conflicts of interest from acting on those conflicts. They apply to all public officials and employees at every level of government in Ohio, as well as to those who do business with them. The ethics statutes and rules can be found in Chapter 102 of the Ohio Revised Code and the Ohio Administrative Code. Related statutes are Ohio Revised Code Sections 2921.42, 2921.421 and 2921.43. Ohio's ethics laws prohibit unethical conduct regarding public contracts, confidentiality, "revolving door" situations, representation, conflicts of interest and supplemental

compensation, among others. They provide for remedies of education, advice and enforcement when violations do occur. As a general rule, the Ohio Ethics Commission says that “Whenever a public official’s personal financial interests, those of his family members, or those of his business associates are involved in a situation before him or her, there is an ethics issue”.

It is important to note that pursuant to Ohio Revised Code Section 102.09(D), all public officials and employees must receive a copy of the Ethics laws within fifteen days of hire, election or appointment, and they must sign a statement acknowledging that they received a copy.

For information on how Ohio’s Ethics Laws affects Board Members, see the Ethics and Conflicts of Interest section in the Board Governance chapter of this handbook.

The complete text of Ohio’s Ethics laws and corresponding administrative rules can be found on the Ohio Ethics Commission’s website - www.ethics.state.oh.us. The Commission can be contacted at 614-466-7090.

Ohio Sunshine Laws

Ohio’s Sunshine Laws, as they are commonly referred to, include the Public Records Act and the Open Meetings Act. These acts are based on the notion that there should be "openness" in government, with public access to records and meetings and to the conduct and activities of government.

The Public Records Act requires that all “public records” kept by any public office, with very few exceptions, be open to public inspection. Upon request, every public office must promptly prepare and make available for inspection its public records that do not fall into one of the exceptions. Public records are those that are:

1. Stored on a fixed medium (any information written or unrecorded via audio or digital devices), AND
2. Created, received or sent under the jurisdiction of a public office, AND that
3. Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office.

All three of these elements must be present for a document to be considered a “public record”.

The Open Meetings Act requires all public bodies to take all official actions and hold all deliberations on official business in meetings that are open to the public. This includes any committee or subcommittee meeting held by the public body. In addition, public bodies are required to establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place and purpose of any special meetings. “Special meetings” may not be held without 24 hours’ advance notice to any news media that have requested notification. If an emergency situation requires immediate official action, news media requesting notification must be informed immediately of the time, place and purpose of the emergency meeting. Minutes of every regular or special meeting must be promptly prepared

and made open to public inspection to enable the public to understand and appreciate the rationale behind the public body's decisions.

The only time a public body may hold a meeting that is closed to the public is when it adjourns into an "executive session". Executive sessions may be held if a majority of a quorum of the public body determines, by roll call vote, to hold the session during a regular or special meeting for the sole purpose of discussing any of the following matters:

- Personnel matters such as appointment, employment, dismissal, discipline or compensation.
- Purchase or sale of property if premature disclosure of information would give an unfair advantage to an individual in the bidding process.
- Conferences with legal counsel concerning pending or imminent court action.
- Preparing for, conducting or reviewing collective bargaining strategies.
- Matters required by federal or state law to be kept confidential.
- Discussion of security matters which, if disclosed, could cause a violation of law or avoiding of prosecution.

The Open Meetings Act and the Public Records Act can be found in Ohio Revised Code Sections 121.22 and 149.43, respectively.

For more information and guidance on Ohio's Sunshine Laws, see the Auditor of State's Open Government Resource Manual, which can be found on the Auditor's Web site at <http://www.auditor.state.oh.us>.

Confidentiality Laws

As Boards receive, retain and disclose individually identifiable health information on a regular basis, it is important for Board directors to be familiar with the state and federal laws that protect the confidentiality of that information.

Federal Laws

*Health Insurance Portability and Accountability Act (HIPAA) of 1996 Privacy Rule
(45 CFR Parts 160 and Subparts A and E of 164)*

There are three parts to the HIPAA statute: the Privacy Rule, the Security Rule and the Electronic Data Interchange Rule.

The Privacy Rule requires the implementation of national standards to protect the privacy of protected health information. A common misunderstanding about the HIPAA Privacy Rule is that it is exclusive of all other confidentiality laws. On the contrary, the Privacy Rule requires adherence to the most "stringent" of federal and state laws governing protected health information on any particular subject. "Stringent" means the most protective of a client's protected health information or the law that provides the client with the greatest right of access to his or her own information.

The Security Rule requires covered entities to implement policies and procedures to assure the confidentiality of protected health information that is stored, created or transmitted electronically.

The Electronic Data Interchange Rule requires all covered entities (i.e., Boards, providers) that send electronic transactions of member data to do so in a standardized format for easy and timely integration into other covered entities' computing systems.

See the Association's "HIPAA" Web page - www.oacbha.org/hipaa - for resources to assist Boards in complying with the HIPAA Privacy, Security and Electronic Data Interchange Rules.

Federal Drug and Alcohol Confidentiality Law (42 CFR Part 2)

The Federal Drug and Alcohol Confidentiality Law, commonly referred to as 42 CFR Part 2, applies to the records of individuals who received or are receiving services from drug or alcohol programs. It is quite a restrictive law and provides for few exceptions to the requirement that client authorization must be obtained prior to using or disclosing a patient's information.

The Legal Action Center, a New York-based advocacy organization, provides legal consultation on issues pertaining to the privacy of individuals receiving drug and alcohol services courtesy of a blanket subscription paid for annually by the Department of Alcohol and Drug Addiction Services. Legal Action Center staff are experts on the interplay between the requirements of the HIPAA Privacy Rule and 42 CFR in terms of which law is more "stringent" and must be adhered to (potentially both) on a particular issue. The Legal Action Center's ActionLine can be contacted at 1-800-223-4044. For additional guidance on 42 CFR and HIPAA, see the Legal Action Center handbook entitled, *Confidentiality and Communication: A Guide to the Federal Drug & Alcohol Confidentiality Law and HIPAA*.

State Laws

Both the Ohio Department of Mental Health and the Ohio Department of Alcohol and Drug Addiction Services have rules protecting the privacy of patients' records. See Sections 5122.31 and 3793.13, respectively.

In addition, Boards are required to comply with the Personal Information Systems Act which applies to all state or local entities that maintain a personal information system, which is defined as a "collection or group of related records which are kept in an organized manner...from which personal information is retrieved by the name of the person or by some identifying number, symbol or other identifier assigned to the person. This includes records that are stored in electronic and written form. The majority of the Act's provisions, found in Ohio Revised Code 1347, closely mirror some of those found in the HIPAA regulations.

As mentioned previously, the most stringent of all applicable federal and state laws governing personal health information on any particular subject must be adhered to by the Board.

Attorney General and County Prosecutor Opinions

The Office of the Ohio Attorney General (AG) publishes the opinions it writes in response to questions posed by state agencies and officers, the prosecuting attorneys of Ohio's 88 counties, and either chamber of the Ohio General Assembly. Many AG opinions apply directly to ADAMH, ADAS and/or CMH Boards. There are also numerous AG opinions that apply to Boards by virtue of the subject matter or type of entity they address.

County Prosecuting Attorney Opinions are also a source of guidance for how Boards are required to proceed on particular matters. A Board can submit questions to its county prosecutor and must also comply with opinions issued by the prosecutor on applicable issues.

See the Association's Web site for a list of State Attorney General and County Prosecuting Attorney opinions that are relevant to Boards (www.oacbha.org - under the "Executive Director's Only" section and click on "Legal Assistance").

Legal Counsel

Board legal representation is different for single-county and multi-county Boards. Pursuant to Ohio Revised Code Section 309.09, the county prosecutor is the general legal counsel for single-county Boards. The single-county Board "may require written opinions or instructions from the county prosecutor in matters connected with his/her official duties." The prosecuting attorney is also required to prosecute and defend all suits and actions to which the Board or its officers are a party, and the Board may not employ any other counsel or attorney at the expense of the county, except with the authorization of the court of common pleas upon application of the prosecuting attorney and the Board of County Commissioners.

For multi-county Boards, there is no authority for the county prosecuting attorney in any county in the Board's district to represent the Board. Therefore, multi-county Boards must secure private legal counsel (See 1975 OAG 75-014).

Additional Considerations

- The "Legal FAQs" section of the "Director's Only" area of the Association's Web site lists responses to questions that the Association most often receives from Boards (www.oacbha.org - under the "Executive Director's Only" section and click on "Legal Assistance").

