

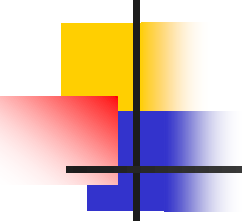


Confidentiality of Alcohol and Other Drug Treatment



Purpose of the Law

People with Drug and alcohol problems would be more likely to seek or accept treatment if:

- 
-
- they knew their substance abuse problems would not be revealed to others
 - they could trust their counselors and programs not to reveal stigmatizing private information about them



Who has to practice this law?

- Holders of information
- Those who have information from other programs
- Those who seek information



Which Providers must comply with 4CFR2?

- Providers must meet the definition of “program” and be “federally assisted.”
- Program includes any person or organization that, in whole or in part, provides alcohol or drug abuse diagnosis, treatment or referral for treatment or prevention.



Mental Health Providers

- Diagnosis alone does not trigger 42CFR2.
- To be protected by 42CFR2, the diagnosis must be made for the purpose of alcohol/drug treatment or referral for treatment.



Consequences of Violating or Disregarding the Law

- Up to \$500 for the first offense
- Up to \$5,000 for each subsequent offense
- The drug or alcohol program may lose its state certification or accreditation
- A medical professional or licensed psychologist, social worker or other counselor may jeopardize his/her professional license



42 CFR Part 2

- **Information Protected Under the Rule:**

“Patient Identifying Information (PII)”

- Information, *recorded or unrecorded*, that could potentially **link** an individual, *by name or otherwise*, to a substance abuse treatment program
- Protection to anyone who has *applied for or been given* substance abuse treatment services and anyone checking on *eligibility* to get into a program following arrest on a criminal charge.

- **Disclosure Prohibited Under the Rule:**

- Direct communications of PII
- Verifications of PII.



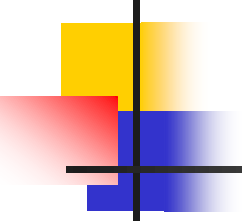
Disclosing Information Is...

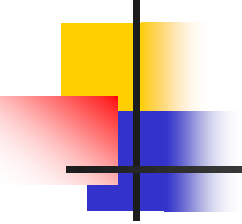
- ...to communicate in any way, written or oral, which identifies someone as an alcohol or drug abuser or recipient of alcohol or drug services 42 CFR 2.11, 2.12 (a)(1)(i)

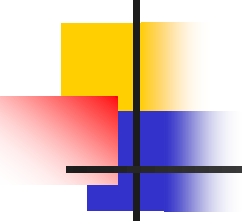


How do agencies disclose?

- Handing over written records with a patient's name on them
- Testifying in court about a patient's treatment
- Reporting to a government agency that a person has sought treatment or referral for an alcohol problem
- Confirming that someone is or was a patient
 - Example: answering a telephone call saying, "yes, she is a patient here. Please hold."

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- Reporting to a court about the progress of a patient mandated into treatment as a condition of his/her probation
 - Calling a managed care or other insurance company for pre-authorization

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- Reporting to Child Welfare the fact that a parent whose children were removed because of a drug problem did not show up for treatment after calling for an appointment
 - Reporting to the welfare caseworker the attendance of a patient referred into treatment as a condition of receiving welfare payments
 - Sending a letter to someone's home with a *return address* such as "ABC Alcoholism Treatment Center"

- 
-
- Providing a list of social security numbers or drivers' license numbers of patients
 - Providing the first name and address or telephone number of a patient
 - Repeating a distinctive story about an unnamed patient who could be identified by details in the story



Who is a “Patient”?

- Anyone who has **applied for** or **received** any sort of individual service relating to drug or alcohol abuse – treatment, counseling and/or diagnosis

42 CFR 2.11



“Patient” Examples

- A person who schedules an appointment for an evaluation but never shows up
- A person who completes an intake procedure but decides not to enter treatment
- A person who receives services, even if he/she did not ask for them



“Patient” however...

- A person whose appointment for an evaluation was arranged by someone else (e.g. a probation officer or child protective caseworker) and who does not show up is not a “patient” because that person never “applied” for services him/herself. That person’s records are not protected.



Situations Allowing Disclosure

- Information can be disclosed within a program or to an entity having direct administrative control over that program, if the recipient needs the information for duties that arise from the provision of substance abuse services 42 CFR 2.12(c)(3)



“Within a Program” means

- Within an alcohol or drug agency or within the substance abuse unit of a larger, multi-service organization service



Examples of Internal Program Communications

- Staff of a detox program in a hospital are within the same program and may share information
- Staff of a free-standing treatment program are within the same program and may share information



Situations Not Allowing Disclosure

- A substance abuse program that is a state or county agency may not share information with other state or county agencies
- A hospital detox unit may not share information with the entire hospital staff



QSO/BA Agreements

- Qualified Service Organization (42CFR@)
- Business Associate (HIPAA)



QSO/BA

- A written agreement that allows programs to disclose information without the patient's consent to an outside organization that provides services to the program or to the program's patients.



For example:

- Data processing
- Laboratory analyses
- Patient transportation
- Attorney
- CPA
- Medical/health care



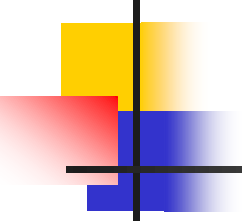
QSO/BA

Two programs cannot enter into a QSO Agreement.



Situations Allowing Disclosure

- An entity having direct administrative control over the Program may receive information only if it is needed in connection with duties arising out of the provision of drug and alcohol services

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- A hospital-based program may share information with other parts of the hospital that are providing administrative services (e.g., record keeping, accounting) for patients in the substance abuse unit



Example of Internal Program Communications

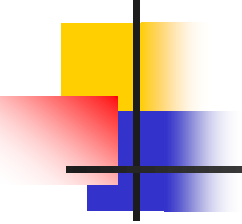
(continued)

- A program within a health maintenance organization (HMO) may give the HMO's central billing office the names of patients, their attendance records, and other information necessary to process the billing



Communication Within A Program Is...

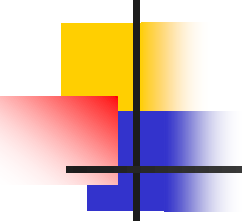
- On a “need to know” basis
 - Only those who need the information in connection with their duties related to alcohol or drug abuse diagnosis, treatment, referral or prevention may have access to it

- 
-
- A counselor may share information with a clinical supervisor and members of a clinical team
 - A program may not distribute lists of all its patients to all employees, unless they all have some need for it



Remember

- Anyone within the program or in direct administrative control of it who receives information under this exception is bound by the confidentiality regulations and may not disclose the information to anyone else, except as the regulations permit

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- Exceptions permit only “LIMITED” disclosures, which are disclosures of only so much information as is necessary to carry out the purpose of the disclosure 42CFR 2.13(a)



- Exceptions

Permitting

Disclosure With

Written Consent:



42 CFR "*Consent*"

- A program may disclose information about a patient if the patient specifically authorizes this process by signing a valid consent form

42 CFR 2.31, 2.33



The "*Consent*" Must Include:

1. Name of Program/general discription
2. Name of Recipient
3. Name of Patient
4. Purpose/Need
5. Extent/Nature
6. Revocation Statement
7. Expiration (date or event)
8. Signature of Patient
9. Date
10. Program's ability to condition treatment, payment, enrollment or eligibility on the patient's agreeing to sign the content.



42CFR & Redisclosure

- Any disclosure made with written patient consent must be accompanied by a written statement that the information is protected by federal law and that the recipient cannot make any further disclosure unless permitted by the regulations.
- 42CFR2.32 & "Confidentiality and Communication", Legal Action Center 2006, page36



Redisclosure:

- Consumer may sign a consent that specifically allows redisclosure.



Scenarios:

- Judy signed a consent form authorizing Gogebic CMH to release her records to Gogebic Community College. Gogebic CMH's file has records from Great Lakes Recovery. Can CMH turn over the Great Lakes records to the community college?
- No. Unless the consent permitted release of Great Lakes records.



Scenarios:

- Famous local celebrity decides it's time to seek drug treatment. FLC is fearful that his treatment will become public information. FLC refuses to sign consent form, which the program needs for billing insurance. Must the program take FLC as a patient, or can it condition treatment on FLC's signing the consent?



Answer:

- The program may refuse to treat FLC if he will not agree to sign the consent form. SAMSHA has stated that HIPAA's prohibition on conditioning treatment on signing a consent form does not apply where a program seeks signature in order to treat the patient or obtain payment for treatment.



Irrevocability of the Consent for the Criminal Justice System:

- Used to be:
 - Special consent forms for disclosures to elements of the criminal justice system that refer patients to treatment as a condition of the disposition of criminal charges against them may be made irrevocable 42 CFR 2.35



However...

- Due to HIPAA (45 CFR), Consents for the Release of Confidential Information for the Criminal Justice System Referral are to be revocable
- It is possible to have a court order that overrides HIPAA.

When a Patient Revokes a Consent



- To revoke a consent (written/oral) at the request of the patient,
 - Draw a line through the consent form
 - Add signatures and date from both the patient requesting this action and the staff person acting on the request
 - Provide a copy for the patient
 - Place revoked consent in the patient's file
 - Inform appropriate staff personnel



Limited Exceptions

- Limited exceptions to confidentiality apply when:
 - Crime on Premises
 - Medical Emergencies
 - Suspected *Child* Abuse or Neglect



Crime on Premises

- Commits a crime (against anyone – including other patients) on program premises
- Commits a crime against a member of the staff (anywhere, even off program premises)
- Threatens to do either 42 CFR 2.129(c)(5)



Programs may...

- Give information related directly to the crime or threat
- Report limited to the circumstances of the incident
- Report limited to the patient's name, address, last known whereabouts
- May not report on past crimes committed elsewhere, unless against program personnel



Example:

- A patient assaults another patient during group therapy. The program could call the police and report the circumstances of the crime, including the patient's name, address and last known whereabouts.



The Program may not...

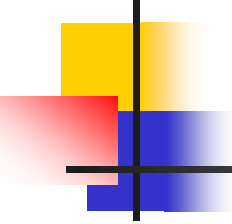
- give the patient's entire record to the police. Neither may the program disclose the names of the other group therapy patients who witnessed the event, without their consent.



Medical Emergencies

- Even without consent, patient-identifying information may be disclosed to certain persons in the event of a medical emergency

42 CFR 2.51



Disclosures may be permitted when a patient has a medical condition that...

- poses an immediate threat to the health of an individual
- requires immediate medical intervention



Programs may disclose information to:

- Medical personnel only
- Those who need the information in order to treat the threatening medical condition
- But NOT family members
- NOT “emergency contacts”



Best Practice:

- Have all incoming recipients sign a form indicating who should be contacted in case of emergency and authorizing release of information about the emergency and their whereabouts.



Suspected Child Abuse or Neglect

- Program staff may comply with State mandatory reporting laws per the following:
 - Make an initial report to the state's child abuse hotline
 - Provide written confirmation, if required
 - Provide nothing more in follow-up investigation, unless provided with patient's written consent or a valid court order 42 CFR 2.12(c)(6)

Confidentiality- HIPAA (Health Insurance Portability

and Accountability Act)
Regulations)

versus 42 C.F.R. (Code of Federal

- Although HIPAA allows ample disclosure to law enforcement agencies, these provisions are *permissive* and not mandatory, whereas 42 C.F.R. Part 2 limits when and how such disclosures are allowed.



HIPAA versus 42 CFR.

- Programs should continue to follow 42 CFR Part 2's mandatory provisions when determining whether and how to make disclosures in these circumstances.



Subpoenas

- You are served with a subpoena that directs you to appear in court with your entire file on a particular recipient and testify about the records in the file.
- You get a subpoena in the mail that directs you to turn over your entire file on a particular patient to an attorney.
- Should you turn the records over and testify?



Answer:

- NO.
- A subpoena that compels you to testify about a recipient or to turn over records is NOT an exception to the general privacy rule.



HIPAA versus 42 CFR. (Confidentiality Final Rule)

- HIPAA allows disclosure in response to a warrant, subpoena, or other investigative demand, 45 CFR 164.512(f)(1), ***but such disclosures are strictly prohibited under 42 CFR Part 2*** unless the patient consents or a court has issued an appropriate/unique order under 42 CFR



Subpoenas & 42 CFR Part 2

- A program confronted with a subpoena or court order directing it to produce patient records or testimony about a patient is best advised to seek the advice of legal counsel
- Those situations involving subpoenas, warrants and court orders are best handled by attorneys



What is a Subpoena?

- A subpoena is a mechanism by which litigants invoke the power of a court to compel an individual to testify or to produce documents.
- Failure to respond to a subpoena – whether by complying with its terms or by appearing in court to object to it (moving to “quash” the subpoena) – may constitute contempt

Legal Action Center, Confidentiality and Communication (2006). New York, p. 60



Who May Issue a Subpoena?

- Judge
- Court Clerk
- District Attorney
- State Attorney General
- Private Attorney
- Lawyer representing a party
- Judge or agency responsible for the hearing and deciding the case



Subpoenas

- A subpoena by itself is not legally sufficient to authorize or compel a program to testify or turn over any patient records to the requesting party 42 CFR 2.61(b)



Subpoenas (continued)

- A program may not turn over any information (including both documents and verbal testimony) in response to a subpoena unless either:



Subpoenas (continued)

- (a) the patient about whom information is sought signs a proper consent form authorizing the program to release the requested information
- (b) a court orders the program to release information or records after giving the program and patient an opportunity to be heard and after making a good cause determination under the confidentiality law and regulations



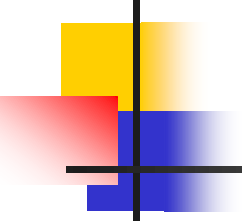
Court Order

- 42CFR2: a court may issue an order authorizing disclosure of confidential records ONLY after it follows certain procedures and makes particular determinations.
- A subpoena alone is not sufficient to authorize/compel a program to disclose information – it may be enough to compel attendance at a hearing about disclosure.



If No Attorney is Available

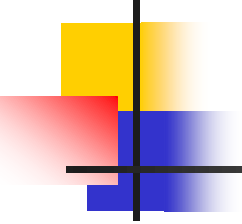
- Program Director should examine the document carefully, with the following considerations in mind:
 - Except when the program itself is the subject of a criminal investigation, a valid court order may not be issued under 42 C.F.R. Part 2 unless the program first received notice about a hearing at which it could appear or present written objections.

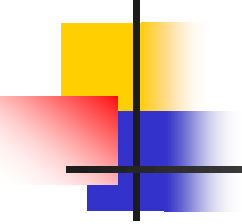
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- So, unless the program was notified that a court order was being sought, no proper court order under the confidentiality law and regulations could be issued
 - Furthermore, a proper court order will usually state specifically that it is being *issued pursuant to 42 CFR Part 2*



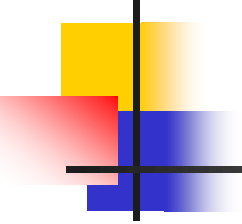
What to do...Subpoenas

- If a program is served with a subpoena to produce documents (as opposed to one to appear at a court hearing) then three general principles may guide programs on how to respond:

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-
- (a) No information should be released by a treatment program in response to a subpoena, even if it is signed by a judge, until and unless a court issues an authorizing/unique order under 42 CFR Part 2.

- 
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- (b) The subpoena should not be ignored. Failure to respond in some way may be grounds for a finding of contempt of court and can result in a fine or even a term in jail

Legal Action Center, Confidentiality and Communication (2006). New York, p. 63

- 
-
- (c) The person (or the program) to whom the subpoena is addressed does not automatically have to testify or turn over the requested materials. The person (or program) has the right to appear and object to the subpoena

Legal Action Center, Confidentiality and Communication (2006). New York, p. 63



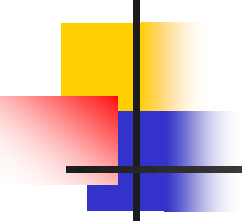
Subpoena Signed by a Lawyer

- If a subpoena is signed by a lawyer representing the patient, the program should inform the patient or the lawyer (after obtaining the patient's written consent to contact the lawyer) that the patient must sign a proper consent form authorizing the program to comply with the subpoena.



When You Do Not Have to Comply

- If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure 42CFR § 2.61(a)(2)

- 
-
- However, upon the entry of a valid subpoena or other compulsory process, the person authorized to disclose must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of these regulations

42 CFR 2.61(a)(2)

Search Warrants or Arrest Warrants

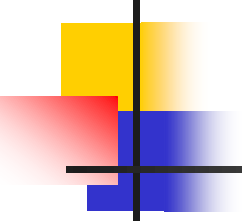


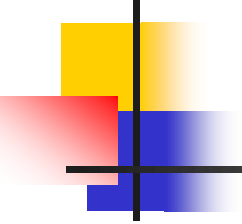
- Neither may programs disclose any alcohol or drug information in response to search warrants or arrest warrants, even if signed by a judge, unless the warrants are accompanied by a court order that satisfies the unique requirements of 42 CFR Part 2.

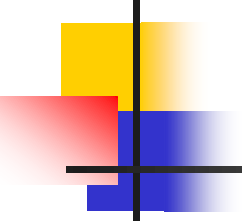


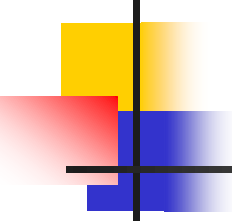
What Programs are to do with a Search or Arrest Warrant

- A counselor or a program confronted by a law enforcement officer with a search or arrest warrant should take the following steps:

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- (1) Produce a copy of 42 CFR Part 2 and explain that the program cannot cooperate with a search or arrest warrant without an appropriate/unique court order, one that has been issued in accordance with the regulations.

- 
-
- (2) Try to get time to notify a lawyer and let him or her attempt to resolve the situation with the officer so that neither the patient's rights nor the program's position is compromised.

- 
-
- (3) Ask to contact the prosecuting attorney or commanding officer so that the program can repeat its arguments, stressing that an authorizing court order is required before the program may make any disclosure. For search warrants, stress that illegally seized records will not be admissible in court.

- 
-
- (4) Very important – if the officer insists on entry, do not forcibly resist. Refusing to obey the orders of a law enforcement officer may constitute a crime, even though the officer's orders may later be shown to be erroneous or illegal
 - 42 CFR Part 2 does not require programs to forcibly resist an officer who insists on entry

Legal Action Center, Confidentiality and Communication (2006). New York, p. 67



Scenario #1

- Crime against program personnel
 - Mike is a counselor at the XYZ Treatment Program. One of his patients, John Doe, has confided to Mike that he plans to ambush his former counselor, Len, on his way home one night and “beat the pulp out of Len”. Len also works at the XYZ Treatment Program.



Scenario #1 (continued)

- Mike is worried about and wants to protect Len. Can he call the police? Can he warn Len?



Scenario #1 (continued)

- Response:
 - Mike may report the threatened crime to the police. He may give John's name, address, last known whereabouts, and status as a patient at the program CFR 2.12 (c)(5)



Scenario #2

- Patient drops out of mandated treatment
 - Luke was mandated into drug treatment as a condition of receiving probation. When he arrived at the treatment program, he signed a consent form authorizing the program to make regular reports to the probation department and court regarding his attendance in treatment



Scenario #2 (continued)

- After attending five outpatient sessions (he was mandated to attend 20), he told his counselor that he was dropping out of treatment. On his way out the door, he shouted, “and I revoke my consent for your reports to my probation officer and the court”.



Scenario #2 (continued)

- Can Luke's Counselor, Betty, report to the probation officer and the court in light of Luke's revocation? What should she do?



Response

- The first thing Betty should do is check Luke's consent form to see if it was made irrevocable
- However, understanding that HIPAA requires that consents are unconditional and revocable, Betty may not provide any information to the criminal justice system.
- Unless there is a court order that overrides HIPAA.



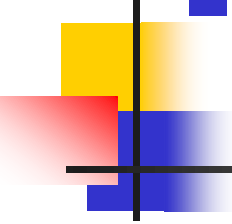
Scenario #3

- Subpoenas and Warrants
 - Eileen, the receptionist at XYZ Treatment Center, was tending the phones one day when two police officers entered the program's lobby. They said they had a search warrant for John Doe's records and believed that John resided at the program



Preventive Action

- Programs should establish relationships with local law enforcement officials and familiarize them with the confidentiality regulations

- 
- It is a good idea to keep a copy of the confidentiality regulations at hand so that when situations like this arise, the program can show the regulations to the person seeking access to the program or its records



Other considerations:

- There is no duty to warn under 42CFR2
- Minors – the minor must consent to the disclosure of information under 42CFR2
- 42CFR2 has no provision for reporting to Adult Protective Services
- 42CFR has does not provide for Michigan P&A to have access to information



Duty to Warn:

- Michigan has a duty to warn.
- How do you warn and not violate 42CFR2?
- Obtain a court order.
- Anonymous or non-patient identifying report. (don't implicate substance abuse treatment.)



Scenario:

- Ellen tells her therapist Lucy, that she is planning to kill her boyfriend, Hank that night. Ellen has a history of violence. She often has talked to Lucy about her violent impulses toward Hank and has threatened him before. Lucy thinks that this threat is different, however. Ellen says she bought a gun the day before.



Continued:

- Ellen has an alibi worked out and has the ability to carry out the plan. Lucy believes her.
- Lucy is concerned. Lucy wants to call the police but she is afraid she will violate confidentiality.
- What should she do?



Answer:

- She can seek a court order
- She can call the police and say she's from Pathways without identifying that Ellen is receiving substance abuse treatment as well as mental health treatment.



Minors:

- Scenario: Mike is 15. He is receiving co-occurring treatment. His mother authorized treatment. His mom signed a release for you to share information with the youth minister at church.
- Can you talk to the youth minister?



Answer:

- NO.
- Mike's consent is required – even if his mom signed for treatment and the consent.



Minors:

- Programs must always obtain the minor's consent for disclosures and cannot rely on the parent's signature instead.
- If parental consent was not required to treat the minor, then parental consent is not required to make disclosures.
- If parental consent for treatment is required, the consent of both the minor and the parent/guardian is required.



Scenario:

- Sue, a minor, just had a relapse. She is drinking so much that she is passing out.
- Can the program tell her parents?



Answer:

- Not unless Sue signed a release allowing the program to contact her parents.
- What about an emergency?
- If Sue's health is threatened and requires immediate medical attention, the program can notify medical personnel who need information to treat the medical emergency.
- If not an emergency, the program could seek a court order.



Best Practice:

- If both the minor and parent/guardian consent to treatment, obtain a release from the minor at intake.
- Explain to parents at intake that at some point in the future, if there is not a release from the child, CMH may not be able to communicate with them anymore about the child's treatment.



Commitment Hearing/ATO

- If no consent to release information,
- Only testify about mental health treatment. Clinical record does not go to court.
- Best Practice: Discuss with courts/law enforcement, CMH's need to comply with 42CFR2 before issues arise.



Anonymous Disclosures

- Ethical considerations
- Not disclosing in a way that connects the person to the program
- Court orders



Other considerations:

- Guardians/GALS
- 42CFR2 – only recognizes the legal guardian of someone who has been adjudicated incompetent.
- GALs – program would need court order authorizing release.
- Power of Attorney – can not authorize release but can authorize treatment.



Thank You

- References:

- Jeanne Diver, RR Consultant, Mid-South Substance Abuse Commission.
- Legal Action Center (20036: Confidentiality and Communication, 6th Edition. City of New York, Inc and portions of Power Point.