

**FEDERAL CONFIDENTIALITY LAW IN THE
TREATMENT OF SUBSTANCE USE DISORDERS:
UNDERSTANDING 42 CFR, PART 2**

A PRESENTATION BY
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**THIS PRESENTATION IS NOT INTENDED
NOR IS IT TO BE CONSTRUED
AS LEGAL ADVICE**

INFORMAL QUIZ 1

CLIENT A, WHOM YOU NOW KNOW TO HAVE DIED FROM AN OVERDOSE, WAS TREATED IN YOUR FACILITY SIX MONTHS BEFORE. A MONTH AFTER HIS DEATH, YOU GET A CALL FROM HIS BROTHER WHO WANTS YOU TO FAX THE RECORD OF HIS TREATMENT. HE SAYS, "YOU ARE AWARE THAT, SINCE "A" IS DEAD, THERE IS NO LONGER ANY CONFIDENTIALITY." WHAT DO YOU DO?

INFORMAL QUIZ 2

CLIENT C'S SISTER CALLS AND ASKS FOR YOU, SPECIFICALLY, TO INQUIRE ABOUT CLIENT C. THIS SISTER ACTUALLY BROUGHT CLIENT C TO YOUR FACILITY AND PARTICIPATED IN YOUR FAMILY WEEKEND TWO DAYS AGO, AND YOU KNOW HER TO BE A CONCERNED FAMILY MEMBER. HOW DO YOU RESPOND?

INFORMAL QUIZ 3

A STATE POLICEMAN COMES TO YOUR FACILITY AND SAYS THAT HE WANTS TO SEE A CERTAIN INDIVIDUAL REGARDING A STRING OF BURGLARIES IN THE AREA. THE TROOPER SAYS THIS INDIVIDUAL MAY HAVE INFORMATION HELPFUL TO THE INVESTIGATION, ALTHOUGH HE IS NOT A SUSPECT. YOU KNOW THIS INDIVIDUAL IS A CLIENT IN YOUR PROGRAM. HOW DO YOU RESPOND?

INFORMAL QUIZ 4

YOU WANT TO REFER CLIENT D TO A RESIDENTIAL TREATMENT FACILITY. YOUR COMPUTER IS DOWN, AND YOU CANNOT ACCESS YOUR STANDARD RELEASE FORM. CLIENT D AGREES TO HAND WRITE, SIGN, AND DATE A RELEASE, STATING THAT YOU HAVE HER CONSENT TO SEND HER RECORDS TO THE SPECIFIED TREATMENT FACILITY. WILL THIS WORK?

INFORMAL QUIZ 5

CLIENT E STATES THAT SHE WANTS HER IMMEDIATE FAMILY (MOTHER, FATHER, TWO SISTERS, AND A BROTHER) TO BE ALLOWED TO KNOW ABOUT HER PROGRESS IN YOUR PROGRAM. SHE SIGNS A CONSENT OKAYING RELEASE OF INFORMATION “TO THE IMMEDIATE FAMILY OF...” ALL OTHER CRITERIA FOR A VALID RELEASE ARE MET. IS THIS A VALID RELEASE?

INFORMAL QUIZ 6

YOU ARE CALLED TO THE LOBBY OF YOUR DETOXIFICATION UNIT WHERE THERE IS A CONSTABLE WANTING TO SERVE CLIENT B, A CLIENT CURRENTLY IN YOUR FACILITY, WITH A SUBPOENA FROM AN ATTORNEY REPRESENTING THE CLIENT’S SPOUSE IN A DIVORCE PROCEEDING. HOW DO YOU HANDLE THIS?

REASONS FOR CFR 42, PART 2

- DECREASE STIGMA
- DECREASE CONSEQUENCES FOR:
CRIMINAL PROCEEDINGS
CHILD CUSTODY ISSUES
DIVORCE PROCEEDINGS
EMPLOYMENT ISSUES

FOR THOSE SEEKING SUD TREATMENT

PENALTIES FOR VIOLATIONS SEVERE

- FINES UNDER TITLE 18 OF THE US CODE
- ALSO, ETHICAL VIOLATION
MAY RESULT IN LICENSE SUSPENSION
OR LOSS

WHO MUST COMPLY?

- FEDERALLY-ASSISTED PROGRAMS
(i.e. AN INDIVIDUAL OR ENTITY)
THAT “HOLDS ITSELF OUT” AS PROVIDING
DIAGNOSIS, TREATMENT, OR REFERRAL
FOR SUBSTANCE USE DISORDERS

WHO MUST COMPLY?

“FEDERALLY-ASSISTED” MEANING LICENSED, CERTIFIED, AUTHORIZED, AND/OR FUNDED

- BY FEDERAL GOVERNMENT FOR AUTHORIZED
MAINTENANCE OR WITHDRAWAL TREATMENT
- TO DISPENSE UNDER THE CONTROLLED SUBSTANCES ACT
- OR UTILIZING SUCH A PRESCRIBER
- OR IS FEDERALLY-FUNDED:
MEDICARE/MEDICAID
GRANT FUNDS
TAX EXEMPT **OR** IRS ALLOWS DONOR TAX DEDUCTIONS
OR RECEIVES STATE FUNDS FROM US GOVERNMENT
THAT **ARE** USED OR **COULD BE** USED FOR SUD TREATMENT

WHO MUST COMPLY? (CONTINUED)

- DOES **NOT** APPLY TO GENERAL MEDICAL FACILITIES
- **DOES** APPLY TO UNITS OF SUCH FACILITIES
THAT ENGAGE IN SUD TREATMENT

DISCLOSURE DEFINED

- ANY COMMUNICATION ABOUT A CLIENT THAT
WOULD IDENTIFY SOMEONE AS A CLIENT
OR AS A PAST CLIENT
OR
AS A DRUG OR ALCOHOL ABUSER
OR AS ONE WHO SOUGHT TREATMENT
INCLUDING BY REFERRING TO INFORMATION
IN THE PUBLIC DOMAIN
OR
ALREADY KNOWN TO BE BY THE INQUIRING PARTY

DISCLOSING PRESENCE IN SUD TREATMENT PROGRAM

- ONLY WITH CLIENT'S WRITTEN CONSENT
- UNLESS OTHERWISE PROVIDED FOR BY LAW

WHEN DOES CONFIDENTIALITY APPLY?

- EVEN IF THE PERSON SEEKING IT
ALREADY HAS THE INFORMATION OR
- HAS OTHER WAYS OF GETTING IT
EVEN IF IT'S IN THE PUBLIC DOMAIN
- APPLIES TO LAW OFFICERS AND OTHER SUCH
OFFICIALS,
- EVEN WITH A SUBPOENA (UNLESS ACCOMPANIED BY
A JUDGE'S SIGNED AUTHORIZATION)

CONFIDENTIALITY LIMITS & SAFEGUARDS

- LIMITED TO WHAT IS NECESSARY FOR PURPOSE OF DISCLOSURE
- STRICT COMPLIANCE REQUIRED WITH FEW EXCEPTIONS
- EVEN MERE PRESENCE IN A PROGRAM CANNOT BE ACKNOWLEDGED EITHER EXPLICITLY OR IMPLICITLY

REQUIREMENTS FOR A VALID RELEASE

- NAME OF CLIENT
- INDIVIDUAL OR ENTITY PERMITTED TO DISCLOSE
- INDIVIDUAL OR ENTITY PERMITTED TO RECEIVE
- AMOUNT & KIND OF INFORMATION BEING DISCLOSED
- PURPOSE OF DISCLOSURE
- STATEMENT OF CLIENT'S ABILITY TO REVOKE RELEASE (EXCEPT FOR DISCLOSURES ALREADY ACTED UPON)
- DATE OR EVENT ON WHICH RELEASE EXPIRES
- CLIENT SIGNATURE & DATE OF SIGNING

CONSENT MAY NOT BE USED IF IT

- IS EXPIRED BY DATE OR EVENT
- FAILS TO CONFORM WITH REQUIREMENTS
- IS KNOWN TO HAVE BEEN REVOKED (BY ANY MEANS)
- IS KNOWN TO BE MATERIALLY FALSE

DO YOU HAVE A RELEASE?

- DO NOT GUESS!
- BE CERTAIN BEFORE YOU DISCLOSE!!!
- RELEASES ARE ALWAYS TO A SPECIFIC PERSON OR STAFF
- NEVER “TO FAMILY MEMBERS OF.....”

RESPONDING WITHOUT DISCLOSURE

RESPONSES TO ALL NON-PERMITTED DISCLOSURES

- MUST BE MADE IN A WAY THAT DOES NOT REVEAL THAT A CLIENT HAS BEEN OR IS BEING DIAGNOSED OR TREATED FOR A SUD
- A COPY OF 42 CFR, PART 2 MAY BE GIVEN TO THE INQUIRING PARTY WITHOUT INDICATING IT IS IN REFERENCE TO A PARTICULAR PERSON

FAMILY & FRIENDS

CONFIDENTIALITY INCLUDES

- FAMILY & FRIENDS OF THE CLIENT
EVEN WHEN THEY KNOW A CLIENT IS IN TREATMENT
EVEN IF WE SAW THEM BRING THE CLIENT TO TREATMENT
EVEN IF THEY HAVE PARTICIPATED IN FAMILY TREATMENT OR SOME OTHER PROGRAM ACTIVITY

NO EXCEPTIONS!!!

NOT JUST EXPLICIT BUT IMPLICIT DISCLOSURES ARE PROHIBITED

TO PHONE CALLER OR VISITOR:
“HOLD ON, LET ME CHECK HIS CHART FOR A
RELEASE.”

NEVER!!!

WHAT TO SAY TO CALLERS IF WE DON'T KNOW OF A SIGNED RELEASE

“I CAN NEITHER CONFIRM NOR DENY ANY
PERSON IS A CLIENT HERE. THIS IS A MATTER
OF FEDERAL LAW, WHICH IS VERY STRICT IN
THIS CASE. I CANNOT SPEAK WITH ANYONE
ABOUT ANY CLIENT UNLESS THERE IS A SIGNED
RELEASE OF INFORMATION FOR THAT
PERSON.”

IF A CALLER PERSISTS, YOU MIGHT RESPOND HYPOTHETICALLY

“AGAIN, I CANNOT CONFIRM NOR DENY THAT ANY PERSON IS A CLIENT. HOWEVER, I WILL CHECK OUR RECORDS TO SEE IF SUCH A CLIENT EXISTS AND IF THERE IS A SIGNED RELEASE FOR YOU. IF THIS PERSON IS A CLIENT HERE AND IF THERE IS A SIGNED RELEASE FOR YOU, I WILL CALL YOU BACK WITHIN HALF AN HOUR. IF YOU DO NOT GET A CALL BACK FROM ME IN THAT TIME, THEN THIS PERSON EITHER IS NOT A CLIENT HERE OR ELSE HAS NOT SIGNED A RELEASE OF INFORMATION FOR YOU. MAY I HAVE YOUR PHONE NUMBER, PLEASE?”

MINOR CLIENTS

- IF A MINOR HAS THE LEGAL CAPACITY TO ACT ALONE, ONLY HE OR SHE CAN GIVE CONSENT
- IF STATE LAW REQUIRES CONSENT FOR TREATMENT FROM PARENT, GUARDIAN, OR OTHER, THEN AUTHORIZATION MUST BE GIVEN BY **BOTH** MINOR AND PARENT OR GUARDIAN

MINOR CLIENTS WHEN PARENTAL CONSENT IS REQUIRED

MINOR'S APPLICATION FOR TREATMENT MAY ONLY BE COMMUNICATED TO PARENTS OR OTHERS **IF**

- MINOR HAS GIVEN WRITTEN CONSENT, **OR**
- MINOR LACKS CAPACITY FOR RATIONAL CHOICE (DUE TO EXTREME YOUTH OR MENTAL OR PHYSICAL CONDITION), **OR**
- MINOR'S CONDITION POSES THREAT TO SELF OR OTHERS

MEDICAL EMERGENCIES

- PART 2 DOES NOT DISTINGUISH BETWEEN PHYSICAL & MENTAL HEALTH ISSUES
- SIMPLY DEFINED AS A HEALTH EMERGENCY AFFECTING ANY INDIVIDUAL THAT REQUIRES IMMEDIATE MEDICAL INTERVENTION

DISCLOSURES TO RELEVANT ENTITIES IN THE CRIMINAL JUSTICE SYSTEM (CJS)

- MAY DISCLOSE INFORMATION TO THOSE W/IN THE CJS WHICH HAVE MADE PROGRAM PARTICIPATION A CONDITION FOR DISPOSITION OF CRIMINAL PROCEEDINGS (INCLUDING PROBATION OR PAROLE OR OTHER RELEASE FROM CUSTODY)

DISCLOSURES TO RELEVANT ENTITIES IN THE CRIMINAL JUSTICE SYSTEM (CJS) (CONT.)

- ONLY TO THOSE WITHIN THE CJS WHO HAVE A NEED TO KNOW
- BASED ON NEED TO MONITOR PROGRESS (e.g. PROSECUTING ATTORNEY, THE COURT, AND PROBATION AND PAROLE) **AND**
- CLIENT HAS SIGNED A WRITTEN CONSENT THAT MEETS REQUIREMENTS OF Section 2.31

PROCEDURES AND CRITERIA FOR AUTHORIZING DISCLOSURE TO CRIMINALLY INVESTIGATE OR PROSECUTE A CLIENT

PERSON HOLDING THE RECORDS MUST BE PROVIDED:

- ADEQUATE NOTICE
- OPPORTUNITY TO APPEAR AND BE HEARD
- OPPORTUNITY TO MEET IN JUDGE'S CHAMBERS (AS OPPOSED TO OPEN COURT)

CRIMINAL INVESTIGATION OR PROSECUTION

COURT MUST FIND THE FOLLOWING CRITERIA IS MET:

- CRIME IS EXTREMELY SERIOUS
- IT IS LIKELY THAT THE RECORDS HAVE SUBSTANTIAL VALUE TO THE CASE
- OTHER WAYS OF OBTAINING THE INFORMATION IS NOT AVAILABLE
- POTENTIAL INJURY TO CLIENT OR CLIENT-COUNSELOR RELATIONSHIP IS OUTWEIGHED BY THE PUBLIC INTEREST

AFTER DEATH OF CLIENT RECORDS STILL PROTECTED

AUTHORIZED SIGNATURE REQUIRED BY:

- EXECUTOR OR ADMINISTRATOR UNDER APPLICABLE STATE LAW
- IF NONE, THEN BY SPOUSE ONLY
- IF NO SPOUSE, BY ANY RESPONSIBLE FAMILY MEMBER

REASONS FOR RELEASE WITHOUT AUTHORIZATION

- MEDICAL EMERGENCY
- CRIME OR THREATS OF CRIME ON TREATMENT PREMISES
- SUSPECTED CHILD ABUSE & NEGLECT
- PROGRAM AUDITS AND EVALUATIONS
- ORDER OR SUBPEONA **SIGNED** BY A JUDGE

HIPAA VERSUS 42 CFR, PART 2 WHO CAN SIGN A CONSENT

- HIPAA ALLOWS A “PERSONAL REPRESENTATIVE”
(i.e. SOMEONE WITH POWER OF ATTORNEY)
TO SIGN A CONSENT
- 42 CFR, PART 2 ALLOWS ONLY
THOSE APPOINTED LEGAL GUARDIANS TO SIGN

HIPAA VERSUS 42 CFR, PART 2 HEALTHCARE

- HIPAA ALLOWS PROGRAMS TO MAKE DISCLOSURES
TO OTHER HEALTHCARE PROVIDERS
WITHOUT AUTHORIZATION
- 42 CFR, PART 2 LIMITS THIS TO
MEDICAL EMERGENCIES ONLY

NOTICE TO CLIENTS OF FEDERAL CONFIDENTIALITY REQUIREMENTS

- COMMUNICATE REQUIREMENTS TO CLIENT
- PROVIDE CLIENT WITH A SUMMARY
- DESCRIBE LIMITED CIRCUMSTANCES FOR DISCLOSURE
- STATEMENT THAT VIOLATIONS OF PART 2 IS A CRIME
- STATEMENT THAT THREAT OF OR CRIME ON PREMISES IN NOT PROTECTED
- STATEMENT THAT SUSPECTED CHILD ABUSE & NEGLECT NOT PROTECTED

RE-DISCLOSURE WARNING

- PERMITTED DISCLOSURES MUST BE ACCOMPANIED BY A WRITTEN STATEMENT THAT INFO DISCLOSED
 - 1) IS PROTECTED BY FEDERAL LAW **AND**
 - 2) MAY NOT BE RE-RELEASED UNLESS PERMITTED BY REGULATIONS

RE-DISCLOSURE STATEMENT

This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR, part 2). The federal rules prohibit you from making any further disclosure of information in this record that identifies a patient as having or as having had a substance use disorder either directly, by inference to publicly available information, or through verification of such identification by another person unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed or otherwise permitted by 42 CFR, part 2. A general authorization for the release of medical or other information is **NOT** sufficient for this purpose (see 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at 2.12 (c)(5) and 2.65

IN SUMMARY

IN THESE REGULATIONS, RESTRICTIONS ON DISCLOSURE APPLY EVEN IF THE HOLDER OF THE INFO KNOWS THE PERSON SEEKING IT ALREADY HAS IT OR HAS OTHER WAYS OF OBTAINING IT OR IS A LAW ENFORCEMENT OFFICIAL OR OTHER PERSON WITH A SUBPEONA – NOT SIGNED BY A JUDGE – OR WHO INDICATES ANY OTHER JUSTIFICATION FOR A NON-PERMITTED DISCLOSURE.



CONTACT INFORMATION

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