

Section 2: Confidentiality

Summary

Federal laws protect a person's right to the confidentiality of information pertaining to her use of alcohol and other drugs. It is the responsibility of the health care professional to be familiar with the laws, how they apply in the health care setting, and to explain all of the relevant laws to all patients. The laws protecting substance abuse information are more restrictive than the laws protecting confidentiality of general medical information. This is because of the potential negative ramifications to people who are identified as having used alcohol or other drugs.

Federal Regulations on Confidentiality of Alcohol or Drug Treatment Information

During discussions with your patient, she may divulge information about her substance use that may be personally sensitive or even incriminating. Let her know ahead of time what information may be disclosed to staff or other agencies and what may have to be reported to outside authorities. Take every reasonable precaution to ensure the patient's disclosures cannot be used in a punitive way.

The Federal Regulations (42 Code of Federal Regulations Part 2) which implement the federal confidentiality law (42 United States Code 290dd - 2) apply to any federally-assisted alcohol or drug abuse program.

A program is defined as any person or organization that provides the following:

- alcohol or drug abuse diagnosis, or
- alcohol or drug abuse treatment; or,
- alcohol or drug abuse referral,
and
- receives Federal funding (e.g., WIC, Medicaid reimbursement, Baby Love).

A program that meets these requirements must follow Federal laws and regulations concerning the confidentiality of drug and alcohol treatment records.

GENERAL RULE:
A program may not disclose any information that would identify a patient as an alcohol or drug abuser.

Prohibition of Disclosure

The Federal Confidentiality Regulations prohibit disclosure of patient information as follows.

Except under certain limited conditions, the regulations prohibit the disclosure of records or other information concerning any patient in a federally-assisted alcohol or drug abuse program. The prohibition on unauthorized disclosure applies whether or not the person seeking information already has the information, has other means of obtaining it, enjoys official status, has obtained a subpoena or warrant, or is authorized by state law.

Confidentiality also applies to substance abuse information obtained from a third party (such as from a counselor at a mental health agency).

Those who receive patient substance abuse information are prohibited from re-releasing information except as permitted by the regulations.

In circumstances where North Carolina state laws conflict with the Federal confidentiality regulations, the Federal regulations prevail (unless the state law is more restrictive).

Exceptions

Although the general rule is that patient-identifying information may not be disclosed, the regulations set out a number of conditions permitting limited disclosures with patient consent and very few circumstances in which disclosures may be made without patient consent. Each of these conditions or circumstances has its own requirements and limitations.

In general, permitted disclosures are as follows:

- ✓ **With written informed consent of the patient**
Has the patient executed a proper consent form for the proposed communication?
- ✓ **Following internal program communications**
Is the proposed communication to be made to other staff of the program or to an entity with direct administrative control over the program?
- ✓ **In response to a medical emergency**
Is the proposed communication needed to respond to a medical emergency?
- ✓ **In response to a court order following a court hearing in which disclosure is authorized**
Is the proposed communication authorized by a valid court order?
- ✓ **Following a crime at the treatment program or against program personnel**
Does the proposed communication concern a crime or a threatened crime on the premises of the program or against program personnel?
- ✓ **For research or audit purposes**
Is the proposed communication for purposes of research or part of an audit or an evaluation of a program's activities?
- ✓ **In the course of reporting child abuse**
Does the proposed communication involve the reporting of child abuse and neglect?
- ✓ **When there is a qualified service organization agreement**
Will the proposed communication be made pursuant to a qualified service organization agreement?
- ✓ **In response to a request for non-patient identifying information**
Can the proposed communication be made without revealing that the person the disclosure concerns is or was an alcohol or drug abuser?

1. Written Consent Form: Most disclosures are permissible if a patient has signed a valid consent form which has not expired or been revoked by the patient. (note: see Handout 1, at end of section).

A proper consent form must be in writing and contain each of the following items:

- ☑ the name or general designation of the program making the disclosure;
- ☑ the name of the individual or organization that will receive the disclosure;
- ☑ the name of the patient who is the subject of the disclosure;
- ☑ the purpose or need for the disclosure;
- ☑ how much and what kind of information will be disclosed;
- ☑ a statement that the patient may revoke the consent at any time, except to the extent that a program has already acted in reliance on it;
- ☑ the date, event or condition upon which the consent expires if not previously revoked;
- ☑ the signature of the patient; and,
- ☑ the date on which the consent is signed.

A general medical release form is not acceptable.

2. Internal Program

Communications: Program staff may disclose information to other staff within the program or to "an entity having direct administrative control over that program" if the recipient needs the information in connection with duties that arise out of the provision of alcohol or drug abuse diagnosis treatment or referral.

3. Medical Emergency: The regulations permit programs to make disclosures to public or private medical personnel to the extent necessary to meet a bona fide medical emergency of the patient or any other individual. The regulations define "medical emergency" as a situation that poses an immediate threat to health and requires immediate medical intervention. The regulations do not permit a broad definition of "medical emergency" to open a loophole for disclosures. The situation must be one requiring immediate medical attention. A dangerous drug overdose or attempted suicide would both be medical emergencies.

4. Court Order: A state or federal court may issue an order that authorizes a program to make a disclosure of patient-identifying information that would otherwise be prohibited. A court may issue one of these authorizing orders, however, only after it follows certain procedures and makes particular determinations specified by the regulations. **A subpoena, search warrant or arrest warrant, even when it is signed by a judge and says it is a court order, is not sufficient, when standing alone to require or even permit a program to make a disclosure.**

5. Crime at Treatment Program: When a patient has committed or threatened to commit a crime on program premises or against program personnel, the regulations permit the program to report the crime to a law enforcement agency or to seek its assistance. In such a situation, the program can disclose the circumstances of the incident, including the suspect's name, address, last known whereabouts, and status as a patient at the program.

6. Research/Audit Purposes:

The confidentiality regulations permit, but do not require, a program to disclose patient-identifying information to researchers without patient consent, providing certain safeguards are met.

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7. Qualified Service Organization Agreement:

Programs may disclose information to a "qualified service organization." In order for an organization to become qualified to communicate freely, it must first enter into a special written agreement with the program in which it:

- acknowledges that in receiving, storing, processing, or otherwise dealing with any information from the program about patients, it is fully bound by the confidentiality regulations; and,
- promises that it will resist, in judicial proceedings if necessary, any efforts to obtain access to information pertaining to patients except as permitted by regulations.

(note: see Handout 3, at end of section)

8. Child Abuse/Neglect: All treatment programs must strictly comply with the provisions of mandatory child abuse reporting laws in their states. However, the exemption for child abuse reporting applies only to initial reports of child abuse or neglect, and not to requests or even subpoenas for additional information or records, even if the records are sought for use in civil or criminal investigations or proceedings resulting from the program's initial report. Thus, the patient files must still be withheld from child protection agencies if there is no appropriate court order or patient consent.

9. Non-patient Identifying

Information: Communications that neither identify an individual as an alcohol or drug abuser or patient nor verify someone else's identification of the patient are permitted. One example is the disclosure of information by a hospital that provides services to people with other illnesses as well as to alcohol and drug abusers.

A program may disclose that "Mary Doe is a patient at the Smithville General Hospital" as long as the fact that Mary has an alcohol or drug problem is not revealed.

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Communicating with Patient

Providers of health care and social services should explain and discuss confidentiality and reporting laws with patients when they first seek care.

- Federal confidentiality regulations require treatment programs to inform a pregnant substance-using woman about her rights to confidentiality as well as her right to information about laws concerning reporting and court involvement (see Handout 4 at end of section).
- Pregnant substance-using women should be informed by service providers about Federal, State, and local confidentiality and reporting laws and how such laws will affect the delivery of services to them. Relevant areas of law may include the reporting of child abuse to appropriate authorities, custody consequences, and how courts may treat information contained in their records.

Training on Confidentiality and Reporting

All individuals who provide services to pregnant substance-using women must understand Federal regulations on confidentiality and receive training on state and local laws, regulations, and reporting requirements.

- Providers of health care and social services include, but are not limited to, physicians, social workers, nurses, psychologists, psychiatrists, child protective service workers, teachers, child care workers, nutritionists, health educators, and alcohol and other drug counselors.
- Providers of health care and social services must be trained to understand the differences among Federal, State, and local laws regarding confidentiality of information pertaining to alcohol and other drug treatment, medical care, mental health care, child abuse, and HIV/AIDS.
- Providers of health care and social services must know the relevant reporting laws pertaining to child abuse and neglect. This knowledge should include who is mandated to report child abuse and neglect, under what circumstances they are to report child abuse and neglect, and the penalty for not reporting such abuse and neglect.

Health care professionals should explain confidentiality to patients, including the patient's rights and the limitations of confidentiality.

Confidentiality of Information on Infants and Children

A woman has the right to control the release of confidential records and information pertaining to her infant.

- ☑ In order to release confidential information about a child, the written informed consent of the parent or legal guardian must be obtained.
- ☑ The written informed consent must meet all previously stated legal requirements controlling the release of confidential information.
- ☑ When a parent refuses to give consent or is incompetent to give consent or cannot be found, the court may be requested to appoint a legal guardian for the child. This guardian is authorized to make medical decisions for the child, including the release of confidential information.
- ☑ Parental consent for an adolescent seeking substance abuse treatment for self is not necessary when excused by law as is the case in North Carolina.

governing the release of information and train employees in their use.

Agencies should also provide the staff with access to counsel who are knowledgeable in the area of confidentiality.

Unauthorized Release of Information

Non-consensual and unauthorized release of confidential information may harm the child or mother and may subject the health care and social service provider to civil or criminal liability. To avoid this, agencies should develop protocols and procedures

(Center for Substance Abuse Treatment (CSAT), 1993)

Consent for Release of Confidential Information

authorize

(Name of patient)

to disclose to

(Name of program making the disclosure)

(Name of organization to which organization is being made)

the following information:

(Nature of the information, as limited as possible)

The purpose of the disclosure authorized herein is to

(Purpose of disclosure, as specific as possible)

I understand that my records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, and cannot be disclosed without my written consent unless otherwise provided for in the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:

(Specification of the date or event upon which this consent expires)

(Signature of Participant and date)

(Signature of parent or authorized representative - when required)

**PROHIBITION ON RE-DISCLOSURE
OF INFORMATION CONCERNING PATIENT
IN ALCOHOL OR DRUG ABUSE TREATMENT**

This notice accompanies a disclosure of information concerning a patient in alcohol/drug abuse treatment, made to you with the consent of such patient. 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 this information unless further disclosure is expressly permitted by written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

QUALIFIED SERVICE ORGANIZATION AGREEMENT

The XYZ Program and the ABC Program hereby enter into a qualified service organization agreement, whereby the XYZ Program agrees to provide **(insert service to be provided)** to the ABC Program.

Furthermore, the XYZ Program:

(1) acknowledges that in receiving, storing, processing or otherwise dealing with any information from (the program) about the patients in the perinatal program, it is fully bound by the provisions of the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2; and,

(2) undertakes to resist in judicial proceedings any effort to obtain access to information pertaining to patients otherwise than as expressly provided for in the federal confidentiality regulations, 42 CFR Part 2.

Executed this _____ day of _____, 1995.

(Signature of XYZ Program Director)

(Signature of ABC Program Director)

Confidentiality of Alcohol and Drug Abuse Patient Records

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal laws and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser unless:

1. The patient consents in writing; OR
2. The disclosure is allowed by a court order; OR
3. The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation; OR
4. The patient commits or threatens to commit a crime either at the program or against any person who works for the program.

Violation of the Federal law and regulations by a program is a crime. Suspected violations may be reported to the United States Attorney in the district where the violation occurs.

Federal law and regulations do not protect any information about suspected child abuse or neglect from being reported under state law to appropriate state or local authorities.

(See 42 U.S.C. 290dd-22 for Federal laws and 42 C.F.R. Part 2 for Federal regulations.)