

Ethics, Confidentiality, and HIPAA!

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Confidentiality/Privacy

- ▶ Two major laws apply to participants in drug treatment courts.
 - 1) 42 CFR Part 2 – Confidentiality of Alcohol and Drug Abuse Patient Records
 - 2) HIPAA – Health Insurance Portability and Accountability Act

42 U.S. Code 290dd

42 CFR Part 2

- ▶ First issued 1975, revised 1987
- ▶ Designed to address the stigma of addiction
- ▶ Requires notification of confidentiality, consent forms, prohibition on redisclosure
- ▶ Strict construction “I’m sorry I cannot acknowledge whether someone is or isn’t in our treatment program”

What 42 CFR Covers:

- ▶ Records of the identity, diagnosis, prognosis, or treatment of any patient, which are maintained in connection with the performance of any program or activity relating to drug abuse, alcoholism or alcohol abuse education that is conducted, regulated or assisted by the Federal government shall be confidential.
- ▶ http://www.access.gpo.gov/nara/cfr/waisidx_02/42cfr2_02.html

What About?

- ▶ Family members – NO
- ▶ Patient's lawyer – NO
- ▶ Police – NO (not even with search or arrest warrant)
- ▶ Employer - NO

Who Does 42 CFR Protect?

- ▶ Current patients
- ▶ Past patients, including deceased
- ▶ Individuals who are applying for treatment

Federally Assisted?

- ▶ Any entity that receives funding directly or indirectly from the federal government:
 - ▶ Block grant funds
 - ▶ 501 (c)(3) organizations
 - ▶ Licensed or regulated by federal government

HIPAA

- ▶ Health Insurance Portability and Accountability Act of 1996
- ▶ Designed to ensure maintenance of health insurance coverage when you change jobs
- ▶ Administrative simplification – Healthcare processes becoming very complex – look to standardize information – make it easier
- ▶ Protects privacy of health information held by health plans, health care clearinghouses and most providers, including drug & alcohol programs

What Does HIPAA Change

- ▶ Mandates patient access to records
- ▶ Form and content of patient notice
- ▶ Form and content of agreements with qualified service organizations
- ▶ Method for revoking consent
- ▶ Protocols and procedures for research
- ▶ Circumstances under which past crimes may be reported

HIPAA v. 42 CFR Part 2

- ▶ HIPAA: health care industry
- ▶ 42 CFR: drug and alcohol programs
- ▶ The laws cover a lot of the same material
- ▶ Some points of difference – more specific or more recent rule usually applies
- ▶ For treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent

**DO THESE LAWS APPLY TO DRUG
COURT PRACTITIONERS?**

**IS THE DRUG COURT PROGRAM A
PROGRAM FOR THE PURPOSES OF
THE CONFIDENTIALITY REGULATIONS
AND WHY?**

Two Criteria for Coverage

- ▶ An individual or unit within the drug court is a “program” or a “covered entity”
 - Program, if engaged in diagnosis, referral, or treatment – most drug courts qualify
 - Covered entity – unclear, but drug courts’ redisclosure of protected information implicates HIPAA

General Rule of Disclosure

- ▶ Treatment programs may only release information or records that will directly or indirectly identify a drug court participant as a substance abuser or treatment patient:
 - ▶ With a knowing and written consent from the participant,
AND
 - ▶ Nine limited exceptions

Obtaining the Consent

- ▶ **First** contact with an individual
 - ▶ Intake
 - ▶ Screening
 - ▶ Assessment

Elements of a Consent

1. Name of person or organization that may make the disclosure;
2. Name or title of person (or organization) to whom disclosure may be made;
3. Participant's name;
4. Purpose of the disclosure;
5. How much and what kind of information may be disclosed;
6. Participant's signature;
7. Date on which the consent was signed; and
8. Date, event, or condition upon which the consent will expire (some states specify maximum duration)

(Consent cannot be revoked unless in the juvenile or family court setting)

Consents

- ▶ A proper consent can authorize all parties involved in the drug court to share information necessary to monitor treatment progress and compliance
- ▶ Even with proper consent in place, disclosure is not mandated if entity thinks information will harm the individual
- ▶ Unless consent specifically permits, program cannot disclose information to law enforcement seeking to prosecute a separate crime

Minors

- ▶ State law governs when parental consent is necessary for minor to obtain treatment
- ▶ The minor's signature is required for disclosures, even to parents
- ▶ Parental consent also needed in states that require parental consent for treatment

**IN DRUG COURT, IS THE CONSENT
REALLY VALID? AREN'T DEFENDANTS
BEING COERCED INTO GIVING THEIR
CONSENTS?**

Requiring Consents

- ▶ HIPAA prohibits a program from conditioning treatment on a patient signing a consent, *but*
- ▶ The judge, probation/parole, child welfare can condition participation in the drug court program on the defendant signing the consent form

Satisfying 42 CFR and HIPAA

- ▶ HIPAA requires all consents to be revocable, but
- ▶ HIPAA also allows for the use of an administrative order for information disclosure. Therefore,
- ▶ Drug courts can pair their 42 CFR consent with a HIPAA administrative order and/or build HIPAA language into their consent.

Consents and Family Court

- ▶ No criminal justice system exception for family court setting
- ▶ Consents in family court must be revocable

**EVEN WITHOUT WRITTEN CONSENT,
UNDER WHAT OTHER
CIRCUMSTANCES MAY YOU RELEASE
INFORMATION?**

Permitted Disclosures-No Consent

- ▶ Medical emergency
 - ▶ immediate threat to health and in need of treatment
 - ▶ cannot disclose to family w/o consent but medical personnel can disclose
- ▶ Crimes on the premises – staff can call police, regardless of whether on or off premises, e.g. counselor on way home is accosted by patient – only basic facts

Permitted Disclosures-No Consent (cont')

- ▶ Internal communications
 - ▶ Staff within a program can share information on a need to know basis
 - ▶ Staff may share information with a supervising or billing agency
 - ▶ Important to define scope of program

Permitted Disclosures-No Consent (cont')

- ▶ Administration / Qualified Service Organization Agreement
 - ▶ Written agreement between program and an outside agency that provides supportive service (cannot have agreement between 2 agencies where both are subject to 42 CFR)
- ▶ May not enter into QSO with law enforcement without consent

Permitted Disclosures -No Consent (cont')

- ▶ Outside auditors, central registries and researchers – funders, licensing agencies permitted to audit, provided agreement regarding redisclosure
- ▶ May not redisclose patient identities in any manner

Mandatory Disclosure-No Consent

- ▶ State child abuse and neglect reporting laws
- ▶ State laws relating to cause of death
- ▶ Duty to protect others, to warn of imminent, serious harm

Mandatory Disclosure -No Consent (cont'd)

- ▶ Court Order

- ▶ Notice to program of Application
- ▶ Opportunity to be heard
- ▶ Fictitious name
- ▶ Confidential proceeding
- ▶ Finding of good cause (No other way to get information & public interest and need outweigh potential injury to patient)

So we have an agreement to participate in drug court-now what?

- ▶ Is there an issue about the disclosure of information simply used to make a referral to treatment?
- ▶ YES, if the information is derived from a source other than public records, it is protected
- ▶ RULE: get your waiver up front, or at least get a partial waiver until you get the full one. Eg:did they show up at the treatment provider?

Participant Contracts

- ▶ Consider what goes in them. There is the obvious in terms of 42 CFR & HIPAA, and maybe the less obvious
- ▶ What about statements made in court that could form the basis for another criminal case?
- ▶ What about statements made in open court relating to your drug test results and progress in treatment?
- ▶ When do you execute that contract?

Communication Among Team Members

- ▶ Internal communication is permissible on the basis of, “...a need for the information in connection with their official duties..”
- ▶ Ideally, only lawyer representing the participant being discussed is present
- ▶ Ideally, only the treatment provider delivering services to the participant being discussed is present

What About the Courtroom?

- ▶ What happens to confidentiality when court is in session?
Out the window? Not exactly
- ▶ Drug court teams believe successful outcomes are promoted by sharing successes and failures in open court, i.e., part of the court's official duties
- ▶ Therefore, important to exercise care in discussion of highly personal matters

**WHAT IF YOUR COURT CLERK
ANSWERS THE TELEPHONE, “GOOD
MORNING. DRUG COURT.”
IS THIS A VIOLATION OF THE
CONFIDENTIALITY LAWS?**

**HOW DO YOU PROTECT YOUR
WRITTEN AND COMPUTERIZED FILES?**

Paper Records

- ▶ Design system where:
 - ▶ Court file with drug court related notes are kept separately from original court file
 - ▶ Ideally, original court file should not indicate case was transferred to drug court but is this practical? Is it even possible?
 - ▶ After end of case, drug court file is purged of drug court related material, which is stored separately and locked for 6 years

Electronic Records

- ▶ Design system where:
 - ▶ all confidential files are password protected
 - ▶ create levels of access depending on user's role

Training

- ▶ Both drug court and non-drug court staff should be trained in appropriate treatment of confidential information in drug court files

**WHO HAS ACCESS TO YOUR WRITTEN
AND COMPUTERIZED FILES?**

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