Confidentiality of Drug and Alcohol Abuse Treatment Records
in an Electronic Age

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Background

Many social workers who provide drug and alcohol abuse treatment are subject to a high standard of patient confidentiality under a set of federal regulations specific to that treatment area. As electronic health record systems are being implemented, additional layers of complexity are presented which may raise new questions about how to best protect clients’ privacy. To clarify these issues, in 2010 the Substance Abuse and Mental Health Services Administration (SAMHSA) issued a set of “Frequently Asked Questions.” This Legal Issue of the Month article provides an overview of the federal regulations and reviews SAMHSA’s informal guidance as it applies to questions and scenarios faced by social workers.

Federal Law and Regulations

a. Substance Abuse Confidentiality Provisions and Regulations

The key federal law pertaining to confidentiality of drug and alcohol abuse treatment records is located in the Public Health Service Act, section 543, the Substance Abuse Confidentiality provision (42 U.S.C.A.§ 290dd-2), and its implementing regulations. The law generally applies to federally-funded substance abuse prevention or treatment services, including treatment for alcoholism. Specifically, the provisions apply to drug and alcohol abuse services that are conducted, regulated, and directly or indirectly assisted by any department or agency of the United States (42 C.F.R. §2.12(b)). This definition of jurisdiction has been broadly interpreted to encompass virtually any program that receives or benefits from Federal funds, such as tax-exempt organizations, and “Medicare providers who offer alcohol and substance abuse treatment” (Morgan, 2001). The provisions do require patient consent before the patient’s confidential information may be released.

Consent can be an issue when the patient receiving treatment is a minor. Some states require parental consent before a minor may receive drug or alcohol treatment, while other states do not (42 CFR §2.14).

- In states where parental consent for treatment is not required, minor patients in federally assisted programs have sole authority over disclosure of their confidential information. In these states, minors may refuse disclosure of the information to their parents.
- In states where parental consent is required for treatment of minors, written consent for disclosure of information from a federally assisted drug and alcohol treatment program must be given by both the minor and a parent. Thus, the minor still has some degree of control over the use of his or her own information. In addition, unless the minor lacks capacity to make a rational choice, the minor’s written consent is required before the program can communicate to the parents the fact of the minor’s application for treatment (Morgan, 2001).

There are also exceptions to the consent requirement for medical emergencies, research and audits, and upon order of a court (42 U.S.C.A §290dd-2). Courts have interpreted the confidentiality exceptions of the statute. “Limited exceptions have been permitted by courts in New York, Minnesota, and Michigan which ruled that substance abuse treatment records of parents may be introduced in child abuse and neglect proceedings.” (Morgan, 2001). For example in In re Marvin M., et al, a Connecticut court allowed the review of parents’ “intake records, discharge records, attendance records, drug screen test results and records indicating compliance and noncompliance with treatment programs” to determine whether or not to terminate parental rights. The court cited the law and stated,

While nondisclosure is the general rule, exceptions do exist. Subsection (b)(2)(C) permits disclosure of such records without the consent of the patient “[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure (In re Marvin M., 48 Conn.App. 563, 569-570 (Conn. App. 1998).
Here the court found the existence of good cause, and reviewed the records in camera (i.e. in the privacy of the judge’s chambers) to safeguard against unnecessary disclosure (see also U.S. v. Zamora (2006), for review of “good cause” exception).

b. The Health Insurance Portability and Accountability Act

“Comprehensive medical privacy rules issued under the Health Insurance Portability and Accountability Act (HIPAA, PL 104-191) will apply to providers who are already subject to the requirements of the substance abuse statute and regulations” (Morgan, 2001). However the substance abuse provisions are more protective of privacy than HIPAA, and practitioners may follow the more protective regulations (45 C.F.R. §160, 164). For example,

Unlike the HIPAA regulations, the substance abuse regulations prohibit the use, for purposes of criminal investigation or evidence of any criminal charges, of any information obtained from a federally assisted drug or alcohol abuse program by anyone who obtains the information. In contrast, HIPAA permits disclosure to law enforcement, and restrictions on confidentiality do not extend to entities that receive the information (Morgan, 2001; 42 C.F.R. §2.12(d)(1)).

However it is important to note that a court order is necessary before drug and alcohol abuse treatment records may be disclosed to law enforcement (45 C.F.R. §164.512(f); 42 U.S.C.A §290dd-2(b)(2)(C)).

The Substance Abuse and Mental Health Services Administration

The Substance Abuse and Mental Health Services Administration (SAMHSA) in 2010 published an informative document, Frequently Asked Questions: Applying the Substance Abuse Confidentiality Regulations to Health Information Exchange. These answers do not provide new regulations, but are an agency interpretation of the existing confidentiality regulations for the disclosure of drug abuse and alcoholism treatment records and information.

Clients’ health records in many instances are now being maintained and transmitted in electronic format. One model for handling health data involves third parties, who serve as the electronic repositories of protected health information. These technological advances and organizational models have raised issues regarding the confidentiality standards that govern the third party repository’s access to a patient’s protected information and access by other parties, such as health insurers and other health care providers. SAMHSA’s answers explain how federal confidentiality regulations apply to the electronic exchange of drug and alcohol abuse treatment information in “Health Information Exchanges” (Morgan, 2011).

SAMHSA applies new terminology in its answers that may be unfamiliar to social workers, including “Health Information Organization” or “HIO,” which is “an organization that oversees and governs the exchange of health-related information among organizations according to nationally recognized standards” (SAMHSA, FN 2).

SAMHSA’s answers explain that:

- Federal law does allow substance abuse treatment programs to include information on patients’ substance use disorders in electronic health information exchange systems. However the regulations require the patient’s consent, which must be in writing, and has a few exceptions to confidentiality, including physical and mental healthcare emergencies, audits, and evaluations (42 C.F.R. §§2.3, 2.12, 2.13, 2.5).
- When patient information is disclosed, the substance abuse treatment program must ensure that “each disclosure made with written patient consent [is] . . . accompanied by a written statement that the information disclosed is protected by federal law and that the recipient cannot make any further disclosure of it unless permitted by the regulations” (SAMHSA, p. 9).
- A third party entity that maintains electronic patient information (an HIO), based on an agreement to provide services to a substance abuse treatment program, may disclose the patient information to its own contract agents without the patient’s consent (SAMHSA, p. 10).
- An HIO may disclose patients’ demographic information without the patient’s consent, as long as it “does not reveal any information that would identify the person, either directly or indirectly, as having a current or past drug or alcohol problem or as being a patient in a [drug and alcohol abuse treatment] program.”
- If information is released without consent due to a medical emergency, the information can be re-disclosed without the patient’s consent (SAMHSA, p. 16) as long as it is “limited to information necessary to carry out the purpose of the disclosure (42 CFR § 2.13(a)).”

The 2010 SAMHSA FAQs articulate an agency view that the determination of what constitutes an emergency that would warrant access to a patient’s drug and alcohol abuse treatment record may be made by the emergency health care provider in circumstances where the information is maintained in an electronic recordkeeping database.
(such as a Heath Information Organization) (SAMHSA, p.13). Previously, this gate-keeping function has been within the sole purview of the drug and alcohol abuse treatment provider. This shift in decisional authority is likely to result in an increase in disclosure of drug and alcohol abuse treatment information for emergency purposes; however, the issue has not been formally studied.

**Conclusion**

In certain circumstances federal law permits the disclosure of patient information from alcohol and drug treatment programs that receive federal funding. Generally, such information cannot be released without the patient’s consent. However, as explained above, the law does list specific exceptions to the consent requirement, including court orders and medical emergencies. SAMHSA’s guidance also specifies that the high level of privacy protection for minors who receive drug and alcohol abuse treatment remains in force and that the minor’s consent is always needed before the confidential information may be disclosed. Social workers are encouraged to refer to SAMHSA’s *Frequently Asked Questions* for further detailed information on confidentiality regulations and the use of electronic health information exchanges for patient data.

**Related Web Links:**


**References:**


45 C.F.R. §160, 164

42 C.F.R. §§2.3, 2.12, 2.13, 2.5

Health Insurance Portability and Accountability Act, HIPAA, PL 104-191.


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