

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

Bureau of Health Care Services
Health Facilities Division
State Licensing Section
Substance Abuse Programs

SUMMARY OF FEDERAL CONFIDENTIALITY REGULATIONS

APPLICABILITY

The revised regulations went into effect on August 10, 1987 and apply to all state licensed substance abuse programs.

RECORDS AND INFORMATION COVERED

1. Records of Identity.
2. Records of Prognosis.
3. Records of Diagnosis.
4. Treatment Records.
5. Attendance Records.
6. Patient Status Records.
7. Physical Whereabouts Records.

The above covered information may be released only by written consent signed by the client. Written consent must include:

1. Name or general description of the program(s) which are to make the disclosure.
2. The name of the person or organization which shall receive the information.
3. Why the information is needed.
4. The extent or nature of the information to be disclosed.
5. The client's name.
6. A statement that the consent may be withdrawn at any time, except to the extent that the program that is to make the disclosure has already taken action in reliance on the consent.
7. A date, event or condition on which the consent will expire unless revoked earlier by the client.
8. Signature of the client.
9. The date of the client's signature.

See the SAMPLE SECTION for proper release forms to be used by licensed substance abuse programs.

DISCLOSURES NOT CONSIDERED CONFIDENTIAL

1. Communications between staff members of a program.
2. Communications between a program and its governing authority.
3. Communications between a program and a "Qualified Service Organization." For further definition of a "Qualified Service Organization," review section 2.11(a), page 21806 of the Federal Regulations.
4. Information which contains no "patient identifying information." For definition of "patient identifying information," review section 2.11, page 21806 of the Federal Register.

TYPES OF INFORMATION WHICH MAY BE DISCLOSED WITH CONSENT

A program should only disclose information about a client which is actually needed for the purpose stated on the signed consent form. Listed below are some general rules to go by:

1. A treatment program, by signed consent, can provide information necessary for treatment, diagnosis or rehabilitation.
2. An attorney may receive any information dealing with a legal matter in accordance with the client's written consent.
3. Family and friends may receive, with written consent, information about the client's status and progress.
4. Third party payers or funding sources may receive information reasonably needed to process the client's claim, upon receipt of a signed consent.

There are specific rules for disclosure to the criminal justice system. Section 2.35 of the regulations should be reviewed for further details.

DISCLOSURES WITHOUT CLIENT CONSENT

1. Patient identifying information may be disclosed to medical personnel who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention. The program must document the nature, extent and reason for the disclosure in the client's file. For further discussion, review section 2.51(c) of the Federal Regulations.
2. Client identifying information may be disclosed for the purpose of conducting scientific research. For further details, review section 2.52 of the Federal Regulations.

3. If client records are not copied or removed, client identifying information may be disclosed without the consent of the client for the purposes of audit or evaluation activities. The procedure described in section 2.53 of the Federal Regulations is to be followed.

CLARIFICATIONS

1. These regulations apply specifically to programs that specialize in whole or part, in providing alcohol or drug abuse treatment or diagnosis and referral services. (Section 2.11.)
2. Programs can disclose that a particular individual is not and never has been a client. (Section 2.13(c)(2))
3. Program staff may disclose information without the written consent of a client to other staff within a program or to the governing authority if the receiver of the information needs it in connection with duties that arise out of the provision of alcohol or drug abuse diagnosis, treatment or referral services. (Section 2.12(c)(3))
4. These regulations eliminate any restrictions on compliance with state laws mandating the reporting of suspected child abuse or neglect.
5. Programs are required to give clients a written summary of the confidentiality law and regulations. This notice must be given to clients at the time of their admission to the program. (Section 2.22)
6. Programs have the discretion as to whether a client should view or obtain copies of their own records. (Section 2.23)

SAMPLE

CLIENT NOTICE OF CONFIDENTIALITY

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal Law 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;
- (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.

Violation of the Federal Law and Regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with Federal Regulations.

Federal Law and Regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.

Federal Laws 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.

SAMPLE

NOTICE TO ACCOMPANY DISCLOSURE

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 the 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. 7

SAMPLE

CLIENT INFORMATION RELEASE AUTHORIZATION

I, _____, hereby authorize _____
_____, to release
(Client's Name) (Name or General Designation of
Program)

information contained in my client records to the individuals or organizations and only under the conditions listed below:

1. Name or title of person or organization to whom disclosure is made: _____

2. Specific type of information to be disclosed: _____

3. The purpose or need for such disclosure: _____

4. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon:

A. Date: _____

B. Event: _____

OR

C. Condition: _____

WITNESSED BY

CLIENT'S SIGNATURE

DATE WITNESSED

DATE SIGNED

SAMPLE FORM

TO BE USED BY LICENSED PROGRAMS For Use in Criminal Justice System

I, _____, hereby consent to communication between _____
_____ and _____.

The purpose of and need for the disclosure is to inform the criminal justice agency(ies) listed above of my attendance and progress in treatment. The extent of information to be disclosed is my diagnosis, information about my attendance at treatment sessions, my cooperation with the treatment program, prognosis, and _____

I understand that this consent will remain in effect and cannot be revoked by me until:

_____ There has been a formal and effective termination or revocation of my release from confinement, probation, or parole, or other proceeding under which I was mandated into treatment, or

_____ (Other times when consent can be revoked.)

_____ (Other expiration of consent.)

I also understand that any disclosures made is bound by Part 2 of Title 42 of the Code of Federal Regulations governing confidentiality of alcohol and drug abuse patient records and that recipients of this information may redisclose it only in connection with their official duties.

_____ (Date)

_____ (Client's Signature)

_____ (Witness' Signature)

SAMPLE LETTER IN RESPONSE TO A SUBPOENA

*One of the most frequent questions treatment programs ask is, “How do we respond to a subpoena demanding client records or staff members’ testimony about a client?” The short answer is: **Do not ignore the subpoena!** Instead, explain why the program cannot turn over records or testify unless the person alleged to be a client signs a proper consent or a proper court order is issued first. Here is a sample letter that treatment programs can use to respond to a subpoena, and explain the applicable rules, in a civil (not a criminal) proceeding:*

Dear _____,

We have received your subpoena requesting [any records] [testimony from program personnel] concerning [name of patient]. Federal confidentiality laws and regulations (see 42 U.S.C. §§ 290dd-2, 42 C.F.R. Part 2) prohibit this program and its personnel from complying with your request or even acknowledging whether or not this individual is or ever was a patient in our program unless [he/she] executes a proper consent form or the court issues an order authorizing disclosure in accordance with Subpart E of the federal confidentiality regulations (42 C.F.R. § 2.13).

The federal confidentiality laws and regulations permit the release of information about current or former patients with written patient consent in a particular form specified in the regulations. (See 42 C.F.R. § 2.31.) A general medical release is not sufficient.

The federal law and regulations prohibit a program from disclosing information in response to a subpoena (even a judicial subpoena) unless the subpoena is accompanied by a proper consent or a court issues an order in compliance with the procedures and standards set forth in Subpart E of the regulations, §§ 2.61-2.67.

Subpart E of the regulations provides that before the court may issue an order authorizing a program to release patient information, both the alleged patient (or his/her representative) and the program must be notified that a hearing will be held to decide whether an authorizing court order will be issued, and both the patient and the program must be given an opportunity to appear in person or file a responsive statement (42 C.F.R. § 2.64(b)).

In order to issue an authorizing order the court must find, at or after the required hearing, that “good cause” exists to issue the order (§ 2.64(d)). The regulations provide that

to make this [good cause] determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

The federal regulations also limit the type of material that a court may order a program to release. Section 2.64(e) provides that an order must “limit disclosure to those parts of the patient’s record which are essential to fulfill the objective of the order” and that only those persons having a need for the information may receive patient records. Section 2.63 provides that a court may not order any disclosure of confidential communications made by a patient to program staff unless one of three additional conditions is met: (1) the disclosure is necessary to protect against an existing threat to life or of serious bodily injury, (2) the disclosure is necessary in connection with investigation or prosecution of a very serious crime, such as homicide or rape, or (3) the patient has already offered evidence about confidential communications.

Thus, for the court to issue an authorizing court order permitting program personnel to release records containing confidential communications by a patient or to testify about any communications made by a patient, it would first have to find

1. that there is no other way to obtain the necessary information, or other ways would be ineffective;
2. disclosure would not harm the public interest in attracting people to substance abuse treatment; and

3. that one of the three specific conditions of § 2.63 has been met.

Since this program has not received a proper written consent form from the individual about whom [records/testimony] [is/are] sought, or an authorizing court order that was obtained under 42 C.F.R. Part 2, Subpart E, we are compelled by federal law not to release any information.

This decision was reached after a thorough review of the federal laws and regulations governing the confidentiality of alcohol and drug abuse patient records, and is not intended in any way to impede justice.

Sincerely,

Program Director