III. Client Consent Forms

Information about an individual's participation in substance abuse treatment may be disclosed when that individual has given informed consent, in writing, for the disclosure. Before drug courts begin accepting participants into the program, a consent form should be designed that conforms to the requirements of 42 CFR, Part 2, and procedures should be clarified concerning the use of that form. (See Appendix A, “Sample Consent for Disclosure of Confidential Substance Abuse Treatment Information: Drug Court Referral.”)

The following elements are required on client consent forms:

- Name of the person who, or organization that, may make the disclosure;
- Name/title (e.g., Presiding Judge) of the person to whom, or the organization (e.g., Office of the Prosecutor) to which, disclosure may be made;
- Treatment participant’s name;
- Purpose of the disclosure;
- How much and what kind of information may be disclosed;
- Treatment participant’s signature;
- Date on which the consent was signed;
- Statement that the consent is subject to revocation
  — except to the extent that the person or program that is to make the disclosure has already acted in reliance on it; and
  — except for clients mandated to treatment through the criminal justice system (see discussion below); and
- Date, event, or condition upon which the consent will expire if not revoked (42 CFR § 2.31).

The duration of the consent may be based exclusively on the passage of "a specified amount of time or the occurrence of a specified, ascertainable event." Most participants in substance abuse treatment may revoke their consent for disclosure at will at any time.

Individuals who have been mandated to receive treatment by a court as a condition of the disposition of a criminal proceeding, however, such as through probation, parole, sentencing, an agreement for dismissal of charges, or an order for release from imprisonment, may not revoke their consent (42 CFR §2.35). The event that triggers termination of consent for individuals referred to substance abuse treatment by a criminal drug court should be the final disposition of the case—discontinuation of all court and/or probation supervision for an individual who has successfully completed the drug court program, for example, or sentencing a defendant for a violation of the court-imposed conditions. Whether the initial referral of an individual to

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1The statutory exception to the right of revocation is specific to criminal proceedings. No such exception exists for drug courts operating in the juvenile delinquency system or in civil court, including abuse and neglect proceedings.
treatment came from the criminal justice system or another source, no future disclosures can be made after an event occurs that triggers the revocation or termination of consent.

Prospective drug court participants should be informed about their right to confidentiality at the time of their initial screening or assessment and asked to sign consent that will permit disclosure to and exchanges of information between the judge, prosecutor, defense counsel, the probation department, or other relevant party (such as a child welfare agency), and the treatment provider that will be providing direct services. Drug court policy should specify that failure to sign the consent form is grounds for exclusion from drug court participation, since drug court operations require that all members of the “team” be able to follow each participant’s treatment compliance and progress. It is important to note that in exchange for this consent participants can be assured that information cannot be used to expose them to other criminal jeopardies except to the extent that they may be subject to sanctioning as a result of noncompliance with drug court policies.

Any treatment provider (including drug court screening or assessment staff) who discloses information about a person’s chemical dependency, need for treatment, or treatment history to the court, counsel, or other party without obtaining signed consent, or after the expiration of the consent, has violated Federal confidentiality law and is subject to prosecution. This is true regardless of whether contact between the provider and drug court participant was initiated by the court, and regardless of whether those other parties already know that the person is chemically dependent and in need of treatment (42 CFR §2.13(b)).

Federal regulations require that the scope of the disclosures be limited to information necessary to carry out the purpose of the disclosures (42 CFR §2.13(a)). To conform to this requirement, drug court consent forms should narrow the scope of disclosure to “report[s] of the participant’s eligibility and/or acceptability for substance abuse treatment services,” and “report[s] of...treatment attendance, compliance and progress in accordance with drug Court monitoring criteria which are necessary for and pertinent to hearings or reports concerning the participant’s [charges/ indictment/termination of parental rights, etc.].” Consent forms should never permit a treatment provider to turn over the entire client file to anyone.

Drug court consent forms should permit disclosure to the parties listed of information within the scope of the consent, including both written reports and oral testimony.

IV. Redisclosures of Information for Criminal Justice Referrals

Agents of a criminal justice system that has mandated an individual to treatment—judges, probation departments, prosecutors and defense counsel, and others—who have access to confidential information regarding a defendant’s substance abuse treatment may use or redisclose that information only to carry out their official duties “with regard to the individual’s conditional release or other action in connection with which the consent was given” (42 CFR §2.35(d)). This information may not be used in other proceedings, civil or criminal, against the drug court participant or with regard to another person. For example, if a drug court participant is a defendant in another case, or a witness in a case in which someone else is being prosecuted, the prosecutor from the drug court may not disclose that person’s treatment to a prosecutor assigned to the other case.
The Federal regulations have been interpreted to allow drug court staff, judges, and prosecutors and defense attorneys who have received confidential information regarding a participant's substance abuse and treatment compliance and progress to use that information in courtroom discussions, since such discussions constitute the "performance of their official duties" and are related to the action—the participant's court-mandated treatment—for which consent for the exchange of information was given.

V. Maintenance of Written Files

Files and other written documents containing confidential information regarding substance abuse treatment must be protected from access by unauthorized users. These materials should be stored in locked cabinets when not in use and should not be left in plain view when a work area is unattended.

Regulations concerning the length of time substance abuse treatment programs must maintain their client records vary from State to State. When the mandated time for maintaining files has passed, the files should be destroyed—by shredding, for example—rather than simply thrown out.

VI. Redisclosures in General

When individuals are referred to substance abuse treatment through a means other than the criminal justice system, including juvenile delinquency or civil justice systems, information may be disclosed only to those parties specified on the consent form. Consent forms may allow a primary recipient of treatment information to redisclose that information—for example, to permit a treatment provider to process a claim for insurance reimbursement. Any documentary treatment information distributed on the basis of the treatment participant's consent, including faxes and letters to the court, should be accompanied by a Notice of Prohibition Against Redisclosure (42 CFR §2.32).

VII. Consent of Minors

Because in most jurisdictions offenders under the age of majority may be charged in adult criminal courts, and because of the growing interest in implementing the drug court model in the juvenile delinquency system and the dependency/abuse and neglect system (where the parents themselves may be minors), drug courts are likely to deal with issues concerning minors and substance abuse treatment. The Federal regulations look to State law on the issue of whether minors may consent to disclosure of their treatment records on their own behalf; in jurisdictions where State law allows minors to apply for and obtain substance abuse treatment without the consent of a parent or guardian, minors are also considered competent to waive the confidentiality of substance abuse treatment records (42 CFR §2.14). The planning processes for drug courts should include review of relevant State law to determine if the consent of a parent or guardian will be necessary to permit a minor to waive his or her right to the confidentiality of treatment records as well as to permit the minor to be referred to treatment. Even where consent of a parent or guardian is not legally necessary, treatment providers or drug courts may wish to require such consent as a matter of policy.
VIII. Toxicology Results

If a court that does not perform diagnosis of chemical dependency, referral to treatment, or actual treatment requires criminal defendants, respondents in delinquency proceedings, or parents involved in the dependency/abuse and neglect system to submit to drug testing, the test results are not covered by the confidentiality laws because the court is not considered a “program” under applicable Federal statutes. However, when a drug Court that meets the statutory definition of “program”—that is, an entity that provides diagnosis of chemical dependency and referral to treatment—requires drug testing, the results are subject to confidentiality laws.

IX. Subpoenas and Court Orders

A. General

Treatment programs for substance abuse may not disclose information about a current or former client in response to a subpoena, even a subpoena signed by a judge, unless that client signs a consent form authorizing such disclosure or a court of competent jurisdiction enters an authorizing order under the standards set forth in the Federal regulations (42 CFR § 2.61).

Courts may issue orders permitting substance abuse treatment programs to make disclosures that would otherwise be prohibited, but only after following specific procedures and making particular findings and determinations required by Federal regulation. The following is a brief summary of the requirements for making such findings and determinations, as set forth in the Federal regulations.

B. Court Orders: Criminal Investigations or Prosecutions of Treatment Participants

Where a court order for disclosure of information regarding substance abuse treatment is requested as part of a criminal investigation or prosecution, a court hearing must be held and a determination made that the following criteria exist before a judge may issue the order:

- The crime involved must be extremely serious (including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse or neglect);
- There must be a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
- Other ways of obtaining the information are not available, or would be ineffective; and
- The potential injury to the client or the client-program relationship and the ability of the program to serve other clients must be outweighed by the public interest and need for disclosure (42 CFR §§ 2.65(d)(1), (2), (3), and (4)).

The judge may review the records in camera before making a decision to order disclosure.
If an application for disclosure comes from law enforcement officials, the program must be given an opportunity to be represented by counsel before the judge rules, and if the disclosure is ordered, it must be limited to those parts of the client’s records that are essential to meet the objective of the order and to those law enforcement or prosecutorial officials who are conducting that particular investigation or prosecution. Use of the records must be limited to the investigation or prosecution of the crime specified in the application for the order (42 CFR §§ 2.64(d)(5) and (e)).

A court may order disclosure of otherwise confidential client communications regarding substance abuse treatment only if the disclosure is necessary to protect against a threat to life or of serious bodily injury; necessary to investigate or prosecute an extremely serious crime (see illustrative list, above); or in connection with a proceeding in which the client undergoing treatment has already offered testimony pertaining to the content of the confidential communications (42 CFR § 2.63).

C. Court Orders: Noncriminal Purposes

In a civil action, the program and the client whose records are being sought must be given notice of any application for a court order for disclosure and be given an opportunity to respond. The application must use a fictitious name to refer to any client and may not contain or disclose client-identifying information unless the client is the applicant or requests otherwise (42 CFR §§ 2.64(a) and (b)). The court must make a finding of “good cause” at a hearing before issuing an order for disclosure. “Good cause” exists only where the public interest and the need for disclosure outweigh any adverse effect that the disclosure will have on the client undergoing substance abuse treatment, the client-program relationship, and the effectiveness of the program’s treatment services. If the information sought is available through a source other than the substance abuse treatment program (e.g., court transcripts of proceedings in which the client admitted to a history of drug use), the court should not issue the order (42 CFR §2.64(d)).

As in a criminal investigation, the judge may examine the records in camera to determine if they actually contain information that would justify the issuance of a court order (42 CFR §2.64(c)).

A court order authorizing disclosure of confidential client records or information must be limited to those parts of the records that are essential to fulfill the objective of the order (42 CFR §§ 2.65(e)(1) and (2)). Therefore, court orders may not properly be issued for the entire client file. The order must also limit access of the confidential records to those parties whose need for the disclosure is the basis for the order (42 CFR §2.65(e)(3)).

X. Other Exceptions to the General Rule

A. Child Abuse and Neglect Reporting

Treatment programs for substance abuse may release client-identifying information about suspected child abuse or neglect in jurisdictions where they are required by State law to do so. Only the initial report to the appropriate State or local authority is allowed. That initial report, however, may include only the treatment participant’s name, address, the nature of the suspected abuse or neglect, and how the reporter came to be aware of the suspected abuse or neglect. Details of the individual’s substance abuse or
treatment should not be given. For purposes of subsequent investigation, and for use in civil or criminal proceedings that may arise out of the report of suspected child abuse and neglect, other restrictions on disclosure still apply to records of the treatment participant who has been reported (42 CFR § 2.12(4)(c)(6)).

B. Qualified Service Organizations

Treatment programs for substance abuse may enter into agreements with individuals or organizations that provide them with necessary services, such as data processing, bill collection, legal representation, accounting, liability insurance, urinalysis, etc. Before treatment participant information is shared with these service providers, written “qualified service organization agreements” (QSOA’s) must be signed. In the QSOA, the service provider must agree to protect the confidential information of each client to the same extent required by the treatment provider under the Federal regulations in the course of receipt, storage, processing, or other involvement with the materials (42 CFR §2.11), including resisting through judicial proceedings efforts to obtain that information. (See Appendix B, “Sample Qualified Service Organization Agreement.”)

C. Medical Emergency

Treatment programs may disclose relevant confidential information about a participant to medical personnel in the event of a bona fide medical emergency in which there is an immediate health threat that requires medical intervention. Relevant information includes the participant’s name, address, the nature of the apparent medical emergency, and an emergency contact name for the participant; if the program believes that the participant’s medical emergency is related to recent use of a specific drug or an ongoing illness of which the program is aware, that information may also be disclosed to the medical personnel.

D. Research

Information about a participant’s substance abuse treatment may be shared with researchers without written consent from the participant, providing the researchers have demonstrated to the program that they have a protocol that ensures secure storage of information and approved confidentiality safeguards. Researchers may not disclose information that reveals the name or identity of a treatment participant, directly or indirectly, and may not use information obtained in the course of their research for purposes of a criminal investigation or prosecution of a treatment participant (42 CFR §2.62). Researchers who engage in long-term or followup studies of treatment participants may not disclose a participant’s past relationship with substance abuse or treatment services to third persons in an effort to locate individuals for the study; researchers may make followup inquiries only if these inquiries do not reveal the individual’s status as a former substance abuse treatment program participant.

E. Audit and Evaluation

Government funders and regulators and private entities that provide financial assistance, third-party payments, peer review, or utilization and quality control of treatment services may have access to confidential treatment information in order to perform their functions, but only after signing a written agreement like that required for a QSOA. This agreement must obligate the party to protect the information obtained in accordance with Federal requirements. These protections must include the destruction of any participant-
identifying information that is removed from the program premises at the completion of the audit or evaluation.

F. Information That Does Not Identify the Clients

It is permissible to discuss treatment participants without using their names or other identifiers, such as Social Security numbers. This type of permissible communication applies to the reporting of aggregate data or to the use of clearly indicated pseudonyms. Communications that do not identify an individual as a substance abuser or treatment participant are also permissible. The requirement that client-identifying information not be communicated has significant implications for how staff of organizations providing treatment services communicate outside the treatment program. For example, staff of organizations that work exclusively or primarily with substance abusers should not leave telephone messages with their organization’s name, or send mail to participants that might identify the participant as involved in treatment services.

G. Internal Communications

Staff providing substance abuse treatment may discuss confidential information in connection with duties related to providing services to participants, which may include billing or legal challenges to efforts from individuals or organizations outside the treatment program to obtain information. Staff in organizations that have programs other than substance abuse treatment must have the written consent of the client receiving substance abuse treatment in order to disclose information to a staff member involved in other programs run by the organization.

H. Crime on Program Premises or Against Program Personnel

In reporting crimes by participants on the premises of the treatment program or against program personnel, treatment providers may disclose client information, limiting disclosure to the circumstances of the crime (including the participant status of the accused), the accused’s name and address, and his or her last known whereabouts (42 CFR §2.12(5)).

I. Veterans’ Administration or Armed Forces Records

The Federal laws and regulations under 42 USC and 42 CFR discussed in this document do not apply to information regarding substance abuse treatment provided by the Veterans’ Administration, which is governed by Title 38 of the United States Code and by regulations promulgated by the Administrator of Veterans’ Affairs (42 CFR §2.12(c)(1)). These laws and regulations do apply, however, to the communication of information obtained when a treatment participant was in the Armed Forces, except for the exchange of information within the Armed Forces and between the Armed Forces and the Veterans’ Administration for purposes of furnishing health care to veterans (42 CFR §2.12(2)).

J. Integrated Information Systems

Many drug courts use computerized information systems to facilitate the flow of information concerning participants between the judge, the probation department, defense counsel and prosecution, the case manager,
and the treatment providers. Confidentiality issues will come into play when such a system is used, because the information generated by the case manager and treatment provider is highly protected.

A drug court automated information system must be set up to ensure that access to any confidential information is limited to those who are entitled to it, and available only until the date or circumstance that triggers revocation or termination of consent. The system should use access codes so that the court, probation department, the prosecution, and defense counsel can gain access only to confidential material that is within the scope of the existing consent forms. Any automated information system being used to link the various professional components in a drug court must be designed to allow each component access to the same range of information, and for the same time period, to which they would otherwise be privy in oral testimony or paper documents, and for the same limited purposes.
APPENDICES
Appendix A:

SAMPLE

CONSENT FOR DISCLOSURE OF CONFIDENTIAL SUBSTANCE ABUSE TREATMENT INFORMATION: DRUG COURT REFERRAL

I, defendant's name, hereby consent to communication between treatment program's name and Judge name of presiding judge, name of prosecuting attorney or prosecutor's office, name of defense attorney, the probation department of jurisdiction, and/or other referring agency.

The purpose of and need for this disclosure is to inform the court and other above-named parties of my eligibility and/or acceptability for substance abuse treatment services and my treatment attendance, prognosis, compliance, and progress in accordance with the drug court monitoring criteria.

Disclosure of this confidential information may be made only as necessary for and pertinent to hearings and/or reports concerning charges, docket number, indictment number.

I understand that this consent will remain in effect and cannot be revoked by me until there has been a formal and effective termination of my involvement with the drug court for the case named above, such as the discontinuation of all court (and/or, where relevant, probation) supervision upon my successful completion of the drug court requirements or upon sentencing for violating the terms of my drug court involvement (and/or, where relevant, probation).

I understand that any disclosure made is bound by Part 2 of Title 42 of the Code of Federal Regulations, which governs the confidentiality of substance abuse patient (or client) records, and that recipients of this information may redisclose it only in connection with their official duties.

Date

Signature of defendant

Signature of parent, guardian, or representative (if required)
Appendix B:

SAMPLE

Qualified Service Organization Agreement (QSOA)

(Name of qualified service organization [QSO]) and (name of treatment program) hereby enter into a Qualified Service Organization Agreement, whereby (QSO) agrees to provide (describe services) for (treatment program). (QSO) also agrees:

1. that in receiving, storing, processing, and otherwise dealing with any information obtained about a participant of (treatment program), it and all of its agents and assigns are fully bound by the provisions of the Federal laws and regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records (42 United States Code Sections 290dd-2, and 42 Code of Federal Regulations, Part 2); and

2. that it will resist, in judicial proceedings if necessary, any efforts to obtain access to information pertaining to any (treatment program) participant otherwise than as expressly provided for in the Federal confidentiality regulations (42 CFR, Part 2).

Signature of QSO officer
Printed name of above
Title of above officer
Address of QSO

Signature of treatment program officer
Printed name of above
Title of above officer
Address of treatment program
Appendix C:

Frequently Asked Questions About Substance Abuse Treatment
Confidentiality and the Criminal Justice System

Q. Our drug court employs a counselor to screen and assess proposed drug court participants to determine if they are substance abusers in order to refer them to treatment. Since this person is not employed by an agency that provides therapeutic or rehabilitative services, does he or she need to have written consent from the potential participant before sharing the assessment findings with the judge or prosecutor?

A. Yes. A program is defined as “an individual or entity (other than a general medical care facility) who...provides alcohol or drug abuse diagnosis, treatment or referral for treatment.” Diagnosis is defined as “any reference to an individual’s alcohol or drug abuse...which is made for the purpose of treatment or referral to treatment.” A drug court employee is considered a “treatment program” even if he or she is not personally providing therapeutic or rehabilitative services. This employee should obtain signed consent from each individual before beginning the screening or assessment, since reporting the findings without written consent would be a violation of the confidentiality law.

Q. To whom are violations of 42 CFR, Part 2, reported, and what are the ramifications of unauthorized disclosure of confidential substance abuse treatment information?

A. Participants receiving substance abuse treatment who believe that their right to confidentiality has been violated may report the alleged violation to the United States Attorney for the jurisdiction in which the violation occurred. In addition, since most State licensure regulations have adopted the Federal regulations, a report can be directed to the State agency that governs the licensing of substance abuse treatment programs.

Violations of 42 USC §290dd-2 will be fined up to $500 for a first offense and up to $5,000 for each subsequent offense. If the violator is licensed by the State as an addictions counselor, social worker, or other mental health professional, he or she may also be subject to suspension or loss of license; check the State licensing regulations.