# CONFIDENTIALITY

## I. 42 CFR - CASE RECORDS

1. 42 CFR Part 2: Confidentiality of Alcohol and Drug Abuse Patient Records. This section covers any program that is specialized to the extent that it holds itself out as providing and provides alcohol or drug abuse diagnosis, treatment, or referral for treatment and which is federally assisted, directly or indirectly.

* A program conducted in whole or in part by any federal department or agency.
* A program whose lawful conduct in whole or in part requires a license, registration or other authorization from any federal department or agency.
* A program assisted by funds supplied by any federal department or agnecy either directly or indirectly.
* A program assisted by tax-exempt status or by the allowance of income tax deductions for contributions to the program.

The regulations apply to all information or records of identity, diagnosis, prognosis, or treatment received or acquired in connection with an alcohol or drug abuse program and which were maintained after March 21, 1972. Records closed prior to March 12, 1972, are not subject to this regulation.

The regulations prohibit disclosure or use of client records. They are absolutely confidential, and may not be disclosed except as specifically authorized by the regulations. This absolute confidentiality applies to civil, criminal, administrative or legislative proceedings unless disclosure is specifically authorized by the regulations. Records may not be disclosed to a person who merely has some official status or has obtained a subpoena, unless he also has authorization under the regulations. The confidentiality requirements also prohibit implicit or negative disclosures so that any inquiry must be met by a noncommital response. Specifically the following:

1. Any infomation that would identify a client as an alcohol or drug abuser.
2. Any information that would identify a client as a participant in any alcohol or drug abuse treatment program.
3. Any information obtained by the program that would be used to investigate or to bring criminal charges against a client.

Any disclosure permitted under the regulations must be limited to that information which is necessary to carry out the purpose of the disclosure, and requires a signed consent by the client stating the above.

Certain types of communication do not constitute disclosure and are not included within the confidentiality requirement. Specifically the following:

1. Communications of information between or among program personnel who need such information in the course of their duties.

2. Communications of information between a program and a qualified service organization such as a laboratory or other professional service which is needed by the organization to perform its services. (Testing)

3. Communications of information which includes neither patient identifying information nor identifying numbers assigned by the program.

4. Seeking assistance of or reporting a crime to law enforcement personnel when a client commits or threatens to commit a crime on the premises or against personnel of the program, provided such report does not identify the suspect as a client.

Authorized disclosures may generally be catagorized as those requiring written client consent and those requiring no client consent. All authorized disclosures are subject to a requirement that the disclosure be limited to information necessary in light of the need or purpose for the disclosure. All disclosures must be written, and must state:

*"This information has been disclosed to you from records whose confidentiality is protected by federal law. Federal regulations, 42 CFR, Part 2, prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other informatin is NOT sufficient for this purpose."*

Written consent to release information contain the following informaiton:

1. The name of the program which is to make the disclosure.
2. The name of the person or organization to which disclosure is to be made.
3. The name of the client.
4. The purpose or need for the disclosure.
5. The extent or nature of the information to be disclosed.
6. A statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance thereon, and a specification of the date, event, or condition upon which it will expire without expressed revocation.
7. The date on which the consent is signed.
8. The signature of the client or other authorized party.
9. The signature of a witness.

With a written consent the following information may be disclosed to:

1. Medical personnel or treatment or rehabilitation programs when necessary to better enable them to furnish services to the client. Oral consent is permitted for this disclosure if a client on medication is hospitalized, incarcerated, or otherwise unable to give written consent; provided the oral consent is documented in the client record.

2. An attorney for the client upon written consent of the client which is also signed by the attorney.

3. The client's family may receive information evaluating current or past status of the client unless the person responsible for treatment concluded such disclosure would be harmful to the client.

4. Third-party payers or funding sources may receive only such information as is reasonably necessary for the discharge of the legal or contractual obligations of the third-party payer or funding source.

Court orders authorized by the court allow disclosures otherwise prohibited. However they must be made pursuant to a specific court order which is more than just a subpoena. Court orders must be signed by the judge issuing the order, and must be limited to ordering disclosure of objective data only.

REMEMBER: Federal regulations supercede any State or local law.

The penalties for violation of the regulations are $500 for the first offense and not more than $5,000 for any subsequent offense.

SEE ATTACHED SAMPLE RELEASE FORM.

## II. TARASOFF

The case of Tarasoff -vs- Regents of the University of California (1976) set the standard for reporting a threat of great physical violence against another individual. The court case held that:

> *When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs a serious obligation to use reasonable care to protect the intended victim from such danger.*

Two important elements of this court decision must be met in order for the danger to be reported:

1. When the client has communicated to the therapist a serious and imminent threat of physical violence against another.
2. When the threat is against a reasonably identifiable victim or victims.

In the absence of these elements, the duty to warn or to protect the third party does not arise. If these two elements are present, then the counselor shall use reasonable efforts to communicate the threat to the intended victim or victims, and to an appropriate law enforcement agency.

## III. CHILD ABUSE

1. Definition of child abuse: A physical injury, sexual abuse, willful cruelty or unjustified punishment, corporal punishment, neglect or abuse.

* Section 11165 of the Penal Code.

The law reads:

*A counselor who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone., and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident.*

Basically this means that a counselor shall:

1. Telephone the child protective agency immediately or as soon as possible.
2. Prepare and send a written report within 36 hours.

## III. ELDERLY ABUSE

Elderly abuse reporting is basically the same as child abuse. Suspected abuse is reportable to the local Adult Protective Services Agency through the County Welfare Department. The law states:

*A counselor who in his/her professional capacity or within the scope of his or her employment either has observed an incident that reasonably appears to be physical abuse, has observed a physical injury where the nature of the injury, its location on the body, or the repetition of the injury, clearly indicates that physical abuse has occurred, or is told by an elder or dependent adult that he or she has experienced behavior constituting physical abuse, shall report the known or suspected instance of physical abuse to the local Adult Protective Services Agency, and shall prepare and send a written report (SOC 341) thereof within two (2) working days.*

## IV. HIV/AIDS LAW FOR COUNSELORS

1. HIV Antibody test confidentiality: The California "Mandated Blood Testing and Confidentiality to Protect Public Health Act", 1985, (the antibody testing confidentiality act), aimed at preventing anyone or any institution from disclosing an individual's identifiable HIV antibody test results and was meant to encourage testing. Any release requires a special release for disclosure of information regarding HIV antibody test results, (see attached sample). Since 1989, some changes have been made:

- It is legal in include an HIV antibody result in a patient's medical record. However, any disclosure of the record revealing the test result, or the fact that a test was even taken, requires a special release for disclosure.

- It is legal to release the results to a parent of a child under age 12 yrs. without a special release.

- AIDS or ARC must be reported to the designated public health agency.

- It is legal to disclose antibody test results to other practitioners, without consent, only when these results are revelant to the diagnosis, care, or

treatment of the client. However, it is well-advised to require a client to release the specific antibody test result before sending the information. REMEMBER: A counselor must determine that the information is necessary for the diagnosis, care or treatment of the client, and the determination must be well documented.

* HIV antibody results may be charted in the client's record. However, care <u>must</u> be given that the information is separated from the regular information, and not released to anyone or any agency, or viewed by non-counseling staff. A coding system should be utilized.

The duty to warn as outlined in the Tarasoff decision does <u>not</u> apply to HIV/AIDS information. Counselors should always encourage the client to notify all sex partners, and this encouragement is sufficient. We should always strive to have the client notify all sex partners, drug partners, (IVDU's), and especially information involving pregnancy.

It is important that all positive HIV antibody test results be repeated as soon as possible to eliminate the possibility of a false positive. Prior to receiving the second results the client should be encouraged to stop all drug use, especially needle use or sharing, practice safer sex practices, and avoid pregnancy. If the second test results confirm the diagnosis, then strong encouragement to notify must be stressed. Monitoring the client's behavior in regards to these conditions should become part of every counseling session. If the client appears uneasy about notification, then the counselor should offer to counsel the partners of the client, or offer the contact notification process, (similar to the practice used by public health regarding TB or STD).

It should be noted that effective January 1, 1989, the California legislature allowed licensed medical doctors, including psychiatrists, to notify spouses, or sexual partners or needle-sharing partners of their patients without release. This applies to doctors and psychiatrists <u>only, not counselors.</u>