Integration of substance abuse treatment and pretrial case processing raises a broad array of legal and ethical issues. In this chapter, four key sets of legal or mixed legal and ethical issues are discussed, including:

- Issues of constitutional law, including questions related to the constitutionality of program operations under the equal protection clause of the U.S. Constitution
- Legal issues arising under Federal and State laws concerning the confidentiality of information acquired during the course of treatment
- Ethical concerns related to the voluntariness of the defendant's participation in treatment.

**Equal Protection**

The Fourteenth Amendment to the U.S. Constitution prohibits States from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." "Equal protection" does not mean that everyone must be treated in the same way. It means that if distinctions are to be made in the way the State treats people, then those distinctions must have a "rational relationship" to the State's objectives or be supported by a "compelling State interest." Distinctions may not be made on the basis of arbitrary classifications.

Any alternative processing program that systematically excludes a particular class of people -- such as African Americans or women -- would clearly be in violation of the equal protection clause. Does this mean that programs that exclude defendants who are accused of violent offenses, as most do, are unconstitutional? And what about programs that exclude everyone over a certain age?

Most programs that exclude defendants who have committed violent crimes do so on a number of "rational bases." The State has an interest in focusing its limited resources on rehabilitating defendants who are most likely to benefit. Violent defendants often have different or more serious problems than nonviolent defendants. In addition, the State has an important interest in protecting the public safety.

Programs that accept only youthful defendants are supported by similar arguments. The State can act on the hypothesis that youthful defendants are more likely to benefit from treatment; treatment of youthful defendants theoretically also is more cost-effective because if they continue to abuse drugs, it is likely that they have longer criminal careers ahead of them.

If programs that exclude certain classes of defendants on a reasonable basis are constitutional, what about programs that treat "similarly situated" defendants, those in the same "class," differently. Two defendants who have committed exactly the same crime may be treated quite differently: a program may offer one defendant charged with drug possession the option of entering treatment in lieu of criminal justice processing while denying that option to another defendant charged with the same offense. By the same token, a defendant who is accused of committing a relatively minor crime may be subjected to court supervision as long as a defendant who is accused of committing a serious crime.

Is this "unequal" treatment unconstitutional? Probably not. The Constitution permits the State to make distinctions between individuals (as well as "classes" of individuals) if those distinctions are based on reasonable criteria. Thus, treating differently defendants who have been accused of committing the same type of crime is acceptable if the distinction is made because of differences in the addiction or criminal histories of the two defendants or differences in other mitigating or aggravating factors in their backgrounds. Treating identically defendants who are accused of committing dissimilar crimes is acceptable if the defendant accused of the lesser crime has a more extensive criminal history, or if the two defendants need the same kind of treatment, or if there are other factors that warrant similar treatment.

Thus, defendants are usually sentenced on an individual basis, and their backgrounds and needs are factored into the ultimate decision. Rarely does the system require the court to treat all defendants convicted of similar crimes in exactly the same way. Indeed, the argument against mandatory sentencing, which requires the judge to impose a particular sentence for an offense, is that it is unfair precisely because it does not permit consideration...
of defendants' backgrounds or of mitigating and aggravating circumstances.

Even defendants who receive identical sentences, probation or incarceration for identical periods of time, may be treated differently. The justice system sometimes rewards defendants on probation for good behavior by discharging them early from supervision. Prison inmates may lose "good time" by violating prison rules, which causes them to be incarcerated for longer periods of time than those who drew the same sentences for the same crimes, but behaved the way prison authorities wanted them to. Few would argue that the justice system should abandon these kinds of distinctions.

Thus, at every stage of the criminal justice system, we treat similarly charged, similarly convicted, and similarly sentenced defendants differently, based on their backgrounds and their actions after their arrests.

One approach to dealing with equal protection concerns would be to "equalize" the length of time in treatment for all defendants who are accused of committing the same crime, but whose addictions vary in severity. One suggestion would require the same length of time in treatment, but vary the intensity of services. This idea presents difficulties, however, because it requires defendants to stay in treatment after they have complied fully, gained what they can, and should have graduated. This raises a number of ethical and practical issues: For defendants who should have graduated, it means they are no longer matched to an appropriate treatment program, but instead are being punished rather than treated. For the treatment program, it means having a valuable treatment slot occupied by someone who no longer needs it. Finally, this solution does not preclude the theoretical possibility of a constitutional challenge. The defendants who receive more intensive services might object that they do not receive precisely the same treatment as those who entered the less intensive program.

A second suggestion for equalizing time in treatment for all defendants who have committed similar crimes would add components like community service or educational requirements for those defendants who require less time in treatment. This solution is interesting because it does not require defendants to remain in treatment when they no longer need it. However, problems with this model exist as well. First, many jurisdictions already require some defendants convicted of certain kinds of minor crimes to perform community service. Second, adding additional requirements to equalize the time all defendants must participate in a program despite their different needs for treatment extends the State's control over a group of individuals who would otherwise have completed their obligations to the system. Third, defendants who receive longer treatment may object that they are denied the benefits of any ancillary educational services that the other group received when its treatment ended.

The wiser course seems to be to acknowledge the reality that defendants committing similar crimes may be treated differently in a drug court program. If, before they enter the program, full disclosure is made to defendants that substance abuse treatment will be tailored to their needs (including whatever that may mean in terms of intensity and length), it is unlikely that a successful lawsuit could be brought on equal protection grounds.

A court's response to an equal protection challenge by a defendant who has agreed in open court to participate in alternative processing and who has acknowledged that no promises have been made regarding the length or intensity of treatment might well be: "The court allowed you to participate for your own benefit. If you are not satisfied, you can always opt to leave treatment and go back into criminal justice processing."

**Due Process**

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from "depriv[ing] any person of life, liberty or property, without due process of law." Due process of law basically means that government must provide individuals with some kind of notice and an opportunity to be heard before it can deprive them of any right or privilege.

Does this mean that if a treatment drug court program seeks to terminate the participation of a defendant because of noncompliance, there must be a "due process" hearing? No, it doesn't.

The Supreme Court has held that the Due Process Clause requires a hearing before an offender's probation or parole can be revoked (Morrissey v. Brewer, 408 US 471 [1972] [parole]; Gagnon v. Scarpelli, 411 US 778 [1973] [probation]). However, similar requirements are not ordinarily applicable to defendants in drug courts while their cases are pending. The drug court follows a diversion or deferred prosecution model. Procedural rights have usually been waived allowing for summary decisions by judges.

The practice in individual drug courts vary. In the Miami drug court model, it is the judge who makes the final decision about termination, in open court, after a hearing at which the defendant is represented by counsel. In the Brooklyn, New York, Drug Treatment Alternative-to-Prison (DTAP) model, the treatment program provides a due process hearing, in accordance with New York State regulations. Why this difference? In Miami, the court is an integral part of the treatment process. The defendant is diverted directly from the courtroom and reports back to
the judge periodically. The judge has access to the defendant's treatment records. DTAP does not involve the court in the treatment process. Once defendants enter treatment, the court hears no more about them unless their treatment is terminated and they return for criminal justice processing, or they graduate and their criminal cases are terminated.

**Federal and State Confidentiality Laws**

For integration of substance abuse treatment and pretrial case processing to be effective, information must flow between the treatment program and the criminal justice system. Most treatment drug court programs rely on detailed information flowing regularly to the judge, prosecutor, and defense attorney. This information (including the defendant's attendance record and drug test results) enables the drug court judge to "work with" the defendant, offering praise for good performance or criticism (or punishment) for failure. Programs designed to integrate substance abuse treatment with pretrial case processing cannot work unless the treatment program can disclose information about defendants to the criminal justice system.

Research evaluating the efficacy of these programs also requires that substance abuse programs disclose data about their patients to others. Policymakers considering whether to fund a program will want to know whether it works. The long-term survival of drug courts depends on good research, based on good data.

Programs designed to integrate substance abuse treatment with pretrial case processing cannot work unless the treatment program can disclose information about defendants to the criminal justice system.

**Federal Restrictions on Disclosure of Information About Patients**

Although the flow of information from the substance abuse treatment program to the criminal justice system and to the researcher/evaluator is critical, those planning or operating programs and research studies must keep in mind that Federal laws and regulations protect information about all persons receiving alcohol and drug abuse prevention and treatment services (42 U.S.C. Section 290dd-3 and ee-3 and 42 Code of Federal Regulations, Part 2). These laws and regulations prohibit disclosure of information regarding patients who have applied for or received any alcohol or drug abuse-related services, including assessment, diagnosis, counseling, group counseling, treatment, or referral for treatment, from a covered program. The restrictions on disclosure apply to any information that would identify a patient as an alcohol or drug abuser, either directly or by implication. They apply to patients who undertake treatment as a form of alternative processing, patients who are civilly or involuntarily committed, minor patients, and former patients. They apply even if the person making the inquiry already has the information, has other ways of getting it, enjoys official status, is authorized by State law, or comes armed with a subpoena or search warrant.

Any program that specializes, in whole or in part, in providing treatment, counseling, and/or assessment and referral services for patients with alcohol or drug problems must comply with the Federal confidentiality regulations (Section 2.12(e)). Although the Federal regulations apply only to programs that receive Federal assistance, this category includes organizations that receive indirect forms of Federal aid such as tax-exempt status, or State or local funding coming (in whole or in part) from the Federal government.

**The Importance of Obtaining Defendants’ Consent to Disclosure of Information**

Information that is protected by the Federal confidentiality laws and regulations may always be disclosed after the defendant has signed a proper consent form. The Federal regulations also permit disclosure without the defendant's consent in several limited situations, including medical emergencies, under a court's special authorizing order, and in communication among substance abuse treatment program staff.

Disclosures to the criminal justice partner are permissible once a defendant has signed a criminal justice system consent form (Section 2.35). An example of this form is presented in Exhibit 8-1. This form must be in writing and must contain each of the following items:

- The name or general description of the program(s) making the disclosure
- The name or title of the individual or organization that will receive the disclosure
- The name of the patient who is the subject of the disclosure
- The purpose or need for the disclosure
- How much and what kind of information will be disclosed
• A statement regarding revocation of consent
• The date, event, or condition upon which the consent will expire
• The signature of the patient
• The date on which the consent is signed.

The requirements regarding consent are somewhat unusual and strict but must be carefully followed. A general medical release form, or any consent form that does not contain all of the elements listed above, is not acceptable.

Limitations on Disclosure

All disclosures, and especially those made pursuant to a consent form, must be limited to information that is necessary to accomplish the need or purpose for the disclosure (Section 2.13(a)). It would be improper to disclose everything in a defendant's file if the recipient of the information needs only one specific piece of information.

The purpose or need for the communication of information must be indicated on the consent form. Once this material has been identified, it is easier to determine how much and what kind of information will be disclosed, tailoring it to what is essential to accomplish the need or purpose that has been identified.

The kind and amount of information disclosed to the criminal justice system by a treatment program will depend on the structure of the collaborative program. For example, in the drug court model, the judge, prosecutor, and defense counsel see the defendant frequently to offer words of encouragement or criticism in response to the defendant's performance. In this model, the purpose of the disclosure would be "to provide information about performance in treatment" and the kind and amount of information would be "drug test results, attendance at the program, and counselor's assessment."

Information that is protected by the Federal confidentiality laws and regulations may always be disclosed after the defendant has signed a proper consent form.

Seeking Information From Collateral Sources

When a substance abuse treatment program that screens, assesses, or treats criminal defendants asks relatives, doctors, employers, or school representatives about defendants, it is making a patient-identifying disclosure. In other words, when treatment program staff seek information from other sources, they are letting these sources know that the defendant is being considered for substance abuse treatment. The Federal regulations generally prohibit this kind of disclosure unless the patient consents.

The substance abuse treatment program can proceed in one of two possible ways. First, if the criminal justice partner makes the inquiries without mentioning substance abuse or treatment, there is no disclosure of the defendant's substance abuse and therefore no violation of the confidentiality rules has occurred. The second way, of course, is to get the defendant's consent to contact the relative, doctor, employer, school, health care facility, etc.

The Duration of Consent

The criminal justice system consent form must contain a date, event, or condition upon which it will expire. The Federal confidentiality regulations permit the criminal justice system consent to be irrevocable until this specified date or condition occurs.² Thus, a defendant entering treatment in lieu of prosecution or punishment cannot prevent the court or other agency from monitoring his or her progress (see Exhibit 8-1.) The regulations require that the following factors be considered in determining how long a criminal justice system consent will remain in effect:

• The anticipated duration of treatment
• The type of criminal proceeding in which the defendant is involved
• The need for treatment information in dealing with the proceeding
• The expected date of final disposition
• Anything else the patient, program, or criminal justice agency believes is relevant.

These rules allow programs to continue to use as a traditional expiration condition for a consent form the phrase "when there is a substantial change in the patient's justice system status."
Prohibitions on Redisclosing Information

Information obtained from a substance abuse treatment program through a patient’s consent cannot be redisclosed unless permitted by the regulations (Section 2.32). The Federal confidentiality regulations require that disclosures made with written patient consent be accompanied by a written statement that the information disclosed is protected by Federal law and that the person receiving the information cannot make any further disclosure of such information. This statement should be delivered and explained to the recipient at the time of disclosure or earlier (see Exhibit 8-2).

Using Criminal Justice System Consent Forms

Whenever possible, it is best to have a proper criminal justice system consent form signed by the defendant before he or she is referred to the treatment program. If that is not possible, the treatment program should have the defendant sign a criminal justice system consent form at his or her very first appointment.

If a program fails to have the defendant sign a criminal justice system consent form and the defendant fails to complete the assessment process or treatment, the program has few options when faced with a request for information from the referring criminal justice agency. It is unclear whether a court can issue an order under Section 2.65 that would authorize the program to release information about a referred defendant who has left the program in this type of case. This is because the regulations allow a court to order disclosure of treatment information for the purpose of investigating or prosecuting a patient for a crime only where a crime has been committed that is “extremely serious.” Absconding from a program generally will not meet that criterion.

Therefore, unless a consent form is obtained by the judge or criminal justice agency or by the substance abuse treatment program at the beginning of the assessment or treatment process, the program could be prevented from providing any information to the court or to another criminal justice agency that referred the defendant.

If the defendant referred to treatment program by one court or another criminal justice agency never applies for or receives services from the program, that fact may be communicated to the referring agency without patient consent (Section 2.13(c)(2))

Information About Patients

As discussed previously in this TIP, it is essential in the planning stages of an alternative processing program that the criminal justice and treatment partners reach agreement about communications between the program and the criminal justice agency. Clear guidelines must be established: How detailed will the program’s reports be? Will the program report specific treatment information, as is done in some drug courts, or only limited information? And how will the criminal justice system use the information?

These issues raise the question of fairness: For example, will the prosecutor and court be able to use information obtained from the substance abuse treatment program against a defendant who fails to complete treatment? Would such use violate the Federal laws and regulations? Finally, could a treatment program function if the negative information it obtains in the course of treatment could be used against a defendant at a later date?

Will the prosecutor and court be able to use information obtained from the substance abuse treatment program against a defendant who fails to complete treatment?

The issue of program viability is inextricably linked with the question of fairness. In order to provide counseling, programs must obtain information about their patients’ lives, feelings, and thoughts. Substance abuse treatment providers hear a great deal of negative information about their patients, whether or not their patients are involved in the criminal justice system. It would be virtually impossible for programs to function if patients felt constrained about disclosing such information. To increase the punishment of defendants, either by adding charges for new offenses or by increasing punishment in light of newly discovered evidence, as a result of disclosures they made while in treatment would be both unfair and counterproductive.

Defendants should also be informed about what kind of information will be disclosed to the court and other justice systems agencies, how often it will be disclosed, and how it will be used. The criminal justice system consent form signed by the defendant should detail the kinds of information that will be disclosed to the justice system. The Federal confidentiality regulations also require programs to notify patients of their right to confidentiality and to give them a written summary of the regulations’ requirements. (The regulations contain a sample notice.) The notice and summary should be handed to patients when they begin participating in the program or soon thereafter (Section 2.22(a)).
The Implications of Computerization

Computerizing the flow of information between the substance abuse treatment provider and the courts allows the system to react promptly to information from the treatment provider. For example, judges with immediate access to the attendance records and drug testing results entered by the treatment provider can quickly reward or sanction improvements or slips in the defendant's behavior. Computerization also reduces the number of times the same information is gathered and recorded.

Computerization of communications between the substance abuse program and its criminal justice partners does create some confidentiality problems. A disclosure of protected information occurs each time someone "accesses" a file from a computer. Unless appropriate safeguards are built into the software, computerization can undermine the controls on disclosure that are inherent in requiring the patient to sign a consent form before each disclosure to a new person or entity.

Computerizing the flow of information between the substance abuse treatment provider and the courts allows the judge to promptly reward or sanction a defendant's improvement or slip.

Computerization carries a risk that treatment information entered by the substance abuse treatment provider will be obtained by a person or entity not authorized to obtain it. Security of computer systems with telephone links between the treatment and justice system partners must be safeguarded.\(^7\) The treatment provider also must take care that the information entered into the computer is limited to that which it is authorized to disclose according to the defendant's consent form. Finally, computerization carries the risk that information about the defendant will remain accessible after the defendant has left the system and the consent form has expired. Programs planning to computerize must devise a way to delete all substance abuse information about a defendant once his or her consent form expires.

Coding Patients' Names

The Federal confidentiality regulations protect "patient identifying information." Section 2.11 of the regulations defines this to mean the name, address, Social Security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of or contain numbers that could be used to identify a patient with reasonable accuracy and speed from sources external to the program (such as Social Security or driver's license number).

Responding to Patients' Disclosures of Criminal Activity

Reporting Threatened Activity: The Duty to Warn

For most treatment professionals, the issue of reporting a patient's threat or intention to commit a crime is a troubling one. Many professionals feel that they have an ethical, professional, or moral obligation to prevent a crime when they are in a position to do so, particularly when the crime is a serious one. In working with defendants, substance abuse treatment practitioners may face questions about their "duty to warn" someone of a patient's threat to harm another.

A recent trend in the law requires psychiatrists and other therapists to take "reasonable steps" to protect an intended victim when they learn that a patient presents a "serious danger of violence to another."

There are five ways a substance abuse treatment program participating in alternative processing can proceed when patients threaten to harm others or themselves.

- The program can make a report to the court or other criminal justice agency that is its partner in the program, as long as there is a criminal justice system consent form signed by the defendant that is worded broadly enough to allow this sort of information to be disclosed. The criminal justice agency can then act on the information by warning the intended victim or notifying another law enforcement agency of the threat. However, in doing so, the criminal justice agency must be careful that no mention is made that the source of the information was a substance abuse program or that the defendant is in substance abuse assessment or treatment. (Disclosures that do not identify the defendant as someone with a substance abuse problem are permitted. See Section 2.12(a)(1).)
- The substance abuse treatment program can go to court and request a court order in accordance with Section 2.64 of the Federal regulations, authorizing the disclosure to the intended victim, or in
accordance with Section 2.65, authorizing disclosure to a law enforcement agency.\(^8\)

- The substance abuse treatment program itself can make a disclosure to the potential victim or law enforcement officials that does not identify as a patient the individual who threatens to commit the crime. This can be accomplished either by making an anonymous report or, for a substance abuse treatment program that is part of a larger non-drug/alcohol entity, by making the report in the larger entity's name.

- The program can make a report to medical personnel if the threat presents a medical emergency that poses an immediate threat to the health of any individual and requires immediate medical intervention (Section 2.51). Thus, for example, a program could notify a private physician about a suicidal patient so that medical intervention can be arranged.

- The program can obtain the patient's consent.\(^9\)

If none of these options is practical, what should a treatment program do? It is, after all, confronted with conflicting moral and legal obligations. If a substance abuse treatment program believes there is clear and imminent danger to a patient or a particular other person, it is probably wiser to err on the side of making an effective report about the danger to the authorities or to the threatened individual.

As in other areas where the law is still developing, treatment programs should find a lawyer familiar with the issues, who can provide advice on a case-by-case basis. "Duty to warn" issues also present an area in which staff training, as well as a staff review process may be helpful.

### Reporting Past Criminal Activity

What should a substance abuse treatment program do when a patient tells a counselor, for example, that she intends to get her children new clothes by shoplifting, a crime the counselor knows she has committed many times in the past? Does the program have a duty to tell the police? Does a program have a responsibility to call the police (or its criminal justice partner) when a patient discloses to a counselor that he participated in a crime some time in the past, or during his participation in the program? What can a treatment program do when a patient commits a crime at the program or against an employee of the program? These are three very different questions that require separate analysis.

A substance abuse treatment program generally does not have a duty to warn another person or the police about a patient's intended actions unless the patient presents a serious danger of violence to an identifiable individual. Shoplifting rarely involves violence, and it is unlikely that the counselor will know which stores are to be victimized. Petty crime like shoplifting is an important issue that should be dealt with therapeutically. It is not something a substance abuse program should necessarily report to the police.

Suppose, however, that a patient admits during a counseling session that he killed someone during a robbery three years ago. Does the program have a responsibility to report that? And is the answer any different if the defendant admits he or she committed a serious crime while participating in treatment as part of an alternative processing agreement?

In a situation in which a patient has told a counselor that he or she committed a crime in the past, there are generally three questions the substance abuse program needs to ask as it considers whether to make a report:

**Is there a legal duty to report the past criminal activity to the police under State law?** The answer to his question varies from State to State. In most States, however, there is no legal duty to report a crime committed in the past to the police.

**Does State law permit a counselor to report the crime to law enforcement authorities if he or she wants to?** Whether or not there is a legal obligation imposed on citizens to report past crimes to the police, State law may protect conversations between counselors of substance abuse treatment programs and their patients and exempt counselors from any requirement to report past criminal activity by patients. Such laws are important to patients in substance abuse treatment, many of whom have committed offenses. Part of these patients’ therapeutic process is acknowledging the harm they have done others. If substance abuse treatment programs routinely reported patients' admissions of past criminal activity to the police, their work with patients in the recovery process would be thwarted. Laws protecting conversations between counselors of substance abuse programs and their patients are designed to protect the special relationship that substance abuse counselors have with their patients, as well as the treatment process.

State laws vary widely in the protection they accord communications between patients and counselors. In some States, admissions of past crimes may be considered privileged, and counselors may be prohibited from reporting them; in others, admissions may not be privileged. Moreover, each State defines the kinds of relationships
protected differently. Whether a communication about past criminal activity is privileged (and therefore cannot be reported) may depend upon the type of professional the counselor is and whether he or she is licensed or certified by the State.

**If State law requires a report (or permits one and the program decides to make a report), how can the substance abuse treatment program comply with the Federal confidentiality regulations and State law?**

Any substance abuse treatment program that decides to make a report to law enforcement authorities about a patient's prior criminal activity must do so without violating either the Federal confidentiality regulations or State laws. A program that decides to report a patient's crime can comply with the Federal regulations by following one of the first three methods described above in the discussion of "Duty to Warn":

- If the patient is a defendant participating in a drug court program, the substance abuse agency can make a report to the court or other appropriate criminal justice partner, if it has a criminal justice system consent form signed by the patient that is worded broadly enough to allow this sort of information to be disclosed.

- The substance abuse treatment program can make a report in a way that does not identify the individual as a patient.

- The treatment program can obtain a court order under Section 2.65 of the regulations, permitting it to make a report if the crime is "extremely serious."

By using any one of these methods, the substance abuse program will have discharged its reporting responsibility without violating the Federal regulations. However, the law enforcement agency that receives the report is prohibited by the regulations from investigating or prosecuting a patient based on information obtained from a substance abuse program, that is unless the court order exception is used (42 U.S.C. Section 290 dd-3(c) and ee-3(c) and 42 C.F.R. Section 2.12(d)(1)). Because of the complicated nature of this issue, any program considering reporting a patient's admission of criminal activity that occurred in the past should seek the advice of a lawyer familiar with local law as well as the Federal regulations. For a discussion about how programs can deal with search and arrest warrants, see TIP 19, *Detoxification from Alcohol and Other Drugs*, p. 83 (CSAT, 1995).

**Reporting Current Criminal Activity**

What should the treatment program do if a defendant it is treating admits to committing a crime during treatment? Smooth operation requires trust between the partners and there is nothing more destructive of trust between the substance abuse treatment system and the criminal justice system than misunderstanding and disagreement on this issue.

To ensure that no misunderstandings occur, the substance abuse treatment program and the justice system participants should agree in writing about whether criminal activity will be reported and, if so, what kinds of activity. They should decide how much discretion the program will use in dealing with criminal activity as a therapeutic issue.

In coming to an agreement on this issue, the substance abuse treatment program and the criminal justice system must balance the goal of public safety with the goal of individual recovery. Those concerned with public safety will generally advocate drawing the line at a point that requires greater reporting of criminal activity by the treatment program. Those concerned with the effectiveness of treatment programs may argue that reporting of criminal activity must be limited if defendants are to continue to communicate freely in recovery.

Wherever the line is drawn, it is essential that the defendants participating in a drug court program be informed that their admissions of criminal activity committed during treatment will be reported. The criminal justice system consent form that defendants sign should make clear that certain kinds of ongoing criminal activity will be reported promptly to the court and/or prosecutor.

It is important to recognize that the Federal regulations strictly prohibit any investigation or prosecution of a patient based on information obtained from a substance abuse treatment program unless the Section 2.65 court order exception is used (42 U.S.C. Sections 290 dd-3 and ee-3 and 42 C.F.R. Section 2.12(d)(1)). For this reason, those creating programs should consider providing treatment providers with the capacity to apply for a court order under Section 2.65 of the Federal regulations in cases where patients commit serious crimes. All that is required is a model set of legal papers that the program can submit to the appropriate court on a moment's notice. This will permit prompt reporting of crimes that threaten public safety and that call for separate investigation and prosecution.

When a patient has committed or threatens to commit a crime on treatment program premises or against program personnel, the regulations permit the treatment program to report the crime to a law enforcement agency or to seek its assistance. In such a situation, without any special authorization, the program can disclose the
circumstances of the incident, including the individual's name, address, last known whereabouts, and status as a patient at the program (Section 2.12(c)(5)).

Conducting Research in Accordance With Confidentiality Laws and Regulations

Chapter 6 discussed evaluation efforts that can be helpful in assessing the effectiveness, operations, and impact of programs integrating substance abuse and pretrial case processing. Because research on criminal justice or substance abuse treatment programs usually entails the gathering of information about individual clients, there are a number of confidentiality regulations and procedures that must be followed. This section offers guidelines for following these regulations when conducting research on these types of programs.

Research about and evaluation of the efficacy of programs is essential if existing ones are to continue to receive funding and if new programs are to be developed. The Federal confidentiality regulations provide three ways for substance abuse treatment programs to share information with researchers.

1. The regulations permit programs to give researchers access to information about patients when no patient identifying information is revealed.
2. The regulations permit programs to give researchers patient identifying information without patients' consent when certain criteria are met.
3. Researchers may also obtain information that is protected by the Federal confidentiality regulations if patients sign proper consent forms.

Access to Data Not Containing Patient Identifying Information

The Federal regulations permit programs to disclose information about patients if the program reveals no patient identifying information (Section 2.12(a)(1)). “Patient identifying information” is information that identifies specific individual as an alcohol or drug abuser. Thus, a program can give researchers aggregate data about its population or some portion of its population. For example, a program could tell a researcher that during the past year, 42 patients completed treatment, 67 dropped out in less than 6 months, and 25 left between 6 and 12 months.

Use of Patient Identifying Information for Research, Audit, and Evaluation

Nonconsensual Use of Information

The Federal confidentiality regulations permit programs to disclose patient identifying information to researchers, auditors, and evaluators without patient consent, providing that certain safeguards are in place (Section 2.52; Section 2.53).

Research. Substance abuse treatment programs can disclose patient-identifying information to persons conducting “scientific research” if the treatment program director determines that the researcher is qualified to conduct the research; has a protocol under which patient identifying information will be kept confidential in accordance with the regulations' security provisions (see Section 2.16); and has provided a written statement from a group of three or more independent individuals (such as an Institutional Review Board) that have reviewed the protocol and determined that it protects patients' rights. Researchers are prohibited from identifying any individual patient in any report or otherwise disclosing any patient identities except back to the program.

Audit and evaluation. Federal, State, and local government agencies that fund or are authorized to regulate a substance abuse treatment program, private entities that fund or provide third party payments to a program, and peer review entities performing a utilization or quality control review may review patient records on the program's premises in order to conduct an audit or evaluation. Any person or entity that reviews patient records to perform an audit or conduct an evaluation must agree in writing that it will use the information only to carry out the audit or evaluation and that it will redisclose patient information only back to the program; in accordance with a court order to investigate or prosecute the program (Section 2.66); or to a government agency overseeing a Medicare or Medicaid audit or evaluation (Section 2.53(a), (c), (d)). Any other person or entity who the program director deems qualified to conduct an audit or evaluation and who agrees in writing to abide by the restrictions on redisclosure can also review patient records.

Use of Information Obtained With Patients’ Consent

Researchers can also obtain patient identifying information if the patient has signed a valid consent form that has not expired or been revoked (Section 2.31). This consent form differs from the criminal justice system consent
form, in two respects (see Exhibit 8-3). First, the defendant may revoke the consent at any time and the consent form must contain a statement to this effect. (However, if a program has already given information to a researcher prior to the revocation, it need not try to retrieve the information it has already disclosed.) Revocation by the patient need not be in writing.

Second, the consent form must contain a date, event, or condition upon which it will expire if not previously revoked. Section 2.31(a)(9) provides that the consent must "last no longer than reasonably necessary to serve the purpose for which it is given."

**Followup Research**

Research that follows patients for any period of time after they leave treatment presents a special challenge. Under the Federal regulations, no information that the researcher or evaluator gained from the substance abuse treatment program with the patient's consent or through the research, audit, and evaluation exceptions may be disclosed to anyone else. Yet the researcher must locate the patient in order to collect followup data.

To ensure that patients can be located after they leave treatment, researchers sometimes ask for the names of persons with whom the patients are likely to have continued contact. Making inquiries of these persons in order to locate a former patient might seem at first glance to pose no risk to a patient's right to confidentiality. However, confidentiality is just as essential in these types of communications. For example, if someone from a research entity called a former patient's relative or friend to locate the former patient, the fact he or she had been in treatment might well be revealed. The Federal regulations clearly prohibit this kind of disclosure without the patient's consent. Thus researchers and evaluators trying to locate a patient must do so without disclosing to others any information about the patient's connection to substance abuse treatment or they must obtain the patient's consent to do so.

If followup contact is attempted over the telephone, the caller must ascertain that he or she is indeed talking to the patient before identifying himself or herself or mentioning a connection to the substance abuse treatment program. The program (or research agency) may form another entity, without a hint of its substance abuse focus in its name (for example, Health Research, Inc.), that can contact former patients without worrying about disclosing information simply by giving its name. However, the representative of such an entity calling former patients still must be careful that the patient is on the line before revealing any connection to the program. It is a good idea for the research entity to have a set of scripted answers that the caller can use when questioned about the purpose of the inquiry. If followup is to be done by mail, the return address should not disclose any information that could lead someone to conclude that the addressee was in treatment.

**Followup With Collateral Sources**

Research or evaluation that collects data about patients from collateral sources raises a similar issue to that raised by followup with patients themselves. How can an inquiry be made of relatives (including parents), employers, schools, or social welfare agencies without violating the Federal regulations?

There are two ways to approach this problem. First, the researcher can structure the data-gathering to avoid revealing that the patient was in treatment. To accomplish this, the name of the entity that conducts the research must be neutral, revealing nothing about a substance abuse connection. The questions asked of the collateral sources must also be phrased so that they offer those sources no information that would directly or implicitly link the patient with substance abuse or treatment.

The second way a researcher can gather information from collateral sources is to obtain the patient's consent to disclose to the collateral source the fact that the patient was in treatment for substance abuse. The special consent form required by Section 2.31 of the regulations must be used. As outlined above, this form must include the purpose of the disclosure, in this instance, research, and how much and what kind of information will be disclosed, in this instance, the fact that the patient was in substance abuse treatment. The form also must include an expiration date and a statement that consent can be revoked at any time.

Using a consent form to gather information from collateral sources may require more work initially, but it provides more freedom to the researcher. With consent forms signed by patients, the researcher may ask questions about current alcohol or other drug use. However, he or she still must take care to reveal only the limited information allowed by the consent form. The researcher should have a system to keep track of the expiration dates of the consent forms.

**Coding Patients' Identities**

If a researcher codes patients' names to protect their identities, can some of the intricate rules of the Federal
confidentiality regulations be disregarded? It depends. As noted above, the Federal regulations protect "patient identifying information." If a researcher can code patients' names so that the number created for each patient cannot be "used to identify a patient with reasonable accuracy and speed from sources external to the program," the researcher need no longer be concerned with safeguarding information about the patient.

Voluntariness

One of the concerns sometimes raised about treatment drug courts is that they "force" the defendant into treatment by offering a choice between treatment and conventional prosecution that would be likely to result in more onerous restrictions on the defendant's liberty. Critics contend that coerced treatment is unethical and, on a more pragmatic note, may also add that treatment, which is supposed to help empower people, is unlikely to be successful if the defendant did not freely choose to participate.

One response to this criticism is that it is based on a false premise, in the case of defendants who are in the pretrial stages of criminal case processing. As noted in Chapter 1, a pretrial defendant cannot be compelled to participate in any real treatment program. The decision about participation is the defendant's alone. It is a decision that should ordinarily be made after consultation with a defense lawyer who can explain the legal situation to the defendant and help protect all of the defendant's legal rights.

A second response is one that, at least in some instances, defendants may choose the treatment option because it appears less onerous than conventional prosecution. In that sense, there may be an element of "coercion" underlying the defendant's decision to enter treatment. However, it is common for substance abusers to enter treatment not simply because they want to stop abusing drugs but because someone, a spouse, an employer, a doctor, or another significant figure, has given them to an ultimatum -- obtain treatment "or else." The possibility of a return to conventional prosecution is the justice system's "or else" for programs that integrate substance abuse treatment and pretrial cases processing. Furthermore, treatment has been proven to be more effective if the client stays with it for more than 90 days, so the "coercion" actually improves the substance abusers' chances of overcoming their addiction or related problem.

The authority of the court and/or the prosecutor's office to resume conventional prosecution in the case that a defendant fails to comply with the program's conditions is undoubtedly an important incentive for keeping defendants in treatment, particularly at the outset of a treatment regimen. Treatment is rarely an easy or comfortable experience, and the dropout rates of many substance abuse treatment programs are high.

Footnotes

1 This chapter was written for the Consensus Panel by Margaret K. Brooks, Esq.

2 Hereinafter, citations in this section in the form "Section 2..." refer to specific sections of 42 C.F.R., Part 2, implementing the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. Section 290dd-3) and the Drug Abuse Prevention, Treatment, and Rehabilitation Act (42 U.S.C. Section 290ee-3).

3 If the offender is a minor, parental consent must also be obtained in some States. This issue is discussed in more detail in TIP 3, Screening and Assessment of Alcohol- and Other Drug-Abusing Adolescents (CSAT, 1993a).

4 For detailed discussion of exceptions to nondisclosure regulations, see TIP 19, Detoxification from Alcohol and Other Drugs (CSAT, 1995).

5 Note, however, that no information obtained from a program (even if the patient consents) may be used in a criminal investigation or prosecution of a patient unless a court order has been issued under the special circumstances set forth in Section 2.65 (42 U.S.C. Section 290dd-3(c), ee-3(c); 42 C.F.R. Section 2.12(a), (d)).

6 This is a key difference between the criminal justice system consent form and the general consent form authorized by the Federal regulations, which permits the offender to revoke consent at any time. See the discussion about the general consent form below.

7 Security of the computer system is especially important in view of the security requirements of the Federal regulations. Section 2.16 provides: (a) Written records which are subject to these regulations must be maintained in a secure room, locked file cabinet, safe or other similar container when not in use; and (b) Each program shall adopt in writing procedures which regulate and control access to and use of written records which are subject to these regulations."

8 The regulations limit disclosures to law enforcement agencies for the purpose of investigating or prosecuting a patient to "extremely serious" crimes, "such as one which causes or directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect." (Section 2.65). For a discussion of the court order exceptions, see TIP 7, Screening and Assessment for Alcohol and Other Drug Abuse Among Adults in the Criminal Justice System (CSAT, 1994a).
9 Note that Federal confidentiality statutes and regulations strictly prohibit any investigation or prosecution of a patient based on information obtained from records unless the court order exception is used. 42 U.S.C. Section 290 dd-3(c) and ee-3(c) and 42 Section 2.12(d)(1).

10 In addition to the Federal confidentiality laws and regulations discussed in this section, two other Federal statutes permit the United States Attorney General and the Secretary of Health and Human Services (HHS) to issue "confidentiality certificates" to researchers. Once a certificate is issued, the researcher "may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceeding to identify the subjects of research for which such authorization was obtained." See 42 U.S.C. Section 241(d) (permitting the Secretary of HHS to issue confidentiality certificates) and 21 U.S.C. Section 872(c) (permitting the Attorney General to do so).

11 These entities may also copy or remove records, but only if they agree in writing to maintain patient identifying information in accordance with the regulations' security requirements (see Section 2.16) to destroy all patient identifying information when the audit or evaluation is completed, and to redisclose patient information only (1) back to the program, (2) in accordance with a court order to investigate or prosecute the program (Section 2.66), or (3) to a government agency overseeing a Medicare or Medicaid audit or evaluation (Section 2.53(b)).
## Exhibit 8-1 Consent for the Release of Confidential Information

<table>
<thead>
<tr>
<th>Exhibit 8-1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consent for the Release of Confidential Information:</strong></td>
</tr>
<tr>
<td><strong>Criminal Justice System Referral</strong></td>
</tr>
<tr>
<td>The purpose of and need for the disclosure is to inform the criminal justice agencies listed above of my attendance and progress in treatment. The extent of information to be disclosed is my diagnosis, information about my attendance or lack of 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:</td>
</tr>
<tr>
<td>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 time when consent can be revoked and/or expires)</td>
</tr>
<tr>
<td>I also understand that any disclosure 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 re-disclose it only in connection with their official duties.</td>
</tr>
<tr>
<td>(Date)</td>
</tr>
<tr>
<td>(Signature of parent, guardian, guardian, or authorized representative if required)</td>
</tr>
</tbody>
</table>
### Exhibit 8-3 Consent for the Release of Confidential Information

<table>
<thead>
<tr>
<th>Consent for the Release of Confidential Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>I, ____________________________</td>
</tr>
<tr>
<td>authorize, ____________________________</td>
</tr>
<tr>
<td>to disclose to ____________________________</td>
</tr>
<tr>
<td>the following information:</td>
</tr>
<tr>
<td>________________________________________</td>
</tr>
<tr>
<td>The purpose of the disclosure authorized herein is to:</td>
</tr>
<tr>
<td>________________________________________</td>
</tr>
<tr>
<td>I understand that my records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, and cannot be disclosed without my written consent unless otherwise provided for in the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows: (Specification of the date, event, or condition upon which this consent expires)</td>
</tr>
<tr>
<td>(Date)</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
Prohibition on Re-disclosing Information

Concerning AOD Abuse Treatment Patients

This notice accompanies a disclosure of information concerning a client in alcohol/drug abuse treatment, made to you with the consent of such client. 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.

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