Chapter 9

Confidentiality

Honorable William G. Meyer (Ret.)

I. [§9.1] INTRODUCTION

The Ten Key Components (provided on page 217) are the seminal yardstick upon which drug courts operate, and Key Component 1 requires that "drug courts integrate alcohol and other drug treatment services with justice system case processing."[1]

One benchmark to the key component contemplates that the court and treatment providers maintain ongoing communication, including frequent exchanges of timely information on a participant's program performance, consistent with federal and state confidentiality law requirements.[2]

Two federal statutes presumptively regulate the disclosure of participant alcohol and other drug treatment information in the drug court context.[3] Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996.[4] In 2002, the federal regulations relating to HIPAA were initially adopted.[5] The purpose of HIPAA was to improve the health care system through the establishment of standards and requirements for the electronic transmission of certain health information. As part of those standards, a privacy rule prohibited covered entities from disclosing health information without proper consent or authorization.

In the 1970s, the Drug Abuse Prevention, Treatment and Rehabilitation Act[6] was enacted to expand access and accessibility to substance abuse treatment programs.[7] The statute and regulatory scheme provide for the confidentiality of patients records "maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States."[8]

This chapter is not intended to be an exhaustive treatise on federal confidentiality laws. Rather, it is designed to give the judge an overview of the subject, enabling the court to ask the questions or do the research to determine federal compliance.[9] In some circumstances, the regulations are unclear and authoritative interpretations are divided. In such situations, the author always recommends opting for the interpretation that is the most restrictive, thus according the greatest confidentiality protection to the drug court participant.

II. [§9.2] HIPAA

Despite conventional wisdom and practice, the provisions of HIPAA do not apply to drug courts, law enforcement, or probation officers. As succinctly stated by the well-respected National GAINS Center:[10]

> Contrary to myth, HIPAA-covered entities do not include the courts, court personnel, accrediting agencies such as the JCAHO, and law enforcement.[11]

HIPAA also does not apply to correctional facilities or law enforcement having lawful custody of an inmate or detainee if the protected health information (PHI) is necessary to provide health care to the individual; to protect the individual, other inmates, security officers or employees; or for the administration, maintenance of safety and security of the facility including law enforcement.[12]

Although HIPAA does not apply to drug courts, the spirit of HIPAA should be respected.

Although HIPAA does not apply to courts, the author recommends that the court employ two procedures to comply with the spirit of HIPAA. The court should issue an administrative order requiring that treatment providers disclose relevant treatment information to the drug court team. The court should also require the execution of a consent form by the participant that meets HIPAA requirements. A sample administrative order and consent form are included as exhibits on pages 191 and 192 of this document.

A. [§9.3] HIPAA Order

Federal regulations permit a HIPAA-covered entity to disclose any protected health information in the course of a judicial proceeding in response to an order of court and only to the extent that the PHI is expressly authorized by such an order.[13] Although not required by the rule, the order should acknowledge that disclosure of the information will be used by members of the drug court team for drug court purposes, that no redisclosure will occur, and that the order expires upon the participant's termination or graduation from the drug court program. Finally any order should provide that the disclosure should be the "minimum necessary to accomplish the intended use, disclosure, or request."[14] Thus, the court should limit the disclosure to whether the individual attended treatment, participated in treatment, prognosis, and any information the treatment provider believes is necessary to put the drug court participant's compliance with treatment in context. A sample order is depicted in Exhibit 1 on page 191 of this document.

B. [§9.4] HIPAA Consent Forms

HIPAA consent can be integrated into the participant's 42 CFR (Code of Federal Regulation) Part 2 consent form which is discussed herein. Proper advisements, acknowledgements, and written consents should follow the Part 2 process. For HIPAA purposes, consent can be revoked at any time, and treatment cannot be conditioned upon consent.[15] However, drug courts can properly condition participation in the drug court program upon execution of a HIPAA consent form.[16]

C. [§9.5] 42 CFR PART 2

Part 2, as it is commonly known by practitioners, prohibits the release of identification and alcohol or other drug-use information from any program that is assisted or regulated by the federal government, with certain exceptions.

D. [§9.6] What Is a Program Covered by Federal Confidentiality Laws?

The federal confidentiality law applies to any "program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States."[17] The definition has two components: (1) that the program involves substance abuse education, treatment, or prevention, and (2) that it is regulated or assisted by the federal government. Involving substance abuse education, treatment, or prevention is quite broad because it includes not only diagnosis and treatment, but also referral for treatment. Thus, a court employee who administers an alcohol or other drug screening and assessment or a judge who orders substance abuse treatment as a condition of probation or drug court participation arguably brings the court within the ambit of the federal definition of program.[18] The second part of the definition is equally as broad because it covers both direct and indirect funding and assistance. The regulations include, *inter alia*, (1) any entity being a recipient of any federal funds, including funds not used for alcohol or other drug diagnosis, treatment, or referral; (2) activities conducted by a state or local governmental unit, which through revenue sharing or otherwise receives federal funds that could be (but are not necessarily) spent on a substance abuse program; or (3) a program that receives tax exempt status or the program has donors who receive income tax deductions for contributions to the program. Thus, any state or local court system would almost certainly qualify as being a recipient of federal assistance.[19]

Irrespective of whether the drug court meets the two tier qualification for being a federally assisted program, the drug court judge is undoubtedly going to be the recipient of treatment information protected by federal confidentiality laws.[20] When a court receives information protected by the federal confidentiality laws, the court is prohibited from redisclosing such information, absent a proper consent or those limited authorized disclosures permitted without consent.[21] Hence, it is prudent to assume that the federal confidentiality laws apply when operating a drug court.[22]

E. [§9.7] What Information Is Protected?

The federal confidentiality laws apply to all records relating to the identity, diagnosis, prognosis, or treatment of any patient in a substance abuse program. Thus, 42 U.S.C. § 290 dd applies to information that either reveals the identity of a person receiving treatment or discloses that a person is receiving, has received, or has applied to receive substance abuse treatment services.[23] Drug-testing results alone are not protected information, unless used for the diagnosis, treatment, or referral for treatment.[24] Because of the therapeutic use of drug-testing results, the drug court should generally consider them as covered by the federal confidentiality laws.

F. [§9.8] How Can Protected Information Be Shared?

The general rule is that for participants in alcohol and drug treatment programs, patient identifying information cannot be shared. However, the federal regulations carve out exceptions. Information can be shared where there is proper written consent. Under limited circumstances, where there is no consent there exist permissive and mandatory disclosures. The alternatives will be discussed in turn.

1. [§9.9] Consent

There are two requirements for procuring a valid consent, the advisement and the actual consent. The advisement must contain the following notices:[25]

1. A header with the following statement: "This notice describes how medical and drug and alcohol related information about you may be used and disclosed and how you can get access to this information. Please review it carefully."
2. A citation to both HIPAA and the confidentiality law and regulations.
3. A description, including at least one example, of the types of uses and disclosures that the program is permitted to make for treatment, payment, and health care operations (include only those permitted under 42 CFR Part 2).
4. A description, including at least one example, of each of the other purposes for which the program is permitted or required to disclose PHI without the individual's consent (this should include only those permitted under 42 CFR Part 2, including a warning that information can be released if the patient commits or threatens to commit a crime on program premises or against program personnel) and that the program must report suspected child abuse or neglect.
5. A statement that other uses and disclosures will be made only with the individual's written consent and that the individual may revoke this consent.
6. A statement of the individual's rights and a description of how the individual may exercise his or her rights.
7. A statement that the program is required by law to maintain the privacy of and to provide individuals with notice of its legal duties and privacy practices.
8. A statement that the program is required to abide by the terms of the notice.
9. A statement that the program reserves the right to change the terms of the notice, and a description of how the program will provide individuals with a revised notice.
10. A statement that (1) a violation of 42 CFR Part 2 is a reportable crime and that (2) under HIPAA, individuals may complain to the program and to the Department of Health and Human Services (HHS) if they believe their privacy rights have been violated, together with (3) a description of how the complaint may be filed.
11. The name, title, and telephone number of a contact for further information.
12. The date on which the notice became effective.

In the criminal justice context, consent cannot be revoked.[26] Conversely, HIPAA requires that consent can be revoked. However, if the drug court has issued an appropriate order, it can still obtain the needed treatment participation information.[27]

The elements of the written consent are as definite as the notice. The consent form requires ten elements:[28]

1. The name or general designation of the program(s) making the disclosure.
2. The name of the individual or organization that will receive the disclosure.
3. The name of the patient who is the subject of the disclosure.
4. The purpose or need for the disclosure.
5. A description of how much and what kind of information will be disclosed.
6. The patient's right to revoke the consent in writing and the exceptions to the right to revoke or, if the exceptions are included in the program's notice, a reference to the notice.
7. The program's ability to condition treatment, payment, enrollment, or eligibility of benefits on the patient agreeing to sign the consent, by stating either (1) that the program may not condition these services on the patient signing the consent, or (2) the consequences for the patient refusing to sign the consent.
8. The date, event, or condition upon which the consent expires if not previously revoked.
9. The signature of the patient (and/or other authorized person).
10. The date on which the consent is signed.

In the criminal justice context, expiration of the consent may be conditioned on an event instead of a date. Thus, expiration may be conditioned upon the drug court participant's successful completion of or termination from the program.[29] Once the consent form has been completed, the participant must be informed that the information disclosed is protected by federal law and that any further disclosures (redisclosure) must be made in accordance with 42 CFR, Part 2.[30] Disclosures that are permitted pursuant to a valid consent form include information that can be used for a probation revocation, including alcohol or other drug-use admissions.[31] A sample consent form is included in Exhibit 2 on page 192 of this chapter.

Although not explicitly required, the drug court should employ practices that will ensure the participant's consent is knowingly obtained and entered into voluntarily.[32] The participant should have the opportunity to consult a lawyer before executing the consent.

Because of potential literacy concerns, the notification and consent and redisclosure prohibition should be read to the participant before execution. When appropriate, the consent should be translated for the participant. The participant should be asked to reexecute the consent during program participation when there is a change in drug court team membership and to rectify any situation where the participant was still using drugs when the original consent was obtained. Finally, the various team members should enter into a memorandum of understanding (MOU) that details the information which will be shared, by whom, and for what limited purpose. The MOU should also contain the acknowledgment of team members as to the applicability of and adherence to federal and state confidentiality laws including those related to redisclosure. Of particular significance, are the limitations upon prosecutorial use of information gained from treatment programs and in staffing. The MOU should also include file access limitations and storage standards.

In addition to the practices surrounding the execution of the consent and the team execution of the MOU, the court should consider certain additions to the consent. First, the participant should admit he or she was advised and had the opportunity to have counsel present. The consent could also contain language acknowledging sobriety and understanding. Finally, in the consent form, the participant should recognize that the courtroom is public and the potential exists for disclosure of confidential information during open court proceedings.[33]

2. [§9.10] Mandatory Disclosures

There are three situations where disclosure is mandatory:

- The existence of a valid court order
- Child abuse or neglect
- Cause of death

a. [§9.11] Valid Court Order

The prerequisites for a valid court order are determined by the nature of the proceeding and the type of information sought to be disclosed. A subpoena or search warrant or other court order not meeting these requirements is not valid.[34]

In a civil context,[35] before a court may issue an order, the program and the patient must be given notice and the opportunity to participate in the hearing.[36] If the information is being sought to investigate or prosecute the patient, notice need only be given to the program.[37] If the program is the target of the investigation, no notice need be given.[38]

At the hearing, the person seeking the information must establish and the court must find "good cause."[39] The good-cause finding requires the court to determine that the information is not available elsewhere, and the need for disclosure outweighs any adverse effect on the patient, the doctor-patient relationship, and the program's effectiveness.[40]

Where the request for the information is for the investigation or prosecution of a patient, a higher standard must be met.[41] Not only must the good-cause standard be established but the court must find:

- The crime involved is extremely serious (caused or threatening to cause death or serious bodily injury);
- The records sought to be obtained are likely to contain significant information for the investigation or prosecution;
- There is no other practical way to obtain the information;
- The program had an opportunity to be represented by counsel.[42]

Disclosure is limited to those parts of the records which are essential to the purpose of the order and disclosure is restricted to those persons responsible for investigating or prosecuting the case. No "confidential communications"—statements by the patient to program personnel—may be disclosed unless the requirements of 42 CFR § 2.63 are met.

Successful applications for a court order, whether civil or criminal, are limited to "objective data" such as treatment program dates of enrollment, discharge, or medications.[43] Requests for confidential communications must meet one of the three expressed requirements in 42 CFR § 2.63(a).[44]

In addition to a valid court order, mandatory disclosures include situations of child abuse and neglect and identifying the cause of death.

b. [§9.12] Child Abuse and Neglect

Most states have mandatory child abuse and neglect reporting laws. Both 42 C.F.R Part 2 and HIPAA have provisions that exempt confidentiality protection in situations where the state mandates child-abuse and neglect reporting.[45]

c. [§9.13] Cause of Death

Because states have reporting requirements concerning the cause of death, 42 CFR Part 2 exempts the confidentiality of patient identifying information for such mandatory reports.[46]

G. [§9.14] Permitted Disclosures

Programs are permitted—but not required to—disclose patient identifying information in cases of medical emergency;[47] in reporting crimes on program premises or against staff;[48] to entities having administrative control;[49] to qualified service organizations;[50] and to outside auditors, evaluators, central registries, and researchers.[51]

Disclosures to entities having administrative control and to qualified service organizations require written agreements. Auditors, central registries, and researchers need to have in place written plans to assure confidentiality before disclosures can be made.

III. [§9.15] BEST PRACTICES IN THE CONFIDENTIALITY ARENA

As the foregoing well illustrates, federal confidentiality laws are complex, often confusing, and with occasional conflicting interpretations. At least theoretically, failure to properly follow federal confidentiality laws can lead to withdrawal of funding, program license revocation, and potential criminal penalties.[52] Neither HIPAA nor 42 CFR Part 2 provides a private right of action.[53]

By following best practices,[54] drug courts can greatly reduce the potential of a sanction:

- Designate a privacy official who is responsible for the drug court program's compliance with federal and state confidentiality law requirements.
- Provide the privacy official with the necessary resources to do the job.[55]
- Ensure that appropriate administrative, technical, and physical safeguards are in place to protect the privacy of patient information. This includes locked storage cabinets;

agreed-upon procedures to redact and segregate drug court files into what is available to the public and what is confidential; and the installation of electronic firewalls to prevent access to participant information.

- Ensure that written policies and procedures are in place which limit the disclosed information to the minimum necessary to accomplish the intended use.
- Require that all team members and staff be trained and periodically retrained on federal and state confidentiality requirements.
- Review the current notification, consent, and redisclosure forms to ensure they meet federal and state standards.
- Employ the best practices outlined previously on the reobtaining of consent and contents of the consent form.
- Document all privacy policies and procedures.
- Assume that the confidentiality laws are going to apply to disclosures and, therefore, take all precautions to protect participant's confidentiality rights.

IV. [§9.16] CONCLUSION

Drug courts contemplate the integration of criminal case processing and treatment participation. Sharing of limited treatment information is a necessary function of drug court operations. Compliance with federal confidentiality laws can be readily accomplished with proper procedures, notification, and consent forms and limitations on disclosure to the minimum necessary to accomplish the intended purpose of the disclosure.

Exhibit 1. HIPAA Order

HIPAA ORDER

IN THE _____ COURT

_____, STATE OF _____
(County, District)

Case No. _____

People of the State of _____	)	
Plaintiff,	)	ORDER RE:
v.	)	Limited Release of Specific Substance Abuse Treatment Records
_____	)	
Defendant.	)	

This matter is before the court for consideration of the limited release of specific substance abuse treatment records. The court makes the following findings:

1. On _____, the defendant was accepted into/referred to the
(Date)
_____ Drug Court.

2. As a condition of participation in the drug court program, the defendant must attend substance abuse treatment and the drug court team must monitor the defendant's progress in substance abuse treatment.

3. The defendant has voluntarily and knowingly signed a HIPAA and 42 C.F.R. Part 2 compliant release.

4. The information necessary to monitor the defendant's progress in substance abuse treatment includes:

> defendant's diagnosis, defendant's urinalysis results, defendant's treatment attendance or nonattendance, defendant's cooperation with treatment, defendant's progress in treatment, and defendant's prognosis. This treatment information is the minimum necessary to carry out the purpose of the disclosure. *See* 45 C.F.R. §165.502(b)(11) and 42 C.F.R § 2.13(a).

It is therefore ordered that:

1. (_____) shall provide to the members of the
Name of treatment provider
drug court team (as reflected in the HIPAA/42 C.F.R. Part 2 Consent to Release Form or team member replacements) the following information:

> defendant's diagnosis, defendant's urinalysis results, defendant's treatment attendance or nonattendance, defendant's cooperation with treatment, defendant's progress in treatment, and defendant's prognosis.

2. The named treatment provider shall continue to provide the treatment information until defendant's successful completion of or termination from the drug court program or further court order, whichever shall first occur.

3. The drug court team shall not redisclose the information received pursuant to this Order, except as may be provided by law.

SO ORDERED this ____ day of _____, 20___.

_____
Judge

Exhibit 2. Consent for the Release of Confidential Information

CONSENT FOR THE RELEASE OF CONFIDENTIAL INFORMATION:

CRIMINAL JUSTICE SYSTEM REFERRAL

I, _____, authorize (initial whichever parties apply):
(Name of defendant)

□ *[The ABC Alcohol and Drug Treatment Program]*_____,
(Name or general designation of program making disclosure)

□ *[The Probation Department] employees supervising my case,*

□ *[The Case Managers] employees supervising my case]*_____.

□ _____ □ _____
(Name of the appropriate drug court) (Name of prosecuting attorney)

□ _____ □ _____
(Name of criminal defense attorney) (Other)

to communicate with and disclose to one another the following information (nature and amount of the information as limited as possible):

_____ my diagnosis, urinalysis results, information about my attendance or lack of attendance at treatment sessions, my cooperation with the treatment program, prognosis, and

_____ _____

The purpose of the disclosure is to inform the person(s) listed above of my attendance and progress in treatment.

I understand that my alcohol and/or drug treatment records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. Parts. 160 & 164. 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:

[Specify the date, event, or condition upon which this consent expires. This could be one of the following:]

_____ 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

_____ _____
(Specify other time when consent can be revoked and/or expires)

I understand that I might be denied services if I refuse to consent to a disclosure for purposes of treatment, payment, or health care operations, if permitted by state law. I will not be denied services if I refuse to consent to a disclosure for other purposes.

I recognize that my review hearings are held in an open and public courtroom and it is possible that an observer could connect my identity with the fact that I am in treatment as a condition of participation in drug court. I specifically consent to this potential disclosure to third persons.

I understand that if I refuse to consent to disclosure or attempt to revoke my consent prior to the expiration of this consent, that such action is grounds for immediate termination from drug court.

I have been provided a copy of this form.

I acknowledge that I have been advised of my rights, have received a copy of the advisement, and have had the benefit of legal counsel or have voluntarily waived the right to an attorney. I am not under the influence of drugs or alcohol. I fully understand my rights and I am signing this Consent voluntarily.

Dated: _____ _____
Signature of Drug Court Participant

Witness: _____ _____
(position)

PROHIBITION ON REDISCLOSURE
OF CONFIDENTIAL INFORMATION

This notice accompanies a disclosure of information concerning a client in alcohol/drug 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 C.F.R. 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 C.F.R. 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 this information to criminally investigate or prosecute any alcohol or drug abuse patient.

1 Nat'l. Ass'n. of Drug Court Prof'ls & Bureau of Justice Assistance, U.S. Dep't of Justice, Defining Drug Courts: The Key Components 9-10 (1997), *available at* http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf.

2 *Id.* at 4. This chapter does not cover juvenile drug court operations or family dependency court operations. Because these are civil proceedings, many of the applicable provisions such as the duration of or the permissibility of a revocation of consent are different than those employed in criminal cases.

3 In addition, individual states have statutes that protect AOD treatment disclosures. Furthermore, evidentiary privileges, such as the physician-patient privilege and ethical obligations may constrain the free exchange of drug court participant-treatment provider information. This chapter does not address state law confidentiality provisions, ethical limitations, or evidentiary privileges.

4 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

5 *See* 45 C.F.R. Parts 160-164. These regulations have been consistently amended.

6 Public Health Services Act of 1944, 42 U.S.C. § 290 dd.

7 United States *ex. rel.* Chandler v. Cook County, 277 F.3d 969, 982-8 (7th Cir. 2002), *aff'd on other grounds,* 538 U.S. 119 (2003).

8 42 U.S.C. § 290dd-2.

9 No attempt has been made to address state mandated confidentiality requirements.

10 The National GAINS Center is funded by the United States Department of Health and Human Services through the Substance Abuse and Mental Health Services Administration (SAMHSA).

11 John Petrila, CMHS Nat'l GAINS Ctr. for Systemic Change for Justice, Dispelling the Myths About Information Sharing Between the Mental Health and Criminal Justice Systems (2007).

12 45 C.F.R. § 165.512(k)(5).

13 45 C.F.R. § 165.512(e)(1).

14 *See* 45 C.F.R. § 164.502(b), 164.514(d). Technically, the "minimum necessary" requirement does not apply when the participant has consented to disclosure, but the better practice in drug courts is that the standard applies regardless of the existence of consent.

15 45 C.F.R. § 164.508(b)(4).

16 *See* Legal Action Ctr., Confidentiality and Communication, A Guide to the Federal Drug & Alcohol Confidentiality Law and HIPAA 129 (2006).

17 42 U.S.C. § 290dd-2; 42 C.F.R. § 2.11-2.12.

18 *See* Jeffrey Tauber et al., Nat'l Drug Court Inst., Federal Confidentiality Laws and How They Affect Drug Court Practitioners 6 (1999).

19 Not all courts have read the regulations in such an expansive manner. *See, e.g.,* Ex parte Execution, 773 So.2d 431, 431 (Ala. 2000) (holding that the treatment program must receive the federal funds, and not just the University of Alabama at Birmingham). *See also* United States v. Zamora, 408 F. Supp. 2d 295, 295 (S.D. Tex. 2006) (relying on the 42 C.F.R. § 2.12(e)(2) exception and stating that the treatment program itself not the hospital must receive direct federal assistance and noting emergency room exception); Ctr. for Legal Advocacy v. Earnest, 320 F.3d 1107, 1111-1112 (10th Cir. 2003) (holding, consistent with amendment to federal regulations, that referrals to substance abuse treatment providers by emergency rooms does not make emergency rooms a program unless the ER's primary function is AOD treatment or the ER holds itself out to the public as providing such services).

20 Tauber et al., *supra* note 18, at 8.

21 42 C.F.R. § 2.32, 2.35; *see* Legal Action Ctr., *supra* note 16, at 35-36, 135-136.

22 This interpretation is not without its detractors. In United States v. White, 902 F. Supp. 1347, 1352 (D. Kansas 1995) The court stated:
The information concerning White's history of substance abuse will be disclosed in connection with the magistrate judge's performance of his official duties in pronouncing sentence. Moreover, if *White's* analysis and interpretation of the regulations were correct, any mention by the magistrate judge of the information gleaned from the evaluation performed by the Pawnee Mental Health Center during sentencing in open court would potentially constitute a violation of those regulations, subjecting the magistrate judge to criminal penalties. Clearly this is not and cannot be the law.

23 *See* State v. Johnson, 836 N.E.2d 1243, 1243 (2005) (holding that the statements to AOD assessor were about homicide, and not about the identity, diagnosis, treatment or prognosis of any patient and, thus, were not protected); United States v. Smith, 511 F. 3d 77, 77 (1st Cir. 2007) (holding that a casual reference to a drug abuse treatment would not bar admission of Order of Commitment to mental health institution, where reference could be excised).

24 Legal Action Ctr., *supra* note 16, at 129.

25 Excerpted from Legal Action Ctr., *supra* note 16, at 94-96; 45 C.F.R. § 164.520(b); 42 C.F.R. § 2.22(b).

26 42 C.F.R. § 2.35, Edwards v. Stephens, ___ F. Supp.2d ___ (W.D. La. 2006).

27 LEGAL ACTION CTR., *supra* note 16, at 41.

28 42 C.F.R. § 2.31(a); 45 C.F.R. § 164.508(c); LEGAL ACTION CTR., *supra* note 16, at 27.

29 TAUBER ET AL., *supra* note 18, at 10; LEGAL ACTION CTR., *supra* note 16, at 40. *See also* State v. Wheat, 76 P.3d 280, 280 (Wash. Ct. App.) (holding that although the defendant had executed a consent to disclosure of his records before entry into the treatment program, there was no release signed to obtain the treatment records when the investigation disclosed the failed drug tests); State v. Johnson, 836 N.E.2d 1243, 1243 (2005 (addressing the issue of strict construction and need for consent).

30 *See* LEGAL ACTION CTR., *supra* note 16, at 36, sample forms at pp. 242 and 284.

31 State v. Rudy, 974 So. 2d 1164, 1164 (Fla. App. 4th Dist. 2008).

32 These suggestions for best practices are partially obtained from TAUBER ET AL., *supra* note 18, at 9.

33 *See* State v. Noelle Bush, Case #48-02 CF 6371-0, (October 15, 2002) (holding that open and public courtroom trumps federal confidentiality requirements). Even though court proceedings are open, the best practice would dictate that for graduations that new consents be executed or that the participant be given the option of a more private ceremony.

34 LEGAL ACTION CTR., *supra* note 16, at 59-69.

35 At least one court has ruled that a criminal probation revocation proceeding is a civil proceeding. People v. Silkworth, 538 N.Y.S.2d 692, 692 (1989).

36 42 C.F.R. § 2.64.

37 42 C.F.R. § 2.65.

38 42 C.F.R. § 2.66.

39 42 C.F.R. § 2.64(d); Carter v. Knox County, 761 NE2d 431, 431 (Ind. App. 2002) (specifying procedure); Hicks v. Talbott Recovery Systems, 196 F.3d 1226, footnote 32 (11th Cir. 1999).

40 42 C.F.R. § 2.64(d); Nelson v. Labor Finders, 897 So.2d 501, 501 (Fla. App. 2005).

41 42 C.F.R. § 2.65(d). United States v. Shinderman, 515 F. 3d 5, 5 (1st Cir. 2008) (holding that ex parte orders are permitted in limited circumstances and notice to non-patient aggrieved party does not have to be contemporaneous with the issuance of the order).

42 *See* United States v. Hughes, 95 F. Supp. 2d 49, 49 (Mass. 2000); State v. Center for A Drug Free Living, 842 So.2d 177, 177 (Fla. App. 2003).

43 *In re* Marvin, 711 A.2d 756, 756 (Conn. 1998); *In re* 1993 Regular Grand Jury (Hosp. Subpoena), 854 F. Supp. 1380, 1384 (S.D. Ind. 1993).

44 The requirements are met when the disclosure is necessary (1) to protect against a threat to life or of serious bodily injury or (2) is necessary to investigate or prosecute an extremely serious crime; or (3) is in connection with a proceeding where the patient has already presented testimony concerning confidential communications. 42 C.F.R. 2.63(a); Granger v. McBride, No. 2:04 CV 8, 2006 U.S. Dist. LEXIS 34689 (N.D. Ind. 2006).

45 42 C.F.R. § 2.12(c)(6); 45 C.F.R. §164.512(b)(1)(ii); In Re B.S. 659 A.2d 1137 (Ut. 1995).

46 42 C.F.R. § 2.15(b).

47 45 C.F.R. § 164.506(c); 42 C.F.R. § 2.51.

48 45 C.F.R. § 164.502(j)(2), 164.512(f)(2); 42 C.F.R. § 2.12 (c)(5).

49 45 C.F.R. § 164.502(a)(1), 164.506(a), (c); 42 C.F.R. § 2.12(c)(3).

50 45 C.F.R. § 160.103, 164.504(e); 42 C.F.R. § 2.12 (c)(4).

51 45 C.F.R. § 164.501, 164.506, 164.512; 42 C.F.R. § 2.53(c)-(d); 42 C.F.R. § 2.52; 45 C.F.R. § 164.512(i)(1)(ii).

52 *See* 42 C.F.R. § 2.4; 45 C.F.R. § 160.408; LEGAL ACTION CTR., *supra* note 16, at 97-99.

53 Werdehausen v. Benicorp Ins. Co., 487 F.3d 660, 660 (8th Cir. 2007); Acara v. Banks, 470 F.3d 569, 569 (5th Cir. 2006); Ellison v. Cocke County, 63 F.3d 467, 467 (6th Cir. 1995); 42 U.S.C. § 290dd; 42 C.F.R. Part 2.

54 Many of these recommended practices are distilled from Legal Action Ctr., *supra* note 16, at 20-24.

55 At a minimum the privacy official should have a copy of: (1) LEGAL ACTION CTR., CONFIDENTIALITY & COMMUNICATION 2006; (2) JEFFREY TAUBER, NAT'L DRUG COURT INST., FEDERAL CONFIDENTIALITY LAWS AND HOW THEY AFFECT DRUG COURT PRACTIONERS (1999); AND (3) U.S. DEP'T OF JUSTICE, PRACTICAL GUIDE FOR APPLYING FEDERAL CONFIDENTIALITY LAWS TO DRUG COURT OPERATIONS (1999), *available at* http://www1.spa.american.edu/justice/documents/1936.pdf. In addition, the individual should be aware of the U.S. Department of Health & Human Services' web site for HIPAA at http://www.hhs.gov/ocr/privacy/ (last visited Aug. 4, 2010).