



Confidentiality of Information and Records: A Guide for Programs Working with Women with Disabilities who are Survivors of Sexual Assault or Domestic Violence

This paper represents background information for a "work in progress" of the Violence Against Women with Disabilities Project. The information contained within this paper is included to raise our collective awareness about confidentiality of information and records. Project efforts continue to collaboratively develop best practices or guidelines for ensuring an effective and legally sound multi-disciplinary response to working with women victims/survivors with disabilities.

Violence Against Women with Disabilities Project

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Confidentiality of Information and Records: A Guide for Programs Working with Women with Disabilities who are Survivors of Sexual Assault or Domestic Violence

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Introduction

Confidentiality of information and records is a value shared by most agencies that provide human services. It is important in order to provide safety and freedom from stigma and discrimination, and to encourage individuals to enter into relationships with human service providers. It is also an empowerment issue. People who use human services want to have control over the information about their lives and the services they receive.

However, confidentiality is not absolute. The individual can authorize the release of confidential information by giving his/her informed consent. The laws governing different human service providers also contain a number of exceptions to confidentiality, i.e., the circumstances under which information can be shared without the person's informed consent. These vary widely by provider agency and to some extent reflect the history and culture of the type of provider. For example, the laws governing the records of substance abuse treatment providers are much stricter than those governing general medical providers. This is due in part to the greater stigma traditionally attached to substance abuse treatment than to other medical care.

The laws governing confidentiality are complex. There are both state and federal laws and each one is a somewhat different from the other. There are also laws specifically relating to the confidentiality of records of agencies and laws relating to privilege, meaning the use of information in the courtroom. It is beyond the scope of this document to discuss the details of all the laws that may affect information relating to women with disabilities who have experienced sexual assault or domestic violence. However, we will discuss why a program may want to share information, how to do it with the client's consent, what the differences are between confidentiality and privilege, and what information may be shared in an emergency.

Why Share Information?

Women with disabilities who have experienced sexual assault or domestic violence may have complex needs and on-going relationships with other service providers. A woman with a mental illness may be receiving therapy from a counselor, medications from a psychiatrist, and have a case manager, if involved with county funded services. A woman with a developmental disability may be receiving vocational or day services, live in an adult family home, and have a case manager. In order to provide domestic violence or sexual assault services that are appropriate for a woman with disabilities it may be necessary to communicate with these other service providers. Likewise, a disability service provider who has a client who has experienced sexual assault or domestic violence needs to know how to communicate with sexual assault or domestic violence service providers and what restrictions they have on sharing information.

To effectively assist a woman with a disability it is important to consider the whole person and not just the part of the person that a human service provider is focusing on. Thus, the person and the various providers working with her need to be in communication and in coordination with each other. Failure to do so often leaves the client in the middle, receiving different messages about what to do and having to figure out how to navigate through complex human service systems.

How to Share Information

If a human service provider wants to communicate with another provider, at least two types of releases of information from the client are needed. One allows the first provider to contact the second provider. To do this the first provider needs an informed consent to release information which conforms to the legal requirements covering his/her agency. For example, a sexual assault or domestic violence service provider would have to obtain informed consent to release confidential information in order to contact a woman's mental health counselor. In addition, a domestic violence service provider would need to obtain consent to waive the nondisclosure law.

The second release needed is one for the second provider to communicate with the first provider. Thus, the mental health counselor would need informed consent from the client to communicate with the sexual assault or domestic violence service provider. The consent required would have to meet the requirements of state and federal laws to release mental health records. In this example the sexual assault or domestic violence service provider could obtain a copy of the consent form used by the mental health counselor, have the client sign it, and send or fax it back to the mental health counselor. Alternatively, the sexual assault or domestic violence agency could have forms on hand that they believe meet the requirements of the mental health confidentiality laws, have the client sign the form, and send or fax it to the counselor. After the client has signed both forms the two providers can communicate with each other.

Confidentiality laws cover spoken information as well as written records. Thus, it is important to have the informed consent forms signed prior to making a phone call or having a meeting with the other provider. It is, however, possible to contact another provider without revealing the client's name or identity to generally discuss a situation or to arrange to get the proper informed consent forms.

In summary, the following releases of information are needed: 1) A release of information for your agency to contact or share information about a client with another agency/individual; 2) A release of information from the second agency/individual for them to share information with you; and 3) For domestic violence service agencies, a waiver of nondisclosure.

Differences between Confidentiality and Privilege

Confidentiality is a set of laws and policies that governs the sharing of certain private information between individuals, agencies, and other entities. Privilege is a rule of evidence which governs the use of certain information in the court room. Thus, privilege is a narrower concept than confidentiality. However, privilege is often used as a basis for confidentiality, using the rationale that if information cannot be compelled in a court of law then it cannot be required to be disclosed in other contexts. Therefore, those who provide services to individuals protected by privilege must take measures to protect the confidentiality of privileged communications in order to preserve the right to assert privilege if and when the information is sought in a court of law.

Types of Privileges

Wisconsin law recognizes several different privileges: privilege between a patient and a physician, nurse, chiropractor, social worker, psychologist, marriage and family therapist, or professional counselor; lawyer - client privilege; domestic violence or sexual assault advocate – victim privilege; husband - wife privilege; and clergy privilege. These privileges are all contained in Chapter 905 of the Wisconsin Statutes. The statutes all set out the context for when a communication is privileged, who may assert it, when it may be waived, and when it does not apply. Two of these privileges will be examined in more detail below.

Privilege between a Patient and Physician, Registered Nurse, Chiropractor, Social Worker, Psychologist, Marriage and Family Therapist, or Professional Counselor

If an individual, couple, family, or group makes a communication to one of these licensed professionals for the purpose of diagnosis or treatment of a physical or mental condition it may be privileged. The privilege may be waived if disclosure is made to others who are not involved in the treatment or diagnosis of the patient or if the recipient of the information does not have privilege. The privilege may be asserted, meaning that the patient or the professional may refuse to testify or provide information to the court, by the patient, his/her guardian or conservator, the parent of a minor, or the personal representative of a deceased patient. The professional may also assert the privilege on the patient's behalf. There are a number of exceptions to this rule of privilege, meaning that these are cases where the privilege does not apply. These include: homicide trials; child abuse or neglect cases; court ordered examinations; court proceedings for civil commitment, guardianship, or protective placement or services; certain juvenile court proceedings; paternity actions; tests for intoxication; mandated reporting of certain wounds or burns; or when the patient relies on his/her mental or physical condition as an element of his/her claim or defense in a case. A court may also order the release of privileged information if it is relevant and necessary for the determination of a defendant's guilt or innocence in a criminal proceeding.

Privilege between a Victim and a Domestic Violence or Sexual Assault Advocate

Under this law a "victim" is defined as someone who has been subject to, or who has alleged that s/he has been subject to, child abuse, interspousal battery, domestic abuse, or sexual assault. An "advocate" is an employee or volunteer for an organization whose purpose is to provide counseling, assistance, or support services free of charge to victims. Communications between victims and advocates on or after July 30, 2002 for the purposes of providing counseling, assistance, or support may be privileged. This privilege may be waived if disclosure is made to others (excluding the victim's family or members of a group receiving services) who are not involved in providing counseling, assistance, or support, or who do not have privilege. The victim, his/her guardian or conservator, parent of a minor, or personal representative of a deceased victim may assert the privilege. The advocate may also assert it on the victim's behalf. There is only one statutory exception to this rule of privilege which is mandated child abuse reports.

Please note that domestic violence and sexual assault programs are not mandated child abuse reporters; however, certain individuals working in those programs, such as social workers or professional counselors, may be. Reports are required if the mandated reporter has reasonable cause to believe that a child s/he has seen in the course of his/her professional duties has been abused or neglected or threatened with abuse or neglect.

Informed Consent for Releasing and Obtaining Information

As stated above the confidentiality laws vary as to what is required to release information from your agency and to obtain information from another agency. In this section we will review the state and federal laws that govern agencies that may be involved in providing services for women with disabilities who have experienced sexual assault or domestic violence.

Mental Health and Developmental Disability Service Records

Wisconsin has a law which specifically covers the records of individuals and agencies providing services for mental illness or developmental disabilities (Section 51.30, Wisconsin Statutes and HFS 92, Wisconsin Administrative Code). This law has quite broad coverage, including the records of the Wisconsin Department of Health and Family Services, county human service departments, and public and private treatment facilities, plus other individuals who may be providing services to one of these entities, such as billing services or consultants. The definition of treatment facility includes inpatient and community programs, such as outpatient clinics, community support programs, community based residential facilities, day service programs, etc. The only providers not covered are those individuals in private practice outside a clinic setting, such as an individual psychologist or psychiatrist. These providers are covered by the health care provider records law discussed below. This law also covers court records relating to proceedings under Chapter 51, which would include civil commitments and patient rights actions. As will be discussed below certain records covered by this law are also covered by the new federal law on privacy of medical records, HIPAA.

Requirements for Informed Consent

Consent must be in writing

The consent document must include:

Name of individual whose record is being disclosed

Name of individual, agency, or organization to which disclosure is being made

Specific type of information to be disclosed

Purpose or need for disclosure

Statement that the individual has the right to inspect and receive a copy of the records being disclosed as provided in HFS 92.05 and 92.06

Time period during which the consent is valid

Date on which the consent is signed

Signature of the individual or person legally authorized to consent for the individual

Who May Sign the Informed Consent Form

A competent adult may sign his/her own informed consent form.

The guardian of an adult who has been found to be incompetent by a court may sign the form on behalf of the individual.

A health care agent of an activated health care power of attorney may sign the form if the power of attorney document gives him/her this authority.

If the adult appears to be incompetent to sign the form, meaning s/he is not substantially able to understand all the information specified on the consent form, a temporary guardian should be sought to sign the form.

When the client is a minor under the age of 14, a parent, guardian or person acting in place of the parent (for example, a foster parent) may sign the form.

When the minor is age 14 or older, the minor him or herself may sign or the parent, guardian, or person acting in place of the parent may sign the form.

Note: A parent who has been denied periods of physical placement may not sign the form to release confidential information.

In the case of a deceased individual an executor, administrator, or personal representative of the person's estate may sign the informed consent form. If there is no such person, consent may be given by the person's spouse, if any, and if not, by any responsible member of the individual's family.

Restrictions on Redislosure of Information

Personally identifiable information may not be redisclosed by a recipient of the information except with the informed consent of the individual or as otherwise permitted under Sec. 51.30, Wis. Stats., or otherwise required by law. For example, a residential services provider who receives information from an individual's psychotherapist may not redisclose this information without the person's written informed consent or as provided under sec. 51.30, Wis. Stats. All written information about a client that is released must be accompanied by a written statement which states that the information is confidential and that disclosure without patient consent or statutory authorization is prohibited. The law does not require any particular wording for this statement.

Forms

A model informed consent form for release of mental health or developmental disability service records is contained in Appendix A.

Substance Abuse Service Records

There is federal law which governs the release of substance abuse records (42 Code of Federal Regulations Part 2). The records covered are those maintained by a program that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment. The above referenced law on mental health records also covers substance abuse treatment records. However, the federal law generally controls and will be the focus of the discussion here.

Requirements for Informed Consent

Consent must be in writing

The consent document must include:

Name of the client

Specific name or general designation of the program or person permitted to make the disclosure

Name or title of the individual or the name of the organization to which disclosure is to be made

How much and what kind of information is to be disclosed

Purpose of the disclosure

Date, event, or condition upon which the consent will expire if not revoked before then

Statement that the consent is subject to revocation at any time except to the extent that a program or person making the disclosure has already acted in reliance on it

Date on which the consent is signed

Signature of the client and/or person authorized to sign on the client's behalf

Who May Sign the Informed Consent Form

An adult client may sign his/her own informed consent form.

The guardian of an adult client who has been found incompetent by a court may sign the form on behalf of the client.

A health care agent may sign pursuant to an activated health care power of attorney if the document gives him/her this authority.

The director of a program who determines that a client suffers from a medical condition that prevents knowing or effective action on his/her own behalf may sign the form for the sole purpose of obtaining payment for services from a third-party payer.

In other circumstances of persons believed to be incompetent to give informed consent, a temporary guardian should be sought.

When the client is a minor, if parental or guardian consent is required for treatment, then both the parent or guardian and the minor must consent to the release of information.

If treatment is provided without parent or guardian consent, then only the consent of the minor is needed. Under Wisconsin law minors age 12 and older may obtain outpatient substance abuse treatment without parent or guardian consent under certain limited circumstances.

If the client is deceased consent may be given by an executor, administrator, or other personal representative appointed by the court. If there is no such person appointed, consent may be given by a client's spouse or, if none, by any responsible member of the client's family.

Restrictions on Redislosure of Information

Each disclosure of information with written consent must be accompanied by a written statement that states that the information may not be redisclosed except pursuant to the client's written consent or as otherwise provided under the federal law. The regulations contain specific wording that must be used in this notice.

Forms

A model informed consent form for the release of substance abuse service records is contained in Appendix A.

Health Care Provider Records - State Law

Wisconsin law on health care records covers the records of a wide array of licensed health care providers, such as doctors, nurses, social workers, pharmacists, acupuncturists, massage therapists, etc., and the practice settings/organizations of these professionals, for example clinics, hospitals, nursing homes, hospices, etc. (See Sec. 146.81, Wis. Stats. for a listing) The law, however, specifically exempts

providers who are covered by the mental health records law discussed above. Most health care provider records are also covered by the new federal law on health care privacy, HIPAA, which will be discussed below.' Thus, the key is making sure that any release of confidential medical information is in conformity with both the state and federal law.

Requirements for Informed Consent

Consent must be in writing

The consent document must include:

The name of the patient whose record is being disclosed

The name of the individual, agency, or organization to which disclosure may be made

The types of health care providers making the disclosure

The type-of information to be disclosed

The purpose of the disclosure such as whether it is for further medical care, application for insurance, payment of an insurance claim, for a disability determination for a vocational evaluation, for a legal investigation, or for another specific purpose

The time period during which the consent is valid

Date on which the consent is signed

Signature of the patient or person legally authorized to sign on behalf of the patient, including that person's authority or relationship to the patient

Who May Sign the Informed Consent Form

A competent adult may sign his/her own informed consent form.

The guardian of an adult found to be incompetent by a court may sign on behalf of the individual.

A health care agent of an activated health care power of attorney may sign if the power of attorney document gives him/her this authority.

A temporary guardian appointed by the court may sign for a person believed to be incompetent.

If the patient is a minor, a parent, guardian, legal custodian (under Ch. 48), or person vested with supervision of the child under Ch. 938 may sign on behalf of the minor.

If the patient is deceased, the personal representative or spouse may sign the form. If there is no spouse, an adult member of the patient's immediate family may sign.

Restrictions on Redislosure of Information

The law states that "all patient health care records remain confidential." They can be released only with informed written consent or pursuant to one of the enumerated circumstances in the statute where consent is not required.

Forms

A model informed consent form for the release of health care provider records is contained in Appendix A.

Health Care Provider Records - Federal Law – HIPAA

The new federal law on health care provider records covers most of the same providers that are covered by the state health care provider records law as well as those covered by the mental health and developmental disability services records law. "Health care" is defined as care, services, or supplies related to the health of an individual, including preventative, diagnostic, therapeutic, maintenance, or palliative care, and counseling, service, assessment, or procedure with regard to physical or mental condition, or functional status, of an individual or that affects the structure or function of the body. The sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription is also defined as health care. However, certain small health care providers who do not electronically submit health care information may not be covered by this law.

When the state and federal law are in conflict, the federal law generally controls. However, if the state law provides the individual greater privacy protection or other rights, then it controls. For example, the federal law allows sharing of health care information identifying a person as a possible subject of domestic violence to a government authority without the individual's consent. However, the state health care provider records law does not permit such sharing of information without the person's consent and thus, it could not be done. The key when dealing with both the state and federal laws is to make sure that consent forms and any releases without consent comply with both sets of requirements.

Requirements for Informed Consent (called Authorization for Disclosure)

Authorization must be in writing

Authorization document must include:

Name of the individual whose record is being disclosed

The name or other specific identification of the person(s), or class of persons, authorized to make the disclosure

The name or other specific identification of the person(s), or class of persons, to which disclosure may be made

A description of the information to be disclosed that identifies the information in a specific and meaningful way

A description of each purpose for the disclosure

A statement of the individual's right to revoke the authorization in writing

A statement regarding whether treatment, payment, enrollment, or benefits may be conditioned on the person's signing the authorization

A statement that if information is redisclosed, it will no longer be protected by federal law

An expiration date or event for the disclosure

The date the authorization was signed

The signature of the individual or personal representative of the individual, including a description of that individual's authority

Who May Sign the Authorization

A competent adult may sign.

A personal representative (PR) may sign on behalf of the individual; personal representative is defined as:

Person who has the legal authority to make health care decisions on behalf of an adult; in WI this would be a court appointed guardian or a health care agent under a health care power of attorney, or

Person who has legal authority to consent to health care for a minor; in WI this would be a parent or guardian.

Note: The health care provider may refuse to recognize someone as a personal representative if they have a reasonable belief that the individual has been subjected to domestic violence, abuse or neglect by the PR, or treating the person as a PR could endanger the individual, and the provider determines it is not in the best interests of the individual to treat the person as a PR. This provision would supercede WI law. However, in these cases it is unclear who would sign the authorization to release information.

A minor may sign the form if/s/he has the legal authority to consent to the health care services on his/her own without parent/ guardian consent.

An executor, administrator, or other person who has the authority to act on behalf of a deceased individual or his/her estate may sign the form.

Restrictions on Redislosure of Information

The federal law does not prohibit the rerelease of health care information by entities who are not covered by the federal law. However, Wisconsin law does prohibit such rerelease and thus would control.

Forms

A model informed consent form for release of medical records under HIPAA is contained in Appendix A.

Records Relating to HIV Tests

Wisconsin has a very comprehensive law on the confidentiality of HIV test results. It covers a health care provider, blood bank, blood center or plasma center that subjects a person to a test for the presence of HN, antigen or nonantigenic products of HN or an antibody to HIV. Test results may be released with informed consent or pursuant to a list of circumstances enumerated in the statutes. HIV test results generated by a health care provider are also subject to the requirements of the federal HIPAA law.

Requirements for Informed Consent

Consent must be in writing

Consent document must include:

Name of the person who is subject of the test

Statement of the circumstances under which disclosure may be made without consent or a statement that this information is available upon request

Name of the person to whom test results may be disclosed

Time period during which consent for disclosure is valid

Date on which the consent is signed

Signature of the person who is subject of the test or person legally authorized to consent for the person

Who May Sign the Informed Consent Form

The person who is subject of the test may sign the form.

The individual's health care agent if the person has executed a valid health care power of attorney and the person has been found to be incapacitated may sign the form.

A guardian of an adult who has been adjudicated incompetent may sign the form.

The parent or guardian of a minor under age 14 may sign the form.

Restrictions on Redislosure

The statute does not contain a specific prohibition on redislosure.

Forms

A model informed consent form for release of HIV test results is contained in Appendix A.

Adult Protective Service Records

The treatment and service records of someone who receives or applies for services under Chapter 55, the adult protective services law, are subject to Sec. 51.30, the Mental Health and Developmental Disability Service-Records Law discussed above. Thus, records of county human service departments that provide adult protective services, agencies under contract with county protective service agencies, and agencies serve individuals under protective placements or court ordered protective services would all be covered under this law.

Independent Living Center Records

Independent Living Centers (ILCs) provide advocacy and a variety of social and other supportive services for individuals with physical and mental disabilities living in the community. Their records are covered by federal regulations (34 CFR Sec. 364.56). In addition, if services meet the definition of health care or mental health or developmental disability services, the records would be covered by the state and/or federal laws discussed above. See the sections on Mental Health and Developmental Disability Service Records, Health Care Provider Records - State Law, and/or Health Care Provider Records - Federal Law - HIPAA. In this section the requirements of the federal regulations will be discussed.

Requirements for informed Consent

The regulations require that there be written informed consent for the release of personal client information to another agency or organization. If medical or psychological information is to be released the receiving agency must assure the ILC that the information will be used only for the purpose for which it is provided and will not be further released to the individual. The regulations do not provide additional requirements for the form of the release; thus, agencies have some discretion in designing their forms.

Who May Sign the Informed Consent Form

The individual or his/her legally authorized representative may sign the consent form.

Restrictions on Redislosure of Information

The information may not be re-released to the individual; the regulations imply that the information may not be re-released to others.

Sexual Assault Service Provider Records

The records of sexual assault service providers are not directly regulated by state or federal laws which are specific to sexual assault service providers. In some instances, sexual assault service providers are mental health and disability service providers as defined by state law or a sexual assault service agency may employ one or more staff whose records would be defined as health care provider records under state or federal law. In these circumstances the above sections on Mental Health and Developmental Disability Service Records, Health Care Provider Records - State Law, and/or Health Care Provider Records - Federal Law - HIPAA would apply.

In addition, federal and/or state funding laws require confidentiality in services provided to Victims at agencies receiving this funding. Further, the advocate privilege provides protection for agency records. Agencies routinely ask for the informed consent of the victim before releasing records or other information as a way to protect the confidentiality of privileged communications between the advocate and victim. In order to make certain that a victim understands the possible consequences of releasing confidential information it is important to discuss the risks and benefits from a release. The Checklist of Questions contained in Appendix B. provides an outline of the issues to discuss with victims in helping them make the decision of whether or not to release confidential information.

Forms

A model informed consent form for the release of records from a sexual assault service agency and a Checklist of Questions to Review with a Victim are contained in Appendix B. For agencies or individuals who must comply with the requirements of state and federal law for health care provider and/or mental health records there is a model informed consent form contained in Appendix A.

Domestic Abuse Service Records

The records of domestic abuse service providers are protected by the nondisclosure law in Wisconsin, federal funding laws that require confidentiality, and the victim - advocate privilege law discussed above. The nondisclosure law (Sec. 895.67, Wis. Stats.) covers domestic abuse service organizations which include nonprofit or public agencies providing shelter facilities or private home shelter care, advocacy and counseling, and/or 24 hour telephone service for victims of domestic abuse. The law prohibits domestic abuse service organizations from disclosing the location of a current or past service recipient, his/her minor child, or a minor who is his/her custody or who accompanies the recipient when s/he receives domestic abuse services. This law is interpreted to cover the records of recipients of domestic abuse services as well as their location.

In addition, some providers in domestic abuse programs, such as social workers, may be covered by the health care provider laws and/or the state mental health records law. In this situation the above sections on Mental Health and Developmental Disability Service Records, Health Care Provider Records - State Law, and/or Health Care Provider Records - Federal Law – HIPAA would apply.

Requirements for Informed Consent

The nondisclosure law requires that there be written informed consent before revealing a service recipient's location, but does not further define what must be in the consent document. The Wisconsin Coalition Against Domestic Violence recommends that there be a separate consent document for release of information/records which go beyond information about a service recipient's location, for example, information about the services that an individual has received. Agencies have some discretion

about how to write their informed consent forms, but should have two separate documents - one to waive the nondisclosure law and one to release other confidential information.

Who May Sign the Informed Consent Forms

The nondisclosure statute states that the service recipient may sign the form. While not explicitly stated, presumably a guardian of the person may sign on the recipient's behalf.

Restrictions on Redislosure of Information

The nondisclosure statute does not address this issue.

Forms

Model informed consent forms to waive the nondisclosure law and to release other confidential information are contained in Appendix C.

Release of information without Informed Consent

Most of the laws discussed above allow for release of confidential information without the individual's informed consent. The circumstances vary considerably according to the particular statute; these will be discussed in general terms below. However, there are two circumstances that may be of particular concern to individuals providing services for women with disabilities who have experienced sexual assault or domestic violence. These are a duty to take action to protect an individual from harm or from harming others and mandated or discretionary reporting of client abuse or neglect. These two situations will be discussed in some detail.

Duty to Take Action to Protect a Client or Others from Harm

Duty to Warn or Take Action

The Wisconsin Supreme Court has held that certain professionals have a duty of their clients to protect them from harming themselves or from harming others when that harm was foreseeable by the professional. The case, *Schuster v. Altenberg*, concerned a psychotherapist and his/her duty to warn a third party of potential danger or to take action, such as initiating a civil commitment, to protect the client or others from harm. The Court said that this duty overrode the professional's duty to protect confidentiality in these circumstances.

The duty to warn or take action has been incorporated into a number of professional codes of ethics. Thus, social workers, physicians, and other professionals have an ethical, as well as legal duty to act in these cases. How far this duty may extend to other professionals or individuals working in the human service field is unclear. It also is unclear about whether this duty extends to situations where the client is at risk of being harmed by someone else.

An agency may adopt a policy that it will take action and break confidentiality in certain situations where it is predicted that the client will harm themselves or others or be harmed by someone else. However, such action should not be taken lightly; there should be a requirement that staff consult with someone knowledgeable about the probability that the harm may actually occur and that the reasons for their

actions be well documented. In addition the possible harm from breaking confidentiality should be balanced against the possible benefit to the client or others and other less drastic interventions, such as counseling the client to take action to resolve the situation themselves, should be considered.

An agency may wish to incorporate a provision in their intake materials that notifies clients about the circumstances under which they may break confidentiality. A domestic violence service program may want to ask the client to sign a waiver of nondisclosure form which covers these circumstances.

Duty to Crime Victim

There is also a statutory duty in Wisconsin that applies to all individuals to summon law enforcement or provide assistance to a victim if the person knows a crime is being committed and the victim is exposed to bodily harm. (Sec. 940.34, Wis. Stats.) This duty does not apply if compliance would place the reporting person in danger or interfere with his/her duties to others. Thus, this law also creates a duty to take action in certain circumstances.

Reporting Abuse or Neglect of a Client

Child or Adult Abuse or Neglect

Wisconsin law requires certain individuals to report abuse or neglect of a child seen in the course of their professional duties. (Sec. 48.981, Wis. Stats.) The various confidentiality statutes either explicitly or by interpretation allow for such reporting. However, there is no parallel mandate to report abuse or neglect of adults. Instead there are a few limited reporting requirements and some circumstances under which reports may be made.

Reporting of Wounds

Wisconsin statutes do require certain medical personnel to report to local law enforcement officials gunshot wounds and other wounds or serious burns if they have reasonable cause to believe they occurred as the result of a crime. (Sec. 146.995, Wis. Stats.) Since this law is broadly worded, there has been concern that it may require reports of domestic abuse. The Wisconsin Medical Society has adopted a policy statement which attempts to balance patient privacy and self-determination with required reporting. It is as follows: "In treating patients who are possible victims of domestic violence, the goal of the intervention must be to help victims regain control of their lives. It is, therefore, vital that physicians pay great respect to a patient's right not to disclose domestic abuse or to refuse intervention when the patient believes that such action is not in her/his best interest the role of the physician in this process is to offer patients options and allow them to make decisions in their lives. The patient's decision should be documented in the medical record." However, the policy goes on to state that there are circumstances when intervention must occur without the patient's consent. For adults these include: gunshot wounds or life-threatening injuries, when there is a question regarding the patient's mental competency, or if the physician believes that the patient is at high risk for life-threatening or serious injury.

Abuse by Caregiver

A large number of human service agencies must report client abuse or neglect or misappropriation of property that is the result of caregiver misconduct. A "caregiver" is an employee or volunteer in a covered program or agency. Reports must be made to the Wisconsin Department of Health and Family Services and the Department of Regulation and Licensing if the caregiver is licensed. (Sec. 146.40(4r), Wis. Stats. and HFS 13, Wis. Admin. Code) Certain agencies also must report client deaths that were the

result of suicide, restraint or seclusion use, or psychotropic medications to the Wisconsin Department of Health and Family Services.

Non-Mandated Abuse Reporting

Reporting of elder abuse is permissible, not mandated. (Sec. 46.90, Wis. Stats.) Various confidentiality statutes have provisions that allow this reporting to take place. (For example, the state mental health and health care provider records laws and HIPAA.) Reporting of cases to adult protective services, to the long term care ombudsman program, and to the state protection and advocacy agency are all allowable, but not required, under the mental health and health care provider records laws.

Sexual Contact by a Therapist

Reporting of sexual contact by a therapist is permitted but only if the patient gives consent to do so. However, a therapist who learns of such sexual contact between a patient and another therapist is required to ask the patient if s/he wants to make such a report and to follow through if so requested. (Sec. 940.22, Wis. Stats.)

See Appendix D. for a summary of mandated reporting requirements for adult abuse.

Other Releases of Information without Client Consent

Mental Health and Developmental Disability Service Records (including Adult Protective Services records)

In addition to those discussed above, Section 51.30, Wis. Stats. contains numerous exceptions to the requirement of client informed consent for the release of confidential information. These include releases to licensing and certification agencies, to county human service departments or WI Department of Health and Family Services for the purposes of service coordination or oversight, researchers, attorneys and guardians ad litem to prepare for Ch. 51, 55, or 880 cases, within treatment facilities, to physicians in certain crisis situations, to law enforcement under very limited circumstances, and pursuant to court orders. Each exception is narrowly defined so it is important to actually read the statute before releasing information. Also, since many of these records are covered by HIPAA it will be important to determine if the release is also allowable under this law. Releases without client consent must be allowable under both the state and federal law.

Substance Abuse Treatment Records

The federal substance abuse treatment records law allows releases without client consent when there is a qualified service agreement between agencies, within a treatment program, for child abuse or neglect reporting, for administrative audits and evaluations, in medical emergencies, for research purposes, to law enforcement under very limited circumstances, and pursuant to certain court orders. Like the mental health records statute these exceptions are narrowly defined and the law should be consulted before releasing records without client consent.

Health Care Provider Records - State Law

In addition to the exceptions discussed above, the state health care records law allows releases of information without client consent to other health care providers if they are rendering assistance or

consultation to the client, in medical emergencies, for administrative accreditation, audits or evaluations, for research, for billing to insurance companies and others, to state or federal agencies to "perform a legally authorized function", to school personnel in certain circumstances, or pursuant to a court order. These exceptions are also narrowly defined and are subject to HIPAA. Thus, both the federal and state law must allow the records to be released in order for the release to be lawful.

Health Care Provider Records - Federal Law - HIPAA

The new federal law, HIPAA, is quite complex. It allows sharing of information without client consent in some fairly broad areas, such as treatment, payment, and health care operations. It also has some more narrowly drawn exceptions relating to public health, child abuse reporting, law enforcement, health care oversight activities, research, threats to health and safety, etc. However, a release has to meet the requirements of both the state and federal law. Thus, the HIPAA provisions have to be compared to the state health care provider law and the mental health records law exceptions to client consent. Whichever law better protects patient privacy controls.

HIV Testing Records

The state law contains a number of circumstances under which test results can be shared without client consent. These include to certain health care providers, blood banks, the state epidemiologist, funeral directors, accreditation bodies, researchers; coroners/medical examiners, certain crime victims, correctional facility personnel, out of home placement facilities for children, and pursuant to court order. All of these exceptions are narrowly drafted and should be read carefully before disclosure is made. Also these records would be subject to the federal HIPAA requirements.

Independent Living Center Records

The federal regulations allow an ILC to release personal information for audit, evaluation, or research activities; if required by federal regulations; in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by state or federal law; pursuant to court order; or to protect the individual or others if the individual poses a threat to his/her safety or the safety of others. Several of these exceptions are narrowly defined and the federal regulations should be consult before releasing information without client consent.

Sexual Assault Service Provider Records

Sexual assault agencies may release information without the consent of the client, but should do so only under narrowly defined circumstances so that client confidentiality and privilege are maintained. Sexual assault agencies may employ licensed professionals with ethical obligations to take action to protect others from harm or to report child abuse or neglect. As a result, many agencies have adopted policies that allow reporting of child abuse or neglect and the contacting of appropriate agencies if a client threatens to harm him/herself or others. These agencies routinely explain the confidentiality rights and exceptions to the confidentiality policies to victims at intake.

Domestic Abuse Service Records

There are no statutory exceptions to the non-disclosure law. There is an informal Attorney General's opinion stating that mandatory child abuse reports may be made by domestic abuse service providers, provided that the location of the service recipient or child with the service recipient is not revealed.

Conclusion

The laws surrounding confidentiality are complex. The best rule is to obtain client consent before sharing information with individuals outside of your agency. However, in certain exceptional circumstances information may need to be released without consent. When doing so, consult your agency's policies and discuss the proposed release with a supervisor or other agency personnel. Expert advice about confidentiality is also available from the Wisconsin Coalition for Advocacy, Wisconsin Coalition Against Domestic Violence, and Wisconsin Coalition Against Sexual Assault. Information about HIPAA and Wisconsin's confidentiality laws may be found on the following website: www.hipaacow.org.

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Appendices

(FORMS AND TABLES NEED TO BE TRANSCRIBED)