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Federal Confidentiality Laws and How They Affect Drug Court Practitioners

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April 1999

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Prepared by the National Drug Court Institute the research, scholarship and education affiliate of The National Association of Drug Court Professionals

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Judge Jeffrey Tauber
Director, NDCI

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Introduction

The many details of this document can be reduced to four essential themes:
First, drug courts are required to comply with state and federal confidentiality laws. Second, drug court practitioners should recognize both the valuable function that those laws serve and their impact on the operation of drug courts. Third, most conflicts between confidentiality laws and drug court procedures can be resolved through the use of consent forms, drafted and executed in accordance with the regulations implementing Section 290dd-2. Fourth, although consent is a useful tool, drug courts also should be willing to modify their procedures in order to accommodate confidentiality requirements, where doing so will further the court's goals. Awareness of these principles should prevent problems that would result from the failure to comply with confidentiality laws.

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I. Scope and Purpose

Drug courts and confidentiality laws are designed to achieve the shared goal of encouraging substance abusers to obtain and remain in treatment.1 Tension between confidentiality laws and drug courts can arise, however, because confidentiality laws restrict the spread of information, while drug courts can only function if information is shared among the members of the drug court team. The goal of this document is to inform drug court practitioners generally about potential conflicts and to demonstrate that most pitfalls can be avoided without infringing on drug court participants' confidentiality interests or impairing drug court operations.

This document is not intended as a comprehensive treatise on confidentiality laws,2 for two reasons. First, the legal mandates concerning confidentiality are too complex to be condensed into a brief guide. Second, courts or regulators have not considered many of the concerns identified in this document. For those issues, there have been few authoritative statements about what solutions are acceptable.

The focus of this monograph is on federal confidentiality laws, which apply to virtually all drug courts. The goal is to help drug courts implement procedures that will not only satisfy federal confidentiality requirements but also effectuate the practitioners' need to share information.

II. Policies

Confidentiality laws relating to drug treatment originally were enacted to encourage substance abusers to seek assistance with their drug problems. The theory behind these laws is that substance abusers are more likely to enter treatment if they are assured that information about their drug use will not readily be available to the public. The law restricts the distribution of information in order to provide such assurances. Confidentiality laws also encourage substance abusers to be open with their counselors by prohibiting counselors from revealing client disclosures to third parties and the general public.

The goals of drug courts and confidentiality laws are compatible; both seek to help substance abusers overcome their drug problems, for the benefit of the users themselves and society at large. Furthermore, trust between substance abusers and their therapists, which the confidentiality laws encourage, is as important in drug courts as in more traditional forms of treatment.

Most of the existing laws date back to the 1970s. At that time, criminal defendants sometimes underwent drug treatment in conjunction with the legal proceedings against them; federal confidentiality laws acknowledge this practice and include some provisions that would apply to criminal drug courts (but not family or juvenile drug courts). The modern drug court model was developed after these confidentiality laws, however, and these laws sometimes appear to impede drug court operations (in adult, family and juvenile drug courts). For instance, drug courts sometimes sanction participants by requiring them to spend a day in the jury box observing drug court proceedings. While there, they may hear confidential information revealed by other participants about themselves. Another example of a potential conflict arises in the context of family drug treatment courts, which frequently obtain information about drug-using parents that may be relevant to the court's primary mission, protecting the children within its jurisdiction. If, for instance, a family court acquires confidential information that a parent has

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relapsed, the court may be required to take action to protect a child's safety, including using the information to remove the child from the relapsing parent's custody.

Where drug court practices conflict with confidentiality laws, the laws control. Most of these conflicts can be avoided, however, by adjusting drug court procedures or by obtaining consent from participants. With sound legal counsel, drug courts should be able to develop practices that are fully compatible with confidentiality laws.3

III. Definitions and Sources of Law

A. Participants, Team Members and Covered Information

In this document, substance abusers receiving services from drug courts – adult criminal defendants, juvenile offenders, and family court litigants – are referred to as participants. The terms drug court team and drug court practitioners are used to embrace all people working for or with the drug court who might use participant-related information, including, among others, judges, prosecutors, defense attorneys, probation officers, child protection workers, treatment providers and coordinators.

As will be explained below, disclosure of certain information relating to participants is restricted. The information subject to such limitations is referred to as covered information.

B. Confidentiality Laws, Evidentiary Privileges and Ethical Duties

The law restricts disclosures of information in several ways. This document will focus primarily on confidentiality laws, which are statutes and regulations that prohibit specified disclosures (usually subject to specified exceptions). Improper disclosures of information covered by confidentiality laws can lead to criminal prosecutions and civil lawsuits.

Unlike confidentiality laws, evidentiary privileges generally do not constrain those who choose to disclose information. Instead, privileges protect against compelled disclosure. For example, lawyers who are called as witnesses can refuse to testify about communications they have had with their clients. Even when a lawyer appearing as a witness is willing to disclose such communications, the client may assert the privilege to prevent counsel from doing so. Outside of the courtroom, the privilege could be asserted to avoid compelled disclosures (e.g., to quash a subpoena for client records) but not to prevent voluntary disclosures.

In state courts, evidentiary privileges are creatures of state law (often codified in state rules of evidence). Privileges vary greatly from state to state. Of particular relevance in drug court practice is the diversity of medical/therapy privileges. Some states recognize a doctor-patient privilege, while others recognize psychotherapist-patient privileges. Either of these privileges would apply to confidences between patients and their psychiatrists; the doctor-patient privilege would also protect communications by a patient to an internist (but not by a client to a psychologist), while the psychotherapist-patient privilege would protect communications by a client to a psychologist (but not by a patient to an internist). A few states have created privileges relating specifically to drug treatment. In North Dakota, for example, communications between addiction counselors and their clients are privileged.

Like confidentiality laws, ethical duties prohibit the disclosure of information. Ethical duties, which are ordinarily embodied in professional canons,4 apply to communications between professionals and those they serve. A dramatic example of an ethical duty of confidentiality appears in the Alfred Hitchcock film, I Confess, in which a

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killer confesses to a priest. The priest is subsequently accused of committing this crime, and he stands trial for murder rather than implicate the man who had confessed to him. Professionals who violate ethical duties of confidentiality can be disciplined (including losing their licenses). In addition, disclosures of information covered by an ethical duty and/or a privilege may lead to civil liability.

Confidentiality laws, evidentiary privileges and ethical duties sometimes overlap. For example, a psychiatrist asked to testify about a patient that he or she has been treating for substance abuse should consider whether confidentiality laws and ethical duties allow him or her to comply with this request and whether any evidentiary privileges would allow him or her to refuse to comply.

C. Federal Confidentiality Laws

Among federal laws regulating the disclosure of information, the most significant for drug courts is Section 290dd-2 of Title 42 of the United States Code. Under Section 290dd-2, covered information acquired by affected programs is confidential, subject to exceptions set forth in the statute and accompanying regulations. Section 290dd-2 is the focus of this document and will be discussed in greater detail below.

D. State Confidentiality Laws

- Pertinent Regulation: 42 C.F.R. § 2.20

Most states have enacted their own confidentiality laws to control the disclosure of information relating to drug treatment. In some states, these laws expressly incorporate federal provisions and go no further. In such a state, a drug court can comply with state law merely by following federal law.

Other states have confidentiality provisions that do not rely on federal law. In those states, treatment program personnel must comply with federal restrictions and all compatible state laws. Thus, program personnel may not disclose any information that is protected by either federal or state law. Furthermore, if state laws mandate certain disclosures, the program must comply if the disclosures are not prohibited by federal law. If, however, the required disclosure is forbidden by federal law, the federal provision prevails. Every drug court team should investigate the laws of its state to determine whether they impose any burdens or restrictions beyond what federal law requires.

E. Contractual Requirements

Many drug courts receive financial assistance from private organizations. Sometimes, such grants come with "strings attached," possibly including limits on the disclosure of information obtained by the recipient program. Conversely, the donor may require reporting about how the funds are used. In the unlikely event that a donor demands disclosure of covered information, the drug court must nevertheless comply with state and federal laws. It is a good practice to inform potential donors of the constraints imposed by confidentiality laws.

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IV. Introduction to Section 290dd-2

The sections that follow describe the scope of Section 290dd-2 and the associated regulations (Title 42, Part 2 of the Code of Federal Regulations). In some cases, it might not be clear whether Section 290dd-2 applies to a particular disclosure. The best practice in those situations is to presume that Section 290dd-2 does apply.

A. Programs Covered by Section 290dd-2

(Pertinent Regulations: 42 C.F.R. §§ 2.11, 2.12

In general, Section 290dd-2 and the accompanying regulations apply to all drug rehabilitation programs that are assisted or regulated by the federal government. This includes most, and possibly all, drug courts, as will be explained below. Moreover, even drug courts that are not directly covered by Section 290dd-2 will likely confront Section 290dd-2 issues arising from the affiliations between the court and programs that are subject to this federal statute.

By its terms, Section 290dd-2 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." This definition has two components: (1) that the program involve substance abuse treatment or prevention, and (2) that it be regulated or assisted by the federal government.

The first component of this definition is broader than many drug court practitioners realize. Under the regulations, Section 290dd-2 applies to any drug court that "holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment" (emphasis added). Thus, a drug court is covered by Section 290dd-2 if it has employees who conduct screening or assessments to diagnose participants as substance abusers. Also, if employees of the court refer participants to drug treatment, or if the drug court judge issues a mandate requiring drug treatment, then the court is a program covered by Section 290dd-2. Therefore, any drug court that is involved in these aspects of the drug court process must comply with Section 290dd-2. This requirement applies to all participant-related information, not just information concerning diagnosis and referral. (As will be discussed below, even if a drug court is not directly covered by Section 290dd-2, it must comply with that statute with respect to information received from programs that are subject to Section 290dd-2.)

The second requirement for application of Section 290dd-2 - federal regulation or assistance - is at least as broad as the first. Under the regulations implementing Section 290dd-2, federal assistance includes both direct and indirect funding. It is not necessary for the drug court itself to receive grants from the U.S. Department of Justice or another federal agency. It is sufficient for the state or local government that funds the court to receive federal support for any program. It is therefore likely that all drug courts are "federally assisted" as that term is used in Section 290dd-2 and the accompanying regulations.

B. Information within the Scope of Section 290dd-2

(Pertinent Regulations: 42 C.F.R. §§ 2.11, 2.12

Section 290dd-2 applies to all records relating to "the identity, diagnosis, prognosis, or treatment of any patient" in a substance abuse program. The regulations broaden this slightly by embracing information that is not recorded. The regulations also clarify that these provisions only apply to information that could identify the patient as a drug

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abuser. Thus, Section 290dd-2 applies to information that (1) makes it possible to identify a participant and (2) reveals that the participant is receiving, has received or has applied to receive substance abuse treatment services.

To illustrate, Section 290dd-2 does not apply to discussions of "a patient," so long as no information tending to identify the patient is disclosed. It is not permissible, however, to use participants' names or to reveal enough information about participants to allow listeners to learn their identities, with or without the aid of other sources. For instance, it would be unlawful to refer to a participant as "the daughter of a senator from State X," because listeners could use publicly available information about the families of X's senators to learn the participant's name. This would be true even if both senators had several daughters; the description would come so close to specifying a particular individual that it would be within (or at least on the border of) forbidden territory.

It would also be illegal to identify somebody as a participant. In other words, when a participant's name comes up in conversation, it is unlawful to say, "She was a participant in my drug court."

C. Disclosures Subject to Section 290dd-2

(Pertinent Regulations: 42 C.F.R. §§ 2.11, 2.12, 2.32

Section 290dd-2 and the accompanying regulations apply to all disclosures of information by drug treatment programs (as defined above), subject to specified exemptions and exceptions (which are discussed below). Section 290dd-2 continues to apply after a participant has been identified as a patient in a treatment program. For example, if Adam gives covered information about participant Jack to Ann, further disclosures to Ann about Jack are regulated by Section 290dd-2, just as if the initial disclosure had never occurred.

Furthermore, disclosures by Ann to another person would be regulated. These would be <u>redisclosures</u> and would be subject to the same restrictions as Adam's communications with Ann. In other words, the fact that covered information has already been disclosed, lawfully or otherwise, does not authorize further disclosure, by either the provider or the recipient of information. This means that even a drug court that is not subject to Section 290dd-2 must comply with that statute whenever it receives covered information from a program that is subject to Section 290dd-2.

D. Penalties for Non-Compliance with Section 290dd-2

(Pertinent Regulation: 42 C.F.R. § 2.4

A violation of Section 290dd-2 or the accompanying regulations is a crime, for which the violator can be fined up to $500 for a first offense and up to $5,000 for subsequent offenses. Also, the program where the violation occurred can lose its federal funding, and both the program and violator can lose their licenses under state law.

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V. Consensual Disclosures

A. Effect of Consent

❨ Pertinent Regulation: 42 C.F.R. § 2.32

Valid consent from a participant allows the use of information in a manner that would otherwise violate Section 290dd-2. The regulations implementing Section 290dd-2 require that consent forms describe, in writing, the limits of the disclosures being authorized. Any disclosure beyond those limits is unlawful to the same degree as if no consent had ever been given.

Two limitations on consent must be noted. First, consent to disclosure does not authorize redisclosure, unless specifically provided. Thus, for example, a participant's consent to disclosure by a therapist to a probation officer does not thereby permit disclosure by the probation officer to any other person. Indeed, both the consent form and all written disclosures made pursuant to the participant's consent must include a notice that redisclosure is unlawful.

The second limitation is that Section 290dd-2 consent only waives the requirements of Section 290dd-2. Other restrictions on disclosure, such as ethical duties of confidentiality, would still apply, unless expressly waived by the participant.

B. Requirements under Federal Law

❨ Pertinent Regulations: 42 C.F.R. §§ 2.14, 2.15, 2.31, 2.35

To be valid, consent must be in writing. It also must contain nine elements, which are described below and quoted in a footnote.5 Two sample consent forms, one from the federal regulations and another that has been used in a drug court, are attached as appendices C and D, respectively.

As noted in the preceding section, the consent form must describe the type of information to be disclosed. The consent form also must specify the purpose of the disclosures, who is authorized to make them and who is authorized to receive them.

The consent form must identify the participant and contain his or her signature and the date of the signing. If the participant is a minor, the signature of a parent or guardian may also be necessary, depending on state law. If the participant is determined to be incompetent, the consent form may be signed by an authorized person, as defined in another regulation.

The consent form also must state when the consent will expire. This can be a specific date, or expiration can depend on the occurrence of some event or condition. For instance, the consent could stipulate that it will be effective until the participant completes the drug court program or is terminated from the program.

Finally, the consent form must mention the participant's right to revoke consent, where such a right exists. As discussed below in Subsection E, individuals referred to drug treatment programs by the criminal justice system do not have a right to revoke their Section 290dd-2 waivers, but participants in juvenile and family drug courts may do so. Thus, in juvenile and family drug courts, the right of revocation must be acknowledged in the waiver.

C. Best Practices

❨ Pertinent Regulation: 42 C.F.R. § 2.22

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If consent is not knowing and voluntary, it will be deemed invalid, even if it contains the nine elements required by the regulations. This does not mean that a waiver will be deemed invalid simply because the participant's other options were unappealing. Thus, for example, a participant's consent to disclosure is not inherently invalid simply because this consent was a condition of drug court participation and the participant faced a substantial prison sentence if he or she did not enroll in the drug court. The practices described below are recommended in order to ensure that consents are voluntary and will withstand legal scrutiny after the participant signs them.

First, the participant should have an opportunity to consult with a lawyer before signing the form. The lawyer should not necessarily present the form to the participant, as this may give the impression that the lawyer is trying to obtain the participant's consent rather than assisting the participant in deciding whether to consent.

Second, whomever presents the form should review it with the participant, with particular attention to the possibility that the participant is illiterate or cannot read or comprehend the language in which the waiver is printed. If the participant cannot understand or read English, the person reviewing the form should be bilingual or be assisted by a translator.

Third, regulations require that the participant be advised, orally and in writing, that federal law protects the confidentiality of treatment records. The notice must cite Section 290dd-2 and the implementing regulations (Sections 2.1 through 2.67 of Title 42 of the Code of Federal Regulations) and state that

a) treatment information is ordinarily kept confidential;

b) it is a crime to violate this confidentiality requirement, which the participant may report to appropriate authorities;

c) notwithstanding this confidentiality requirement, covered information may be released under specified circumstances (which should be listed for the participant); and

d) federal law does not protect information relating to crimes committed on the premises of the program, crimes against program personnel or the abuse or neglect of a child.

The regulations provide a sample notification form, a copy of which is included as appendix E.

Third, the participant should be asked to re-execute the consent at least once, if not regularly, during the course of participation in the drug court. The purpose of re-executing the first time is to allow participants to re-affirm their consent after acquiring more information about what drug court participation entails. Also, there is a strong possibility that the original consent form will be presented while a participant is under the influence of drugs or going through withdrawal; the initial re-execution ensures that the consent is a product of sober consideration. To satisfy these goals, the re-execution should occur as soon as the court is satisfied that the participant is not suffering from any effects of substance abuse.

Routine re-execution afterwards is not legally mandated. (By contrast, re-execution is required when a new person joins the drug court team.) Nevertheless, drug court personnel may choose to have participants re-affirm their consent at appropriate intervals. This will help the court to refute charges that the initial waiver was not the product of informed decision-making.

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D. Consent by Minors

(Pertinent Regulation: 42 C.F.R. § 2.14

Consent by participants who are under 18 years old, even in adult drug court, raises special concerns for two reasons. First, some states require the consent of a parent or guardian for a minor to enter a treatment program. Even in those states, the fact that a child has sought treatment is confidential under federal law. This means that drug court practitioners may not approach the child's parents to ask them to approve the child's request for admission unless the child (1) authorizes disclosure of that request or (2) lacks the ability to make the choice. Once the parent has consented and the child has been admitted, further disclosures require the consent of both the child and the parent.

The second issue that can arise in the context of minors is the possibility that the child, because of extreme youth or other condition, cannot make rational decisions. This issue is unlikely to appear in drug court practice.

E. Revocation

(Pertinent Regulations: 42 C.F.R. §§ 2.31, 2.35

In criminal drug courts, the participant does not have the right to revoke a consent to disclosure. Waivers in the criminal context are not permanent. However; they must expire at some specified point (either a particular date or, more commonly, the occurrence of some event, such as successfully completing the program or being sentenced for another offense). Participants in criminal drug courts must be informed that their consents are irrevocable but not permanent.

In family and juvenile drug courts, consent is revocable at the will of the participant. When participants execute their consent forms, they should be advised that their participation in the drug court is contingent upon their consent to certain disclosures. Thus, revocation of consent will result in termination from the drug court program and loss of the benefits promised for drug court participation.

VI. Disclosures without Consent

There are situations in which disclosures are authorized or mandated even if the participant does not consent. Two practices should be observed in all of the situations described below. First, lawyers on the drug court team should confer before covered information is revealed, to determine what, if anything, may be, or must be, disclosed. Second, when participants enter the program, they should be advised that information might be disclosed without their consent in certain limited circumstances. (Section V of this document, which addresses the process of obtaining consent from participants, discusses this type of advice in more detail.)

A. Permitted Disclosures

(Pertinent Regulations: 42 C.F.R. §§ 2.11, 2.12, 2.21, 2.34, 2.52, 2.53

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In some situations, members of a drug court team may, but are not required to, disclose information without the consent of the participant. In general, the best practice is to obtain the participant's consent before divulging any information. This is not always possible or advisable, however. For instance, in a medical emergency, the participant's well-being may depend on the disclosure of treatment-related information to medical personnel. Section 290dd-2(b)(2)(A) specifically authorizes such disclosures.

The regulations also allow disclosure of information relating to crimes on the program premises or against program staff. Under this provision, only the details of the incident and the participant's name and whereabouts may be revealed.

In addition, the regulations permit disclosures to entities having direct administrative control over the program and to qualified service organizations working with the program. An example of the former would be the central administration of a hospital with a substance abuse treatment ward. Qualified service organizations are outside contractors providing services to the program, such as bill collection agencies or law firms. Disclosures to such organizations are permitted only if the organization has entered into a written agreement acknowledging its obligations under Section 290dd-2. A sample agreement is attached as appendix F.

There are also provisions allowing disclosure to outside auditors, central registries and researchers. Subject to strict limits, auditors, including investigators from federal agencies that assist the program, may be allowed to review information that identifies participants in order to evaluate the program. As for central registries, these may be established by groups of programs to prevent patients from enrolling in multiple clinics. Disclosures to and by central registries are limited to information necessary to avoid multiple enrollments. Finally, Section 290dd-2(b)(2)(B) allows researchers to collect information that does not identify patients. While the statute merely authorizes programs to furnish data to researchers, some state laws appear to require such cooperation.

Auditors, qualified service organizations and entities with administrative control over programs must protect any covered information they obtain. Before removing such information from the program's premises, they must submit written plans outlining their procedures for ensuring confidentiality.

B. Mandatory Disclosures

(Pertinent Regulations: 42 C.F.R. §§ 2.12, 2.15, 2.61, 2.62, 2.63, 2.64, 2.65, 2.66

Neither Section 290dd-2 nor the accompanying regulations compels treatment providers to disclose information under any circumstances, but they do permit compliance with other disclosure mandates. Four such obligations are delineated below.

First, some states have laws requiring people in certain professions to report suspected abuse or neglect of a child, and Section 290dd-2(e) specifically authorizes compliance with these reporting requirements. Therefore, depending on the laws in the state where a drug court operates, some drug court practitioners might be required to notify appropriate authorities if a participant brings his or her child to a court proceeding and the practitioner observes signs of abuse, such as bruises. Another example of this would be where a participant reveals that he or she is abusing drugs or alcohol at times when he or she is responsible for the care of his or her child. This results in the child being neglected. In these circumstances, practitioners subject to the duty of disclosure are not permitted to reveal all of the information that they possess about the participant. Instead, they must provide the authorities with information necessary to begin an investigation, to the extent specified in the applicable state statute.

Second, disclosure is required when a drug court or a member of the drug court team receives a valid court order to produce covered information. For instance, if a drug court participant is involved in a car accident that results in a lawsuit, the opposing party might seek records of the participant's substance abuse treatment as evidence that the accident was drug-related. In such a situation, it is not sufficient for the party seeking the records to deliver a subpoena, with or without a judge's signature. Instead, the party must obtain an order with two

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components, generally contained in separate documents: (1) a finding by the issuing court that good cause exists for requiring disclosure, and (2) a subpoena or other order demanding certain information. Before making a good cause finding, the issuing court must conduct a hearing, to which the holder of the information must be invited. An order that is deficient in any respect is not valid, and the recipient of the order may not comply with it. If a drug court team member receives an invalid order, it is advisable to send an attorney to the issuing court to explain why compliance with the order is prohibited and to move to set the order aside.

Third, under the regulations implementing Section 290dd-2, drug court team members must comply with state laws concerning the collection of information relating to causes of death. This may involve revealing that the participant was being treated for substance abuse.

Fourth, some drug court practitioners may be subject to a duty to protect third parties. In some states, psychotherapists who believe that their patients may endanger others have a duty to protect the potential victims, possibly by warning them of the danger. The leading case establishing a duty to protect is Tarasoff v. Regents of the University of California.6 The litigation in Tarasoff was precipitated when a psychiatric patient expressed his intention to murder a woman and then carried out his intention. The Supreme Court of California held that the woman's family could sue the psychiatrist and his employer, the University of California, for failing to take adequate measures to protect the victim. Section 290dd-2 does not specifically authorize these warnings. Nevertheless, it is permissible to warn possible victims if the warning does not identify the potential perpetrator as a drug treatment patient (for instance, if the warning is anonymous). Whatever course is followed, consultation with counsel is particularly important in this area because of the potential conflict between Section 290dd-2 and the duty to protect.

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VII. Operations

A. Sharing Information Generally

❨ Pertinent Regulation: 42 C.F.R. § 2.12

A successful drug court requires communication among members of the team. For instance, if the treatment center conducts a urinalysis and the results are positive, these results must be reported to the court, in order for the court to consider imposing a sanction. The prosecutor and defense attorney should also be notified, since both parties must have access to all information on which the judge relies to make decisions. Then, if the sanction includes time in jail, the participant's probation officer and treatment provider should be informed, so that they will understand if the participant misses any scheduled appointments.

The simple way to ensure that such communications do not violate Section 290dd-2 is to obtain valid consent from the participant. If the consent form is properly drafted and sufficiently inclusive, federal confidentiality laws will not obstruct the sharing of information among drug court members.

It is worth mentioning that there is a provision that might permit communications of the sort described above even without consent. One of the regulations implementing Section 290dd-2 authorizes internal communications among program personnel, so long as the employees receiving the information need it to perform their duties. It is not clear that this exemption is broad enough to embrace all of the disclosures that are essential to a drug court's operation. Thus, valid consent is the best way to ensure that the components of a drug court can comply with Section 290dd-2 while fulfilling their responsibilities.

B. Memoranda of Understanding

Neither Section 290dd-2 nor the accompanying regulations refer to memoranda of understanding, so such memoranda cannot be used to authorize otherwise unlawful disclosures. Nevertheless, it is valuable for the various parties involved in a drug court to be united by a memorandum of understanding ("MOU").

MOUs serve two purposes. First, they foster trust and cooperation by ensuring that each component of the drug court is aware of how the other components will access, share and use information. Second, when participants sign the consent to disclosure, the MOU can be used to explain how information will be distributed within the drug court. If a MOU is used in this fashion, it should be emphasized that the MOU is merely a blueprint that can be altered without the participants' consent. Accordingly, the scope of their consent will be dictated by the terms of the consent itself, regardless of the terms of the MOU.

Ordinarily, MOUs will not be limited to confidentiality concerns and will cover a variety of issues relevant to drug court operations (such as scheduling matters). With respect to confidentiality, a MOU should contain five elements. First, it should note that discussions at team meetings are confidential, not only because of legal concerns but also to promote trust and fairness. In drug courts where outsiders are permitted to attend team meetings, the MOU should require that they sign agreements promising to abide by the confidentiality provisions of the law and the MOU. (Even with such an agreement, the outsider's presence is not lawful under Section 290dd-2, unless it is within the scope of the drug court participant's consent.) Similarly, the MOU should provide that, when staff meetings are videotaped to be used for training purposes, the tape will be edited to eliminate any names or other participant-identifying information.

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Second, the MOU should note that all parties are bound by the redisclosure provisions of Section 290dd-2 (which are congruent with the provisions governing initial disclosures). Consequently, any member of the team who receives covered information may only distribute that information in accordance with Section 290dd-2.

Third, a MOU should incorporate an agreement that the prosecutor's office will not use information obtained in the drug court to prosecute the participant, with two exceptions - child neglect or abuse and crimes committed at the treatment center or against treatment personnel. It is, of course, quite common for the prosecutor to learn of offenses by participants, particularly drug possession offenses. For example, in some states, having drugs in one's body amounts to possession. Thus, a positive urinalysis would be proof of a violation of laws against possessing drugs. A participant who commits crimes may lose eligibility for the drug court program (among other possible consequences) but should not be prosecuted for those crimes based on information that the state acquired through the drug court.

Fourth, the MOU should describe the parameters for sharing and refusing to share information. The MOU should encourage the free flow of information within the drug court team to promote the drug court's mission. On the other hand, the MOU should acknowledge that members of the drug court team may be subject to legal and ethical restrictions on disclosure, which in some situations must be observed notwithstanding either the participant's Section 290dd-2 waiver or the likelihood that disclosure would benefit the court and the participant. Assume, for instance, that participant Lee tells defense counsel James that she has used drugs recently. That information would be covered by both Section 290dd-2 and James's ethical duty of confidentiality as an attorney. Whether and to whom James can disclose that information will depend on the scope of Lee's consent and the applicability of various exceptions to these confidentiality requirements. The MOU should, at the very least, acknowledge that such situations might occur and that it is not improper for members of the team to withhold information when they are required to do so. It would be helpful to map out possible approaches to be used when foreseeable conflicts arise.

Fifth, the MOU should include rules governing storage of, and access to, written and automated records. Such written policies are required by federal law.

C. File Storage and Information Systems

(Pertinent Regulation: 42 C.F.R. § 2.16

The regulations implementing Section 290dd-2 require that written records be stored in a secure room or locked container. In addition, the program must have written procedures controlling access to, and use of, such records. Such procedures should be included in every drug court's MOU.

Furthermore, although court records ordinarily are available to the public, drug court records should not be. Drug court files should be kept separate from other court records. They should have labels indicating that they are confidential and may only be viewed by members of the drug court team. The staff at the courthouse should be educated about these procedures and the rationale behind them.

The regulations implementing Section 290dd-2 do not address computerized records, because they were promulgated before computerized record-keeping and networked computers became popular. Nevertheless, procedures involving computers should conform to the spirit of the regulations through the use of safeguards built into procedures, software and hardware. With hard drives, diskettes and similar storage vessels, this could be fairly simple. Records covered by Section 290dd-2 should be password-protected, and the password should be guarded in the same manner as the key to a file cabinet. The MOU should include rules relating to these procedures, just as it contains rules relating to the storage of paper records.

Networked computers can be managed in a similar fashion. One danger that may be more significant on a network than on a single computer is the alteration of data. For such concerns, the court should consult computer

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specialists. In this regard, it is significant that the regulations accompanying Section 290dd-2 expressly permit disclosures to qualified service organizations to the extent necessary to obtain services (although it might be possible to obtain assistance from computer consultants without disclosing confidential information).

Finally, all storage systems should include procedures for limiting access to records after the participant's consent expires or is revoked. Thus, paper records that can be accessed by all drug court personnel during the duration of the participant's consent should be transferred to a more restricted storage facility as soon as the consent is terminated. Records on computers can be sealed by changing the password or other access authorization, either manually or with programs designed to perform that function at the appropriate time.

VIII. Conclusion

It is important to recognize that any grey area between federal confidentiality laws and drug court procedures can be resolved easily. This monograph is merely a vehicle to make drug court practitioners aware of these federal mandates and provide guidance on how to accommodate confidentiality requirements in drug courts.

1 See, e.g., Whyte v. Connecticut Mutual, 818 F.2d 1005, 1009 (1st Cir. 1987) (discussing the purpose of the primary federal confidentiality statute, 42 U.S.C. § 290dd-2); Produced by the National Association of Drug Court Professionals, Printed by the Office of Justice Programs, U.S. Department of Justice, Defining Drug Courts: The Key Components 7 (1997) (discussing the purpose of drug courts).

2 The National Drug Court Institute (NDCI) is in the process of developing a comprehensive treatise on confidentiality and ethical issues confronting all practitioners in drug court. This monograph is an overview of the confidentiality section of that treatise and primarily is aimed at judges and attorneys working in drug courts. NDCI plans to publish the comprehensive treatise in the fall of 2000, which will provide information to all disciplines.

3 Another way to avoid conflicts is to change the laws in order to accommodate the unique situations that confront drug court practitioners. In the future, the National Association of Drug Court Professionals (NADCP) intends to advocate for such changes in federal regulations.

4 Ethical duties and professional codes of conduct will be explored in NDCI's comprehensive treatise mentioned in footnote 2.

5 Title 42, Section 2.31(a) of the Code of Federal Regulations lists nine elements that must be included in a written consent:

(1) The specific name or general designation of the program or person permitted to make the disclosure.
(2) The name or title of the individual or the name of the organization to which disclosure is to be made.
(3) The name of the patient.
(4) The purpose of the disclosure.
(5) How much and what kind of information is to be disclosed.
(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.
(7) The date on which the consent is signed.
(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.
(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

The eighth element, concerning the revocation of consent, should not be included in consent forms in criminal drug courts, but it must be included in juvenile and family drug court waivers. See 42 C.F.R. § 2.35.

6 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

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APPENDIX A

Special Issues Arising in Family and Juvenile Drug Courts

Special Issues Arising in Family and Juvenile Drug Courts

1. Possible conflicts between treating parents and the best interests of their children

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2. Revocation of waivers
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3. Special considerations for waivers by minors
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4. Permissive disclosures relating to patients referred from the criminal justice system

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APPENDIX B

Table of Contents of the Federal Regulations Implementing Section 290dd-2

Table of Contents of the Federal Regulations Implementing Section 290dd-2

42 C.F.R. Section

2.1. Statutory authority for confidentiality of drug abuse patient records.
2.2. Statutory authority for confidentiality of alcohol abuse patient records.
2.3. Purpose and effect.
2.4. Criminal penalty for violation.
2.5. Reports of violations.
2.11. Definitions.
2.12. Applicability.
2.13. Confidentiality restrictions.
2.14. Minor patients.
2.15. Incompetent and deceased patients.
2.16. Security for written records.
2.17. Undercover agents and informants.
2.18. Restrictions on the use of identification cards.
2.19. Disposition of records by discontinued programs.
2.20. Relationship to state laws.
2.21. Relationship to federal statutes protecting research subjects against compulsory disclosure of their identity.
2.22. Notice to patients of federal confidentiality requirements.
2.23. Patient access and restrictions on use.
2.31. Form of written consent.
2.32. Prohibition on redisclosure.
2.33. Disclosures permitted with written consent.
2.34. Disclosures to prevent multiple enrollments in detoxification and maintenance treatment programs.
2.35. Disclosures to elements of the criminal justice system which have referred patients.
2.51. Medical emergencies.
2.52. Research activities.
2.53. Audit and evaluation activities.

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2.61. Legal effect of order.

2.62. Order not applicable to records disclosed without consent to researchers, auditors and evaluators.

2.63. Confidential communications.

2.64. Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

2.65. Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

2.66. Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a program or the person holding the records.

2.67. Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of a program.

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APPENDIX C

Sample Waiver Form from 42 C.F.R. § 2.31 (b)

Sample Waiver Form from 42 C.F.R. § 2.31(b)

1. I, _____, Request/Authorize:
(name of patient)

2. _____
(name or general designation of program which is to make the disclosure)

3. To disclose: _____
(kind and amount of information to be disclosed)

4. To: _____
(name or title of the person or organization to which disclosure is to be made)

5. For _____
(purpose of the disclosure)

6. Date _____
(on which this consent is signed)

7. Signature of participant _____

8. Signature of parent or guardian (where required)

_____

9. Signature of person authorized to sign in lieu of the patient (where required)

_____

10. This consent is subject to revocation at any time except to the extent that the program, which is to make the disclosure, has already taken action in reliance on it. If not previously revoked, this consent will terminate upon: (specific date, event, or condition)

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APPENDIX D

Sample Waiver Form for a Drug Court

Sample Waiver Form for a Drug Court*

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

I, _____, hereby consent to communication between
(name of defendant)

_____, and Judge _____,
(name of treatment program) (name of presiding judge, drug court judge)

_____
(prosecuting attorney, assistant prosecuting attorney, public defender, assistant public defender or defense counsel)

the probation department of _____ and _____.
(name of jurisdiction) (name(s) of other referring agency)

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

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

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

of the drug court requirements OR upon sentencing for violating the terms of my drug court involvement _____.
(and/or, where relevant, probation)

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

_____ _____

Date Name

_____

Signature

_____

Signature of Defense Counsel

_____ _____

Signature of Interpreter (where applicable) Signature of parent or guardian (where applicable)

*Adapted from a sample provided by S. Rebecca Holland, Legal Director, The Osborne Association, Brooklyn, NY

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APPENDIX E

Sample Notification Form from 42 C.F.R.§ 2.22(d)

Sample Notification Form from 42 C.F.R. § 2.22(d)

CONFIDENTIALITY OF ALCOHOL AND DRUG ABUSE PATIENT RECORDS

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by federal law and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser Unless:

(1) The patient consents in writing;

(2) The disclosure is allowed by a court order; or

(3) The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation.

Violation of the federal law and regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with federal regulations.

Federal law and regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.

Federal laws and regulations do not protect any information about suspected child abuse or neglect from being reported under state law to appropriate state or local authorities.

(See 42 U.S.C. § 290dd-3 and 42 U.S.C. § 290ee-3 for federal laws and 42 C.F.R. Part 2 for federal regulations.)

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APPENDIX F

Sample Qualified Service Organization Agreement

Sample Qualified Service Organization Agreement*

Qualified Service Organization Agreement (QSOA)

_____ and_____ hereby enter into
Name of QSO name of treatment program

a Qualified Service Organization Agreement (QSOA), whereby _____
name of QSO
agrees to provide _____ for _____.
describe services name of treatment program

_____ also agrees:
Name of QSO

1. that in receiving, storing, processing and otherwise dealing with any information obtained about a participant of _____, it
name of treatment program

and all of its agents and assignees are fully bound by the provisions of the federal laws and regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records (42 United States Code Section 290dd-2, and 42 Code of Federal Regulations Part 2); and

2. that it will resist, in judicial proceedings if necessary, any efforts to obtain access to information pertaining to any _____
name of treatment program

participant otherwise than as expressly provided for in the federal confidentiality regulations (42 C.F.R. Part 2).

_____ _____
Signature of QSO officer Signature of treatment program officer

_____ _____
Printed name of above Printed name of above

_____ _____

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Title of above officer	Title of above officer
_____	_____
Address of QSO	Address of treatment program
_____	_____
Date	Date

*Sample provided by S. Rebecca Holland, Legal Director, The Osborne Association, Brooklyn, NY

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