



*Christian & Barton's  
Jonathan M. Joseph and Liz S. Olcott  
present*

***42 CFR Part 2 Confidentiality  
in SUD Programs:  
What You Don't Know Can  
Hurt Your Patients***

## *When does 42 CFR Part 2 apply?*

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- Applies to information obtained by:
  - Part 2 program
    - Must be federally assisted and providing substance use disorder diagnosis, treatment or referral for treatment
- Applies to information relating to:
  - Identification of a patient having or having had a substance use disorder; and
  - Obtained for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.
    - Not applicable just because you have a dual diagnosis patient in your program

## *Pressure for changes to 42 CFR Part 2*

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- SAMHSA under pressure because . . .
  - Electronic health records
  - Managed care issues
  - HIPAA
  - Changing reimbursement mechanisms
- Final Rule effective August 14, 2020

## *August 2020 revisions—what stays the same*

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- Part 2 protection of SUD patient records remains
- Patients can directly obtain their records and redisclose them at will
- Treatment record disclosure restricted without patient consent
- Disclosure to law enforcement only with appropriate court order

## *August 2020 revisions—the changes*

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- Patients may consent to record disclosure without naming a specific recipient for disclosure
- Activities that constitute “payment and health care operations” disclosure clearly specified

## *August 2020 revisions—the changes*

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- Programs permitted to enroll in state prescription drug monitoring programs and report data into program when prescribing or dispensing Schedule II-V medications

## *August 2020 revisions—the changes*

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- Refines definition of bona fide medical emergency for SUD record disclosure without consent
- Aligns Part 2, HIPAA and Common Rule for record sharing for research purposes
- Clarifies disclosure for audit and evaluation purposes

## *August 2020 revisions—the changes*

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- Employees' personal devices do not need to be confiscated or destroyed to sanitize for records compliance
- Extends time period courts are authorized to place undercover informants in Part 2 program investigations



## *Forthcoming revisions in 2021*

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- Keep an eye out for additional regulations based on the CARES Act
  - Not in effect until at least March 2021
  - Changes addressed today are not based on the CARES Act

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# Practical Application of the Regulations – Old & New



## *Business Associate Agreements*

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- Need to check your BAA forms and vendor contracts to make sure they include Part 2 requirements where needed
  - 42 CFR 2.33(c)

## *Notice of Privacy Practices*

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- Need to check your Notice of Privacy Practices forms as well
  - Will be an updated model notice issued within one year of enactment of CARES Act
  - Current changes may be needed around changes in disclosures with written consent, etc.

- Many similarities to HIPAA Authorization Forms, but important differences
  - 42 CFR Part 2 information also protected by HIPAA
  - Must include “an explicit description of the substance use disorder information that may be disclosed.”
    - 42 CFR § 2.31



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You receive a request from law enforcement or even a subpoena.

Must respond? No!

## *Court Order Required*

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- You must insist on a proper court order
  - Subpoena + Proper Court Order = Disclosure
    - Cannot disclose confidential communications/records protected by 42 CFR Part 2 without both or patient's written consent
      - 42 CFR § 2.61



How should I respond when the local civil court directs my CSB to communicate a client's treatment participation outcome to probation officers, DSS or guardian ad litem without a client's consent?





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An MCO calls about a client who is no longer receiving services.

Do you release information?

Do you have a valid release as releases end with discharge?



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An MCO calls because they cannot locate a client to engage for services. But the client is no longer receiving services at your CSB.

Do you release information?

***You can't even acknowledge  
that the patient is (or was) a patient!!  
(without an authorization)***

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*“Any answer to a request for a disclosure of patient records which is not permissible under the regulations in this part must be made in a way that will not affirmatively reveal that an identified individual has been, or is being, diagnosed or treated for a substance use disorder.*”

An inquiring party may be provided a copy of the regulations in this part and advised that they restrict the disclosure of substance use disorder patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient.”



Is there an ethical and legal obligation conflict between Part 2 and duty-to-warn guidelines?

## ***What about other laws?***

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*However, no state law may either authorize or compel any disclosure prohibited by the regulations in this part.*

Practically, consider whether a report can be made without revealing SUD.

***Important exception:  
mandatory reporting of abuse and neglect***

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“The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.”

42 CFR § 2.12



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I don't have a ROI from a client with a SUD diagnosis. The MCO wants information as they "are paying for the service."

What info can be provided?



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Can you speak to the intersection of changes to part 2 and proposed Virginia legislation related to opioid treatment programs reporting to the state's PDMP?



## § 2.36 *Disclosures to prescription drug monitoring programs*

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A part 2 program or other lawful holder is permitted to report any SUD medication prescribed or dispensed by the part 2 program to the applicable state prescription drug monitoring program if required by applicable state law. A part 2 program or other lawful holder must obtain patient consent to a disclosure of records to a prescription drug monitoring program under §2.31 prior to reporting of such information.

**Any further questions?**



CHRISTIAN & BARTON, LLP  
ATTORNEYS AT LAW

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*This is provided as an informational service and does not constitute legal counsel or advice, which can only be rendered in the context of specific factual situations.*

*If a legal issue should arise, please retain the assistance of competent legal counsel.*

**Thank You**

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**Jonathan M. Joseph**

804.697.4125

[jjoseph@cblaw.com](mailto:jjoseph@cblaw.com)



**Liz S. Olcott**

804.697.4136

[lolcott@cblaw.com](mailto:lolcott@cblaw.com)