

CONFIDENTIALITY EXPLAINED

THESE LAWS APPLY TO: Anyone **receiving services** for **mental illness**, a **developmental disability** or **substance abuse** in the State of Wisconsin.

[**NOTE:** This document **does not** take into account any differences between Wisconsin law and the Health Insurance Portability and Accountability Act of 1996 (**HIPAA**) in 45 Code of Federal Regulations, parts 160 and 164. You are advised to discuss any Confidentiality issues with the HIPAA Privacy Officer serving your facility or agency.]

[**Note:** These are not necessarily direct quotes from the statutes. It is put into a format that is intended to be more “user friendly”. Please refer to the actual law for verbatim wording.]

WHAT RECORDS ARE CONFIDENTIAL? Individual’s “**registration records**” and “**treatment records**” are confidential--including written, computer, electronic and microform records. They include **all** records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism or drug dependence. Treatment records do not include staff’s notes or records maintained for their personal use that will not be shared with others. [See § 51.30(1)(am) and § 51.30(1)(b), Wis. Stats., and DHS 92.02(16), Wis. Admin. Code].

THE CONFIDENTIALITY RULE

This is the statute that sets out the basic rule that treatment information and records are confidential. In general, they can only be **released** to others **with the informed written consent** of the individual, if competent, or the guardian. The rule covers both verbal information and treatment records. [§ 51.30(4)(a), Stats.]

THE EXCEPTIONS

(§ 51.30(4)(b), Stats.)

These are the exceptions to the rule above, where certain, specific people or entities may access certain information and/or records for certain purposes **without** the individual’s or guardian’s informed written **consent**. It is helpful with each exception to think about these three items [**Note: format not exactly as per statute. It is intended to be more user friendly**]:

- a) **Who** may get the information?
- b) For what **purpose**? and
- c) Are there **limitations** on what records/information can be released?

ACCESS WITHOUT THE INDIVIDUAL'S CONSENT (§ 51.30(4)(b), Stats.)

Access without the individual or his/her guardian's informed written consent is given:

- 1)a) To those people or organizations **designated** by the department
- b) To do **management audits**, financial audits or **program monitoring and evaluation**.
- c) Cannot disclose names or other identifying information and the information must remain confidential.

- 2)a) To the department, director of a county department, or a staff member **designated** by the director
- b) To use for **billing and collection** purposes.
- c) Only the information necessary for this purpose. The information may only be used for this purpose and must remain confidential.

- 3)a) To **researchers** doing projects approved by the department
- b) For **research** approved by the department.
- c) Final product cannot contain any identifying individual information and all such information will remain confidential.

- 4)a) Pursuant to a **court order** (usually obtained from the Probate Court judge).
[NOTE: Under DHS 92.04(4)(b), a subpoena for treatment records must be signed by a **judge** of a court of record, **not** simply by an attorney, to be sufficient to allow disclosure]

- 5)a) To qualified **staff members of the department**, the director of the county department responsible for serving the subject individual, and qualified staff members designated by the director
- b) **To determine progress and adequacy of treatment**, whether the person should be transferred to a less restrictive or more appropriate treatment modality or facility, and for purposes of § 51.14 (outpatient treatment of minors).
- c) Disclosure is on an "**as necessary**" basis; the information must remain confidential.

- 6)a) To individuals employed, serving in bona fide **training programs** or participating in supervised **volunteer programs** within the facility
- b) As necessary for the performance of their duties.
- c) Disclosure when and to the extent **required** to perform duties.

[NOTE: Under DHS 92.04(6)(b), confidential information can only be released to students or volunteers if facility staff supervise them. Students / volunteers should be instructed in regard to confidentiality as part of their orientation.]

- 7)a) To **staff within the department**
- b) **To coordinate treatment** for mental illness, developmental disabilities, alcoholism or drug abuse for individuals committed to or under the supervision of the department.
- c) To the extent necessary to coordinate treatment.
- 8 a) To **health care providers** who cannot obtain the individual's consent due to the individual's condition or the nature of the emergency
- b) For treatment of the individual in a **medical emergency**
- c) **Limited** to the information **necessary** to meet the **medical emergency**.
- 8g)a) To a **health care provider** or to any person acting under the supervision of a health care provider who is involved in the individual's care,
- b) If necessary for the current treatment of the individual.
- c) **Limited** to the individual's name, address, and date of birth; the name of the individual's provider of services for mental illness, developmental disability, alcoholism or drug dependence; date of any of those services provided; the individual's medications, allergies, diagnosis, diagnostic test results and symptoms*; and any other relevant demographic information necessary for the current treatment.
- [* "Diagnostic test results" means the results of clinical testing of biological parameters, but does not mean the results of psychological or neuropsychological testing.]
- 8m) a) To appropriate **examiners**
- b) For court proceedings under §971.17 (not guilty by reason of insanity)
- c) All relevant information; it must remain confidential except for reports to court. [Reference to ch. 980 deleted effective 8/1/06]
- 8s) a) to appropriate **examiners** and staff of **DHS, DOC, DOJ, District Attorneys**
- b) For court proceedings under §980 (sexually violent person)
- c) All records involving or related to the individual; the court may issue a protective order limiting information or re-disclosures; information may be re-released for any purpose consistent with ch. 980.
- 9)a) To a **facility which is going to receive** an involuntarily committed or forensic patient from another treatment facility
- b) **As part of a transfer.**
- c) Limited to any treatment records otherwise required by law, a record or summary of all somatic (health related) treatments, and a discharge summary. The discharge summary may include a statement of the individual's problem, the treatment goals, the type of treatment that has been provided, and a recommendation for future treatment. It may not include the **entire record**.

[**NOTE:** Under DHS 92.04(9)(e), treatment information may be disclosed only to the extent necessary for an understanding of the individual's current situation. Also, per DHS 92.04(9)(f), disclosure of information upon the transfer of a voluntary patient requires the individual's informed consent, a court order, or other provision of law.]

- 10a) To a **correctional facility** or **probation and parole agent** who is supervising an individual receiving inpatient or outpatient evaluation or treatment in a program operated by, or under contract with the department or a county department, when the treatment or evaluation is a condition of the probation and parole supervision plan (or when such individual is transferred from a state or local correctional facility to the treatment program, and then transferred back to the correctional facility)
- b) For supervision of **probationers and parolees**.
- c) Information is specifically limited to: report of evaluation pursuant to a written probation and parole supervision plan, discharge summary written at termination of treatment provided under a probation and parole supervision plan, including a record or summary of all somatic (health related) treatments, and any information **necessary** for supervision purposes. Disclosure can be made only to clinical staff, except that where the individual is on probation or parole, disclosure can be made to a probation and parole agent.

[**NOTE:** Under DHS 92.04(5)(b), information available under this exception may also be released to: members of the **parole board**, members of the **special review board** for sex crimes, employees of the **juvenile offender program**, and members of the **juvenile corrections reception center's** joint planning and review committee. Also, under DHS 92.04(10)(b), this same information may be released to: the **probation and parole agent's supervisor**, the individual's **social worker**, the social worker's **supervisor** and their superiors, and consultants or corrections employees who have clinical assignments regarding the individual.]

- 10m)a) To the **Department of Justice** or **District Attorneys**
 - b) For proceedings under **Ch. 980**.
 - c) Records **relevant** to a **Ch. 980** proceeding.
- 11)a) To the **individual's counsel** or **guardian ad litem**
 - b) **To prepare for** involuntary commitment or recommitment **proceedings**, reexaminations, appeals or other actions (such as Chapter 55 proceedings) relating to detention, admission, commitment or patients' rights under Chs. 51, 971, 975 [or 980 as of 8/1/06].
 - c) Available without modification and at any time needed for the above purpose(s).

[**NOTE:** Under DHS 92.04(11)(c), the individual's attorney and guardian ad litem may have access at any time to any records that are directly available to staff on duty.]

- 12)a) To a **correctional officer**
 - b) If s/he **has custody of or is responsible for** the supervision of an individual being transferred or discharged from a treatment facility.
 - c) Limited to notice of the subject individual's change in status.

- 12m)a) To any **individual**
 - b) **If a forensic patient is on unauthorized absence** from a treatment facility.
 - c) Only information which would assist in apprehending the patient.

- 14)a) To **public attorneys** (District Attorney, County Corporation Counsel, etc.)
 - b) **To prepare for** involuntary commitment or recommitment **proceedings**, reexaminations, appeals or other actions (such as Chapter 55 proceedings) relating to detention, admission or commitment under Chs. 51, 971, or 975.
 - c) Only information concerning the admission, detention or commitment of an individual who is presently admitted, detained or committed.

- 15)a) To **county departments** who have written agreements with the department to coordinate services
 - b) **To coordinate human services delivery** and case management.
 - c) Only information necessary for this purpose, and only if the individual received services through a county department under § 51.42 or § 51.437 within the previous six months. The information will remain confidential and is specifically limited to: name, address, age, birth date, sex, client-identifying number and primary disability, type of service rendered or requested for the individual, dates of such service or request, funding sources and other funding or payment information.

- 16)a) To a **law enforcement agency** upon request
 - b) For **tracking of forensic patients**.
 - c) Must be **authorized** by the DHS Secretary / designee. Information is specifically limited to: name and other identifying information, including photographs and fingerprints, the branch of the court that committed the individual, the crime that the individual is charged with, found not guilty by reason of mental disease or defect or convicted of, whether or not s/he is or has been authorized to leave the institution grounds and information as their whereabouts during any time period.

- 17)a) To a **county agency** designated under § 46.90(2) or other **investigating agency** under § 46.90, to the **county department** as defined in § 48.02(2g), or the **sheriff or police department** for the purposes of § 48.981(2) and (3) or to a county protective services agency for the purposes of § 55.043.

- b) For reporting and investigating **elder abuse, abuse of a vulnerable adult or abuse or neglect of a child, or abuse of an unborn child.**
 - c) Not specified; should limit to information which would reasonably be considered necessary to the report and/or investigation of whether or not the alleged abuse occurred.
- 18)a)** To the **Protection & Advocacy group** (Disability Rights Wisconsin - DRW)
- b) To **protect and advocate for the rights** of persons with developmental disabilities or mental illness.
 - c) If the individual has a guardian appointed under § 880.33, Stats., information is specifically **limited** to: nature of an alleged rights violation, if any, name, birthdate, county of residence, whether individual was voluntarily admitted, involuntarily committed or protectively placed, date and place of admission, placement or commitment, name address and telephone number of any guardian, date and place of guardian's appointment. If more information is desired, DRW must notify the guardian by mail of the request and of the guardian's right to object. If the guardian does not object in writing within 15 days after the notice is mailed, the information can then be released. If the guardian does object, the information will **not** be released.

[NOTE: These restrictions on access do not apply if the records custodian does not promptly furnish the guardian's name, etc., to DRW, if there is cause to believe the individual is in serious immediate danger which the guardian is letting happen, if there is cause to believe the parent/guardian is abusing the individual, or if the guardian is a governmental agency.

- 19)a)** To state and local **law enforcement** agencies
- b) To **report an apparent crime** 1) committed at an inpatient treatment facility or a nursing home or, 2) observed by staff or agents of the facility or nursing home, regardless of where the apparent crime occurred.
 - c) Information related to the apparent crime and any relevant information as permitted per the exception in **16)c)**, above.
- 20)a)** To a **spouse, domestic partner under Ch. 770, parent, adult child or sibling** who is **directly involved** in providing care to or monitoring the treatment of the individual. (This **involvement must be verified** by the individual's physician, psychologist or some other person who is responsible for providing care and treatment to the individual.)
- b) **To assist in the provision of care or monitoring of treatment.**
 - c) Except in an emergency, as determined by the person verifying involvement, request must be in writing. Also, unless the person has been adjudged incompetent under Ch. 880, the person verifying involvement must notify the individual of the release of information. Information which may be released is specifically limited to: a summary of the diagnosis and prognosis, a listing of medications the individual has received and is receiving, and a description of the treatment plan.

- 21)a) To a **mental health review officer**
 b) For the purposes of § 51.14 (**outpatient treatment of minors**).
 c) Not specified; use “**need to know**” standard.
- 22)a) To a representative of the **board on aging and long-term care**
 b) To fulfill the **oversight** function of the board.
 c) With **permission** of the individual (if competent), the legal guardian, or legal counsel, the board representative may examine the individual’s clinical records.
- 23)a) To the department, a **sheriff, police department** or **district attorney**
 b) For the purpose of **investigating a death reported under § 51.64(2)(a)**, which requires a facility to report a patient death to the department within 24 hours if there is reason to believe that the death was related to the use of physical restraint or psychotropic medication or was a suicide.
 c) Not specified; use “**need to know**” standard.
- 24) a) To the **Department of Corrections**
 b) To obtain information about someone required to register as a **sex offender**
 c) The person’s name and aliases, vital statistics, laws violated, placement information, address, supervising agency, vehicle information, employer, and any school the person is enrolled in. This information can be shared with law enforcement agencies, victims, schools, day care providers, child welfare agencies, group and shelter homes, foster homes, county departments and agencies providing child welfare services, the Department of Justice, the Department of Public Instruction, DHS, neighborhood watch programs, agencies like the Boy Scouts & Girl Scouts, sheltered workshops, other agencies protecting the public, and members of the public when law enforcement agencies determine it is **necessary** they know the information.

**REQUIRED ACCESS TO CERTAIN INFORMATION
 WITHOUT INFORMED CONSENT**

Except as limited by § 51.30(4)(c) [limits on access to AODA records to comply with federal law], treatment records **shall, upon request, be released without the individual’s informed consent** to:

- **The parent, child, sibling, spouse, or domestic partner under ch. 770, of an individual who is at an inpatient facility;**
- **To a law enforcement officer who is seeking to determine if the individual is on unauthorized absence from the facility;**

- To **mental health professionals** who are providing treatment to the individual at the time the information is released to others.

Information released under this provision is **limited** to:

- **Notice** as to **whether or not** the individual **is at an inpatient facility** and,
- If the individual is **no longer at the facility**, the **facility** or **other place, if known**, at which the **individual is located**.

The above provisions **do not apply** under any of the following circumstances:

- To the individual’s parent, child, sibling ~~or spouse~~, or domestic partner under ch. 770 who is requesting information if the individual has specifically requested that the information be withheld from the individual’s parent, child, sibling, spouse, or domestic partner.
- If, in the opinion of the inpatient facility, there is reasonable cause to believe that disclosure of the information would result in danger to the individual.

§ 51.30(4)(cm), Stats.

WITHIN THE COUNTY AND WITH “PURCHASE OF SERVICES” PROVIDERS

There are specific provisions of the law allowing for sharing of treatment information, as necessary in order to provide services, without the written informed consent of the individual or guardian. **Summary of statutory language:** Any subunit of a county department of human services, community programs or developmental disabilities may exchange confidential information about an individual, without written informed consent, with any other subunit of the same county department, with a resource center, care management organization or family care district, or with any person providing services to the individual under a purchase of services contract with the county department, if necessary to enable an employee or service provider to perform their duties, or to enable the county department to coordinate the delivery of services to the individual. [See § 46.23(3)(e), § 51.42(3)(e) and § 51.437(4r)(b), Stats.]

Despite the fact that the exchange of information in the above circumstances can occur without consent, it is **usually a good idea to notify the individual or guardian** of these exchanges of information (to the extent feasible). That may help maintain a good trust level, and facilitate their ongoing involvement in the planning of care and treatment.

THE “NEED TO KNOW” STANDARD

This is the standard against which disclosures of confidential information are measured. The principle of preserving confidentiality requires that disclosures are limited to the extent of the “need to know” of the person(s) the information is disclosed to. This means that you may disclose **only that information** which the receiver **needs to know** in order to perform their duties in relation to the individual. This applies to all disclosures of confidential information, to sources within the facility and outside of the facility. The only exceptions are where the statute specifies the information a particular source is entitled to or when the individual gives informed written consent for a particular disclosure.

[NOTE: Disclosures between employees of a social services department, who are acting within the scope of their employment and need the information in order to carry out job-related functions in regard to individual(s), will usually be covered by §§ 51.30(4)(b)5 or 7, exceptions to the informed consent requirement (see above). Agencies or individuals with whom a department contracts for provision of services are treated as employees (“agents”) of the department for these purposes. Contractees / purchase of service providers should always be instructed about the obligation not to re-disclose confidential information obtained in the course of their work under such contracts.]

THE “DUTY TO WARN” EXCEPTION

Mental health professionals should be aware of the **Schuster** case* decided by the Wisconsin Supreme Court. It held that mental health professionals **might be liable** if they fail to take action that is **reasonably necessary** to prevent an individual from causing **harm** to self or to the public at large. This decision expanded the existing common law “duty to warn” an identifiable individual who is the target of an individual’s credible threat of serious harm. Such actions may require breaching confidentiality, and sharing selective information would be authorized in those instances. [* 144 Wis. 2d 223, 424 N.W. 2d 159 (1988)]

[Note: In a 2010 decision, the Wisconsin Court of Appeals for District 1 held that, while there may be a “duty to warn”, it **does not create an exception** to the confidentiality statutes allowing for release of **written records**. *Milwaukee Deputy Sheriff’s Association, et al v. City of Wauwatosa*, 2010 W. App 95 (2010)]

At the Mental Health Institutes this would generally apply only when dealing with an outpatient or an inpatient at the time of release.

In **any** facility the “duty to warn” may apply in situations involving risks to peers. An example would be where an individual who is Hepatitis-B positive is also a “biter”. While other individuals (staff and peers) do not have a “need to know” the H-B+ status (and thus have no right to be informed of that status), they should be warned

to be careful of being bitten. In this example, the “need to know” may change if a person is actually bitten by an individual who is H-B+.

Any threat of harm, or risk to self or others must be evaluated by a clinician prior to disclosure of confidential information. The clinician must determine whether the risk is so reasonably foreseeable that a professional duty arises to violate confidentiality in order to protect potential (or actual) victims. In the “biting” example noted above, the risk of transmitting the hepatitis virus would depend on the seriousness of the bite, the possibility of blood being transferred to the victim, etc.

ACCESS TO TREATMENT INFORMATION / RECORDS

Individual access during treatment

The individual must have access at any time to their records of all medications and somatic (health related) treatments. However, **during treatment**, the Director may restrict access to any other treatment records. However, to deny treatment records, the treatment director or his/her designee must have reason to believe that the benefits of allowing access to the individual are outweighed by the disadvantages of allowing access. The reasons for any such denial must be entered into the treatment record. (§ 51.30(4)(d)(1), Stats., and DHS 92.05(1))

[NOTE: § 51.61(1)(fm), enacted in 1993, created a new right of every individual to be “fully informed of his or her treatment and care and to participate in the planning of his or her treatment and care”. Any restriction of an individual’s access to their records may not interfere with this right.]

Individual access after discharge (§ 51.30(4)(d), Stats., and DHS 92.05(2))

After discharge, the individual has a right to a **complete record** of all medications and somatic treatments prescribed during their admission or commitment and to a copy of the discharge summary. Also, after discharge the individual may request access to and/or photocopies of all of his or her treatment records. The request does not have to specify particular records or information, but can simply ask for “all information” or “all treatment records”. The request must be processed within five working days. A “reasonable and uniform charge” for reproduction may be assessed.

Informants: The records can be modified to protect the confidentiality of other patients or the names, though not the information itself, of any other persons referred to in the record who gave information subject to the condition that their identity remain confidential. However, entire documents cannot be withheld in order to protect such confidentiality. Nor can the facility deny the existence of documents containing such confidential information. Instead, this information should be deleted

from the individual document as necessary, with as minimal a modification as possible [DHS 92.05(4)].

When an individual requests to inspect treatment records **after discharge**, the director of the facility or their designee and the treating physician must be given **notice** of at least **one working day** so that they can exercise their right to be present during the inspection if they so desire.

Individuals must be **notified** at the time of discharge of these post-discharge rights of access to their treatment records.

Each time written information is released from the treatment record it should be **noted in the record** and specify: the name of the person to whom the information was released, the identification of the information released, the purpose of the release, and the date of the release. The individual has the same rights of access to this release information as to the other parts of their treatment record.

Release of treatment records after death (DHS 92.03(4))

Consent for release of the treatment records of a deceased patient can be given by the executor, administrator or other court-appointed personal representative of the estate. If no personal representative was appointed, the deceased patient's spouse or domestic partner can consent. If there is no spouse or domestic partner, any **responsible member** of the deceased patient's family can consent to release of the treatment records. No consent is required for disclosing information required under state or federal laws regarding death statistics.

Correction of information in treatment records (§ 51.30(4)(f) and DHS 92.05(5))

The individual or their guardian (if they have been adjudicated incompetent under Ch. 880) can challenge **factual** information in records released to them. In the case of a minor the minor, their parent, guardian or person in the place of a parent, can make the challenge. An attorney representing any of the above people can also make a challenge.

Factual information can be challenged on the basis of **accuracy, completeness, timeliness, or relevance**. Statements in a treatment record which render a diagnosis are **judgments**, not statements of fact, and cannot be challenged.

The request for correction must be **in writing** and must specify the information to be corrected and the reason for correction. The request must be granted or denied within 30 days by the director of the facility, program director of the § 51.42 or § 51.437 board, or the secretary, depending on which person has custody of the record. This request becomes part of the treatment record and any release of the challenged information must include a copy of the information change request.

If the request is **granted**, the treatment record must be corrected immediately and notice of the correction sent to the person who filed the request. The requestor may also have notice of the correction sent to any specified person(s) who received the incorrect information in the past. Any information determined to be completely false, irrelevant or untimely should be marked through and specified as incorrect. If the request is **denied**, it must be denied in writing explain the reasons for the denial. It must also notify the requestor that they have the right to insert a statement in the record correcting or amending the disputed information. This statement then becomes a part of the treatment record and will be released along with any release of the disputed information.

If the investigation casts **doubt** on the disputed information, but no clear determination can be made, the responsible officer will put those doubts in writing. Both this document and the challenge become part of the treatment record which are to then be included with any release of the disputed information.

Informed Consent Requirements (§ 51.30(2), Stats., and DHS 92.03(3))

Informed consent must be **in writing** and must be voluntarily given by an individual who is “substantially able to understand all information specified on the consent form”. The **form must contain**:

- the name of the individual, agency or organization to which disclosure is to be made;
- the name of the person whose treatment record is being disclosed;
- the purpose or need for the disclosure;
- the specific type of information to be disclosed;
- the time period during which consent is effective;
- the date on which consent is signed; and,
- the signature of the individual or person legally authorized to give consent on behalf of the individual.

The informed consent document must also include a statement of the individual’s **right to copies** of disclosed information under DHS 92.05 and DHS 92.06 (patient rights to access during treatment and after discharge). A copy of the informed consent document must be offered to the individual or guardian. A copy must also be added to the treatment record. A guardian can consent on behalf of the ward. The individual or individual representative **may refuse to consent** or **may withdraw consent** at any time. If this occurs, any agency which is not authorized under one of the exceptions in § 51.30(4)(b) to get the information without written informed consent must be told that § 51.30, Stats., prohibits release of the information requested.

Minors: consent for disclosure of information (§ 51.30(5)(a), Stats.)

The parent, guardian, or person in place of a parent of a minor can consent to the release of confidential information in court and treatment records. A minor who is

14 or older can consent to release of information **without** the consent of their parent, guardian, or person in place of a parent, as long as they are capable of providing informed written consent.

Minors: access to information (§ 51.30(5)(b) and DHS 92.06)

A minor 14 or older has the **same rights** of access to their record as adults (described in “access during treatment” and “access after discharge”, above). A minor **under 14 years** of age also has access to their own records; however, their inspection of records must be in the presence of a parent, guardian, counsel, guardian ad litem or facility staff member.

Guardians and parents: access to information (51.30(5)(b) and DHS 92.06)

The guardian of an individual found incompetent under Chapter 880 may have access to their ward’s court and treatment records at all times. The parent, guardian or person in the place of a parent of a minor has the same rights to disclosure of the minor’s records as a subject individual has to their own records (same as under “access during treatment” and “access after discharge”, above).

The parent, guardian or person in the place of a parent of a developmentally disabled child has access to the minor’s court and treatment records at all times, **except** that if the child is 14 or older, s/he can file a written objection to such access with the custodian of the records.

[NOTE: A parent who has been denied any periods of physical placement of the child with that parent, by order of a court (because the court has found such placement would endanger the child’s physical, mental or emotional health) does **not** have the above rights of a parent or guardian [§ 51.30(5)(bm), Stats.]. Further, while the law refers to persons “in the place of a parent of a minor” in several places, we have never encountered a situation where the rights accorded by law to parents and guardians were extended to other parties on the basis of being “a person in the place of a parent of a minor”. It is unclear to us what parties and/or authority this phrase may refer to.]

Minors: treatment for drug and alcohol abuse (§ 51.30(4)(c), DHS 92.03(1)(g) DHS 92.06(2), and 42 Code of Federal Regulations § 2.14)

Information from a minor’s alcohol or drug abuse treatment can **only be released** with the **consent of both** the minor and their parent, guardian or person in the place of a parent, **except** that outpatient or detoxification services information can be disclosed with only the minor’s consent as long as that minor is at least 12 years old.

There are **four exceptions** to this right of a minor to give sole consent for release. Thus, the physician or health care facility must also get the consent of the parent or guardian:

1) before performing any surgical procedure on the minor, unless the procedure is essential to preserve the life or health of the minor and the parent's or guardian's consent is not readily obtainable, 2) before administering any controlled substances except to detoxify the minor, 3) before admitting the minor to an inpatient treatment facility, unless the admission is to detoxify the minor for ingestion of alcohol or other drugs, 4) if the detoxification period for the minor extends beyond 72 hours after the minor's admission as a patient.

[NOTE: Parents / guardians may still be notified in medical emergencies involving the child.]

Destruction, Damage, Falsification, Concealment, Unlawful Disclosure, or Falsely Obtaining Records

Anyone who intentionally **falsifies** a treatment record, **conceals or withholds** a treatment record with intent to prevent its release to the individual, to his or her legal guardian or persons with the informed written consent of the individual or with the intent to prevent or obstruct an investigation or prosecution, intentionally **destroys** or damages records in order to prevent or obstruct an investigation or prosecution, **requests** or obtains confidential information **under false pretenses**, or discloses confidential information with knowledge that the disclosure is **unlawful** and is not reasonably necessary to protect another from harm may be fined up to \$25,000 or imprisonment for up to 9 (nine) months, or both. (§51.30(4)(dm) and § 51.30(10).)

OTHER CONFIDENTIALITY ISSUES

AODA Records (42 Code of Federal Regulations - Part 2)

It is important to be aware that there are special **federal rules** regarding AODA records. These rules **supersede state law** and are often much more stringent. They apply to any program that is specialized to the extent that it holds itself out as providing and does provide alcohol or drug abuse diagnosis, treatment, or referral for treatment and which is federally assisted, directly or indirectly. The federal regulations allow disclosure without the individual's consent in very limited circumstances, generally for a bona fide medical emergency, for qualified research and for audit or program evaluation. Disclosures to a court can only be made if the court order meets the requirements specified in 42 CFR 2.61 to 2.67.

The federal regulations do not apply to: reporting under state law of incidents of suspected child abuse and neglect to state or local authorities; to communications within a program or between a program and an entity having direct administrative

control over the program; to communications between a program and a qualified service organization; and to disclosures to law enforcement officers concerning an individual's commission of, or threat to commit, a crime at the program or against personnel of the program. It is less important to know the specific requirements of the federal regulations than to recognize when they apply, so that further assistance can be obtained regarding the interpretation / application of this specialized body of law.

HIV/AIDS Issues (Chapter 252, Wisconsin Statutes)

The law regarding release of HIV test results, AIDS related diagnoses and involuntary HIV testing is quite **stringent**. Pertinent information should be in a segregated portion of the treatment record and relevant law scrutinized prior to authorizing any disclosures. As with the federal law regarding AODA records, it is less important to know the specific requirements of this body of law than it is to recognize that **special requirements apply**, and to obtain further assistance in determining how to apply the requirements to specific situations. This is especially true when dealing with HIV/AIDS issues, as this body of law is still evolving. There are severe civil damages awards and criminal penalties attached to disclosing a person's HIV status either negligently or intentionally.

Verification of Status (DHS 92.03(2)(a))

No person may disclose information or acknowledge whether an individual has applied for, has received or is receiving treatment except with the informed consent of the individual (or parent or guardian where appropriate). If there is not a consent to acknowledge that, the facility must develop written procedures including a standard, **noncommittal response** to inquiries regarding whether or not a person is or was receiving treatment. For example, institute policy may provide the following response for use with callers: "Institute policy does not permit the release of information on past, present, or future patients."

[NOTE: Under § 51.30(4)(cm) the individual's written informed consent is not necessary to verify the presence of a patient to the parents, children, sibling, spouse, or domestic partner of that patient (unless the patient has specifically requested that the information be withheld from them), to a law enforcement officer trying to determine if a patient is on unauthorized absence from the facility, or to mental health professionals who are presently providing treatment to the individual. (See page 7.) However, there should be reasonable assurance of the requestor's identity before any acknowledgment of the individual's presence is given. Other exceptions under § 51.30(4)(b) may apply.]

Privileged Communications (§ 51.30(6), Stats., and DHS 92.07)

“Privilege” is a legal concept applicable to what can be admitted as evidence in a court proceeding. “Privileges” exempt certain people from having to testify in regard to certain communications in which there is a legally recognized expectation of confidentiality.

For example, communications between a physician or psychologist and patient or between an attorney and their client are privileged. There are limited exceptions to these privileges under state law (§ 905.03 and § 905.04). However, note that the federal regulations regarding alcohol and drug dependence treatment records do not recognize these statutory exceptions and require either informed consent or a court order under 42 CFR 2.61 to 2.67 to disclose confidential information. These federal regulations supersede state law.

PENALTIES / LIABILITY FOR CONFIDENTIALITY BREACHES

Secs. 51.30(9) through (12) authorize various penalties for violation of any provision to § 51.30 regarding patients’ rights to confidentiality of treatment records and information. However, violations found to be knowing and willful carry punitive damages as well as any actual damages, reasonable costs and attorney fees.

Sec. 895.46, Stats., requires the state and counties to insure employees against liability and attorney fees due to lawsuits filed against their employees arising out of the course of employment. This covers everything “within the scope of employment”, including error, mistakes, negligent acts, and malpractice. This coverage applies as long as the employee honestly and reasonably believed in good faith that the activity was within the scope of employment. The employee is not covered if he or she was not acting within the scope of their employment at the time of the violation or if the act was knowing and willful, rather than merely negligent.

For example, if the employer has **corrected the employee’s understanding of a law** (e.g., through mechanisms for assuring staff knowledge and compliance, such as a patient rights grievance procedure, specific training, employee disciplinary process, etc.) repetition of the same error would likely be willful and knowing such that the employer would not be obligated to defend the employee in a subsequent lawsuit. Further, employees should be aware that § 51.30(11) specifically authorizes the department, county departments and public treatment facilities to **discharge or suspend without pay** any employee who violates patients’ right to confidentiality of treatment records / information.

Sec. 51.30(8) allows individuals to bring civil and criminal actions for violations of patient rights. Violations may also be processed as grievances, through a facility or program’s patient rights grievance procedure. The grievance procedure may order

changes in practice, but does not have the authority to award monetary damages to an injured party. Individuals are not required to use the grievance procedure before filing a civil or criminal action.

The civil and criminal penalties for violating confidentiality and records laws were substantially increased as of May 5, 2000. (See: Confidentiality – Penalties document.)

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