

# Mind if I Videotape You, Officer? Legal and Ethical Issues Regarding Confidentiality

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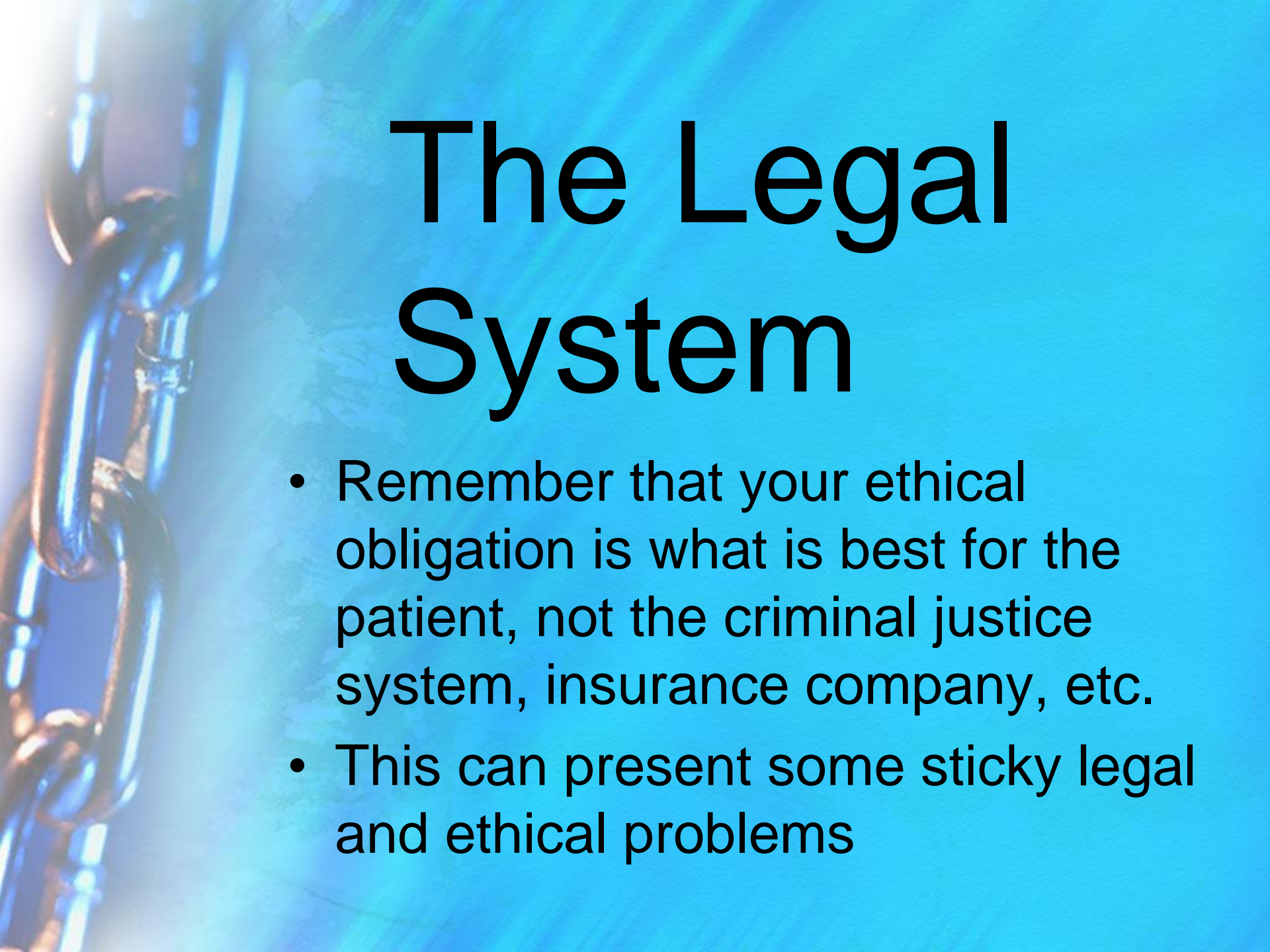
## Laws & Ethics Update

- Licensure/tiers is coming
- Banning smoking is coming
- Hiring of former patients prohibition is coming
- Specifics about social media is coming



## *True or False?*

- Ethically speaking we may never ever reveal any information about our clients without their permission.



# The Legal System

- Remember that your ethical obligation is what is best for the patient, not the criminal justice system, insurance company, etc.
- This can present some sticky legal and ethical problems



# Back to Basics

- Laws....and those who enforce them....are Deontological
- Ethics....and the counselors who must follow them.....are Eudaimonic & Consequentialist
- You and the PO have different clients!
- The distinctions are not usually a problem, but when they are.....
- The case of Michael Wempe
- The case of Noelle Bush



# Somehow you have to

- Protect your patient
- Protect your treatment center
- Keep the CJS folks happy
- Always try to have a friendly, working relationship with POs and PAs
- The case of Jose, who went to visit his family
- The case of George, who wants to go to his mother's funeral



# Court-ordered patients

- Have signed away consent for LEPs to access records
- Doesn't change your obligation to act in their best interest
- Don't chart anything that might really hurt them
- This now extends to all patients, IMHO



Protecting all our patients:

- CFR 42,  
part B
- HIPAA



The background is a vibrant blue with a subtle, abstract pattern of light and dark blue streaks. On the left side, there is a vertical image of a metallic chain, possibly made of stainless steel, with several links visible. The chain is slightly out of focus, creating a sense of depth.

CFR 42 Part 2

**Understanding  
Federal Law &  
Regulations for  
Alcohol and Drug  
Patients**



## Please Note:

- 2017: SAMSHA is currently in the process of revising regulations for CFR 42. This is mainly for the sake of the new use of electronic medical records and insurance companies that are using them. This presentation covers current regs for CFR 42 & HIPAA, but you should always be on the lookout for possible changes.
- Los Angeles County is working on a “Universal Consent Form” to cover everything; my guess is that the Feds will cover it



Program Directors should  
worry the most....

But all counselors should know  
the basics.

Here are the basics:



**42 U.S. Code 290dd  
42 CFR Part 2**

■ **First issued 1975, revised 1987**

# What 42 CFR Covers:

✦ “Any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the United States.”

## Federally Assisted Programs

- a. Block Grant funds from State
- b. Operated by Federal Government
- c. Is a 501-c-3 non-profit program
- d. Licensed or Regulated by Federal Government



Could be considered  
the “Standard of  
Care”:

Bottom line:  
applies to pretty  
much everyone!



## CFR 42 Part 2

### **I. Governing Confidentiality of Patient records**

#### **A. General Rule**

**1. A program may not disclose the identity of a patient or any information about that patient**



**CFR 42 Part 2**

**II. Importance of Confidentiality**

**A. Stigma**

**B. Reputation**

**C. To encourage treatment**





## CFR 42 Part 2

### **III. Federal Regulations**

#### **A. CFR 42 Part 2**

- 1. Patient Identifying Information is Confidential**
- 2. Regulations Protect Patients**
  - a. Current Patients**
  - b. Past patients, including deceased**
  - c. Applicant patients**



## CFR 42 Part 2

### **III. Federal Regulations (*cont*)**

#### **B. Crime to disclose**

- 1. Fines may be imposed, but NOT LIKELY**
- 2. Trouble with State Licensing Regulatory Agency**
- 3. Ethical sanctions for counselors**



## CFR 42 Part 2

### III. Federal Regulations (*cont*)

#### B. CFR 42 Part 2 Applies to

**All staff equally, paid or  
unpaid, volunteer or  
student, cook or  
counselor**



## CFR 42 Part 2

### **IV. Federal Regulation CFR 42 Part 2 Disclosures**

- A. No information may be revealed to a third party, including**
  - 1. Family Members**
  - 2. Lawyers**
  - 3. Police**
  - 4. District Attorney**
  - 5. Employer**

## CFR 42 Part 2

### V. Nine Exceptions

#### 1. No (AOD) Patient Identifying Information

(“someone is trying to kill you”) This is why you need #2

#### 2. Proper Consent (can't do much without)

Must be written with CFR 42 language

#### 3. Internal Communications

a. Need to Know Rule

b. Can't disclose around the water cooler



## Example:

- Your patient Sylvia tells you that she just got diagnosed with liver disease. You can't tell anyone who isn't authorized to review charts.
- Let her tell her friends
- No such thing as "oral consent" under CFR 42

## CFR 42 Part 2

### V. Nine Exceptions (*cont*)

#### 4. Qualified Service Organization Agreement (QSOA)

- a. Written agreement between AOD program and another non-CFR-42 program, e.g. a mental health unit
- b. Cannot have with Law Enforcement
- c. Must cover confidentiality, and agree to resist any unauthorized attempt to get that information, even if it means going to court



## CFR 42 Part 2

### V. Nine Exceptions

#### 4. Qualified Service Organization Agreement (QSOA) *(cont)*

d. More specific than a simple MOU

e. Don't have to get specific consent from clients, but good idea

f. Must have specific client consent to talk to law enforcement



## CFR 42 Part 2

### V. Nine Exceptions (*cont*)

#### 5. Medical Emergency

- a. Can disclose to Medical Personnel in emergency, even without consent
- b. Cannot disclose to Police or Family without consent
- c. get the paramedics or hospital to do it
- d. be sure and chart what you did



## CFR 42 Part 2

### **V. Nine Exceptions (*cont*)**

#### **6. Child and Elder Abuse**

- a. Can disclose only an initial report and paperwork**
- b. Cannot cooperate in follow-up investigation without consent or special court order**

## CFR 42 Part 2

### V. Nine Exceptions (*cont*)

- 7. Crime on program premises or against program personnel anywhere; drug possession doesn't count (Noelle Bush)**
  - a. Cannot disclose identity of other residents, even victims, without consent**

## CFR 42 Part 2

### V. Nine Exceptions (*cont*)

#### 8. Research and Audit

a. Funders, including the government, must have written agreement that restricts their use of information.

*Section 2.53*

b. Researchers must be qualified and agree not to disclose. *Section 2.52*

## CFR 42 Part 2

### V. Nine Exceptions (*cont*)

#### 9. **Court Order**

**a. Subpoenas, arrest warrants, and search warrants, even if signed by a judge, are not enough!**

**b. Must be a special order under CFR 42 , signed by a judge**



# What's the difference?

- Subpoena: Tells you what you have to do, e.g. go to court, turn over records
- Warrant: tells the government what they can do

## CFR 42 Part 2

### **V. Nine Exceptions**

#### **9. Court Order (*cont*)**

**c. To get records, e.g. for a custody dispute, the law requires that the treatment center and the client must receive a Notice and an Opportunity to Be Heard, use a fictitious name, and have a hearing be held in a confidential setting (e.g. judge's chamber). Without all of these is is not a real CFR 42 order.**

## CFR 42 Part 2

### V. Nine Exceptions

#### 9. Court Order (*cont*)

d. Don't ignore the subpoena, though. You may get client's consent. If refused, ask to speak to their attorney. If not possible, try to persuade whoever issued the court order to get a new order under CFR 42.

e. Go to the hearing, bring the regs, but do not turn over records unless CFR 42 compliant.





## At court: You must insist

- Private meeting in judge's chambers
- Must be under a fictitious name
- Do not acknowledge the patient's name or any information about the patient
- Bring a copy of CFR 42, part B ONLY
- Insist that you can only comply with a valid CFR 42 court order, which is very unlikely you will get
- New Trick: don't let the D.A. tell you it's a "real CFR42 court order"; only trust a judge who you know has read CFR 42
- Give the order to an attorney



## CFR 42 Part 2

### **VI. Criminal court orders/Police at the door**

**a. Same applies, except the notice goes to the treatment center only.**

**b. All of the following must be met:**

**1) The crime is extremely serious, such as causing or threatening to cause death or serious bodily injury**

**2) The records sought are likely to contain information of significance to the investigation of the prosecution**

## CFR 42 Part 2

### **VI. Criminal court orders/Police at the door**

**b. All of the following must be met  
(*cont*):**

**3) There is no other practical way to  
get the information**

**4) The public's interest in, and the need for the  
disclosure, outweigh the harm to the client, the  
doctor-patient relationship, and the program's  
ability to serve other patients, and**



## CFR 42 Part 2

### **VI. Criminal court orders/Police at the door**

**b. All of the following must be met  
(*cont*):**

**5) If law enforcement personnel seek the order the program has an opportunity to be represented by a lawyer.**

## CFR 42 Part 2

### **VII. Police at the door with an Arrest Warrant or Search Warrant**

**a. Produce a copy of the regs and perhaps the sample letter**

**b. Explain that because of Federal Law, the program may not cooperate with a court order unless it is issued under CFR 42. Tell them that that if they come back with such an order you would be happy to help, but do not confirm or deny that the person they are seeking is a patient**



## CFR 42 Part 2

### **VII. Police at the door with an arrest warrant or search warrant (*cont*)**

**c. Ask to speak to a commanding officer if they persist; call your attorney if you have one; supervisor, etc.**

**d. Do not forcibly resist their attempts to enter the program facility**

**e. If the patient was court ordered into TX they should have already signed a release, and you should hand over the patient**



IN ALL CASES:

- **Bambuser**



To protect yourself, your patients,  
and even the police:

- Videotape any encounter with law enforcement that threatens the safety or confidentiality of your patients
- It is your obligation to protect confidentiality, not theirs
- This includes times when you may have called them to come to you, e.g. a crime on the premises






# Understanding the police

- It is their job to take control and exert authority; usually this is exactly what you would want them to do
- We do the same in crisis intervention
- Court orders signed by a judge: God
- Not trained in CFR 42; most are quite surprised to hear about it
- May appear defensive and defiant if you challenge their authority in any way
- Don't like being videotaped
- Don't have to tell the truth



## As a result you may get challenged

- Told to stop videotaping
- Told it is illegal to film them without their permission
- Told they can confiscate your camera as “evidence”
- Demand ID
- Threaten to arrest you for interfering
- Unless you are physically interfering they cannot legally enforce any of these. None.



# Smith v. Cumming, U.S. Court of Appeals, 11<sup>th</sup> Circuit

- Ruling clearly states that we can film the police (and other public officials) in a public place while they are acting in an official capacity.
- Ruled as a constitutional right under the First Amendment; no local policy, law or regulation can override this
- BTW, No one can have an expectation of privacy in a public place, so people can film us and our patients from a sidewalk



## What to do

- If they challenge your filming just keep repeating “the courts have ruled that police officers may always be filmed while they are acting in an official capacity”
- Be ready to repeat over and over
- If told to back up, back up
- “How do I know you don’t have any weapons? Stand where they can see you if possible; offer to be frisked
- If they keeping insisting, insist they bring a supervisor to the location; keep filming



# Do not:

- Raise your voice
- Use profanity
- Call them Nazis or thugs
- Be disrespectful
- Physically interfere in any way
- Threaten to sue....(debatable)
- Back down



# While filming

- Use horizontal rather than vertical if using your phone
- Do a sweep up and down with the camera to show that you are far away from (and not interfering with) their “investigation”
- Ask for the officer’s name and badge number, and repeat it out loud to make sure it is recorded
- If they won’t give their name, repeatedly ask “Isn’t it your department’s policy to identify yourself to a citizen?” “Are you refusing to identify yourself?”



## Do I have to show them ID?

- Can be a tool of intimidation
- In California you are not legally required to show ID if you are not driving or if you are not being detained or arrested.
- Might be easier to show ID; up to you. Easiest: leave it inside
- If you don't want to, then assert your rights.
- Repeatedly ask “am I being detained?” “am I free to go?”



## If detained

- Show your ID or Name/DOB
- Ask “If I am being detained, please give me a “reasonable articulation” of the crime you think I may have committed or are about to commit”  
Keep asking
- “Suspicious behavior” is not a crime
- “I’m doing an investigation” is not reason to detain you
- Keep repeating “am I being detained?” “am I free to go?”





# Social Media

**SINCE CLIENTS OWN  
THEIR INFORMATION THEY  
ARE FREE TO DO WHAT  
THEY WANT WITH IT.  
SINCE WE DON'T OWN THE  
INFORMATION, WE HAVE  
NO RIGHT TO GIVE IT  
AWAY**



# Social Media

- Formal regs and ethical mandates are coming
- For now: REMEMBER:
- Dual Relationships not unethical, but harmful ones are; always dangerous
- “go to the wedding, but not the reception”
- If you let someone “friend” you on Facebook they can see things about you that you may not want seen
- Never even hint or acknowledge that you have had a professional relationship
- Nothing that could be considered flirtatious

# Of Interest

The memories and impressions of program staff are considered “records” protected by the regulations even if they are never recorded in any form.

✦ A payer or funding source that maintains records of a recipient of drug/alcohol treatment becomes subject to 42 CFR Part 2 to the same extent as the program from which the information came.

# HIPAA

## ✦ H e a l t h I n s u r a n c e P o r t a b i l i t y a n d A c c o u n t a b i l i t y A c t o f 1 9 9 6

- ✦ Designed to ensure maintenance of health insurance coverage when you change jobs.
- ✦ Administrative simplification – Healthcare processes becoming very complex – look to standardize information – make it easier.
- ✦ Protect confidentiality and security of patient information

# HIPAA vs. 42 CFR Part 2

- ✦ The laws cover a lot of the same material.
- ✦ Some points of difference – more specific or more recent rule usually applies.
  - ✦ For the AODA Treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent and therefore apply

**Problem with some MHPs: trained only in HIPAA**

# Requiring Consents

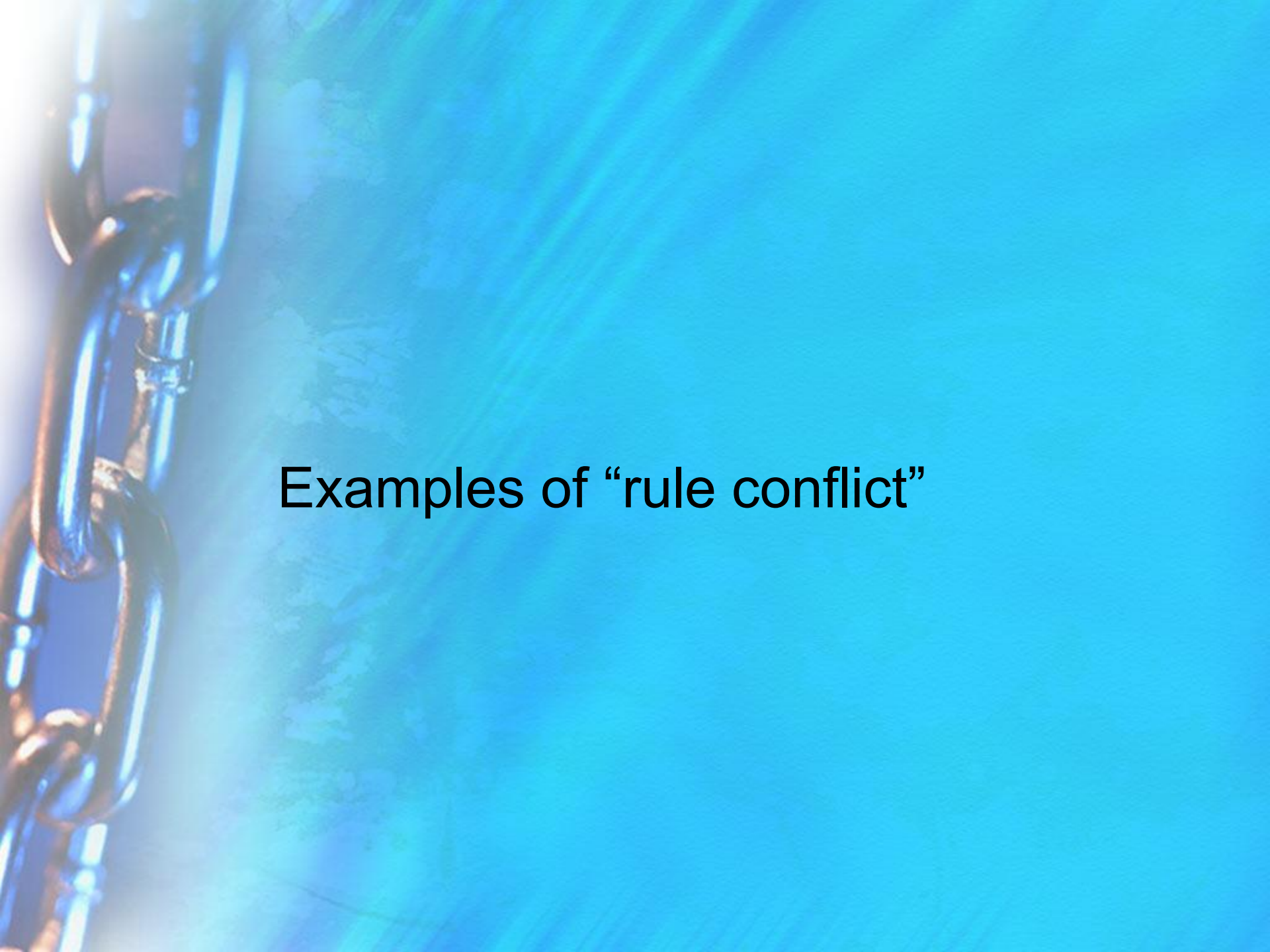
- ✦ HIPAA prohibits a program from conditioning treatment on a patient signing a consent, but the judge, probation/parole, child welfare can condition participation in the drug court program on the defendant signing the consent form.

# Satisfying 42 CFR and HIPAA

**✦ HIPAA requires all consents to be revocable, but HIPAA also allows for the use of an administrative order for information disclosure. Therefore, Courts can pair their 42 CFR consent with a HIPAA administrative order and/or build HIPAA language into their consent**





The image features a vibrant blue background with a subtle, radial light effect emanating from the top left. On the left side, a portion of a heavy, metallic chain is visible, showing several interlocking links. The chain is rendered in shades of blue and grey, with highlights that suggest a polished, reflective surface. The overall composition is clean and modern, with the text centered in the lower half of the frame.

Examples of “rule conflict”



# Disclosure for Payment

- HIPAA PERMITS disclosure with out patient consent for the purpose of payments.
- 42 CFR Part 2 PROHIBITS these disclosures with out patient consent.

AODA providers must follow 42 CFR Part 2.



# Patient Rights & Administrative Requirements

- HIPAA imposes several new administrative requirements and establishes new patient rights.  
(CEO & Program Director stuff....)
- These are not included in 42 CFR Part 2.

AODA providers must follow HIPAA.



## Personal Representatives

- HIPAA permits a “personal representative” (e.g. power of attorney) to sign consent forms on behalf of the patient.
- 42 CFR Part 2 limits those who may act in the place of the patient to individuals who have been legally appointed the patients’ guardian.

AODA providers must follow 42 CFR Part 2.



# Re-disclosure of Information

- HIPAA is silent on this topic.
- 42 CFR Part 2 requires that a statement prohibiting re-disclosure accompanies the patient information that is disclosed.

AODA providers must follow 42 CFR Part 2.



## Disclosures to Other Providers

- HIPAA allows, but does not require, programs to make disclosures to other healthcare providers without authorization.
- 42 CFR Part 2 limits this to medical emergencies.

AODA providers must follow 42 CFR Part 2.



## Medical Emergencies

- HIPAA allows health care providers to inform family members of the individual's location and condition without consent in emergency circumstances or if a person is incapacitated.
- 42 CFR Part 2 limits this disclosure to medical personnel ONLY.

AODA providers must follow 42 CFR Part 2.

# Disclosure to Public Health

- HIPAA permits disclosure to a public health authority for disease prevention or control, or to a person who may have been exposed to or at risk of spreading a disease or condition.
- 42 CFR Part 2 prohibits these disclosures unless there is an authorization, court order, or the disclosure is done with out revealing patient information.

AODA providers must follow 42 CFR Part 2.





# Court Orders

- HIPAA makes no mention of any standards or procedures that a court must follow when issuing a court order.
- 42 CFR Part 2 has specific requirements.

AODA providers must follow 42 CFR Part 2.

## Disclosure of Abuse

- HIPAA permits disclosure about any individual believed to be a victim of abuse, neglect or domestic violence.
- 42 CFR Part 2 limits the exception to initial reports of child abuse or neglect (no other kinds of abuse or neglect).

AODA providers must follow 42 CFR Part 2, but if a state law compels to report other abuse:

Obtain authorization      Anonymous reporting  
QSO/BA with state agency      Court order



## Right to Access Records

- HIPAA REQUIRES a covered program to give an individual access to his/her own health information (with few exceptions).
- 42 CFR Part 2 gives programs DISCRETION to decide whether to permit patients to view or obtain copies of their records, unless they are governed by a state law that gives right to access.

AODA providers must follow HIPAA.

I'm waiting for the court case on this one...



## Privacy Notice

- HIPAA requires the Privacy Notice to be given at the time of first service.
- 42 CFR Part 2 requires the notice must be given at admission or as soon as a patient is capable of rational communication.

AODA providers must follow HIPAA.

The image features a vibrant blue background with a subtle, radial light effect emanating from the top left. On the left side, a portion of a metallic chain is visible, showing several interlocking links. The chain is rendered in shades of blue and white, suggesting a reflective surface. The overall composition is clean and professional, suitable for a presentation slide.

# Integrating HIPAA and 42 CFR Part 2


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**HAZELDEN**

Corporate Privacy and Confidentiality Policies **2.1 Access to Protected Health Information & Procedures**

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**Purpose**  
This policy defines practices involving right of access to *protected health information (PHI)*.

**Scope**  
This policy applies to all Hazelden owned and managed programs and operations (see [Appendix C](#)) that create, maintain, access, use, or disclose *protected health information (PHI)* as defined by applicable law and regulation.

**Policy**

**Rights Statement**  
A *patient/participant* generally has the right of access to information contained within his/her *designated record set* for the purpose of inspecting and/or copying that information.

Under *HIPAA* this right of access does not apply to:

- ◆ Information compiled in reasonable anticipation of, or for use in, a civil criminal, or administrative action or

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**Example of On-line Privacy & Confidentiality Policy**

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## Request to Access Health Records

**Part A:** (to be completed by requestor)

Date: \_\_\_\_\_

Patient Name: \_\_\_\_\_ DOB: \_\_\_\_\_

Mailing Address: \_\_\_\_\_ City \_\_\_\_\_ State/Country \_\_\_\_\_ Zip \_\_\_\_\_

Phone Number: (\_\_\_\_) \_\_\_\_\_

Specify Information Requested: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Format Requested:  verbal  view  print

Please note: You have the right of access to your protected health information for the purpose of inspecting and or/copying that information. Your right **does not** include the following:

- Research information connected with treatment, as long as you signed the appropriate consent forms
- Information covered by the Privacy Act
- Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding

There may be additional limitations in accordance with applicable state and/or federal law. You will be told the reason for any limitations under state and/or federal law.

**Example of On-line Privacy & Confidentiality Form**



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<b>Chicago Programs</b>	<b>RMIS Code</b>	<b>45 CFR (HIPAA)</b>	<b>42 CFR Part 2</b>	<b>Name of Individual Served</b>	<b>Type of Notice</b>
Day Treatment	11405	yes	yes	Patient	Privacy Notice
Outpatient - Day	11005	yes	yes	Patient	Privacy Notice
Outpatient - Evening	11505	yes	yes	Patient	Privacy Notice
Continuing Care Groups	10805	yes	yes	Patient	Privacy Notice
Assessment - Non Res	10005	yes	yes	Patient	Privacy Notice
Chicago Evaluation	11605	yes	yes	Patient	Privacy Notice
Family Program - Non Res	11305	no	no	Attendee	Notice to Attendees & Registrants on Privacy
Sober Residence	10501	Yes	Yes	Patient	Privacy Notice

<b>Fellowship Club-St. Paul Programs</b>	<b>RMIS Code</b>	<b>45 CFR (HIPAA)</b>	<b>42 CFR Part 2</b>	<b>Name of Individual Served</b>	<b>Type of Notice</b>
Outpatient	11003	Yes	Yes	Patient	Privacy Notice
Intermediate Care	10903	yes	yes	Patient	Privacy Notice
Mental Health (* with CD diagnosis)	11103	yes	yes	Patient	Privacy Notice
Mental Health (* no CD diagnosis)	11103	Yes	No	Client	Privacy Notice
Assessment - Non Res	11603	yes	yes	Patient	Privacy Notice
Family/Cpls Therapy	11203	yes	No	Client	Privacy Notice

## Program/Service Classification Grid

Other: (Specify) \_\_\_\_\_  
  Follow Up:  To locate me  Progress update

**Purpose for the Disclosure: Is to assist program staff with treatment and recovery unless checked below:**

Legal (Specify case type and client/attorney relationship): \_\_\_\_\_  
 Application for Insurance  Insurance benefits ID/claim review  Crisis Contact  Other \_\_\_\_\_

**PATIENT RESTRICTIONS ON METHODS FOR DISCLOSURE:**  
 I understand that communication of the items to be obtained or disclosed can occur:  
 Verbally  In-person conference  Written questionnaire  Mailed or faxed medical record/correspondence

**I understand that:**

- My health information is protected by federal regulations (Alcohol and Drug Abuse Patient Records, 42 CFR Part 2; and/or HIPAA, 45 CFR) and state privacy laws, and disclosure is allowed only with my authorization except in limited circumstances described in Hazelden's Privacy Notice. I understand that I have a right to inspect and receive a copy of my treatment records that may be disclosed to others, as provided under applicable state and federal laws.
- I can revoke this authorization at any time except to the extent that action has been taken in reliance on it. Hazelden's Privacy Notice outlines the procedure for revocation. This authorization will expire in one year from the date I sign it unless I request an earlier expiration in writing.
- For disclosures other than for treatment, payment and health care operations purposes, treatment may not be conditioned on my agreement to sign an authorization (unless I am receiving care solely to create protected health information for disclosure to a third party) [45 CFR § 164.508(b)(4)(iii)].
- Communications resulting from this authorization will reveal that I received services at Hazelden.
- Federal confidentiality regulations (42 CFR Part 2) prohibit redisclosure of information from alcohol and drug abuse patient records. However, HIPAA requires Hazelden to notify me of the potential that information disclosed pursuant to this authorization might be redisclosed by the recipient and is no longer protected by the HIPAA rules.
- This authorization may be used by Hazelden owned or managed programs upon transfer of my care to them.

**Client Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
**Witness Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

14 Apr 2003; July 2003; Oct. 2004

## Section of Authorization to Disclose Information

# Resources

- To order “Confidentiality and Communication: A Guide to the Federal Drug & Alcohol Confidentiality Law and HIPAA” by The Legal Action Center:

[http://www.lac.org/Merchant2/merchant.mvc?Screen=CTGY&Category\\_Code=P](http://www.lac.org/Merchant2/merchant.mvc?Screen=CTGY&Category_Code=P)

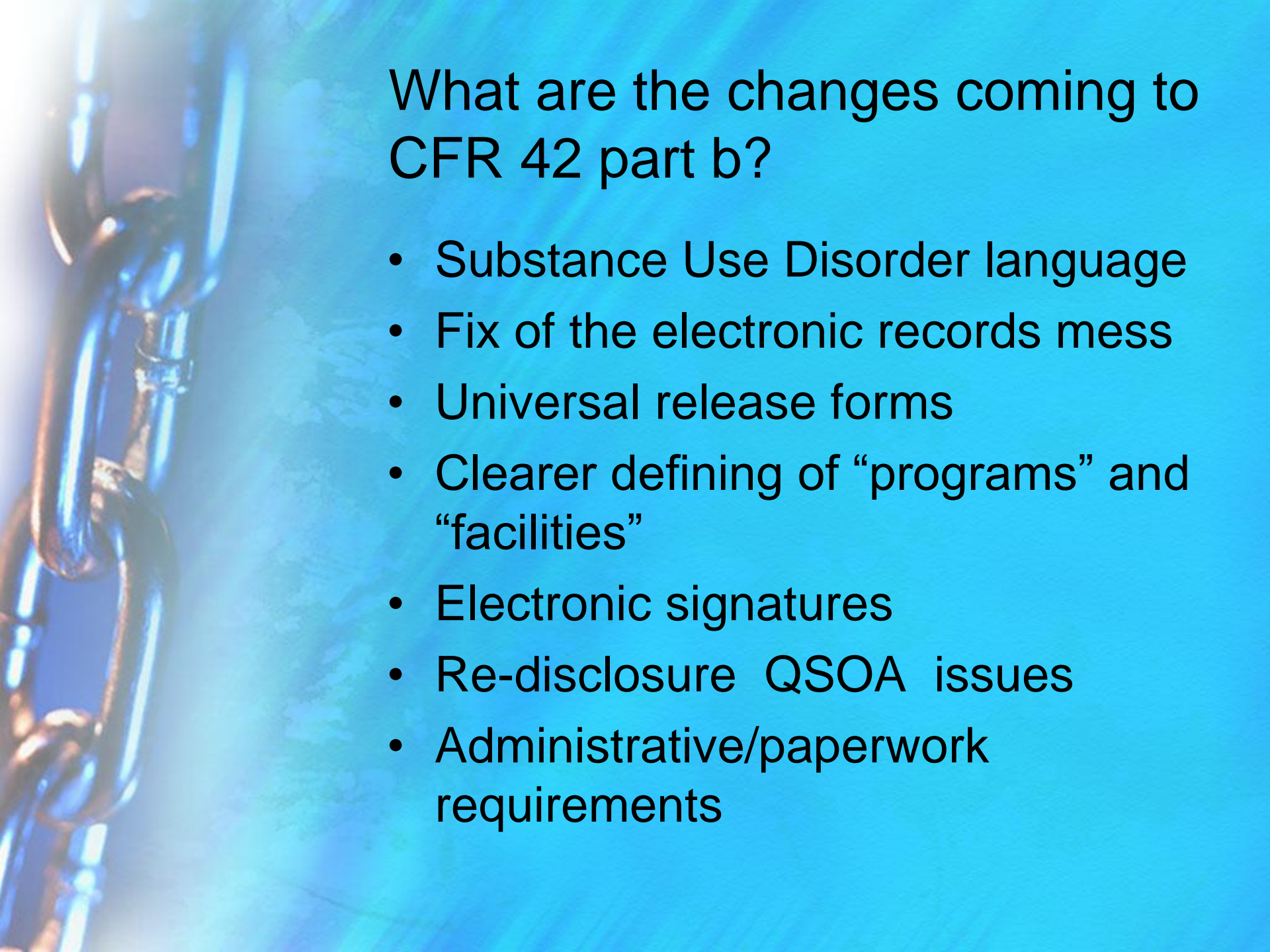
- **42 CFR Part 2 Regulation**

<http://cfr.law.cornell.edu/cfr/cfr.php?title=42&type=part&value=2>

- **HIPAA and 42 CFR Part 2 Crosswalk**

<http://www.tcada.state.tx.us/HIPAA/Crosswalk.pdf>

- [jwesloh@hazelden.org](mailto:jwesloh@hazelden.org)



# What are the changes coming to CFR 42 part b?

- Substance Use Disorder language
- Fix of the electronic records mess
- Universal release forms
- Clearer defining of “programs” and “facilities”
- Electronic signatures
- Re-disclosure QSOA issues
- Administrative/paperwork requirements



