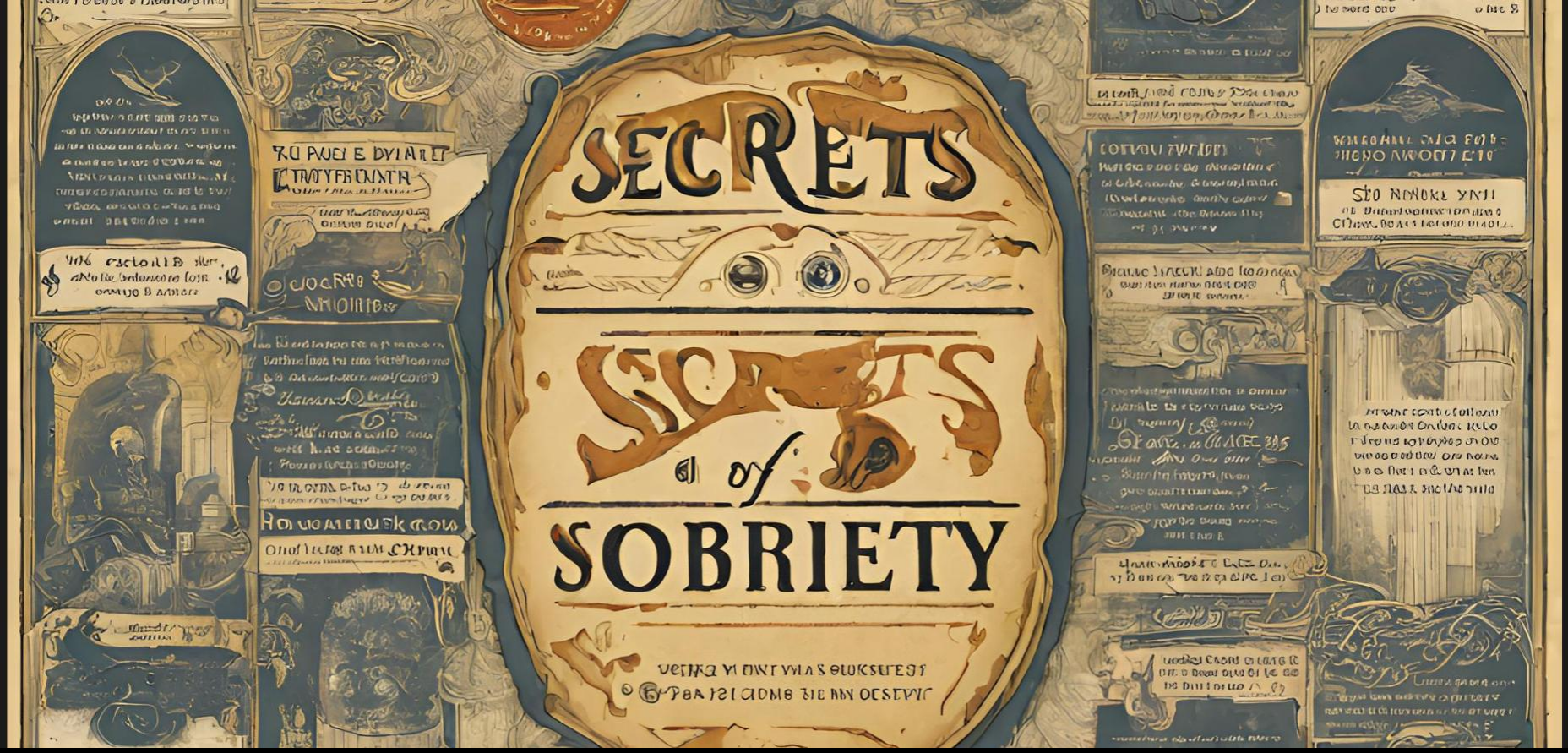

The Secrets of Sobriety: Ethics of Confidentiality

Ken Martz, Psy.D.

Licensed Psychologist

Overview

- Background context
- Confidentiality: What's the big deal?
- Confidentiality laws
- Recent changes
- Other considerations
- Recommendations/Next steps

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Why Confidentiality?

- To increase the likelihood of someone seeking care by protecting clients from stigma
- To create a safe environment for self exploration
- To minimize provider risk of liability
- So that a client is not made more vulnerable by seeking treatment than not seeking treatment

Why Confidentiality?

To increase the likelihood of someone seeking care by protecting clients from stigma

Fear of stigma is a primary reason why individuals do not seek treatment.

- Fear of what the neighbors/friends will think
- Fear of effects on employment

Examples:

- A young man whose employer refused to allow him to return to work after he successfully completed treatment for alcoholism, saying that he was a safety threat even though his physician had cleared him to return to work with no restrictions.
- A young mother who was being threatened with eviction from a shelter because she was taking prescribed methadone for her opioid addiction (another young mother had already been evicted from the same facility for the same reason, and had become homeless; neither woman was using illegal substances);
- A posting after a famous individuals death: "Overdose is nature's way of taking out the trash."

Why Confidentiality?

- So that a client is not made more vulnerable by seeking treatment than not seeking treatment

- Harms can be associated with breaches of confidentiality.
  - 29 year old mother who lost her 3 year old in a child custody case because, after the unlawful disclosure of her addiction treatment records, she was deemed unfit by a judge and her child was put in the custody of child protective services.
  - Young lawyer who learned after two weeks at her new job that she would be terminated because the fact she was on methadone came up in a background check.

- Cases where individuals were not able to get various types of insurance because their treatment records had been re-disclosed. We learned lack of access to insurance often changed the trajectory of individuals' lives:
  - A small businesswoman had to give up her dream of owning her own business because she could not get a health insurance policy for her employees; and
  - A husband with four children who was in a high risk fisheries job was unable to get life insurance to protect his wife and children.

Why Confidentiality?

- To create a safe environment for self-exploration

- Treatment involves sharing of our most vulnerable inner shame, secrets and trauma.
- Fear of consequences can impede exploration of these issues.

- Consider:
  - A young woman shares about the rape from a stranger she experienced as a child and never told anyone or the therapist until 2 months into treatment when she began to feel safe, due to feelings of shame that she believes she caused it.
  - A client in early recovery goes to a family Thanksgiving get together. There is wine at dinner and the client feels the urge to drink, but does not. The individual hides this from his therapist for fear of "looking bad"

Why Confidentiality?

- To minimize provider risk of liability
- Programs may be sued for violations of confidentiality
- Program/professional license are subject to sanctions
- Under federal law, fines included are:
  - § 2.4 Criminal penalty for violation.
  - Any person who violates any provision of those statutes or these regulations shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

Examples

The US Department of Health and Human Services Office for Civil Rights has received over 100,000 complaints of HIPAA violations, many resulting in civil and criminal prosecution.

Examples of HIPAA violations and breaches include:
•Hospital staff disclosed HIV testing concerning a patient in the waiting room, staff were required to take regular HIPAA training, and computer monitors were repositioned.
•An office manager accidentally faxed confidential medical records to an employer rather than a urologist's office, resulting in a stern warning letter and a mandate for regular HIPAA training for all employees.
•Private practice lost an unencrypted flash drive containing protected health information, was fined $150,000, and was required to install a corrective action plan.
•Walgreen's pharmacist violated HIPAA and shared confidential information concerning a customer who dated her husband resulted in a $1.4 million HIPAA award.
•Six doctors and 13 employees were fired at UCLA for viewing Britney Spears' medical records when they had no legitimate reason to do so.
•Cardiac monitor vendor fined $2.5 million when a laptop containing hundreds of patient medical records was stolen from a car.
•Washington State Medical Center employee fired for improperly accessing over 600 confidential patient health records.
•Tricare Management of Virginia exposed confidential data of nearly 5 million people.

https://www.ncbi.nlm.nih.gov/books/NBK500019/

6/15/22 Baptist Medical Center in Texas reported a breach affecting 1,608,549 individuals
7/30/23 HCA Healthcare in Tennessee reported a breach affecting 11,270,000 individuals

Historical Perspective

Federal Perspectives- Congress

- "The conferees wish to stress their conviction that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. **Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem to be overcome."** (*U.S. Code Congress & Admin. News*, 1972)

Federal Perspectives: Supreme Court

- "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult, if not impossible, for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication...[While] there may be exceptions to this general rule, there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. **The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well**. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment. (*Taylor v. US, 1955*)
- "In regard to mental patients, the policy behind such a statute is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. **"The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition…It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world** (*Taylor v. US, 1955*)
- "**Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears**. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." (Jaffee v. Redmond, 1996)

Relevant Laws

Pertinent Laws and Regulations

Federal:

- **42 CFR Part 2 Subparts A-E (Federal Regulations)**
- **45 CFR Subtitle A Chapter C (HIPAA)**
- 42 U.S.C. 290ee-3 (Federal Drug Law)
- 42 U.S.C. 290dd-3 (Federal Alcohol Law)

State

Ethics

42CFR Part 2

- All information identifying someone as having substance use disorder is confidential
  - Identifies 9 exceptions.
  - Within exceptions, it is to be limited to that which is required.
  - **Once disclosed, it can not be redisclosed.**
    - **Key element: The individual knows who has been given their information.**

Exceptions to Confidentiality General Rule

- **Release of Information**
- **Good Cause Court Order**

- Audit/Evaluation
- Medical Emergency
- Child Abuse/Neglect
- Crime on Premises
- Qualified Service Organization Agreement

Examples of QSO Services

- **Data processing:** Storing, processing, or analyzing patient information.
- **Billing and collections:** Handling financial transactions related to treatment.
- **Laboratory analysis:** Performing tests on samples from patients.
- **Legal or accounting services:** Providing support in these areas.
- **Medical staffing:** Providing temporary or permanent staff to the program.

Confidentiality

- Facility bears the responsibility for the client's welfare….only release information that is a benefit to the client

Sec. 2.13 (a) Confidentiality Restrictions

- "Any disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure."

Redisclosure

- Excerpts from the Federal Law relating to the prohibition on re-disclosure

Notice to accompany disclosure. Each disclosure made with the patient's written consent must be accompanied by the following written statement:

"This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR, part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by written consent of the person to whom it pertains or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient." CFR 42 Section 2.32

Information Shared

- HIPAA (Standard 4.04a)
  - According to HIPAA, when disclosing or requesting PHI, a covered entity must make reasonable efforts to limit the information to **the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.**

Information Shared

- Implications of HIPAA (Standard 4.04b)
  - Under HIPAA, psychologists working in independent practice, group practices, or systems of health care are permitted to share PHI internally.
    - no restrictions when disclosure is with other health professionals for the purposes of providing treatment
    - disclosures to nontreatment personnel restricted to minimum amount necessary to perform their duties

Information Shared

- Disclosures Mandated by Law
  - The standard permits psychologists to disclose confidential information without consent when the disclosure is mandated by law (e.g. child abuse, elder abuse).
  - "Duty to Protect Laws"
    - in response to the landmark case Tarasoff v. Regents of the University of California (1976)
    - typically require certain classes of health care providers to inform a third party of the prospect of being harmed by a client/patient
    - State laws differ in psychologists' obligations

Applicability

- Consult your local lawyers to confirm the applicability of your federal, state, and local regulations.
- In addition to federal confidentiality laws, there can be state law on mental health, substance use disorder, and HIV related confidentiality.

Applicability- 42CFR

§ 2.12 Applicability.
(a) ***General*** —
(1) ***Restrictions on disclosure.*** The restrictions on disclosure in the regulations in this part apply to any **records which:**
(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and
(ii) Contain drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or contain alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.
(2) ***Restriction on use.*** The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

Applicability- 42CFR

(b) ***Federal assistance.*** A program is considered to be federally assisted if:
(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency of the United States (but see paragraphs (c)(1) and (2) of this section relating to the Department of Veterans Affairs and the Armed Forces);
(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:
(i) Participating provider in the Medicare program;
(ii) Authorization to conduct maintenance treatment or withdrawal management; or
(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of substance use disorders;
(3) It is supported by funds provided by any department or agency of the United States by being:
(i) A recipient of federal financial assistance in any form, including financial assistance which does not directly pay for the substance use disorder diagnosis, treatment, or referral for treatment; or
(ii) Conducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program; or
(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

Applicability- HIPPA
Health Insurance Portability and Accountability Act

SEC. 1172. (a) APPLICABILITY.--Any standard adopted under this part shall apply, in whole or in part, to the following persons:
"(1) A health plan.
"(2) A health care clearinghouse.
"(3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1173(a)(1).

"**SEC. 1173.** (a) STANDARDS TO ENABLE ELECTRONIC EXCHANGE.--
"(1) IN GENERAL.--The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically, that are appropriate for--
"(A) the financial and administrative transactions described in paragraph (2); and
"(B) other financial and administrative transactions determined appropriate by the Secretary, consistent with the goals of improving the operation of the health care system and reducing administrative costs.
"(2) TRANSACTIONS.--The transactions referred to in paragraph (1)(A) are transactions with respect to the following:
"(A) Health claims or equivalent encounter information.
"(B) Health claims attachments.
"(C) Enrollment and disenrollment in a health plan.
"(D) Eligibility for a health plan.
"(E) Health care payment and remittance advice.
"(F) Health plan premium payments.
"(G) First report of injury.
"(H) Health claim status.
"(I) Referral certification and authorization.

Applicability

- Consult your local lawyers to confirm the applicability of your federal, state, and local regulations.
- In addition to federal confidentiality laws, there can be state law on mental health, substance use disorder, and HIV related confidentiality.

Why Confidentiality?

JANUARY 2, 2018

ADDITIONAL DISCLOSURES OF PATIENT IDENTIFYING INFORMATION, WITH PATIENT CONSENT, FOR PAYMENT AND HEALTHCARE OPERATIONS SUCH AS CLAIMS MANAGEMENT, QUALITY ASSESSMENT, AND PATIENT SAFETY ACTIVITIES.

AUGUST 14, 2020

FINAL RULE REMOVED PROTECTION ON VERBAL COMMUNICATIONS AND OTHER CHANGES TO DISCLOSURES

MARCH 25, 2020

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT

(CARES ACT)

ALIGN 42CFR TO HIPPA

2024 FINAL RULE

2024 Final Rule

Effective date: This final rule is effective on April 16, 2024.

Compliance date: Persons subject to this regulation must comply with the applicable requirements of this final rule by February 16, 2026.

Final Rule: 160 pages

2024 Final Rule

- **Major Changes in the New Part 2 Rule**
- **Patient Consent**
  - Allows a single consent for all future uses and disclosures for treatment, payment, and health care operations.
  - Allows HIPAA covered entities and business associates that receive records under this consent to redisclose the records in accordance with the HIPAA regulations.[1]
- **Other Uses and Disclosures**
  - Permits disclosure of records without patient consent to public health authorities, provided that the records disclosed are de-identified according to the standards established in the HIPAA Privacy Rule.
  - Restricts the use of records and testimony in civil, criminal, administrative, and legislative proceedings against patients, absent patient consent or a court order.
- **Segregation of Part 2 Data**: Adds an express statement that segregating or segmenting Part 2 records is not required.

2024 Final Rule

- **Major Changes in the New Part 2 Rule**
- **SUD Counseling Notes**: Creates a new definition for an SUD clinician's notes analyzing the conversation in an SUD counseling session that the clinician voluntarily maintains separately from the rest of the patient's SUD treatment and medical record and that require specific consent from an individual and cannot be used or disclosed based on a broad Treatment Payment and Operations consent. This is analogous to protections in HIPAA for psychotherapy notes.[4]
- **Patient Consent:**
  - Prohibits combining patient consent for the use and disclosure of records for civil, criminal, administrative, or legislative proceedings with patient consent for any other use or disclosure.
  - Requires a separate patient consent for the use and disclosure of SUD counseling notes.
  - Requires that each disclosure made with patient consent include a copy of the consent or a clear explanation of the scope of the consent.

2024 Final Rule

- **Major Changes in the New Part 2 Rule**
- **What comes next?**
- Persons subject to this regulation must comply with the applicable requirements of this final rule two years after the date of its publication in the *Federal Register*. The Department will conduct outreach and develop guidance on how to comply with the new requirements, such as filing breach reports when required.
- OCR plans to finalize changes to the HIPAA Notice of Privacy Practices (NPP) to address uses and disclosures of protected health information that is also protected by Part 2 along with other changes to the NPP requirements, in an upcoming final rule modifying the HIPAA Privacy Rule.
- HHS planning to implement in separate rulemaking the CARES Act antidiscrimination provisions that prohibit the use of patients' Part 2 records against them.

- **https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/fact-sheet-42-cfr-part-2-final-rule/index.html**

Ethics

Consider Standards of Care

Consider How Professionals Handle Situations

Consider Liability

- Dereliction
- Duty
- Directly
- Damages

Ethics- NAADAC Code of Ethics

II-1 Confidentiality

Addiction professionals shall understand that confidentiality and anonymity are foundational to addiction treatment, and shall accept the duty to protect the identity and privacy of each client as a primary obligation. Providers shall communicate the parameters of confidentiality in a culturally-sensitive manner.

II-5 Disclosure

Addiction professionals shall not disclose confidential information regarding the identity of a client, nor information that could potentially reveal the identity of a client, without written consent by the client. In situations where the disclosure is mandated or permitted by state and federal law, verbal authorization shall not be sufficient, except in emergencies.

II-10 Essential Only

Addiction professionals shall release only essential information when circumstances require the disclosure of confidential information.

Telecommunications

Attend trainings on technology and data security

- Phishing
- Passwords

Consider if my technology is HIPPA compliant

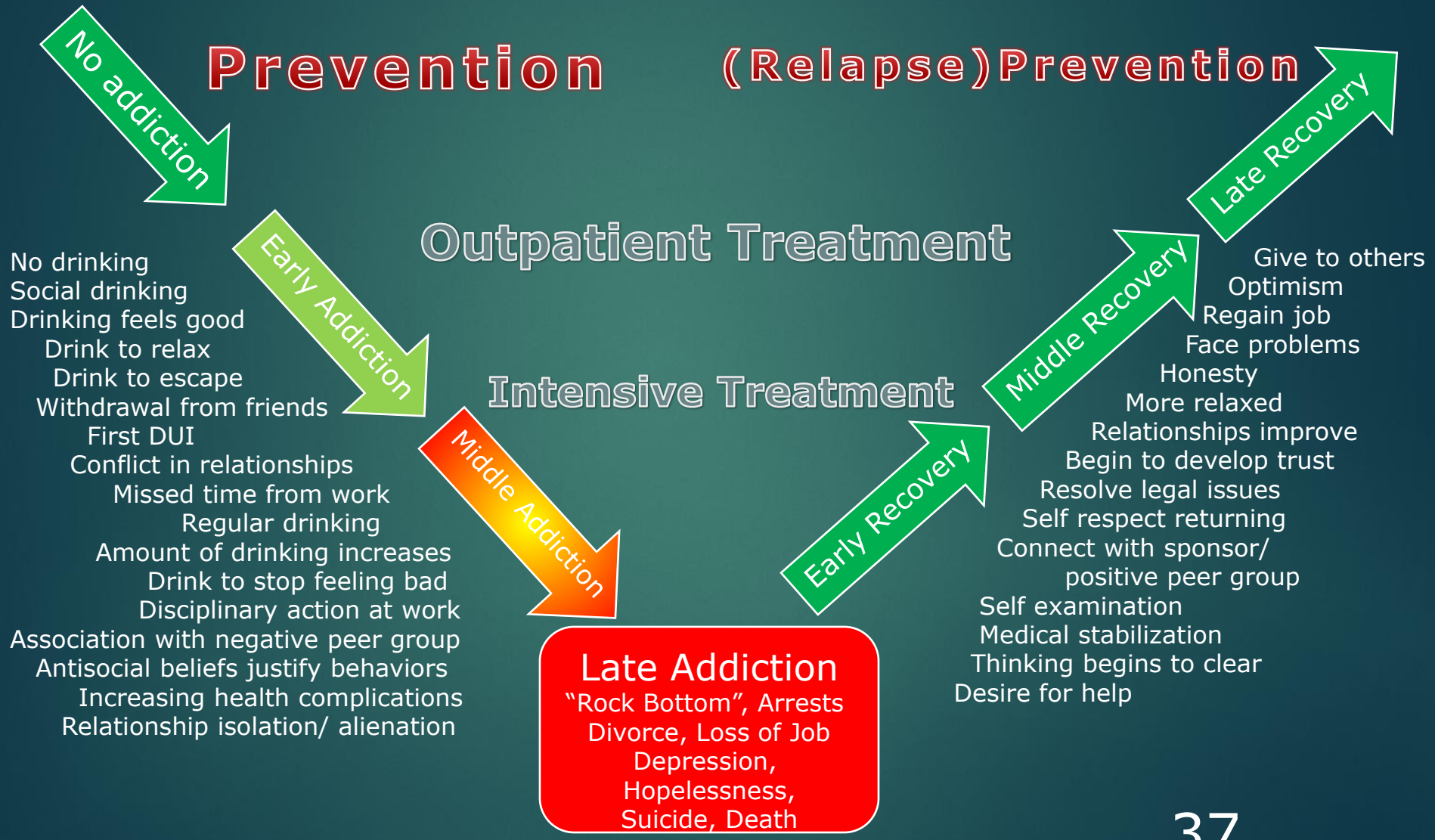
- Consider your video/audio technology
- Email
- Cell Phone

Consider other ethical privacy issues with telecommunications

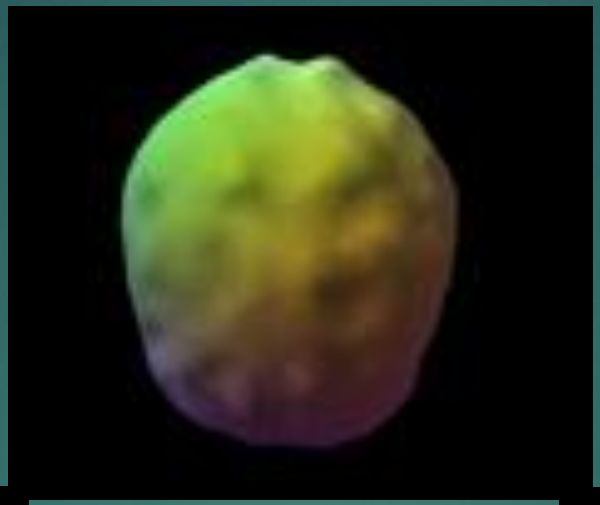
- Eg can the individual speak freely

Context of Informed Consent

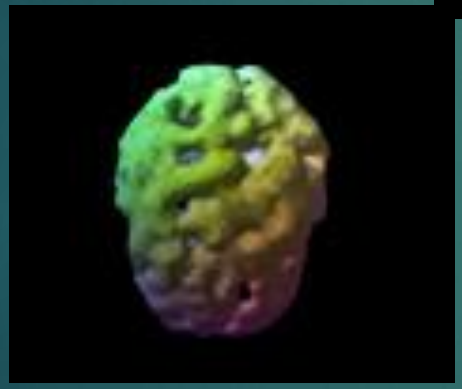
Progression of a Disease and Recovery



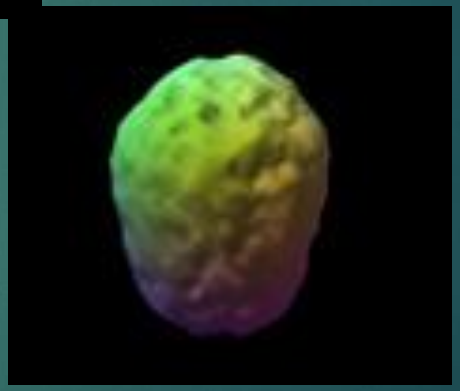
Which Brain do You Want?



Normal healthy view.
Top down surface view.
Full, symmetrical activity



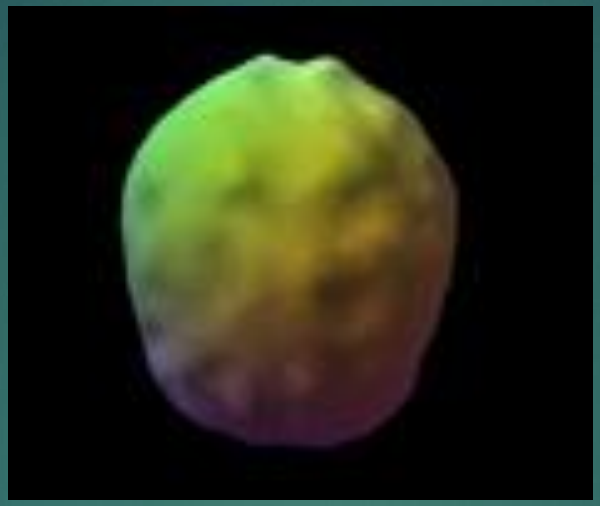
During substance use



One year drug and alcohol free

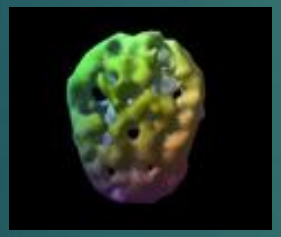
Notice the overall holes and shriveled appearance during use and marked improvement with abstinence.

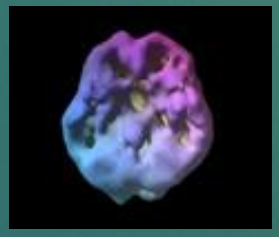
Which Brain do You Want?

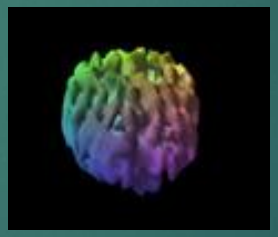


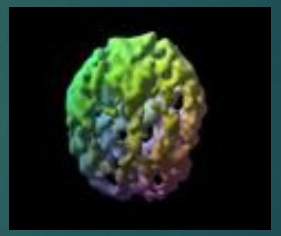
Normal healthy view.
Top down surface view.
Full, symmetrical activity

Effects of other substances:









Long term alcohol use	57 y/o 30 years marijuana use (underside view)	39 y/o – 25 years frequent heroin use	40 y/o, 7 years on methadone. Heroin 10 years prior.

Informed Consent

- In light of brain development and recovery, what are implications for the capacity to consent to release:
  - While intoxicated in the emergency department?
  - While experiencing acute withdrawal management?
  - At one month in recovery?
  - At five years in recovery?
  - What are the implications for readability?

What Can I Do? Simple Steps

1. Check local Regulations on confidentiality
2. Attend ongoing training on confidentiality
3. Learn communication skills within the confidentiality laws
4. Share based on permitted disclosures
5. Share the minimum information necessary for the purpose

Contact Information

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THANKS!!!