ETHICS: Data Privacy

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- **Overview of Data Privacy and Practices Classification, sources and types of data**
- **Chapter 13; HIPAA and Chemical Dependency Data**
- **Data-sharing for multi-disciplinary teams**
- **Discovery; Cross-over CHIPS and Criminal**
- **Inadvertent Release and Inadvertent Receipt**

2

Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation.

MN Rules of Professional Conduct, Rule 1:1

"For the things we have to learn before we can do them, we learn by doing them."

— Aristotle, The Nicomachean Ethics

3

Overview of Data Privacy & Practices

4

Overview of Data Privacy & Practices

Data Privacy regulations strive to balance:

- The public's right to know about their government;
- The government's need to have/use data to do its work;
- Individual privacy rights.

5

Overview of Data Privacy & Practices

- Data Privacy is the relationship between technology and the legal right to, or public expectation of, privacy in the collection and sharing of data.

6

Overview of Data Privacy & Practices

HIPAA	FOIA
FCRA	DPPA
COPPA/CIPA	TRA
FERPA	FTA
FCRA	PPA
FISMA	MMRA

WE COULD GO ON….

7

Minnesota Government Data Practices Act

The Minnesota Government Data Practices Act (a/k/a Ch. 13) was enacted in 1979 to assist with the classification and regulation of government data.

8

Minnesota Government Data Practices Act

Chapter 13:

- Defines what is government data.
- Presumes government data are public.
- Classifies certain data as not public.
- Provides rights for the public and data subjects.
- Requires that data on individuals are accurate, complete, current, and secure.
- Includes penalties, both civil and criminal, for breaches.

9

Minnesota Government Data Practices Act

"Government data" means all data collected, created, received, maintained, or disseminated by any government entity regardless of its physical form, storage media, or conditions of use.

Ch. 13.02, subd. 7

10

Minnesota Government Data Practices Act

"Government data" is government data, no matter where it is stored.

11

Minnesota Government Data Practices Act

There are two types of data under Ch. 13:

- **Data on individuals**: an individual can be identified as the subject of the data (13.02, subd. 5)
- **Data NOT on individuals**: data that are not about individuals, e.g., data on businesses, organizations, or intangible objects (13.02, subd. 4)

12

Minnesota Government Data Practices Act

What is **PUBLIC** data?

- "Public data" are anything not classified by state statute, federal law, or temporary classification as either private or confidential. Accessible to anyone for any reason, the county's "responsible authority" is required to establish procedures to facilitate access to public data.

13

Minnesota Government Data Practices Act

What is **PRIVATE** data?

- Private data is data on individuals that is expressly classified as private by state statute, federal law, or temporary classification. Private data is not accessible to the public, but may be accessed by:
  - The subject of the data.
  - Individuals within the county (county officials or employees) whose work assignments reasonably require access.
  - Outside entities or agencies that are authorized by state or federal law to access that specific data.
  - Entities or individuals given access by express written direction of the data subject.

14

Minnesota Government Data Practices Act

What is **CONFIDENTIAL** data?

Confidential data is data on individuals that is expressly classified as confidential by state statute, federal law, or temporary classification.

- Access is limited to:

- Individuals within the county whose work assignments reasonably require access.
- Outside entities and agencies authorized by state or federal law to access that specific data.

15

Minnesota Government Data Practices Act

What is **NONPUBLIC** data?

- Nonpublic data is ONLY accessible to the subject of the data (if there is one, but not accessible to the public).

16

Minnesota Government Data Practices Act

What is **PROTECTED NONPUBLIC** data?

- Protected nonpublic data is not accessible by EITHER the subject of the data or the public.

17

Welfare Data
Minn. Stat. 13.46

- Substantial portions of the data collected, created, received, maintained and disseminated in conjunction with a Child Protection matter, will be "Welfare Data"

18

Welfare Data
Minn. Stat. 13.46

- Data on individuals'' collected, maintained, used, or disseminated by the welfare system are private data on individuals and shall not be disclosed except pursuant to informed consent, a court order or for a variety of other reasons. [Statute lists 33 exceptions that allow disclosure of data], including, but not limited to:
  - To health care provider to coordinate services;
  - To an investigator as to criminal or civil or administrative proceeding related to the administration of the program;
  - In case of emergency to protect health or safety.

19

Welfare Data
Minn. Stat. 13.46

- Welfare System is broadly defined and includes:
  - The Department of Human Services
  - Local social services agencies
  - County public health agencies
  - The public authority responsible for child support enforcement
  - Persons, agencies, institutions, organizations and other entities under contract to any of the above agencies to the extent specified in the contract

Minn. Stat. 13.46, Subd. 1

20

Reporting of Maltreatment of Minors
MN Stat. 626.556

The public policy of the Reporting of Maltreatment of Minor's Act is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or neglect

21

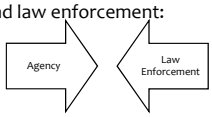
Reporting of Maltreatment of Minors

- The agency and law enforcement must collaborate to comply with mandated duties:
  - Cross Report Minn. Stat. 626.556, Subd. 10(a)
  - Collaborate to coordinate the planning and execution of their respective investigation and assessments Minn. Stat. 626.556, Subd. 10(b)(5)

22

Reporting of Maltreatment of Minors

- Information must be shared between the agency and law enforcement:



  - Each must immediately report allegations of child maltreatment to the other entity.

    Minn. Stat. 626.556, Subd. 10 (a)
  - If report involves possible criminal conduct, law enforcement and agency shall coordinate the planning an execution of respective investigations

    Minn. Stat. 626.556, Subd. 10 (b) (5)

23

Reporting of Maltreatment of Minors

- Cross Report to Law Enforcement and vice versa
  - Failure of agency to report to LE may result in disciplinary action
  - Failure of law enforcement to report to agency may result in disciplinary action

24

Reporting of Maltreatment of Minors

- Identity of Reporters – Confidential
  - Protect the rights of the person making the report
  - Intentional disclosure of reporters identity prior to completion of investigation is a misdemeanor

25

Reporting of Maltreatment of Minors Act

- Both law enforcement and agency shall prepare a separate report of the results of the investigation or assessment.
  Minn. Stat. 626.556, Subd. 10
- Agency shall provide relevant private data to the mandated reporter.
  Minn. Stat. 626.556, Subd. 10j (a)
- Agency may provide data to other mandated reporters with ongoing responsibility for the health, education or welfare of the child. *Id.*

26

HIPAA
45 CFR §160 - 164

- The Health Insurance Portability and Accountability Act (HIPAA) protects the privacy of individually identified health information (PHI) that is held by covered entities and their business associates (BA).

27

HIPAA

- HIPAA has both a Privacy and a Security function and each covered entity is required to have designated official for both functions.

28

HIPAA

- Who is a COVERED ENTITY under HIPAA?
  - County departments such as public health, social services, jail/corrections and administration/human resources.
  - The County may be considered a hybrid for HIPAA purposes as a result of its organizational structure – having both covered and not-covered operations.

29

HIPAA

HIPAA applies to the county's business associates that have access to PHI in carrying out any covered functions on our behalf.

30

HIPAA

Covered entities are required to provide a written privacy notice whenever collecting PHI that provides:

- Permitted uses and disclosures of PHI;
- List of the individual's rights;
- List of the County's duties to protect PHI;
- Notice of use for treatment reminders and to offer alternative services; and
- Contact information for complaints.

31

HIPAA

Covered Entities may ONLY use or disseminate PHI when authorized by the HIPAA Privacy Rule OR the individual gives consent in writing.

32

HIPAA

- A KEY ASPECT of the Privacy Rule is the principle of "minimum necessary" use and disclosure.

A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.

33

HIPAA

What happens when an IMPERMISSIBLE use or disclosure of PHI occurs?

34

RESPECT FOR RIGHTS OF THIRD PERSONS -

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

MN Rules of Professional Conduct, Rule 4.4(b)

35

HIPAA

Be familiar with the Minnesota Health Records Act (Minn. Stat. § 144.291) which:

- Protects privacy of health records by provider or received from a provider.
- Includes a few NARROW exceptions to the general consent requirement; and
- Allows for disclosure of records by mental health provider to law enforcement in LIMITED circumstances.

36

Chemical Dependency Data

- Federal regulations 42 CFR Part 2 ("Part 2") provide special protections to ensure privacy related to Substance Use Disorders and treatment data.
- Enacted to encourage individuals with SUDs to enter and remain in treatment

37

Chemical Dependency Data

Part 2 generally prohibits treatment programs and certain third-party recipients from disclosing patient identities or records without patient consent, except in the following circumstances:

- Medical emergencies, 42 CFR § 2.51
- Child abuse or neglect reports required by state law, 42 CFR § 2.12(c)(6)
- Reporting a patient's crime on program premises or against program personnel, 42 CFR § 2.12(c)(5)
- Qualified audit or evaluation of the program, 42 CFR § 2.53
- Research requests, 42 CFR § 2.52
- Qualified Service Organization Agreements, 42 CFR § 2.12(c)(4)
- Court orders authorizing disclosure and use of the patient records, 42 CFR §§ 2.61-2.67

38

Chemical Dependency Data

Each disclosure made with the patient's written consent must be accompanied by one of the following written statements:

(1) 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 information in this record that identifies 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 unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed 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 (see §2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§2.12(c)(5) and 2.65; or

(2) 42 CFR part 2 prohibits unauthorized disclosure of these records.

39

Chemical Dependency Data

Part 2 recognizes the sensitivity of SUD patient records by requiring a special court order before turning over patient records in response to a subpoena, search warrant, or law enforcement request. 42 USC § 290dd-2; 42 CFR §§ 2.61-2.67.

Sample forms are available from the Legal Action Center to help programs and courts comply with the Part 2-specific court order requirements, including:

- Sample letter in response to a subpoena – civil cases
- Sample letter in response to a subpoena – criminal cases
- Sample court order
- Sample standing court order

https://lac.org/addiction-confidentiality-42-cfr-part-2-important/

40

Chemical Dependency Data

What is the difference between Part 2 and HIPAA?

- Both Part 2 and HIPAA protect patient privacy by regulating the way that patient information can be shared and disclosed. HIPAA applies to many types of patient information, not just SUD information, and generally is less protective of patient privacy than Part 2.

41

Chemical Dependency Data

What is the difference between Part 2 and HIPAA?

- One of the most important differences between Part 2 and HIPAA is the privacy protections for patient records in criminal and civil legal proceedings. Part 2 requires a specific court order for the disclosure of Part 2-protected information in response to a subpoena, search warrant, or law enforcement request.

42

Chemical Dependency Data

What is the difference between Part 2 and HIPAA?

- HIPAA also permits disclosures *without patient consent* for "treatment, payment, or healthcare operations." Part 2 requires patient consent authorizing disclosure of SUD records for treatment, payment, or healthcare operations. 42 CFR § 2.33.

43

Multidisciplinary Team

- A county shall establish a Multidisciplinary Team;
- Who? Team "May include but not be limited to the director of the local welfare agency or designees, the county attorney or designees, the county sheriff or designees, representatives of health and education, representatives of mental health or other appropriate human services or community-based agencies and parent groups."

Minn. Stat. 626.558

44

Multidisciplinary Team

- Team Duties
- Generally - A multidisciplinary child protection team may provide public and professional education, develop resources for prevention, intervention, and treatment, and provide case consultation.
- "Case Consultation" means a case review process in which recommendations are made concerning services to be provided to the identified children and family

45

Multidisciplinary Team

- Information Sharing
- The Agency may make available to the case consultation committee, all records collected and maintained by the agency under section 626.556 (Maltreatment Reporting Act) and in connection with case consultation.

46

Multidisciplinary Team

- A member may share information acquired in the member's professional capacity with the committee to assist in case consultation
- All members must annually sign a data-sharing agreement approved by the Commissioner of Human Services, assuring compliance with Chapter 13. Minn. Stat. 626.558, subd 3

MULTI-DISCIPLINARY ADULT PROTECTION TEAM
AGREEMENT RELATING TO
NOT PUBLIC, PRIVATE AND CONFIDENTIAL DATA

Data Sharing Agreement

47

Multidisciplinary Team

- All data acquired by the case consultation committee or subcommittee in exercising case consultation duties are confidential as defined in 13.02, subd. 3
- All data from the case consultation team shall not be disclosed except to the extent necessary to perform case consultation, and shall not be subject to subpoena or discovery.
- No member shall disclose what transpired in case consultation except to carry out the case consultation plan.

"What happens in case consultation stays in case consultation!"

48

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.01.Disclosure by Petitioner Without Court Order

Upon the request of any party, the petitioner shall without court order make the following disclosures:

(a) **Documents and Tangible Items.** The petitioner shall allow access at any reasonable time to all information, material, and items within the petitioner's possession or control which relate to the case. The petitioner shall permit inspection and copying of any relevant documents, recorded statements, or other tangible items which relate to the case within the possession or control of the petitioner and shall provide any party with the substance of any oral statements which relate to the case. The release of a videotaped statement of a child abuse victim or alleged victim shall be governed by Minnesota Statutes, section 611A.90. The petitioner shall not disclose the name of or any identifying information regarding a reporter of maltreatment except as provided in Minnesota Statutes, section 626.556, subdivision 11.

49

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.01. Disclosure by Petitioner Without Court Order

Upon the request of any party, the petitioner shall without court order make the following disclosures:

(b) **Witnesses.** The petitioner shall disclose to all other parties and the county attorney the names and addresses of the persons intended to be called as witnesses at trial. The county attorney or petitioner shall permit all other parties to inspect and copy such witnesses' written or recorded statements that relate to the case within the petitioner's knowledge.

50

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.01.Disclosure by Petitioner Without Court Order

Upon the request of any party, the petitioner shall without court order make the following disclosures:

(c) **Expert Witnesses.** The petitioner shall disclose to all other parties and the county attorney:

(1) the names and addresses of all persons intended to be called as expert witnesses at trial;

(2) the subject matter about which each expert witness is expected to testify; and

(3) a summary of the grounds for each opinion to be offered

51

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.03.Information Not Discoverable

The following information shall not be discoverable by any party or the county attorney with or without a court order:

(a) documents containing privileged information between an attorney and client, legal research, records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the attorney for a party or other staff of an attorney for a party; and

52

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.03. Information Not Discoverable

The following information shall not be discoverable by any party or the county attorney with or without a court order:

(b) except as otherwise required by this rule, reports, memoranda, or internal documents made by an attorney for a party or staff of an attorney for a party.

53

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.04. Discovery Upon Court Order

Upon written motion of any party or the county attorney, the court may authorize other discovery methods, including, but not limited to, the following:

(a) **Physical and Mental Examinations.**

(b) **Depositions.**

(c) **Reports or Examinations and Tests.**

(i.e., physical or mental examinations, chemical dependency assessments and treatment records, scientific tests)

(d) **Experts.**

(facts known and opinions held)

54

Discovery
MN Rules Juv. Protection, Rule 17

Rule 17.06.Regulation of Discovery

Subd. 1. Continuing Duty to Disclose.
Subd. 2. Protective Orders.
Subd. 3. Timely Discovery.
Subd. 4. Sanctions.
Subd. 5. Failure to Act.

55

EXPEDITING LITIGATION –
A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

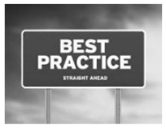
MN Rules of Professional Conduct, Rule 3.2

Comment [1] "Dilatory practices bring the administration of justice into disrepute."

56

Discovery
Tips and Tricks

- Redaction
- Training your agency on the content of chronos



57

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL –
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MN Rules of Professional Conduct, Rule 4.2

58

DEALING WITH UNREPRESENTED PERSON –
In dealing on behalf of a client with a person who is not represented by counsel:
(d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interest of the client.

MN Rules of Professional Conduct, Rule 4.3

59

Criminal Case Crossover:

- Who has access?
- Agency shall make available to the investigating, petitioning, or prosecuting authority any record which contains information relating to any prior incidents of neglect of abuse involving any of the same persons

60

Criminal Case Crossover:

- Others seek access to private or confidential data and the county opposes discovery of non-public data:
- Responding to actions to compel discovery
- When a non-investigating, petitioning or prosecuting authority seeks access:

May bring Action to compel discovery

In determining if data is discoverable, court weighs whether the 'benefit of access' outweighs harm to confidentiality interests

Ch. 13.03, subd. 6

61

Criminal Case Crossover:

State v. Hokanson

- Communicate and coordinate
- Utilize *in camera* review via State v. Paradee

62

REPORTING PROFESSIONAL MISCONDUCT – A lawyer who knows that another lawyer has committed a violation of the Rules that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

MN Rules of Professional Conduct, Rule 8.3

The Minnesota Lawyers Professional Responsibility Board

Office of Lawyers Professional Responsibility

http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx

63

Questions??

64