

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment

# Integrating Substance Abuse Treatment and Vocational Services

*Treatment Improvement Protocol (TIP) Series*

38



# 7 Legal Issues

**A**lcohol and drug counselors providing vocational rehabilitation (VR) services directly or through referral need to be aware of legal and ethical issues in three areas: discrimination against recovering individuals, welfare reform, and confidentiality.

Part I, Discrimination, examines

- The Americans with Disabilities Act (ADA) and the Rehabilitation Act, which protect individuals with disabilities, including individuals with substance abuse disorders (but not those who are currently engaged in illegal drug use and who are not in treatment)
- How those laws apply to individuals recovering from substance abuse disorders when they seek equal access to social service agencies and programs, including vocational and educational training programs
- The Workforce Investment Act of 1998, which reorganized the delivery of federally funded vocational training services, and how the Act might affect individuals in substance abuse treatment
- How the laws protecting individuals with disabilities apply to individuals recovering from substance abuse disorders when they seek equal treatment in the area of employment
- Remedies available to those who suffer discrimination

Part II, Welfare Reform, looks at the new Federal legislation governing public assistance

and how it can affect individuals recovering from substance abuse disorders.

Part III, Confidentiality, outlines the requirements of the Federal confidentiality law and regulations and describes ways in which counselors can communicate with vocational training programs and employers.

## Part I: Discrimination in Employment and Employment-Related Services

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Clients in substance abuse treatment who are entering or are in the job market sometimes encounter employer rejection or discrimination because of a history of substance use. For example, a computer training program might refuse to accept an applicant with a substance abuse disorder history. Or, a business may fire a secretary when it discovers that her request for medical leave was to allow her to enter a treatment program for alcoholism.

The section below outlines the protections Federal law currently affords people with substance abuse disorders, as well as the limitations of those protections and the available legal remedies. It describes how counselors can help clients deal with the issue of discrimination as they enter the job market. Also discussed are the protections offered by State antidiscrimination laws, new legislation that reorganizes federally funded vocational training programs,

and how the Drug-Free Workplace Act may affect the employment of former illegal drug users.

## **Federal Statutes Protecting People With Disabilities**

There are two Federal statutes that protect people with disabilities: sections 503 and 504 of the Federal Rehabilitation Act (29 United States Code [U.S.C.] §791 et seq. (1973)) and the ADA (42 U.S.C. §12101 et seq. (1992)). Together, these laws prohibit discrimination based on disability by private and public entities that provide most of the benefits, programs, and services an individual in treatment for a substance abuse disorder is likely to need in order to enter or reenter the world of work.<sup>1</sup> These statutes outlaw discrimination by a wide range of employers.

### ***Agencies, establishments, programs, and services covered***

Together, the Rehabilitation Act and ADA prohibit discrimination against individuals with disabilities in services, programs, or activities provided by

- State and local governments and their departments, agencies, and other instrumentalities (29 U.S.C. §794(b) and 42 U.S.C. §§12131(1) and 12132).
- Most public accommodations, including hotels and other places of lodging, restaurants and other establishments serving food or drink, places of entertainment (movies, stadiums, etc.), places the public gathers (auditoriums, etc.), sales and other retail establishments, service establishments (banks, beauty shops, funeral parlors, law offices, hospitals, laundries, etc.), public transportation depots, places of public display or collection (museums, libraries, etc.), places of recreation (parks, zoos, etc.), educational establishments, social service centers (day care or senior citizen centers,

homeless shelters and food banks, etc.), and places of exercise and recreation (42 U.S.C. §§12181(7) and 12182).

### ***Employers covered***

The Rehabilitation Act and ADA provide protection against discrimination by a wide range of employers,<sup>2</sup> including

- Employers with Federal contracts worth more than \$10,000
- Employers with 15 or more employees
- Federal, State, and local governments and agencies
- Corporations and other private organizations and individuals receiving Federal financial assistance
- Corporations and other private organizations and individuals providing education, health care, housing, social services, or parks and recreation
- Labor organizations and employment committees

### ***Kinds of protection offered***

Together, the Rehabilitation Act and ADA cover discrimination in an extraordinarily broad range of establishments, services, programs, and employers.

### ***In public accommodations***

The Rehabilitation Act and ADA prohibit discrimination on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” (42 U.S.C. §12182(a)).<sup>3</sup> Public accommodations—including training programs—are prohibited from

- Denying a disabled person the opportunity to participate in or benefit from goods, services, facilities, privileges, advantages, or accommodations
- Affording a disabled person an opportunity to participate that is not equal to that afforded to others

- Providing a disabled person with a separate or different opportunity, service, benefit, etc. (unless it is necessary in order to provide an opportunity, service, etc. that is as effective as that provided to others)
- Imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities
- Failing to make reasonable modifications in policies, practices, or procedures when modifications are necessary to afford disabled individuals equal services, etc. (unless it can be shown that such modifications would fundamentally alter the nature of the services, etc.)

### *Limitations*

The Rehabilitation Act and ADA have two major limitations:

- They protect only an individual with disabilities who is “qualified,” a term that is defined as someone “with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs...” (42 U.S.C. §12131(2)). For example, an organization that sponsors week-long bicycle trips for teenagers would be justified in refusing to enroll a 10-year-old hearing-impaired boy because he is under age. (Of course, if the organization has made previous exceptions, its position would be more doubtful.) On the other hand, a therapeutic treatment community that requires clients to perform work in the facility might be required to make modifications to its program for a substance user who had lost the use of his hands.
- They exclude from protection an individual with a disability who “poses a *direct threat to the health or safety of others*,” defined as “a significant risk to the health or safety of others that cannot be eliminated by a

modification of policies, practices, or procedures, or by the provision of auxiliary aids or services” [italics added].

Organizations running programs or offering services “must make individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk” (28 Code of Federal Regulations [CFR] §36.208; Supplemental Information 28 CFR Part 35, Section-by-Section Analysis, §35.104; 45 CFR §84.3(k)(4)). For example, an organization that sponsors mountain-climbing vacation adventures might be justified in refusing to allow the participation of someone who is blind on the grounds that her inability to see could endanger other novices.

### *In employment*

Employers may not

- Limit or classify a job applicant or employee because of a disability in a way that adversely affects that individual’s opportunities or status
- Use standards or criteria that have the effect of discriminating on the basis of disability or that perpetuate discrimination by others who are subject to the employer’s control
- Use qualification standards, employment tests, or other selection criteria (including medical examinations) that screen out or tend to screen out an individual with a disability, unless the standard, test, or criterion is shown to be job-related for the position in question and is consistent with business necessity
- Deny equal employment or benefits, including hiring, promotion, tenure, layoff,

rates of pay, job assignments and classifications, leaves of absence, sick leave, fringe benefits, selection and financial support for training, or employer-sponsored activities

- Deny equal employment or benefits because of the known disability of an individual with whom an applicant or employee has a relationship
- Fail to make reasonable accommodations to the known limitations of an individual with a disability, unless such accommodation would impose an undue hardship on business operations
- Deny employment opportunities to avoid having to make reasonable accommodations (42 U.S.C. §12112(a) and (b); 45 CFR §84.11(b))

An employer may not ask an applicant about a disability before making an offer of employment, but can ask about her ability to perform specific job functions. An employer may also make a job offer contingent on the applicant's passing a postoffer medical examination if such an exam is required of all applicants for the particular job category (42 U.S.C. §12112(d)); 45 CFR §84.14; 29 CFR §1630.13).

### **Limitations**

In the employment context, the Rehabilitation Act and ADA have two major limitations:

1. They protect only a "qualified individual with a disability"; that is, someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires" (42 U.S.C. §12111(8)). "Reasonable accommodation" includes "job restructuring, modified work schedules, reassignment to a vacant position... and other similar accommodations..." (42 U.S.C. §12111(9)).

2. Employers are not required to hire or retain individuals who "pose a direct threat to the health or safety of other individuals in the workplace" (42 U.S.C. §12113(b)). A direct threat is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation" (42 U.S.C. §12111(3)).

The Rehabilitation Act explicitly adopts ADA's standards with regard to complaints of employment discrimination (29 U.S.C. §794(d)).

### **Range of disabilities protected**

Both the Rehabilitation Act and ADA extend protection from discrimination<sup>4</sup> to individuals

- Who *have a physical or mental impairment that substantially limits one or more major life activities*. Major life activities are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."
- Who *have a record of having an impairment that substantially limits one or more major life activities*, including "a history of such impairment or a misclassification of having such impairment."
- Who *are regarded as having such an impairment*: those with an impairment that does not substantially limit major life activities but that is treated by others as such, those whose impairment results solely from the attitudes of others toward the condition or disease, and those who have no impairments but are treated as though they have a disability. This includes persons who are denied services or benefits because of myths, fears, and stereotypes associated with a disability.<sup>5</sup>

Examples of the kind of discrimination covered by these laws include individuals who may be turned down from certain positions because of poor eyesight (such as piloting airplanes) in

spite of adequately corrective lenses; because of a past history of mental illness or substance abuse that an employer assumed will lead to trouble on the job; or because the individual is known to be HIV-positive, even though he has no symptoms that impair his ability to do the job.

### ***Protections for individuals with substance abuse disorders***

For those seeking benefits and services, an individual with a substance abuse disorder is included in the definition of “individual with a disability” in many, but not all, instances. The Federal regulations implementing ADA and the Rehabilitation Act make a distinction between individuals whose substance abuse disorder involves alcohol and those who use illegal drugs.

#### *Alcohol abusers*

In general, the Rehabilitation Act and ADA protect alcohol-dependent persons who are seeking benefits or services from an organization or agency covered by one of the statutes (29 U.S.C. §706(8)(C)(iii) and 42 U.S.C. §12110(c)), if they are “qualified” and do not pose a direct threat to the health or safety of others (28 CFR §36.208(a)). This means that an organization or program cannot refuse to serve an individual unless

- The individual’s alcohol abuse is so severe, or has resulted in other debilitating conditions, that he no longer “meets the essential eligibility requirements for the receipt of services or the participation in programs... with or without reasonable modifications to rules, policies, or practices...” (42 U.S.C. §12131(2))
- The individual poses “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services” (36 CFR

§ 36.208(b); Supplemental Information 28 CFR Part 35, Section-by-Section Analysis, §35.104)

For example, a hospital might take the position that an alcohol-dependent patient with dementia was not “qualified” to participate in occupational therapy because he could not follow directions. Or, an alcohol-dependent individual whose drinking results in assaultive episodes that endanger elderly residents in a long-term care facility might pose the kind of “direct threat” to the health or safety of others that would permit his exclusion.

The Rehabilitation Act also permits programs and activities providing services of an educational nature to discipline students who use or possess alcohol or illegal drugs (29 U.S.C. §706(8)(C)(iv)).

#### *Users of illegal drugs*

The Rehabilitation Act and ADA distinguish between former users of illegal drugs and current users.

*Individuals who no longer are engaged in the illegal use of drugs* and have completed or are participating in a drug rehabilitation program are protected from discrimination to the same extent as alcohol abusers (29 U.S.C. §706(8)(C)(ii) and 42 U.S.C. §12210(b)). In other words, they are protected so long as they are “qualified” for the program, activity, or service and do not pose a “direct threat” to the health or safety of others. Service providers may administer drug tests to ensure that an individual who formerly used illegal drugs no longer does so (28 CFR §36.209(c) and 28 CFR §35.131(c)). For example, if an applicant for a vocational training program claims he no longer uses illegal drugs and has completed a course of rehabilitation, the training program could administer drug tests to determine that he is no longer using illegal drugs.

*Individuals currently engaging in the illegal use of drugs* are offered full protection only in

connection with health and drug rehabilitation services (28 CFR §36.209(b) and 28 CFR §35.131(b)). (However, drug treatment programs may deny participation to individuals who continue to use illegal drugs while they are in the program (28 CFR §36.209(b)(2).) The laws explicitly withdraw protection with regard to other services, programs, or activities (29 U.S.C. §706(8)(C)(i) and 42 U.S.C. §12210(a)).

A hospital that specializes in treating burn victims could not refuse to treat a burn victim because he uses illegal drugs, nor could it impose a surcharge on him because of his addiction. However, the hospital is not required to provide services that it does not ordinarily provide, for example, drug treatment (Appendix B to 28 CFR Part 36, Section-by-Section Analysis, §36.302). On the other hand, a vocational training program could refuse to admit a user of illegal drugs, unless the individual had stopped and was participating in or had completed drug treatment.

The protections ADA provides to clients in substance abuse treatment are summarized in Figure 7-1.

## The Workforce Investment Act of 1998

In 1998, Congress passed the Workforce Investment Act to improve the workforce, reduce welfare dependency, and increase the employment and earnings of participants (§106 of P.L. 105-220). The Act requires that local “one-stop delivery systems” be established for those looking for work, and it provides Federal funding for these programs.

A major emphasis of the legislation is its “work-first” approach, which strongly encourages the unemployed to find work before requesting training. The Act establishes three tiers of service (§134(c)(1) of P.L. 105-220) available through a “one-stop operator”:

1. *Core services* (assessment, information, and job search help) are available to everyone.

2. *Intensive services* (specialized assessments, counseling, skills training) are available to those who (1) fail to find employment after receiving core services and (2) are determined by the one-stop operator “to be in need of more intensive services in order to obtain employment” (§134(d)(3)(A)(i) of P.L. 105-220).
3. *Training services* (including occupational and on-the-job training) are available to those who have been unable to obtain or retain employment after receiving core and intensive services. The one-stop operator must determine that the individual seeking services is in need of training and has the skills and qualifications to successfully participate in the selected training program. The training program must be directly linked to employment opportunities in the community (§134(d)(4)(A) of P.L. 105-220). Training must generally be run by certified providers and paid for through vouchers (called Individual Training Accounts), although there are some exceptions.

(See Figure 7-2 for a more detailed description of the three tiers of services.)

The Workforce Investment Act requires States to give recipients of public assistance and other low-income individuals priority in the allocation of intensive and training services (§134(d)(4)(E) of P.L. 105-220). It also recognizes that “low-income individuals with substantial language or cultural barriers, offenders,<sup>6</sup> the homeless, and other hard-to-serve populations as defined by the [State]... face multiple barriers to employment.” Members of these “special participant populations” may sidestep the voucher system and take part in training “of demonstrated effectiveness” that is offered “by a community-based or other private organization to serve special participant populations that face multiple barriers to employment” (§§134(d)(4)(G)(iv) and (G)(ii)(III) of P.L. 105-220).

Figure 7-1

Americans With Disabilities Act and Rehabilitation Act Protections

Alcohol		Illegal drugs		
	<u>Current abuse</u>	<u>Recovering</u>	<u>Current abuse*</u>	<u>Recovering</u>
<b>Educational or Training Program</b>	Individuals qualified for services are protected	Protected	Protection limited to health and rehabilitation services	Individuals qualified for services are protected
<b>—Exceptions</b>	Individuals are not protected if <ul style="list-style-type: none"> <li>■ Their alcohol abuse is so severe that they no longer meet the eligibility requirements.</li> <li>■ They pose a significant risk to health or safety of others that cannot be eliminated by service modification or auxiliary aids/services.</li> </ul>	No Exceptions	Substance abuse treatment programs may expel clients who continue to use illegal drugs while attending the program.	Individuals are not protected if they pose a direct threat to the health or safety of others. Service providers may administer drug tests to ensure that an individual with a history of illegal drug use is no longer using illegal drugs.
<b>Employment</b>	Individuals qualified for the job are protected if they can perform job duties without posing a threat to health, safety, or property.	Protected	No Protection	Individuals qualified for the job are protected if they <ul style="list-style-type: none"> <li>■ Participate in a supervised rehabilitation program and are no longer using illegal drugs</li> <li>■ Have successfully completed treatment and are no longer using illegal drugs</li> </ul>
<b>—Exceptions</b>	See box above.	No Exceptions	Not Applicable	Employer may administer drug testing to ensure that an individual with a history of illegal drug use is no longer using.

\*Current abuse is defined as the illegal use of drugs that occurred recently enough to conclude that it is still a problem.

**Figure 7-2**  
**Services Provided Under the Workforce Investment Act of 1996**

**Core Services include**

- Assessment of individuals' skill levels, aptitudes, abilities, and supportive service needs
- Job search and placement assistance and, where appropriate, career counseling
- Information about current job vacancies, the skills those jobs call for, and the kinds of jobs that are generally available in the community, including pay levels and skill requirements
- Information about training available through the one-stop delivery system
- Information about and referral to supportive services, including child care and transportation
- Assistance with establishing eligibility for welfare-to-work activities and financial aid programs for training and education not funded by the Act
- Followup services (including counseling about the workplace) for those placed in unsubsidized employment (§134(d)(2) of P.L. 105-220)

**Intensive Services include**

- Comprehensive and specialized assessments of the skill levels and service needs of individuals, including diagnostic testing and in-depth interviewing and evaluation to identify employment barriers and appropriate employment goals
- Development of individualized employment plans identifying employment goals, appropriate achievement objectives, and appropriate combinations of services required to achieve employment goals
- Counseling, including group, individual, and career
- Case management for those seeking training services
- Short-term prevocational services to prepare individuals for unsubsidized employment or training (including development of learning, communication, interviewing, and personal maintenance skills and instruction about punctuality and professional conduct) (§134(d)(3) of P.L. 105-220)

**Training Services include**

- Occupational skills training, including training for nontraditional employment
- On-the-job training
- Programs that combine workplace training with related instruction
- Training programs operated by the private sector
- Skill upgrading and retraining
- Entrepreneurial training
- Job readiness training
- Adult education and literacy activities
- Customized training conducted by an employer or group of employers committed to employing individuals upon successful completion of the training (§134(d)(4) of P.L. 105-220)

***The effect on clients in substance abuse treatment***

The work-first approach may result in additional barriers for clients seeking vocational training.

The three-tier system will mean that clients in

substance abuse treatment who lack job skills will have to go through the process of assessment and job search (part of the "core services") before they receive any individualized ("intensive") service such as testing, counseling,

development of an individualized employment plan, or prevocational services. Only those who are unable to obtain or retain employment after participating in both “core” and “intensive services” will be eligible for “training services.” Clients seeking a training program must find one that is directly linked to employment opportunities in the community and must have the skills and qualifications to participate in the program successfully.

Those in substance abuse treatment (or with a history of substance abuse) may not be refused service because of their “disability.” The Act explicitly incorporates current Federal antidiscrimination laws, including ADA and the Rehabilitation Act, as well as laws relating to wages, benefits, health, and safety (§188(a) and §181(a) and (b) of P.L. 105-220). However, as stated above, those currently using illegal substances are not protected by ADA. Recipients of public assistance and low-income individuals should be given priority for “intensive” and “training” services.

Clients who participate in services under the Act may be tested for illegal drugs. The Act permits States to test job training participants for the use of controlled substances. States may sanction individuals who test positive by banning them for up to 6 months from the program for a first positive test and for up to 2 years for subsequent positive tests. States that choose to test participants for the use of controlled substances must establish a procedure that ensures “a maximum degree of privacy” (§181(f) of P.L. 105-220).

Two final comments: The Workplace Investment Act is new, and it is not clear how different States will implement it. In addition, counselors should keep in mind that although federally funded programs may dominate this area, there are programs funded by private enterprise or nonprofits that offer more individualized and flexible services.

## ***Protections in the area of employment***

### ***Alcohol-dependent and alcohol-using individuals***

The Rehabilitation Act and ADA provide limited protection against employment discrimination to individuals who abuse alcohol but who can perform the requisite job duties and do not pose a direct threat to the health, safety, or property of others in the workplace (29 U.S.C. §706(8)(C)(v); 42 U.S.C. §12113(b); 42 U.S.C. §12111(3)). For example, the Acts would protect an alcohol-dependent secretary who binges on weekends, but reports to work sober and performs his job safely and efficiently. However, a truck driver who comes to work inebriated and unable to do her job safely would not be protected. Nor would the employee whose promptness or attendance is erratic, unless the employer tolerates nonalcoholic employees’ lateness and absences from work (see Shaw et al., 1994).

ADA (42 U.S.C. §12114(c)) also permits an employer to

- Prohibit all use of alcohol in the workplace
- Require all employees to be free from the influence of alcohol at the workplace
- Require alcoholic employees to maintain the same qualifications for employment, job performance, and behavior that the employer requires other employees to meet, even if any unsatisfactory performance is related to the employee’s alcoholism

### ***Users of illegal drugs***

*Individuals who no longer are engaged in the illegal use of drugs* and have completed or are participating in a drug rehabilitation program are offered some protection: The Rehabilitation Act and ADA (29 U.S.C. §706(8)(C)(ii) and 42 U.S.C. §12210(c)) protect employees and prospective employees who

- Have successfully completed a supervised drug rehabilitation program or otherwise have been rehabilitated and are no longer engaging in the illegal use of drugs
- Are participating in a supervised rehabilitation program and are no longer engaging in illegal drug use
- Are erroneously regarded as engaging in illegal drug use

Employers may administer drug testing to ensure that someone who has a history of illegal drug use is no longer using.<sup>7</sup> ADA (42 U.S.C. §12114(c)) also permits an employer to

- Prohibit all use of illegal drugs in the workplace
- Require all employees to be free from the influence of illegal drugs at the workplace
- Require an employee who engages in the illegal use of drugs to maintain the same qualifications for employment, job performance, and behavior that the employer requires other employees to meet, even if any unsatisfactory performance is related to the employee's drug abuse

### **The Drug-Free Workplace Act**

Another Federal law, the Drug-Free Workplace Act (41 U.S.C. §701 et seq.), may also affect clients in recovery. The Act requires employers who receive Federal funding through a grant (including block grant or entitlement grant programs) or who hold Federal contracts to certify they will provide a drug-free workplace. The certification means that affected employers must

- Notify employees that “the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the workplace and specify the actions that will be taken against employees [who violate the] prohibition”
- Establish an ongoing drug awareness program to inform employees of the dangers

of drug abuse in the workplace, the availability of any drug counseling or employee assistance program, and the penalties that may be imposed for violations of the employer's policy

- Take appropriate action against an employee convicted of a drug offense when the offense occurred in the workplace
- Notify the Federal funding agency in writing when such a conviction occurs

*Individuals currently engaging in the illegal use of drugs* have no protection against discrimination in employment, even if they are “qualified” and do not pose a “direct threat” to others in the workplace (29 U.S.C. §706(8)(C)(i) and 42 U.S.C. §12210(a)).

The protections offered to clients in substance abuse treatment are summarized in Figure 7-1.

### **State Laws**

Most States have also enacted laws to protect people with disabilities (or “handicaps”). And some States' laws protect persons with substance abuse disorders. Each State's law is different and a treatment provider seeking help under State law should get in touch with the State or local agency charged with enforcing State civil rights laws.

### **Federal Law**

#### ***An ounce of prevention***

The old adage “an ounce of prevention is worth a pound of cure” is particularly applicable to the area of employment discrimination. It is always easier to persuade an employer to hire an applicant *before* he has made a decision to reject him. In a variety of ways, counselors of individuals in treatment for substance abuse disorders can help hard-to-employ clients enhance their chances for employment. Counselors should be prepared to help clients, whether directly or through referrals, with the following tasks.

### *Focusing on jobs for which clients can qualify*

Clients in substance abuse treatment often lack perspective about the world of work. To many, there is a great divide between jobs with status (professional or high-visibility) and jobs that they believe have no status (e.g., fast food, other service industry jobs). Counselors can help clients understand and accept that there are many low-profile jobs that provide livelihood and satisfaction to millions of people. They can help clients develop realistic plans that could require starting at the bottom in order to attain a desirable goal. Such plans could include finding a training program that would lead to a good job. This kind of counseling will be increasingly important as the many aspects of welfare reform are implemented.

### *Helping clients avoid common pitfalls*

- Clients should avoid volunteering information about their substance use histories. Job seekers should generally avoid volunteering information employers may view negatively. A substance abuse disorder history falls in that category. Unless it is likely to surface (if, for example, the client is in a methadone program and will be tested for drug use) or may benefit the client (who, for example, is applying for a job as a counselor), a substance abuse disorder history is not a subject the client should introduce.
- Clients should avoid outright lies. Although volunteering information that employers may view negatively is unwise, lying is not advisable either. If an employer asks about the client's education or experience, the client would be foolish to manufacture degrees or an impressive employment history. The employer is bound to discover the truth and fire the client, no matter how valuable the client believes he has become in the

meantime. The law generally sides with the employer in this situation.

- Clients should have a strategy for dealing with "illegal questions." ADA prohibits employers from asking a job applicant about a disability—including a substance abuse disorder—before making an offer of employment. The employer can ask about the applicant's ability to perform specific job functions and may condition a job offer on the applicant's passing a postoffer medical examination all applicants must pass. How, then, should an individual with a substance abuse disorder history respond to the question, "Have you ever used any of the following: heroin, cocaine, marijuana, etc.?"

There are four ways to deal with this kind of question:

1. The client can answer "yes," and add that she has participated or is participating in a supervised rehabilitation program (or has otherwise been rehabilitated) and is no longer engaged in illegal drug use. This is the "correct" legal answer. If the client is rejected, she can pursue one of the remedies outlined below.
2. The client can answer "no," which is a lie, and run the risk of being found out later. If the lie is uncovered, the client will most likely be fired, no matter how well she performed the job. In these circumstances, the law offers no remedies.
3. The client can inform the employer that the question is illegal. However, no matter how diplomatically this is put, it will likely offend the employer and indicate that the applicant does have a substance abuse disorder history.
4. Sometimes, the client can try to address an illegal question by supplying the information the employer seems to be seeking. If it appears that the employer is

concerned about abuse of sick time, or employees who fall asleep on the job, the applicant may be able to offer the reassurance that she's rarely sick or is not a night owl.

The counselor can help the client sort through the alternatives. Failing to disclose a substance abuse disorder history is rarely an illegal act (unless an application form requires attesting to the accuracy of information). It is for the client to decide how she wants to handle this problem, for she is the one who has to live with the consequences.

### ***Enforcement: the pound of cure***

Discrimination against individuals with substance abuse disorders continues despite the existence of the Rehabilitation Act and ADA. However, these laws offer those who believe they have suffered discrimination a choice of remedies.

The alternatives listed below must be pursued within certain time limits established by State and Federal laws. An individual who is considering filing a complaint with any one of the agencies mentioned below should consult an attorney at an early date to determine when a complaint must be filed.

#### ***For discrimination by a program or activity***

**Filing a complaint with the Federal agency that funds the program, activity, or service** (42 U.S.C. §12133; 29 U.S.C. §794(a); 28 CFR Part 35, Subparts F and G). For example, if the program is educational, it may receive funding from the Department of Education; if it involves health care, it may be funded by the Department of Health and Human Services. Once a complaint is filed, the agency is supposed to investigate and attempt an informal resolution. If a resolution is reached, the agency drafts a compliance agreement that is enforceable by the U.S. Attorney General. Federal agencies are required by ADA and sections 503 and 504 of

the Rehabilitation Act to establish an appeals process and to designate the person in charge of compliance.

If no resolution is achieved, the agency issues a "Letter of Findings" that contains findings of fact, conclusions of law, a description of the suggested remedy, and a notice of the complainant's right to sue. A copy is sent to the U.S. Attorney General. The agency must then approach the offending program about negotiating. If the program refuses to negotiate or negotiations are fruitless, the agency refers the matter to the U.S. Attorney General with a recommendation for action.

*Advantages:* A complaint to the Federal funding agency may get the offending program's attention (and change its decision) because the funding agency has the power to deny future funding to those who violate the law. It is also inexpensive (no lawyer is necessary); however, if the complainant opts to be represented by an attorney, he may be awarded attorneys' fees if he prevails.

*Disadvantage:* Depending upon the kind of complaint and which Federal agency has jurisdiction, this may not be the most expeditious route.

**Filing a complaint with the State administrative agency charged with enforcement of the antidiscrimination laws** (42 U.S.C. §12201(b)). Such State agencies often have the words "civil rights," "human rights," or "equal opportunity" in their title. *Advantage:* This route is inexpensive. *Disadvantages:* Some of these agencies have large backlogs that generally preclude speedy resolution of complaints. Depending upon the State, remedies may be limited.

**Filing a lawsuit in State or Federal court.** One can file a court case requesting injunctive relief (temporary or permanent) and/or monetary damages. The court has the discretion to appoint a lawyer to represent the plaintiff (42 U.S.C. §§12188 and 2000a-3(a); 28 CFR §36.501).

*Disadvantages:* Unless one can find a not-for-profit organization that is interested in the case, a lawyer willing to represent the aggrieved party pro bono (free of charge), or a lawyer willing to take the case on contingency or for the attorneys' fees the court can award the side that prevails, this may be an expensive alternative. It can also take a long time. *Advantages:* The complainant can ask for injunctive relief (a court order requiring the program to change its policy) and/or monetary damages. It may give the complainant a better sense of control over the process. A lawyer may produce results quickly: a lawyer's approach to an offending program can have prompt and salutary effects. No one likes to be sued. It is costly, unpleasant, and often very public. It is often easier to re-examine one's position and settle the case quickly out of court. The advantages and disadvantages of filing a case in State court will depend upon State law, State procedural rules, and the speed with which cases are resolved.

**Requesting enforcement action by the U.S. Attorney General**, who can file a lawsuit asking for injunctive relief, monetary damages, and civil penalties (42 U.S.C. §12188 and 2000a-3(a); 28 CFR §36.503).

### *For employment discrimination*

**Filing a complaint with the Federal Equal Employment Opportunity Commission (EEOC)** (42 U.S.C. §12117) **or the State administrative agency charged with enforcement of the antidiscrimination laws** (42 U.S.C. §12201(b)). If the EEOC finds reasonable cause to believe that the charge of discrimination is true and it cannot get agreement from the party charged, it can bring a lawsuit against any private entity. If the offending entity is governmental, the EEOC must refer the case to the U.S. Attorney General, who may file a lawsuit. The complainant can intervene in any court case brought by either the EEOC or the Attorney General.

The EEOC or the U.S. Attorney General can also seek immediate relief by filing a case for a preliminary injunction in a Federal court. The court can order injunctive relief, including reinstatement or hiring, back pay, and attorneys' fees (42 U.S.C. §2000e-5).

*Advantage:* A complaint to the EEOC, the U.S. Department of Justice, or a State or local antidiscrimination agency or State Attorney General is relatively inexpensive because it does not require a lawyer. *Disadvantage:* Some of these agencies have large backlogs that generally preclude speedy resolution of complaints.

### **Filing a lawsuit in State or Federal court.**

After an aggrieved party has filed a complaint with the State administrative agency and/or the EEOC, she can file a lawsuit (42 U.S.C. §2000e-5(f)).

*Disadvantage:* This may be an expensive alternative and may also take a long time.

*Advantage:* It can get fast results (see section above on discrimination by a program or activity).

## **Employment Discrimination Against People With Criminal Records**

Many individuals with substance abuse disorder histories also have criminal records. Most employers are reluctant to hire people with criminal records. Although there are rulings that prohibit employers from asking applicants about arrests that did not result in convictions, there are few protections for ex-offenders who have been convicted of misdemeanors or felonies. As is the case for individuals with substance abuse disorder histories, the best strategy is to prepare for difficulties in advance. See Chapters 3 and 8 for more on this issue.

## **A Closing Note**

For individuals in treatment for substance abuse, Federal law provides protection against

discrimination by programs, services, and employers. Many States have also adopted laws prohibiting discrimination against “individuals with disabilities” or “handicaps,” and some of these statutes also protect those recovering from substance abuse disorders. Some States also offer limited protection to ex-offenders. To learn more about State law—the protections it offers and the available remedies—providers can call the State or local “human rights,” “civil rights,” or “equal opportunity” agency. Advocacy groups for individuals with disabilities are also a good source of information. Local legal services offices, law school faculties, and bar associations may also have information available or may be able to provide an individual lawyer willing to make a presentation to staff.

## **Part II: The Revolution in Rules Governing Public Assistance**

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In 1996, Congress enacted a major overhaul of welfare called “The Personal Responsibility and Work Opportunity Reconciliation Act.” It transformed the Aid to Families With Dependent Children (AFDC) program, which “entitled” needy individuals with dependent children to assistance, into Temporary Assistance for Needy Families (TANF), a program offering limited relief. Unlike AFDC, TANF imposes work requirements on aid recipients, limits the amount of time an adult can receive benefits, and bars benefits to certain categories of persons, including individuals with felony drug convictions. States may screen recipients for alcohol and drug use and sanction those who test positive. TANF promises to have a major impact on clients who are also parents. Also in 1996, as part of the Contract With

America Advancement Act, Congress amended the Social Security disability laws to eliminate benefits for any individual whose substance abuse disorder is or would be a contributing factor to an award of Supplemental Security Income (SSI) or Disability Insurance (DI) benefits (§105 of P.L. 104-121). Those receiving SSI or DI benefits are also generally eligible for food stamps and Medicaid; thus, the loss of SSI or DI benefits carries with it the possible loss of these benefits, including support for substance abuse treatment.

Finally, as part of the Adoption and Safe Families Act of 1997, Congress has required the States to shift the focus of child abuse prevention and intervention services from family reunification to children’s health, safety, and permanent placement. There is now a 15-month limit on “family reunification services,” which are provided when children have been removed from the home and placed in foster care. This limit applies to substance abuse treatment and mental health services; individual, group, or family counseling; and transportation to or from services (42 U.S.C. §675(5), as amended by §§103 and 305 of the Adoption and Safe Families Act of 1997). States must begin proceedings to terminate parental rights when children have been in foster care for 15 of the most recent 22 months (42 U.S.C. §675(5)(C), as amended by §301 of the Adoption and Safe Families Act of 1997).

These three pieces of legislation promise to put great pressure on clients in substance abuse treatment to regain and retain sobriety, find work, and assume responsible parenting, all within a relatively short period of time. The following section provides an overview of these changes and a brief discussion of the practical implications for substance abuse treatment clients.

## Changes in the Rules Governing Public Assistance

### *Personal Responsibility and Work Opportunity Reconciliation Act*

The Personal Responsibility and Work Opportunity Reconciliation Act (1996) affects clients receiving TANF in the following ways:

- *Mandatory work requirements.* With few exceptions, recipients of TANF must work within 2 years. Those who fail to comply with the work requirements will see their benefits reduced or eliminated. (States may not penalize single parents with a child under 6 who cannot find child care.) States may also cut Medicaid coverage to parents who do not comply with the work requirement (42 U.S.C. §607(e)).
- *Time limits.* No family may receive assistance for more than 5 cumulative years (or a lesser period of time, at the State's option). Once a parent has been on public assistance the allotted time, he or she may be cut from the rolls, although certain hardship exceptions can be made (42 U.S.C. §608(a)(7)).
- *Drug testing.* States may screen welfare recipients for alcohol and drug use and sanction those who test positive by reducing or eliminating their benefits.
- *Drug felony ban.* Those applying for public assistance must disclose any drug-related conviction of any household member. States can then deny public assistance and food stamps to people whose drug felony convictions occurred after August 22, 1996. States must take an affirmative step to opt out of this ban (§115 of P.L. 104-193, as amended by §5516 of P.L. 105-33).
- *Probation/parole violation ban.* Offenders who violate the terms of their probation or parole lose their public assistance and food stamps. In some States, offenders who have been mandated into treatment and leave treatment

may be subject to this provision (42 U.S.C. §608(a)(9)).

### *Contract With America Advancement Act of 1996*

The Contract With America Advancement Act of 1996 affects individuals who have been found disabled because of their substance abuse disorder and are receiving SSI or DI benefits.

- *Alcoholism and drug addiction removed as qualifying disabling conditions.* Individuals who might previously have been classified disabled and found eligible for SSI or DI because of their substance abuse disorder may no longer be found disabled if their substance abuse disorder "would (but for this subparagraph) be a contributing factor to the [Social Security] Commissioner's determination that the individual is disabled" (§105(a)(1) of P.L. 104-121, the "Contract With America Advancement Act of 1996"). However, if an individual who has previously been classified disabled because of substance abuse has another, coexisting mental or physical disability that qualifies as a disabling condition, he may still be eligible for these benefits.
- *Representative payee required.* The benefits of any individual who receives SSI or DI for another disabling impairment must be paid to a representative payee if "such payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as determined by the Commissioner) and the individual is incapable of managing such benefits" (§105(a)(2) of P.L. 104-121).
- *Mandatory referral to treatment.* Individuals whose benefits are paid to a representative payee must be referred "to the appropriate State agency administering the State plan for substance abuse treatment services. . . ." (§105(a)(3) of P.L. 104-121).

## Changes in the Rules Governing Families Involved With Child Protective Services

Congress has established a series of programs to fund and support States' efforts to help families in crisis, including family preservation, family reunification, foster care, and adoption assistance.<sup>8</sup> These programs require States to adopt policies, timetables, and restrictions that may have the following results:

- *States may take a less tolerant view when children are living in households with one or more substance-abusing adults.* The Federal legislation requires a shift in focus from a concern with "family preservation" to children's health and safety as "the paramount concern" (42 U.S.C. §671(a)(15), as amended by the Adoption and Safe Families Act of 1997). This means that children may be placed in foster care more readily than before.
- *Parents will have a shorter time period to achieve sobriety if they are to retain their children.* Family reunification services are now limited to 15 months after the child has been removed from the family and placed in foster care. This time limit applies to any substance abuse treatment and mental health services; individual, group, or family counseling; and transportation services provided as part of family reunification services (Id. at §675(5)).
- *There may be speedier termination of parental rights.*
- *There is greater emphasis on permanent placement of children.* States must hold a "permanency" hearing within 12 months of a child's placement in foster care to determine whether to return the child, initiate proceedings to terminate parental rights, or place the child in another permanent living arrangement (Id. at §675(5)(C)).
- *There will be limits on how long children can remain in foster care.* States must begin the

process of terminating parental rights or finding long-term foster care placement for children who have been in foster care for 15 of the most recent 22 months (Id. at §675(5)(C)).

Parents who are unable to achieve sobriety after a year of treatment will be at greater risk of losing their parental rights as States implement the 15-month time limit on family preservation services and enforce the requirements regarding prompt determinations about children's permanent placement.

## Changes in the Rules Governing Immigrants

There are some new restrictions on benefits for immigrants. A lawful immigrant may or may not be eligible for benefits, depending on a variety of factors, including her immigrant status, the kind of benefit the immigrant applies for (e.g., TANF, SSI, DI, Medicaid, food stamps), when the immigrant arrived in this country, how long she has been here, her age, and other facts about her personal history (42 U.S.C. §602(a)(33); 42 U.S.C. §2115).

The changes in the rules governing public assistance, disability benefits, and immigrants are fairly new, and States have some choice in the way they implement them. To learn more about how the State is implementing these laws, programs can consult their agency's counsel, if one exists, or a board member who is an attorney. Or, they can seek help from a lawyer familiar with the State law and regulations in this area who works for the State's Department of Social or Human Services, the State Attorney General's office, the Single State Agency, the local Legal Aid Society or Legal Services office, a family law clinic (perhaps at a law school), or a private practice specializing in family law. Often bar associations have lists of attorneys who work pro bono on issues such as these.

## Combined Impact of Welfare Reform and Changes in Child Welfare Laws

The combined effects of the new welfare reform requirements, the amendments to the disability laws, and the changes in the child welfare laws threaten to put clients who rely on public assistance or who are involved with a child protective services (CPS) agency under tremendous pressure. Clients will no longer receive disability benefits (SSI or DI) based on their substance abuse problems and may lose eligibility for food stamps and Medicaid as well. Clients with children may face reduction or elimination of their benefits if they fail to achieve and maintain sobriety, comply with work requirements, or enter the workforce within 5 years. Clients whose benefits are reduced or eliminated may have difficulty providing their children with the requisite level of food, clothing, shelter, and medical care. At the same time, clients involved with a CPS agency may be required to meet additional requirements within a limited time period.

Those with substance abuse problems, minimal work experience, and a lack of parenting skills can feel overwhelmed by these growing demands. Maintaining sobriety, by itself, is a difficult achievement for many. If they have to comply with work requirements and assume new parenting responsibilities, they may see all of this as impossible. For some, the response will be denial of the reality that “the system” has changed. Others may be overcome by hopelessness and be inclined to give up. Others will relapse.

As welfare reform, amendments to the disability laws, and changes in child protection laws are implemented, counselors will see increasingly stressed clients in need of supportive counseling and a web of support services. In these changed times, however, support will not suffice. If a client in substance abuse treatment is to emerge with a source of

income and his family intact, the counselor must combine support with a firmness rooted in the understanding that the rules in this area have changed and become less forgiving. The challenge for counselors is to continue supporting clients while conveying to them the urgency of their attaining or maintaining sobriety and finding gainful employment.

## Part III: Confidentiality Of Information About Clients

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Programs providing treatment or VR services to individuals with substance abuse disorders frequently need to communicate with individuals and organizations as they gather information, refer clients to services the program does not provide, and coordinate care with other human service providers. This section outlines the laws protecting client confidentiality and examines how staff can protect clients’ privacy while providing appropriate treatment or VR services.

Information about individuals applying for or receiving substance abuse prevention, screening, assessment, or treatment services is subject to a Federal statute and regulations that guarantee confidentiality (42 U.S.C. §290dd-2; 42 CFR, Part 2). State laws also protect information about individuals’ health or mental health status or treatment, as well as information about certain diseases, and may restrict disclosure of information about substance abuse.<sup>9</sup> The Federal law, however, is generally more restrictive than State laws. Federal law preempts less restrictive State laws, but does not preclude enforcement of State law that is more restrictive.

This section describes what the Federal law and regulations require and examines their impact on substance abuse treatment programs. It details the rules regarding the use of consent forms to get a client’s permission to release

## A Final Note

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The legal and ethical issues that affect clients and staff of programs providing VR services are complex and interrelated. Welfare reform has reduced the support system upon which many clients relied and given greater urgency to programs' efforts to help clients enter the world of work. Federal and State laws offer some protection to those clients as they participate in training and seek employment. As programs help clients deal with the new welfare rules and find training and employment, they must keep in mind the Federal confidentiality rules, which affect every communication programs make about clients to welfare agencies, vocational training programs, employers, and others.

## Endnotes

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1. For a discussion of how these laws apply to persons living with HIV / AIDS, see the TIP, *Substance Abuse Treatment for Persons With HIV/AIDS* (CSAT, 2000b).
2. *Rehabilitation Act and key implementing regulations*: 29 U.S.C. §793 and 29 CFR Part 1630; §794(a), (b)(1), (b)(3)(A), and 45 CFR Part 84; *Americans with Disabilities Act and key implementing regulations*: 42 U.S.C. §§12111(2) and (5) and 12112 and 28 CFR Part 35, Subpart C, and 29 CFR Part 1630.
3. *Rehabilitation Act and key implementing regulations*: 29 U.S.C. §794 and 45 CFR Part 84; *Americans with Disabilities Act and key implementing regulations*: 42 U.S.C. §12182(b)(1)(A), 42 U.S.C. §12182(b)(2), and 28 CFR Part 35 and Part 36.
4. 42 U.S.C. §12102(2), 29 U.S.C. §706(8)(A), and, e.g., 28 CFR §§35.104 and 36.104.
5. Supplemental Information 28 CFR Part 35, Section-by-Section Analysis, §35.105 and Appendix B to 28 CFR Part 36, Section-by-Section Analysis, §36.104.
6. The Act defines "offender" as "any adult or juvenile (A) who or has been subject to any stage of the criminal justice process, for whom services under this Act may be beneficial; or (B) who requires assistance in overcoming artificial barriers to employment resulting from a record of arrest or conviction" (§101(27) of P.L. 105-220).
7. 29 U.S.C. §706(8)(C)(ii), 42 U.S.C. §12210(b), 28 CFR §36.209(c), and 28 CFR §35.131(c).
8. For a more detailed description of these changes, see the TIP, *Substance Abuse Treatment for Persons With Child Abuse and Neglect Issues* (CSAT, 2000a).
9. For a discussion of these kinds of State confidentiality laws, see TIP 24, *A Guide to Substance Abuse Services for Primary Care Clinicians* (CSAT, 1997a), Appendix B. For a discussion of confidentiality issues for those with HIV / AIDS, see the TIP, *Substance Abuse Treatment for Persons With HIV/AIDS* (CSAT, 2000b).
10. However, no information that is obtained from a program (even if the client consents) may be used in a criminal investigation or prosecution of the client unless a court order has been issued under the special circumstances set forth in §2.65 (42 U.S.C. §§290dd-2 and 42 CFR §2.12(a), (d)).
11. The regulations state that "acting in reliance" includes the provision of services while relying on the consent form to permit disclosures to a third-party payor. (Third-party payors are health insurance companies, Medicaid, or any party that pays the bills other than the patient's family or the treatment agency.) Thus, a program can bill the third party-payor for past services provided before the consent was revoked.
12. Minors are those individuals, under a certain age, who do not have all the rights and privileges of adults. The specific age

- varies according to State law and also according to the “right” or “privilege” at issue—e.g., serving in the Army, drinking.
13. For a discussion of “duty to warn” when a client threatens violent harm to another person, see TIP 19, *Detoxification from Alcohol and Other Drugs* (CSAT, 1995[b]), Appendix F, Legal and Ethical Issues for Detoxification Programs, pp. 82, 84–85.
  14. For an explanation about how to deal with search and arrest warrants, see TIP 19, *Detoxification from Alcohol and Other Drugs* (CSAT, 1995[b]), Appendix F, Legal and Ethical Issues for Detoxification Programs, pp. 84–85. For advice about dealing with subpoenas, lawyers, and law enforcement, see TIP 24, *A Guide to Substance Abuse Services for Primary Care Physicians* (CSAT, 1997[a]), Appendix B, Legal and Ethical Issues, pp. 111–112.
  15. If the information is being sought to investigate or prosecute a patient for a crime, only the program need be notified (§ 2.65). If the information is sought to investigate or prosecute the program, no prior notice at all is required (§ 2.66).
  16. If the purpose of seeking the court order is to obtain authorization to disclose information in order to investigate or prosecute a patient for a crime, the court must also find that (1) the crime involved is extremely serious, such as an act causing or threatening to cause death or serious injury; (2) the records sought are likely to contain information of significance to the investigation or prosecution; (3) there is no other practical way to obtain the information; and (4) the public interest in disclosure outweighs any actual or potential harm to the patient, the doctor–patient relationship, and the ability of the program to provide services to other patients. When law enforcement personnel seek the order, the court must also find that the program had an opportunity to be represented by independent counsel. (If the program is a governmental entity, it *must* be represented by counsel. [§2.65(d)].
  17. For a description of the rules governing Qualified Service Organization Agreements, see TIP 19, *Detoxification from Alcohol and Other Drugs* (CSAT, 1995[b]), Appendix E, Legal and Ethical Issues, pp. 87–88.
  18. For a description of the rules governing communications in medical emergencies, see TIP 19, *Detoxification from Alcohol and Other Drugs* (CSAT, 1995[b]), Appendix E, Legal and Ethical Issues, p. 87.
  19. For a more complete explanation of the requirements of §§2.52 and 2.53, see TIP 14, *Developing State Outcomes Monitoring Systems for Alcohol and Other Drug Abuse Treatment* (CSAT, 1995[a]), Chapter 6, Legal Issues in Outcomes Monitoring, p. 58.
  20. For a description of what and how programs may report crimes on program premises or against program personnel, see TIP 19, *Detoxification from Alcohol and Other Drugs* (CSAT, 1995[b]), Appendix E, Legal and Ethical Issues, p. 85.
  21. For a comprehensive discussion of how programs should handle reporting child abuse or neglect to State authorities, see the TIP, *Substance Abuse Treatment for Persons With Child Abuse and Neglect Issues* (CSAT, 2000a).
  22. For a brief discussion of the issues computerization raises, see TIP 23, *Treatment Drug Courts: Integrating Substance Abuse Treatment with Legal Case Processing* (CSAT, 1996), pp. 52–53.