

2016 Healing to Wellness Court Enhancement Training

HIPAA AND CONFIDENTIALITY

Presenters:

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TWO LAWS

- 42 C.F.R. Part 2
 - Info of patients of drug and alcohol treatment and prevention programs
- Health Insurance Portability and Accountability Act (HIPAA)
 - info of health plans, health care clearinghouses and the vast majority of health care providers, including most drug and alcohol programs
- Generally give effect to both laws if possible
- HHS HIPAA regulations
 - HIPAA did not intend to repeal other confidentiality laws.
 - In most situations HIPAA and 42 C.F.R. Part 2 do not conflict
 - 42 C.F.R. Part 2 will continue to be standard



WHO MUST COMPLY?

- 42 C.F.R. Part 2 applies only to drug and alcohol programs
 - Program – “holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment, referral for treatment or prevention.”
 - AND
 - Federally assisted – if you receive federal funds in any form, even if those funds do not directly pay for alcohol or drug abuse services.



WHO MUST COMPLY?

- HIPAA applies generally to large portion of health care industry
 - Health care provider – individual or entity that furnishes, bills, or is paid for health care in normal course of business
 - And transmits health information electronically in connection with a covered transaction



IS YOUR COURT UNDER 42 C.F.R. PART 2 AND/OR HIPAA?

○ 42 C.F.R. Part 2

- If unit or office specializes in diagnosis, treatment, referral for treatment and receives federal assistance? YES!

○ HIPAA

- If you transmit health information electronically as part of a covered transaction? YES!
- If the Court works with independent treatment programs? No, **BUT** team members will be!



WHAT IS PROTECTED?

- 42 C.F.R. Part 2 protects info that identifies patient as an alcohol or drug patient, either directly or indirectly.
 - Oral or written
 - Also whether was a former patient
- HIPAA protects all health info which identifies an individual



WHO IS PROTECTED?

- 42 Part C.F.R Part 2
 - Patients who have...
 - Applied for
 - Participated in
 - Received an interview, counseling, or any other service
 - Including someone who, after arrest on a criminal charge, is identified as an alcohol drug patient during an evaluation of eligibility for treatment
 - Applicants are included, whether or not they are admitted to program
 - BUT – person who does not show up for an appointment arranged by a 3rd party is not a patient
- HIPAA – protects all health related information that identifies an individual



USES AND DISCLOSURES

- 42 C.F.R. Part 2 has a general prohibition against disclosure UNLESS meet one of exceptions
- 42 C.F.R. Part 2 defines ‘disclosure’
 - any communication of information that would identify someone as a patient
 - verification of information
 - Applies to disclosures made to 3rd parties as well as disclosures made within program



USES AND DISCLOSURES

- HIPAA –disclosure without consent of
 - covered entity’s own treatment
 - payment or health care operations
- HIPAA disclosure defined more broadly
 - Release, transfer, provision of access to or divulging in any other manner protected information outside the covered entity



EXCEPTIONS TO RULE OF NO DISCLOSURE

- Written Consent
- Internal communications
- No patient-identifying information
- Medical emergency
- Court order
- Crime at program/against program personnel
- Research
- Audit and evaluation
- Child abuse
- Qualified service organization/business associate agreement



CONSENT – WHAT DO I NEED?

- Name of program making disclosure
- Name of individual or organization that will receive disclosure
- Name of patient who is the subject of the disclosure
- Purpose or need for the disclosure
- A description of how much and what kind of information will be disclosed
- Patient's right to revoke the consent in writing
 - (42 C.F.R. Part 2 allows oral revocation but HIPAA does not)



CONSENT – WHAT DO I NEED?

- Program's ability to condition treatment, payment, enrollment or eligibility of benefits on patient agreeing to sign the consent,
 - stating either that program may not condition these services on the patient signing the consent
 - or the consequences for the patient refusing to sign the consent
- Date, event or condition upon which consent expires if not previously revoked
- Signature of patient
- Date on which consent is signed



SAMPLE CONSENT FORM

- http://lac.org/wp-content/uploads/2014/12/Sample_Form_1.pdf



**FORM 1
SAMPLE CONSENT FORM**

**CONSENT FOR THE RELEASE OF
CONFIDENTIAL INFORMATION**

I, _____, authorize
(Name of patient)

(Name or general designation of alcohol/drug programs making disclosure)

to disclose to _____ the
(Name of person or organization to which disclosure is to be made)

following information: _____
(Nature and amount of information to be disclosed; as limited as possible)

The purpose of the disclosure authorized in this is to :

(Purpose of disclosure, as specific as possible)

I understand that my alcohol and/or drug treatment records are protected under the Federal regulations governing Confidentiality and Drug Abuse Patient Records, 42 C.F.R. Part 2, and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. pts 160 & 164, and cannot be disclosed without my written consent unless otherwise provided for by the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:

(Specification of the date, event or condition upon which this consent expires)

I understand that I might be denied services if I refuse to consent to a disclosure for purposes of treatment, payment, or health care operations, if permitted by state law. I will not be denied services if I refuse to consent to a disclosure for other purposes.

I have been provided a copy of this form.

Dated: _____
Signature of Patient

Signature of person signing form if not patient

Describe authority to sign on behalf of patient _____



42 C.F.R. PART 2 REVOKING CONSENT

- When participation is condition of probation/parole, sentence, dismissal of charges, release from imprisonment, or other disposition of any criminal proceeding
- Consent form still required
- But consent duration can be linked to final disposition of criminal proceeding.
 - This allows programs to provide information even after patient leaves treatment



REVOKING CONSENT IN CRIMINAL JUSTICE SYSTEM REFERRALS

- Sample consent http://lac.org/wp-content/uploads/2014/12/Sample_Form_3.pdf



FORM 3
CRIMINAL JUSTICE SYSTEM REFERRAL CONSENT FORM*
 (Revocable Consent Form; To be used when no HIPAA court order is entered.)

**CONSENT FOR THE RELEASE
 OF CONFIDENTIAL INFORMATION:
 CRIMINAL JUSTICE SYSTEM REFERRAL**

I, _____, authorize (initial whichever parties apply):
(Name of defendant)

(Name or general designation of program making disclosure)

(The Probation Department) employees supervising my case

(The Parole Department) employees supervising my case

_____ _____
(Name of the appropriate court) (Name of prosecuting attorney)

_____ _____
(Name of criminal defense attorney) (Other)

to communicate with and disclose to one another the following information (nature and amount of the information as limited as possible):

_____ my diagnosis, urinalysis results, information about my attendance or lack of attendance at treatment sessions, my cooperation with the treatment program, prognosis, and

The purpose of the disclosure is to inform the person(s) listed above of my attendance and progress in treatment.

I understand that my alcohol and/or drug treatment records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2, and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Pts. 160 & 164. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:

(continued)



FORM 3

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Page 2

[Specify the date, event or condition upon which this consent expires. This could be one of the following:]

- there has been a formal and effective termination or revocation of my release from confinement, probation, or parole, or other proceeding under which I was mandated into treatment, or

— _____
(Specify other time when consent can be revoked and/or expires)

I understand that I might be denied services if I refuse to consent to a disclosure for purposes of treatment, payment, or health care operations, if permitted by state law. I will not be denied services if I refuse to consent to a disclosure for other purposes.

I have been provided a copy of this form.

Dated: _____

Signature of Patient

Signature of person signing form if not patient

Describe authority to sign on behalf of patient: _____

*To see a criminal justice system referral consent form that can be made irrevocable with a HIPAA court order, go to www.lac.org



REVOKING CONSENT IN CRIMINAL JUSTICE SYSTEM REFERRALS

- HIPAA – consents are revocable and no exceptions
- BUT – HIPAA allows disclosures in response to court orders.
 - Sample court order <http://lac.org/wp-content/uploads/2014/12/sample-standing-court-order.pdf>



[PLEASE NOTE: THIS IS A STANDING COURT ORDER. NOT ALL JURISDICTIONS RECOGNIZE THESE COURT ORDERS. YOU SHOULD CHECK WITH YOUR STATE AND LOCAL COURT RULES TO DETERMINE IF A STANDING COURT ORDER IS AUTHORIZED IN YOUR AREA]

SAMPLE

[NAME OF COURT]

ORDER TO DISCLOSE PROTECTED HEALTH INFORMATION

The court, having reviewed all relevant regulations and procedures, hereby finds:

1. One of the purposes of the _____
[Name of Drug Treatment Court]

(the "Drug Treatment Court") is to monitor closely the progress of defendants

("Participants") appearing in the Drug Treatment Court in their substance abuse treatment.

2. Participants' enrollment in a substance abuse treatment program is a condition of Participants' continued participation in the Drug Treatment Court.

3. The Drug Treatment Court requires timely and accurate information concerning Participants' attendance and progress in treatment in order to adequately monitor the effectiveness and progress of Participants' participation in treatment.

4. From time to time, the Drug Treatment Court may direct a Participant to receive additional health-related services in connection with the Participant's involvement in the Drug Treatment Court, from which follow-up information concerning the diagnosis and prescribed treatment of the Participant must be received by the Drug Treatment Court staff in order for the Court to properly monitor and modify the Participant's treatment plan.

5. The privacy regulations promulgated by the United States Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Parts 160 and 164, have imposed restrictions on the ability of health care



providers to disclose protected health information concerning a particular individual to third parties except under particular circumstances.

6. HIPAA's privacy regulations contain an exception permitting health care providers to disclose protected health information "in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal" (45 C.F.R. § 164.512(c)(1)).

THEREFORE, IT IS HEREBY ORDERED:

Pursuant to HIPAA, all substance abuse treatment and other health care providers to whom a Participant is referred by the Drug Treatment Court shall disclose to the Drug Treatment Court and/or its staff, upon request, **subject to the federal regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records (42 C.F.R. Part 2)**, information concerning, as applicable, the treatment recommendation, diagnosis, attendance, scope of treatment, treatment progress and quality of participation, dates and results of toxicology testing, and termination or completion of treatment concerning such Participant of the Drug Treatment Court. Any application for disclosure of information pursuant to 42 C.F.R. Part 2 shall be made in accordance with 42 C.F.R. §§ 2.61 - 2.65 and other applicable sections.

DATED: _____

Judge/Justice



WHAT DID WE LEARN?

- Obtain consent – in writing
- Link to a criminal justice event
- Have a court order for HIPAA
- Name all the parties
- Don't redisclose



FOR MORE INFORMATION

- www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court.
- www.wellnesscourts.org
- www.tlpi.org

