

MATCP 2016: Promoting Best Standards for Treatment Courts

CONFIDENTIALITY

Presenters:

Hon. Charlene Jackson

T.L.P.I. Consultants

Tribal Law & Policy
Institute



TRIBAL HEALING TO WELLNESS COURTS

- What's a Healing to Wellness Court?
- Indian Nations are Sovereign Nations
- Sovereignty and Confidentiality



TWO LAWS – WHAT DO WE DO?

- 42 C.F.R. Part 2
- HIPPA
- If 2 laws – generally give effect to both laws if possible
- HHS issued HIPPA regulations and concluded that Congress in enacting HIPPA did not intend to repeal other confidentiality laws.
 - In most situations HIPPA and 42 C.F.R. Part 2 do not conflict, and 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?

- HIPPA 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 HIPPA?

- 42 C.F.R. Part 2
 - If unit or office specializes in diagnosis, treatment, referral for treatment and receives federal assistance?
YES!
- HIPPA
 - 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 patient identifying information that identifies patient as an alcohol or drug patient, either directly or indirectly.
 - Oral or written
 - Also whether was a former patient
- HIPPA 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
- HIPPA – protects all individuals



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 about identified patient or of info that would identify someone as a patient including verification of information already known by the person making the inquiry
 - Restrictions on disclosures apply to disclosures made to 3rd parties as well as disclosures made within program



USES AND DISCLOSURES

- HIPPA – permits disclosure without consent for covered entity's own treatment, payment or health care operations and, with some limitations, for treatment, payment or health care operations of another covered entity.
- HIPPA 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 HIPPA 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 program 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 _____



RE-DISCLOSURE

- 42 C.F.R. Part 2 requires that once consent form is completed, that any disclosure made with consent be accompanied by written statement that information disclosed is protected by federal law and recipient cannot make any further re-disclosure
- If disclosure made orally, written statement must still be sent.



42 C.F.R. PART 2 CONSENT AND CRIMINAL JUSTICE SYSTEM REFERRALS

- When patient's participation in treatment is official condition of probation/parole, sentence, dismissal of charges, release from imprisonment, or other disposition of any criminal proceeding
- Consent form still required, rules concerning duration and revocation of different
- 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

- 42 C.F.R. Part 2 - Consent form can state it cannot be revoked until a certain specified date or condition occurs.
 - So patient who agreed to enter treatment in lieu of prosecution or punishment cannot prevent court, probation, parole or other agency from monitoring progress.
 - Irrevocability must end not later than final disposition of criminal proceeding.
 - 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

- HIPPA – consents are revocable and no exceptions
- BUT – HIPPA allows disclosures in response to court orders.
 - Issue order require programs to provide information on progress of patients mandated into treatment by criminal justice system, this allows programs to use to use irrevocable criminal justice consents and programs will continue to follow requirements of 42 C.F.R.
 - Sample court order <http://lac.org/wp-content/uploads/2014/12/sample-standing-court-order.pdf>
- Voluntarily in Court – consent is always revocable.



[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

Sample Prepared by the Legal Action Center



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



THESE LAWS ARE IMPLICATED WHEN

- 1. An individual or unit within the drug court receives or discloses information about a “patient” from a “program” covered by the regulations
- 2. And/or if an individual or special unit within the drug court itself is a “covered entity” or “program” covered by the regulations



WHEN SHOULD WE OBTAIN CONSENT?

- Time of assessment or
- Time referral is made
- Then you can fax consent form and then later contact treatment program to determine if the person showed up.
- HIPPA prevents a program from conditioning treatment on signing consent
- Judge, probation or parole office, or child welfare case worker can condition participation in HWC on defendant signing the form.



GUIDELINES FOR COMMUNICATING WITH CONSENT

- First determine whether assessment or participation in treatment program is official condition of probation, parole, sentencing, dismissal of criminal charges, release from imprisonment or other disposition of a criminal proceeding
- If yes to above – special rules for criminal justice system referral consents apply.
 - Meaning it can be made irrevocable until certain specified date
 - But make sure to do a HIPPA court order
 - This does not apply to juveniles or parents involved in civil child abuse/neglect cases
 - Can re-disclose in connection with official duties with respect to particular criminal proceeding (not other proceedings)



GUIDELINES FOR COMMUNICATING WITH CONSENT

- Include all appropriate parties in the consent
- Limit the information to be disclosed
 - The minimum necessary to fulfill the purpose of the communication



ACTIVITIES THAT DO NOT TRIGGER LAWS

- Requiring drug tests of all adult arrestees or juvenile offenders, tests alone not protected UNLESS test was used to diagnose a drug or alcohol problem or performed for purpose of referring an individual to treatment
- BUT if Court asks member of court staff or treatment program to conduct assessment, then 42 C.F.R. is triggered



FOR MORE INFORMATION

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

