

Confidentiality and Drug Courts



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Confidentiality/Privacy

Several rules apply to participants in Drug treatment courts.

42 CFR Part 2 – The alcohol and substance abuse treatment confidentiality rule.

HIPAA – New federal rules covering all health related information.

A local rule may also exist (e.g. HIV info)

42 CFR Part 2

- First issued 1975, revised 1987
- Designed to help deal with the stigma of addiction.
- Requires notification of confidentiality, consent forms, prohibition of redisclosure
- “I’m sorry I cannot acknowledge whether someone is or isn’t in our treatment program”.

HIPAA

- Health Insurance Portability and Accountability Act of 1996
- Designed to ensure maintenance of health insurance coverage when you change jobs.
- Administrative simplification – Healthcare processes becoming very complex – look to standardize information – make it easier.
- Protect confidentiality and security of patient information

Privacy Standards

- Places restrictions on the use and/or disclosure of “Protected Health Information” –PHI
- Effective 4/14/03
- Essentially applies “42 CFR p.2-like” requirements to all health care.

Protected Health Information (PHI)

- Any health information:
 - ◆ *Oral , paper, or electronic*
- Including identifying demographic information
- Relating to:
 - ◆ Physical or mental health (**treatment**) of individual,
 - ◆ Provision of health care to an individual (**operations**)
 - ◆ **Payment** for provision of health care to individual

Security Standards

- Security of information against non-approved access
- Electronic creation, transmission, and storage of information a significant concern – hackers
- Requirements for logging of access, automatic log offs, encryption of information sent by internet.
- Regulations take effect in 4/05

Minimum Necessary Standard

- When using/disclosing PHI, only the minimum necessary information should be shared.
- The disclosure should cover only the authorized information
- Individuals, family, visitors, etc. who do not have a need to know PHI should not have access to it.

HIPAA v. 42 CFR Part 2

- The laws cover a lot of the same material.
- Some points of difference – more specific or more recent rule usually applies.
- For the CD Treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent
- In several cases HIPAA wins.

When the Regulations Apply

1. If an individual or unit within the drug court receives or re-discloses information about a “patient” from a “program” covered by the regulations, and/or
2. If an individual or special unit within the drug Court itself is a “covered entity” or “program” covered by the regulations.

Persons who are protected as “Patients”

- A person is a “patient” if they have sought or received a treatment programs services.
- If someone fails to appear for an initial appointment, that information is protected because they have “sought” treatment.

Defining the Program

1. A unit or office of the Drug Court itself provide diagnosis, treatment or makes referrals to CD treatment.
 - Is a “Program” under 42 CFR Part 2.
 - Is a “Covered Entity” if it transmits PHI electronically.
 - Requires a valid multi-party consent to disclose information to the Drug Court Team.

Defining the Program

2. The program is independent of the Drug Court.
 - Requires valid multiparty consents for re-disclosure of information to the Drug Court Team.

Consents

- A proper consent can authorize all parties involved in the drug court to share information necessary to monitor treatment progress and compliance.
- To be effective the consent form should be signed at the earliest possible time.
- Judge, coordinator, probation, etc., should get consent and fax it to treatment before 1st appointment.

Requiring Consents

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent, but
- The judge, probation/parole, child welfare can condition participation in the drug court program on the defendant signing the consent form.

Consent Guidelines

- Criminal Justice System (CJS) consents
 - ◆ Determine whether assessment and treatment participation is an official condition that the person must meet.
 - ◆ CJS consents have special rules under 42 CFR part 2 – irrevocable until expiration.
 - ◆ HIPAA requires all consent be revocable.

Option 1- Court Order & Irrevocable Consent

- Use of Court Order (court or administrative body) – Satisfies HIPAA
 - ◆ “Standing order”
 - ◆ “Limited HIPAA Order”
 - ◆ Irrevocable consent – 42 CFR Part 2

Option 2 – Revocable Consents

- “Unlikely” the individual will revoke consent if it means they will be in violation of terms of sentence.
- Saves Court work – no orders
- If revoked, programs will have to inform court that a 42 CFR Part 2 court order is needed.
- Consent needs to describe specifically how disclosed info will be used.

Use and Redisclosure

- Under 42 CFR § 2.35, information from a CJS release may be redisclosed and used only in connection to their official duties with respect to the particular criminal proceeding.
- The information may not be used in other proceedings, for other purposes or with respect to other individuals. (42 CFR § 2.12(d)(1))

Can a Judge share treatment information in open court?

- The Judge may decide that sharing information about progress/difficulty in treatment is a “legitimate part of the court’s official duties and responsibilities with respect to the criminal proceedings”.
- Remember the Minimum Necessary Information standard.

Resources

- Legal Action Center (www.LAC.org)
 - ◆ Confidentiality and Communication (2003)
 - ◆ *Of Substance* – newsletter
- www.hipaadvisory.com



THE END