Federal Confidentiality Laws and Ethical Considerations

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Presented by:
Souder F. Tate

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Overview of Session

- Federal Confidentiality Laws
- Consents
- Beyond Consents
- Ethical Considerations of Team Members

FEDERAL CONFIDENTIALITY LAWS

Confidentiality & Drug Courts

- Key Component 1 requires drug courts to integrate drug treatment services with justice system case processing.
- This requires ongoing communication and frequent exchange of information about a participant's performance.
- This communication must comply with federal and state confidentiality requirements.

Federal Confidentiality Statutes

- Two federal statutes presumptively regulate the disclosure of a participant's treatment information in a drug court context.
  - Drug Abuse Prevention, Treatment and Rehabilitation Act (42 USC 290dd)
  - Health Insurance Portability and Accountability Act (HIPAA)

42 CSR 290dd & 42 CFR Part 2

- Enacted to expand access to substance abuse treatment programs
- Covers any "*program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the United States*."

42 CFR Prohibits

- Prohibits disclosure or re-disclosure of all records relating to the identity, diagnosis, prognosis, or treatment of any patient in a substance abuse program.
- Cannot disclose that a person is receiving, has received or has applied to receive substance abuse treatment services.

42 CFR Part 2 applies

- Whenever the Court orders:
  - Screening
  - Assessments
  - Referrals
  - Treatment
  - Diagnosis

Who is Protected by 42 CFR

- Current patients
- Past patients, including deceased
- Individuals who are applying for treatment
- Applies to both disclosures and re-disclosures
- No exceptions for family members, the patient's lawyer, police or employer

Health Insurance Portability and Accountability Act of 1996

- Designed to ensure continuation of coverage of health insurance while changing jobs
- Provides administrative simplification
- Protects confidentiality & security of a patient's information
- Provides a patient with right of access to medical records

HIPAA

- Regulates health care providers, payees or billers who electronically transmit Protected Healthcare Information (PHI)
- Covered entities do not include courts, court personnel, probation officers, law enforcement or correctional facilities
- Drug Courts are impacted because treatment providers are subject to HIPAA

Consents

How should a treatment court participant consent to release of information?

General Rules of Disclosure

- Privacy rights must be given in writing;
- Treatment Programs may only release information identifying a drug court participant as a substance abuser or treatment patient with either a knowing and written consent or for certain limited exceptions;
- Information released must be what is minimally necessary to meet the terms and conditions of the written consent.

HIPAA Consent Requirements

- Requires that all consents be revocable at any time;
- Treatment cannot be conditioned upon execution of a consent;
- But allows the use of an administrative order for disclosure of treatment information.

Best Practices

- Therefore, even though HIPAA does not directly apply to courts, you should require:
  - Administrative Order requiring treatment providers disclose relevant treatment information to the drug court team;
  - Execution of a consent form by participant which covers both 42 CFR and HIPAA requirements and covers open courtrooms and voluntariness.

Elements of a Consent

1. Name of person or organization that may make the disclosure;
2. Name or title of person (or organization) to whom disclosure may be made;
3. Participant's name;
4. Purpose of the disclosure;
5. Description of how much and what kind of information may be disclosed;
6. Participant's signature;
7. Date on which the consent was signed;
8. Date, event, or condition upon which the consent will expire.

Best Practices

- Designate a privacy official responsible for compliance with federal and state confidentiality law requirements;
- Provide privacy official with the necessary resources to do the job;
- Ensure appropriate administrative, technical, and physical safeguards are in place to protect the privacy of information. e.g. locked cabinets, segregation of drug court files, electronic firewalls.

Best Practices

- Ensure participant understands the release: literacy, opportunity to consult attorney;
- Document privacy policies and review regularly;
- Update participant releases regularly to account for new team members;
- Consider having all team members sign Memorandum of Understanding (MOU);
- Require that all team members be trained periodically on confidentiality requirements.

Memorandum of Understanding

- Details what information will be shared, by whom, and for what purposes;
- Sets forth the limitations upon prosecutorial use of information gained from treatment programs and in staffing;
- Acknowledges the applicability of federal and state confidentiality laws including those related to re-disclosure;
- File access limitations and storage standards;
- Clear reference to 42 USC/CFR.

Beyond Consents

Even without written consent, under what other circumstances may information be released?

Permitted disclosures -no consent

- Medical emergency
- Crimes on the premises
- Crimes against staff
- Administration / qualified service programs working with drug court
- Outside auditors, central registries and researchers
- No re-disclosures unless permitted

Mandatory disclosure -no consent

- State child abuse laws
- A valid court order
- State laws relating to cause of death
- Duty to protect others, to warn of imminent, serious harm

ETHICAL CONSIDERATIONS

General Ethics

- Everyone on the drug court team has both personal and professional ethical standards:
  - At times, these standards can conflict
  - The "rules" can change, or they can be different in different jurisdictions
  - ex. *Tarasoff* ruling (Duty to warn)
  - When in doubt, seek the advice of state experts on ethical dilemmas

General Issues

- For everyone on the team, it is necessary to maintain a professional relationship with the drug court participants. Most of the time, the correct answer is obvious. For example:
  - Don't lend money
  - Don't co-sign loans
  - Don't develop intimate relationships

Judges

- Canon 1: "*A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety*."
  - Key Component 6: "a coordinated strategy governs drug court responses to participants' compliance";
  - Key Component 10: mandate to "forge partnerships" with law enforcement and community groups.

Judges & Impartiality

- Canon 2: "*A judge shall perform the duties of judicial office impartially, competently, and diligently*."
  - **Ex Parte Communications** – There is a "therapeutic court exception" to ex parte communications in the ABA Model Code but few states have adopted it.
  - Ohio has adopted this exception in Rule 2.9 (A)(6).

Judges & Conflict of Interests

- Canon 3: "*A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office*."
  - What about attendance at picnics, bowling, baseball games or float trips with participants? What if activity is sponsored by law enforcement?
  - Question to ask: Does the activity cast a reasonable doubt on the judge's impartially or threaten public confidence in judge's integrity?

Prosecution and Defense Roles in Treatment Court

- Key Component #2: "*Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights*."
- Non-adversarial does not imply that team members relinquish their professional roles or responsibilities.

Non-Adversarial

- Prosecutors continue to advocate for public safety, victim interests, and accountability.
- Defense counsel continues to advocate for participants' due process and legal rights.
- Treatment providers continue to advocate for effective and humane treatment.
- The principal distinction in Drug Courts is that advocacy occurs primarily in staffings as opposed to court hearings.

Two Final Points

- Be comfortable with how you fulfil your role and your ethical obligations on the treatment court.
- Be prepared to make a rational defense of your actions if your ethicality is ever questioned.

- Souder F. Tate
  - Attorney at Law
- soudertatelaw@gmail.com
- (417) 831-5299