

Testimony
National Prison Rape Elimination Commission
Lynn F. Sander, MD
December 5, 2007

Confidentiality and Reporting: Medical Ethics, Victim Safety and Facility Security

The maintenance of patient confidentiality is a basic tenet in developing a therapeutic relationship between medical staff and patients as well as a legal requirement mandated by both federal and states laws. This takes on another dimension in a correctional institution where the medical staff must maintain a therapeutic relationship with both the victim and the perpetrator especially in smaller facilities where there may be only one physician and small numbers of other medical personnel. Although some may argue that the greater public good in reporting certain information outweighs the individual rights, there are methods to both protect the public and the individual. This, too, is particularly critical in a correctional setting where patients frequently enter with poor expectations with regard to how they will be treated and how their privacy will be maintained. It is also fundamental to achieving the goals of the Prison Rape Elimination Act for if one is to collect meaningful data, inmates must feel that both their privacy and safety is protected should they report such an incident.

The National Commission on Correctional Healthcare (NCCHC) has developed several standards that apply to inmates who are victims of sexual assault. These include J/P-G-09, Procedure in the Event of Sexual Assault; J/P-H-02, Confidentiality of Health Records and Information and J/P-I-03, Forensic Information. The full text of these is appended at the end of this testimony. The intent of the standard Procedure in the Event Sexual Assault is that the victim obtains proper treatment while confidentiality of protected health information is maintained for both the victim and the perpetrator. Both this standard and the standard on collection of forensic information do not allow medical staffs who treat the inmates to collect forensic information that might have an adverse effect on the legal proceedings of that inmate. In other words, if the victim consents, providers may collect evidence from him or her; however, providers should not collect forensic evidence from the perpetrator that might be used against him/her at trial. The intent of the standard on confidentiality is, as with HIPAA, to protect the confidentiality of personal health information. In instances, where there are legal requirements to report this information, the patient should be informed of this at the beginning of the health encounter.

Because rapid treatment for the protection from infectious disease is paramount and the proper collection of forensic evidence is critical for conviction of the perpetrator, ideally victims should be sent to a community healthcare facility able to accomplish these goals. Many correctional institutions do not stock either the recommended medications for sexually transmitted disease (STD) prophylaxis or rape kits necessary for the proper collection of evidence and generally providers have not been trained in the performance of this procedure. Additionally, sending the patient off-site enhances the ability of the medical staff to remain distanced from the procedures thereby allowing a therapeutic relationship to continue in future medical encounters with both patients: the victim and the perpetrator. Facility medical staff can review the medical record of the perpetrator and relate to outside providers the likelihood that STD prophylaxis is necessary for the

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victim without revealing the identity of the individual. Additionally, sending the patient to a community provider means that the patient will receive the same evaluation and treatment that non-incarcerated sexual assault victims as stipulated by the Estelle v. Gamble Supreme Court decision.

In addition to the NCCHC standards most states have statutes that impact the reporting when medical personnel have treated a sexual assault victim. These fall into four categories:

- (1) "Laws that specifically require medical professionals to report treatment of a rape victim to law enforcement;
- (2) Laws that require the reporting of injuries that may include rape;
- (3) Laws relating to other crimes or injuries which may impact rape and sexual assault victims; and
- (4) Laws regarding sexual assault forensic examinations which may impact rape and sexual assault reporting."

These are categorized as quoted above and described in a report by Teresa Scalzo; Esquire entitled Rape and Sexual Assault Reporting Requirements for Competent Adult Victims. This document is available at <http://www.usmc-mccs.org/famadv/restrictedreporting/National%20Rape%20Reporting%20Requirements%206.15.06.pdf>. The report also describes issues in the interpretation of the laws by state. For medical providers working in the any environment, it is prudent for to seek legal counsel in the interpretation of the governing statutes of their jurisdiction.

The HIPAA regulations that apply to correctional institutions are slightly different than those that govern most of the health industry. As stated in HHS §164.512 (k) (5)

(5) Correctional institutions and other law enforcement custodial situations.

(i) Permitted disclosures. A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for:

- (A) The provision of health care to such individuals;
- (B) The health and safety of such individual or other inmates;
- (C) The health and safety of the officers or employees of or others at the correctional institution;
- (D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;
- (E) Law enforcement on the premises of the correctional institution; and
- (F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) Permitted uses. A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

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(iii) No application after release. For the purposes of this provision, an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.

Although the rule appears broad, the intent is that protected health information is only disclosed to as absolutely necessary for the health and safety of the patient and others in the correctional facility. In most instances, one can accomplish the goals of protection and safety without revealing the specifics of the information. For example, a medical person might inform classification personnel of the need for a particular inmate to be in a protected environment without revealing the specific medical reason.

Although in many instances, allegations of sexual assault are brought to the attention of medical staff by correctional officers, in cases where the inmate comes to the medical staff first and does not want this information revealed to the custody staff, there are alternative methods to achieve the goals of treatment and safety. Ideally, the provider has a trusting relationship with the patient such that he or she can convince the patient that it is in his or her best interest to inform appropriate custody staff of the events. This is extremely important if the perpetrator is a staff member. Often by ascertaining the reason for the patient's reluctance to report, the provider can address the issues concerning the patient. If the patient is still adamant that he or she does not want custody informed, the patient will need to be sent to a community facility for examination, forensic collection and initiation of treatment and where they might be willing to cooperate with other law enforcement agencies. Upon return, custody staff can be informed of the need for protection of this inmate without revealing the reason. Using the public health model, data collection can proceed anonymously.

**I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED ON THIS _____ DAY OF NOVEMBER, 2007.**

Lynn F. Sander, MD

National Commission on Correctional Health Care

Standards for Health Services (jail or prison) 2003 (current) and 2008

G-09 PROCEDURE IN THE EVENT OF SEXUAL ASSAULT

Important

Standard

The medical and psychological trauma of a *sexual assault* is minimized as much as possible by prompt and appropriate health intervention.

Compliance Indicators

1. All aspects of the standard are addressed by written policy and defined procedures.
2. Victims of sexual assault are either referred to a community facility for treatment and the gathering of evidence, or if these procedures are performed in-house, the following guidelines are used.
 - a. A history is taken and qualified health care professionals conduct an examination to document the extent of physical injury and to determine whether referral to another medical facility is indicated. With the victim's consent, the examination includes the collection of evidence from the victim, using a kit approved by the local legal authority.
 - b. Prophylactic treatment and follow-up care for sexually transmitted or other communicable diseases (e.g., HIV, hepatitis B) are offered to all victims, as appropriate.
 - c. Following the physical examination, there is an evaluation by a qualified mental health professional for crisis intervention counseling and long-term follow-up.
 - d. A report is made to the correctional authorities to effect a separation of the victim from his or her assailant in their housing assignments.

Definition

A *sexual assault* is a sexual act that is coercive or assaultive in nature and that involves the use or the threat of force.

Discussion

The standard intends that appropriate treatment take place for victims of sexual assault.

With the sexual assault victim's consent, health providers are permitted to gather forensic evidence from the victim, even though, under this standard, they are not permitted to gather forensic evidence from the alleged perpetrator. However, medical information may be obtained from the alleged perpetrator, with his or her consent, so that appropriate medical intervention can be initiated for the victim.

Recommendations

Immediate response to an act of sexual assault is of the utmost importance. Separation of the victim and alleged assailant is needed to protect the victim and to prevent further violence.

Psychological trauma may occur to individuals other than the victim of a sexual assault. Mental health staff should be available to provide support and assistance to those in need. Where an adolescent is the victim of sexual assault, careful assessment of his or her potential for suicide should be done; sexual assault is especially traumatic to the adolescent.

National Commission on Correctional Health Care

Standards for Health Services (jail or prison) 2003 (current) and 2008

H-02 CONFIDENTIALITY OF HEALTH RECORDS AND INFORMATION

Essential

Standard

The confidentiality of a patient's written or electronic health record, as well as verbally conveyed health information, is maintained.

Compliance Indicators

1. A written policy and defined procedures address all aspects of the standard.
2. Health records stored in the facility are maintained under secure conditions separate from correctional records.
3. Access to health records and health information is controlled by the health authority.
4. Evidence exists that health staff receive instruction in maintaining patient confidentiality.
5. If records are transported by nonhealth staff, the records are sealed.
6. Nonhealth staff who observe or overhear a clinical encounter are instructed that they also are required to maintain confidentiality.

Discussion

The intent of this standard is to protect the patient's right to confidentiality of personal health information.

The principle of confidentiality protects the patient from disclosure of certain confidences entrusted to a provider during a course of treatment. This principle extends to patients and their health care providers. Thus, health records must be maintained under security and completely separate from inmates' custody records.

At all times, including during transfers and referrals, the confidentiality of the contents of health records must be maintained.

Maintaining confidentiality of health records and information is to be included in the orientation program for health staff (see J-C-09 Orientation for Health Staff), and is to be reviewed periodically. Health services staff are to be reminded not to discuss patients' health information in front of custody staff or other inmates, including those working in or near the health services area. Nonhealth staff who observe or overhear a clinical encounter are instructed that they also are required to maintain confidentiality. Evidence that staff with access to the health records have been instructed in the need for confidentiality may take several forms. These include policies and procedures, memoranda to staff, minutes of meetings, and reviews during roll call or in-services.

Recommendation

The health authority should maintain a current file on the rules and regulations covering the confidentiality of health records and the types of information that may and may not be shared. Local, state, or federal laws may allow certain exceptions to the obligations of health care providers to maintain confidentiality; health services staff should inform inmates at the beginning of the health care encounter when these circumstances apply.

National Commission on Correctional Health Care

Standards for Health Services (jail or prison) 2003 (current) and 2008

I-03 FORENSIC INFORMATION

Important

Standard

Health services staff are prohibited from participating in the collection of *forensic information*.

Compliance Indicators

1. All aspects of the standard are addressed by written policy and defined procedures.
2. Health services staff are not involved in the collection of forensic information (e.g., DNA testing), except when:
 - a. complying with state laws that require blood samples from inmates, so long as there is consent of the inmate and health services staff are not involved in any punitive action taken as a result of an inmate's nonparticipation in the collection process;
 - b. conducting body cavity searches, and blood or urine testing for alcohol or other drugs when done for medical purposes by a physician's order;
 - c. conducting inmate-specific, court-ordered laboratory tests, examinations, or radiology procedures with consent of the inmate; and
 - d. in the case of sexual assault, gathering evidence from the inmate-victim with his or her consent.

Definition

Forensic information is physical or psychological data collected from an inmate that may be used against him or her in disciplinary or legal proceedings.

Discussion

The intent of this standard is to ensure that the role of the health services staff is to serve the health needs of their patients. Performing psychological evaluations of inmates for use in adversarial proceedings (e.g., court, probation or parole hearings), conducting body cavity searches for contraband, and collecting blood or urine specimens for drug analysis are examples of ethical conflicts for a facility's health services staff. Such acts undermine the credibility of these professionals with their patients, and compromise health services staff by asking them to participate in acts that are usually done without inmates' consent. Where state laws and regulations require that such acts be performed by health services staff, the services of outside providers or someone on the institution's staff who is not involved in a therapeutic relationship with the inmate is obtained.

Alternatives to health services staff participation in collecting information for forensic purposes are available in several instances. For example, in lieu of body cavity searches, a dry cell could be used. Oral and buccal sampling for DNA are now available and do not require the involvement of health services staff. Urine testing for drug use can be done by correctional staff.

Recommendation

Maintaining ethical boundaries and professional attitudes is difficult in correctional institutions. However, orientation for new hires and continuing education on potential ethical conflicts can help health services staff maintain their ethical perspectives.