

Legal Brief

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Reporting Patient Drug Use or Diversion

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of February 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

Both the HIPAA-mandated federal medical privacy rules and South Dakota law regarding the patient/physician privilege generally prohibit the release of health-care related information to third parties. The prohibition exists regardless of the physician's knowledge of the patient's illegal drug use. However, this privilege is not without exception. The federal privacy rules and South Dakota law permit and even require the disclosure of health-care related information to law enforcement officials in specified circumstances.

Discussion

Under both federal law and South Dakota law, patients enjoy a privilege with regard to communications with a medical provider. As a result, nearly all communication with a physician is deemed confidential and may not be disclosed to a third party by the physician. Under some limited circumstances, however, a patient's illegal drug use, including the use of prescription drugs for recreational purposes (referred to in this legal brief as "diversion") may require or permit a physician to disclose protected health care information to law enforcement.

Under South Dakota law, "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of [the patient's] physical, mental, or emotional condition, including alcohol or drug addiction..." SDCL §19-13-7. However, the privilege has several exceptions. First, a physician may disclose otherwise protected information if the physician "reasonably believes actions by the patient are likely to result in imminent death or substantial bodily harm to another." SDCL §19-2-12. Next, the privilege is handled differently in criminal proceedings. In such a proceeding, "if the physical or mental condition of any person is in issue," the general physician-patient privilege is deemed waived for "the purpose of proving the commission of a criminal offense." SDCL §19-2-3.2. This exception allows the physician to provide evidence concerning the commission of a criminal offense, but it doesn't authorize a report of a criminal offense by a physician. Finally, it should be noted that the court can order an examination of the physical, mental, or emotional condition of a patient. Such an examination is excepted from the general physician-patient privilege. SDCL §19-13-10.

Physicians should also be aware of the general obligation to report felony crimes. If a physician has unprivileged knowledge of the commitment of a felony including felony drug crimes, he is required to report it. Failure to report such unprivileged knowledge of a felony or concealing the felony is a class 1 misdemeanor. See SDCL §22-11-12.

The HIPAA mandated federal privacy rules also require that individuals' health care information be kept confidential. See 45 CFR §160 through §164. However, if drug use or diversion becomes the subject of a law enforcement action, the health care provider is required to disclose the information when done in compliance with a court order or court-ordered warrant, subpoena, or an administrative request. Otherwise, the rules permit, *but do not necessarily require*, disclosure of confidential health-care related information for "law enforcement purposes." 45 CFR §164.512.

It is permitted but not required for the physician to disclose health-care related information to law enforcement for the identification or location of a suspect, fugitive, material witness, or missing person if not otherwise required to disclose the information. If the physician chooses to provide information for this purpose, disclosure should be limited to the following information:

1. Name and address;
2. Date and place of birth;
3. Social security number;
4. ABO blood type and rh factor;
5. Type of injury;
6. Date and time of treatment;
7. Date and time of death, if applicable; and
8. A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

It is permitted but not required for the physician to disclose health-care related information to law enforcement in response to a law enforcement official's request for such information about an individual who is, or is suspected to be, a victim of a crime if:

1. The individual agrees to the disclosure; or
2. The health care provider is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided:
 - a. The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;
 - b. The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and
 - c. The disclosure is in the best interests of the individual as determined by the health care provider, in the exercise of professional judgment.

It is also permitted but not required for the physician to disclose health-care related information:

1. To alert law enforcement of a persons' death, if the provider suspects that criminal activity caused the death;
2. If the provider believes that health-care related information is evidence of a crime that occurred on its premises and;
3. By a health care provider providing emergency health care in response to a medical emergency, other than an emergency on the premises of the provider, if such disclosure appears necessary to alert law enforcement to:
 - a. The commission and nature of a crime;
 - b. The location of such crime or of the victim(s) of such crime; and
 - c. The identity, description, and location of the perpetrator of such crime if a physician believes that the medical emergency is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care. 45 C.F.R. § 164.512(f).

Conclusion

Individual health-care related information is protected both under state and federal law. As a result, such information may be disclosed to a third party only if permitted by law. Physicians should exercise care prior to disclosure of any health-care related information, including the knowledge of illegal drug activity. However, reporting the illegal use of drugs or diversion is required when done in compliance with a court order or court-ordered warrant, subpoena, or an administrative request. Disclosure of health-care related information is permitted but not required in connection with other limited law enforcement related conditions.



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