

CONFIDENTIALITY LAWS

IN THE STATE OF TEXAS

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Confidentiality Laws

I. State Statutes and exclusions

Unlike the United States Constitution in Texas there is no general right to privacy under the Texas Constitution regarding the disclosure of certain information that an individual may deem to be highly sensitive.

See however, Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S. W. 2d 203 (Tex. 1987).

See also, City of Beaumont v. Boullion, 896 S. W. 2d 143 (Tex. 1995).

Moreover, there is no law in Texas creating a special duty on the part of a CSCD to refrain from disclosing information regarding a defendant under its supervision.

Hence, any confidentially protected interest to certain information maintained by a CSCD must arise from a specific statutory provision or a judicially created cause of action which prohibits the unauthorized disclosure of certain types of information.

A. Medical information - Section 159.001 et seq. Occupations Code

Section 159.002, Occupations Code states that:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.
- (d) The prohibitions of this chapter continue to apply to a confidential communication or record relating to a patient regardless of when the patient receives the services of a physician, except for medical records at least 100 years old that are requested for historical research purposes
- (e) The privilege of confidentiality may be claimed by the patient or by the physician on behalf of the patient.

The types of communications that are privileged under Chapter 159, Occupations Code, are those “relative to or in connection with any professional services as a physician to a patient.” The duty of confidentiality that arises under this statute results from the physician-patient relationship; the duty does not exist independent of that relationship. A party is aggrieved for purposes of recovering damages only if a physician-patient relationship exists. See Sloan v. Farmer, 217 S. W. 3d 763 (Tex. App. – Dallas, 2007).

Note: Physician-patient statute did not bar alcohol test results showing that the motorist involved in an accident was intoxicated, even though the investigating officer received information from an attending physician without the patient's authorization; the motorist's rights were not violated when the state discovered his blood alcohol level. See State v. Hurd, 865 S. W. 2d 605 (Tex. App. – Fort Worth, 1993).

Section 150.003 - Exceptions to the privilege of confidentiality in a court or administrative proceedings exist:

- (2) if the patient or someone authorized to act on the patient's behalf submits a written consent to the release of confidential information
- (7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under Chapter 462 (Treatment of Chemically Dependent Persons), 574 (Court-Ordered Mental Health Services), or 593 (Admission and Commitment to Mental Retardation Services, Health and Safety Code (but not Chapter 841, Civil Commitment of Sexually Violent Predators);
- (10) in a criminal prosecution where the patient is a victim, witness, or defendant;
- (12) to a court or a party to an action under a court order or court subpoena.

Note: This section does not authorize the release of confidential information to investigate or substantiate criminal charges against a patient.

Note also: Records or communications are not discoverable under Section (a) (10) until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion thereof.

Note further: Section 159.004 (h) Exceptions to the privilege of confidentiality, in a situation other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the followings:

- (1) a governmental agency if the disclosure is required or authorized by law;
- (2) medical or law enforcement personnel if the physician determines that there is a probability of:
 - (A) imminent physical injury to the patient, the physician, or to another person, or
 - (B) immediate mental or emotional injury to the patient.
- (5) a person who has consent
- (9) to health care personnel of a penal or other custodial institution in which the patient is detained if the disclosure is for the sole purpose of providing health care to the patient.

Note: Persons who fall within this last exception must be acting on the patient's behalf when making the disclosure.

Section 159.005 (a) Consent for the release of confidential information must be in writing, and signed by:

- 1) the patient

- 2) a parent or legal guardian of the patient if the patient is a minor
- 3) a legal guardian of the patient if the patient has been adjudicated incapacitated to manage the patient's personal affairs;
- 4) an attorney ad litem appointed for the patient; or
- 5) a personal representative of the patient if the patient is deceased.

The written consent must specify:

- 1) the billing records, medical records, or other information to be covered by the release;
- 2) the reason or purposes for the release; and
- 3) the person to whom the information is to be released.

The patient, or other person authorized to consent, is entitled to withdraw the consent to the release of any information.

Note: Withdrawal of consent does not affect any information disclosed prior to the written notice of withdrawal.

Note further: Cannot maintain a cause of action against a physician for the disclosure made by the physician in good faith reliance on an authorized consent if the physician did not have written notice that the authorization had been revoked.

Any person who receives information made confidential may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

Note: A physician does not have to respond to a consent to release if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient and the physician may delete confidential information about another patient or family member of the patient who has not consented to the release.

Information pursuant to a consent to release shall be furnished by the physician not later than the 15th business day after the date of receipt of the written consent for release.

B. Psychological information

State laws dealing with the confidentiality of psychological information is found in Chapter 611, Health and Safety Code

Section 611.002 - Communications between a patient and a professional, and record of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Confidential communications and records may not be disclosed except as otherwise provided by law.

Professional:

- 1) a person authorized to practice medicine in any state or nation;
- 2) a person licensed or certified by this state to diagnose, evaluation, or treat any mental or emotional condition or disorder; or
- 3) a person the patient reasonably believes is authorized, licensed, or certified.

Non-Judicial/Administrative Proceedings

A professional may disclose confidential information only:

- 1) to a governmental agency if the disclosure is required or authorized by law;
- 2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of imminent mental or emotional injury to the patient;
- 3) to qualified personal for management audits, financial audits, program evaluations, or research
- 4) to a person who has the written consent of the patient;
- 9) to health care personnel of a correctional facility in which the patient is detained if the disclosure is for the sole purpose of providing health care to the patient.

A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information.

Section 611.0045 - A professional may deny access to any portion of the record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

Note: For audits or research personnel who receive confidential information may not directly or indirectly or otherwise disclose the identity of a patient in a report or in any other manner.

A professional shall delete confidential information about another person who has not consented to the release.

Section 611.006 - Judicial and Administrative Proceedings

A professional may disclose confidential information

3) a judicial or administrative proceeding in which the patient waives the patient's right in writing to the privilege of confidentiality of information;

5) a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, except that those communications may be disclosed only with respect to issues involving the patient's mental or emotional health.

- 7) any criminal proceeding, as otherwise provided by law;
- (10) an involuntary commitment proceeding for court-ordered treatment or for a probable cause hearing under:
 - (A) Chapter 462 (Treatment of Chemically Dependant Persons);
 - (B) Chapter 574 (Court-Ordered Mental Health Services); or
 - (C) Chapter 593 (Admission and Commitment to Mental Retardation Services).
- 11)judicial or administrative proceeding where the court has issued an order or subpoena.

Note: Regarding exception 5) the court, in determining the extent to which disclosure of all or any part of a communication is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Section 611.0045 Right to Mental Health Records

- (a) Ordinarily, a patient is entitled to have access to the content of a confidential record made about the patient.
- (b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.
- (c) If the professional denies access to a portion of the patient's record, he must inform the patient in a signed and dated written statement that having access would be harmful to the patient's physical, mental or emotional health and specify in the patient's records the portion of the denied record, the reason for the denial, and the duration of the denial
- (g) A professional shall delete confidential information about another person who has not consented to the release, but may not delete information relating to the patient that another person has provided, the identity of the person responsible for that information, or the identity of any person who provided information that resulted in the patient's commitment.
- (i) The professional or other entity that has possession or control of the record shall grant access to any portion of the record to which access is not specifically denied within a reasonable time and may charge a reasonable fee.
- (j) Notwithstanding confidentiality of medical records under the Occupations Code, this section applies to the release of a confidential record created or maintained by a professional, including a physician, that relates to the diagnosis, evaluation, or treatment of a mental or emotional condition or disorder, including alcoholism or drug addiction.

Section 611.007 - Revocation of Consent

A patient may revoke a disclosure consent to a professional at any time.

A revocation is valid only if it is written, dated, and signed by the patient.

Note: A patient may not maintain an action against a professional for a disclosure made in good faith reliance on an authorization if the professional did not have notice of the revocation of consent.

Section 611.008 - A professional must respond to a consent not later than the 15th day after the date of receiving the request. In order for a patient to get a copy of his/her records s/he must request a copy.

Note: Chapter 611 makes no mention that a waiver must be in writing and signed by the patient. However, implicit in the statute is the requirement that a waiver must be signed.

C. Release of Sex Offender Information

The release of sex offender information is found in Chapter 109, Occupations Code

Definitions

Sec. 109.001. In this chapter:

- (1) "Administration of criminal justice" and "Criminal justice agency" have the meanings assigned by Article 60.01, Code of Criminal Procedure.
- (2) "Local law enforcement authority" has the meaning assigned by Article 62.01, Code of Criminal Procedure.
- (3) "Sex offender" has the meaning assigned by Section 9(m), Article 42.12, Code of Criminal Procedure.

Release of Information

Sec. 109.051 (b). - Notwithstanding Subtitle B, Title 3, of this code or Chapter 611, Health and Safety Code, a person described by Subsection (a), on request or in the normal course of business, shall release information concerning the treatment of a sex offender to:

- (1) another person described by Subsection (a);
- (2) a criminal justice agency; or
- (3) a local law enforcement authority.

Sec. 109.052. A criminal justice agency, on request or in the normal course of official business shall release information concerning the treatment of a sex offender to:

- (1) another criminal justice agency;
- (2) a local law enforcement authority; or
- (3) a person described by Section 109.051 (a).

Sec. 109.053. A local law enforcement authority, on request or in the normal course of official business, shall release information concerning the treatment of a sex offender to:

- (1) another law enforcement authority;
- (2) a criminal justice agency; or
- (3) a person described by Section 109.051 (a).

Purpose of Release

Sec. 109.002. A person who is authorized by this article to release or obtain information may do so only for the administration of criminal justice.

Release of Information by Persons Providing Mental Health or Medical Services

Note: Sec. 109.051 (a). Information concerning the treatment of a sex offender may be released by a person who:

(1) is licensed or certified in this state to provide mental health or medical services, including a:

(A) physician;

(B) psychiatrist;

(C) psychologist;

(D) licensed professional counselor;

(E) licensed marriage and family therapist; or

(F) social worker; and

(G) while licensed or certified, provides or provided mental health or medical services for the rehabilitation of sex offenders.

109.054 Treatment Information

Information concerning the treatment of a sex offender includes:

1) criminal history;

2) the discharge summary;

3) the official offense report;

4) progress report;

5) test results;

6) victim statements; and

7) any other information necessary for the treatment of the sex offender.

Immunity from Liability

Sec. 109.003. A person who releases or obtains information as authorized by this article is not liable for damages arising from the release of the information.

Note: "Administration of criminal justice" means the performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes criminal identification activities and the collection, storage, and dissemination of criminal history record information.

Note further: "Criminal justice agency" means a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and allocates a substantial part of its annual budget to the administration of criminal justice.

Note moreover: "Sex offender" means a person who has been convicted or has entered a plea of guilty or nolo contendere for an offense under any one of the following provisions of the Penal Code:

- (1) Section 20.04(a)(4) (Aggravated Kidnapping), if the person committed the offense with the intent to violate or abuse the victim sexually;
- (2) Section 21.08 (Indecent Exposure);
- (3) Section 21.11 (Indecency with a Child);
- (4) Section 22.011 (Sexual Assault);
- (5) Section 22.021 (Aggravated Sexual Assault);
- (6) Section 25.02 (Prohibited Sexual Conduct);
- (7) Section 30.02 (Burglary), if:
 - (A) the offense is punishable under Subsection (d) of that section; and
 - (B) the person committed the offense with the intent to commit a felony listed in this subsection;
- (8) Section 43.25 (Sexual Performance by a Child); or
- (9) Section 43.26 (Possession or Promotion of Child Pornography).

Note: Does not include Section 21.02, Penal Code (Continuous Sexual Abuse of a Young Child or Children).

Note finally: "Local law enforcement authority" means the chief of police of a municipality or the sheriff of a county in this state.

D. CJAD Standards

37 T. A. C. Section 163.41 (d) states that all records and other information concerning an offender's physical or mental state, including all information pertaining to an offender's HIV-AIDS status, are confidential in accordance with the statutes and other authorities set forth in the above-referenced TDCJ-CJAD's Community Supervision and Corrections Department Records manual.

Medical and psychological information shall be maintained in a safe and secure manner with access to this confidential information restricted to only those persons who have been authorized to receive this information by law or with a duly executed release and waiver of confidentiality from the offender.

This provision further states that the CSCD may disclose medical and psychological information relating to special needs offenders in accordance with Texas Health and Safety Code, Chapter 614 and the other statutes and authorities identified in the aforementioned TDCJ-CJAD manual.

E. Exchange of Information

Exchange of information is found in Section 614.017, Health and Safety Code.

The section states that:

- (a) an agency shall:

- (1) accept information relating to a special needs offender that is sent to the agency to serve the purposes of continuity of care regardless of whether other state law makes that information confidential, and
 - (2) disclose information relating to a special needs offender, including information about the offender's identity, needs, treatment, social, criminal, and vocational history, supervision status and compliance with conditions of supervision, and medical and mental health history, if the disclosure serves the purposes of continuity of care.
- (b) Information obtained under this section may not be used as evidence in any criminal proceeding unless obtained and introduced by other lawful evidentiary means.
- (c) In this section:
- (1) "Agency" includes any of the following entities and individuals, a person with an agency relationship with one of the following entities or individuals, and a person who contracts with one or more of the following entities or individuals:
 - (A) the Texas Department of Criminal Justice and Correctional Managed Health Care Committee;
 - (B) the Board of Pardons and Paroles;
 - (C) the Department of State Health Services;
 - (D) the Texas Juvenile Probation Commission;
 - (E) the Texas Youth Commission;
 - (F) the Department of Assistive and Rehabilitative Services;
 - (G) the Texas Education Agency;
 - (H) the Commission on Jail Standards;
 - (I) the Texas Department on Aging and Disability Services;
 - (J) the Texas School for the Blind and Visually Impaired;
 - (K) community supervision and corrections departments;
 - (L) personal bond pretrial release offices established under Article 17.42, Code of Criminal Procedure;
 - (M) local jails regulated by the Commission on Jail Standards;
 - (N) a municipal or county health department;
 - (O) a hospital district;
 - (P) a judge of this state with jurisdiction over criminal cases; and
 - (Q) an attorney who is appointed or retained to represent a special needs offender;
 - (R) the Health and Human Services Commission;
 - (S) the Department of Information Resources;
 - (T) the bureau of identification and records of the Department of Public Safety; and
 - (U) the Department of Family and Protective Services.

Note: Section 614.017 (2), Health and Safety Code defines a "Special needs offender" to mean an individual for whom criminal charges are pending or who after conviction or adjudication is in custody or under any form of criminal justice supervision.

F. Texas Rules of Evidence

Rule 509 – There is no physician-patient privilege in criminal proceedings.

Rule 510 – A communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible.

See also, Article 38.101, Code of Criminal Procedure.

Exception to Rule 510 is Rule 511 – A person upon whom these rules confer a privilege against disclosure waives the privilege if:

- 1) he discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged, or;
- 2) he calls a person to whom privileged communications have been made to testify as to his character or a trait of his character, insofar as such communications are relevant to such character or character traits.

G. State Causes of Action

i. Breach of Privacy

Unreasonable Publicity given to the Other's Private Life

- 1) that publicity was given to matters concerning his private life;
- 2) the publicity of which would be highly offensive to a reasonable person of ordinary sensibilities; and
- 3) that the matter publicized is not of legitimate public concern.

“Publicity” requires communications to more than a small group of persons; the matter must be communicated to the public at large.

The State may not protect an individual's privacy interests by recognizing a cause of action in tort for giving publicity to highly private facts, if these facts are a matter of public record.

See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S. W. 2d 668 (Tex. 1976)

- ii. Libel – is a written or printed defamation which tends to injure the reputation of a living person and thus expose him to public hatred, contempt, ridicule, or financial injury, or impeach his honesty, integrity, virtue, or reputation.
- iii. Slander – is a defamatory statement orally communicated or published without legal excuse.

Absolute immunity – is limited to a communication uttered in executive, legislative, judicial or quasi-judicial proceedings and the marital relationship.

Qualified immunity – a communication made in good faith, in reference to a matter in which the person communicating has an interest, is privileged, if made to another for the purpose of protecting that interest.

II. HIV and AIDS

Section 81.103, Health and Safety Code, states that an HIV test result is confidential.

A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as otherwise provided by law.

Section 81.101, Health and Safety Code, defines a “test result” to mean any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, . . . including a statement or assertion that the individual is positive, negative, at risk, or does not have a certain level of antigen or antibody.

The confidentiality protection for HIV information is not derived from the patient/doctor relationship.

Waiver – no prescribed form – see above mentioned mental health confidentiality.
Must have the effective consent of the individual.

A. Partner Notification Program

Section 81.051, Health and Safety Code states that the Department of State Health Services shall establish a partner notification program.

A partner notification program shall make the notification of a partner of a person with HIV infection regardless of whether the person with HIV infection who gave the partner” name consents to the notification; and
a health professional shall notify the partner notification program when the health care professional knows the HIV+ status of a patient and the health care professional has actual knowledge of possible transmission of HIV to a third party.

B. CJAD Standards dealing with HIV-AIDS

37 T. A. C. Section 163.41 (c) states that information regarding HIV-AIDS testing and results is confidential.

HIV-AIDS information shall be maintained in a safe and secure manner with access to this confidential information restricted to only those persons who have been authorized to receive this information by law or with a duly executed release and waiver of confidentiality.

This provision further states that a CSCD may disclose HIV-AIDS information relating to special [needs] offenders in accordance with Texas Health and Safety Code, Chapter 614 and the other statutes and authorities set forth in TDCJ-CJAD’s Community Supervision and Corrections Department Records manual (October 10, 2000), as amended from time to time.

III. Federal Laws of Confidentiality

A. HIPAA (Health Insurance Portability and Accountability Act of 1996)

In 1996 the United States Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). This act provides that information regarding a person's health care treatment is confidential and cannot be released except as otherwise provided in this act or through a waiver voluntarily executed by the patient. Nevertheless the regulations promulgated for the enforcement of this act, known as the Privacy Rule, did not go into effect until April 14, 2003. The Privacy Rule prohibits covered entities from using or disclosing protected health information except as the rule permits.¹ Moreover, a state law that is "contrary" to the Privacy Rule is preempted.² In addition HIPAA provides civil and criminal penalties for its violation.³

The Privacy Rule only applies to a "covered entity" which is a health care plan, health care clearinghouse, and a health care provider. Although this may appear to limit the application of HIPAA, covered entities are broadly construed and under certain circumstances can include treatment services provided through a probation or parole department. The Privacy Rule encompasses "individually identifiable health information." "Individually identifiable health information" is "information that is a subset of health information, including demographic information collected from an individual," and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.⁴

Generally, a covered entity using, disclosing, or requesting protected health information "must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."⁵ The Privacy Rule permits a covered entity to "use or disclose protected health information for its own treatment, payment, or health care operations."⁶ Also, an individual may authorize or agree to certain uses or disclosures of protected health information.⁷ In addition under HIPAA a covered entity can disclose protected health information for the following purposes:

- a) to provide, coordinate, and manage the individual's health care and any related services;
- b) to obtain payment for the services provided;
- c) to facilitate the function of the entity's health care operations;
- d) when required to do so by any federal, state, or local law;
- e) when there is a risk to public health;
- f) if the entity believes that a patient is the victim of abuse, neglect or domestic violence;
- g) to cooperate with a health care oversight agency in conducting such functions as audits; civil, administrative, or criminal investigations, inspections, licensure, etc;

- h) in the course of any judicial or administrative proceeding in response to an order of a court or administrative tribunal;⁸
- i) to a law enforcement official for law enforcement purposes;
- j) for research when research protocols have been approved to address the privacy of the patient's protected health information;
- k) when necessary to prevent or lessen a serious and imminent threat to the patient's health or safety or to the health and safety of the public; and
- l) to comply with worker's compensation laws.⁹

At first glance it may appear that a criminal justice agency such as a probation or parole office would not constitute a covered entity. Thus, if the probation or parole department were outsourcing the provision of such rehabilitative services as counseling for emotional problems, substance abuse or mental health treatment or only making referrals to outside entities for these services then it would appear that the department would not fall under HIPAA's definition of a "covered entity." However if the probation or parole were providing in-house counseling or treatment services, including services provided in a residential setting that is administered by a parole agency or a probation department, then these services might well fall within the definition of "individually identifiable health information" and the parole agency or probation department would be a covered entity for purposes of complying with the requirements established under HIPAA. If such were the case then not only would the parole agency or probation department be required to follow the Privacy Rule's regulations but the entity would also have to develop policies and procedures to comply with HIPAA's requirements.

Note: During the Seventy-Eighth Regular Legislative Session, the Legislature passed S. B. 519. The federal Health Insurance Portability and Accountability Act of 1996 grants to patients considerable control over their health care records. When a patient is also an inmate, the regulations account for this situation, but once an inmate is released from custody, their full rights under HIPAA come into play. Criminal justice agencies are very concerned about having to obtain authorizations from offenders in order to share protected health information on topics such as substance abuse treatment and sex offender treatment. There are three state statutes that permit, but do not require, information sharing on criminal justice clientele. If those statutes are made mandatory, information sharing without authorization will be permitted under the HIPAA regulations, specifically 45 CFR sec. 164.512(a), which permits the use or disclosure of protected health information where it is "required by law." S. B. 519 makes mandatory three state statutes that currently provide for permissive information sharing with regard to special needs offenders, parolees in general, and sex offenders in particular.

Note further: Health care providers and other entities covered under HIPAA may disclose confidential health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence, subject to procedures and limits set out in the regulations.

See 45 C. F. R. Sections 160.203, 164.502 (g) and 164.512 (2002)

See also, Attorney General Opinion, No. GA-106, dated September 24, 2003

A. Federal Substance Abuse

42 CFR 2.1 provides that if a treatment provider falls within the ambit of federal regulations, he must protect the confidentiality of the identity of “patients” seeking drug and alcohol treatment, i.e., those treatment providers who directly or indirectly receive financial assistance, including medicare or medicaid reimbursement.

Generally, the federal regulations are much more stringent than state laws.

Those who receive this information cannot pass it on without proper authorization.

There are certain narrow exceptions:

- 1) crimes on program premises or against program personnel;
- 2) medical emergencies;
- 3) mandated reports of suspected child abuse or neglect; and
- 4) court orders.

One cannot disclose any alcohol or drug information in response to subpoenas even if signed by a judge.

The patient must be notified and afforded an opportunity to respond (except for criminal investigation of patient).

One must specifically request a court order authorizing the information to be disclosed.

The judge must review the records *in camera*.

The court must find good cause.

The court order must limit disclosure.

The crime must be extremely serious and balance necessity and public interest in disclosure with the right of the patient.

Information derived from consent only cannot be used to initiate or substantiate any criminal charge against a patient or be introduced in evidence in the prosecution of a patient.

IV. Presentence Investigation Reports

Article 42.12, Section 9 (j), Code of Criminal Procedure, states that a judge by order may direct that any information and records that are not privileged and that are relevant to a (PSI) report . . . be released to an officer conducting a presentence investigation or postsentence report. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence report are confidential and may be released only:

- (1) to those persons and under those circumstances authorized by this section;*
- (2) pursuant to Section 614.017, Health and Safety Code; or
- (2) as directed by the judge for the effective supervision of the defendant.

- 1) the defendant or his defense counsel;
- 2) prosecutor;
- 3) substance abuse counselor, treatment program, and agency approved by [TCADA] (sic);
- TDCJ.

Article 42.12, Section 9A, Code of Criminal Procedure, (Sex Offenders: Presentence Investigation and Postsentence Treatment and Supervision) states:

(b) If the defendant is a sex offender, a supervision officer may release information in a presentence or postsentence report concerning the social and criminal history of the defendant to a person who:

- (1) is licensed or certified in this state to provide mental health or medical services, including a:
 - (A) physician;
 - (B) psychiatrist;
 - (C) psychologist;
 - (D) licensed professional counselor; or
 - (E) social worker; and
- (2) provides mental health or medical services for the rehabilitation of the person.

Note further: See also, Article 42.12, Section 9 (l), Code of Criminal Procedure, which also provides that if a person is a sex offender, a supervision officer may release information in a presentence or postsentence report concerning the social and criminal history of the person to a person who:

- (1) is licensed or certified in this state to provide mental health or medical services, including a:
 - (A) physician;
 - (B) psychiatrist;
 - (C) psychologist;
 - (D) licensed professional counselor; or
 - (E) social worker; and
- (2) provides mental health or medical services for the rehabilitation of the person.

V. Victim Information

Article 56.03 (e), Code of Criminal Procedure states that prior to the imposition of a sentence by the court in a criminal case, the court, if it has received a victim impact statement, shall consider the information provided in the statement. Before sentencing the defendant, the court shall permit the defendant or his counsel a reasonable time to read the statement, excluding the victim's name, address, and telephone number, comment on the statement, and, with the approval of the court, introduce testimony or other information alleging a factual inaccuracy in the statement. If the court sentences the defendant to a term of community supervision, the court shall forward any victim's

impact statement received in the case to the community supervision and corrections department supervising the defendant, along with the papers in the case.

Article 56.03 (g), Code of Criminal Procedure, states that a victim impact statement is subject to discovery under Article 39.14 of this code before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material.

Article 56.09, Code of Criminal Procedure, states that as far as reasonably practical, the address of the victim may not be a part of the court file except as necessary to identify the place of the crime. The phone number of the victim may not be a part of the court file.

Article 57.02, Code of Criminal Procedure

(b) A victim [of a sexual assault] may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense . . .

(d) A completed and returned pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except on an order of a court of competent jurisdiction.

The court finding required by Subsection (g) of this article is not required to disclose the confidential pseudonym form to the defendant in the case or to the defendant's attorney.

(g) A court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense.

During the Seventy-Eighth regular legislative session, the Legislature enacted a measure to exempt certain victim information from the requisite disclosure provision of the Texas Public Information Act. S. B. 1015 added a Section 552.1325 to the Government Code to provide that information pertaining to the name, social security number, address, and telephone number of a crime victim or any other information the disclosure of which would identify or tend to identify the crime victim that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential. This new bill is effective immediately.

Sec. 552.1325. CRIME VICTIM IMPACT STATEMENT: CERTAIN INFORMATION CONFIDENTIAL. (a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Sec. 552.138, Government Code, EXCEPTION: FAMILY VIOLENCE SHELTER CENTER AND SEXUAL ASSAULT PROGRAM INFORMATION.

(a) In this section:

(1) "Family violence shelter center" has the meaning assigned by Section 51.002, Human Resources Code.

(2) "Sexual assault program" has the meaning assigned by Section 420.003.

(b) Information maintained by a family violence shelter center or sexual assault program is excepted from the requirements of Section 552.021 if it is information that relates to:

(1) the home address, home telephone number, or social security number of an employee or a volunteer worker of a family violence shelter center or a sexual assault program, regardless of whether the employee or worker complies with Section 552.024;

(2) the location or physical layout of a family violence shelter center;

(3) the name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter center or sexual assault program;

(4) the provision of services, including counseling and sheltering, to a current or former client of a family violence shelter center or sexual assault program;

(5) the name, home address, or home telephone number of a private donor to a family violence shelter center or sexual assault program; or

(6) the home address or home telephone number of a member of the board of directors or the board of trustees of a family violence shelter center or sexual assault program, regardless of whether the board member complies with Section 552.024.

VI. Child Abuse Victims

Family Code, § 261.101 (Persons Required to Report; Time to Report) states that:

(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

(b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of sexual assault and the professional has cause to believe that the child has been abused, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has

been or may be abused or neglected or is a victim of an offense of sexual assault. A professional may not delegate to or rely on another person to make the report.

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

- (1) as provided by Section 261.201 (which provides for confidentiality and disclosure of information pertaining to an investigation of child abuse); or
- (2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Note further: This provision imposes a mandatory requirement upon any person, not merely law enforcement officers, to report child abuse, whether it is physical abuse, sexual abuse, or other conduct included in the definition of “abuse.”

See State v. Harrod, 81 S. W. 3d 904 (Tex. App. – Dallas, 2002)

Note also: In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

Family Code, Section 261.101 (a) mandates immediate reporting of suspected child abuse. The report should reflect the reporter’s belief that a child has been abused and must identify the child if the child’s identity is known.

Note: The Council on Sex Offender Treatment may not interpret Section 261.101 (a) of the Family Code to permit a registered sex offender treatment provider or affiliated sex offender treatment provider to decide whether to report a suspicion where the suspicion is based on dated or incomplete information.

See Attorney General Op. No. DM-458 dated November 26, 1997.

VII. Nondisclosure Orders and Expunctions

A. Nondisclosure Orders

In 2003 the Seventy-Eighth Legislature enacted legislation to preclude the disclosure under certain circumstances that an individual had once been on deferred adjudication for a felony or misdemeanor charge. S. B. 1477 amends Section 411.081 of the Government Code to provide that if a person is placed on deferred adjudication community

supervision, subsequently receives a discharge and dismissal, and satisfies the requirements under Subsection (e), Section 5, Article 42.12, Code of Criminal Procedure (sic)¹⁰, the person may petition the court that placed the defendant on deferred adjudication for an order of nondisclosure. This bill further provides that after notice to the state and a hearing on whether the person is entitled to file the petition and issuance of the order is in the best interest of justice, the court shall issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication. Nevertheless under this measure, a criminal justice agency can still disclose criminal history record information that is the subject of the order to:

- 1) other criminal justice agencies;
- 2) a noncriminal justice agency authorized by federal statute or executive order or by state statute to receive criminal history record information; and
- 3) the defendant who is the subject of the criminal history record information.

This bill further provides that a defendant may file a petition for nondisclosure:

- 1) after the discharge and dismissal of the term of deferred adjudication community supervision for a nonviolent or nonsexual misdemeanor offense;
- 2) after the fifth anniversary of the discharge and dismissal of the term of deferred adjudication community supervision for a misdemeanor offense listed in the following chapters of the penal code:
 - a) Chapter 20 (Kidnapping and Unlawful Restraint);
 - b) Chapter 21 (Sexual Offenses);
 - c) Chapter 22 (Assaultive Offenses);
 - d) Chapter 25 (Offenses against the Family);
 - e) Chapter 42 (Disorderly Conduct and Related Offenses); or
 - f) Chapter 46 (Weapons); or
- 3) after the tenth anniversary of the discharge and dismissal of the term of deferred adjudication community supervision for a felony offense.

Nevertheless this bill states that a person is not entitled to file a petition for nondisclosure if, during the above-listed anniversary periods, the defendant has once again been granted deferred adjudication or been convicted of a felony or non-traffic related misdemeanor offense. Moreover, this bill states that a person is not entitled to file a petition for nondisclosure if, prior to being granted deferred adjudication community supervision, the person had been convicted or placed on deferred adjudication for:

- a) an offense requiring registration as a sex offender;
- b) aggravated kidnapping;
- c) murder;
- d) capital murder;
- e) injury to a child, elderly individual or disabled individual;
- f) abandoning or endangering a child;
- g) violation of a protective order or magistrate's order;
- h) stalking; or
- i) any offense involving family violence.

S. B. 1477 further provides that when an order of nondisclosure is issued under this measure, the clerk of the court must send a copy of the order by certified mail, return

receipt requested, to the Crime Records Service of the Department of Public Safety. The DPS, in turn, must send a copy of the order by mail or electronic means to all law enforcement agencies, correctional and detention facilities, judicial and other criminal justice entities, central state depositories of criminal records, and to all central federal depositories of criminal records that there is reason to believe have criminal history record information that is the subject of the order.

In addition, this bill adds a Section 552.142 to the Government Code to provide that information [pertaining to the criminal history of a deferred adjudication matter] is excepted from the requirements of [the Texas Public Information Act] if an order of nondisclosure with respect to the information has been issued under this measure. Moreover this bill states that a person who is the subject of information that is excepted from the requirements of [the public information act] may deny the occurrence of the arrest and prosecution to which the information relates under the exception, unless the information is being used against the person in a subsequent criminal proceeding. Lastly, this bill adds a Section 522.1425 to the Government Code to provide that a private entity that compiles and disseminates for compensation criminal history record information may not compile or disseminate information with respect to which an order of nondisclosure has been issued under this measure.

It is my position that this new measure creates both a right of confidentiality and an exception to the disclosure requirements of the Texas Public Information Act. Hence if an order of nondisclosure is issued, then it is my opinion that a criminal justice agency in this state is prohibited from disclosing information regarding the deferred adjudication status of the offender and the circumstances surrounding the offense unless the disclosure is made to another criminal justice agency, an agency authorized by law to receive criminal history record information, or to the defendant who obtained the order of nondisclosure.¹¹ However it is my further opinion that for noncriminal justice governmental entities, if an order for nondisclosure is issued and the governmental entity receives a request for disclosure of said information under the Texas Public Information Act, the entity may, but is not required, to disclose any information it may have pertaining to an individual's deferred adjudication status or the circumstances surrounding the offense for which the individual was granted deferred adjudication.

It also appears that this new measure is equally applicable in situations in which an individual is placed in a pre-trial diversion program in accordance with Section 76.011 of the Government Code as in situations in which the defendant is granted deferred adjudication. This bill states that for purposes of this measure a person is considered to have been placed on deferred adjudication community supervision if, regardless of the statutory authorization:

- 1) the person entered a plea of guilty or nolo contendere;
- 2) the judge deferred further proceedings without entering an adjudication of guilt and placed the person under supervision of the court or an officer under the supervision of the court; and
- 3) at the end of the period of supervision the judge dismissed the proceedings and discharged the person.

Although ordinarily a person placed in a pre-trial diversion program does not enter a plea of guilt or nolo contendere, it does not appear that the definition of deferred adjudication established under this measure excludes persons placed in pre-trial diversion programs.

Finally this new measure is applicable to past instances in which a person was granted deferred adjudication community supervision. S. B. 1477 states that the changes made to Section 411.081, Government Code, and Sections 551.142 and 552.1425, Government Code, apply to information related to a deferred adjudication or similar procedure, regardless of whether the deferred adjudication or procedure is entered before, on, or after September 1, 2003. Thus the Courts in this State may anticipate an influx of filings of petitions for orders of nondisclosure for deferred adjudication cases that were heard and disposed long before the effective date of this bill.

B. Expunctions

No Right to an Expunction Once You have been Placed on Community Supervision

Over the years, I have received a number of inquiries regarding the circumstances, if any, under which a probationer could petition the court for an order of expunction. I have answered these inquiries by stating that in my opinion it was highly doubtful that a person placed on community supervision could subsequently obtain a court order expunging the person's criminal record. Now a recent court decision confirms my opinion regarding this matter. In Ex parte Munoz, 139 S. W. 3d 349 (Tex. App. – San Antonio, 2004), the defendant in 1979 was placed on regular probation for the offense of possession of heroin for a term of ten years. In 1985 the defendant's term of probation was terminated.

In accordance with then Article 42.12, Section 7, Code of Criminal Procedure, [1979 and 1983 Ed.] (now Article 42.12, Section 20 (a), Code of Criminal Procedure), the trial judge also permitted the defendant to withdraw his guilty plea and then dismissed the indictment and set aside the judgment of his conviction.¹² The defendant later filed a motion for expunction for his 1979 conviction. The trial court denied his motion. The defendant then filed an application for writ of habeas corpus to the San Antonio Court of Appeals.

The defendant contended in his writ that the trial court erred in denying his motion for expunction. He argued that because the heroin indictment had been dismissed, he met the criteria for expunction under Article 55.01, Code of Criminal Procedure. Nevertheless the appellate court noted that Article 55.01, supra, was "not intended to allow a person who is arrested, pleads guilty to an offense, and receives probation after pleading guilty to expunge his record." See State v. Knight, 813 S. W. 2d 210 (Tex. App. – Houston [14th Dist.] 1991). Rather, the Court stated that the purpose of Article 55.01, supra, was to allow those who had been wrongfully arrested to expunge their arrest records. See Harris v. State, 733 S. W. 2d 710 (Tex. App. – San Antonio, 1987). Finally the Court observed that an expunction proceeding was a civil proceeding in which the petitioner bore the burden of proof in meeting the statutory requirements. See Harris v. State, supra.

Hence the appellate court stated that since the defendant was neither acquitted of the heroin offense nor subsequently pardoned, he had to meet each of the following conditions in order to have his conviction expunged:

- (A) an indictment or information . . . has not been presented . . . or, . . . the indictment or information has been dismissed or quashed, and:
 - (i) the limitations period expired before the date on which a petition for expunction was filed under Article 55.02; or
 - (ii) the court finds that the indictment or information was dismissed or quashed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause . . . or because it was void;
- (B) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court ordered community supervision under Article 42.12 for any offense other than a Class C misdemeanor; and
- (C) the person has not been convicted of a felony in the five years preceding the date of arrest.¹³

Moreover the Court observed that it was undisputed that the defendant pled guilty to the heroin conviction and completed his probationary term.¹⁴ Thus the San Antonio Court of Appeals held that the defendant was ineligible for expunction under Article 55.01 (a)(2) (B), *supra*, and that the trial court properly denied his motion to expunge his 1979 conviction.¹⁵

Sec. 552.142. EXCEPTION: RECORDS OF CERTAIN DEFERRED ADJUDICATIONS. (a) Information is excepted from the requirements of Section 552.021 if an order of nondisclosure with respect to the information has been issued under Section 411.081(d).

(b) A person who is the subject of information that is excepted from the requirements of Section 552.021 under this section may deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

VIII. Social Security Numbers

On February 21, 2007 the Attorney General issued Opinion No. GA-0519, which greatly affected the policies and procedures of district and county clerks across the State. In this opinion the Attorney General opined that Section 552.147 (b), Government Code, which states that the [SSN] of a living person is excepted from the general disclosure provision of the Texas Public Information Act, made SSNs confidential. Moreover, the Attorney General states that, in accordance with Section 552.352, Government Code, if a district or county clerk were to improperly disclose a SSN then this action could constitute official misconduct and a criminal misdemeanor punishable by a fine of up to \$1,000, confinement in the county jail for up to six months, or both. Needless to say, this Attorney General's opinion has cause a great deal of consternation among local officials

who prepare or distribute documents or records that include the SSN of a living person and has drastically alternate certain long-standing policies and procedures.

In light of this Attorney General opinion, the Legislature at this regular session enacted H. B. 2061 and the Governor signed this bill into law on March 28th. This law went into effective immediately upon the Governor's signature. This bill amends Section 552.147 (a) of the Government Code to provide that the [SSN] of a living person is excepted from the requirements of Section 552.021, *but is not confidential under this section and this section does not make the social security number of a living person confidential under another provision of this chapter or other law* (emphasis added). This bill further states that notwithstanding any other law, a county or district clerk may disclose in the ordinary course of business a social security number that is contained in information held by the clerk's office, and that disclosure is not official misconduct and does not subject the clerk to civil or criminal liability of any kind under the law of the state, including any claim for damages in a lawsuit or the criminal penalty imposed by Section 552.352. Finally this bill states that unless another law requires a social security number to be maintained in a government document, on written request from an individual or the individual's representative, the clerk shall redact . . . all but the last four digits of the individual's social security number from information maintained in the clerk's official public records.

Passage of H. B. 2061 would appear to resolved the issues addressed by the Attorney General in GA-0519. However, there are still two matters that must be examined. In the Attorney General's opinion, while he relied primarily on state law in formulating his opinion that SSNs were confidential in nature, in one part of his opinion, when he could not rely on state law to justify his opinion, he cited the federal Social Security Act to reach his conclusion that SSNs were confidential. Thus one problem that remains is that even though the Legislature has modified state law, the Attorney General could still reaffirm his opinion that SSNs are confidential and hence restrict the district and county clerks from disclosing this information but this time relying solely on federal law.

The second issue is that 42 U. S. C. Section 405 (c)(2)(C)(viii)(I) does state that social security numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record. This statute further defines "authorized person" to mean an officer or employee of the United States, an officer or employee of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990. Finally this statute states that an authorized person who violates this provision would be subject to criminal penalties found in 26 U. S. C. Section 7213 (a) (2) (the Internal Revenue Code). Thus a violation of the provision of the federal law making SSNs confidential would constitute a felony offense punishable by a fine in any amount not exceeding \$5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

Despite these two potential problems that I have identified, it is still my opinion that, at least for documents prepared by the Bell/Lampasas Counties CSCD and court records generated by our department that might be available or exposed to the public, we should revert to the policies and procedures we employed prior to the issuance of Attorney General Opinion GA-0519. First, it is uncertain how the Attorney General would rule on this matter if this issue were once again presented to him for his opinion. Moreover, in light of the clear legislative intent found in H. B. 2051 that SSNs are not confidential, the Attorney General might issue a different opinion and until the Attorney General did issue another opinion on this matter, I do not believe we should try to anticipate what this opinion would be.

Second, in regards to the federal prohibition against the improper disclosure of SSNs, this statute clearly states that an authorized person can only violate this provision if the person discloses a SSN pursuant to any provision of law enacted on or after October 1, 1990. I am not aware of any information that includes a SSN that this office presently produces and may be made available to the public that is generated pursuant to a law enacted on or after October 1, 1990. Presentence investigation reports have been authorized by law since the early 1980's and information forwarded for the issuance of warrants, including SSNs on offenders, have been produced pursuant to law that is much older than any authorization enacted since October 1, 1990.

IX. Polygraphs Examinations

Section 1703.306 of the Occupations Code provides for confidentiality of examination results.

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
 - (1) the examinee or any other person specifically designated in writing by the examinee;
 - (2) the person that requested the examination;
 - (3) a member, or member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
 - (4) another polygraph examiner in private consultation; or
 - (5) any other person required by due process of law.
- (b) The department [of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
- (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a) (4) may not disclose the information except as provided by this section.

Note: In 1981 the Texas Legislature added a stringent confidentiality provision to the Texas Polygraph Examiners Act forbidding a polygraph examiner to release information received in a polygraph examination except in those limited circumstances described statutorily. The reason for this added provision in the Polygraph Examiners Act was the Legislature's belief that polygraph examinations were increasingly being used in employment settings and that a confidentiality provision was necessary in order to minimize the problems generally associated with polygraph examinations, such as an invasion of privacy. See Attorney General Opinion No. JC-0070 dated July 6, 1999.

Since this confidentiality provision was added in 1981, the trial courts in this state have more and more been ordering probationers to submit to a polygraph examination as a condition of community supervision. This is especially true for persons placed on community supervision for a sex offense. See *Ex parte Renfro*, 999 S. W. 2d 557 (Tex. App. – Houston [14th Dist.], 1999); see also, *Marcum v. State*, 983 S. W. 2d 762 (Tex. App. – Houston [14th Dist.], 1998). Nevertheless as the Attorney General opined in the above cited opinion, “the legislature did not contemplate the use of polygraph examinations in sex-offender treatment programs.” This change would clarify that information of a criminal nature derived through a polygraph examination can be disclosed to law enforcement officers, officers of the court and sex offender treatment providers.

January 27, 2010

¹ 45 C. F. R. § 164.502(a).

² 45 C.F.R. § 160.203 (2003). Note: A state statute is contrary if it would be impossible to comply with both the state statute and with HIPAA, or if state law would be an obstacle to "accomplishing the full purposes and objectives of the Administrative Simplification portions of HIPAA." OCR Summary, *supra* note 8, at 16; 45 C.F.R. § 160.202 (2003). Moreover, the Privacy Rule does not exempt state statutes that are "more stringent." 45 C.F.R. §§ 160.202-.203 (2003). Generally, a state statute is more stringent than the Privacy Rule if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." *Id.* § 160.202(6);

³ See 42 U.S.C. §§ 1320d-5, 1320d-6 (2000).

⁴ 45 C.F.R. § 160.103 (2003) defines "protected health information."

⁵ *Id.* § 164.502(b)(1).

⁶ *Id.* § 164.502(b)(1).

⁷ *Id.* § 164.506(b)(1).

⁸ Under this circumstance, the covered entity may disclose the protected health information in response to a subpoena to the extent authorized by state law if the entity is satisfied that the patient has been notified of the request or that an effort was made to secure a protective order.

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- ⁹ To better understand the privacy protections under HIPPA, information is available at the United States Department of Health and Human Services website at the following address:
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/>
- ¹⁰ I am unaware of any requirement that a defendant must satisfy under Article 42.12, Section 5 (c), Code of Criminal Procedure. This provision states that if a defendant is granted deferred adjudication for unlawful restraint, kidnapping, aggravated kidnapping or an attempt thereof, the judge must make an affirmative finding if the judge determines that the victim or intended victim was younger than 17 years of age at the time of the offense.
- ¹¹ Article 42.12, Section 5 (f), Code of Criminal Procedure, states that a record in the custody of the court clerk regarding a case in which a person is granted deferred adjudication is not confidential. It is my opinion that the changes made in S. B. 1477 do not affect this provision in Section 5. Thus court records pertaining to a defendant granted deferred adjudication community supervision should still be available for public inspection
- ¹² Then Article 42.12, Section 7, supra, provided that “in case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information, or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.” This provision, as it is presently codified in Article 42.12, Section 20 (a), Code of Criminal Procedure, has remained basically unchanged except for the fact that this statute now only refers to regular community supervision cases.
- ¹³ See Article 55.01 (a)(2), Code of Criminal Procedure [Vernon Supp. 2004]
- ¹⁴ Note: In Harris County District Attorney’s Office v. D.W.B., 860 S. W. 2d 719 (Tex. App. – Houston [14th Dist.] 1993), the Fourteenth Court of Appeals in Houston held that merely completing the terms of deferred adjudication and obtaining a dismissal did not entitle a petitioner to expunction of his criminal records.
- ¹⁵ During the regular legislative session in 2003, the Seventy-Eighth Legislature enacted legislation to preclude the disclosure under certain circumstances that an individual had once been on deferred adjudication for a felony or misdemeanor charge. S. B. 1477 amended Section 411.081 of the Government Code to provide that if a person were placed on deferred adjudication community supervision, subsequently received a discharge and dismissal, and satisfied the requirements under Subsection (e), Section 5, Article 42.12, Code of Criminal Procedure, the person could petition the court that placed the defendant on deferred adjudication for an order of nondisclosure. A nondisclosure order differs from an expunction order in that whereas an order of expunction eliminates all knowledge of the existence of a criminal record, a nondisclosure order simply prevents agencies from informing certain parties of the existence of the criminal record.

Appendix A

Authorization to Release Medical and Psychological/Psychiatric Information

I, _____, do hereby authorize any and all physicians, surgeons, psychiatrists and therapists including _____ who have examined, treated, evaluated or diagnosed me and all hospitals in which I have been a patient to furnish to any personnel with the _____ County Community Supervision and Corrections Department, all communications, records, reports or other data or information, including observations and opinions in their knowledge, possession or control relative to the physical conditions, identity, diagnosis, evaluation, or treatment, past, present, and future of myself and permit said to examine and copy such records, reports, and information. The above-described medical information and records may be released for the following reasons or purposes:

I, _____, do further authorize any and all psychiatrists, psychologists and counselors, including _____ who have examined, treated, or counseled me and all hospitals in which I have been a patient for treatment, diagnosis or examination for any mental or emotional illnesses or disorders, to furnish to any personnel with the _____ County Community Supervision and Corrections Department, all records of the identity, diagnosis, evaluation, or treatment of myself and any and all communications between me and my psychiatrist, psychologist, counselor or their representative in regards to the treatment, diagnosis, or evaluation of any mental or emotional condition.

This authorization and request does not authorize disclosure of such information to any other person without written authority to do so. All prior authorization is hereby canceled.

The authorization hereby granted may be evidenced by a photo static copy hereof.

I have further been informed that I am free to revoke this authorization at any time as to any future release of medical information.

I am authorizing this release of medical and/or psychological/psychiatric information voluntarily and of my own free will.

Signed this _____ day of _____, 20_____.

Signature

Witness

Witness

Appendix B

VOLUNTARY CONSENT AND WAIVER OF CONFIDENTIALITY

I, _____, do hereby authorize personnel of the _____ County Community Supervision and Corrections Department to release information concerning my medical history and any information concerning any existing medical diagnosis, condition or treatment, including acquired immune deficiency syndrome, human immunodeficiency viral infection, or AIDS-Related complex to the following:

This voluntary consent and waiver of confidentiality is made for the following reasons and purposes:

I further waive my privilege of confidentiality as to any and all communications which occurred between myself, and any physical or mental health care personnel involved in my diagnosis, evaluation or treatment, the personnel of the _____ County Community Supervision and Corrections Department and the above-named individuals relating to any diagnosis, evaluation, or treatment for any mental or emotional illness or disorder of myself. This waiver is limited to communications made to and between the above-named parties. I do not waive my privilege of confidentiality in regards to any other individual or party not named in this voluntary consent and waiver of confidentiality.

I fully understand and have been informed by my community supervision officer that the execution of this consent to release of medical, psychological and/or psychiatric information is entirely voluntary on my part. I further understand and have been informed that any information that I have authorized to be released to any party pertaining to my medical or mental state will be kept in the strictest confidence by the party who acquires this information.

I have further been informed that I am free to revoke this waiver of confidentiality at any time as to any future communications.

Signed this _____ day of _____, 20_____.

Signature

Witness

Witness
