Informed Consent for Trauma Care

What Utah Professionals Need to Know

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Mini CV:

–Former Utah Assistant Attorney General

–Represented Department of Health & Human Services: Substance Use & Mental Health, Utah State Hospital, DCFS, JJYS, Office of Licensing, DSPD

–Criminal Defense Attorney

–Guardian ad Litem

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-Founded Yoga Programs at Tranquility House and Safe Harbor

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Presentation Overview

This presentation will provide participants with information about key components of proper and effective informed consent, focusing on trauma related care and services.

Goals & Objectives

After this presentation, participants will be able to:

- Identify the core components of informed consent
- Understand “privilege” as it applies to informed consent
- Identify how state laws impact informed consent
- Understand the concept of capacity to give consent
- Engage with trauma patients/clients with awareness of special considerations in obtaining informed consent
- Deploy strategies to best inform trauma patients/clients

Q: What are you *informing* the client of with “informed consent?”

A: Fundamentally, you are informing them of the consequences of providing consent to treatment.

So, what exactly is Informed Consent?

(My) Definition of Informed Consent

Informed Consent is a:

- Communication
- Between healthcare provider and patient/client (legal relationship)
- About the risks and benefits, and
- Effects and alternatives of participating
- So that the patient can make an informed decision about whether to proceed with the therapeutic relationship or not

This Communication Typically Includes

–A waiver of liability

–Partnership engagement

What does this mean exactly?

How many of you brought an informed consent form from your office? Take a look – does it contain ***language about waiving liability from the provider***? And outlines the ***agreement between provider and client***?

(Philosophical) Characteristics of Informed Consent

A legal concept related to liability

A moral concept related to humanity/interrelationships

A best practices concept related to professionalism

Relationship Dynamics

- Professional
- Health service provider
- Knowledgeable Person
- Consumer
- Patient/Client
- Vulnerable Person

Legal Concerns in Obtaining Informed Consent

Legal Questions that Arise from the Treatment Relationship: Privilege

Does privilege attach?

Privileged relationships recognized by law in Utah that touch trauma work:

1. Mental Health Therapist - Patient
2. Sexual Assault Counselor – Victim*
3. Physician/Surgeon/Physician Assistant - Patient
4. Victim Advocate - Victim*

* *Language used in the statute*

Legal Questions that Arise from the Treatment Relationship: Privilege

What is privilege anyway?!

1. Right to bar the disclosure of information
2. Given by a patient/client
3. To a professional identified by law:

   Mental Health Therapist
   Sexual Assault Counselor
   Physician/Surgeon/Physician Assistant
   Victim Advocate

Therapist Defined

“Therapist” is defined in Utah law as a licensed:

(1) Psychiatrist
(2) Psychologist
(3) Marriage and family therapist
(4) Social worker
(5) Psychiatric and mental health nurse specialist
(6) Clinical mental health counselor

Utah Code Ann. Section 78B-3-501 (Therapist’s Duty to Warn)

Mental Health Therapist Defined

“Mental Health Therapist” is defined in Utah law as an individual practicing within the scope of practice defined in the individual’s respective licensing act and is licensed as a:

(1) Physician and surgeon, or osteopathic physician engaged in the practice of mental health therapy
(2) APRN, specializing in psychiatric mental health nursing
(3) APRN intern, specializing in psychiatric mental health nursing
(4) Psychologist qualified to engage in the practice of mental health therapy
(5) Certified psychology resident qualifying to engage in the practice of mental health therapy

Utah Code Ann. Section 58-60-102 (15) (Mental Health Professional Practice Act)

Mental Health Therapist Defined

(6) PA specializing in mental health care
(7) Clinical social worker
(8) Certified social worker
(9) Marriage and family therapist
(10) Associate marriage and family therapist
(11) Clinical mental health counselor
(12) Associate clinical mental health counselor
(13) Master addiction counselor
(14) Associate master addiction counselor

Utah Code Ann. Section 58-60-102 (15)

Sexual Assault Counselor Defined

“Sexual Assault Counselor” is defined in Utah law as:

“An individual who (a) is employed by or volunteers at a rape crisis and services center; (b) has a minimum of 40 hours of training in counseling and assisting victims of sexual assault; and (c) is under the supervision of the director or designee of a rape crisis and services center.”

Utah Code Ann. Section 77-38-203 (3)

Sexual Assault Counselor Discretion to Disclose

Disclosures to a sexual assault counselor are potentially available to a third person when there is consent by the “victim” or their parents AND the counselor represents it is in the best interest of the “victim.”

Disclosures to a sexual assault counselor by a minor may be disclosed to the parents if the counselor believes it is in the best interest of the minor.

Utah Code Ann. Section 77-38-204

Utah has Included Privilege in the Rules of Evidence

“A patient has a privilege, during the patient’s life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

-diagnoses made, treatment provided, or advice given by a physician or mental health therapist;
-information obtained by examination of the patient; and
-information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist.”

Rule 506 (b), Utah Rules of Evidence

Utah has Included Privilege in Statute

“[A] mental health therapist under this chapter (Occupations & Professions) may not disclose any confidential communication with a client or patient without the express written consent of:

(a) the client or patient;
(b) The parent or legal guardian of a minor client or patient; or
(c) A person authorized to consent to the disclosure of the confidential communication by the client or patient in a written document . . .”

Exceptions: mandatory reporting, duty to warn or other laws requiring disclosure; and disclosure made under generally recognized professional or ethical standards that authorize or require disclosure

Utah Code Ann. Section 58-60-114

Statutory Privilege for Speech-Language Pathologists and Audiologists

“A person licensed … may not be examined or required to reveal any findings, examinations, or representations made to the licensed person by the licensed person’s client, or any advice or treatment given to the client in the course of professional practice, without the consent of the client or the client’s representative.”

Utah Code Ann. Sect. 58-41-16

Legal Questions that Arise from the Treatment Relationship: Capacity

Does the person have capacity to consent?

A. Is the person a minor?

B. Does the person have a guardian (adult or minor)?

C. Is the person in clear and obvious distress, or in an incapacitated state such that a reasonable person would believe they lack capacity to make legal decisions, e.g., consent to care?

Trauma Client vs. Elective Client

The trauma client/patient will potentially have more difficulty than the elective client/patient with aspects of an “intake” interview, or initial session.

Which leads to other considerations by the provider before agreeing to treat, or, rather, before accepting the person’s consent to treat.

Elective Client vs. Court Ordered Client

It’s important to give full and accurate information about the nature of a professional relationship with a client that is court ordered or court referred to treatment services because it’s different than with an elective client.

The consequences of failing to give consent by the court ordered client are going to be very different and potentially more harmful to that client.

The Court Process: Non-Elective Services

If the patient/client is court ordered/referred to treatment, the following should be addressed:

- What happens if the patient/client refuses treatment?
- What happens if they can’t pay?
- Will the provider make reports to the court?
- How and when is treatment terminated?
- Can the patient/client elect to continue the therapeutic relationship after the court process is concluded?
- Other considerations according to the terms of the court order/referral

Other Issues to Consider Before Accepting Consent

- Recall
  - –Shock response
  - –Reliability
- Amount of Information to Process
  - –“Informed” is kind of unwieldy
  - –It’s a legal document!
- Perception of Choice
  - –Provider “authority”
- Diminished Comprehension
  - –Blocks intake of information
- Trust
  - –Helper-Stranger

Strategies to Address Concerns

- Be mindful of the trauma perspective:

  Detachment
  Flashbacks
  Neuroception - in constant “fight or flight” mode

- Offer a support person - not only for minors

–A trusted friend or relative can help with comprehension, perspective and explanation, all of which can assist the person in making an informed decision

Strategies to Address Concerns

- Provide written materials before, during and/or after your consultation

  –Remember recall, comprehension are likely impacted

What is the legal meaning of all this?

These strategies are meant to create optimal circumstances where a patient/client's consent can be reliably found to be "informed" and, therefore, validly obtained. This has the potential to eliminate or at least diminish the professional's exposure to liability for failing to obtain valid informed consent.

Utah Recognizes Informed Consent as Valid Defense

“When a person submits to health care rendered by a health care provider, it is presumed that actions taken by the health care provider are either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider’s failure to obtain informed consent, the patient must prove the following:

(among other things) **the patient was not informed of the substantial and significant risk** (associated with the health care).”

Utah Code Ann. Section 78B-3-406

Valid Informed Consent

So, it becomes critical – for purposes of avoiding liability – that the provider has done everything reasonably necessary under the specific circumstances to ensure that consent is informed (communicated, understood, verified)

and, therefore, valid.

Trauma-Related Services & Consequences of Informed Consent

For Context

Going back to our earlier definition of informed consent:

- A communication regarding a procedure or service
- Explaining the risks and benefits of proceeding or not
- And providing alternatives to proceeding or not

Medical Treatment

Consenting to medical treatment/consequences may include:

- Submission to evidence gathering
- Testing for HIV, STDs, pregnancy, rape kit
- Photographs, fingerprints (to rule out)
- Substance abuse related referrals can be made
- Suicide related precautions, referrals

Counseling Services

Consenting to counseling services may occur in a variety of scenarios:

- Emergency related - the process becomes expedited, depending on the circumstances
- Patient requested - ordinary course of events
- Parent/guardian requested - minors have limited rights to consent
- Court ordered - consequences are different than elective patients

The Court Process: Crime Victim Services

If the patient/client is a crime victim, there may be evidence collected, physical and verbal, and questions arise:

- What happens to evidence collected
- What happens next
- If evidence collected is inadmissible, possible the client can be subpoenaed anyway

Making a referral for victim advocacy services that are available

Permission to contact patient later, e.g., extending the relationship

Victim Advocate Defined

“Victim Advocate” is defined in Utah law as:

(1) A criminal justice system victim advocate;
(2) A nongovernment organization victim advocate; or
(3) An individual employed or authorized to volunteer by a public or private entity and designated by the Utah Office for Victims of Crime as having the specific purpose of providing advocacy services; and
(4) Does not include an employee of the Utah Office for Victims of Crime

Utah Code Ann. Section 77-38-403 (10) (Code of Criminal Procedure-Crime Victims)

Criminal Justice System Victim Advocate Defined

“Criminal Justice System Victim Advocate” is defined in Utah law as an individual who:

(1) Is employed or authorized to volunteer by government agency with a role or responsibility in the criminal justice system;
(2) Has a primary responsibility to address mental, physical, or emotional recovery of victims;
(3) Completes a minimum 40 hours of training approved by the Utah Office for Victims of Crime in crisis response, effects of crime and trauma, victim advocacy services, ethics, **informed consent**, and privileged communications; and
(4) Is under the supervision of the agency director or designee

Utah Code Ann. Section 77-38-403 (4) (Code of Criminal Procedure-Crime Victims)

Nongovernment Organization Victim Advocate Defined

“Nongovernment Organization Victim Advocate” is defined in Utah law as an individual who:

(1) Is employed or authorized to volunteer by a nongovernment organization advocacy services provider;
(2) Has a primary responsibility to address the mental, physical, or emotional recovery of victims;
(3) Completes a minimum 40 hours of trauma-informed training in assisting victims specific to the specialization or focus of the organization provider, including privileged communications, approved by UOVC or that meets equivalent standards; and
(4) Is under the supervision of the agency director or designee

Utah Code Ann. Section 77-38-403 (7) (Code of Criminal Procedure-Crime Victims)

Other Rights Implicated

- Privilege may or may not attach to the communication
- Information obtained is subject to privacy laws, e.g., HIPAA (medical providers), 42 CFR Part 2 (substance use providers), FERPA (school counselors)
- Rights of non-English speakers to translation services if the service is federally funded or supported

Other Types of Trauma Related Treatment

Specific and detailed statutory requirements for informed consent for:

- Abortion

  Utah Code Ann. Section 76-7-305
- Sterilization of a person over 18

  Utah Code Ann. Section 26B-6-806
- Sterilization of a person under 18

  Utah Code Ann. Section 26B-6-807

Practical Concerns in Obtaining Informed Consent

Trauma Informed Language is Respectful

Refer to your “Patient” or “Client”	NOT “victim” or “addict” or “incompetent person”
“Invite” or “Encourage” to receive information (even if you are required to give it)	NOT “you have to sign this before I can treat you” – the trauma survivor has already been harmed in a situation where they had no control
Use inclusive, protective, plain words	NOT sterile, clinical, legalese

Soft Considerations in Assessing Capacity to Consent

Age

Intellectual development

Cognitive skills

Learning styles

Informed Consent Best Practices

From a legal perspective, here are some practical and best practices to ensure that consent is informed and freely given:

Get consent orally and in writing/be complete - no one wants to repeat the process because a signature was not obtained at the end of the process

Ask if the patient/client has questions and let them know that you will stop at any point in time to answer their questions or if they need more explanation

Allow for breaks in your process

Informed Consent Best Practices

Speak slowly (even if you think the patient/client may want this over with quickly)

Address the patient/client in a way that is tailored to their communication level, modalities, language/terms

Developmental sensitivity

Cultural sensitivity

Notify about mandatory reporting laws as applicable

What to Include in a Consent Form

Key Elements

- Type of Service
- Benefits
- Limitations, including mandatory reporting obligations
- Risks to consenting
- Alternatives to Service
- Potential outcomes or consequences of consenting
- Attestation for client that they understand what has been explained

What do the Professional Associations Say about Informed Consent?

“Obtaining informed consent is not only a legal requirement but also a cornerstone of ethical and effective psychological practice.” Template provided.

- American Psychological Association

“Counselors shall inform clients of the purposes, goals, procedures, limitations, and potential risks and benefits of services and techniques either prior to or during the initial counseling session. . . . Counselors will confirm that the client understands the provided information and obtain written informed consent to participate in counseling.”

- National Board for Certified Counselors

What do the Professional Associations Say about Informed Consent?

“Social workers should provide services to clients only in the context of a professional relationship based, when appropriate, on valid informed consent. Social workers should use clear and understandable language to inform clients of the purposes of services, risks related to the services, limits to services because of the requirements of a third-party payer, relevant costs, reasonable alternatives, clients’ right to refuse or withdraw consent, and the time frame covered by the consent. Social workers should provide clients with an opportunity to ask questions.”

- National Association of Social Workers

What do the Professional Associations Say about Informed Consent?

“Clients have the freedom to choose whether to enter into or remain in a counseling relationship and need adequate information about the counseling process and the counselor. Counselors have an obligation to review in writing and verbally with clients the rights and responsibilities of both counselors and clients. Informed consent is an ongoing part of the counseling process, and counselors appropriately document discussions of informed consent throughout the counseling relationship.”

- American Counseling Association

What do the Professional Associations Say about Informed Consent?

“Marriage and family therapists obtain appropriate informed consent to therapy or related procedures and use language that is reasonably understandable to clients. . . . The content of informed consent may vary depending upon the client and treatment plan; however, informed consent generally necessitates that the client: (a) has the capacity to consent; (b) has been adequately informed of significant information concerning treatment processes and procedures; (c) has been adequately informed of potential risks and benefits of treatments for which generally recognized standards do not yet exist; (d) has freely and without undue influence expressed consent; and (e) has provided consent that is appropriately documented.”

- American Association for Marriage and Family Therapy

Questions?