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Informed Consent for Urine Drug Testing of OB Patients
Hawaii

This summary is for information and education purposes only and does not constitute specific legal advice. OB practitioners should obtain specific legal advice regarding this matter from their own legal counsel prior to making any conclusions or decisions regarding whether to obtain informed consent prior to performing urine drug screening or testing on their patients.

What is informed consent?

The doctrine of informed consent is based on the legal principal of battery, which is the touching of an individual without consent. As such, a medical practitioner may be held liable for a battery for performing any medical procedure that involves a "touching" of a patient where the patient's consent has not been obtained. Generally, a "touching" occurs for any procedure, treatment, surgery, or similar encounter between a practitioner and a patient.

What are the elements of an informed consent?

In Hawaii, Section 671-3(b) Hawaii Revised Statutes establishes the information that must be provided to the patient "prior to obtaining consent to a proposed medical or surgical treatment or diagnostic or therapeutic procedure:"

1. The condition to be treated;
2. A description of the proposed treatment or procedure;
3. The intended and anticipated results of the proposed treatment or procedure;
4. The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
5. The recognized material risks of serious complications or mortality associated with:
    a. The proposed treatment or procedure;
    b. The recognized alternative treatments or procedures; and
    c. Not undergoing any treatment or procedure; and
6. The recognized benefits of the recognized alternative treatments or procedures.

The American Medical Association ("AMA") has published on its website recommended elements to be discussed and disclosed with patients (http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page). The AMA's recommended elements are similar to Section 671-3, but include:

1. The patient's diagnosis, if known;
2. The nature and purpose of a proposed treatment or procedure;
3. The risks and benefits of a proposed treatment or procedure;
4. Alternatives (regardless of their cost or the extent to which the treatment options are covered by health insurance);
5. The risks and benefits of the alternative treatment or procedure; and
6. The risks and benefits of not receiving or undergoing a treatment or procedure.

What are the State laws related to informed consent for UDT in pregnant patients?

The Hawaii Medical Board may establish additional standards for health care providers. The objective is to ensure that the patient's consent is informed consent. In the area of urine drug testing of pregnant patients, however, no standards have been published.

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What is the impact of *Ferguson v. City of Charleston* on provider informed consent?
Ferguson v. City of Charleston was a 2001 case decided by the United States Supreme Court regarding the use of informed consent for urine drug testing of pregnant patients. In *Ferguson*, the Medical University of South Carolina ("MUSC"), the Charleston public hospital, offered to cooperate with the city in prosecuting mothers whose children tested positive for drugs at birth because, despite referrals for counseling and treatment of patients who tested positive for cocaine, the incidence of cocaine use among maternity patients remained unchanged. MUSC worked with police to develop a policy that included, among other things, testing of pregnant patients suspected for drug use. The policy did not include any change in care for prenatal patients who tested positive, nor did it include any special treatment for the newborns. MUSC performed the drug testing without the consent of the patients.

MUSC obstetrical patients who were arrested after testing positive for cocaine challenged the policy claiming that it violated the Fourth Amendment protection against unreasonable searches and seizures. The lower court held that although performing the urine drug test without consent was a search, it was permitted based on prior Supreme Court cases that recognized "that 'special needs' may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends." The Supreme Court reversed the lower court ruling, holding that, "[a] state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. The interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant."

The decision to require informed consent from the patient was based on 2 reasons:

1. Because the hospital was a governmental agency, the search and seizure protections of the Fourth Amendment required the patient to consent to the urine drug test.
2. The "special needs" that supported the program do not outweigh the individuals right to privacy in this case because:
    a. The use of positive test results and dissemination to law enforcement was not clearly explained to the patients as a tool to coerce women to obtain treatment; and
    b. The purpose of the test cannot be separated from the state's general law enforcement interest because the test was used to gather evidence for law enforcement and not for patient care, even though the objective may have been to get pregnant woman with positive urine drug screen results into a drug treatment program.

The applicability of this ruling to OB providers in Hawaii is limited and does not require informed consent prior to conducting urine drug testing of patients if:

1. The purpose of the urine drug testing is for patient care and treatment;
2. Law enforcement is not involved with the urine drug testing protocol and/or does not receive results of the testing; and
3. The OB provider is not part of a government entity, such as a state or city hospital.

Application and Conclusion
For OB providers considering whether to obtain an informed consent prior to performing a urine drug test, the issue can be reduced to one question: **"What do you plan to do with the results?"** If the answer is that the results will ONLY be used to provide care to the patient, then

informed consent is NOT required because there are no substantial risks in a urine drug test to identify on the informed consent. Put another way, even if the practitioner were to complete an informed consent for the urine drug testing, the patient could have a general understanding of the procedure, possibly the medically acceptable alternatives to the procedure, but there are not any substantial risks involved in the procedure.

If, on the other hand, the results might be shared with law enforcement or any other state agency, such as child protective services agencies, then there is an identifiable risk to the patient of which the patient should be made aware through an informed consent. Although this is not legally required, the use of an informed consent in situations where the practitioner would share the results of the test can help protect practitioners from potential legal action.