



UCSF AIDS Health Project

Training Program http://ucsf-ahp.org/HTML2/services_providers_training.html

Online Resources for the Basic I

Legal and Policy Information for HIV Counselors: Informed Consent

Informed Consent Defined

Informed consent is established once a client has been fully informed of the risks and benefits of the HIV test and alternatives to the test, demonstrates the mental capacity to understand this information and freely agrees, without coercion, to have the test performed.

Relevance

Relevant for every client seen in CDPH/OA-funded HIV test sites.

Conditions

1. Client is of legal age to give consent (in California, 12 years old or older).
2. Client is in a sound mental state and can understand the information.
3. Client gives consent voluntarily, not through coercion.

Information Client Must Understand to Establish Informed Consent

1. Nature of the HIV test.
2. Risks of the test.
3. Benefits of the test.
4. Alternatives to the test, and risks and benefits of these.

Anonymous Testing

In anonymous settings, the client is expected to give informed consent but, to protect anonymity, the counselor (not the client) signs the consent for the OraQuick rapid test. Counselor must review the nature of the procedure, risks and benefits, alternatives; and using reasonable judgment should determine the client is 12 years or older, in a sound mental state, and not being coerced to take the test. Once this has been covered and the client affirms his or her wish to proceed with testing, informed consent has been established.

Confidential Testing

In confidential settings, the client must give written informed consent. The client must sign a written consent form covering the information listed above. The signed consent form provides documentation that the consent was competent, voluntary and informed.

In sites where rapid testing is being offered, there are consent forms for both confidential and anonymous clients. Confidential clients must sign a form that states they have been informed of what a preliminary positive test result means and have agreed to the collection of second sample and a confirmatory result session. Clients testing anonymously must give their verbal consent and the counselor then initials the consent form.

Counselor Responsibilities

All counselors have an individual responsibility to ensure their clients are giving informed consent for testing, and, in confidential settings, that clients give written informed consent.

An Excerpt From AIDS Law For Mental Health Professionals

Informed consent is legally defined to require practitioners to disclose to clients both the risks and the benefits of the medical procedure to be performed, and to ensure that clients understand the nature of the procedure. Thus, in the context of HIV antibody testing, the provider has not obtained the client's informed consent until he or she explains at least the following points:

- a. Early knowledge of their HIV status will allow clients to be referred promptly to appropriate health care and social service providers;
- b. Early knowledge of HIV status will increase a client's chances of obtaining both counseling and early medical intervention that should contribute to his or her survival;



- c. Taking the HIV antibody test is a stressful event, regardless of the results, because of fears about antibody status;
- d. Disclosure of a client’s antibody test result, or sometimes the disclosure that a person even took the test, may lead to discrimination, denial of health coverage, stigmatization and violence, so test results should be carefully guarded;
- e. Pre-existing physical or emotional conditions of a client’s, for example a fainting response to the drawing of blood, combined with the antibody test procedure or potential results might cause a client harm;
- f. Pre- and post-test counseling should be a part of the testing program.

Excerpt from Wood GJ, Marks R, Dilley JW. AIDS Law for Mental Health Professionals: A Handbook for Judicious Practice, Updated Version. San Francisco: AIDS Health Project, 1992.

Vignettes Regarding Informed Consent

The following vignettes present hypothetical situations and then describe important points and laws to consider in addressing these situations. Remember, as an HIV counselor, you are not expected to intervene in crisis situations or know every aspect of law or ethics that may arise in your work. It is part of your job, as an HIV counselor, to know the appropriate people and resources to access in crisis situations or situations which may require legal consultation.

1. ADOLESCENTS

A father comes to a confidential test site with his 14-year-old daughter, and asks that she receive the HIV test. What do you do?

Is your response any different at an anonymous test site?

Points to consider:

- a. People 12 years old and older can give informed consent for standard HIV testing. However clients must be 13 in order to receive the OraQuick Rapid Test or the OraSure fluid collecting device.
- b. A person giving informed consent must do so voluntarily, without coercion.

Answer: Persons 12 years old and older can give informed consent for standard HIV testing, and may

not be tested against their will or under coercion at state-funded anonymous or confidential test sites. It is not clear whether this is a “supportive father” or a “coercive father.” Talk to the 14-year-old privately and determine whether she is choosing to have the test of her own free will. If not, she is not providing informed consent.

At an anonymous test site, your response is the same.

There are circumstances under which testing of minors or adults can be coerced or required (such as the military, Job Corps, or in a juvenile detention facility). However, at Office of AIDS funded test sites, coerced or mandatory testing is never allowed.

2. CLIENT UNDER THE INFLUENCE (SEVERE)

A client comes in for a risk assessment session with alcohol on his breath and keeps “nodding out” (fading in and out of wakefulness) during your session. What do you do?

Points to consider:

- a. For consent to be informed, a client must be in a sound mental state and able to understand the information.

Answer: This client may not be oriented enough to be considered in “a sound mental state,” capable of understanding the information. If this is the case, he cannot give informed consent. Assess the client’s mental state further, and if he does not appear capable of understanding the information in the session, explain your concern to the client and re-schedule the appointment for a later date. Emphasize the importance of the client being oriented and alert during the session.

3. CLIENT UNDER THE INFLUENCE (MODERATE)

A client comes for risk assessment. Her speech is pressed, her manner “speedy” and you suspect she is high on some kind of amphetamine. She demonstrates by her comments that she is oriented and aware of where she is, who she is and what is happening.

Points to consider:

- a. For consent to be informed, a client must be in a sound mental state and able to understand the information.



Answer: This client certainly appears to be under the influence of substances. However, she is reasonably well-oriented to the situation and appears capable of understanding the information presented. She is, therefore, capable of giving informed consent.

Remember, many chronic substance users are virtually always in some sort of altered state of consciousness. This circumstance in and of itself does not necessarily mean the person is not of “sound mental state.” As one counselor said, “If I refused to counsel anyone who was drunk or high, I’d never see any clients at all in my program because most of the people I see are always using something.”

4. CLIENT WITH COGNITIVE, PSYCHOLOGICAL OR DEVELOPMENTAL PROBLEMS

A client comes for risk assessment. Something seems unusual about his manner of interaction. His speech is slow and deliberate, and his responses do not always relate to your comments or questions. You suspect he may have cognitive, psychological or developmental problems. (“Cognitive” refers to thought processes; someone with cognitive problems cannot think clearly. “Developmental problems” might include developmental disability, formerly called mental retardation, or severe learning disability.) What do you do?

Points to consider:

- a. For consent to be informed, a client must be in a sound mental state, and able to understand the information.
- b. Federal and state laws protect persons with disabilities from discrimination.

Answer: This is one of the most difficult situations to assess. Your question is whether this individual is capable of understanding the information given, and the vignette raises the possibility he cannot. It is also important to consider what the effects of a disclosure session might be for this individual if he is in a similar mental state at the time he learns his HIV results.

Discrimination: On the other hand, it is important not to discriminate against persons simply because they appear to have a deficiency of understanding,

especially if it turns out they do not have one. Equal protection under the law is a balancing consideration here. It means that a person should not be precluded from accessing services (made available to others upon request) without just cause. A person denied such services could have a cause of action (legitimate legal complaint) if discrimination is proven.

What to do: Ask further questions and see if you can get a clearer sense of this client’s ability to understand the session. Explain your concerns, and ask if he has been aware of difficulties understanding or following conversations in the past. You might also ask if he has a guardian or conservator who helps him make decisions about his life.

If these further questions do not clarify the situation, ask for help from your site supervisor.

If the client cannot understand the information: Ultimately, if the client seems unable to understand the information, he cannot give informed consent. Explain again your concerns about his ability to understand the testing process. You can ask him to re-schedule for a later date, with the understanding that you or your supervisor will re-evaluate his situation at that time, or invite him to return with an advocate or conservator, if he has one. If the client does have a conservator or legal guardian and intends to return, then it will be necessary to confirm that relationship as valid (that is, to assure that the person is indeed the actual legal guardian, and not someone masquerading as same).

Alternatives: It may be useful to suggest to this client, if he has an established relationship with a health care provider, that he seek services in a setting where his psychological or developmental issues are known and can be accommodated.

Enlist the help of others, and document the process: If at all possible, enlist the help of another counselor or clinician before denying access to testing so your own impressions are confirmed and validated by someone else for the record. For your own benefit and to protect the site, write up careful and thorough notes about the situation, including concrete examples of behavior leading to any decision to postpone HIV testing.