

**Mental Illness in the Justice System:**  
Communication and HIPAA Compliance

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for

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## **Abstract**

As funding for mental health institutions has decreased, the justice system has been given the undue burden of dealing with individuals with mental illnesses. With no real alternatives, the prison system is becoming the biggest mental health provider in the United States. The justice system was never intended to provide mental health treatment and is often ill equipped to deal with these offenders, who boast the highest rate of recidivism and find themselves lost in the system repeatedly.

Although not a substitute for mental health institutions or providers, many facets of the justice system are working to improve the treatment, care and services provided to the mentally ill. For example, Cuyahoga County, there is a mental health docket at the common pleas court with judges trained to work with the mentally ill, a mental health and developmental disability unit of the probation department, and numerous agencies that provide services and care during incarceration and upon release. All of these resources help provide mentally ill offenders with the stability they need to not re-offend and to help them move through the criminal justice system quickly while providing the utmost amount of justice.

The justice system has created a way to deal with and help mentally ill offenders, but these resources hinge upon a person being classified as mentally ill as quickly as possible. With so many different facets working together, communication becomes invaluable, especially when time is of the essence. The focus of this paper is on the movement of communication throughout the justice system and how various laws limit this movement and may impede treatment of the mentally ill as a result.

The federal Health Insurance Portability and Accountability Act of 1996, (HIPAA) and the Ohio statutes are examined to better understand how communication is limited. HIPAA limits how Private Health Information known as “PHI,” is shared and the Ohio statutes are comparable to these regulations.

The flow of mental health information throughout the justice system is explored through discussion with various entities therein. The purpose, use, and problems encountered at each step are explored from intake to release. Each section looks at how the laws limit communication, how these limitations are dealt with, and the problems each section faces.

It becomes obvious throughout each step that the laws present no insurmountable obstacle to the sharing of information, but that problems with communication certainly do exist. As these communication issues arise, the flaws of the justice system become clear and it is easy to see where improvement is needed. The paper concludes by looking at a new jail management system being implemented here in Cuyahoga County known as “In Jail”. This new management system bridges many of the communication gaps and provides uniformity to a system that currently has none.

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## Introduction

Each year there is an increase in the number of incarcerated individuals with a mental illness. These numbers have increased so drastically that the prison systems are the largest mental health provider in the United States, with almost 16.9% of all inmates classified as mentally ill, a figure that is three to four times the number of mentally ill people in the general population.<sup>1</sup> It is these individuals who boast the highest rate of recidivism<sup>2</sup> and when not adequately treated during incarceration become more prone to symptoms and violence upon release.<sup>3</sup> The justice system can be a difficult labyrinth to navigate through and is one that mentally ill offenders seem to find themselves lost in over and over again.

Mentally ill offenders have a vast number of illnesses with varying degrees and symptoms. Regardless of the type of illness, all interactions with these offenders need to be handled carefully. Persons experiencing symptoms of a mental illness can be a threat to themselves or others and their thoughts may not always be coherent or rational.<sup>4</sup> In addition to safety, it is important that while wards of the state these individuals receive adequate care and the utmost amount of justice.

The key to helping the mentally ill through the justice system is communication. The more information shared with the necessary people, the more opportunities there are for care. Throughout the justice system a correctly identified mentally ill offender may be given proper

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<sup>1</sup> Tracy Russo, The Justice Blog. (2009, December 1). *Addressing Mental Illness in the Criminal Justice System*. Retrieved June 8<sup>th</sup>, 2011 from: <<http://blogs.usdoj.gov/blog/archives/431>>

<sup>2</sup> Id.

<sup>3</sup> Cynthia Holder Rich, Ecclessio.com. (2011, June 8<sup>th</sup>). *Uncovering a Crisis and its Call to the Church*. Retrieved on June 22<sup>nd</sup>, 2011 from: <<http://www.ecclessio.com/2011/06/uncovering-a-crisis-and-its-call-to-the-church-by-cynthia-holder-rich/>>

<sup>4</sup> Jamie Fellner, "A Corrections Quandary: Mental Illness and Prison Rules," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 41, 391-412, 2006.

medical care, put on a special mental health docket for court, or placed on probation with a specially trained MRDD probation officer. These resources help provide the stability needed to keep a person from re-offending once released.

Sharing information within the justice system can prove to be difficult but information regarding private health information, such as information about a mental illness, can be even more difficult because of the legal implications. States and the federal government have imposed laws to help protect an individual's right to privacy in regards to their private health information. These laws were created to help aid and protect an individual but they make sharing vital information a challenge.

A good deal of this essay is comprised of information reported directly from the people involved in the justice system in Cuyahoga County who work with the mentally ill or developmentally disabled. Their knowledge of the system and the problems therein come from years of working in related fields. Additionally, members of the Cuyahoga County Mental Health Court Initiative (CCMHCI) provided invaluable information as to their dealings with the mentally ill and the problems they encounter in doing so.

Part I of this essay looks at the legal implications and impact of the well-known federal Health Insurance Portability and Accountability Act (HIPAA) and Ohio statues on sharing mental health information. Sections II – VII focus on the different agencies and people a mentally ill individual would come into contact with in the justice system and the current practices, procedures and problems they encounter in sharing the information necessary to their job execution.

## Part I: Legal Limitations and Implications of Sharing Mental Health Information

In 1996 the federal government created an act called the Health Insurance Portability and Accountability Act, better known as HIPAA. It was created to help protect a person's individual healthcare information and to create and restore a sense of trust and accountability between an individual and their health care provider. It created this sense of trust by limiting who has access to your private health information and how that information can be shared and for what purpose.<sup>5</sup> HIPAA is still one of the biggest pieces of health care legislation; however, many misconceptions about it have surfaced.

Most people have a basic knowledge of the act and what it means but very few have a good grip on its actual content.<sup>6</sup> It is not uncommon to hear HIPAA referred to in conversation, especially in health care facilities. It is better to protect your information than not, but there is a point where sharing information can become necessary to providing treatment. Understanding HIPAA is the first step towards understanding how mental health information can be shared and obtained.

HIPAA is known for its privacy clause. Contrary to popular belief, however, not everyone is subject to the provisions of this clause. The privacy clause set forth in HIPAA establishes that consent must be provided to obtain or share information about a person's Private Health Information, or PHI. When obtaining consent the reason for the disclosure of the information

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<sup>5</sup> John Petrila & Fader-Towe, H. (2010) Information Sharing in Criminal Justice-Mental Health Collaborations: Working with HIPAA and Other Privacy Laws. Council of State Governments Justice Center.

<sup>6</sup> John Petrila, National Gaines Center. *Dispelling the Myths about Information Sharing Between the Mental Health and Criminal Justice Systems*. Retrieved May 27<sup>th</sup>, 2011 from: <[http://gainescenter.samhsa.gov/text/integrated/Dispelling\\_Myths.asp](http://gainescenter.samhsa.gov/text/integrated/Dispelling_Myths.asp)>



must be clearly stated and the information provided is limited in scope depending on that purpose.<sup>7</sup>

Those who are subject to HIPAA are considered covered entities and are the only ones who can be considered criminally liable for improperly releasing Private Health Information, known as PHI. HIPAA defines a covered entity as: “health plans, healthcare clearing houses and health care providers.”<sup>8</sup> It is under this definition that a covered entity can share and receive information on a limited basis.

HIPAA greatly impacts how and how much information can be obtained through a covered entity; however, it does not greatly limit non-covered entities, such as the court. For the court to be able to obtain all necessary information there are certain circumstances and exceptions which allow for access as long as confidentiality is kept and the information is deemed necessary. Any court ordered tests or assessments provide the largest exception as the complete results of these tests would be shared. PHI can also be made available to the court or to any law enforcement agency when it is in the best interest of the individual for the information to be disclosed. A situation like this might arise when someone experiencing severe symptoms of their mental illness is arrested and is unable to sign a release due to their mental condition. In the event of this happening, it may be in the best interest of the patient for their primary care provider to release any pertinent information to keep the individual and the people they come into contact with safe and for care to be provided.

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<sup>7</sup> Id.

<sup>8</sup> Id.

Exceptions do apply under certain circumstances, but it is always preferable to obtain the necessary information with consent and with the proper authority. Under HIPAA, if a state has stricter laws regarding sharing of PHI, those laws apply in addition to HIPAA. Although this act sets forth a set of standards in relationship to PHI, there can be some variances between states. To understand how HIPAA affects our state, we must look at the state laws regarding the sharing of health information.

Through better understanding of HIPAA, it is understood that information is not withheld, but restricted. For any reasonable request for information, there are relatively simple ways to receive this information. In the state of Ohio there are statutes which set out additional rules as to private health information. PHI is defined rather broadly in HIPAA as simply “private health information” but the Ohio Revised Code defines it as *protected* health information. They define this specifically as:

....information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual’s past, present, or future physical or mental status or condition, receipt of treatment or care, or purchase of health products, if either of the following applies: (a) The information reveals the identity of the individual who is the subject of that information. (b) The information could be used to reveal the identity of the individual who is the subject of that information, either by using the information alone or with other information that is available to predictable recipients of the information.<sup>9</sup>

In section (C) of the Ohio Revised Code §3701.27 it is provided that information not considered protected health information in accordance with the definition may be released in “summary, statistical, or aggregate form” as long as an individual is not identified; this information is

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<sup>9</sup> Definition of Protected Health Information in ORC Ann. § 3701.17 (2011).

considered public record according to Ohio Revised Code §149.43<sup>10</sup>. The Ohio Revised Code does allow for the release of some health information and clearly defines protected health information, but because it is a federal act, HIPAA regulations must be followed. That is not to say that some of the same exceptions for release of information do not apply under HIPAA as well.

The release of non-protected health information is permitted in the Ohio Revised Code, which also provides exceptions as to when protected health information can be released. Release of PHI information *is* authorized when treatment is necessary, when it is necessary to ensure the accuracy of the information, or when the information is released in accordance with a subpoena, search warrant or the request of a prosecutor or grand jury due to a criminal investigation.<sup>11</sup> All of these exceptions make obtaining PHI possible under extraordinary circumstances but they all must also be in compliance with the confidentiality requirements established as:

Any disclosure pursuant to this section shall be in writing and accompanied by a written statement that includes the following or substantially similar language: 'This information has been disclosed to you from confidential records protected from disclosure by state law. If this information has been released to you in other than a summary, statistical, or aggregate form, you shall make no further disclosure of this information without the specific, written, and informed release of the individual to whom it pertains, or as otherwise permitted by state law. A general authorization for the release of medical or other information is not sufficient for the release of information pursuant to this section.'<sup>12</sup>

The access to information, especially in the justice system, is reasonable despite the constraints. Consent is generally required and is not difficult to obtain as seen in following

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<sup>10</sup> Ohio Revised Code Ann. 3701.17 section (C)

<sup>11</sup> Ohio Revised Code Ann. 3701.17 sections (B)1-3

<sup>12</sup> Ohio Revised Code Ann. 3701.17 section (D)

sections. The information that is provided may be limited in scope, but it is more than enough to create a safe environment, provide adequate care and keep information flowing through the system swiftly. Overall, Ohio has comparable laws regarding health information that are not very different from those set by HIPAA.

## **Part II: Initial Encounter with an Offender and Intake**

When a police officer approaches a suspect or goes to arrest someone, the officers are in a vulnerable position as they are generally unaware if a suspect is armed or what the exact physical, mental or emotional state of the person in question is. For a person who is mentally ill an encounter with the police can be as confusing and stressful as it is burdensome on the officer. Although trained to look for signs of mental illness out in the field an officer has no real way of knowing if a person is mentally ill other than familiarity with the person. Because the mentally ill so frequently reoffend, it is not uncommon for police officers and jailers in small districts to become familiar with these offenders.

In an effort to better handle situations with mentally ill offenders and to ensure the safety of the individual and the police officers, Linn County, Oregon has initiated a mental health database. The database is accessible to police officers in their vehicle and allows them to see the type of illness a person has and what symptoms they may experience. This database allows an officer to know what to expect upon approach and what actions they can take to help calm a suspect down or ease the situation. The database is currently comprised only of

mentally ill individuals who sign up for it of their own free will. Someone arrested and found to be mentally ill is not put in the database automatically.<sup>13</sup>

The database in Oregon is a good example of ways the justice system can improve interactions with the mentally ill and help further public safety. It is a new development, only starting in early 2011, so the effectiveness and the number of those volunteering is limited at this time. If nothing else, this step towards making identification easier helps demonstrate the problems the mentally ill face in such situations and also their willingness to help improve these interactions. Aside from situations where it is known an individual is mentally ill, many symptoms of mental illness do not become apparent until arrest and intake into a jail facility.

A jailer does not usually know upon intake that a person has a mental illness. The jailer may be the first to identify possible red flags and contact the correct people to make the diagnosis. At intake, a jailer will complete a booking sheet which provides the opportunity to interact with the offender. Going over basic questions can give an experienced jailer a good idea of the mental stability of a prisoner and also point out concerns when presented.

Despite being a small police department, Shaker Heights has seen an increase in mentally ill offenders and the jailer has become accustomed to dealing with them. Over the years he has become familiar with some of the “regulars” and has also gained enough knowledge and experience to know what to look for when completing a booking sheet or attending to a prisoner to know if additional help is necessary. If a person is showing signs of a

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<sup>13</sup> Alex Paul, Albany Democrat-Herald. *Database to help patients, police*. Retrieved May 30<sup>th</sup>, 2011 from: [http://www.democratherald.com/news/local/crime-and-courts/article\\_dc33f796-2528-11-e0-9d4a-001cc4c03286.html](http://www.democratherald.com/news/local/crime-and-courts/article_dc33f796-2528-11-e0-9d4a-001cc4c03286.html)

possible mental illness, he contacts the Forensic Liaison at Recovery Resources to help with an initial assessment and to find necessary services for the prisoner. If an additional evaluation is needed, the jailer contacts one of the bailiffs at the Shaker Height Municipal Court who then contacts the judge to request she order a psychiatric evaluation.

Aside from these initial concerns, the jailer finds out the necessary medical information to provide care to the prisoner while in custody. To do this the jailer obtains the prisoner's written consent to obtain medical information and faxes this form to the Shaker Heights Health Department where the city's nurse gathers the necessary information.

If a prisoner is in need of a medication, the jailer is provided only with the necessary information to provide medication. Over the years, like many people in the justice system, the Shaker Heights jailer has become familiar with what medications treat which mental illness but he will never be provided with a diagnosis.

At the Shaker jail all medical records in paper are kept indefinitely for prisoners but are not readily accessible. The jail may have "regulars" but consent and medical records have to be obtained each time they are booked, even if it is within a short time span.

Intake is the first step in contacting the correct people to identify a mentally ill offender and if these trained professionals are not contacted at intake a defendant's mental illness can be missed. Although a jail is not a covered entity, the medical information usually comes from a covered entity and is limited in scope. The Shaker Heights jailer reports that he has never had any difficulties obtaining consent from defendants and even if the information is limited, he has found many of the prisoners have adequate resources available to receive the care they need.

### **Part III: Agencies' Roles in Aiding the Mentally Ill**

One reason the number of mentally ill individuals in the justice system is rising is due to the defunding of institutions throughout the United States. It has become increasingly difficult for people with a mental illness to receive the treatment they need and without this treatment their behavior may be erratic. For disruptive behavior caused by lack of treatment, a mentally ill individual may be taken into custody and get sent to jail because no other alternative presents itself. Similarly, without treatment side effects of a mental illness may cause an individual to commit crimes. This obviously has a huge impact on the prisons and the justice system and creates an even bigger dependence on those agencies that aid the mentally ill.

A group of these agencies are funded by the Alcohol, Drug Addiction & Mental Health Services board known as the ADAMHS board. Most of the agencies overseen by the ADAMHS board have several places where services and resources are provided. They may offer counseling services, psychological and psychiatric evaluations, aid in job and housing placement and help in creating a sense of stability once a defendant is released. Many of these agencies do not deal solely with defendants, but many of them have a large number of clients who become connected with the agency through the justice system.

Some of the larger agencies overseen by the ADAMHS board have offices in the Justice Center in downtown Cleveland so that outreach begins during incarceration at the county jail.

For the smaller jails, their only link is provided through municipal agencies' Forensic Liaisons who are contacted to help and are able to visit a prisoner and perform initial assessments in the suburbs. Recovery Resources contacts a prisoner for the first time after

being contacted by a jailer, judge or other official who had contact with the individual and had questions about the prisoner's mental status.

These agencies often act as filters through the system and the number of people they see are large, many of whom exhibit no real symptoms of mental illness. When asked about this, a forensic liaison at Recovery Resources simply stated, "It is better to look at too many than to miss one who is mentally ill." Upon request, they meet with the prisoner to do an initial assessment which is generally a gathering of basic information in the form of a casual conversation. It is during this initial assessment that the prisoner may express an interest in drug or alcohol counseling or programs that would help them get a GED. While prisoners may seek out these resources, their quick release from jail may result in the liaison being unable to find them when the resource becomes available.

The questions during the assessment are rather basic and include self-disclosed family, health, substance abuse, legal and mental health history. This first encounter hinges upon the defendant providing accurate information and gives the liaison a chance to assess the defendant's mental stability and also obtain basic consent forms. During this assessment the liaisons generally manage to obtain a signed consent form to speak with a person's family, doctor or judge assigned to the defendant's case. Liaisons keep between five to ten consent forms on file which are considered valid for six months but are kept up to date.

The assessment is casual by nature and the liaisons rarely go into a first meeting blind. Being in the Justice Center, they have access to centralized computers which allow them to get a first glimpse into the person they will be meeting. They are able to see the defendant's mug



shot as well as their criminal history. Having this information can help the liaison determine how forthcoming a client is being during the meeting. The defendant is able to refuse a meeting and is not notified ahead of time when a meeting will take place. If a defendant refuses a meeting with a liaison, they cannot be forced. However, any uncooperative or unusual behavior may be noted by the trained liaisons which may result in a psychiatric evaluation being ordered by a judge. The temperaments and cooperation levels of defendants vary but the process goes rather smoothly the majority of the time. The liaisons at Recovery Resources find that consents are not difficult to obtain and that people seem to be pretty willing to receive help, even if it is just because they think the judge will show them leniency for this positive step.

Following an initial assessment the liaison begins to make recommendations for the client. The liaison may approach a judge and ask that a psychiatric evaluation be ordered or recommend putting the offender on a special mental health docket. Although requested, liaison recommendations are not always followed by some judges.

As for sharing information, as a covered entity the liaisons will only share information when consent is provided. Along with this consent, per HIPAA, the reason for requesting the information must be provided. Recovery Resources is happy to share information as needed and makes sure to provide information that is limited to the scope requested. As a covered entity, however, they will provide the necessary information without consent under circumstances as outlined previously in accordance with HIPAA and Ohio laws.

Just as it is important that a jailer be aware of the mental state of a prisoner, it is also important that these liaisons are contacted in order to further the process. Most agencies are poised in a good position to both receive and share information and are well aware of the laws regarding PHI. Recovery Resources has a firm grasp on the laws and the issues of HIPAA in the justice system. To an outsider it may seem that Recovery Resources has no problems dealing with HIPAA on a daily basis but they do have some basic concerns about HIPAA and the justice system in general.

As a primary goal, these agencies are there to help their “clients,” not only with treatment but to help guide them through the justice system and to the correct facets of it, such as the mental health court. One of the largest problems agencies such as Recovery Resources have is getting these mentally ill clients onto the mental health docket of the Common Pleas Mental Health Court. They view this problem as not HIPAA related, but as a communication barrier with other facets of the system. The agencies perceive these difficulties are attributed to a reluctance to aid the mentally ill because of their recidivism rate and some jurists’ lack of knowledge and understanding of mental illness.

Aside from the difficulty of receiving the ideal cooperation level from other parts of the justice system, the agencies also perceive timeliness of information to be an issue. The information they are able to receive regarding a client is sufficient if not plentiful, but it is not always timely. Receiving information can be difficult as it relies heavily on the person sending it. For agencies looking to receive PHI quickly, they often find themselves waiting for the information to go through bureaucratic channels. Once again this timeliness issue is not HIPAA

related, but is a matter of communication. Ideally the necessary information would be at their fingertips, however, getting this information into the system requires good connections with outside hospitals and agencies as well.

As a whole, Recovery Resources goes above and beyond to help mentally ill individuals. They experience some difficulties with communication when they are trying to help a defendant outside of their normal scope. Recovery Resources will attempt to help a defendant clear up warrants and cases in other courts although not required to do so. If a defendant suspects they have an open case in another court, the liaisons will look at that court's docket to see if the prisoner is correct. To do this they simply log onto a court's website and access it as anyone else would. While this is something this agency does as a courtesy, this step would be much easier if all courts' information could be linked through one system. Clearing up other cases during incarceration allows prisoners to be freed without any outstanding warrants and allows courts to close cases.

For mentally ill offenders, these agencies are their first and strongest ally and one that will continue to help them upon release. They have swift access to information and follow HIPAA closely. The problems they encounter with communication are a reoccurring theme and one which points to the real problems at hand.

#### **Part IV: The Common Pleas Mental Health Docket and Court**

In Cuyahoga County, the Court of Common Pleas has a special court for the mentally ill or the developmentally disabled. Known mentally ill offenders or those suspected to be are put on a mental health docket which allows their cases to be heard in the mental health court.

Attaining a spot on the mental health docket is an important step for mentally ill offenders because it allows one of five judges with special training to hear their case and ultimately may lead to sentences which include access to resources.

To be put on the mental health docket an offender must be “flagged” in the system. Ideally the offender is flagged as early as possible so they may be put on the correct docket, but that doesn’t always happen. Even if an offender is not flagged early enough and is not seen in the mental health court, they still can be flagged at a later time for use in the future. This flagging in the system is useful as many offenders with mental illness recidivate.

The initial movement to the mental health docket begins when a fax of a psychological evaluation which includes an “AXIS” diagnosis is received by the court from a forensic liaison. For offenders new to the system it may take a while for the liaisons to be contacted and the assessment completed. This delay in information can often result in offenders not being placed on the mental health docket efficiently. Once this faxed is received, a letter is delivered to the judge, county prosecutor and the defense attorney notifying them of the offender’s eligibility. From here they are flagged in the system and hopefully moved to the mental health docket to await court.

If an offender is not flagged early enough, they may find themselves in a normal courtroom process where some judges may take their illness into account and others may not. It is in the best interest of the offender for a judge to transfer the case to the mental health court; however, that is at the judge’s discretion. A judge may show some reluctance to do this because by the time it is known that an offender is eligible for the mental health docket, the

judge may already have invested time in the case. Additionally, if a judge recuses himself from a case with a mentally ill defendant he is given two cases in its place.

For a mentally ill individual, a judge can be the most important person in the justice system as they can be their ally or their foe. People with a mental illness may commit crimes because of their illness or may just commit crimes. This is an important distinction and one that judges need to consider when sentencing. Because the rate of recidivism is so high, it is somewhat understandable that a judge may question the validity of providing treatment as an alternative to a stiff sentence, but these cases do require extra consideration. If defendants are committing crimes because of their illness this must be taken into account because imposing a harsh sentence is not going to be the solution.

Few people in the justice system have any background in psychology or psychiatry, and while they are forced to deal with mental illness, judges do not always have an understanding or specialty training about mental illness. This is incredibly important to note as the number of mentally ill offenders rises and as a juvenile judge said, "Mental illness and the justice system just don't mesh comfortably."

The Mental Illness and Developmental Disability or "MHDD" Docket Coordinator says she has no problem obtaining PHI or obtaining consent when necessary. She sees communication issues unrelated to HIPAA as some of the biggest obstacles for her job. The timing of communication is essential to her job. The faster information can be gathered and shared, the faster the individual can be correctly identified and resources can be shared. The coordinator thought the idea of courts being able to share information and assessments would

help with this issue of time and cut down on costs. Even to know ahead of time that another court had identified an offender as mentally ill would make that identification that much faster and fewer steps would be required to find appropriate resources. She also thought that communication with the judges and other entities could be made easier. Because judges play such an important role in treatment of the mentally ill, she wishes that there was not such a barrier between resources, such as the mental health docket and the agencies, and the judges.

### **Part V: Providing Medical Treatment While in Custody**

In 1987 in the case of *Wideman v. Shallowford Community Hospital, Inc.*<sup>14</sup>, the court held that when the state plays a significant custodial role a special relationship exists. This special relationship requires that a state provide medical care when “the government’s isolation of the person places him in a worse situation than he would have been had the government failed to act.”<sup>15</sup> What this means is that a person in custody must be provided adequate medical care when necessary. Over the years this definition has come to include the mentally ill and to require adequate mental health treatment as well.

To provide adequate treatment to the mentally ill it is important that medical staff for the jails have a prisoner’s correct diagnosis and all pertinent medical information. For smaller jails this care can be especially important as very few facilities are connected to a health department. For those jails any health concern can prompt a trip to the hospital emergency room. This ultimately becomes very costly and ineffective depending on the number of prisoners and the illnesses that may plague them.

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<sup>14</sup> *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 11<sup>th</sup> Cir. (1987)

<sup>15</sup> *Id.* at 1035.

Shaker Heights jail is lucky to have a city health department so many of these problems are avoided. Having a health department also makes obtaining information easier for jailers and ultimately allows for better medical care of those in custody. The Shaker Heights Nursing Director is one of the jail's most important contacts and helps obtain the necessary information and orchestrate the necessary care.

To obtain PHI, the jailer has the prisoner sign a consent form which is then faxed to the nurse. After this form is received the nurse generally first tries to call Walgreens as they have a contract with Shaker Heights to provide all of their medication. She inquires if a person has any prescriptions on file, and if so, requests to have them filled. Walgreens will generally do an extensive check to see if any prescriptions are on file at any locations. The nurse stated that she has never had any problem gaining cooperation with Walgreens, and despite the fact that both the nurse and Walgreens are considered "covered entities" under HIPAA she has never been asked to provide them with a consent form. This lack of consent may be due to the relationship they have built, the contract for medications, or poor understanding of HIPAA. Prisons and law enforcement can often mislead people to believe that they must provide information without consent, which is true but only in certain situations. While this is somewhat questionable, the Nursing Director would be able to provide consent if asked.

If Walgreens is unable to provide any information on a prisoner, the nurse will then try contacting other pharmacies. If a prisoner claims to take a medication she is unable to find on file she will try to contact their physician. In the event that the prisoner is experiencing symptoms such as with asthma, and their doctor cannot be contacted fast enough, the Shaker

Heights' city doctor will prescribe something generic and soothing – usually low in dosage and just enough to minimize the problem until the proper medication can be given. Depending on the severity of a prisoner's illness health department personnel have the discretion to recommend police get a prisoner to a hospital facility for further treatment.

Occasionally a prisoner will be carrying medication on them when he is taken into custody or a family member will hear of the arrest and bring medications in. These medications can be given to prisoners but must meet certain criteria. A bottle must have the original information printed on it, contain instructions and consist of only one type of pill. If any of this is questionable, the prescribing doctor must be contacted.

When obtaining medical records the Shaker Heights Nursing Director always states that it is an urgent matter as she has experienced long delays in the past. Having good relationships with medical facilities and knowing who to contact can make obtaining information a little easier but does not always make obtaining that information faster. Again, time is a huge issue as treatment would ideally be provided as quickly as possible once records are obtained. The amount of time it takes to receive information and how much information is received varies depending on the provider. Free standing services, such as agencies, return information fairly quickly and while some providers may provide more details than others, diagnoses are never provided. Medical and mental conditions can be quite obvious by what the records state and what medications are prescribed.

The nurse provides only minimal information to the jailers and keeps detailed records indefinitely. Like the jailers, the nurse may become familiar with some of the people regularly in



and out of the jail, but the entire medical process must be redone for each subsequent incarceration, even within a short period of time.

The Shaker Heights Nursing Director feels that HIPAA adequately protects PHI and poses no real problems to the execution of her job or the justice system. She provides the court with the minimum amount of information necessary but thinks that justice is served for the mentally ill. She finds that one of the biggest problems she does experience is related to the time it takes to obtain information which she attributes largely to the cooperation and demands placed on large medical facilities. Another problem she experiences on a smaller scale is with jailers. While she knows the regular jailers, she recognizes that interim jailers and those there on weekends do not always know what to ask or what to look for during intake. An experienced jailer can help ease the process of providing medical care and some are more knowledgeable than others.

Yet another problem with communication is between the various courts and jail facilities. Since each is run independently, the different systems and communications can make sharing of PHI difficult. It would be in the best interest of the prisoner, especially someone who is mentally ill and needs stabilizing medication, for information to be sent with his transfer from one jail to another. At the current time, if a prisoner is brought in from another prison or jail, no information is provided. If they have taken their medication and what medication they should be taking is unknown, this prompts the whole process of acquiring information to be done again. This lapse in communication between the jails can make a large impact on treatment and be detrimental to the mental health of a prisoner with a mental illness.

## **Part VI: Providing Justice to Mentally Ill Juveniles**

Juvenile offenders pose a slew of different problems as does dealing with mentally ill juveniles. Similarly, juvenile courts experience different problems than those of the adult system. One of the goals of this paper is to find a way to more effectively share information regarding mental illness, and this extends to children who move from the juvenile court to the adult system. Ideally, a juvenile diagnosed as mentally ill would be able to be known as mentally ill when entering the adult system for the first time. This would help create fewer steps to providing treatment sooner and more efficiently.

A juvenile court judge noted that aside from taking elective classes, most judges and other members of the justice system have little knowledge or experience dealing with the mentally ill. This judge always tries to help a mentally ill child receive the help they need and to treat the behavior, not the symptoms or diagnosis. The judge finds that with mentally ill children, different psychologists come up with different diagnoses which make the prescribing of medication useless. Too often doctors are too quick to try different medications and are unlikely to listen to how a child says he or she feels.

Out of roughly 15,000 cases a year, only about 2,000 - 3,000 cases result in a child being sent to the Ohio Department of Youth Services also known as ODYS or "juvie." Of those, almost 50% of the kids experience symptoms of a mental illness. As in the adult system, there are many agencies and resources available to mentally ill juvenile offenders. These programs are assets in terms of providing treatment and lowering the rate of recidivism, which is high for mentally ill youth.

For juvenile offenders, probation officers take a more active role and are generally the ones to obtain and share information with judges regarding a mentally ill child. One of the biggest distinctions between adult and juvenile court is the discretion available when sentencing. For an offender under the age of 18, there is no clear line of at what age a child should know what behavior is acceptable. While society deems certain behavior acceptable at certain ages, many of the children committing crimes do not fit into these categories. Development differs individually and that is important to note when dealing with juvenile offenders.

Part of the reason a juvenile is treated as such in the justice system is so that they do not have a stigma attached when they become of age and hopefully “grow out of” their juvenile behavior. One concern with sharing mental health information for children is that a new stigma would be attached to a juvenile, which is something that does need to be considered.

Given that people are often misdiagnosed and as a result mistreated, the stigma that a flag of mental illness creates needs to be considered. If a child were to be flagged prior to entering the adult system, the flag might disappear after a certain amount of time. If a juvenile reoffends within two years, they might show as mentally ill whereas if they do not reoffend and enter the adult system for ten years, another assessment might eventually be needed to re-flag them. Given the truth and fear of misdiagnoses, this seems to be a viable option for both children and adults.

## Part VII: MHDD Probation Officers

All of the resources in the justice system that are provided defendants while incarcerated can help create stability for a prisoner, but maintaining that stability once the prisoner is released can prove to be difficult. It is upon release from this jail stay that probation departments become crucial to helping provide the guidance needed to help a defendant adjust to society – no matter how short their incarceration was. The role of probation is vital for mentally ill offenders, especially with their high rate of recidivism. It is for this reason that the specially trained probation officers at Cuyahoga County Common Pleas Court who work with mentally ill and developmentally disabled defendants are so important. Out of about 8,000 people currently on probation through Cuyahoga County Common Pleas Court, 700 of them are mentally impaired.

To qualify to be placed with a mental health court probation officer, an offender must have a known mental illness or a low intelligence quotient that makes them developmentally disabled. These offenders tend to come from the mental health court and they meet with their probation officers on a more frequent basis. The MHDD probation officer receives PHI and criminal histories directly from the court and rarely has to seek information. As Recovery Resources and the Shaker Heights Nursing Director stated, the MHDD Probation Supervisor reported it takes a long time to receive information, which she attributes not to HIPAA or any laws, but to the paperwork and time it takes for an individual to send it.

The terms of probation are set by the judge on the case, and the involvement of the probation officer depends on their outreach and the relationship they build with the offender.

An MHDD probation officer has all of the regular duties of a probation officer but also closely monitors if an individual is taking their medication. This is especially important upon release because the mentally ill individual has hopefully been stable while incarcerated and may go off their medication as a result. It is important to note that it is not uncommon for people suffering from mental illnesses to disbelieve that taking medication makes them feel better. As a result they stop taking medication. Similarly, many people who are mental ill become drug users as a way of self-medicating, which only increases their likelihood of recidivating and poses another obstacle to overcome.

The probation officer can provide a mentally ill offender with good resources and help from a connection with an agency such as Recovery Resources. At the probation department there is usually a forensic liaison from a mental health agency ready and willing to talk with offenders and help them when possible. Having a good relationship with a probation officer can provide the offender with support where there otherwise is none and can help maintain stability, which is important to keep someone from re-offending. Furthermore, if the offender has a connection with a forensic liaison, with whom they are required to meet, this can increase the likelihood of utilizing the resources available.

### **Part VIII: Working with Agencies beyond the Jail Walls**

Forensic liaisons at many agencies have good connections with probation officers so that their services are known and readily available. Agencies get linked with offenders in the jail, but also may get linked as conditions of probation ordered by the judge.

Some agencies do have offices in the Justice Center, but all have offices located throughout the city and the suburbs. Although part of the same agency, the resources available at the different locations vary. At Recovery Resources in the Justice Center, the liaisons choose when and with whom to meet and the information at their fingertips is plentiful; at the Detroit Avenue office, the waiting room is full of people, some with appointments and others who show up in need of help. The hustle and bustle of the office is noticeable even from the street. While the Detroit Avenue personnel do initial assessments and some of the same work as the office downtown, they also offer a vast number of services such as substance abuse counseling, psychological and psychiatric evaluations and therapy.

These resources are valuable to any recently released defendant, but especially to those individuals who struggle with a mental illness and may need additional support. Being linked to these resources and these agencies can be relatively simple while incarcerated, but can be difficult to maintain once released if the necessary paperwork is not provided.

For example, a forensic liaison for the Cuyahoga County Board of Developmental Disabilities was working with a client with a known mental illness who had been released for a little while but was having a hard time receiving resources. The liaison was working to get this client employment, housing and mental health services. To do this, he needed to help the client get a state ID. While incarcerated he was stripped of all his IDs and they were not returned upon release. Having been born out of state, and unsure of the exact location, he was having difficulty obtaining his birth certificate – the first step to getting a new ID.

The problem of not having identification seems somewhat trivial, but is so important to be able to function in the world on a daily basis. There are so many odds stacked against a mentally ill offender already and lack of identification poses yet another huge obstacle to overcome in addition to everything else. This is apparently a common situation. If an individual is moved between jails, their possessions do not always transfer with them, or seem to simply get thrown out if their incarceration is a long period of time. In the best circumstances, a prison may keep the ID and be willing to return it to the offender, but only when they present identification when picking it up, which obviously poses a problem.

That information and possessions are misplaced, forgotten or thrown out shows the disorganization of the system. This leads to frustration of the parolee upon release, which we would normally presume to be a time most offenders look forward to. The liaison also noted that this is another theme he encounters when dealing with the developmentally disabled. To be considered developmentally disabled, a person must have an IQ below 70 and there must be a record revealing this IQ before the person was 22 years old. To show that the offender's IQ was under 70 before the age of 22, most agencies obtain school records. These records can be obtained with consent, but for many clients, especially older clients, these records have been lost over time. Although mental illness is the focus of this paper, specifically PHI, these problems help show the importance of uniformity to improve the system and to make information available and easily accessible.

Many of the ADAMHS Board agencies discussed have a "forensic" program, which is tailored to convicted offenders, but many also help people with no criminal history overcome

substance abuse or deal with a mental illness. More than half of Recovery Resources' clients at the Detroit Avenue office are part of the forensic program or were at one point. For these clients, medical and criminal history is sent to the office from downtown, as the offender has usually been linked to the agency during incarceration. Like the office at the Justice Center, the agency keeps 5-10 consent forms for each client and validates them once every six months.

While many agencies have no problems obtaining consent or gaining access to the required PHI, they, too, note the importance of obtaining the information quickly. Being reliant on someone else to send information can always prove to be difficult and unpredictable, and we see this throughout the justice system. One problem the Forensic Coordinator for Recovery Resources noticed was that he doesn't always receive a complete criminal history at the Detroit office. He considers this information to be as important as PHI as it allows the agency to know the nature of defendants' crimes, determine what treatment would serve them best, and figure out possible triggers for their illness or the crimes they commit. This lack of criminal history may not be HIPAA related, but it does further demonstrate the lapses in communication.

Another problem an agency may encounter is in dealing with other agencies. Each agency runs independently but maintains good relationships with one another as a client may need to change agencies or receive other resources. A person may change agencies if they relocate, which is not uncommon, and the new agency will contact the old agency for information. This is ineffective if a liaison is aware a person is transferring. It would be more effective to automatically obtain consent and transfer the information *prior* to their first



meeting with the new agency. This is a concept that the agencies could discuss in terms of policy and procedures and how to improve the lines of communication with each other.

These agencies, and all of those who are overseen by the ADAMHS board, really do provide valuable and necessary services to the mentally ill. They are a huge resource for the justice system and one that can help lower the rate of recidivism for mentally ill offenders. They also become a huge asset to the justice system as offenders often do recidivate and their information must enter the system all over again.

### **Part IX: Minimizing Communication Problems through Jail Management**

This paper began as a discussion of HIPAA and the Ohio statues and as a way to discover the problems they create in the justice system and ultimately propose a solution, or solutions if necessary. After examining the laws it has become apparent that they do not pose any real difficulty. Almost everything requires consent but it is seldom difficult to obtain. In the event that a person cannot provide consent, the laws do provide ways in which a court or law enforcement agency may receive the necessary information.

HIPAA communication issues are not as big a problem as was initially thought; but it is still important to look at the problems that do exist and see about correcting them. HIPAA limits how people communicate about an individual's PHI, and a problem with communication in the justice system was expected because of it. This problem of communication, which was expected, does exist but not due to HIPAA. Each facet of the justice system may experience

different problems, but the reoccurring themes between each were communication and the time it takes obtain the information they are seeking.

With so many different people and entities involved, it is hard to establish one way to facilitate better communication. Each entity has its own protocol, purpose and schedule and unifying all of them or posing one solution to all would be nearly impossible. This does not mean that more effective means of communication throughout the justice system cannot begin to be established. As demonstrated with the mental health database in Oregon, steps are being made to improve communication with law enforcement and the justice system, especially in connection with mental illness. There is no doubt that improving communication about mental illness would also improve communication in general within the justice system.

The original reason for looking at this flow of information was to help identify problems within the justice system and hopefully find ways to fix them. It is obvious that the number of individuals in the justice system is growing and the rate of recidivism is as well. As defunding continues, these numbers will only become more staggering and the mentally ill will receive even fewer necessary resources and treatments. The justice system may be where many mentally ill offenders find themselves, but it is not the place where they will find the help they need or the solutions to their real problems. Agencies and mental health courts offer resources but they cannot be expected to be the only resources available to the mentally ill. Believing that funding for mental institutions will grow in the near future is a hard idea to entertain, let alone be optimistic about. In the meantime, it is important that the justice system be as effective as

possible in dealing with these offenders and ultimately see about cutting its own costs and minimizing the problems it encounters.

The Oregon mental health database demonstrates the beginning of a solution. Similarly, a new project occurring in Cuyahoga County holds the same promise and movement towards improving the justice system. There is a new jail management system being developed and implemented called "In Jail." In Jail provides an easy to use, easy to maintain booking sheet for jails. Some smaller jails around Cuyahoga County have begun to use it and the hope is that it will become a uniform jail management system throughout the county and eventually the entire state.

What is so exciting about this jail management system is how it interconnects all of the jails and booking information. The booking sheet has all of the standard questions of a normal booking sheet; however, depending on how questions are answered (most of which are yes or no), it may prompt additional questions that help better identify mental health problems. For non-experienced jailers, this may help them better assess a situation they are unfamiliar with and the likelihood of information being lost decreases. Similarly, for experienced jailers, this keeps track of the behavior they notice that helps prompt a call to a forensic liaison. The booking sheet even asks if a forensic liaison was contacted when certain behavior is exhibited. Prompting this question helps raise awareness of a possible mental illness that may have otherwise been missed, and the sooner a person is known to be mentally ill, the more effective the justice system can be in helping them.

In addition to helping simplify booking a prisoner in one jail, it helps move information upon transfer to another facility and throughout the criminal justice system. There are ways to communicate between jails about the status of prisoners if they are en route to a different facility, such as what time they took their medication, etc. Currently, a prisoner is often transferred and no information is provided to the new facility. Sharing this information, which takes about the same amount of time it would take to send a short email, helps maintain the necessary regularity for dealing with all prisoners and particularly those on psychiatric medications. This minimizes or eliminates delay a health provider and jailer may experience with receiving information, and ultimately can cut down on resources as information need not be obtained multiple times.

A person is flagged as mentally ill in the Cuyahoga County jail system and similarly can be flagged on the In Jail system. The nice thing about the flag is that a person, who may not be able to actually view the booking sheet, may still be able to see the flag next to a person's name which provides an important visual cue about information they may need to obtain. These flags are important to the mental health docket and it is also important to be able to add a flag later on if it is not done right away. The jail management system automatically adds a flag when certain mental health information is entered. The flag increases a person's chance of being put on the correct docket and ultimately seeing a trained mental health court judge. Accessing resources can greatly depend on these first few steps, which can be as simple as a flag.

For a mentally ill offender time is of the essence in terms of being correctly classified. Jail is not a place most people want to end up and the idea of corrections is to help correct the

problem. With the rate of recidivism being so high for mentally ill offenders, it is obvious that problems are not being corrected. While there are many reasons that contribute this to, communication is the most significant. With more effective communication, the justice system can be more effective. There will probably always be problems in communication as there are so many people involved, but solving communication issues must start at the beginning, which "In Jail" does.

The booking sheet provided by In Jail helps unify a system that currently has a vast array of protocols and helps people to start on the same page. The justice system is large, but it is interconnected and there is no reason it cannot be unified in its information gathering. Unifying such a large system could minimize problems, reduce costs and help conserve resources.

In Jail is an exciting prospect, and one that will no doubt succeed. In Jail, and similar jail management systems are bridges the justice system needs. Cuyahoga County agencies not using CRIS as their jail management system may be able to transfer needed jail booking information via an interface between In Jail and their current computer vendor. If all jails in Cuyahoga County adapt this jail management system or easily transfer jail data to it, communication will improve and then these other small issues we see will be minimized as well.

### **Conclusion**

The justice system is vast with many different facets; each one contributes to both the positive aspects of the justice system as well as the problems of it. This paper touched on some major problems within the justice system and looked at several large facets of it, but there are

many other people involved that have their own concerns and own interactions with mentally ill offenders. Social workers, prosecutors, public defenders and many other individuals contribute to movement of the justice system and provide valuable resources to the mentally ill. There is no doubt that the problems discussed are some of the many problems they encounter themselves.

There are problems with communication, as anticipated, but through different means than expected. The assumption was that laws would provide the biggest constraints in the sharing of PHI, and instead it was weak connections between providers and throughout the justice system. This discovery in some ways seems bigger than those posed by the laws, but hopefully will prove easier to fix. The statistics about mentally ill offenders is staggering and hopefully others will take note; maybe then the necessary steps will be taken to fix the problems.

All the problems a mentally ill offender faces are interconnected and hinge upon communication. Mentally ill offenders recidivate because they are not provided with the resources they need, or their problems cannot be stabilized – in part because the justice system is not a mental health provider. At the current time, the justice system is being asked to take on a role it neither sought nor is qualified to handle. The justice system cannot be expected to be a mental health provider, but it can become more effective at dealing with mentally ill individuals.

Improving communication, by requiring better communication between mental health agencies and offering programs like the In Jail management system, would allow mentally ill

offenders to avoid many problems they currently face. Being put on the correct docket and seeing a judge with additional training, who presumably is knowledgeable about the subject, can create fewer steps to providing these offenders with the resources they need to maintain stability and ultimately lower their chances of recidivism.

In addition to providing resources to mentally ill offenders, it is important that they are afforded the justice they are entitled to. One problem we often hear of in terms of the justice system is that it doesn't provide the solution necessary to stop the problems that land people behind bars. This is even truer for mentally ill offenders as the justice system struggles just to provide them with minimum care, let alone act as the necessary care they need. To best aid these offenders and begin to create a proper solution, improvements need be made whenever possible. Communication is the biggest problem the justice system, the jails and the mental health providers face and one where the beginning of a solution is within reach.