

GENERAL OVERVIEW OF IRBS

I am going to be providing a general overview of institutional review boards and research regulations. Before we start, however, I should put this session in context and ask why are we talking about this at all? What do the federal research regulations have to do with legal academics?

Well, for most of the research we do, you don't have to worry about federal regulations. If you are analyzing statutes or creating a new paradigm of constitutional law, you are just working with published documents and ideas from your head, and you need not worry about regulations. More and more people are doing empirical research, however, and that might be subject to regulation. If you are going to interview people (called "human subjects" by the regs) or look at private records with identifying information, such as medical records, you might have to obtain approval from your university's institutional review board. Professor Menikoff will speak a lot more about the circumstances in which research oversight is required. The concern is that your subjects might be put at some risk. You might cause them distress by the questions you ask, or you might violate their privacy by mishandling their personal records.

A. What Is Regulated?

There are two sources of regulation, the Food and Drug Administration (FDA), and the Department of Health and Human Services (DHHS). Research studies, generally termed "clinical trials," for the development of new drugs and devices are regulated by the FDA. That you don't have to worry about. All clinical trials that involve human subjects undergoing procedures, including questionnaires and surveys, are subject to DHHS regulation if they are "conducted, supported or otherwise subject to regulation by

any federal department or agency....”¹ Because most universities receive federal funding, the regulations apply to their studies. The universities provide assurances that they will review any research study that is conducted out of the university

B. IRBs

Research that is governed by the federal regulations must be reviewed by an IRB. An IRB is a committee constituted by an institution to provide initial approval and periodic monitoring for research studies. The IRB’s primary purpose is to review research proposals and to protect the rights and welfare of human subjects. The IRB reviews a document known as the “protocol” for each proposed clinical trial, which describes the objectives of the research, its procedures, eligibility requirements for participants, the number of subjects to be tested, and other details. The material submitted to the IRB also includes a document known as the “informed consent” form, which is given to all potential enrollees in order to provide them with a detailed explanation of the clinical trial and an opportunity to agree to participation in the study. After the IRB approves the informed consent form, all those who wish to become human subjects must sign a copy of the document, affirming the voluntariness of their choice. In most cases there must be a face to face discussion between the investigator and each potential research participants to ensure that the participant understands everything that is involved in the trial and really wants to be involved.

The structure and duties of IRBs are also guided by the DHHS regulations. Each IRB must be composed of at least five members with diverse cultural and ethnic backgrounds, and both men and women should be included. At least one member of the IRB should be a person whose principal concerns are in the scientific realm, and one

¹ In some cases both DHHS & FDA regs will apply, so the more stringent FDA regs will govern

individual's expertise should be nonscientific (e.g. a lawyer or minister). Furthermore, to enhance its objectivity, each IRB must include at least one member who is not otherwise affiliated with the research facility and who has no immediate family members affiliated with the entity. According to DHHS's Office for Protection from Research Risks (OPRR), now renamed the Office for Human Research Protection (OHRP), eighty-six percent (86%) of IRB members in 1995 were affiliated with academic research institutions as full-time faculty (56%), clinical and research staff (18%), and administrators (6%).

I have been a member of two different IRBs, one in Houston, Texas, and one in Cleveland. The University of Texas IRB had about 35 members, and I was one of the community representatives (non-scientist). The IRB I sit on in Cleveland has between 15 and 20 members, and I'm not sure if I'm considered a community representative, or a lawyer, or a bioethicist, but I'm there in some capacity.

In my experience, IRBs meet twice a month for several hours (lunch is provided), so it is a significant time commitment. Academic institutions do not compensate their IRB members for their work, and so these individuals must volunteer their time without receiving payment or relief from other job duties. So, we are big heroes.... This does raise some interesting issues. We are starting to see IRBs being sued in a few cases where subjects have died or been hurt. The allegation is that IRBs did not sufficiently review the protocols to ensure the safety of the participants. However, if there is potential liability for IRB members, some ask, who is going to volunteer?

Research protocols must be reviewed at IRB meetings at which a majority of members are present, including a member whose expertise is nonscientific. Decisions

concerning approval of each study are made by majority vote. Typically you will have one or more member in charge of each protocol, and they read every line and present the protocol to the group. Because some of the protocols are 100 pages long, the rest of the members read their non-assigned studies less carefully.

The IRB may approve, disapprove, or require modifications to the proposed research activities. It is extremely rare for an IRB to just disapprove a protocol. If we are uncomfortable with a protocol, we send it back for clarification about the procedures or the risks involved. Most commonly, we have quibbles about the informed consent document. These documents are typically fairly long (10 or more pages) and they are written in technical language. We worry that the explanations are not accessible to the average reader (6th-8th grade average reading comprehension level in US). We ask for simplifications or for wording that is more explicit.

Investigators are then given written notification of the IRB's decisions, and IRBs are required to monitor the clinical trials they approve at intervals of at least once a year, or more frequently, depending on the severity of the risks entailed. This periodic monitoring is known as "continuing review." Continuing review is a whole different problem and is generally quite inadequate because IRBs don't have sufficient resources. We don't send out people to the actual research sites to monitor compliance, but rather, rely on reports submitted by the investigators themselves. They tell us how many people have participated in the study, whether anyone has experienced any adverse consequences, etc.

Before approving a clinical trial, the IRB must ensure that specific criteria are met. These include: (1) risks to participants are minimized; (2) risks to subjects are

reasonable in light of anticipated benefits; and (3) selection of participants is equitable, and the protocol is sensitive to the particularized problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled individuals, or economically or educationally deprived persons.

C. Investigator Duties: Recruitment, Risks, Informed Consent etc.

So, if you are planning an empirical study involving contact with participants or their records, what do you have to worry about? You need to make sure that you recruit a diverse group of participants. We don't want to be making generalizations about the way the world is if we have not studied all relevant segments of the American population. IRBs sometimes will ask investigators, why are you focusing only on one group; why aren't you recruiting from different ethnic populations.

Recruitment is accomplished in a variety of ways. It can be done through advertisements in the media, posters, direct mailing, e-mails, websites, and other mechanisms. At my university, I have on several occasions gotten surveys from students and professors in the sociology department asking for my participation, most recently in a research project about campus safety.

You need to worry about minimizing the risks to participants. Unlike researchers in some of the medical studies, I don't think you have potential to kill anyone. However, people do get distressed when they have to answer questions about their personal opinions or their personal lives. Have you been as sensitive as possible in wording your questions? Have you implemented safeguards to protect people's confidentiality? If you will be addressing sensitive issues or a particularly vulnerable population, you might want to include a discussion of available counseling services on campus or in the

community. This might be appropriate, for example, if you will be working with rape victims or critically ill patients.

You will have to write the protocol. Your IRB office will provide you with detailed information concerning what they want included and will often give you samples, so be sure to contact them. And finally, you have to be very careful about the informed consent document, because that is what IRBs scrutinize most carefully.

The contents of informed consent forms is also governed by the federal regulations. As I mentioned earlier, the informed consent document must be written in language that is accessible to subjects. Informed consent may not include language that waives any of the subject's rights or releases the institution or research personnel from liability for negligence. The regulations further require that informed consent be obtained in writing from each enrollee, though they allow for certain exceptions.

The regulations specify the data that must be featured on the informed consent document, and the information is voluminous, which is why many consent forms are extremely long. It includes a description of the purpose, procedures, and duration of the research project, an explanation of its risks, benefits, and alternatives, a discussion of confidentiality, a list of contact people, and a statement that participation is voluntary and may be discontinued at any time. In addition, if applicable, the informed consent document must include a description of reasons for involuntary termination of participation, costs to participants, consequences for withdrawal from the study, number of subjects expected to participate, and a discussion of payment or incentives for participation.

In truth, I suspect that for some of the empirical research that a law professor might conduct, informed consent will not be necessary, and the protocol will receive an expedited review in the IRB office so that the full IRB does not deliberate about it in a regular meeting. Professor Menikoff will discuss exemptions and expedited review in detail. Just to build anticipation for his talk, very briefly, exemptions have to do with whether you are looking at publicly available records, whether you will record the data in a way that will make it impossible for subjects to be identified, how much direct contact you will have with participants, and what risks are involved in the study. So, obtaining IRB approval for most legal research may not be that challenging.