

# 2015 Tribal Healing to Wellness Courts Enhancement Training

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## *CONFIDENTIALITY*

Presenters:

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# OVERVIEW



# TWO LAWS – WHAT DO WE DO?

- 42 C.F.R. Part 2
- HIPPA
- If 2 laws – generally give effect to both laws if possible
- HHS issued HIPPA regulations and concluded that Congress in enacting HIPPA did not intend to repeal other confidentiality laws.
  - In most situations HIPPA and 42 C.F.R. Part 2 do not conflict, and 42 C.F.R. Part 2 will continue to be standard



# WHO MUST COMPLY?

- 42 C.F.R. Part 2 applies only to drug and alcohol programs
  - Program – “holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment, referral for treatment or prevention.”
  - AND
  - Federally assisted – if you receive federal funds in any form, even if those funds do not directly pay for alcohol or drug abuse services.



# WHO MUST COMPLY?

- HIPPA applies generally to large portion of health care industry
  - Health care provider – individual or entity that furnishes, bills, or is paid for health care in normal course of business
  - And transmits health information electronically in connection with a covered transaction



# IS YOUR HWC A PROGRAM UNDER 42 C.F.R. PART 2 AND/OR HIPPA?

- 42 C.F.R. Part 2
  - If unit or office of HWC specializes in diagnosis, treatment, referral for treatment and receives federal assistance? YES!
- HIPPA
  - If you transmit health information electronically as part of a covered transaction? YES!
- If HWC works with independent treatment programs? No, **BUT** team members will be!



# WHAT IS PROTECTED?

- 42 C.F.R. Part 2 protects patient identifying information that identifies patient as an alcohol or drug patient, either directly or indirectly.
  - Oral or written
  - Also whether was a former patient
- HIPPA protects all health info which identifies an individual



# WHO IS PROTECTED?

- 42 Part C.F.R Part 2
  - Patients who have...
    - Applied for
    - Participated in
    - Received an interview, counseling, or any other service
    - Including someone who, after arrest on a criminal charge, is identified as an alcohol drug patient during an evaluation of eligibility for treatment
    - Applicants are included, whether or not they are admitted to program
    - BUT – person who does not show up for an appointment arranged by a 3<sup>rd</sup> party is not a patient
- HIPPA – protects all individuals





# USES AND DISCLOSURES

- 42 C.F.R. Part 2 has a general prohibition against disclosure UNLESS meet one of exceptions
- 42 C.F.R. Part 2 defines 'disclosure'
  - any communication of information about identified patient or of info that would identify someone as a patient including verification of information already known by the person making the inquiry
  - Restrictions on disclosures apply to disclosures made to 3<sup>rd</sup> parties as well as disclosures made within program



# USES AND DISCLOSURES

- HIPPA – permits disclosure without consent for covered entity's own treatment, payment or health care operations and, with some limitations, for treatment, payment or health care operations of another covered entity.
- HIPPA disclosure defined more broadly
  - Release, transfer, provision of access to or divulging in any other manner protected information outside the covered entity



# EXCEPTIONS TO RULE OF NO DISCLOSURE

- Written Consent
- Internal communications
- No patient-identifying information
- Medical emergency
- Court order
- Crime at program/against program personnel
- Research
- Audit and evaluation
- Child abuse
- Qualified service organization/business associate agreement



# CONSENT – WHAT DO I NEED?

- Name of program making disclosure
- Name of individual or organization that will receive disclosure
- Name of patient who is the subject of the disclosure
- Purpose or need for the disclosure
- A description of how much and what kind of information will be disclosed
- Patient's right to revoke the consent in writing
  - (42 C.F.R. Part 2 allows oral revocation but HIPPA does not)



# CONSENT – WHAT DO I NEED?

- Program's ability to condition treatment, payment, enrollment or eligibility of benefits on patient agreeing to sign the consent,
  - stating either that program may not condition these services on the patient signing the consent
  - or the consequences for the patient refusing to sign the consent
- Date, event or condition upon which consent expires if not previously revoked
- Signature of patient
- Date on which consent is signed



# SAMPLE CONSENT FORM

- [http://lac.org/wp-content/uploads/2014/12/Sample\\_Form\\_1.pdf](http://lac.org/wp-content/uploads/2014/12/Sample_Form_1.pdf)



# REDISCLASURE

- 42 C.F.R. Part 2 requires that once consent form is completed, that any disclosure made with consent be accompanied by written statement that information disclosed is protected by federal law and recipient cannot make any further redisclosure
- If disclosure made orally, written statement must still be sent.



# 42 C.F.R. PART 2 CONSENT AND CRIMINAL JUSTICE SYSTEM REFERRALS

- When patient's participation in treatment is official condition of probation/parole, sentence, dismissal of charges, release from imprisonment, or other disposition of any criminal proceeding
- Consent form still required, rules concerning duration and revocation of different
- Consent duration can be linked to final disposition of criminal proceeding.
  - This allows programs to provide information even after patient leaves treatment





# REVOKING CONSENT IN CRIMINAL JUSTICE SYSTEM REFERRALS

- 42 C.F.R. Part 2 - Consent form can state it cannot be revoked until a certain specified date or condition occurs.
  - So patient who agreed to enter treatment in lieu of prosecution or punishment cannot prevent court, probation, parole or other agency from monitoring progress.
  - Irrevocability must end not later than final disposition of criminal proceeding.
  - Sample consent [http://lac.org/wp-content/uploads/2014/12/Sample\\_Form\\_3.pdf](http://lac.org/wp-content/uploads/2014/12/Sample_Form_3.pdf)



# REVOKING CONSENT IN CRIMINAL JUSTICE SYSTEM REFERRALS

- HIPPA – consents are revocable and no exceptions
- BUT – HIPPA allows disclosures in response to court orders.
  - Issue order require programs to provide information on progress of patients mandated into treatment by criminal justice system, this allows programs to use to use irrevocable criminal justice consents and programs will continue to follow requirements of 42 C.F.R.
  - Sample court order <http://lac.org/wp-content/uploads/2014/12/sample-standing-court-order.pdf>
- Voluntarily in HWC – consent is always revocable.



# THESE LAWS ARE IMPLICATED IN HWC WHEN

- 1. An individual or unit within the drug court receives or discloses information about a “patient” from a “program” covered by the regulations
- 2. And/or if an individual or special unit within the drug court itself is a “covered entity” or “program” covered by the regulations



## WHEN SHOULD WE OBTAIN CONSENT?

- Time of assessment or
- Time referral is made
- Then you can fax consent form and then later contact treatment program to determine if the person showed up.
- HIPPA prevents a program from conditioning treatment on signing consent
- Judge, probation or parole office, or child welfare case worker can condition participation in HWC on defendant signing the form.



# GUIDELINES FOR COMMUNICATING WITH CONSENT

- First determine whether assessment or participation in treatment program is official condition of probation, parole, sentencing, dismissal of criminal charges, release from imprisonment or other disposition of a criminal proceeding
- If yes to above – special rules for criminal justice system referral consents apply.
  - Meaning it can be made irrevocable until certain specified date
  - But make sure to do a HIPPA court order
  - This does not apply to juveniles or parents involved in civil child abuse/neglect cases
  - Can redisclose in connection with official duties with respect to particular criminal proceeding (not other proceedings)



# GUIDELINES FOR COMMUNICATING WITH CONSENT

- Include all appropriate parties in the consent
- Limit the information to be disclosed
  - The minimum necessary to fulfill the purpose of the communication



# HWC ACTIVITIES THAT DO NOT TRIGGER LAWS

- Requiring drug tests of all adult arrestees or juvenile offenders, tests alone not protected UNLESS test was used to diagnose a drug or alcohol problem or performed for purpose of referring an individual to treatment
- BUT if Court asks member of court staff or treatment program to conduct assessment, then 42 C.F.R. is triggered



# CONFIDENTIALITY AND COURT

- Closed proceedings
  - 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings. (Florida v. Noelle Bush, Florida, 2002)
- Staffing
  - Based upon uniqueness of Drug Court, Adult Drug Court staff meetings are not subject to open courts provision of Washington Constitution. (State v. Sykes, Washington 2014)





## CONFIDENTIALITY AND PROVIDERS

- Reluctant to Share Information
- What do you need to know?
  - Appropriateness for Program
    - Moderate to Severe Substance Use Disorder
    - Co-Occurring Disorders
    - Treatment Recommendations
  - Progress in Treatment
  - Changes in Treatment recommendations
  - No need for details



# AMHC STANDARDS OF PRACTICE

- Adhere to all state laws governing practice
- Adhere to administrative rules, ethical standards and other requirements
- Comply with codes of Ethics
- Responsibility – in this order:
  - Society
  - Consumers
  - Profession
  - Themselves



## AMHC – ETHICS: COMMITMENT TO OTHER PROFESSIONALS

- Mental Health counselors respect the rights and obligations of the institutions with which they associate.
- Understand how related professions complement their work and make full use of other resources that best serve the interests of clients.



# ARIZONA BOARD OF BEHAVIOR HEALTH EXAMINERS

- Adverse Action 2011-009
  - Client signs consent for counselor to communicate with Psychiatrist
  - Client reported suicide attempts – no risk assessment
  - Client reported alcohol abuse issues – no assessment
  - Client prescribed Ambien by Psychiatrist
  - No communication with Psychiatrist



## BOARD SAID ...

- “Incumbent upon Licensee to clearly communicate with Psychiatrist regarding Client’s alcohol abuse in order to ensure that Psychiatrist had the information needed to properly monitor Client’s medications.”



# OUTCOME

- Consent Agreement: Probation – 12 Months
  - 6 Hours “Staying Out of Trouble” course
  - Three semester credit hour graduate course
    - Diagnosis and Assessment
  - 3 Hour course “Clinical Recordkeeping”
  - 3 Hours Billing Practices; audits
  - Practice Monitor
  - No Clinical Supervision during probation
  - \$1,000 penalty - stayed



## FOR MORE INFORMATION

- [www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court](http://www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court).
- Excerpts from Selection Opinions of Federal, State and Tribal Courts Relevant to Drug Court Programs, Volume II: Decision Summaries by Issue and Jurisdiction, BJA Drug Court Clearinghouse and Technical Assistance
- [www.tlpi.org](http://www.tlpi.org)

