

*Tribal Healing to Wellness Court
Enhancement Training*

December 5, 2012

Being Confident about Confidentiality

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Laws, Privileges and Duties

- Laws – restrict disclosure of information
 - Improper disclosure can lead to criminal prosecution and civil lawsuits
 - 42 USC 290dd and 42 CFR Part 2
 - HIPAA
- Evidentiary privileges – protect against compelled disclosure
- Ethical duties – prohibit disclosure of information
 - Violation can lead to discipline in your field and/or civil liability

42 CFR Applicability

- Any program or activity relating to substance abuse, education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the U.S.
- This includes courts

HIPAA Applicability

- Applies to “covered entities” – health plans, health care clearing houses, billing services, community health information, and health care providers
- This does not include courts

What's Protected?

- HIPAA – any individually identifiable health information.
 - Broadly defined to include any party of medical record or payment history
- 42 CFR Part 2 – all records, written or not, relating to identity, diagnosis, prognosis, or treatment of any patient in a substance abuse program

Consent – The 9 Written Parts

- Describe the type of information to be disclosed
- Specify the purpose of disclosures
- Who is to make disclosure
- Who is authorized to receive them
- Identify participant, contain signature and date of signing
- If a minor – signature of parent may be necessary
- If participant determined to be incompetent – may be signed by an authorized person
- Include when consent expires – date or event
- Mention participant's right to revoke consent, where the right exists (criminal vs juvenile and family drug courts)

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Consent Best Practices – Knowing and Voluntary

- Not invalid because consent is condition of drug court participation – will withstand legal scrutiny if follow best practices
- Opportunity to consult with attorney before signing form.
- Whomever present forms should review it with participant (not necessarily defense attorney)
- Fed regs require participant be advised orally and in writing that federal law protects confidentiality of treatment records.

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Consent Best Practices – Knowing and Voluntary

- Cite to federal law and implementing regulations and state the following
 - Treatment information is ordinarily kept confidential
 - A crime to violate this requirement
 - Notwithstanding confidentiality agreement, covered information may be released under specified circumstances (list them)
 - Federal law does not protect information relating to crimes committed on premises of program, crimes against program personnel, or abuse or neglect of child.

Consent Best Practices – Knowing and Voluntary

- Participant should be asked to re-execute the consent at least once, if not regularly, during participation in court.
 - This is not required (but a good idea), except when new person joins the team.

Revocation

- Criminal drug courts – participant does not have right to revoke consent to disclosure (42 CFR Part 2)
 - Waivers are not permanent – expire
 - Cannot be revoked but expire
- HIPAA – Requires consent be revocable – can do standing court order
- Family and juvenile drug courts – consent is revocable at the will of participant
 - Should be advised that participant in HWC is contingent upon their consent
 - And revocation of consent results in termination

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Disclosures Without Consent

- Permitted Disclosures
 - Best practice – obtain disclosure – BUT
 - Medical emergency
 - Crimes on premises or against program staff
 - Disclosures to entities have direct admin control over program and to qualified service organizations working with program.
 - Direct admin control – central administration of hospital with substance abuse treatment program
 - Qualified service organization – outside contractors providing services to program
 - Outside auditors, researchers

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Disclosures Without Consent

- Mandatory Disclosures
 - Suspected abuse or neglect of a child
 - Valid court order
 - Comply with state laws concerning collection of information relating to causes of death
 - Some practitioners may be subject to duty to protect third parties

MOUS

- MOUs do not authorize disclosures
- Foster trust and cooperation
- And explain how info distributed within drug court, once consent is signed
- Five elements
 - Discussions at team meetings are confidential, not only for legal reasons, but to promote trust and fairness.
 - If outsiders allowed to attend team meetings, MOU requires they sign agreements
 - When staff meetings videotaped for training purposes, tape edited to eliminate names or other identifying information

MOUS

- Five elements continued
 - Note all parties bound by re-disclosure provisions
 - Incorporate agreement that prosecutor's office will not use information obtained in drug court to prosecute the participant, except
 - Child neglect or abuse
 - Crimes committed at treatment center or against personnel

MOUS

- Five elements continued
 - Describe parameters for sharing and refusing to share information
 - Defense attorney example
 - Include rules governing storage of, and access to, written and automated records