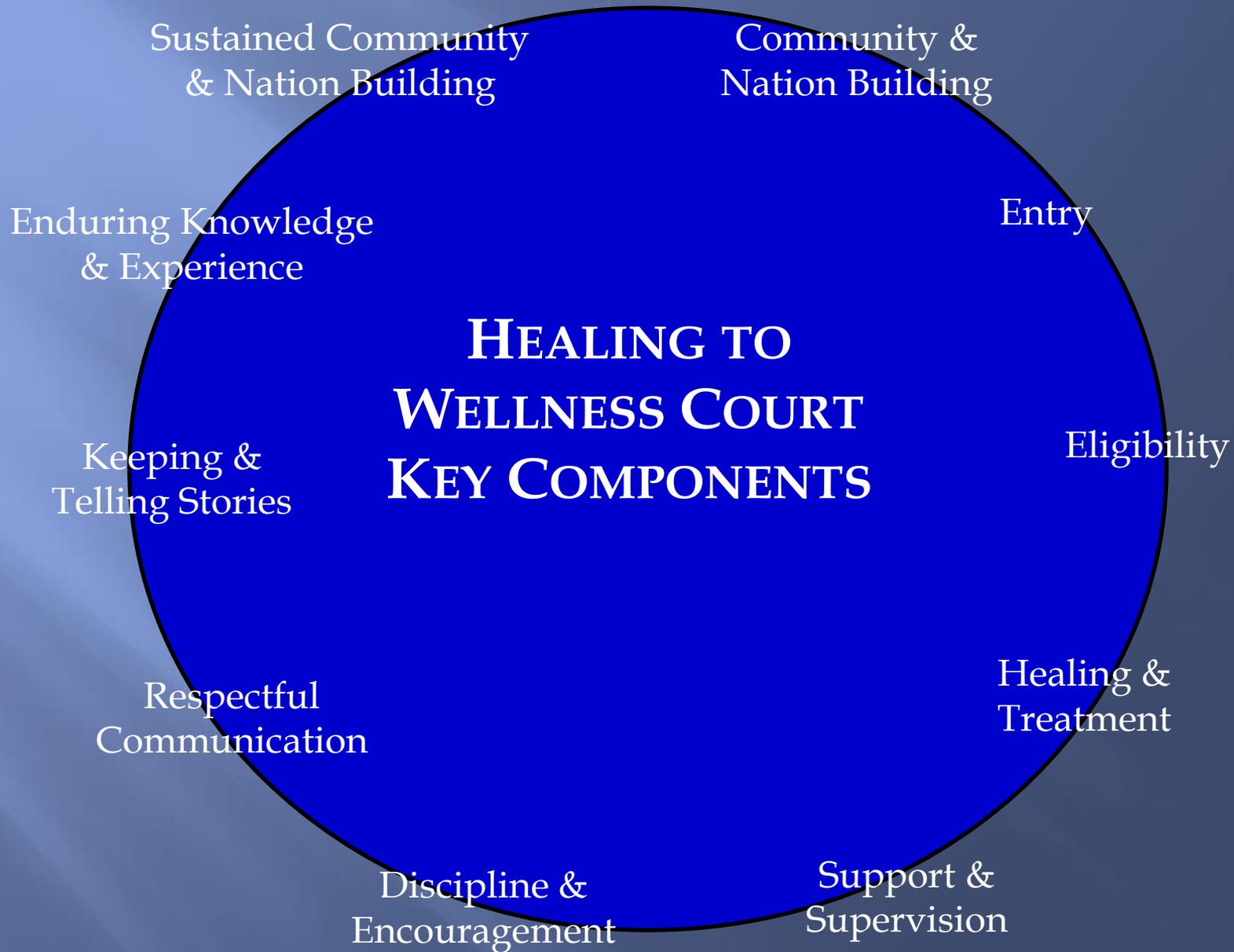


*Tribal Healing to Wellness Court  
Enhancement Training*

*December 5, 2012*

**Being Confidential  
about  
Confidentiality**



# 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 part 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)

# 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.

# 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

# 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

# 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