

# Ethics in Healing to Wellness Courts

Tribal Healing to Wellness Court  
Enhancement Training

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Tribal Law & Policy Institute

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# “Ethics”? Meaning?

- ▶ Merriam-Webster
  - ▶ The discipline of what is good and bad with moral duty and obligation
  - ▶ The principles of conduct governing and individual or group
  - ▶ Guiding philosophy



# Ethics – A Matter of Common Sense?

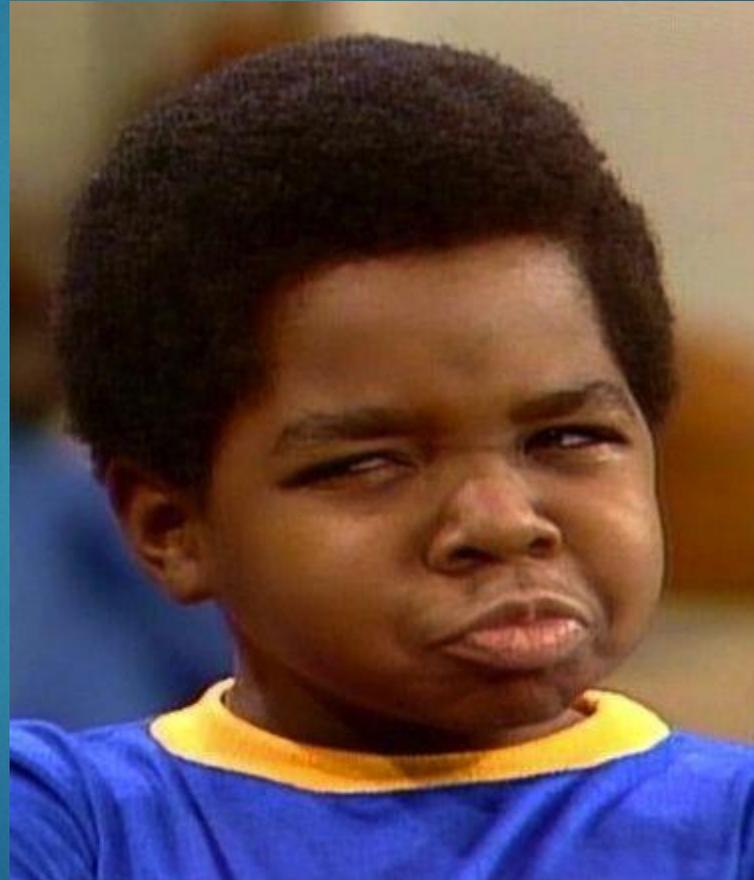
- ▶ Multidisciplinary approach to treatment
- ▶ Each discipline has own rules, guidelines, and expectations
- ▶ Privacy Laws
- ▶ Cultural differences
- ▶ Jurisdictional differences
- ▶ Times are a changin'
- ▶ Sometimes it isn't a matter of common sense



# The Case for Ethical Rules and Guidelines

- ▶ Positions of power and authority over others
- ▶ Positions of trust
  - ▶ Highly vulnerable clients
  - ▶ High need clients
- ▶ Helps with the multidisciplinary approach
- ▶ Helps with transition from adversarial structure
- ▶ Manage expectations of others
- ▶ Manage expectations for ourselves

What you talkin' 'bout?



LOCAL  
DAILY NEWS  
BOWLING GREEN  
Drug court judge is charged with perjury  
October 5, 2011 12:00 AM CDT • Updated: October 6, 2011 10:21 AM CDT  
NEWS OBITUARIES SP  
sex

Chicago Tribune HOME NEWS BUSINESS SPORTS A&E LIFESTYLES OPINION

## Drug Court judge's daughter among 10 arrested on pot charges in Wilmette

June 03, 2013 | By Gregory Trotter | Tribune reporter

Local therapist  
BY JAMES BURGER Californian staff writer jburger@bakersfield.com  
an  
POSTED 5:51 AM, NOVEMBER

73°  
misconduct

**Still Not  
Convinced?**

.....

# For those of us needing more encouragement ...

- ▶ Core Competencies
- ▶ Codes of Conduct
- ▶ Confidentiality Requirements

# Important to Keep in Mind

## Differences – Silos vs. Circles

### Traditional Court

- Focus: Offense
- Punishment determined by sentencing range
- Judicial interaction limited
- Minimal post sentence interaction
- Remove offender from community

### Drug Court

- Focus: Behavior behind Offense
- Individualized treatment plan
- Increased judicial interaction
- High post sentence interaction
- Offender remains in community

# Shared Core Competencies among Disciplines - Examples

- Fully participates as team member; committed to program, mission and goals
- Operating in a non-adversarial manner, promoting a sense of unified team presence
- In appropriate non-court settings, advocates for effective incentives and sanctions
- Monitor participant progress within boundaries
- Knowledgeable about addiction
- Community education about program and efficacy

# Judicial Core Competencies - Examples

- Program advocate by utilizing community leadership role to create interest and develop support
- Leads the team to develop protocols and procedures
- Aware of impact substance abuse has on the court system, the lives of offenders, their families and community
- Encourages the education of peers, colleagues, judiciary in the efficacy of Drug Courts

# Prosecutor Core Competencies - Examples

- “Gate keeper” – maintains eligibility standards while participating in a non-adversarial environment
- Focus on the benefits of therapeutic outcomes

# Defense Counsel Core Competencies - Examples

- Evaluates defendant's legal situation and ensures protection of defendant's legal rights
- Effectively advises defendants of their legal rights, options, treatment options, program conditions and sentencing outcomes while developing a relationship with the defendant that promotes the defendant's long term best interest
- Focus on the benefits of therapeutic outcomes

# Treatment Core Competencies - Examples

- Timely and competent evaluation process
- Treatment progress reporting
- Training in substance abuse, addiction and treatment to provide team a meaningful foundation

# Community Supervision Core Competencies - Examples

- Coordinated and comprehensive supervision to minimize participant manipulation and splitting of program staff
- Drug testing and supervision
- Timely compliance reporting

# Delving Deeper – The Ethics of It

- ▶ Competencies are *aspirational*
- ▶ My conduct is governed by my professional rules of conduct
- ▶ Focus on Judges, Attorneys and Treatment



# Judicial Ethics – ABA Model Rules

- Judicial Canons
- Ex Parte Communications
- Independent decision
- Neutrality
- Due Process

# Ex Parte Communication – Case Staffing

- Therapeutic court exception
- A judge may initiate, permit, engage in or consider ex parte communications expressly authorized by law, such as when serving on a therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.
  - Comment 4 on ABA Rule 2.9

# Independent Decision & Duty to Decide: Coordinated Response

- Staffing – discuss participant progress and reach consensus regarding incentive or sanction
- Judge has ability to reject or modify recommendation based upon facts presented by the participant in court
- Final decision must always remain with the judge

# Neutrality



- Impartial does not mean indifferent
- Be aware of transference and countertransference potential
- Different focus
  - HTWC – Compliance with treatment – behavior modification
  - Traditional Court – Dispute between parties

# Due Process



- Still applies: Notice and meaningful opportunity to respond
- Process for responding to recommendations for sanctions/incentives
- Loss of liberty and termination from drug court

# Prosecutorial and Defense Counsel Ethics – Shifting Focus

- Once a participant is accepted into HTWC Court the focus is on participant recovery, compliance with the law and reintegration into the community not the merits of the case
- Still maintain distinct roles but have shared goal of addressing dependence and reduction/elimination of defendant's engagement in criminal justice system
  - Prosecutor – Public safety by ensuring eligibility and program compliance
  - Defense – Due Process protection and encouraging full participation

# NAADAC – Association for Addiction Professionals: An Example

- ▶ General Considerations
  - ▶ Allow others to chose their own destiny
  - ▶ Responsibility to observe and obey legal and ethical directives
- ▶ Competence
- ▶ Limits of Confidentiality
  - ▶ Mandated counseling – explain limits and respect client autonomy

## More ....

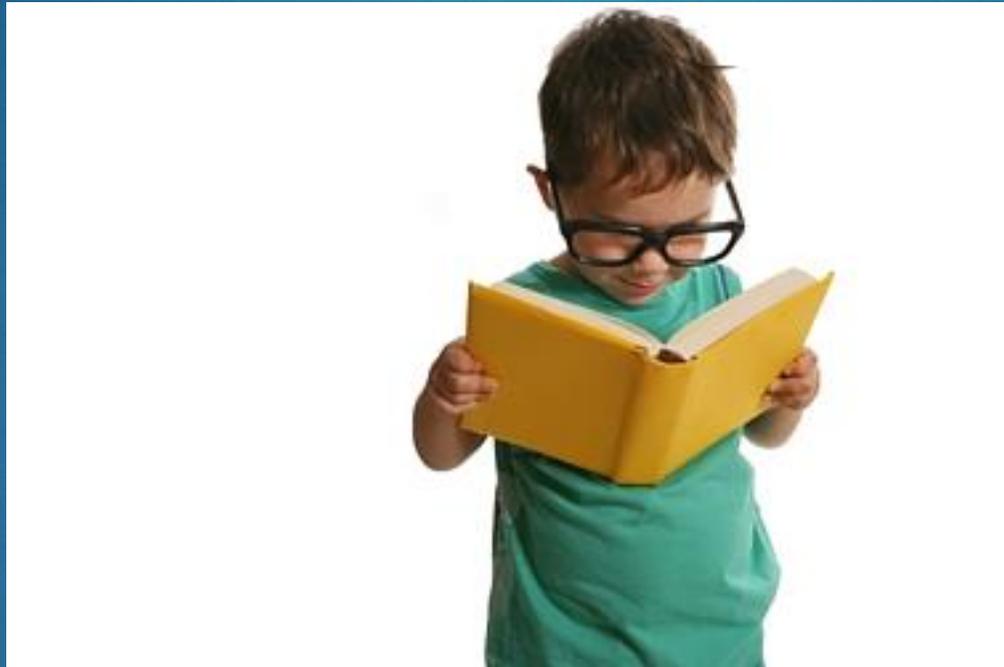
- ▶ Cannot withhold reports to referral agencies regarding client treatment/progress when reports are needed for legal purposes simply due to non-payment
- ▶ Release only essential information when circumstances require

# Multidisciplinary Care



”.. Inform the client when the Provider is a participant in a multidisciplinary care team providing coordinated services to the client. The client shall be informed of the team member’s credentials and duties, information being shared, and the purposes of sharing client information.”

# Applying the ABA Model Rules



# Competence



- Understanding of the Drug Court model to provide proper advice
- Interdisciplinary training to understand nature of substance abuse and treatment options
- Experienced practitioners should be assigned

# Scope of Representation



- Decision to enter Drug Court – defense counsel should ensure the option of Drug Court is extended to all eligible defendants and provide adequate basis for exercising that option; competent informed decision
- Decision to enter Drug Court is that of the defendant so long as decision is made knowingly

# Prosecutorial Discretion and Victim's Rights

- Entry into Drug Court – Prosecutorial Discretion
  - Consider foregoing charges that might be appropriate in absence of Drug Court – negatively impacting eligibility
  - Not a promise not to charge
- Victim's Rights
  - Victims deserve the same considerations as traditional court
  - However, confidentiality laws prohibit sharing of information learned in Drug Court

# Defense Counsel – HTWC Advisement

- Proper advisement on overall nature
- Effect of participation on expectations of confidentiality
- Structure of legal representation
- Attorney still has duties of competent, diligent, and loyal representation – primary function shifts to staffing
- Does not mean every sanction is challenged – sanctions should continue to serve participant's recovery and consistent with sanctions imposed on others for similar violations

# Defense Counsel – HTWC Advisement

- ▶ If sanction rises to level of loss of liberty—may need to request a separate hearing
- ▶ Consider if Defense Counsel represents client overall, or if Defense Counsel represents client only in Wellness Court

# A Word About Confidentiality



# HIPAA is Not an Excuse

- ▶ Health Insurance Portability and Accountability Act
  - ▶ Consent vs. authorization
    - ▶ Consent not necessary uses and disclosures of protected information for treatment, payment and health care operations
    - ▶ Authorization required for uses and disclosures of protected health information for other purposes – must be valid authorization
  - ▶ Patient has right to request information be sent to a 3<sup>rd</sup> party
  - ▶ HHS Office for Civil Rights – complaint process

# Federal Confidentiality is Not an Excuse

- ▶ Federal Confidentiality laws have process for authorization/consent for disclosure of information
- ▶ Follow them!

# Failure to Disclose – An Arizona Story



# The Facts

- ▶ Psychiatrist referred Client referred for counseling
- ▶ Authorization for Counselor to communicate with Psychiatrist
- ▶ History: Victim of child sexual abuse, passive suicidal ideation, cutting for attention. During counseling, client disclosed cutting wrists 3x in past year and admitted not disclosing that to psychiatrist
- ▶ Diagnosis: Bipolar Disorder, PTSD, Alcohol abuse, Adult Child of Alcoholic Personality Disorder, Borderline Traits
- ▶ Medication: Ambien

# The Problem

- ▶ Failure to document
  - ▶ No suicidal risk assessment or safety plan completed
  - ▶ No documented substance abuse assessment
  - ▶ ***No documentation of communication with Psychiatrist or attempt to coordinate care***
- ▶ Insurance denies payment
  - ▶ Client signed authorization but covered only “diagnosis”, “treatment plan” and “treatment summary”
  - ▶ To obtain payment, counselor released treatment notes

# The Sanction by Consent Agreement

- ▶ 12 month probation
- ▶ Education Courses
  - ▶ Diagnosis and assessment
  - ▶ Clinical recordkeeping
  - ▶ Billing Practices
- ▶ Practice Monitor
- ▶ No Clinical Supervision
- ▶ Fines – Stayed
- ▶ Board commentary: “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.”

# FMI:

- ▶ [www.ndcrc.org](http://www.ndcrc.org)
- ▶ Marlowe, Douglas B and William Meyer, 2011, *The Drug Court Judicial Bench Book*, [www.ndci.org](http://www.ndci.org)
- ▶ Bureau of Justice Assistance, Core Competencies Guide Adult DCPI Trainings, [www.dcpincjrs.gov/dcpincjrs/pdf/ndci-core-competencies.doc](http://www.dcpincjrs.gov/dcpincjrs/pdf/ndci-core-competencies.doc)
- ▶ [www.healthit.gov](http://www.healthit.gov)
- ▶ [www.naadac.org](http://www.naadac.org)

# THANK YOU



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[www.home.tlpi.org](http://www.home.tlpi.org)

[www.WellnessCourts.org](http://www.WellnessCourts.org)

[www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org)