Update on Ethics and Law for California Community College Mental Health and Wellness Association

Skyline College
March 21, 2014

Daniel O. Taube, JD, PhD

Continuing Education Course Information

Title: Update on Ethics and Law for California Community College Mental Health and Wellness Association.

Instructor: Daniel O. Taube, JD, PhD Continuing Education Credit: 3 hours

Open to: Licensed Psychologists, MFTs, LCSWs, MDs, RNs and by instructor consent.

Location: Skyline College Time: 9:15 a.m. to 12:15 p.m.

Course Description: Professional mental health ethics codes, case law and regulations are ever changing. With the busy schedules most Community College Counseling Center MHPs have, it can be difficult to keep up with these changes. As a result, licensing boards require regular updates for practicing professionals (e.g., the Board of Psychology and the BBS). The purpose of this course is to meet and exceed the requirements of regulatory organizations, assist mental health professionals in maintaining competence in this vital area, and help Community College Counseling Center MHPs think through some of the complex situations they face. It will do so by providing a review of key ethical and legal concepts, and delineating recent ethical, regulatory and other legal changes that affect professional practice. The course will be taught at an intermediate level, and is appropriate for currently licensed or certificated professionals. It should meet and exceed the Board of Psychology's mandated ethics and law update requirement, and partially fulfill the Board of Behavioral Sciences 6 hour update requirement.

Learning Objectives: On completion of this course, participants will be able to:

a. Describe 2 areas of personal and professional boundary blurring
b. Understand the nature of issues with permissive exceptions to disclosure and students of concern committees
c. Describe two aspects of HIPAA and FERPA interactions in a community college setting
d. Name a recent change in the *Tarasoff* standards.
e. Describe one recent change in mandated child abuse reporting law

Evaluation of Participant Learning: Participants will be given a post-test at day's end.

Readings: There are no required readings. Handouts of relevant materials will be provided.

Contact Information: Dr. Taube can be reached at dtaube@alliant.edu, or by phone at 415-336-8060. His mailing address is Alliant International University, California School of Professional Psychology-San Francisco Bay Campus, One Beach Street, Suite 100, San Francisco, CA 94133.

Dr. Taube is not a member of the Bar, and will not offer legal advice in this course. The course is intended to provide education regarding various ethical and legal aspects of mental health services. In the event participants encounter legal issues in their practices, they should consult a member of the bar competent in mental health law.

Course Outline

Update on Ethical and Law

9:15 a.m. - 10:45 a.m.

1. Introduction

2. Purposes and structure of workshop

3. Stepping in to the professional role

4. Digital footprints and Cyber-blurring of the personal/professional distinction

10:45 a.m. to 11:00 a.m.

Break

11:00 a.m. to 12:15 p.m.

4. Googling our clients…really? Ethical and legal concerns

5. Privacy updates (limits to confidentiality—HIPAA and FERPA at the College level: Tarasoff Updates: 2009; 2012; Child abuse reporting changes; clarifying immunities; recent cases; Permissive exceptions—how to best deal with disclosures of "treatment records" in a FERPA environment)

6. Conclusions

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Slide 2

Disclosure of Relevant Financial Relationships

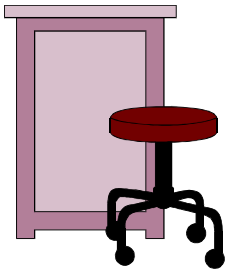
Content of Activity:
Date of Activity:

Name	Commercial Interests	Relevant Financial Relationships : What Was Received	Relevant Financial Relationships: For What Role	No Relevant Financial Relationships with Any Commercial Interests
Dan Taube, J.D., Ph.D.		None	None	NA

Slide 3

Introduction

- Presenter and purposes of workshop
  - Hours
  - Questions
  - Use of slides
  - Ethics “expertise”
  - Topics (see next slide)



Slide 4

Structure of today’s course

1. Stepping into the professional role
2. Digital footprints and cyber-blurring of the personal/professional distinction
3. Googling our clients
4. Informational boundaries--Privacy updates (limits to confidentiality; updates on *Tarasoff* and child abuse reporting; permissive sharing of information)
5. Conclusion

Slide 5

A Brief Exercise

Consider this hypothetical:

- Therapist S is employed as a counselor at the Lone Star Community College. She is at a private holiday party, and has a few drinks. She is confident, as the evening nears an end, that she is sober enough to drive
- She looses control of her car on the way home, and collides with the center divider on 101
- No one is hurt, but the officer requests a breathalyzer—and she complies; her blood alcohol level is .16 (2 times the legal limit)
- She is arrested for a DUI. She pleads no contest to a misdemeanor charge, and is placed on 3 years probation
- This is an isolated event; she does not abuse drugs or alcohol, and has never been arrested nor convicted of any crime before

Slide 6

Exercise, continued

- The BOP or BBS files, *sua sponte*, charges against her license for "engaging in unprofessional conduct."
- She goes before an administrative law judge for a hearing
- The judge finds that there was no substantial relationship between her DUI conviction and her professional activities, and recommends that the BBS/BOP dismiss the case

Slide 7

Exercise, cont.

- In small groups (4 or 5 people in a row), assume you are the BBS/BOP
- Please discuss whether you think there is a substantial relationship between this event and this person's professional activities
- What would you decide?

Slide 8

*Sulla v. Board of Registered Nurses** (2012)

- These are (almost) the exact facts for Mr. Sulla, a registered nurse who had a BRN action against him (though I took some liberties with the facts)
- The Board (operating under the same standards as you and I work under), found that there WAS a substantial relationship
- Mr. Sulla took it to Superior Court, and the Judge found that the Boards findings were contrary to the ALJs factual findings, and thus vacated the Boards decision.
- The Board appealed to the First Circuit Court of Appeals—and THAT court agreed with the Board. The CA Supreme Court let the decision stand
- Mr. Sulla was kept on probation by the Board—despite the ALJ and Superior Court's findings and decision

205 Cal. App. 4th 1195; 140 Cal. Rptr. 3d 514; 2012 Cal. App. LEXIS 543

Slide 9

How Can the Licensing Boards Do That?

- Remember—the licensing system is set up to protect the public, not the professional
- In its first stages, it is an inquisitorial model—not a truly adversarial one until you get to Superior Court (if you can afford it).
- This kind of question about the degree to which our personal lives should be brought into decisions regarding professional practice are vexing—for professionals and boards

Slide 10

Assumptions regarding personal v. professional

- The "right to be let alone"
  (that is, a right for the professional person, in his or her personal capacity, to privacy)
- Ethics codes (particularly APA, CAMFT and NASW) are **silent** regarding our behavior **outside** the workplace or practice setting
- Do our ethics codes and licensing laws govern our private behavior at times? (see Pipes, Holstein & Aguirre, 2006)

Slide 11

Yes: Examples of Standards in this Regard

- APA's rule regarding expulsion if convicted of a felony
- BOP/BBS rules regarding **criminal convictions** "substantially related to the qualifications, functions, and duties" of the professional (Cal. B & P Code § §2963, 2012 (psychologists); § 4982(a), 2012 (MFTs)); §4992.3 (a), 2012, (LCSWs);
- BBS/BOP rules for denying, limiting or revoking licenses if **drugs or alcohol are used "to an extent or in a manner** dangerous to himself or herself, any other person, or the public, or to an extent that this use impairs his or her ability to perform the work of a psychologist with safety to the public." (Cal. B & P Code §§ 4992.3 (c), 2012, (LCSWs); 2960(b), 2012 (psychologists); 4982(c), 2012 (MFTs))

Slide 12

Examples (cont.)

- Or BOP/BBS rules regarding "**sexual misconduct that is substantially related to the qualifications, functions or duties**" of the professional (Cal. B & P Code §§4992.3 (a), 2010, (LCSWs), 2960(o), 2007, psychologists; 4982(k), 2010, MFTs)
- BBS/BOP rules regarding **"commission of any dishonest, corrupt, or fraudulent act substantially related to the qualifications**, functions, or duties of a licensee or registrant" (Cal. B & P Code § §4982(j), 2010 (MFTs); 4992.3 (j), 2010, (LCSWs), 2960(n), 2010 (psychologists)

Slide 13

What are the implications?

- Behaviors in the private realm can and do impact our professional lives.
- Pipes et al., 2006, suggest that our ethics codes explicitly require such clarifications
- They also suggest that ethics codes make it clear in the broad, non-enforceable value statements, that MHPs aspire in their personal lives to abide by consensus values (e.g., integrity, justice, respect for peoples rights and dignity)
- In other words—**character matters**
- Some concerns about this suggestion
- The need to "walk our talk."

Slide 14

Will those Steps Be Sufficient?

- Unfortunately, the distinction between the personal and professional is becoming increasingly blurred (Barnett & Russo, 2009; Barnett, 2011; Zur, 2009; Kolmes & Taube, 2014)
- This has been evolving rapidly over the past 15 years, with the permeation of the Internet and digital devices into all of our lives
- At many levels, the realm of the personal has been shrinking

Slide 15

Cyber-blurring of the personal/professional boundary

- Ofer Zur (2009) spoke to three categories of therapist self-disclosure:
  --Deliberate
  --Accidental
  --Unavoidable
- He, and others (Donner & Zur, 2009, Nicholson, 2011) have argued that the Internet has created an increasingly higher level of unavoidable therapist transparency

Slide 16

Blurring (cont.)

(Thanks to Dr. Keely Kolmes for her gracious permission to use these next two slides)

- Clients (or employers, or students, or colleagues) may find personal information about us:
  - Photos, likes vs. dislikes, hobbies, religious affiliations, recent activities, where you are if you use LBS
- Social Networking sites can reveal overlapping social contacts you may have with your clients
  - Friend lists, comments, etc.
- This illumination effect may be magnified for groups/individuals with social clusters connected via ethnicity, sexual orientation, religion, or disability.

Slide 17

Blurring (examples)

- Googling oneself

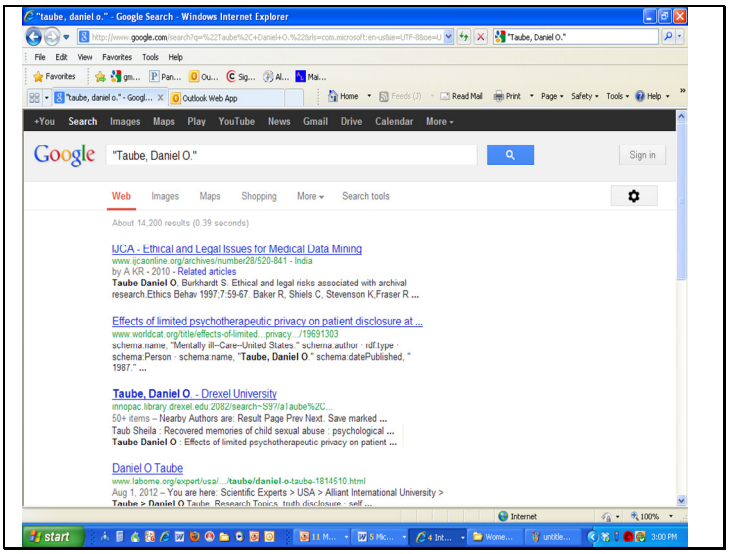
  (finding such sites Spokeo.com, etc.)

- Microblogging (e.g., Twitter)

- Social Media Services (e.g., Facebook)

- Professional Activities

Slide 18



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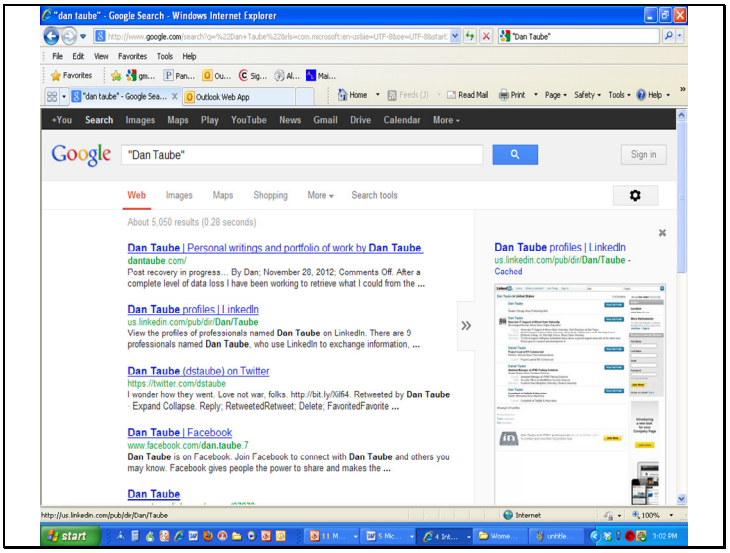

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Slide 21

But We Don't Have Much that's Personal Online, Do We?

- Interesting—not very much data available
- Its assumed that there is a considerable amount about us
- MacDonald et al., 2010, did a study of about 335 MDs in New Zealand
- About 70% had Facebook pages, and roughly a third had not set privacy settings. Plans about vacations, weekend activities, and other personal information was easily found
- Notion is, we must become more mindful of the intersection of our personal with professional lives—not just in the more extreme example of *Sulla v. Board of Registered Nurses* (2012)

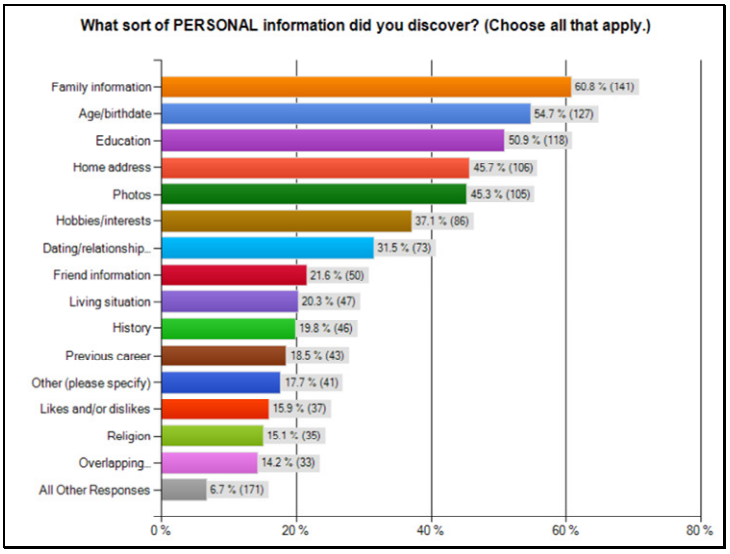
Slide 22

Research on clients finding psychotherapist information on the Internet (Kolmes & Taube, 2014—in preparation;

(Again my thanks to Dr. Keely Kolmes for her generous permission to use the three following slides)

- In a survey of 332 clients, 70% reported finding personal information about their therapist on the Internet.
- 92% of these individuals found it intentionally while 13% found it accidentally (some had both).
- 78% found the information via Google, 42% found it via Facebook, 17% found information on LinkedIn. 10% found it on a blog.

Slide 23



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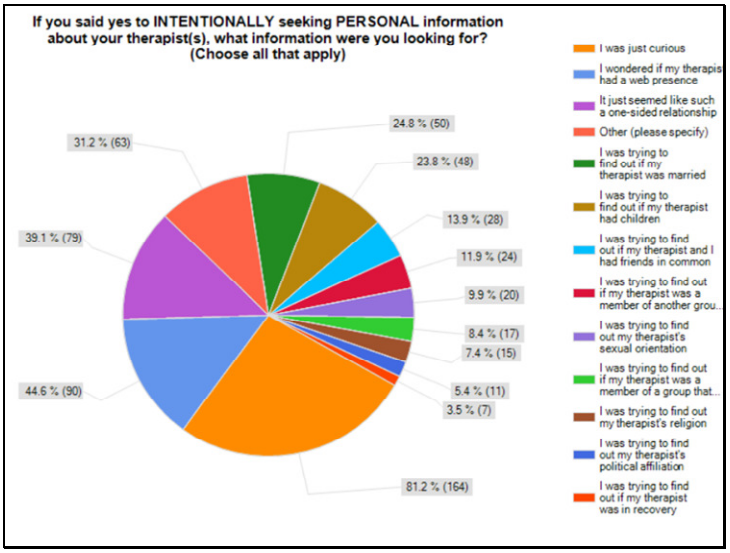

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Implications

- This study demonstrates that the concerns of those in practice are real; it confirms Zur and Donner's (2009) assertions.
- Therapists can expect less personal privacy
- And less control over personal disclosures—especially if there is personal or family information on line
- Consideration has to be given to ***how*** to handle this fact, rather than assuming it does not happen
- But we'll come back to that issue-and some suggestions—shortly.

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Another Concern Has to Do with ***Professional*** Information Online

- You saw what came up for just two shortened pages of Google on one person
- It has become extraordinarily simple to obtain professional publications online
- Clients can—and likely do—find such publications
- Even if I strip identifying information from professional examples, clients will know (or believe) personal information is being published about them
- Becoming a "case" as opposed to a person: a means to an ends rather than an end in oneself, has ethical and clinical implications (Amos, 2011)

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What Can One Do About This?

- Google yourself periodically, and set up Google alerts
- Make corrections when you can—go to the source of the information—for example, information unintentionally distributed
- Be thoughtful about what your personal page/wall posts, tweets, and so on—what effect if sensitive or fragile clients see it?
- Consider and set appropriate privacy controls on all personal and professional (but be aware of our ultimate *lack* of control)
- Have a purposeful, professional Internet presence
- Take control of your digital footprint—even if it's a "little feat."
- Having something that comes up first about us that communicates a sense of respect, is positive, clear and professional.

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Additional Considerations

- Counseling Center and Professional Web-pages
- Are Web-page visitors simply that?
- When, if at all, do visitors become clients?
- Active/passive/hybrid qualities of Web pages (Recupero & Applebaum, 2006)
- On our own Websites: beware cookies, "click stream data," take reasonable steps to assure people who browse are not identified

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Additional Considerations (cont.)

- Crossing jurisdictional boundaries and practicing without a license
- Internet advertising is marketing in ALL markets—and may constitute practicing in those jurisdiction
- Differing reporting laws: For example, immunity in CA for child abuse reports is very strong (PC 11172, 2013), but may NOT be similarly protective (e.g., requiring good faith), in other states, thus opening professional up to law suits for *making* a child abuse report in another state (as opposed to a suit for failing to make such a report)
- Though more extreme, the *People v. Hegeseth* case (2005) prosecution is an example of what can occur—though not a high risk.
- Clarify bounds of clinic services in Internet-based sites, and at this point; careful about "seeing" clients in other states

Slide 30

But There's a Flip Side…

- Can and should *therapists* search for *client* information on the Internet?
- Suppose a student comes to the center and has a credible story about competing at a world level in soccer? Or being from a very wealthy family that is embroiled in lawsuit against the county in which you work?
- Would it be reasonable to check?
- What if they are a person who you think you've seen in a local news station expose on sex offenders…how about then?

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Another Study…

- Keely Kolmes and I conducted an online survey of 227 clinicians (*Professional Psychology*; 2013)
- We asked, among other things, how often and under what circumstances clinicians searched for client information on the internet
- Were also asked who many informed clients ahead of time, or discussed it with their clients
- Our findings suggest that some 49% of our sample purposefully searched for client information on the Internet
- Very few informed clients of such searches
- Only about 8% searched because of an emergency
- Mostly it was curiosity; not clear clinical need or motivation

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Googling clients (cont.)

In other studies,

- up to 27% of psychology graduate students reported seeking online information about clients (Lehavot, Barnett, & Powers, 2010).
- 22% of 193 clinical psychology graduate students googled their clients (Martin, 2010).
- Lal and Asay found that *22%* of 193 clinical psychology graduate students had Googled their clients (Martin, 2010).
- DeLillo and Gale (2011) surveyed 854 doctoral students in psychology and *97.8%* had reported using social networking sites to find client information.

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Googling Clients

(Thanks to Dr. Keely Kolmes for her gracious permission to use this slide)

Is it okay to look up information on patients?

- Under what circumstances?
- How might you communicate this to patients?

•It may be a legal, ethical, or personal breach of trust.

•As oneself--what are my motives: Is it personal curiosity or is it in service to clinical care?

•Do I do it routinely?

•Do I do it in crisis situations?

•Do I document it? (note that all professional activities should be documented)

•Do your clients know you are doing this? (Is it a part of the treatment agreement?)

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Googling Clients (cont.)

- Especially with traumatized people, issues of integrity and consistency are crucial: this is about safety and control over even the public information that might be available
- Our position is that we should inform clients of our policy regarding searching for them on the Internet : have a conversation (note the *in vivo* search analogy)
- This reflects honoring autonomy and respecting persons, in addition to the clinical issues just mentioned
- Emergencies are, in my view, the exception.
- Others have argued that some situations might justify such searches—such as a paranoid schizophrenic person who might be very upset with a search, but who you find is telling the truth about an otherwise unlikely set of events in their lives
- I still question whether its truly necessary and overcomes autonomy and respect ideas

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Addressing the Availability of Client Information on the Internet

- This group of studies, in addition to the increasing online overlapping personal networks gives rise to a suggestion;
- Create CC Center policies that relate to the use of social media, interaction with clients on the Internet, and related Internet-based contacts--
- A good example can be found on Keely Kolmes, PsyD's, website, at http://www.drkkolmes.com/docs/socmed.pdf
- socmed.pdf
- She is happy to share this resource, but appreciates acknowledgement of her work
- You'll likely have to modify it for organizations or your practices, depending on your approach to the issues raised

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Just in Case We Have Doubts about the Relevance of Such Policies and Activities…

- The Social Media Revolution 2014.avi

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The Confidentiality of Client Information in CC Counseling and Psychological Services Centers

- The notion of consent is a bridge to talking about confidentiality concerns
- That is, it relates to whether, when, and how information is shared about students who seek mental health/counseling services through CA CC Centers
- To address that issue, a brief review of HIPAA and FERPA is required

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HIPAA v. FERPA in College Counseling/MH Centers

- An ongoing debate about whether only FERPA applies to such services on campus
- Or whether HIPAA applies
- Or whether its both
- The 2008 DHHS/DOE Joint Guidance was supposed to have clarified this relationship
- Unfortunately, many confusions continue to persist

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A few Reminders Regarding HIPAA

Health Insurance Portability and Accountability Act

- These are Federal Legislation and Regulations
- Intended as "MINIMUM" standards
- ONLY preempts LESS strict state standards
- If a state has MORE stringent standards for greater privacy protections, for example, STATE LAW will prevail

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For MHPs, Privacy and Security Rules are related to:

- Securing privacy of health records
- Developing privacy policies for "covered entities" (and giving notice of such)
- Assuring consumer access to records

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- HIPPAA Privacy Rule compliance was required by April 14, 2003:
  Security rule compliance by April 15, 2005
- Affects covered entities (CE): insurers, hospitals, health departments, clinics. managed care organizations, group practices and even solo practitioners
  CEs are entities that USE ELECTRONIC TRANSACTIONS or do Medical or Medicare work (electronic transactions are not required for these)
- Focus on the privacy, "security," transactions related to, and access by patients to PROTECTED HEALTH INFORMATION(PHI)

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"Electronic Form" Means using:

- The internet ("wide open")
- An "extranet" (internet technology that links a business with collaborating parties only)
- Leased lines
- Dial-up lines
- Private networks
- Transmissions physically moved from one location to another, using Magnetic tape, disk or CD media

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Transaction means:

•The transmission of information

•Between two parties

•To carry out financial or administrative activities related to healthcare

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So at Least Theoretically, CA CC Counseling/MH Centers Could be Required to Comply with HIPAA.. Right?

- Errrr—not so fast!
- There is a definition section in the HIPAA regulations that *exempts information* that is an "educational (or) treatment" record under FERPA (45 CFR 160.103(2)(i) & (ii); 2003, 2009), from being defined as PHI
- That is, it appears that such information is NOT governed directly by HIPAA (at least HIPAA Privacy and Security rules; the Transaction rules may apply, but we will not focus on those today)

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FERPA—rather than HIPAA—may be the primary statute/regulations to apply

- FERPA (as I think all of you know, the Family Educational Rights and Privacy Act of 1974, as amended, 2013) governs privacy, sharing and access to **educational records**
- It governs any educational institution that receives Federal funding of some sort or another (most colleges and Universities do)
- The law says **educational records can't be shared** with someone outside of the educational agency
- Though a large number of exceptions exist

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FERPA and Information Sharing

- Primary mechanism for sharing these records is *consent* by the parents OR an eligible student—typically an adult (18 or over) who is not a dependent for tax purposes
- AND sharing with other school official who have legitimate educational interests (20 USC 1232g(b)(1)(a) 2013)
- So under FERPA, does that mean that Counseling/MA treatment records can be disclosed to other school officials (e.g., Students of Concern Committees, teachers, Deans) without consent?

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FERPA and Educational Record Privacy

- Whoooaa—not so fast…
- It turns out that in post-secondary educational institutions, records related to MH/counseling treatment—even if developed by paraprofessionals, are NOT educational records!
- Now, didn't I say just a few minutes ago that these records are not PHI under HIPAA?
- Yes, I did
- And now you are saying they are not "educational records?
- Yes—I am!

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FERPA and Educational Record Privacy (continued)

- It means that the usual educational record rules about sharing information under FERPA seem that they would not apply
- These are "treatment records."
- *Consent is* typically required for the release of such records
- And the Joint Guidance (2008), as well as some commentators (.e.g., Wise et al. 2011), have argued that once the information is disclosed (e.g.., even by student consent), it converts to an educational record and does not receive the higher level of protection presumably offered by being a "treatment" record.

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FERPA and Educational Record Privacy (continued)

- But there are some contradictions here: the exceptions to the rule requiring consent of the student or her/his parents (when a dependent) seem, in the statute, to apply only to educational records (20 USC 1232g(b)(1)(a) and 1232g(b) 2013)
- But the Joint Guidance seems to suggest that the vast range of exceptions to consent requirements for educational records also apply to treatment records
- Yet FERPA does NOT apply to treatment records!?

Slide 50

- What the….?

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FERPA and Educational Record Privacy (continued)

- So how do we address such conflicts?
- One suggestion has been to turn to California law
- That means using such things as the Confidentiality of Medical Information Act (CMIA), State case law (such as *In re Lifschutz*, 1970; *Tarasoff* , 1974/76 and its progeny), and other state statutes, such as the CA Welfare and Institutions code (e.g., 5328, 2013) and the Security Breach Notification Law (e.g., CA Civil Code 1798.29, 2013)
- These rules are complex as well: but in general consent (authorization) is required to disclosure, unless there is shared clinical responsibility, a need for services for a client, for payment and information management, or in emergent situations, or (like danger others, duty to protect, etc; see, for example, CA W & I 5328, 2013; CA Civil Code 42.93, 2013).

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FERPA and Educational Record Privacy (continued)

- Put another way, at least in my view, it is likely best practice to assume that we need to be MORE careful with treatment record information—because it is probably state law that governs its disclosure (not FERPA or HIPAA Privacy or Security rules)
- And the "conversion" of treatment records into educational records when they are shared substantially reduces protections for student information (that is, the laundry list of exceptions to consent by eligible students and parents of dependents would apply)

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FERPA and Educational Record Privacy (continued)

- So, one approach that is compliant with the law, and ethically most appropriate (see ACA, 2005, Section B; APA, 2010, Std 4; NASW, 2008, Std 1.07), would be to clarify for ourselves and our student clients the situations under which sharing of information either must or can occur
- And also clearly describe to student clients the impact on their privacy that would follow
- That means developing policies in CC health/counseling/wellness centers that delineate the situations where information is required—and may—be shared

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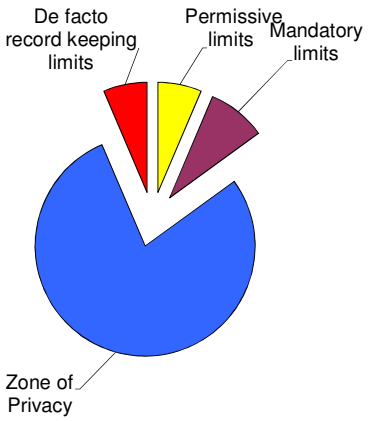
FERPA and Educational Record Privacy (continued)

- These limitations in CA are in traditional situations—mandatory as well as permissive
- The former relate to situations such as when a client is a danger to others, when child abuse or neglect, or elder or dependent adult abuse or neglect is reasonably suspected, or when a court orders disclosure
- The latter (permissive) include, for example, consent, a danger to self, or grave disability.

Slide 55

WE PROTECT CONFIDENTIALITY WITH ONLY LIMITED EXCEPTIONS



Slide 56

Some Updates on CA Mandated Reporting Laws

- Only minor changes with *Tarasoff* over the past 8 years or so
  -Brief review of duty to protect statute
  -Reminder regarding immediate family members and basic elements
  -"Warning" language removal in 2012
- There has been much more activity around child abuse reporting—including some extensions this past year that are directly relevant to post-secondary education

Slide 57

Developments following *Tarasoff*

- Confusion, concern and voluminous commentary over what constituted sufficient protective actions (remember that the intern/supervisor had attempted to have Poddar hospitalized by campus police in the original case)
- Cases were complex and at times contradictory about those situations in which the duty to warn and protect would apply
- For example, *Thompson v. County of Alameda*, 1980—no identifiable group, despite threat to kill a child in the neighborhood; *Jablonski by Pahls*, 1983—duty to evaluate and obtain prior records to determine if dangerous; *Hedlund v. Superior Court*, 1983—therapist has duty to diagnose/investigate possible threats

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Developments, continued

- **California State Psychological Association moved to limit liability by going to CA legislature**
- AB 2900 (now CA Civil Code Section 43.92, 2013) was put into place with the intent to clarify and, arguably, limit the imposition of a duty to protect and warn potential victims.
- The language of that section read (and still reads) as follows:

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Developments (cont.)

43.92. (a) There shall be **no monetary liability** on the part of, and **no cause of action** shall arise **against**, any person who is a **psychotherapist** as defined in Section 1010 of the Evidence Code **in failing to warn of and protect** from a patient's threatened violent behavior or failing to predict **and warn of** and protect from a patient' s violent behavior **except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.**

(b) There shall be **no monetary liability on the part of, and no cause of action shall arise** against, **a psychotherapist who,** under the limited circumstances specified above, **discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.**

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Cases following Passage of AB 2900

- Cases hewed closely to CA Civ. Code §43.92
- *Barry v. Turek* (1990): no duty to warn when no specific threat by a patient against hospital staff
- *Tilley v. Schulte* (1999): no duty to warn with no specific threat by patient against police officer

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Tarasoff Cases (cont.) (change afoot?)

- Bragg v. Valdez (Sept. 2003)
- Pt released because no insurance, and then killed someone and self
- Appeals Ct said—not a Tarasoff or 43.92, but rather a failure to "protect" under WIC
- Pt was in custody and released for likely ***unjustifiable*** reason

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Ewing v. Goldstein

[No. B163112. Second Dist., Div. Eight. Jul. 16, 2004.

- Interprets Civ Code 43.92 more broadly
- "First, a communication from [an immediate] family member to a therapist, made for the purpose of advancing a patient's therapy, is a "patient communication" within the meaning of section 43.92."
- Second, a therapist's duty to warn arises if the information communicated leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to another"

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Changes following *Ewing v. Goldstein*

- An attempt to modify Civ Code 43.92 to get rid of Ewing language failed (2006); language is identical
- BUT—notion was to allow professionals to use other methods to address dangerous behavior (e.g., hospitalization) and we are encouraged to contact patients when third parties inform us of a threat
- Also a slight change--AB 1178 (2008)—clarified that CA CMIA allowed *Tarasoff* warnings (it had not been clear before and may have confused juries in these cases)

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Tarasoff Cases (cont.)

- ***Greenberg v. Superior Court*** (2009): Without warning, 19 year old William Freund shot and killed two members of a next door neighbor friend's family. Trial court held *no Tarasoff* liability (no threat communicated to the therapist)
- BUT court let suit to go forward on a "public policy" argument that Dr. Greenberg owed a more general duty to this family to treat within the standard of care

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Greenberg v. Superior Ct. (cont)

- On appeal, court went through a decades old public policy analysis, and considered whether to permit a suit by the Calderon's on that basis
- It decided, though, that there could be no liability with that expanded "public policy" argument. It agreed with Dr. Greenberg—no such duty existed in this case
- Real potential to expand T*arasoff* here—but did not
- Appellate court seems to suggest that, for now, it would not easily permit liability on other, more general legal theories as compared to *Tarasoff*.

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Another minor change

- Yee (SB1134) introduced a superficial change to our statute in February of 2012
- It was signed into law in July, 2012
- It just removes "a duty to warn." It says there's a duty to protect, and the method of maintaining immunity is to do just what the prior law asks us to do
- That is, make reasonable attempts to warn the intended victim(s) and law enforcement
- Will NOT change our substantive duties (but more in line with case law and general ideas underlying the duty)

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Other Mandated Disclosure changes: Child Abuse Law

In the wake of the horrific abuse events at Penn State University, many states have moved to widen the range of mandated reporters (some 22 have passed new laws, at last count on May 29, 2013).

- CA CANRA was expanded over the past year to require all employees and admins in post-secondary education to report abuse (AB 1434; SB 1264)
- Athletic coaches, directors and admins have been added to required reporter list in any school grade K-12 (AB 1435)

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Child Abuse Law Changes (cont.)

In an attempt to further address child pornography on the Internet:

AB 1817: expands the list of persons identified as mandated reporters to include commercial computer technicians

AB 1713: expanded the kind of information commercial print and photographic processors must report, so as to include list of media to which those provisions apply to include, among other things, any representation of information, data, or an image

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Child Abuse Reporting Changes/ Updates (cont.)

- Moving in the opposite direction, though, the Second District Court of Appeals ruled that, when hired by the prosecution or defense, the *attorney client privilege trumps child abuse reporting*
- *Elijah v. LA Superior Court* (May 8, 2013). Case involved a psychologist on the approved court list of assessors, who, when asked to evaluate a 10 year old for competence to be tried in an arson case, informed defense counsel that she was bound by Child Abuse reporting law (a standard approach).
- Counsel argued that Atty-Client privilege, and the Constitutional right to effective assistance of counsel, should hold sway.
- The trial court agreed with the psychologist; BUT
- On appeal, the 2nd Circuit overturned the trial court, saying constitutional concerns overrode these statutory mandates.

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Child Abuse Reporting Review/Update Reporting of Unlawful Sexual Intercourse* ("Statutory Rape")

Person Under 16, but 14 or over, with similar-aged partner	⇨	**No Report Required (unless some evidence of abuse)**
14 or 15 year old, with person 21 or over	⇨	**Report Required**
Person 16 or over, with person 21 or over	⇨	**No Report Required (unless some evidence of abuse)**

***Note that Unlawful sexual intercourse is a crime. However, there are some circumstances, as noted above, where the Child Abuse Reporting Law does not require that this crime be reported. For example, when two 15 year olds engage in voluntary sexual intercourse, no report is currently mandated.**

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Lewd and Lascivious Conduct

- **One child under 14, one person 14 or over** → Report required
- **One person 14 or 15, and the other, at least 10 years older (by birthdays)** → Report required

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Lewd and Lascivious Conduct

- **Both children under 14**

  ("Playing doctor")

- **OLD LAW SAID: No report IF**:
  - .Close in age
  - Voluntary
  - Not close blood relation
  - No other evidence of abuse

Note some indications that the state believes older case law is applicable, but BE CAUTIOUS, as no court has ruled since statutes changed. Be sure to consult regarding this situation: I suggest you call a CPS supervisor.

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Reporting of Voluntary Oral Copulation and Sodomy between Minors

- Concerns about such required reports in recent years—homophobic, and given the rate of oral sex among teens, likely not what the CANRA intends to catch in its net
- A 2006 Law Review article asserted that the statutory scheme did not contemplate mandated reporting unless force, intoxicants, or age differences (like those in lewd and lascivious conduct) applied
- Difficult to get any clarification—legislators have not taken it on
- Putatively, there has been a recent opinion offered by a senior staff attorney at the CA DCA that says no, and interprets the law like unlawful sexual intercourse
- BE VERY CAUTIOUS-SUCH OPINIONS DO NOT HOLD THE WEIGHT OF LAW!!

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Immunity from liability for abuse reporting

•McMartin v. Children's Inst. Int'l (1989)

[E]ven if... a mandated reporter... submits a false report with the intent to vex, annoy or harass an innocent party, civil or criminal liability cannot be imposed."
(212 Cal. App. 3d at 1400; 261 Cal. Rptr. at 441)

•Strecks v Young (1995)
even in arguably weak case for reporting, court upheld immunity from civil liability--case ended with summary judgment

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Note on immunity from liability for child abuse reporting

•11172. (a) No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment.
(a relatively old amendment that is not well-known; 2004)

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Recent Abuse Reporting Case

- Gonzales v. Superior Ct (Santa Clara County DSS)(Jan, 2014)
- DSS removed a child from parents following a report of abuse, and substantiation that Mom had spanked 12 year old with wooden spoon and left bruises
- Mom argued that a parent had a right and obligation to discipline her child (she was apparently

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Gonzales case (cont.)

- She appealed the DSS finding and Superior Court ruling that the episode should be logged in the C Abuse Central Index
- And the 6th District Appellate Court agreed with Mom—saying that Legislature allows reasonable parental discipline
- But note: this case does NOT mean we do not report when bruises occur—that only requires reasonable suspicion.

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But what about "Permissive" Sharing of Treatment Records under CA law?

- No question that MHPs in college settings may:
  - >Disclose information to protect clients from harming themselves
  - > Disclose information in cases of grave disability
  - > Attempt to hospitalize involuntarily for danger to others (note commentary and criticism following the VA Tech tragedy and in the Pima Community College shootings, 2011)

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Permissive disclosures (cont.)

- LPS (5828(a) for many years also has allowed providers (and providers' staff) to disclose, without formal consent, information for the purpose of treatment (service provision) or referrals, or to coordinate care with any healthcare provider (any discipline) "who has medical or psychological responsibility for the patient" (though note frequent reticence by hospitals to do so; time permitting a suggestion in that regard)
- The CA CMIA (Civil Code 56.10 et seq., 2013) also allows a range of exceptions to consent requirements, including for service coordination, payment, and so on.
- But NONE allow disclosure for non-emergency purposes to those not sharing responsibility, paying for or coordinating treatment (e.g., therapist, insurance co, and so on)

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Permissive disclosures (cont.)

•So what about Student of Concern Committees and the role of MHPs?

The SOCC can share information among members who have a legitimate educational interests

But remember—treatment records are NOT educational records

But they can become so if disclosed to someone not responsible for a student's treatment

This means that heightened care needs to be used in sharing an treatment records with the SOCC

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Permissive disclosures (cont.)

- Of course, an emergency exception can apply (recall that CA state law allows for such, without relying on FERPA or HIPAA)
- But what to do in the more typical situation where the Committee has asked for input about a particular student? How do you currently handle such requests?

- Examples?

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Permissive disclosures (cont.)

- One potential solution is for Counseling Centers to develop (along with the Student Affairs Deans and Counsel) policies that are provided to students as regards what, if any information will be shared

- A clearer, but perhaps less practical method is to obtain consent, in conjunction with a clear policy, from all who obtain services from the Center

- Note that some have argued, though that such disclosures scuttle treatment record protections.

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Conclusion

- We are in a time of massively exploding information availability and shrinking privacy—but need to take steps to manage our online information as best we can, and to refrain from stepping into clients lives unbidden
- FERPA is most likely what controls CA CC educational records, but there continues to be ambiguity as to the rules regarding treatment records

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Conclusion

- Imminent safety concerns, abuse reporting and court orders are still exceptions to the privacy of treatment records
- When addressing permissive exceptions to which California law likely applies, my sense is that it is best to take a careful approach—developing Center and College policies about sharing information, informing student clients clearly and asking permission at the outset of treatment

Continuing Education Post-Test (Learning self-evaluation; no need to hand in)

Course: Ethical and legal review and update **Name**_____

License Number_____

1. HIPAA privacy and security rules apply to:

a. All functions of a community college
b. Educational records in college
c. Threat assessment committees in colleges
d. None of the above

2. Recent updates to the *Tarasoff* standards in California include:

a. Removal of the terms "warn of."
b. Addition of the terms "warn of."
c. A major shift to warning the whole community if there is a credible threat by a client
d. Removal of the term "protect"

3. True or False (circle one). Child abuse reporting is no longer required in post-secondary education settings such as community mental health centers.

4. Which of the following is **not** a way to address increasing online transparency?

a. Regularly search online to determine the scope and content of personal information available online
b. Forbid clients from viewing your personal information online
c. Address Internet boundary issues in social media policies
d. Invite clients to discuss what they have found about you on the Internet
e. All of the above