



# CONFIDENTIALITY IN TREATMENT COURTS

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# CONFIDENTIALITY: 42 CFR PART 2 & HIPAA

## **42 CFR Part 2:**

Title 42, Part 2 of the Code of Federal Regulations ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.

## **HIPAA**

**H**ea**l**th **I**nsu**r**ance **P**orta**b**ility **A**ccounta**b**ility **A**ct encourages electronic transmission of certain health information with its own privacy rule

# CONFIDENTIALITY

## HIPAA - SUMMARY

**H** **e** **a** **l** **t** **h** **I** **n** **s** **u** **r** **a** **n** **c** **e** **P** **o** **r** **t** **a** **b** **i** **l** **i** **t** **y** **A** **c** **c** **o** **u** **n** **t** **a** **b** **i** **l** **i** **t** **y** **A** **c** **t**

HIPAA does not apply to courts, court personnel, accrediting agencies, jails, or law enforcement personnel

Treatment courts are impacted by HIPAA because it applies to treatment providers and medical providers on the treatment court team and protected health information is re-disclosed to the treatment court team



# CONFIDENTIALITY

## What are Part 2 Regulations?

- Title 42, Part 2 of the Code of Federal Regulations addresses use of substance use disorder information in non-treatment settings
- Part 2 ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.
- Separate regulations from HIPAA

## Does it apply to treatment courts?

- Yes, if the treatment court, its state funding agency or any tax exempt entity or a treatment provider receives federal funds. This is broadly interpreted. Assume it applies to your court.
- Yes, if it is patient identifying information

# CONFIDENTIALITY

## What Does Part 2 Protect?

- Part 2 protects “records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States.”
- Confidentiality protections help address concerns that discrimination and fear of prosecution deter people from entering treatment for SUD.

# CONFIDENTIALITY

## Who is Protected by Part 2?

- *Patient* means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program.
- *Patient* includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program.
- This definition includes both current and former patients.



# CONFIDENTIALITY

## PART 2 REGULATIONS ~ DISCLOSURE

- Treatment Courts Should Use Consent Forms
- Treatment Courts Should Use Standing Court Orders
- Other means of disclosure are **VERY LIMITED**
  - Civil subpoena – must show good cause
  - Criminal subpoena – must show good cause and serious crime

# 2024 PART 2 AMENDMENTS

- February 8, 2024, HHS through SAMHSA announced a final rule modifying the Confidentiality of Substance Use Disorder Patient Records regulations at 42 CFR Part 2
- Align aspects of Part 2 with HIPPA
- Takes effect on April 16, 2024, and organizations have two years to comply.



# 2024 PART 2 AMENDMENTS

## What Has Not Changed Under the New Part 2 Rule:

- The revised rule does not alter the basic framework for confidentiality protection of substance use disorder (SUD) patient records created by federally assisted SUD treatment programs.
- Part 2 continues to prohibit law enforcement's use of SUD patient records in criminal prosecutions against patients, absent a court order.
- Part 2 also continues to restrict the disclosure of SUD treatment records without patient consent, other than as statutorily authorized in the context of a bona fide medical emergency; or for the purpose of scientific research, audit, or program evaluation; or based on an appropriate court order.

# 2024 PART 2 AMENDMENTS

## Required Elements for Consent Form (Section 2.31):

- Name of patient
- Name of program making disclosure
- Recipient of information
  - Regulations suggest the following text for Recipient: "My treating providers, health plans, third party payers and people helping to operate this program"
- The specific purpose or need for the disclosure
  - Regulations suggest: "For Treatment, Payment, and Health Care Operations"
- How much and type of information to be disclosed
- Recipient can now be described as a class of persons, e.g. "my treatment providers" or "health plans"

# 2024 PART 2 AMENDMENTS

## Required Elements for Consent Form (Section 2.31):

- Right to revoke consent in writing
- Program's ability to condition payment, enrollment, or eligibility of benefits on the patient
- Date, event or condition on which the consent expires (e.g. "end of treatment" or "none")
- Signature of patient
- Date signed
- Notice of redisclosure per HIPAA
  - Regulations suggest: "Patient record may be re-disclosed in accordance with the permissions contained in HIPAA regulations except for uses and disclosures in civil, criminal, administrative, and legislative proceedings against the patient."



# 2024 PART 2 AMENDMENTS

## Important Protections Related to Consent:

- SUD records obtained in an audit or evaluation cannot be used to investigate or prosecute patients without consent or a court order
- Cannot combine patient consent for use and disclosure of records for civil, criminal, administrative, or legislative proceedings with patient consent for any other use or disclosure
- Disclosure made with consent must include a copy of the consent or a clear explanation of the scope of the consent

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(f. d.).

**Saverne**, Name, d.

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**Saverne**, hinter lat. Saverne

1844 als Professor in Saverne

reicht geol. und botan.

thologia toscana (4 Bde.).

**Savignone** (spr. -wijn),

Stadt im Kreis Sa-

luzzo der ital. Prov. Cuneo in Piemont, rechts

an der Maia, an den Linen Caramagnola, Ganto

und S. Salvo (12 km) des Mittelmeeres, in

fruchtbarer Ebene, ist regelmäßig gebaut und von

Mauern und Zinnen umgeben, hat (1881) 9932

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des 8. Infanterieregiments und das 17. Radallier-

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genannt Carracino, eine Benediktinerabtei, großen

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Seidenweberei und Handel mit Vieh und Wein. —

Am 4. und 6. Nov. 1799 fügten hier Russen und

Österreicher unter Belas über die Franzosen (f. d.).

(f. d.). S. in Genua der Violinistinnen Ze-

reia und Maria Milanello.

**Savignone di Romagna** (spr. -winnj),

Stadt im Kreis Ferrara der ital. Prov. Ferrara,

an der Via Emilia, und der Linie Bologna-

Rimini des Adriatischen Meeres, hat (1881) 2126

als Gemeinde 4561 E., und eine von dem hier ge-

hebenen Altertumsforscher Graf Boeckh (f. d.). ge-

gründete Akademie mit Bibliothek von 18 000 Bänden

und Münzsammlung.

**Savigny** (spr. -winnj), Friedr. Karl von,

Jurist, geb. 21. Febr. 1779 zu Frankfurt a. M., be-

zog 1798 die Universität Marburg. Nachdem er

auch verübertretend Göttingen, Leipzig und Halle

begann er 1800 in Marburg jurist. Vorlesungen, zu-

erst als Privatdocent, seit 1802 als außerord. Pro-

fessor. Auf mehrjährigen Reisen durch Deutschland

und Frankreich widmete er sich der Aufsuchung un-

bekannter Quellen des röm. Rechts und der Rechts-

geschichte. 1808 wurde er Professor der Rechte in

Landshut und 1810 bei Errichtung der Universität

in Berlin einer der ersten Lehrer an derselben, 1817

Mitglied des Staatsrats, 1819 Rat des für die

Provinz errichteten Revisionsofizes und

ab 1812 vreuß. Minister für die Revision der

Gesetzgebung. Er trat im März 1848 ins Privatleben

zurück und starb 25. Okt. 1861 in Berlin. S. gehörte

zu den Führern der sog. historischen Schule der

Rechtsgelehrten, obwohl man ihn, ohne Hugo und

seinen nennen kann, nicht den Stifter der

selben nennen kann. Innerhalb dieser Richtung

trat S. zur Zeit der Befreiungskriege den Vor-

schlägen von Thibaut, Schmitz, Henner u. a. welche

ein Vaterlandrecht, von der Herrschaft der fremden

Rechte befreites Geis beizubehalten, in der viel-

bekämpften Schrift »Dem Versuch unserer Zeit für

Gesetzgebung und Rechtswissenschaft« (Heidelb.

1816; Neudruck, Friedr. L. Fr. 1892) entgegen. Die

Wichtigkeit S.s war indessen nicht. Unter-

suchungen jugendend, denen man seine »Geschichte

des röm. Rechts im Mittelalter« (6 Bde., Heidelb.

# 2024 PART 2 AMENDMENTS

## Important Protections Related to Consent:

- Creates a new definition for a SUD clinician's notes analyzing the conversation in a SUD counseling session that the clinician maintains separately from the rest of the patient's SUD treatment and medical record and that require specific consent from an individual and cannot be disclosed on a broad consent.
- Analogous to protections in HIPAA for psychotherapy notes.

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# 2024 PART 2 AMENDMENTS

## Important Protections Related to Consent:

- *Substance use disorder (SUD) counseling notes* means notes recorded (in any medium) by a part 2 program provider who is a SUD or mental health professional documenting or analyzing the contents of conversation during a private SUD counseling session or a group, joint, or family SUD counseling session and that are separated from the rest of the patient's SUD and medical record. *SUD counseling notes* excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.
- Regulations expressly state maintaining a separate file is NOT REQUIRED, but if a separate file is kept, the heightened restrictions apply.



# 2024 PART 2 AMENDMENTS

## Important Protections Related to Consent:

- Part 2 program must obtain consent for use or disclosure of SUD counseling notes, except:
  - Originator can use for treatment
  - Part 2 program can use internally for training
  - Part 2 program can use or disclose to defend itself in legal proceeding brought by patient
  - As required by Secretary of HHS to investigate part 2 compliance
  - As permitted by limited exceptions for mandated reports of suspected child abuse/neglect, deceased patients, oversight activities, and court orders
- Consent authorizing use or disclosure of SUD counseling notes cannot be combined with other consents

# 2024 PART 2 AMENDMENTS

## Medical Emergency (Section 2.51)

- Disclosure to medical personnel without written consent to treat a medical emergency is allowed
- Deference concerning when a medical emergency exists
  - Immediate life threatening condition
  - Infeasible to obtain consent before administering life saving care
- Declared emergencies from natural disasters that disrupt treatment facilities and services
- Must be given privacy notices as soon as practicable

# 2024 PART 2 AMENDMENTS

## Subject Matter

## Patient Consent and Disclosure

## Counseling Notes

## Notice of Privacy Practices

## Alignment with HIPAA

- Allows single consent for future uses and disclosures
- Allows re-disclosure for purposes permitted by HIPAA (but not e.g., administrative, judicial, or legislative) until consent is revoked
- Separated from patient's medical record, such as psychotherapy notes under HIPAA
- Consistency between HIPAA Notices



# 2024 PART 2 AMENDMENTS

## Subject Matter

## Alignment with HIPAA

## Data Breach

- Applies the HIPAA standard to breaches of unsecured SUD records in the same way as a breach of HIPAA unsecured protected health information

## Penalties

- Updates the penalties for wrongful use and disclosure of SUD records as the civil and criminal penalties under HIPAA

# 2024 PART 2 AMENDMENTS

## RECOMMENDATIONS



- Review and update policy and procedure manual and participant handbook
- Review and update consent forms and notices
- Implement a standing court order
- Work with treatment providers to maintain consistency in forms
- Ongoing training for team members
- Legal review

# 2024 PART 2 AMENDMENTS

## For More Information:

- HHS Fact Sheet

- <https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/fact-sheet-42-cfr-part-2-final-rule/index.html>

- HHS HIPAA and Part 2 Fact Sheet

- <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-part-2/index.html>

- Code of Federal Regulations

- <https://www.ecfr.gov/current/title-42/chapter-I/subchapter-A/part-2>



# CONFIDENTIALITY

## OPEN COURTROOMS

### *Florida vs. Noelle Bush*



- Public access to the courts is paramount
- Treatment court proceedings must be open so participants can learn from others
- If treatment court proceedings are closed, other participants and families would be excluded

# **CONFIDENTIALITY**

## **OPEN COURTROOMS -RECOMMENDATIONS**



- **Don't discuss protected health information**
- **Be cautious about discussing sensitive matters**
- **Use the NADCP Judicial Benchcard**
- **Use Motivational Interviewing**
- **Use courtroom as a classroom**

# CONFIDENTIALITY ~ STAFFING

## Washington cases:

- Participant terminated from drug treatment court argued the closed staffing violated his constitutional right to open court proceeding
- Court held that drug courts are philosophically, functionally, and intentionally different from ordinary criminal courts. Staff meetings are not subject to the open courts provision of the state constitution.
- Staffing is not a “critical stage of the proceedings” allowing a defendant to be present



# CONFIDENTIALITY ~ STAFFING

## LAW ENFORCEMENT ISSUES

**Law enforcement may not participate in staffing and then investigate and charge participants with new crimes based on confidential information they learn in staffing.**

- *State v. Plouffe*, 329 P.3d 1255 (Mont. 2014) – the prosecutor cannot charge treatment court participant with a new crime based on confidential information learned in staffing.

# **CONFIDENTIALITY**

## **STAFFING RECOMMENDATIONS**



- **Close treatment court staffing in your policies and procedures manual**
- **Implement a standing order closing treatment court staffing**
- **Require team members to sign in at staffing and acknowledge the confidential nature of the meeting**

# CONFIDENTIALITY

## STAFFING RECOMMENDATIONS



- Include a provision in the participant handbook that there is no right for a participant to attend staffing
- Control attendance at staffing to key team members
- Don't charge participants with new crimes based on information learned in staffing
- Confidentiality principles apply to all team members



A modern office interior with glass walls and a large screen. The room is brightly lit with recessed ceiling lights. A large, dark rectangular screen is mounted on the white wall. The floor is covered with dark carpeting. In the foreground, the back of a black office chair is visible. The text "HOW ARE WE DISCUSSING INFORMATION?" is overlaid in a large, bold, red serif font on a white rectangular background.

**HOW ARE WE DISCUSSING  
INFORMATION?**



# Team Communication and Decision Making

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- Multidisciplinary team serves essentially as a panel of *expert witnesses* providing legal and scientific expertise for the judge—who makes ultimate decision
- Judge should not make treatment decisions
- Assessment results pertaining to a participant's eligibility for treatment court; and treatment and supervision needs
- Attainment of program phase requirements
- Commission of or arrests for new offenses that treatment professionals may be aware of
- Discuss participant progress in all areas

slido



**List words that describe how your staffing runs.**

ⓘ Start presenting to display the poll results on this slide.



# Treatment Court Staffing / Pre-Case Conference

## **Who Attends?**

- Judge
- Coordinator
- Prosecutor
- Defense counsel
- Treatment
- Probation
- Law enforcement

## **When Take Place?**

- Anytime prior to seeing the participant
- Eligibility
- Arraignment
- Progress report
- Probation revocation or termination
- Regression or advancement
- Return on warrant
- Pre-graduation / graduation

## **Why Do it?**

- Shared decision making
- Docket control
- Informed approach
- Empowerment of team

# HOW WE DECIDE

- Responses to behavior
- Changes in treatment
- Changes in supervision

**Who** are they in terms of risk and need?

**Where** are they in the program (phase)?

**Why** did this happen (circumstances)?

**Which** behaviors are we responding to?  
proximal or distal?

**What** is the response choice/magnitude?

**How** do we deliver and explain response?

# THE WHO

Risk and Need  
Matters!





# RISK

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## HIGH RISK:

- Compliance is more difficult
- Be intentional at incentivizing productivity, pro-social endeavors
- Responds to positive reinforcement

## LOW RISK:

- Compliance is easier
- Use negative reinforcement

# NEED

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## HIGH NEED:

- Abstinence is distal  
(eventually behaviors required for abstinence can be mastered, but even after mastery recurrence is a risk, requiring treatment, not punishment)

## LOW NEED:

- Abstinence is proximal  
(mastery of behaviors required for abstinence can occur quickly)

# Equivalent Consequences

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- Participants with similar risk/need levels, phase, etc. receive consequences that are equivalent to those received by others who are engaged in comparable conduct
- Remember, equivalent does not necessarily mean identical
- Equivalent means similar value, severity, magnitude, or intensity



# THE WHERE

The participants' time in the program, current phase, and stage of recovery must be considered





# Different Places – Different Responses

- Phase in the program
- Time in the program
- Recovery stage & changes readiness level
- Amount and type of treatment and recovery management
- Which behaviors have been mastered
- Previous responses for the same behavior
- Emphasis of the current phase – is it time to address this behavior?

# THE WHY

The team should seek to  
find out the why behind  
the behavior



# What's the Whole Story?

- Treatment, supervision, and defense team members can help layout the story
- Triggering event
  - Life event
  - Seasonal
- Therapeutic interventions
- Unavoidable or intentionally created situation
- Does conduct involve proximal behaviors or distal behaviors and have either been mastered
- Assess barriers facing the participant
  - Remember responsivity, criminogenic and maintenance needs



# WHICH ONE?

The magnitude of the response is influenced by the type of behavior, previous responses to the behavior, and the degree of control the participant has over the behavior



# Type of Goal Helps Determine: Magnitude and Frequency of Response

## **PROXIMAL**

- Treatment Responses as needed
- Frequent low magnitude incentives
- Intermediate-to-high magnitude sanctions

## **Mastered**

Frequency and magnitude should lessen

## **DISTAL**

Treatment Responses as needed  
Frequent low magnitude incentives  
Baby steps and smaller magnitude incentives for achieving milestones  
Low magnitude sanctions

# THE WHAT

After proper analysis by the team, it's time to choose the **appropriate response**





# Menu of Options – Varying Magnitudes & Frequency

At staffing, have a list of low, medium, & high magnitude incentives & sanctions

## • Incentives

### **Low**

- Verbal Praise, applause
- Certificates, symbolic rewards

### • **Medium**

- Moderate tangible rewards
- Reduced check-ins or restrictions

### • **High**

- Large tangible rewards
- Phase promotion

## • Sanctions

### **Low**

- Verbal/Written admonishments
- Essays

### • **Medium**

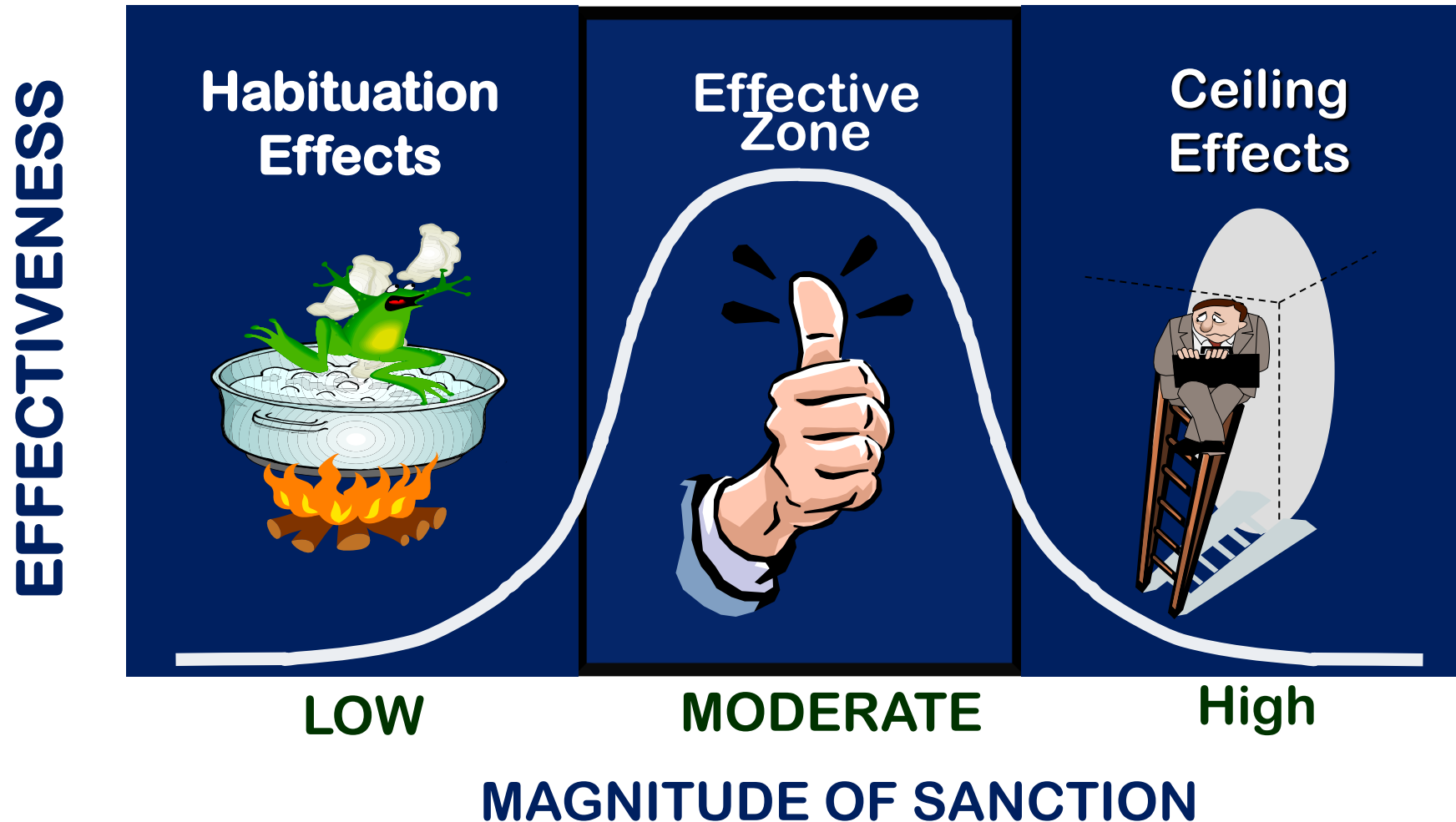
- Community service
- Increased check-ins or restriction

### • **High**

- Fines and fees
- Flash incarceration

# Remember: Stay in the Effective Zone

Utilize Wide Array of Intermediate-Magnitude Sanctions



# ADJUSTING TREATMENT EXAMPLES

## Enhancements

- Re-assessment of needs
- Re-assess change readiness
- Re-assessment of recovery capital
- Adding trauma recovery services
- Move from intensive outpatient to residential treatment
- Incorporating or adjusting medications for addiction or mental health treatment
- Enhancing case management

## Reductions

- Move from intensive outpatient to outpatient
- Fewer treatment groups
- Decreased 1:1 clinical contacts
- Narrow focus (e.g., slow down, refocus, prioritize)
- Reduce requirements
  - Due to improvement—reduced need or increased resiliency; or
  - To reduce discord, treatment resistance, or barriers



# THE HOW

- How we deliver responses matters
- Impacts participant responsiveness
- Contributes to a sense of procedural fairness and judicial impartiality



# SHARING INFORMATION

- ✓ Assessment results pertaining to a participant's eligibility for treatment court and treatment and supervision needs
- ✓ Attendance at scheduled appointments/sessions
- ✓ Drug and alcohol test results conducted by the treatment center, including efforts to defraud or invalidate
- ✓ Attainment of treatment plan goals
- ✓ Evidence of symptom resolution or exacerbation
- ✓ Evidence of treatment-related attitudinal changes
- ✓ Attainment of treatment program phase requirements

# SHARING INFORMATION

- ✓ Compliance with supervision requirements that treatment professional may be aware of (e.g., electronic monitoring, home curfews, travel limitations, stay aways, etc.)
- ✓ Adherence to legally prescribed and authorized use of medicines—if relevant to team decisions
- ✓ Procurement of unauthorized prescriptions or addictive or intoxicating medications
- ✓ Commission of or arrests for new offenses that treatment professionals may be aware of
- ✓ Menacing, threatening, or disruptive behavior

# Evaluation



1. On your compatible phone or tablet, open the built-in camera app.
2. Point the camera at the QR code.
3. Tap the banner that appears on your phone or tablet.
4. Follow the instructions on the screen to complete the evaluation.
5. After completion, you will be provided with a certificate that can be saved and printed.