

4th Annual Collaborative Behavioral Health Provider Training

*Talk It Through: Start-up, Organizational and
Compliance Issues for Doing Business as a
Mental Health Provider*



CROWE&DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW

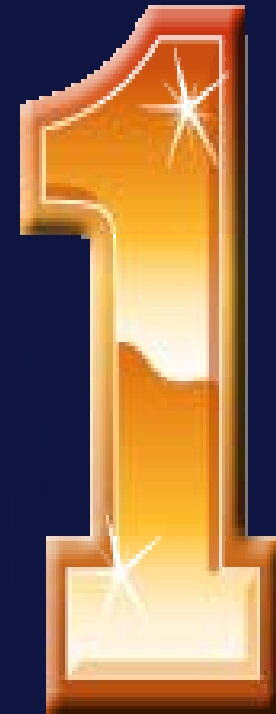
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Steps for Starting a Practice

- **Marketing Research**
 - Need for service
 - Competition
 - Other barriers



Steps for Starting a Practice

- **Entity Selection and Formation**
 - Entity options
 - Examination of personal financial situation and practice plans



Steps for Starting a Practice

- **Finances**

- Open bank account
- Develop business plan and budget
- Secure financing





Steps for Starting a Practice

- **Credentialing and Enrollment**
 - ✎ Research and plan for contracting with payers
 - ✎ Significant lead-in time



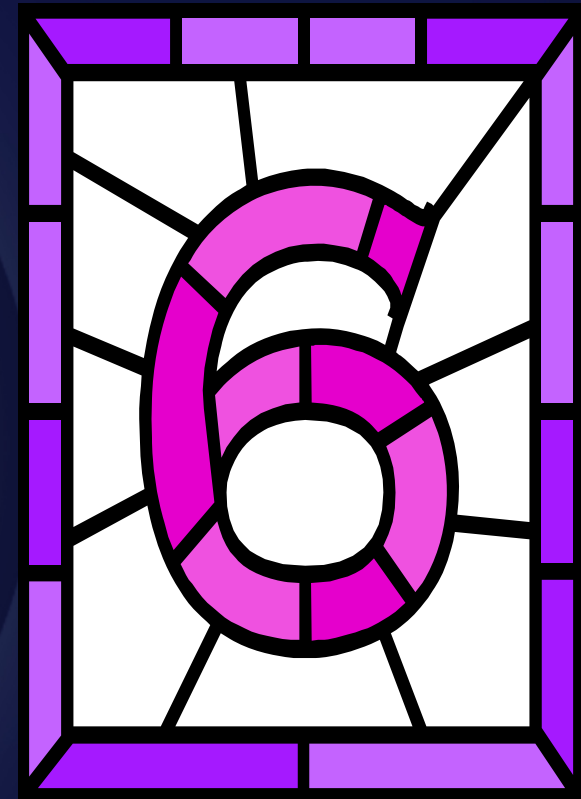
Steps for Starting a Practice

-  **Select a Practice Location**
-  **Decide Whether to Lease or Purchase Space**



Steps for Starting a Practice

- **Acquire Supplies, Equipment and Furniture**
 - ✎ Vendor selection
 - ✎ Rent or purchase
 - ✎ Obtain quotes and references



Steps for Starting a Practice

- **Plan For Technology Needs**
 - Basic IT and technology needs
 - Electronic Health Records



Steps for Starting a Practice

- **Billing and Collections**
 - ✎ In-house or outsource



Steps to Starting a Practice

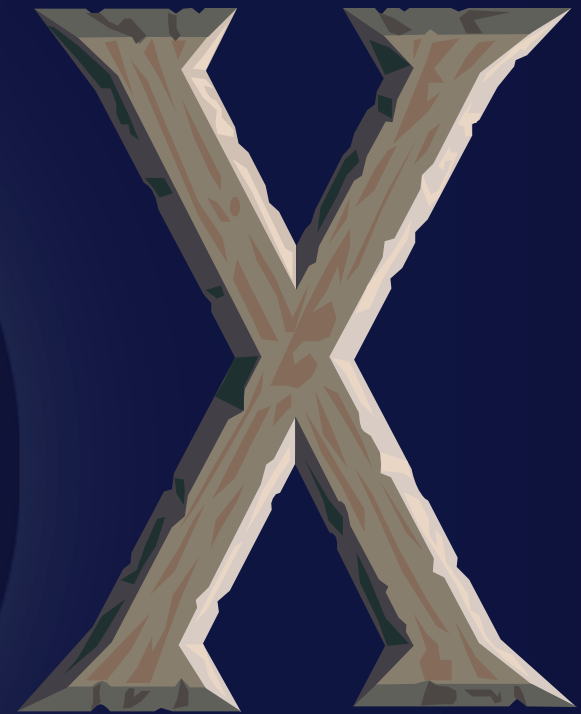
- **Marketing**

- ✎ Establish a website
- ✎ Trade advertisements
- ✎ Consumer advertisements
- ✎ Others



Steps to Starting a Practice

- **Human Resources**
 - Policies
 - Contractual arrangements
 - Benefits
 - Payroll processing
 - Other issues



Choice of Entity

- Benefits of Operating Through an Entity
 - Asset protection
 - Limitations for professionals
 - Professionals eligible for professional entities
 - Physicians
 - Psychologists
 - Licensed professional counselors
 - Licensed social workers
 - Licensed marital and family therapists
 - Licensed occupational therapists

Choice of Entity

- Most Common Entities Used:
 - Professional corporation
 - Separate tax at entity level and owner level unless election made
 - Professional limited liability company
 - Taxable only at owner level, not at entity level
 - Key considerations
 - Desired benefits for owners
 - Employment tax issues
 - Capital needs

Insurance Considerations

- Types of Coverage Needed
 - ✎ Professional liability
 - ✎ Occurrence vs. claims made
 - ✎ Tail coverage issues
 - ✎ General liability
 - ✎ Property
 - ✎ Workers compensation
- Coverage and liability limits
 - ✎ Exclusions
 - ✎ Retainage

Staffing Issues

- Key Considerations
 - “At will” or contractual relationship
 - Independent contractor v. employee
 - IRS guidelines control
 - Employment tax implications
 - Policies and procedures
 - Discrimination issues

Overview of Fraud and Abuse Laws

- Anti-Kickback Laws
- Stark Law



“Stark Law”: 42 U.S.C. § 1395nn

- Prohibits a physician from making a referral to an entity for the furnishing of a designated health service if the physician or a member of the physician’s family has a financial relationship with the entity
- No intent requirement; absolute referral prohibition
- Reasons for Stark Law




Stark Law

- 📖 “Financial relationship” includes both ownership and compensation relationships
- 📖 “Referral” includes any plan of care which includes the order for the service








Stark Law

Prohibits Direct and Indirect Relationships

-  DHS provider can receive payment unless it has actual knowledge of indirect relationship with referring physician, or acts in reckless disregard or deliberate ignorance of relationship






Stark Law

“Designated Health Services”

-  Clinical laboratory services
-  Inpatient/Outpatient hospital services
-  Physical therapy services
-  Occupational therapy services
-  Radiology (including MRI, CT, PET and ultrasound)
-  Radiation therapy services and supplies
-  Durable medical equipment and supplies

Stark Law

 **Implicated By Any Physician Ownership Interest In or Compensation Arrangement With DHS entities:**

-  Service agreements
-  Lease arrangements
-  Purchase/discount arrangements
-  Joint ventures
-  Loans




Stark Law

Numerous Exceptions to Stark Law Prohibition, Including:

-  In-office ancillary service exception for individual physicians or “group” practices





Stark Law

Key Requirements for “Group” Practice:

-  One billing number
-  Income from DHS not allocated based upon the referring physician
-  “Same or centralized” billing requirement

Stark Law

Penalties

-  Denial of Medicare claims
-  Refund of any amount received
-  \$15,000 per service wrongfully billed
-  \$100,000 for each circumvention scheme

Facility and Equipment Leases

Effective October 1, 2009:

- 📖 Percentage rental rates prohibited
- 📖 "Per click" rental rates prohibited if referrals involved



Facility and Equipment Leases

Options:

- ✎ Use fixed price leases
- ✎ Full-time or time-based block leases
- ✎ Provide services rather than equipment



Permissible Percentage-Based Arrangements

- 📖 Management agreements
- 📖 Physician employment and independent contractor arrangements
- 📖 Professional services only










Federal Anti-Kickback Statute

- 📖 Criminal statute that prohibits payments as inducement for refunds of federal healthcare program beneficiaries
- 📖 Implicated by any payments/benefits given to increase Medicare/Medicaid patients
- 📖 Examples









Federal Anti-Kickback Statute

Statute May Apply To:

-  Professional service arrangements
-  Lease arrangements
-  Vendor agreements
-  Joint ventures of services
-  Purchases and sales of businesses
-  Waivers of co-payments/deductibles
-  Marketing activities





Federal Anti-Kickback Statute

Safe-Harbor Protection For:

-  Employment arrangements
-  Physician recruitment
-  Independent contractor arrangements
-  Real estate and equipment leases
-  Joint ventures
-  Malpractice insurance subsidies

Federal Anti-Kickback Statute

Penalties for Violations

-  A criminal fine of up to \$25,000 per violation
-  Imprisonment for up to 5 years
-  Exclusion from government health care programs
-  Civil fines

Oklahoma Anti-Kickback Law

- 📖 63 O. S. 1-742 prohibits payments as inducement for the referral of any health care business
 - ✍ Not limited to Medicare/Medicaid and other government programs
- 📖 Arrangements that meet federal “safe harbor” regulations also protected under state statute
- 📖 Penalties include fines of between \$500 and \$2,000 per violation; loss of license

Contracting Issues

- Contracting with other providers
- Contracting with Medicare, Medicaid, managed care companies and other payers
- Lease arrangements and management agreements

Privacy and Security Issues


 Health Insurance Portability and
Accountability Act

 Enacted in 1996

HIPAA Objectives

 **Transaction Standards:** Enforce standards for health information

 October 16, 2003

 **Privacy and Security Standards:**
Protect health information from inappropriate use and disclosure and facilitate appropriate access


 April 14, 2003 (Privacy)

 April 21, 2005 (Security)

Covered Entities






- 📖 Health Plans
- 📖 Healthcare Clearinghouses
- 📖 **Healthcare Providers** (but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard)

Health Care Provider Definition

 A provider of services (as defined in 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business. 45 CFR 160.103



Policies and Procedures

 **As Covered Entities, Providers Should Have:**

-  NPP
-  Policies on required and permitted uses and disclosures
-  HIPAA compliant authorization
-  Policies implementing administrative requirements and patient rights
-  Business Associate Contract


Privacy - Basic Principle

 **Covered Entity May Not Use or Disclose PHI, except either**

-  As the Privacy Rule permits or requires; or
-  As the individual who is the subject of the information (or the personal representative) authorizes in writing.

What Information Is Protected?

Protected Health Information

-  All “individually identifiable health information” held or transmitted by a covered entity.





Covered Information

Relates to the past, present, or future physical or **mental health condition** of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.

Required Disclosures

Only 2 Required Disclosures:

-  To individuals, when they request access; and
-  To HHS when it is undertaking a compliance investigation or review.

OSDH Authorization

 Standard authorization form:

 http://www.ok.gov/health/Organization/HIPAA_Privacy_Rules/Oklahoma_Standard_Authorization_Forms.html.

|



Required Disclosures – Exception

Psychotherapy Notes

- Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are **separated** from the rest of the individual's medical record.

Oklahoma Patient Access Provisions

76 O.S. § 19 and 20

-  Patient has right to access his/her PHI
-  Sets forth complete waiver of privilege on PHI, to extent a patient brings suit against health care provider

Charge for Medical Record Copies

76 O.S. § 19

- ✍ \$1.00 for the first page and \$0.50 for each subsequent page
- ✍ \$5.00 or the actual cost of reproduction, whichever is less for x-rays or other photograph or image

Oklahoma Law – Mental Health Records

43A O.S. § 1-109

- ✎ Applies to mental health and drug or alcohol abuse treatment information
- ✎ Amended to be consistent with HIPAA in 2004, 2006 and 2008




Oklahoma Physician and Psychotherapist-Patient Privilege

12 O.S. § 2503

- ✍ Gives patient right to prevent disclosure of patient's PHI
 - Health care providers must protect patient's privilege

Oklahoma Privilege

Exceptions to Privilege Where:

-  Disclosure relates to assessment of need for hospitalization for mental illness;
-  Information relates to a court-ordered examination of the patient; or
-  The information is relevant to the physical, mental or emotional condition of the patient in a proceeding in which the patient relies on the condition as an element of his claim or defense

Permitted Uses and Disclosures

 Individuals

 Treatment, Payment and Health Care Operations

 Opportunity to Agree or Object

Permitted Uses and Disclosures

📖 Public interest and benefit activities



Public Interest and Benefit Activities

- 📖 Required by law
- 📖 Victims of abuse, neglect or domestic violence
- 📖 Health oversight activities
- 📖 Judicial and administrative proceedings;
- 📖 Law enforcement purposes

Law Enforcement Purposes Unique Mental Health Issue



Identify or apprehend an individual who as admitted participation in a violent crime



Limited information



Admission was NOT made in the course of or based on the individual's request for therapy, counseling, or treatment related to the propensity to commit this type of violent act. (164.512(j)(1)(ii)(A))



Law Enforcement – Threat of Harm



A covered entity is permitted to disclose PHI if it has a good faith belief that the disclosure



Is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others; and



Is to a person (s) reasonably able to prevent or lessen the threat.



OCR Example



Consistent with other law and ethical standards, a mental health provider whose teenage patient has made a credible threat to inflict serious and imminent bodily harm on one or more fellow students may alert law enforcement, a parent or other family members, school administrators or campus police, or others the provider believes may be able to prevent or lessen the chance of harm.


Minimum Necessary

- 📖 A covered entity must make reasonable efforts to use, disclose and request only the minimum amount of PHI needed to accomplish the intended purpose of the use, disclosure or request.

Business Associates



Definition

-  A person or organization, other than a member of the CE's workforce, that performs activities on behalf of, or provides services to, a CE that involve the use or disclosure of PHI.



Business Associate Contract

- 📖 Model language for business associate good starting point
- 📖 Need to add indemnification; termination rights
- 📖 Need to address state law issues

Patient Rights

 Notice of Privacy Practices

 Access

 Amendment



Patient Rights (2)

 Disclosure Accounting

 Restriction Request

 Alternative Means of Communication

Disclosure Restriction HITECH amendment

- 📖 Covered Entities are *required* to accept a restriction on disclosure to a health plan for payment or operation purposes if:
 - ✍ The information pertains *only* to a healthcare item or service that the individual has paid for out of pocket in full;
 - ✍ Unless the disclosure is otherwise required by law.

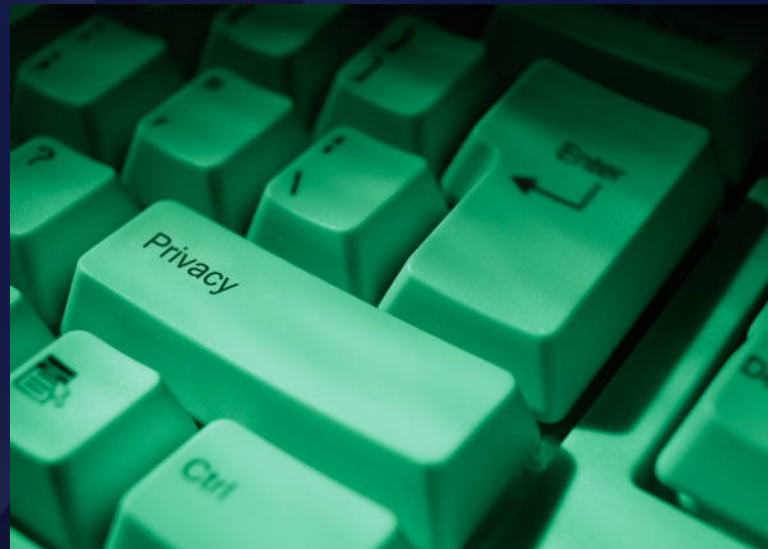
Administrative Requirements

📖 Privacy Policies and Procedures

📖 Privacy Officer

📖 Training

📖 Mitigation



Administrative Requirements

 Data Safeguards

 Complaints

 Retaliation and Waiver

 Record Retention

HIPAA Security Standards

- 📖 Covered entities must protect the confidentiality, integrity and availability of **electronic** protected health information (E-PHI).
- 📖 Requirements: Implement administrative, physical and technical safeguards to protect electronic protected health information in their care.

HIPAA Security Standards

- 📖 Must conduct a risk analysis.
- 📖 Must document security decisions in light of
 - ✎ Risk analysis
 - ✎ Size
 - ✎ Complexity and capabilities
 - ✎ Cost

HIPAA Security Standards



Flexible



Scalable



Technology
Neutral



Comprehensive



HIPAA Security Safeguards

Administrative

 9 standards/12 R/10 A

Physical

 4 standards/4 R/6 A

● Technical

 5 standards/4 R/5 A

Administrative

Security Management Process

-  Risk Analysis (R)
-  Risk Management (R)
-  Sanction Policy (R)
-  Information System Activity Review (R)

Administrative




- 📖 Assigned Security Responsibility (R)
- 📖 Workforce Security
 - ✍️ Authorization and/or Supervision (A)
 - ✍️ Workforce Clearance Procedure Termination Procedures (A)

Administrative

- 📖 Security Incident Procedures
 - ✍️ Response and reporting (R)
- 📖 Contingency Plan
 - ✍️ Data backup plan (R)
 - ✍️ Disaster recovery (R)

Physical

Facility Access Controls





-  Contingency operations (A)
-  Facility security plan (A)
-  Maintenance records (A)

Workstation Use (R)

Workstation Security (R)

Technical

Access Control

-  Unique user identification (R)
-  Emergency access procedure (R)
-  Automatic logoff (A)
-  Encryption and decryption (A)



Security Implementation

- 📖 Have a strong password policy.
- 📖 Pay attention to physical security, preventing easy access to hardware and ePHI.

Security Implementation

 Document security decisions

 Train staff

 Test on ongoing basis

Security Implementation

- 📖 Enforce sanctions
- 📖 Make sure policies represent actual practice
- 📖 Backup regularly

Security Implementation

Audit

Make sure remote users enable security controls

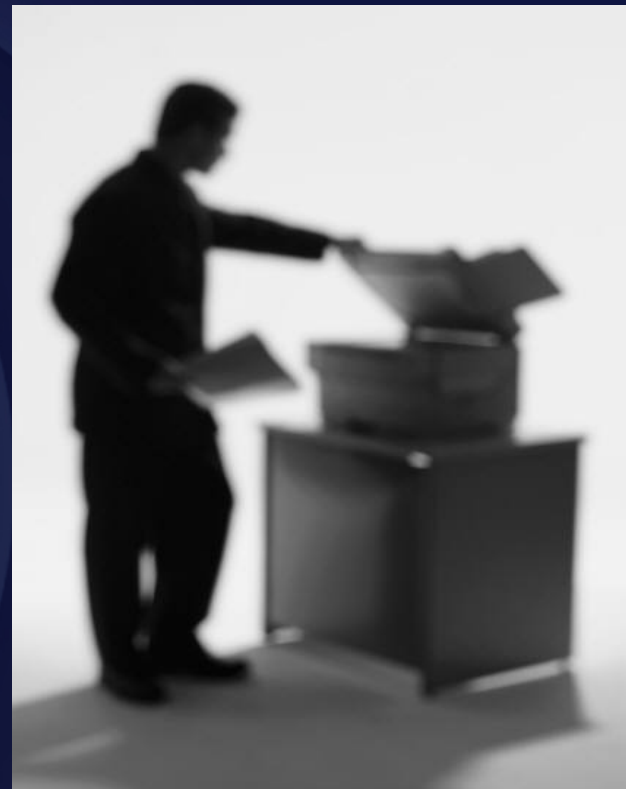
 Laptop alarms

 Cable locks

 Automatic log-offs

Copy Machines

- 📖 Data stored on machines
- 📖 Ensure that it is destroyed or erased when purchasing or leasing new machine



Enforcement

- 📖 Increased penalties
- 📖 Criminal penalties apply directly to employees, as well as the organization
- 📖 Civil enforcement jurisdiction extended to State attorney generals



Tiered Civil Penalty Structure

- 📖 Apply to any privacy or security violations
- 📖 Apply to covered entities and business associates
- 📖 New tiered-penalty structure based on the level of knowledge of the violation


Civil Penalties

Without Knowledge

-  \$100 - \$50,000 per violation, not to exceed
-  \$25,000 - \$1.5 million per calendar year for all violations of an identical requirement

Civil Penalties

Reasonable Cause and Not to Willful Neglect:

-  \$1,000 - \$50,000 per violation, not to exceed \$100,000 - \$1.5 million per calendar year for all violations of an identical requirement

Civil Penalties




Willful Neglect and the Failure to Comply is Corrected Within 30 days:

- ✎ \$10,000 - \$50,000 per violation, not to exceed \$250,000 - \$1.5 million per calendar year for all violations of the same requirements

Civil Penalties

Willful Neglect and the Violation Is Not Corrected Within 30 days:

-  \$50,000 - \$1.5 million per violation, not to exceed \$1.5 million per calendar year for all violations of a identical requirement

Criminal Penalties

- 📖 Knowing violations: up to \$50,000 in fines and 1 year in prison
- 📖 False pretenses: up to \$100,000, with 5 years in prison
- 📖 Intent to sell: \$250,000 and 10 years in prison





Retention

How Long Do I Need To Keep Medical Records?

-  No statute
-  Based on statute of limitations and risk management principles

HITECH Incentives

 Health Information Technology for Economic and Clinical Health (“HITECH”)

-  Part of American Recovery and Reinvestment Act of 2009
-  \$19 billion for E.H.R. implementation

Eligible Professionals Medicare

- 📖 Doctor of medicine or osteopathy
- 📖 Doctor of dental surgery
- 📖 Doctor of podiatry
- 📖 Doctor of optometry
- 📖 Chiropractor



Eligible Professionals Medicaid

- 📖 Physicians
- 📖 Nurse practitioner
- 📖 Certified nurse-midwife
- 📖 Dentist
- 📖 Physician assistant who practices in FQHC or RHC



HITECH Website



<https://www.cms.gov/EHRIncentivePrograms>



Incentive Basics

- 📖 Eligible professionals can receive incentive payments over 5 year period if they demonstrate
 - ✍ Meaningful use of
 - ✍ Certified technology.

Amount of Payments

 Medicare – up to \$44,000

 Medicaid – up to \$63,750 (6 years)

Implementing E.H.R.

- 📖 Assess Vendors
- 📖 Assess E.H.R. functions and features
- 📖 Negotiate
- 📖 Execute agreement and implement

Contracting Issues

- 📖 What are we acquiring?
- 📖 What are we paying for?
- 📖 How to assure our requirements will be met?
- 📖 What happens if the product fails?

Contracting Issues

 Software

 Hardware

 Professional Services

 Support and maintenance

Payment Terms

- 📖 By the calendar vs. achievement of milestones, i.e., “pay for performance”
- 📖 Milestone payments keep provider in control

Deliverables/Scope

- 📖 Requirements definitions
- 📖 Service provider
- 📖 Timelines/measurements
- 📖 Specific roles/responsibilities
- 📖 Obligations for maintenance, updates and repairs

Key Point



***EVERYTHING IS
NEGOTIABLE***



Key Provisions

Definitions

License Terms

Warranties/Support

Limitation of Liability/Indemnification






Testing/Acceptance

Pricing/Penalties

Termination

Conclusion

Avoiding Top 5 Mistakes

-  Set realistic time line to launch practice
-  Have a realistic business plan and budget and stick to it
-  Hire the right people
-  Choose the right E.H.R./PM for your practice
-  Don't try to do it alone. Seek help from qualified consultants, lawyers, accountants, etc

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