



Court Orders, Subpoenas, and Confidential Health Records

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1

Presentation Roadmap

- Overview of Medical Confidentiality Laws
- A Closer Look
 - HIPAA
 - 42 C.F.R. 2
 - G.S. 130A-143
- Questions



2

A Quick Note

There's a lot of text on these slides!

No expectation that you read it all- it's just here for your reference later



3

Overview of
Medical
Confidentiality
Laws



4

4

Medical Confidentiality Laws Covered in this Presentation

Name/description of law	What does it protect?	Legal citation
HIPAA	Protected health information (PHI)	45 C.F.R. Parts 160, 162, 164
42 C.F.R. Part 2	Substance use disorder (SUD) treatment records	42 C.F.R. Part 2
G.S. 130A-143	Information about a person who has or may have a reportable communicable disease or condition	G.S. 130A-143 (for list of reportable diseases and conditions, see 10A N.C.A.C. 41A .0101)

Other Confidentiality Laws

(this is not an exhaustive list)

Name/description of law	What does it protect?	Legal citation
Physician-patient privilege	Communications between physician and patient. *Similar privilege for other health professionals- see G.S. 8-53 et seq.	G.S. 8-53
Local health department confidentiality law	Patient medical information held by local health departments; child lead investigation information collected under G.S. 130A, Article 5, Part 4	G.S. 130A-12
Birth certificate confidentiality	Birth certificate information and records	G.S. 130A, Article 4
FERPA	Education records (including most school health records- e.g., school nurse records)	20 U.S.C. 1232g; 34 C.F.R. 99
Title X family planning confidentiality	Records related to Title X funded family planning services (applies to most local health departments)	42 C.F.R. 59.10
North Carolina mental and behavioral health and IDD law	Information about individuals receiving services for IDD, mental, or behavioral health	G.S. 122C
Minor's consent confidentiality law	Information about services provided to a minor patient under G.S. 90-21.5(a)	G.S. 90-21.4(b)

5

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**Remember:
more than one
law may apply!**

**Most common combination:
HIPAA + one or more other medical
confidentiality laws**

6

HIPAA

7

7

HIPAA Is Not a Roadblock

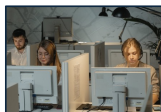


- Myth: HIPAA = stop, do not pass go
 - In fact, HIPAA is a flexible law
 - Many types of permitted disclosures of protected information under HIPAA
- **You can almost always get the information you need under HIPAA**
 - You just have to know which permitted disclosure will get you there
 - Example: a court order!

8

8

Who Must Comply with HIPAA?



A **covered entity** (CE) is the name for entities that are regulated- or "covered"- by HIPAA and must comply with HIPAA's requirements.

There are 3 types of CEs:

- Health plan
 - E.g., Medicaid, Aetna, BCBS, etc.
- Covered health care provider
 - Most, but not all, health professionals
- Health care clearinghouse
 - Clean/standardize data, often for billing purposes

* A CE's "business associate" (BA) must also comply with HIPAA.

9

9

HIPAA Protects...

...protected health information (PHI)

- PHI is any individually identifiable information or records in any form (electronic, paper, spoken) created or maintained by a CE that relates to any of the following:
 - An individual's physical or mental health status or condition,
 - Provision of health care to an individual, or
 - Payment for the provision of health care to the individual.



10

PHI: Common Misconceptions

Common misconception: if there's no "medical/health information" included, it's not PHI. *In fact*, if it is information held by a CE and it includes any of these 18 identifiers, then it's PHI:

•Name	•SSN	•IP addresses
•Geographic information smaller than state (ex: an address or county of residence)- first 3 digits of zip code okay to share, but only if that geographic area has 20k+ people	•Medical record number	•Biometric identifiers (ex: finger and voice prints)
•All elements of date except year (ex: birth date, discharge date)	•Health plan (insurance) numbers	•Photographic images
•Phone number	•Account numbers	•Any other unique identifying number, characteristic, or code (ex: diagnosis for a very, very rare condition)
•Fax number	•Certificate/license numbers	
•Email address	•Vehicle identifiers and other serial numbers (ex: license plate numbers)	
	•Device identifiers and serial numbers	
	•URLs	

11

11

PHI: Exceptions to the Definition

School records covered by FERPA

Individually identifiable health information in school records that are covered by the Family Educational Rights and Privacy Act (FERPA) is not PHI under HIPAA.

Employment records

Individually identifiable health information in employment records that are held by a covered entity in its capacity as an employer is not PHI under HIPAA.

Deceased individuals

Individually identifiable health information that pertains to a person who has been deceased for more than 50 years is not PHI under HIPAA.

12

12

Permitted Disclosures

The “keys” that unlock and enable the lawful sharing of PHI



13

Sharing with Permission

45 C.F.R. 164.508

Covered entity (CE) can always share PHI with permission

- HIPAA calls this an “**authorization**”
 - Must be written and include certain elements
- Permission is given by the patient or their personal representative
 - HIPAA defers to state law on who is a personal representative (e.g., legal guardian, child’s parent)

How it works: Patient/personal rep signs authorization → gives authorization to CE → CE sends records to counsel for use in legal case

14

14

Subpoenas

45 C.F.R. 164.512(e)(ii)

PHI can be shared pursuant to a subpoena, but only if the CE has “satisfactory assurance”:

- From the requestor of the PHI that requestor made reasonable efforts to notify the subject of the PHI of the request for his/her records, **or**
- From the requestor that they made reasonable efforts to secure a qualified protective order

See 45 C.F.R. 164.512(e)(ii) for more on “satisfactory assurance,” “reasonable efforts,” and “qualified protective order”

In practice, you may find that CEs don’t like a subpoena- it makes them nervous! They would much prefer a court order. Which brings us to...



15

15



Court Orders

45 C.F.R. 164.512(e)(1)(i) and 164.512(a)

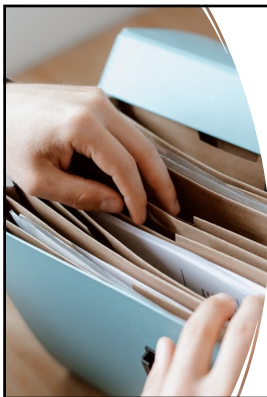
HIPAA allows sharing PHI in response a court order

Why might a CE prefer a court order?

- Much more straightforward- CE doesn't have to obtain any "satisfactory assurances," etc.
- Can be easiest approach if multiple confidentiality laws apply
 - Most medical confidentiality laws allow disclosure pursuant to a court order, but not all allow disclosure in response to a subpoena

16

16



HIPAA Doesn't "Follow" the PHI

If a CE discloses PHI to a person or entity that is *not* also a CE (that is, not subject to HIPAA) then the information is not PHI in the recipient's hands

What this means for you: If a CE discloses PHI to an attorney or the court, it's not protected by HIPAA anymore- can be shared and used as permitted by any other applicable laws

17

17

42 C.F.R. 2

18

18

Who is Subject to 42 C.F.R. 2?

- Certain federally funded health care providers that hold themselves out as providing substance use disorder (SUD) services ("Part 2 programs") and
- Parties who receive SUD information from Part 2 programs ("lawful holders")



19

What Information Does 42 C.F.R. 2 Protect?

- Individually identifying records about a patient that are maintained in connection with provision of services to the patient by a Part 2 program
- **Note:** not *all* SUD-related information is protected by this law. For example, records from an ER about care provided for an overdosing patient are not likely Part 2 records because ERs often aren't Part 2 programs. This ER info would likely be protected by other laws, though, such as HIPAA.



20

42 C.F.R. 2 is Highly Protective

Much more restrictive than HIPAA, for example

Why? Public policy goal of encouraging people to seek care for SUD without fear that information about their SUD diagnosis and care will be used to investigate or penalize them.

21

Can Part 2 SUD Information be Disclosed Based On...?

- ✓ Permission of patient or their legal representative (*certain criteria must be met)
- ✓ A court order (*certain *very detailed* criteria must be met)
- ✗ A subpoena

22

22



Let's Focus on Court Orders

42 C.F.R. 2, Subpart E

There is an entire subpart of the regulations dedicated to Part 2 SUD records and court orders- it's complicated!

23

23

Key Things to Know

42 C.F.R. 2.61, 2.64, 2.65- Court orders, generally

- Court order authorizes, but does not compel, disclosure of Part 2 records. To compel, must also issue a subpoena.
- Regulations include requirements to protect the patient's privacy as much as possible throughout the entire process. For example:
 - Application for court order must use a fake name (John Doe) for the patient
 - Any hearing on the application must be in judge's chambers or other private location
- Court order must include restrictions on use and re-disclosure of the SUD records and other limitations to protect the patient's privacy, which may include putting records under seal

24

24

Key Things to Know

42 C.F.R. 2.64- Criteria for court order for records for noncriminal purposes
(*info below not exhaustive- see regulation for more criteria)

- Can only enter the order if you find "**good cause**," which requires finding that:
 - There's no other effective way of obtaining the information sought, and
 - The public interest and need for the use or disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

25

25

Key Things to Know

42 C.F.R. 2.65- Criteria for court order for records for use in criminal investigation or prosecution of patient (*info below not exhaustive- see regulation for more criteria)

- Can only enter the order if **all five** of the following criteria are met:
 1. The crime involved is extremely serious (e.g., it causes or threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, etc.),
 2. There is reasonable likelihood that the records will provide information of substantial value in the investigation or prosecution,
 3. No other way of obtaining the records is available or effective,
 4. The potential injury to the patient, the physician-patient relationship and ability of the Part 2 program to provide care to other patients is outweighed by the public interest and need for disclosure, **AND**
 5. If the applicant for the court order is law enforcement, then:
 - The holder of the Part 2 records has had the opportunity to be represented by independent counsel, and
 - If the holder of the Part 2 records is a government entity, then it has *in fact* been represented by independent counsel.

26

26

Yes, It's Complicated

But fortunately, the regulations are written in a clear and instructive manner (they even include hypotheticals!).

If you have questions, you can also reach out to SOG



27

27

G.S. 130A-143

28

28

Who Must Comply with G.S. 130A-143?

The law applies to "all information and records, **whether publicly or privately maintained**, that identify a person who has or may have a disease or condition required to be reported" under NC law

- Includes individuals/entities that regularly hold communicable disease information- e.g., health care providers, local health departments, laboratories, school employees, etc.
- ... but also, others who might hold this data: jails/prisons, schools, employers, etc.



29

29

What Information is Protected?

The law applies to "all information and records, whether publicly or privately maintained, **that identify a person who has or may have a disease or condition required to be reported**" under NC law



30

30

What Information is Protected?

Not limited to confirmed cases- includes information about someone who “may have” a disease or condition, such as someone who was exposed but has not yet been diagnosed

Only applies to **reportable** diseases and conditions

31

31

Reportable Diseases

- “Reportable” = by law, must be reported to state/local governmental public health agencies
- See the administrative rules adopted by the NC Commission for Public Health for a full list
 - Look for **10A NCAC 41A .0101**
 - <http://reports.oah.state.nc.us/ncac.asp>
- Ex: HIV infection, Hepatitis C, Ebola, chlamydia, gonorrhea, syphilis, tuberculosis, anthrax, and more
- Does not include: COVID-19, HPV, +

CHAPTER 41A — EPIDEMIOLOGY HEALTH
SUBCHAPTER 41A-1 — COMMUNICABLE DISEASE CONTROL
SECTION 41A-1.01 — COMMUNICABLE DISEASE CONTROL

10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS
(a) The following is a list of communicable diseases and conditions which shall be reported within the time period specified after the disease or condition is normally reported to a case person in Article 1 of Chapter 130A of the North Carolina General Statutes and this Subchapter:

- (1) acquired immune deficiency syndrome (AIDS) — 24 hours
- (2) anisakiasis — 7 days
- (3) anthrax — 7 days
- (4) botulism — 7 days
- (5) brucellosis — 7 days
- (6) chlamydia — 7 days
- (7) diphtheria — 7 days
- (8) enteric fever — 7 days
- (9) hepatitis A — 7 days
- (10) hepatitis B — 7 days
- (11) hepatitis C — 7 days
- (12) HIV infection — 7 days
- (13) infectious mononucleosis — 7 days
- (14) legionnaires disease — 7 days
- (15) listeria — 7 days
- (16) measles — 7 days
- (17) mumps — 7 days
- (18) pertussis — 7 days
- (19) rabies — 7 days
- (20) salmonellosis — 7 days
- (21) shigellosis — 7 days
- (22) syphilis — 7 days
- (23) tetanus — 7 days
- (24) tuberculosis — 7 days
- (25) typhoid fever — 7 days
- (26) varicella — 7 days
- (27) viral hemorrhagic fever — 7 days
- (28) viral hepatitis — 7 days
- (29) whooping cough — 7 days
- (30) yersinia enterocolitica — 7 days
- (31) zoonosis — 7 days
- (32) any other disease or condition which is a reportable communicable disease or condition as determined by the North Carolina General Statutes and this Subchapter.

32

32

Can a Person's Communicable Disease Information Be Disclosed Based On...?

- ✓ Permission of patient or their legal representative (G.S. 130A-143 refers to HIPAA's concept of a legal representative, which defers back to state law- e.g., legal guardian of the person, child's parent)
- ✓ A court order (certain criteria must be met)
- ✓ A subpoena (certain criteria must be met; also, not *all* subpoenas)

33

33

G.S. 130A-143(6): Court Orders + Subpoenas



Release of information may be made pursuant to court order or a subpoena issued by a *judicial official* (read: a magistrate- not any attorney).



Upon request of the person identified in the record, the record shall be reviewed *in camera*.



In the trial, the trial judge may, during the taking of testimony concerning such information, exclude from the courtroom all persons except the officers of the court, the parties and those engaged in the trial of the case.

34

34

Does G.S. 130A-143 “Follow” the Disclosed Communicable Disease Information?

Based on the way the law is written... yes.

Do your best to protect the patient’s privacy

- Use *in camera* review, when possible/requested
- Seal records, if appropriate

35

35

Takeaways

- There are many medical confidentiality laws! More than one can apply at a time. HIPAA will frequently be in the mix.
- HIPAA
 - Flexible, workable- lots of ways to lawfully share information
 - Subpoena okay if criteria are met; CEs often wish you’d issue a court order!
- 42 C.F.R. 2
 - Only applies to certain SUD treatment records (not *all* SUD-related info)
 - Very protective- lots of requirements to issue a court order; subpoena insufficient
- G.S. 130A-143
 - Applies to information about someone who has *or may have* a reportable disease; also applies regardless of who holds the information (even if that’s the court)
 - Court orders and certain subpoenas okay if criteria are met

36

36

Resources

HIPAA

- HHS website: <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>
- UNC SOG Coates' Canons blog (filter by "public health" topic): <https://canons.sog.unc.edu/>

42 C.F.R. 2

- HHS website: <https://www.hhs.gov/hipaa/part-2/index.html>

G.S. 130A-143

- UNC SOG Coates' Canons blog (filter by "public health" topic): <https://canons.sog.unc.edu/>
- "North Carolina Communicable Disease Law," Jill Moore (UNC SOG, 2017), <https://www.sog.unc.edu/publications/books/no-rh-carolina-communicable-disease-law>

Image References

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Questions?

Thank you for your time.

If you have additional questions at a later date, please send me an email or give me call.

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