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THE CONFIDENTIALITY OF SUBSTANCE ABUSE TREATMENT INFORMATION

BASIC SUBSTANCE ABUSE FOR DISTRICT COURT JUDGES
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Applicable Confidentiality Laws

- Federal law governing substance abuse programs—42 CFR Part 2
- State law governing MH/DD/SA providers—GS 122C
- Federal law governing health care providers—45 CFR Parts 160, 164 (HIPAA Privacy Rule)



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Terminology

State MH Law	Privacy Rule	Substance Abuse Law
client	individual	patient
facility	covered entity	program
consent	authorization	consent
confidential information	protected health information	patient identifying information



Is the Information Confidential?

To know when these laws apply, you must know:

- Who is covered by the law?
- What information is protected?
- What is the duty of confidentiality?



Privacy Rule—Covered Health Care Providers

Any health care provider that transmits any health information in electronic form in connection with a HIPAA “transaction”



Privacy Rule—Protected Health Information

PHI is any information

- created or received by a health care provider or other covered entity
- that identifies an individual and
- relates to the
 - physical or mental health of an individual,
 - the provision of health care to an individual, or
 - payment for the provision of health care to an individual



Privacy Rule—Duty

Health care provider may use and disclose PHI only as permitted or required by the privacy rule

- A use or disclosure that is not permitted or required by the rule is prohibited



State Mental Health Law—GS 122C—Covered Providers

Any individual, agency, or company at one location whose primary purpose is to provide services for the care or treatment of mental illness, developmental disabilities, or substance abuse

- Psychiatrists, psychologists, licensed clinical social workers, licensed professional counselors
- Psychiatric hospitals
- LME-MCOs and their contracted providers



State Mental Health Law—Confidential Information

Any information—whether recorded or not—relating to an individual served by a covered provider and received in connection with the performance of any function of the provider



State Mental Health Law—Duty

- No individual having access to confidential information may disclose it except as authorized by the state confidentiality law itself and its implementing regulations.
 - G.S. 122C-51 through -56 and APSM 45-1
- “No individual”



The Case of Jackie Jones

- Court orders Jackie to mental health treatment at Acme Counseling Center as part of a plan to see if she might regain custody of her children. Jackie authorizes Acme to share patient information with DSS “to provide DSS with the information it needs to determine if I have made sufficient progress in treatment so as to regain custody of my children.”
- Must DSS follow G.S. 122C confidentiality with respect to Jackie’s mental health treatment information received from Acme?



Federal Law Governing SUD Records—42 C.F.R Part 2

- Restricts the “use” and “disclosure” of patient information obtained by a “federally assisted” alcohol or drug abuse “program”



“Substance Use Disorder”

A cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems such as impaired control, social impairment, risky use, and pharmacological tolerance and withdrawal.

42 C.F.R. § 2.11

(Does not include tobacco and caffeine.)



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“Program”—Definition One

- An individual or entity (other than a general medical facility) that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment.
 - A private practitioner who provides, and holds herself out as providing, diagnosis and referral for treatment is covered by the regulations even though she does not treat SUD.



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“Program”—Definition Two

- An identified unit *within a general medical facility* that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment
 - If a general hospital has promoted an identified unit, such as a detox unit, to the community as a provider of such services, the identified unit, but not the rest of the general hospital, would be a program



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“Program”—Definition Three

- Personnel *in a general medical facility* whose primary function is the provision of SUD diagnosis, treatment, or referral for treatment and who are identified as such
 - Does not apply to hospital ED staff who refer a patient to the hospital's ICU for an apparent drug overdose unless the *primary* function of such staff is the provision of SUD diagnosis, treatment, or referral for treatment and they are identified as providing such services.

“General Medical Facilities”

- “General medical facility” is not defined in the rule. SAMHSA FAQ says may include:
 - Hospitals
 - Truama centers
 - Federally qualified health centers
 - Practice comprised of primary care providers

Question for Class

- Patient treated for an apparent drug overdose is transferred from ED to a medical floor. A substance abuse counselor visits and evaluates the patient for substance use disorder and possible referral for treatment.
 - Is the hospital ED a “program” under 42 C.F.R. Part 2?
 - Is the substance abuse counselor a “program” under 42 C.F.R. Part 2?

“General Medical Facilities”

- Health care providers who work in these facilities would only be a “program” if they
 - Work in an identified unit within the facility that provides and holds itself out as providing SUD diagnosis, treatment or referral for treatment, or
 - The primary function of the provider is the provision of such services and they are identified as providers of such services.

Question for Class

- Hospital ED treating a trauma patient performs a blood test that identifies cocaine in patient’s blood
 - Does this make the hospital ED a “program” under 42 C.F.R. Part 2?
 - Are the drug test results protected by 42 C.F.R. Part 2?

Covered Information—42 CFR § 2.12(a)

Restrictions on disclosure apply to any info

- that would directly or indirectly identify a “patient”—one who has applied for or been given SUD diagnosis, treatment, or referral for treatment at an SUD program—as having or having had a substance use disorder, and
- is drug or alcohol abuse information obtained by a program
- for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment

Question for Class

- CPS worker investigating report of child abuse or neglect requests access to child's mental health record. Family/social history section of child MH record states that Mom, during intake of child, disclosed that she is "hooked on pain pills."
 - Is the information pertaining to Mom's opiate dependency information protected by 42 C.F.R. 2?



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42 CFR Part 2—Duty

- Prohibits any use or disclosure that is not expressly permitted by the regulations
- No state law may authorize or compel a disclosure prohibited by the federal law



42 CFR Part 2—Applicability of Disclosure Restrictions

Restrictions on disclosure apply to

- Programs
- "Lawful holders" of "patient identifying information"—those who receive covered information from a program and who are notified of the restrictions on disclosure.

42 C.F.R. § 2.32



42 CFR Part 2—Applicability of Use Restrictions

Any information that

- is SUD information obtained by a covered program
- for the purpose of treating substance abuse, making a diagnosis, or making a referral for treatment
- Cannot be used to criminally investigate or prosecute a patient without a court order authorizing the disclosure and use of the information for that purpose
- Applies to anyone who obtains the information from a program regardless of the status of the person or how the information was obtained

42 C.F.R. 2.12



The Case of Jackie Jones

Court orders Jackie to get drug treatment at Acme Drug Treatment Center as part of a plan to see if she might regain custody of her children. Jackie authorizes Acme to share patient information (attendance, progress, urinalysis results, and prognosis) with DSS and the court “to provide DSS and the Court with the information they need to determine if I have made sufficient progress in treatment so as to regain custody of my children.”



The Case of Jackie Jones

1. A law enforcement officer requests information about Jackie from Acme. Officer explains that he is conducting a criminal investigation related to Jackie’s abuse of her children. Can Acme comply with the officer’s request?
2. Instead of going to Acme, the officer goes to DSS and requests information about Jackie that DSS has received from Acme. The officer explains that he is conducting a criminal investigation of Jackie. Can DSS comply with the officer’s request?



Always ask:

1. Is the information confidential under one or more confidentiality laws?
 - Is the entity or person holding the records covered by a confidentiality law?
 - Is the information itself confidential?
2. If so, is there an exception to confidentiality that permits or requires a use or disclosure in the circumstance at hand?
 - A policy exception expressed in law
 - Patient authorization, or
 - Court order



Basic Rule Confidentiality Rule for Providers of SUD Services

To legally disclose confidential information, they need either a

- law
- patient authorization, or
- court order

that permits or requires disclosure under the particular circumstances



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Subpoenas and Court Orders



Subpoenas

- HIPAA privacy rule permits disclosure in response to a subpoena. 45 CFR 164.512(e)
- State law governing MH/DD/SA information (G.S. 122C) does not permit disclosure in response to a subpoena
- Federal law governing SUD treatment information does not permit disclosure response to a subpoena



Court Orders—122C and HIPAA

- GS 122C-54(a) requires a facility to disclose in response to a court order
- HIPAA, 45 CFR 164.512(e), permits a covered entity to disclose in response to a court order
- Neither law expresses any particular procedure, standard, or findings



Court Orders—Evidentiary Privileges—GS 8-53.3, et seq.

A court may compel disclosure of privileged information if, in the court's opinion, disclosure is "necessary to the proper administration of justice"



Court Orders—42 CFR 2

There are four kinds of court orders, depending on the purpose for the disclosure

- Any purpose other than for criminal investigation or prosecution. § 2.64
- To criminally investigate or prosecute a patient. § 2.65
- To criminally investigate or prosecute a program or person holding records. § 2.66
- To place an undercover agent or informant in a program. § 2.67



Court Order to Disclose SUD Info

- Judicial review of records (inc. hearing, oral argument) must be *in camera*
- Court must find “good cause” for disclosure
- Court must limit disclosure to
 - Parts of record that are essential to fulfilling the objective of the order
 - Persons whose need for information forms the basis for the order



“Good Cause”—Disclosures for Non-Criminal Purposes

To order disclosure, the court must find that:

1. Other ways of obtaining the information are not available or would not be effective
2. The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the program’s ability serve other patients.

42 CFR 2.64, 2.65



In re E.P., M.P. 183 N.C. App. 301, 645 S.E.2d 772 (2007)

SUD records of parents were not relevant during the adjudication stage of neglect and dependency proceeding. County DSS had sufficient evidence of mother and father's substance abuse without including their substance abuse records, and nothing indicated that the records would provide additional evidence regarding the neglect and dependency of the children.



"Good Cause"-Criminal Investigation or Prosecution of Patient

3. Crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault w/deadly weapon, and child abuse and neglect
4. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution
5. Person holding records has been given notice and opportunity to appear and be represented by counsel independent of patient.

42 CFR 2.65



The Case of Jackie Jones

DSS is preparing for a hearing to determine if Jackie will be reunited with children. DSS wants to call Jackie's SA counselor to testify about Jackie's prognosis and things Jackie told the counselor. However, Jackie has revoked her consent to disclose to DSS and the Court. DSS subpoenas Jackie's counselor to appear and testify.

1. Can the SA counselor testify at the hearing?
2. Can the court order disclosure?
3. If so, what findings must the court make?



Court Order—Confidential Communications § 2.63—Only if:

- Necessary to the investigation of an extremely serious crime (see 2.65), or
- Necessary to protect against an existing threat to life or of serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties, or
- In connection with litigation or administrative proceeding in which patient offers testimony or other evidence pertaining to content of confidential communications



Questions?



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