Confidentiality Laws Governing Substance Abuse Treatment Records

North Carolina Judicial College
Basic Substance Abuse for District Court Judges

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Part I: Applicable Confidentiality Laws

I. State mental health law - G.S. 122C: The Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, G.S. Chapter 122C, governs providers of mental health, developmental disabilities, and substance abuse services (MH/DD/SA services).

A. Covered providers: Any "facility"—meaning any individual, agency, company, area authority (local management entity), or state facility—at one location *whose primary purpose* is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers.[1]

B. Confidential information: Any information, whether recorded or not, relating to an individual served by a facility and received in connection with the performance of any function of the facility is confidential and may not be disclosed except as authorized by G.S. 122C[2] and implementing regulations at 10A NCAC 26B.[3]

C. Duty: No individual having access to confidential information may disclose it except as authorized by G.S. 122C and the confidentiality rules.[4]

1. Unauthorized disclosure of confidential information is a Class 3 misdemeanor punishable by a fine up to $500.[5]
2. Employees of area and state facilities that are governed by the State Personnel Act are subject to suspension, dismissal, or other disciplinary action if they disclose information in violation of G.S. 122C and the confidentiality rules at 10A NCAC 26B.[6]
3. The unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee disclosing the records.[7]

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[1]. *See* G.S. 122C-3(14) for the full definition, including examples, of "facilities".

[2] The pertinent statutes are G.S. 122C-51 through 122C-56.

[3] These regulations apply to area authorities (local management entities), state facilities, and the providers that contract with area and state facilities. The regulations also appear in a publication of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, entitled "Confidentiality Rules" (APSM 45-1).

[4]See G.S. 122C-52(b). Area and state facilities or individuals with access to or control over confidential information must take affirmative measures to safeguard such information in accordance with the state confidentiality rules, which require a secure place for storage of records, written policies and procedures regarding controlled access to paper and electronic records, and staff supervision of client review of records. See 10A NCAC 26B .0102 and .0107.

[5] See G.S. 122C-52(e).

[6] See 10 NCAC 26B .0104.

[7] The unauthorized disclosure of a patient's confidences by a physician, psychiatrist, psychologist, marital and family therapist, or other health care provider constitutes medical malpractice. *See* Watts v. Cumberland County Hosp.

II. HIPAA[8] privacy rule – 45 CFR Parts 160, 164: The federal "privacy rule"[9]governs the privacy of health information.

A. Covered health care providers: Any "health care provider" that transmits any health information in electronic form in connection with a HIPAA transaction.[10] "Health care provider" is defined broadly to include any person who, in the normal course of business, furnishes, bills or is paid for care, services, or supplies related to the health of the individual.[11]

B. Protected health information: health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that

1. is created or received by a health care provider, health plan, or health care clearing house
2. identifies an individual (or with respect to which there is a reasonable basis to believe the information can be used to identify an individual), and
3. relates to the past, present, or future physical or mental health or 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[12]

C. Duty: A covered entity, including a covered health care provider, may use and disclose PHI only as permitted or required by the privacy rule.

1. **Monetary penalties.** The Office of Civil Rights (OCR) in U.S. DHHS enforces the privacy rule, investigates complaints, conducts compliance reviews, and may impose civil monetary penalties for violations. State attorneys' general may bring a civil action to enforce the HIPAA Privacy Rule in order to (1) enjoin further violations or (2) obtain damages for individuals harmed (calculated pursuant to a statutory formula).
2. **Filing complaint**. Any person or organization may file a complaint with OCR by mail or electronically. Individuals may also file a complaint with the covered entity.

III. Federal substance abuse records law - 42 C.F.R. Part 2: Restricts the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. (42 U.S.C. 290dd-2; 42 C.F.R. Part 2).

System, Inc., 75 N.C. App. 1, 9-11, 330 S.E.2d 242, 248-250 (1985) (holding that malpractice consists of any professional misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

[8] "HIPAA" stands for The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d-1320d(8). This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

[9] The term "privacy rule" in this outline refers to the final rule published in Volume 67, Number 157 of the Federal Register on August 14, 2002.

[10] 45 CFR 160.103, 164.500. "Transaction" means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to determine if an enrollee is covered by the health plan.

[11] 45 CFR 160.103.

[12] See the definitions of "protected health information" and "individually identifiable health information" at 45 CFR 160.103.

A. Covered programs: The federal law applies to any person or organization that, in whole or in part, holds itself out as providing and does provide alcohol or drug abuse diagnosis, treatment, or referral for treatment with direct or indirect federal financial assistance.[13] Applies to:

1. Any free-standing substance abuse facility or independent substance abuse program, inc.,
    - an outpatient substance abuse clinic
    - a residential drug or alcohol treatment facility
    - an independent physician or other therapist with a specialty in substance abuse treatment or diagnosis
2. Any part of a broader organization that is identified as providing SA services, e.g.,
    - a school-based program, but not an entire school or school system;
    - a detox unit or substance abuse program of a general hospital, but not the entire hospital.[14]
3. Not only treatment programs, but also programs providing diagnosis or referral for treatment:
    - employee assistance programs that provide no treatment but evaluate whether a person has a substance abuse problem and then refer the person to treatment at an independent program.
    - a managed care company that evaluates whether a person has a drug or alcohol problem and then refers the person to treatment at an independent program that has a contract with the managed care company.

B. Confidential information: The federal prohibition against *disclosure*, except where permitted by the federal law, applies to any information, whether recorded or not, that:

1. would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser
2. is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program
3. for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

    "Identify" means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

[13] See 42 CFR 2.11 for definition of "program." The regulations apply only to programs that receive, directly or indirectly, federal financial assistance, including programs that receive federal grants or Medicare or Medicaid reimbursement; through federal revenue sharing or other forms of assistance, receive federal funds which could be (but are not necessarily) spent for an alcohol or drug abuse program (e.g., programs operated or funded by state or local government); are licensed or certified by the federal government (e.g., certification of provider status under the Medicare program, authorization to conduct methadone treatment, or registration to dispense a controlled substance for substance abuse treatment); or organizations exempt from federal taxation.

[14] A general medical care facility (general hospital) is not a "program" unless it has an identified unit that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment, or has staff whose primary function is to provide substance abuse services and who are identified as such providers. In this case, only the identified unit or staff would constitute a "program."

"Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition that is identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment.

a. Includes any record of a diagnosis prepared in connection with treatment or referral for treatment of substance abuse but which is not so used.
b. Does not include a diagnosis that is made solely for the purpose of providing evidence for use by law enforcement authorities, or a diagnosis of drug overdose or alcohol intoxication that clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

C. Duty imposed by federal substance abuse records law. The regulations prohibit the disclosure *and* use of patient records except as permitted by the regulations themselves. Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to $500 for first offense, up to $5,000 for each subsequent offense).[15]

D. Restrictions on *Use* of Information to Bring Criminal Charges. In addition to restricting disclosure, the federal regulations restrict the "use" of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. Any information which is

1. alcohol or drug abuse information obtained by a federally assisted substance abuse program
2. for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the 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. See 42 C.F. R. 2.12(2) and 2.65.

E. Applicability to recipients of information.

1. **Use:** The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct a criminal investigation of a patient applies to any person who obtains that information from a federally assisted substance abuse program regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations. Without a court order authorizing use for this purpose, the information cannot be so used.

2. **Disclosure:** The restrictions on disclosure apply to persons who receive records directly from a substance abuse program and who are notified of the restrictions on redisclosure of the records. See 42 C.F.R. 2.12(d) and 2.32. Such notice must accompany any disclosure made with the patient's written consent.

[15] A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. *See* 42 C.F.R. §§ 2.3 and 2.16.

IV. Relationship of federal substance abuse law to state law.

A. 42 C.F.R 2 controls where it is more restrictive: No state law may authorize or compel any disclosure prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that the 42 CFR 2 prohibits, 42 CFR 2 must be followed. 42 C.F.R. § 2.20.

Example: The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code. G.S.7B-302. This state law says that the director of social services (or the director's representative) may make a *written* demand for any information or reports, whether or not confidential, that may in the director's opinion be relevant to *the assessment* or to *the provision of protective services*. Upon such demand, the law requires an agency to provide access to and copies of confidential information to the extent permitted by federal law.

- State mental health law says that providers are required to disclose confidential information when necessary to comply with G.S. 7B-302. See G.S. 122C-54(h).
- No provision of the federal substance abuse law permits disclosure of patient identifying information for purposes of complying with G.S. 7B-302. Thus, absent the patient's written *consent* or a *court order* issued pursuant to 42 C.F.R. 2, the federal law prohibits disclosure of confidential information in response to a DSS demand for information under G.S. 7B-302.

B. State law controls where it is more restrictive: The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.

E. Class Exercise—Patient-identifying information: The restrictions on disclosure apply only to information that would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as a substance abuser or a recipient of substance abuse services. A substance abuse program may provide information about a particular, identified person if doing so would not identify a patient, directly or indirectly, as an alcohol or drug abuser or a recipient of alcohol or drug services.

1. Adult protective services: A substance abuse counselor who works at Triangle Behavioral Healthcare (MH/DD/SA service provider) wants to report to DSS that a substance abuse patient of hers appears to be a disabled adult in need of protective services. The employee knows that a state law, G.S. 108A-102, requires any person having reasonable cause to believe that a disabled adult is in need of protective services to report such information to the department of social services. The federal law, 42 C.F.R Part 2, does not permit the disclosure of patient-identifying information for this purpose. Can the employee comply with both GS 108A-102 and 42 CFR 2?

2. Same scenario as above, but the substance abuse counselor works for a free-standing drug program, a halfway house called Addiction Recovery Services. Can the counselor comply with the state law mandating an adult protective services report and comply with the federal rules prohibiting the disclosure of patient-identifying information for this purpose?

3. Child protective services: Pursuant to GS 7B-302, a child protective services worker assessing a report of child abuse makes a written demand to an MH/DD/SA service provider for the child's mental health record. The social/family history section of the child mental health record describes the mother's abuse of crack cocaine that the mother reported to the child's mental health professional information during the child's intake to services. Does 42 C.F.R. Part 2 permit the MH professional to turn over the record to the CPS worker?

4. Child protective services: Pursuant to GS 7B-302, a child protective services worker assessing a report of child neglect makes a written demand to an MH/DD/SA service provider for the child's mental health record. The child's mother is also being treated by the MH/DD/SA provider. The child mental health record contains information about the mother's drug addiction and treatment that the MH professional recorded in the child record following a discussion with the mother's substance abuse counselor. Can the facility treating the child release the child record to the CPS worker?

Part II: State Laws Requiring Disclosure in Particular Circumstances

I. Introduction: This outline discusses disclosures that are required by law. For the most part, "required-by-law" disclosures arise from provisions of state statutes or rules intended to regulate matters other than the confidentiality or privacy of medical records. For example, state statues requiring the reporting of communicable diseases or child abuse and neglect are intended for the protection of public health or child welfare. This outline discusses *some* of the laws that require disclosure of information otherwise protected by confidentiality law and the relationship of those state mandates to each of the three confidentiality laws governing substance abuse patient records.

II. Child welfare laws:

A. Reporting child abuse and neglect: Anyone who has cause to suspect that a child is abused, neglected, or dependent, or has died as a result of maltreatment, has a legal duty to report the case to the department of social services in the county where the child resides or is found. G.S. 7B-301. A report may be made in person, by telephone, or in writing. The report must include as much of the following as the person reporting knows:

- the child's name, age, and address;
- the name and address of the child's parent, guardian, custodian, or caretaker;
- the names and ages of other children in the home;
- the child's location if the child is not at the home address;
- the nature/extent of any injury or condition resulting from abuse, neglect, or dependency; and
- any other information that might be helpful to establish the need for protective services or court intervention.

1. **Information confidential under state law, G.S. Chapter 122C:** G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-301). Thus, providers must disclose confidential information when necessary to comply with the child abuse reporting statute**.**

2. **Information confidential under the HIPAA privacy rule:** The privacy rule permits a covered provider or other covered entity to disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. 45 CFR 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, GS 7B-301.

3. **Information confidential under federal law, 42 C.F.R. Part 2:** The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities. 42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law, even if compliance means disclosing patient identifying information.

B. Investigation of child abuse and neglect: The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code.

G.S.7B-302. The director of social services (or the director's representative) may make a *written* demand for any information or reports, whether or not confidential, that may in the director's opinion be relevant to *the assessment* or to *the provision of protective services*. Upon such demand, an agency is required to provide access to can copies of confidential information to the extent permitted by federal law.

1. **State confidentiality law, G.S. 122C:** G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-302). Thus, whether or not the information sought by DSS falls within the scope of G.S. 122C, MH/DD/SA providers must provide access to and copies of the requested information, unless disclosure is prohibited by federal law and regulations.

2. **Information confidential under the HIPAA privacy rule:** The privacy rule permits a covered provider to disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the department of social services when that department demands the information pursuant to GS 7B-302.

3. **Federal confidentiality law, 42 C.F.R. Part 2:** Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make the report mandated by G.S. 7B-301, they may *not* provide information beyond the initial report when DSS demands further information pursuant to G.S. 7B-302. The federal rules do not permit disclosure of further information for follow-up investigations or for court proceedings that may arise from the report, absent the patient's written *consent* or a *court order* issued pursuant to Subpart E of the federal regulations. 42 C.F.R. § 2.12(c)(6). "No state law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. 2.20.
    a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." An inquiring party may be given a copy of the federal regulations and advised that they restrict the disclosure of substance abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. 42 CFR 2.13(c)(2).

C. **Guardian Ad Litem access to confidential information: G.S. 7B-601** authorizes the court to appoint a guardian ad litem (GAL) to represent children alleged to be abused, neglected, or dependent in Juvenile Court proceedings. The same statute gives the GAL the authority to obtain "any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case."

1. **Information confidential under state law, G.S. Chapter 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information for purposes of complying with other state law. Thus, when a court order appoints someone

to be a GAL under G.S. 7B-601, the GAL must be granted access to any information, whether or not protected by G.S. 122C, that the GAL believes is relevant to the case.

2. **Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the guardian ad litem as necessary to comply with GS 7B-601.

3. **Information confidential under federal law, 42 C.F.R. Part 2:** Although a federal or state court may authorize the disclosure of information protected by federal law, courts issuing the standard form order appointing a GAL (AOC-J-300) usually do not issue the order according to the specific procedures and criteria required by the federal regulations for court-ordered disclosures. Substance abuse programs must not disclose confidential information to a GAL unless presented with a court order issued according to the special procedures and criteria set forth at 42 C.F.R. §§ 2.61-2.67.

    a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." 42 CFR 2.13(c)(2). See B, 3, a, above.

D. Interagency sharing about juveniles: G.S. 7B-3100 directs the Department of Juvenile Justice and Delinquency Prevention to adopt rules designating local agencies that are required to "share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is *relevant to any assessment* of a report of child abuse, neglect, or dependency or *the provision or arrangement of protective services* in a child abuse, neglect, or dependency case by a local department of social services . . . or to *any case in which a petition is filed* alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed . . . , or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court." The Department adopted rules, effective July 15, 2002 (28 NCAC 01A .0301) designating area MH/DD/SA authorities among the agencies required to share information pursuant to the statute, as well as any "local agency designated by an administrative order issued by the chief district court judge of the district court district in which the agency is located."

1. **Information confidential under state law, GS 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information as required by other state law. Therefore, area authorities (known also as "local management entities" or "LMEs") must disclose information as required by G.S. 7B-3100. Information shared must
    - be used only for the protection of the juvenile or others or to improve educational opportunities of the juvenile;
    - remain confidential, and
    - be withheld from public inspection

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2. **Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered health care provider to disclose protected health information as required by G.S. 7B-3100 and 28 NCAC 01A. 0301.

3. **Information confidential under federal law, 42 CFR 2:** G.S. 7B-3100 and 28 NCAC 01A .0301 do not authorize or compel the disclosure of information protected by the federal drug and alcohol confidentiality law, and the federal law does not permit the disclosure of patient-identifying information pursuant to these state laws.
    a. Unless a provision in the federal law applies that would permit disclosure, substance abuse programs should not, in response to a request for information under the rules, disclose information protected by the federal drug and alcohol confidentiality law.
    b. At the request of the agency soliciting information protected by the federal law, the agency refusing the request must inform "that agency of the specific law or regulation that is the basis for the refusal." 28 NCAC 01A .0302(b). Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." 42 CFR 2.13(c)(2). See section B, 3, a, above.

III. Adult protective services laws:

A. Reporting. Any person having reasonable cause to believe that a disabled adult[16] is in need of protective services[17] must report such information to the department of social services in the county in which the disabled adult resides or is present. G.S. 108A-102. A report may be made orally or in writing, but must include:

- the disabled adult's name, age, and address;
- the name and address of the disabled adult's caretaker;
- the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect; and
- other pertinent information.

1. **Information that is confidential under state mental health confidentiality law, G.S. Chapter 122C:** G.S. 122C-54(h) provides that "facilities" (MH/DD/SA) must disclose confidential information for purposes of complying with Article 6, Chapter 108A of the North Carolina General Statutes (which includes G.S. 108A-102). Thus, MH/DD/SA facilities must disclose confidential information when necessary to make an adult protective services report.

[16] "Disabled adult" means any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

[17] A disabled adult is in need of protective services if he or she is "abused," " neglected," or "exploited" as defined in G.S. 108A-101(a), (j), or (m), and, due to his or her physical or mental incapacity, is unable to perform or obtain for himself or herself essential services and is without able, responsible, and willing persons to perform or obtain essential services. G.S. 108A-101(e); N.C. Admin. Code tit. 10, subchap. 42V § .0209.

2. **HIPAA Privacy Rule:** 45 C.F.R. § 164.512(c)(1) provides that a covered health care provider, or other covered entity, may disclose protected health information about an individual whom the provider reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority authorized by law to receive such reports, to the extent the disclosure is required by law and complies with and is limited to the relevant requirements of law. The privacy rule, therefore, permits the disclosure of protected health information to DSS as required by G.S. 108A-102 as long as the information disclosed is limited to the requirements of G.S. 108A-102.

    a. A covered health care provider or other covered entity that makes such a disclosure must promptly inform the individual that such a report has been or will be made, unless the entity
        - believes informing the individual would create a risk of serious harm,
        - would be informing a personal representative who the entity believes is responsible for the abuse or neglect, or
        - informing the personal representative would not be in the individual's best interest. See 45 C.F.R. 164.512(c)(2)

3. **Information that is confidential under federal law, 42 C.F.R. Part 2:** The federal law does not permit the disclosure of confidential information for the purpose of complying with state adult protective services laws. However, a substance abuse program may provide information about a particular, identified person if doing so would not identify the individual, directly or indirectly, as an alcohol or drug abuser or a recipient of alcohol or drug abuse services. Examples:
    a. A substance abuse program that is part of a larger general mental health center may make the report if the employee of the program tells the department of social services that he or she is calling from the mental health center (or area authority) rather than from the specific substance abuse unit. The employee must not identify him or herself as a substance abuse professional nor indicate that the client is a substance abuser or recipient of substance abuse services.
    b. A free-standing drug program (which may contract with the area authority to provide substance abuse services) may not use its name in contacting DSS, but may report anonymously, as long as nothing said indicates the person is a drug or alcohol abuser.

B. Investigation: The director of the county department of social services (or his or her representative) is required to evaluate the report to determine whether the disabled adult is in need of protective services and what services are needed.

1. Information confidential under state confidentiality law (GS 122C):

a. Caretaker records: When necessary for a complete evaluation, the director has the authority to review and copy *any records related to the care and treatment* of the disabled adult that have been maintained by a *caretaker*. G.S. 108A-103(a). A "caretaker" is any individual, facility or agency who is responsible for the disabled

adult's care as a result of family relationship or who has assumed the responsibility for care voluntarily or by contract, and includes facilities licensed under G.S. 122C to provide mental health, developmental disabilities, and substance abuse services. MH/DD/SA facilities that are caretakers must disclose confidential information when necessary to the evaluation. G.S. 108A-103; G.S. 122C-54(h).

b. Consultation and cooperation. The director's evaluation must include "consultation with persons having knowledge of the facts of the particular case." G.S. 108A-103(a). "The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of his duties." G.S. 108A-103(b). The statute further provides that director can request "immediate accessible evaluations and in-home evaluations."

   If these statutory provisions are construed as *requiring* the sharing of information, then G.S. 122C-54(h), which requires MH/DD/SA facilities to disclose confidential client information when required by other state law, would operate to require the disclosure. If these statutes are so construed, facility staff should be careful to limit disclosure to *information necessary to the evaluation*, i.e., necessary to determine whether the adult is disabled; is abused, neglected, or exploited; is in need of protective services; and lacks the capacity to consent to protective services.

c. G.S. 108A-103 expressly states that information obtained pursuant to the DSS director's authority to access caretaker records and engage in consultation (above two items) remains confidential and governed by G.S. 108-80 and the confidentiality provisions of G.S. 122C.

2. **HIPAA Privacy Rule:** A covered health care provider may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a). Thus, to the extent that G.S. 108A-103 requires disclosure, the privacy rule permits the disclosure of protected health information. G.S. 108A-103 certainly requires the disclosure of caretaker records, and it is possible to construe the statute as requiring the disclosure of PHI through the "consultation" and "cooperation" processes referred to in the statute. See B., 1.b., above.

3. **Federal substance abuse records law, 42 C.F.R. Part 2:** The federal law does not permit the disclosure of confidential information for the purpose of complying with state adult protective services laws.

   a. Caretaker records: If the caretaker is a federally assisted "program" whose records are governed by the federal confidentiality rules, 42 C.F.R. § 2.11, the caretaker could *not* provide access to information that (i) it obtained for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that

treatment, and (ii) would identify a person, directly or indirectly, as a drug or alcohol abuser or a recipient of alcohol or drug services. 42 C.F.R. § 2.12(a)(1).

b. Consultation pursuant to G.S. 108A-103(b): Restrictions applicable to caretaker records, above, apply. Staff of an area authority or MH/DD/SA facility that provides all three kinds of services are not permitted to reveal whether the disabled adult has been or is being treated for alcohol or drug abuse. Employees of a facility publicly identified as a place where only substance abuse services are provided may not acknowledge whether the individual is a patient of the facility. 42 C.F.R. § 2.13(c).

c. Evaluations: The director may arrange for area authorities (LMEs) or other agencies to conduct medical, psychological, or psychiatric evaluations. G.S. 108A-103(b). An evaluation performed by a federally assisted drug or alcohol program that contains references to the individual's alcohol or drug abuse or to a condition that is identified as having been caused by that abuse is protected by the federal rules (and may not be disclosed without patient consent) *if* the evaluation and the references contained therein can be construed as being made *for the purpose of recommending treatment or making a referral treatment.* 42 C.F.R. §§ 2.11, 2.12(a)(1)(ii).

Part III: Subpoenas and Court Orders

I. Subpoenas. A subpoena, alone, does not permit the disclosure of MH/DD/SA records. Generally, the disclosure of records relating to MH/DD/SA services is not permitted unless a court specifically orders disclosure, the person who is the subject of the records consents to the disclosure, or the applicable confidentiality law makes a specific exception to confidentiality under the particular circumstances. A court is not entitled to a patient's treatment information merely because the court ordered the patient into treatment.

A. State confidentiality law governing MH/DD/SA records. GS 122C does not permit the disclosure of confidential information in response to a subpoena alone. A subpoena compels disclosure of confidential information only if it is accompanied by the client's authorization to disclose or a court order to disclose (or some other legal mandate, such as a statute or regulation that requires disclosure under the circumstances).

B. HIPAA privacy rule. The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 CFR 164.512(e). However, because HIPAA does not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone.

C. Federal substance abuse confidentiality law. A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing

order under Subpart E of 42 CFR Part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances).

II. Court Order—State confidentiality law. A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure. GS 122C-54(a).

A. Standard: GS 122C-54(a) provides no guidance to the court for determining whether to order disclosure, nor is there any case law interpreting the provision.
B. The evidentiary privilege statutes for psychologists and other mental health professionals, however, provide that a judge may order disclosure of privileged information when "necessary to the proper administration of justice."[18] See 8-53.3 (psychologists), 8-53.5 (marital and family therapists), and 8-54.7 (social workers) and case annotations.

III. Court Order—HIPAA privacy rule. A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 CFR 164.512(e). However, records that are governed the federal substance abuse confidentiality law (42 CFR Part 2) should not be disclosed pursuant to court order unless the court order complies with Subpart E of 42 CFR Part 2 (outlined below).

IV. Court Order—Federal substance abuse records law. Under Subpart E of the federal regulation, a federal, state, or local court may issue an order requiring an alcohol or drug treatment program to disclose patient-identifying information only after following certain procedures and making particular findings. See 42 C.F.R. §§ 2.63-2.67.

A. Application. An application may be filed separately or as part of a pending action and must use a fictitious name, such as John Doe, to refer to any patient and may not contain or disclose any patient identifying information unless the court orders the record of the proceeding sealed from public scrutiny. [19] Where an application is deficient because it contains the patient's name or other patient-identifying information the deficiency may be cured by the court ordering the record to be sealed. See unpublished opinion, *S M. K v. J F*, 2005 WL 4674284 (Del.Fam.Ct).

1. Non-criminal purposes. An order authorizing disclosure for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure.

[18] Judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. Flora v. Hamilton, 81 F.R.D 576 (M.D.N.C 1978). The statute affords the trial judge wide discretion in determining what is necessary for the proper administration of justice. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983) (interpreting the analogous physician-patient privilege statute, GS 8-53).

[19] When applying for disclosure for non-criminal purposes, the patient's name or other patient-identifying information may be disclosed if the patient is the applicant or has given written consent to the disclosure. 42 C.F.R. § 2.64(a). When applying for disclosure to investigate or prosecute a program or person holding the records, the patient's name or other patient-identifying information may be disclosed if the patient has given written consent to the disclosure. 42 C.F.R. § 2.66(a).

2. Criminal investigation/prosecution of patient. An order authorizing disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by the person holding the records or by any person conducting investigative or prosecutorial activities related to criminal law enforcement.

3. Criminal investigation/prosecution of program. An order authorizing disclosure or use of patient records to criminally or administratively investigate or prosecute a program or person holding the records may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

B. Notice and opportunity to respond.

1. Non-criminal purposes. When the information is sought for non-criminal purposes, the patient and person holding the records must be given (a) adequate notice in a manner that will not disclose patient identifying information to other persons, and (b) an opportunity to file a written response to the application or to appear in person must be notified and given an opportunity to file a written response, or appear in person, for the limited purpose of providing evidence on the legal criteria for issuance of the court order. 42 C.F.R. § 2.64.

2. Criminal investigation/prosecution of patient. When the records are sought for the purpose of criminally investigating or prosecuting a patient and the application is made by a person performing a law enforcement function, the person holding the record must be given (a) adequate notice, (b) an opportunity to appear and be heard for the limited purpose of providing evidence on the criteria for issuance of the court order, and (c) an opportunity to be represented by counsel independent of the counsel for the applicant. 42 C.F.R. § 2.65.

3. Criminal investigation/prosecution of program. When the records are sought for the purpose of investigating or prosecuting a program or person holding the records, no notice is required to the program, to the person holding the records, or to any patient whose records are to be disclosed. 42 C.F.R. § 2.66.

C. *In camera* review. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record. The judge may examine the records before making a decision.

D. Criteria. To order disclosure, the court must determine that "*good cause*" exists for the disclosure.

1. Non-criminal purposes. For an order authorizing disclosure for purposes other than criminal investigation or prosecution, the court must find that:

a. Other ways of obtaining the information are not available or would not be effective, and

b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient's-program relationship, and the program's ongoing treatment services. 42 C.F.R. § 2.64.

2. **Criminal investigation/prosecution of patient.** To authorize disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient, the court must find that:
    a. The 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 with a deadly weapon, and child abuse and neglect;
    b. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
    c. Other ways of obtaining the information are not available or would not be effective;
    d. The potential injury to the patient, the physician-patient relationship, and the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
    e. If the applicant is a person performing a law enforcement function, that (i) the person holding the records has been afforded an opportunity to be represented by independent counsel independent; and (ii) any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant. 42 C.F.R. § 2.65.

3. **Criminal investigation/prosecution of program.** For orders authorizing use and disclosure of records to investigate or prosecute a program or the person holding the records, the court must find that:
    a. Other ways of obtaining the information are not available or would not be effective, and
    b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. 42 C.F.R. § 2.66.

E. Limiting disclosure.

1. **Non-criminal**. Any order authorizing disclosure must (i) limit disclosure to those parts of the patient record that are essential to fulfill the objective of the order (ii) limit disclosure to persons whose need for the information forms the basis for the order, and (iii) include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship, and the treatment services (e.g., sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has be ordered).

2. **Criminal investigation/prosecution of patient.** An order authorizing disclosure to criminally investigate or prosecute a patient must (i) limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, (ii) limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime as specified in D. 2, above, and (iii) include

such other measures as are necessary to limit disclosure and use to only that public interest and need found by the court. 42 C.F.R. § 2.65(e)(2).

3. **Criminal investigation/prosecution of program.** An order authorizing disclosure to investigate or prosecute a program or person holding the records must limit disclosures in the same manner as orders authorizing disclosure for non-criminal purposes (no. 1, above) and require the deletion of patient identifying information from any documentation made available to the public. No information obtained pursuant to the court order may be used to investigate or prosecute the patient or be used as the basis for an application for an order to disclose information for the purpose of investigating or prosecuting a patient. 42 C.F.R. § 2.66(c),(d).

F. Confidential communications. A court may order disclosure of "confidential communications" made by a patient to a program in the course of diagnosis, treatment, or referral to treatment only if the disclosure is

1. Necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties; or
2. Necessary to the investigation or prosecution of an extremely serious crime, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect; or
3. The disclosure is in connection with litigation or an administrative hearing in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. § 2.63.

Part IV: Patient Authorization to Disclose

I. General Rules

A. Rules applicable to all three confidentiality laws: A covered provider *must* obtain an individual's written authorization for disclosure of confidential information, unless the use or disclosure is required or otherwise permitted by the applicable law.

1. The authorization must be in writing.
2. The individual's authorization must be *voluntary*.
3. The individual's authorization must be *informed*. That means the individual signing the authorization must understand what information will be exchanged, with whom it will be shared, and for what purpose.
4. An authorization to disclose confidential information *permits*, but does not require, the covered provider to disclose the information. [Disclosure is mandatory only when the patient requests disclosure to an attorney. G.S. 122C-53(i).]
5. When a covered provider obtains or receives an authorization for the disclosure of information, such disclosure must be consistent with the authorization. This means that covered providers are bound by the statements provided in the authorization.
6. An individual may revoke the authorization at any time except to the extent that the covered provider has taken action in reliance on the authorization.

B. Rule applicable to state mental health law and HIPAA privacy rule:

1. Conditioning of authorizations: Generally, the covered provider may *not* condition the provision of treatment or eligibility for benefits on the individual's provision of an authorization.[20]

II. Disclosure with Patient Authorization—State Mental Health Law

A. Consent form: "Area facilities" (facilities operated by or under contract with an area mental health authority or county mental health program) must use consent forms that contain the information listed below.[21] A consent for release of information does not have to be on the agency form utilized by area or state facilities. However, the area or state facility receiving a consent form must determine that the content of the form conforms to the requirements listed below. A clear and legible photocopy of a consent form is considered as valid as the original.[22]

1. client's name;
2. name of facility releasing the information;
3. name of individual or individuals, agency or agencies to whom information is being released;
4. information to be released;
5. the purpose for the release;
6. length of time consent is valid (may not exceed one year);
7. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;[23]
8. signature of the client or the client's legally responsible person; and
9. date consent is signed.

B. Redisclosure:

1. Redisclosure prohibited: Except as provided by G.S. 122C-53 through G.S. 122C-56, no individual having access to confidential information may disclose it.

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[20] 10A NCAC 26B .0205 (state law) and 45 CFR 164.508(b)(4) (HIPAA privacy rule). The HIPAA privacy rule provides that a covered health care provider may condition the provision of health care—that is solely for the purpose of creating information for disclosure to a third party—on receipt of an authorization for such disclosure.

- Example: John's employer requires periodic drug testing for his continued employment. A health care provider can condition the administration of the drug test on John's authorization to disclose the drug test to his employer, as the test is administered solely for the purpose of disclosing the results to a third party (and not for treatment purposes).
- Example: Jane is applying for life insurance and the application requires that Jane receive and report the results of a physical exam to the life insurance company. A health care provider can condition the conducting of the exam on Jane's authorization to disclose the exam results to the life insurance company, as the exam is provided solely for the purpose of creating PHI for disclosure to a third party.

[21] See 10A NCAC 26B.0202.

[22] 10A NCAC 26B.0202.

[23] "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

2. Notice: Area or state facilities releasing confidential information must inform the recipient that redisclosure of such information is prohibited without client consent. A stamp may be used to fulfill this requirement.

III. Disclosures with Patient Authorization—HIPAA Privacy Rule

A. Content of authorization form: To help ensure that individuals give their authorization on an informed basis, the privacy rule sets out elements that must be included in any authorization. 45 C.F.R. § 164.508(c). To be valid, an authorization to disclose protected health information must contain the elements listed below. A valid authorization may contain elements or information in addition to the required elements, so long as the additional elements or information are consistent with the required elements. § 164.508(b)(1). Required elements are:

1. The name or other specific identification of the person(s), or classes of persons, authorized to make the requested use or disclosure.
2. The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
3. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
4. A description of each purpose of the requested use or disclosure.
    a. The statement "at the request of the individual" is a sufficient description of purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of purpose.
5. An expiration date or event that *relates* to the individual or the purpose of the use or disclosure. (An authorization that purports to expire on the date when the stock market reached a specified level would not be valid, as the expiration event would not relate to the individual or purpose of the use or disclosure.)
6. Signature of the individual (the person who is the subject of the protected information) and date.
    a. If the authorization is signed by a "personal representative" of the individual, a description of such representative's authority to act for the individual must also be provided. The privacy rule requires that covered providers verify and document a person's authority to sign an authorization on an individual's behalf.
7. A statement that notifies the individual of the right to revoke the authorization in writing.[24]
8. Either:
    a. A statement that treatment, payment, enrollment, or eligibility for benefits may not be conditioned on obtaining the authorization (where such conditioning is prohibited by the privacy rule), or
    b. A statement about the consequences of refusing to sign the authorization (if conditioning is permitted by the privacy rule)
9. A statement about the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer protected by

[24] The statement must include either (a) the privacy rule's exceptions to the right to revoke and a description of how the individual may revoke the authorization, or (b) to the extent that the information referred to in "a." is included in the provider's "Notice of Privacy Practices," a reference to the provider's notice.

the privacy rule. This statement is necessary because the recipient of the information might not be a covered provider and, therefore, not subject to the privacy rule.

B. Redisclosure: Unlike the state mental health law and federal substance abuse records law, once the recipient has received the information, the HIPAA privacy rule contains no prohibition against the recipient redisclosing the information unless the recipient happens to be a covered provider under HIPAA. If the recipient is not a covered provider under HIPAA, the privacy law does not bind the recipient.

C. Compound Authorizations: Except in certain circumstances set forth in the privacy rule, an authorization for use or disclosure of protected health information cannot be combined with any other document to create a compound authorization. 45 C.F.R. § 164.508(b)(3). For example, a treatment provider cannot combine an authorization to assign financial benefits (insurance payments) with an authorization to disclose information.

IV. Disclosure with Patient Authorization—Substance Abuse Records Law

A. General rules: The content of any record may be disclosed in accordance with the prior written consent of the patient, but only to the extent, under such circumstances, and for such purposes as permitted by the written consent.

B. Consent form must include[25]:

1. patient's name;
2. name of facility or person disclosing the information;
3. name of individual or individuals, agency or agencies, to whom information is being disclosed;
4. information to be released (how much and what kind);
5. the purpose of the disclosure;
6. the date, event, or condition upon which the consent will expire if not revoked before;
7. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;[26]
8. signature of the patient and, when required for a patient who is a minor, signature of the patient's legally responsible person; and
9. date consent is signed.

C. **Redisclosure**. Each disclosure made with the patient's written authorization must be accompanied by a written notice prohibiting any further disclosure unless further disclosure is expressly permitted by the written authorization of the person to whom it pertains or as otherwise permitted by the federal regulations. 42 C.F.R. 2.32. Persons who receive records directly from a substance abuse program and who are notified of the restrictions on redisclosure of the records are bound by the federal confidentiality regulations. See 42 C.F.R. **§** 2.12(d).

[25] See 42 C.F.R. 2.31.

[26] "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

D. Irrevocable Criminal Justice System Authorizations. A substance abuse program may disclose information about a patient to those persons in the criminal justice system who have made participation in the program a condition of the disposition of any criminal proceedings against the patient or a condition of the patient's parole or other release from custody. 42 C.F.R. § 2.35.

1. **Written authorization required**. The patient may authorize disclosures to individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against a patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient).

2. **Irrevocable.** Under 42 C.F.R. Part 2, a criminal justice system authorization may be made irrevocable during the period of its intended use if the written patient authorization states

    a. the period during which it remains in effect. (This period must be reasonable and take into account the anticipated length of the treatment; the type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and such other factors as the program, the patient, and the person(s) who will receive the disclosure consider pertinent.)
    b. that it is revocable only upon the passage of a specified amount of time or the occurrence of a specified ascertainable event. This time or event must be no later than the final disposition of the conditional release or other activity in connection with which the patient consent is given.

3. **Redisclosure.** A person who receives patient information pursuant to a criminal justice system authorization may redisclose and use it only to carry out that person's official duties with respect to the patient's conditional release or other activity in connection with which the patient consent is given.

4. **Conflicting HIPAA provision.** The HIPAA Privacy Rule does not permit irrevocable authorizations. However, the HIPAA Privacy Rule does permit disclosures in response to a court order issued without satisfying the more rigorous criteria and procedural requirements for court orders under 42 C.F.R. Part 2. Thus, a court could issue an order requiring a substance program to provide information on the progress of patients mandated into treatment by the criminal justice system. This order would authorize the disclosure of HIPAA-protected information. The irrevocable criminal justice system authorization recognized by 42 C.F.R Part 2 would then permit the program to disclose substance abuse patient-identifying information to the court during the period of the offender's treatment, and continue to report to a probation officer or at a court hearing until final disposition of the criminal case even if the patient ceased treatment and no longer wanted to cooperate with the court or program or no longer wanted such information to be disclosed.

SAMPLE AUTHORIZATION FORM

STATE OF NORTH CAROLINA Mental Health, Developmental Disabilities, and Substance Abuse Services	AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED INFORMATION 45 C.F.R. Parts 160 and 164; 42 C.F.R. Part 2; G.S. 122C

This form implements the requirements for client authorization to use and disclose health information protected by the federal health privacy law (45 C.F.R. parts 160, 164), the federal drug and alcohol confidentiality law (42 C.F.R. part 2), and state confidentiality law governing mental health, developmental disabilities, and substance abuse services (G.S. 122C).

Client's Name	Client ID	Date of Birth

I, _____, authorize
Client or client's legally responsible person or personal representative

_____
Agency or person authorized to disclose the information

to disclose to_____
Agency or person who will receive and use the information

the following protected information:[1] _____
Provide a specific and meaningful description of the information to be disclosed

_____

_____

_____

_____

PURPOSE OF USE & DISCLOSURE[2]

The purpose of the disclosure is _____
Describe the purpose(s) for which information will be disclosed and used

_____

_____

REDISCLOSURE

Once information is disclosed pursuant to this signed authorization, I understand that the federal health privacy law (45 C.F.R. Part 164) protecting health information may not apply to the recipient of the information and, therefore, may not prohibit the recipient from redisclosing it. Other laws, however, may prohibit redisclosure. When this agency discloses mental health and developmental disabilities information protected by state law (G.S. 122C) or substance abuse treatment information protected by federal law (42 C.F.R. Part 2), we must inform the recipient of the information that redisclosure is prohibited except as permitted or required by these two laws. Our Notice of Privacy Practices describes the circumstances where disclosure is permitted or required by these laws.

CONTINUED ON BACK SIDE

STATE OF NORTH CAROLINA Mental Health, Developmental Disabilities, and Substance Abuse Services	AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED INFORMATION 45 C.F.R. Parts 160 and 164; 42 C.F.R. Part 2; G.S. 122C

REVOCATION [3] AND EXPIRATION

I understand that, with certain exceptions, I have the right to revoke this authorization at any time except to the extent that action has been taken in reliance on it. The procedure for how I may revoke this authorization, as well as the exceptions to my right to revoke, are explained in *[Insert name of covered entity]*'s Notice of Privacy Practices, a copy of which has been provided to me.

If not revoked earlier, this authorization expires automatically upon

_____

Date or event that relates to the client or the purpose of the use or disclosure

or one year from the date it is signed, whichever is earlier.

NOTICE OF VOLUNTARINESS[5]

I understand that I may refuse to sign this authorization form. If I choose not to sign this form, I understand that *[Insert name of covered entity]* cannot deny or refuse to provide treatment, payment, enrollment in a health plan, or eligibility for benefits on my refusal to sign.

SIGNATURES

Signature of client: _____	Date
Please print name: _____	
Signature of legally responsible person or other personal representative (if required):	Date
_____	
Please print name: _____	
Please explain representative's authority to act on behalf of client: _____	
_____	

The following information is for staff use only and is provided to explain further some of the requirements of applicable federal law and some of the options available under that rule.

[1] A general authorization for the release of medical or other information is not sufficient for the disclosure of alcohol and drug information protected by the federal drug and alcohol confidentiality law, and authorizations for the disclosure of this information must state how much and what kind of alcohol and drug information is to be disclosed. 42 C.F.R. 2.31, 2.32. Therefore, whenever authorization is required for the release of alcohol and drug information, the authorization form must state that the information to be released includes alcohol and drug information and must specify how much and what kind of information is to be released.

[2] The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.

[3] This revocation paragraph is all that is required if the exceptions to the right to revoke and a description of how to revoke are described in the covered entity's Notice of Privacy Practices and that Notice is referenced in the Authorization. Alternatively, the exceptions to the right to revoke and a description of the revocation process can be provided in the Authorization form as follows:

> I understand that I may revoke this Authorization at any time except to the extent that action has been taken in reliance on it (or unless this Authorization is given as a condition of obtaining insurance coverage and the insurer has certain legal rights to contest the policy or a claim under the policy). If I revoke this authorization, I must do so in writing. The procedure for revoking this authorization is *[describe how the individual may revoke the authorization, where to obtain revocation forms]*.

[5] The federal privacy law permits a health care provider, in certain limited circumstances, to condition the provision of health care on obtaining an authorization For example, a covered entity may condition the provision of health care that is to be provided solely for the purpose of creating PHI for disclosure to a third party on an authorization for such disclosure. Where the privacy rule permits the conditioning of services on receipt of an authorization and the health care provider chooses to make treatment conditional on the client providing an authorization, then the sentence in this form regarding the conditioning of the authorization must be modified to explain what the condition is and the consequences to the patient of a refusal to sign the authorization.

SUBCHAPTER A—GENERAL PROVISIONS

PART 1 [RESERVED]

PART 2—CONFIDENTIALITY OF ALCOHOL AND DRUG ABUSE PATIENT RECORDS

Subpart A—Introduction

Subpart B—General Provisions

Subpart C—Disclosures With Patient's Consent

Subpart D—Disclosures Without Patient Consent

Subpart E—Court Orders Authorizing Disclosure and Use

AUTHORITY: Sec. 408 of Pub. L. 92–255, 86 Stat. 79, as amended by sec. 303 (a), (b) of Pub L. 93–282, 83 Stat. 137, 138; sec. 4(c)(5)(A) of Pub. L. 94–237, 90 Stat. 244; sec. 111(c)(3) of Pub. L. 94–581, 90 Stat. 2852; sec. 509 of Pub. L. 96–88, 93 Stat. 695; sec. 973(d) of Pub. L. 97–35, 95 Stat. 598; and transferred to sec. 527 of the Public Health Service Act by sec. 2(b)(16)(B) of Pub. L. 98–24, 97 Stat. 182 and as amended by sec. 106 of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290ee–3) and sec. 333 of Pub. L. 91–616, 84 Stat. 1853, as amended by sec. 122(a) of Pub. L. 93–282, 88 Stat. 131; and sec. 111(c)(4) of Pub. L. 94–581, 90 Stat. 2852 and transferred to sec. 523 of the Public Health Service Act by sec. 2(b)(13) of Pub. L. 98–24, 97 Stat. 181 and as amended by sec. 106 of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290dd–3), as amended by sec. 131 of Pub. L. 102–321, 106 Stat. 368, (42 U.S.C. 290dd–2).

SOURCE: 52 FR 21809, June 9, 1987, unless otherwise noted.

Subpart A—Introduction

§ 2.1 Statutory authority for confidentiality of drug abuse patient records.

The restrictions of these regulations upon the disclosure and use of drug abuse patient records were initially authorized by section 408 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act (21 U.S.C. 1175). That section as amended was transferred by Pub. L. 98–24 to section 527 of the Public Health Service Act which is codified

at 42 U.S.C. 290ee–3. The amended statutory authority is set forth below:

§ 290EE–3. CONFIDENTIALITY OF PATIENT RECORDS.

(a) *Disclosure authorization*

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) *Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent*

(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(c) *Prohibition against use of record in making criminal charges or investigation of patient*

Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

(d) *Continuing prohibition against disclosure irrespective of status as patient*

The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

(e) *Armed Forces and Veterans' Administration; interchange of records; report of suspected child abuse and neglect to State or local authorities*

The prohibitions of this section do not apply to any interchange of records—

(1) within the Armed Forces or witrhin those components of the Veterans' Administration furnishing health care to veterans, or

(2) between such components and the Armed Forces.

The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

(f) *Penalty for first and subsequent offenses*

Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not nore than $5,000 in the case of each subsequent offense.

(g) *Regulations; interagency consultations; definitions, safeguards, and procedures, including procedures and criteria for issuance and scope of orders*

Except as provided in subsection (h) of this section, the Secretary, after consultation with the Administrator of Veterans' Affairs and the heads of other Federal departments and agencies substantially affected thereby, shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C) of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(Subsection (h) was superseded by section 111(c)(3) of Pub. L. 94–581. The responsibility of the Administrator of Veterans' Affairs to write regulations to provide for confidentiality of drug abuse patient records under Title 38 was moved from 21 U.S.C. 1175 to 38 U.S.C. 4134.)

§ 2.2 Statutory authority for confidentiality of alcohol abuse patient records.

The restrictions of these regulations upon the disclosure and use of alcohol

abuse patient records were initially authorized by section 333 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4582). The section as amended was transferred by Pub. L. 98–24 to section 523 of the Public Health Service Act which is codified at 42 U.S.C. 290dd–3. The amended statutory authority is set forth below:

§ 290DD–3. CONFIDENTIALITY OF PATIENT RECORDS

(a) *Disclosure authorization*

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 alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) *Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent*

(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(c) *Prohibition against use of record in making criminal charges or investigation of patient*

Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

(d) *Continuing prohibition against disclosure irrespective of status as patient*

The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

(e) *Armed Forces and Veterans' Administration; interchange of record of suspected child abuse and neglect to State or local authorities*

The prohibitions of this section do not apply to any interchange of records—

(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or

(2) between such components and the Armed Forces.

The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

(f) *Penalty for first and subsequent offenses*

Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

(g) *Regulations of Secretary; definitions, safeguards, and procedures, including procedures and criteria for issuance and scope of orders*

Except as provided in subsection (h) of this section, the Secretary shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection(b)(2)(C) of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(Subsection (h) was superseded by section 111(c)(4) of Pub. L. 94–581. The responsibility of the Administrator of Veterans' Affairs to write regulations to provide for confidentiality of alcohol abuse patient records under Title 38 was moved from 42 U.S.C. 4582 to 38 U.S.C. 4134.)

§ 2.3 Purpose and effect.

(a) *Purpose.* Under the statutory provisions quoted in §§ 2.1 and 2.2, these regulations impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program. The regulations specify:

(1) Definitions, applicability, and general restrictions in subpart B (definitions applicable to § 2.34 only appear in that section);

(2) Disclosures which may be made with written patient consent and the form of the written consent in subpart C;

(3) Disclosures which may be made without written patient consent or an authorizing court order in subpart D; and

(4) Disclosures and uses of patient records which may be made with an authorizing court order and the procedures and criteria for the entry and scope of those orders in subpart E.

(b) *Effect.* (1) These regulations prohibit the disclosure and use of patient records unless certain circumstances exist. If any circumstances exists under which disclosure is permitted, that circumstance acts to remove the prohibition on disclosure but it does not compel disclosure. Thus, the regulations do not require disclosure under any circumstances.

(2) These regulations are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to insure that an alcohol or drug abuse patient in a federally assisted alcohol or drug abuse program is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and who does not seek treatment.

(3) Because there is a criminal penalty (a fine—see 42 U.S.C. 290ee–3(f), 42 U.S.C. 290dd–3(f) and 42 CFR 2.4) for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute (see *M. Kraus & Brothers* v. *United States*, 327 U.S. 614, 621–22, 66 S. Ct. 705, 707–08 (1946)).

§ 2.4 Criminal penalty for violation.

Under 42 U.S.C. 290ee–3(f) and 42 U.S.C. 290dd–3(f), any person who violates any provision of those statutes or these regulations shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

§ 2.5 Reports of violations.

(a) The report of any violation of these regulations may be directed to the United States Attorney for the judicial district in which the violation occurs.

(b) The report of any violation of these regulations by a methadone program may be directed to the Regional Offices of the Food and Drug Administration.

Subpart B—General Provisions

§ 2.11 Definitions.

For purposes of these regulations:

Alcohol abuse means the use of an alcoholic beverage which impairs the physical, mental, emotional, or social well-being of the user.

Drug abuse means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.

Diagnosis means any reference to an individual's alcohol or drug abuse or to a condition which is identified as having been caused by that abuse which is made for the purpose of treatment or referral for treatment.

Disclose or disclosure means a communication of patient indentifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Informant means an individual:

(a) Who is a patient or employee of a program or who becomes a patient or employee of a program at the request of a law enforcement agency or official: and

(b) Who at the request of a law enforcement agency or official observes one or more patients or employees of

the program for the purpose of reporting the information obtained to the law enforcement agency or official.

Patient means any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program and includes any individual who, after arrest on a criminal charge, is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in a program.

Patient identifying information means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of, or contain numbers (such as a social security, or driver's license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the program.

Person means an individual, partnership, corporation, Federal, State or local government agency, or any other legal entity.

Program means:

(a) An individual or entity (other than a general medical care facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

(b) An identified unit within a general medical facility which holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

(c) Medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers. (See §2.12(e)(1) for examples.)

Program director means:

(a) In the case of a program which is an individual, that individual:

(b) In the case of a program which is an organization, the individual designated as director, managing director, or otherwise vested with authority to act as chief executive of the organization.

Qualified service organization means a person which:

(a) Provides services to a program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, medical, accounting, or other professional services, or services to prevent or treat child abuse or neglect, including training on nutrition and child care and individual and group therapy, and

(b) Has entered into a written agreement with a program under which that person:

(1) Acknowledges that in receiving, storing, processing or otherwise dealing with any patient records from the progams, it is fully bound by these regulations; and

(2) If necessary, will resist in judicial proceedings any efforts to obtain access to patient records except as permitted by these regulations.

Records means any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program.

Third party payer means a person who pays, or agrees to pay, for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of his family or on the basis of the patient's eligibility for Federal, State, or local governmental benefits.

Treatment means the management and care of a patient suffering from alcohol or drug abuse, a condition which is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient.

Undercover agent means an officer of any Federal, State, or local law enforcement agency who enrolls in or becomes an employee of a program for the purpose of investigating a suspected violation of law or who pursues that purpose after enrolling or becoming employed for other purposes.

[52 FR 21809, June 9, 1987, as amended by 60 FR 22297, May 5, 1995]

§2.12 Applicability.

(a) *General*—(1) *Restrictions on disclosure.* The restrictions on disclosure in

these regulations apply to any information, whether or not recorded, which:

(i) Would identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person; and

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (or if obtained before the pertinent date, is maintained by a federally assisted alcohol or drug abuse program after that date as part of an ongoing treatment episode which extends past that date) for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

(2) *Restriction on use.* The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290ee–3(c), 42 U.S.C. 290dd–3(c)) applies to any information, whether or not recorded which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (or if obtained before the pertinent date, is maintained by a federally assisted alcohol or drug abuse program after that date as part of an ongoing treatment episode which extends past that date), for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

(b) *Federal assistance.* An alcohol abuse or drug abuse program is considered to be federally assisted if:

(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency of the United States (but see paragraphs (c)(1) and (c)(2) of this section relating to the Veterans' Administration and the Armed Forces);

(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:

(i) Certification of provider status under the Medicare program;

(ii) Authorization to conduct methadone maintenance treatment (see 21 CFR 291.505); or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of alcohol or drug abuse;

(3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of Federal financial assistance in any form, including financial assistance which does not directly pay for the alcohol or drug abuse diagnosis, treatment, or referral activities; or

(ii) Conducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program; or

(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

(c) *Exceptions*—(1) *Veterans' Administration.* These regulations do not apply to information on alcohol and drug abuse patients maintained in connection with the Veterans' Administration provisions of hospital care, nursing home care, domiciliary care, and medical services under title 38, United States Code. Those records are governed by 38 U.S.C. 4132 and regulations issued under that authority by the Administrator of Veterans' Affairs.

(2) *Armed Forces.* These regulations apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and

those components of the Veterans Administration furnishing health care to veterans.

(3) *Communication within a program or between a program and an entity having direct administrative control over that program.* The restrictions on disclosure in these regulations do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of alcohol or drug abuse if the communications are

(i) Within a program or

(ii) Between a program and an entity that has direct administrative control over the program.

(4) *Qualified Service Organizations.* The restrictions on disclosure in these regulations do not apply to communications between a program and a qualified service organization of information needed by the organization to provide services to the program.

(5) *Crimes on program premises or against program personnel.* The restrictions on disclosure and use in these regulations do not apply to communications from program personnel to law enforcement officers which—

(i) Are directly related to a patient's commission of a crime on the premises of the program or against program personnel or to a threat to commit such a crime; and

(ii) Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address, and that individual's last known whereabouts.

(6) *Reports of suspected child abuse and neglect.* The restrictions on disclosure and use in these regulations do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities. However, the restrictions continue to apply to the original alcohol or drug abuse patient records maintained by the program including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect.

(d) *Applicability to recipients of information*—(1) *Restriction on use of information.* The restriction on the use of any information subject to these regulations to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any person who obtains that information from a federally assisted alcohol or drug abuse program, regardless of the status of the person obtaining the information or of whether the information was obtained in accordance with these regulations. This restriction on use bars, among other things, the introduction of that information as evidence in a criminal proceeding and any other use of the information to investigate or prosecute a patient with respect to a suspected crime. Information obtained by undercover agents or informants (see §2.17) or through patient access (see §2.23) is subject to the restriction on use.

(2) *Restrictions on disclosures—Third party payers, administrative entities, and others.* The restrictions on disclosure in these regulations apply to:

(i) Third party payers with regard to records disclosed to them by federally assisted alcohol or drug abuse programs;

(ii) Entities having direct administrative control over programs with regard to information communicated to them by the program under §2.12(c)(3); and

(iii) Persons who receive patient records directly from a federally assisted alcohol or drug abuse program and who are notified of the restrictions on redisclosure of the records in accordance with §2.32 of these regulations.

(e) *Explanation of applicability*—(1) *Coverage.* These regulations cover any information (including information on referral and intake) about alcohol and drug abuse patients obtained by a program (as the terms "patient" and "program" are defined in §2.11) if the program is federally assisted in any manner described in §2.12(b). Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as

providing, and provide alcohol or drug abuse diagnosis, treatment, or referral for treatment. However, these regulations would not apply, for example, to emergency room personnel who refer a patient to the intensive care unit for an apparent overdose, unless the primary function of such personnel is the provision of alcohol or drug abuse diagnosis, treatment or referral and they are identified as providing such services or the emergency room has promoted itself to the community as a provider of such services.

(2) *Federal assistance to program required.* If a patient's alcohol or drug abuse diagnosis, treatment, or referral for treatment is not provided by a program which is federally conducted, regulated or supported in a manner which constitutes Federal assistance under § 2.12(b), that patient's record is not covered by these regulations. Thus, it is possible for an individual patient to benefit from Federal support and not be covered by the confidentiality regulations because the program in which the patient is enrolled is not federally assisted as defined in § 2.12(b). For example, if a Federal court placed an individual in a private for-profit program and made a payment to the program on behalf of that individual, that patient's record would not be covered by these regulations unless the program itself received Federal assistance as defined by § 2.12(b).

(3) *Information to which restrictions are applicable.* Whether a restriction is on use or disclosure affects the type of information which may be available. The restrictions on disclosure apply to any information which would identify a patient as an alcohol or drug abuser. The restriction on use of information to bring criminal charges against a patient for a crime applies to any information obtained by the program for the purpose of diagnosis, treatment, or referral for treatment of alcohol or drug abuse. (Note that restrictions on use and disclosure apply to recipients of information under § 2.12(d).)

(4) *How type of diagnosis affects coverage.* These regulations cover any record of a diagnosis identifying a patient as an alcohol or drug abuser which is prepared in connection with the treatment or referral for treatment of alcohol or drug abuse. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by these regulations. The following are not covered by these regulations:

(i) Diagnosis which is made solely for the purpose of providing evidence for use by law enforcement authorities; or

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987, as amended at 60 FR 22297, May 5, 1995]

§ 2.13 Confidentiality restrictions.

(a) *General.* The patient records to which these regulations apply may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority. Any disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure.

(b) *Unconditional compliance required.* The restrictions on disclosure and use in these regulations apply whether the holder of the information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement or other official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by these regulations.

(c) *Acknowledging the presence of patients: Responding to requests.* (1) The presence of an identified patient in a facility or component of a facility which is publicly identified as a place where only alcohol or drug abuse diagnosis, treatment, or referral is provided may be acknowledged only if the patient's written consent is obtained in accordance with subpart C of these regulations or if an authorizing court order is entered in accordance with subpart E of these regulations. The regulations permit acknowledgement of the presence of an identified patient in a facility or part of a facility if the

facility is not publicy identified as only an alcohol or drug abuse diagnosis, treatment or referral facility, and if the acknowledgement does not reveal that the patient is an alcohol or drug abuser.

(2) Any answer to a request for a disclosure of patient records which is not permissible under these regulations must be made in a way that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse. An inquiring party may be given a copy of these regulations and advised that they restrict the disclosure of alcohol or drug abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. The regulations do not restrict a disclosure that an identified individual is not and never has been a patient.

§ 2.14 Minor patients.

(a) *Definition of minor.* As used in these regulations the term "minor" means a person who has not attained the age of majority specified in the applicable State law, or if no age of majority is specified in the applicable State law, the age of eighteen years.

(b) *State law not requiring parental consent to treatment.* If a minor patient acting alone has the legal capacity under the applicable State law to apply for and obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under subpart C of these regulations may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. These regulations do not prohibit a program from refusing to provide treatment until the minor patient consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a State or local law requiring the program to furnish the service irrespective of ability to pay.

(c) *State law requiring parental consent to treatment.* (1) Where State law requires consent of a parent, guardian, or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under subpart C of these regulations must be given by both the minor and his or her parent, guardian, or other person authorized under State law to act in the minor's behalf.

(2) Where State law requires parental consent to treatment the fact of a minor's application for treatment may be communicated to the minor's parent, guardian, or other person authorized under State law to act in the minor's behalf only if:

(i) The minor has given written consent to the disclosure in accordance with subpart C of these regulations or

(ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the program director under paragraph (d) of this section.

(d) *Minor applicant for services lacks capacity for rational choice.* Facts relevant to reducing a threat to the life or physical well being of the applicant or any other individual may be disclosed to the parent, guardian, or other person authorized under State law to act in the minor's behalf if the program director judges that:

(1) A minor applicant for services lacks capacity because of extreme youth or mental or physical condition to make a rational decision on whether to consent to a disclosure under subpart C of these regulations to his or her parent, guardian, or other person authorized under State law to act in the minor's behalf, and

(2) The applicant's situation poses a substantial threat to the life or physical well being of the applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other person authorized under State law to act in the minor's behalf.

§ 2.15 Incompetent and deceased patients.

(a) *Incompetent patients other than minors*—(1) *Adjudication of incompetence.* In the case of a patient who has been adjudicated as lacking the capacity, for any reason other than insufficient age, to manage his or her own affairs, any consent which is required under these regulations may be given by the

guardian or other person authorized under State law to act in the patient's behalf.

(2) *No adjudication of incompetency.* For any period for which the program director determines that a patient, other than a minor or one who has been adjudicated incompetent, suffers from a medical condition that prevents knowing or effective action on his or her own behalf, the program director may exercise the right of the patient to consent to a disclosure under subpart C of these regulations for the sole purpose of obtaining payment for services from a third party payer.

(b) *Deceased patients*—(1) *Vital statistics.* These regulations do not restrict the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.

(2) *Consent by personal representative.* Any other disclosure of information identifying a deceased patient as an alcohol or drug abuser is subject to these regulations. If a written consent to the disclosure is required, that consent may be given by an executor, administrator, or other personal representative appointed under applicable State law. If there is no such appointment the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

§ 2.16 Security for written records.

(a) Written records which are subject to these regulations must be maintained in a secure room, locked file cabinet, safe or other similar container when not in use; and

(b) Each program shall adopt in writing procedures which regulate and control access to and use of written records which are subject to these regulations.

§ 2.17 Undercover agents and informants.

(a) *Restrictions on placement.* Except as specifically authorized by a court order granted under § 2.67 of these regulations, no program may knowingly employ, or enroll as a patient, any undercover agent or informant.

(b) *Restriction on use of information.* No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]

§ 2.18 Restrictions on the use of identification cards.

No person may require any patient to carry on his or her person while away from the program premises any card or other object which would identify the patient as an alcohol or drug abuser. This section does not prohibit a person from requiring patients to use or carry cards or other identification objects on the premises of a program.

§ 2.19 Disposition of records by discontinued programs.

(a) *General.* If a program discontinues operations or is taken over or acquired by another program, it must purge patient identifying information from its records or destroy the records unless—

(1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records to the acquiring program or to any other program designated in the consent (the manner of obtaining this consent must minimize the likelihood of a disclosure of patient identifying information to a third party); or

(2) There is a legal requirement that the records be kept for a period specified by law which does not expire until after the discontinuation or acquisition of the program.

(b) *Procedure where retention period required by law.* If paragraph (a)(2) of this section applies, the records must be:

(1) Sealed in envelopes or other containers labeled as follows: "Records of [insert name of program] required to be maintained under [insert citation to statute, regulation, court order or other legal authority requiring that records be kept] until a date not later than [insert appropriate date]"; and

(2) Held under the restrictions of these regulations by a responsible person who must, as soon as practicable

after the end of the retention period specified on the label, destroy the records.

§ 2.20 Relationship to State laws.

The statutes authorizing these regulations (42 U.S.C. 290ee–3 and 42 U.S.C. 290dd–3) do not preempt the field of law which they cover to the exclusion of all State laws in that field. If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law. However, no State law may either authorize or compel any disclosure prohibited by these regulations.

§ 2.21 Relationship to Federal statutes protecting research subjects against compulsory disclosure of their identity.

(a) *Research privilege description.* There may be concurrent coverage of patient identifying information by these regulations and by administrative action taken under: Section 303(a) of the Public Health Service Act (42 U.S.C. 242a(a) and the implementing regulations at 42 CFR part 2a); or section 502(c) of the Controlled Substances Act (21 U.S.C. 872(c) and the implementing regulations at 21 CFR 1316.21). These "research privilege" statutes confer on the Secretary of Health and Human Services and on the Attorney General, respectively, the power to authorize researchers conducting certain types of research to withhold from all persons not connected with the research the names and other identifying information concerning individuals who are the subjects of the research.

(b) *Effect of concurrent coverage.* These regulations restrict the disclosure and use of information about patients, while administrative action taken under the research privilege statutes and implementing regulations protects a person engaged in applicable research from being compelled to disclose any identifying characteristics of the individuals who are the subjects of that research. The issuance under subpart E of these regulations of a court order authorizing a disclosure of information about a patient does not affect an exercise of authority under these research privilege statutes. However, the research privilage granted under 21 CFR 291.505(g) to treatment programs using methadone for maintenance treatment does not protect from compulsory disclosure any imformation which is permitted to be disclosed under those regulations. Thus, if a court order entered in accordance with subpart E of these regulations authorizes a methadone maintenance treatment program to disclose certain information about its patients, that program may not invoke the research privilege under 21 CFR 291.505(g) as a defense to a subpoena for that information.

§ 2.22 Notice to patients of Federal confidentiality requirements.

(a) *Notice required.* At the time of admission or as soon threreafter as the patient is capable of rational communication, each program shall:

(1) Communicate to the patient that Federal law and regulations protect the confidentiality of alcohol and drug abuse patient records; and

(2) Give to the patient a summary in writing of the Federal law and regulations.

(b) *Required elements of written summary.* The written summary of the Federal law and regulations must include:

(1) A general description of the limited circumstances under which a program may acknowledge that an individual is present at a facility or disclose outside the program information identifying a patient as an alcohol or drug abuser.

(2) A statement that violation of the Federal law and regulations by a program is a crime and that suspected violations may be reported to appropriate authorities in accordance with these regulations.

(3) A statement that information related to a patient's commission of a crime on the premises of the program or against personnel of the program is not protected.

(4) A statement that reports of suspected child abuse and neglect made under State law to appropriate State or local authorities are not protected.

(5) A citation to the Federal law and regulations.

(c) *Program options.* The program may devise its own notice or may use the

sample notice in paragraph (d) to comply with the requirement to provide the patient with a summary in writing of the Federal law and regulations. In addition, the program may include in the written summary information concerning State law and any program policy not inconsistent with State and Federal law on the subject of confidentiality of alcohol and drug abuse patient records.

(d) *Sample notice.*

CONFIDENTIALITY OF ALCOHOL AND DRUG ABUSE PATIENT RECORDS

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal law and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser *Unless:*

(1) The patient consents in writing:

(2) The disclosure is allowed by a court order; or

(3) The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation.

Violation of the Federal law and regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with Federal regulations.

Federal law and regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.

Federal laws and regulations do not protect any information about suspected child abuse or neglect from being reported under State law to appropriate State or local authorities.

(See 42 U.S.C. 290dd–3 and 42 U.S.C. 290ee–3 for Federal laws and 42 CFR part 2 for Federal regulations.)

(Approved by the Office of Management and Budget under control number 0930–0099)

§ 2.23 Patient access and restrictions on use.

(a) *Patient access not prohibited.* These regulations do not prohibit a program from giving a patient access to his or her own records, including the opportunity to inspect and copy any records that the program maintains about the patient. The program is not required to obtain a patient's written consent or other authorization under these regulations in order to provide such access to the patient.

(b) *Restriction on use of information.* Information obtained by patient access to his or her patient record is subject to the restriction on use of his information to initiate or substantiate any criminal charges against the patient or to conduct any criminal investigation of the patient as provided for under § 2.12(d)(1).

Subpart C—Disclosures With Patient's Consent

§ 2.31 Form of written consent.

(a) *Required elements.* A written consent to a disclosure under these regulations must include:

(1) The specific name or general designation of the program or person permitted to make the disclosure.

(2) The name or title of the individual or the name of the organization to which disclosure is to be made.

(3) The name of the patient.

(4) The purpose of the disclosure.

(5) How much and what kind of information is to be disclosed.

(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.

(7) The date on which the consent is signed.

(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

(b) *Sample consent form.* The following form complies with paragraph (a) of this section, but other elements may be added.

1. I (name of patient) ☐ Request ☐ Authorize:
2. (name or general designation of program which is to make the disclosure)

3. To disclose: (kind and amount of information to be disclosed)

4. To: (name or title of the person or organization to which disclosure is to be made)

5. For (purpose of the disclosure)

6. Date (on which this consent is signed)

7. Signature of patient

8. Signature of parent or guardian (where required)

9. Signature of person authorized to sign in lieu of the patient (where required)

10. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon: (specific date, event, or condition)

(c) *Expired, deficient, or false consent.* A disclosure may not be made on the basis of a consent which:

(1) Has expired;

(2) On its face substantially fails to conform to any of the requirements set forth in paragraph (a) of this section;

(3) Is known to have been revoked; or

(4) Is known, or through a reasonable effort could be known, by the person holding the records to be materially false.

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§ 2.32 Prohibition on redisclosure.

Notice to accompany disclosure. Each disclosure made with the patient's written consent must be accompanied by the following written statement:

This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

[52 FR 21809, June 9, 1987; 52 FR 41997, Nov. 2, 1987]

§ 2.33 Disclosures permitted with written consent.

If a patient consents to a disclosure of his or her records under § 2.31, a program may disclose those records in accordance with that consent to any individual or organization named in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of §§ 2.34 and 2.35, respectively.

§ 2.34 Disclosures to prevent multiple enrollments in detoxification and maintenance treatment programs.

(a) *Definitions.* For purposes of this section:

Central registry means an organization which obtains from two or more member progams patient identifying information about individuals applying for maintenance treatment or detoxification treatment for the purpose of avoiding an individual's concurrent enrollment in more than one program.

Detoxification treatment means the dispensing of a narcotic drug in decreasing doses to an individual in order to reduce or eliminate adverse physiological or psychological effects incident to withdrawal from the sustained use of a narcotic drug.

Maintenance treatment means the dispensing of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

Member program means a detoxification treatment or maintenance treatment program which reports patient identifying information to a central registry and which is in the same State as that central registry or is not more than 125 miles from any border of the State in which the central registry is located.

(b) *Restrictions on disclosure.* A program may disclose patient records to a central registry or to any detoxification or maintenance treatment program not more than 200 miles away for the purpose of preventing the multiple enrollment of a patient only if:

(1) The disclosure is made when:

(i) The patient is accepted for treatment;

(ii) The type or dosage of the drug is changed; or

(iii) The treatment is interrupted, resumed or terminated.

(2) The disclosure is limited to:

(i) Patient identifying information;

(ii) Type and dosage of the drug; and

(iii) Relevant dates.

(3) The disclosure is made with the patient's written consent meeting the requirements of § 2.31, except that:

(i) The consent must list the name and address of each central registry and each known detoxification or maintenance treatment program to which a disclosure will be made; and

(ii) The consent may authorize a disclosure to any detoxification or maintenance treatment program established within 200 miles of the program after the consent is given without naming any such program.

(c) *Use of information limited to prevention of multiple enrollments.* A central registry and any detoxification or maintenance treatment program to which information is disclosed to prevent multiple enrollments may not redisclose or use patient identifying information for any purpose other than the prevention of multiple enrollments unless authorized by a court order under subpart E of these regulations.

(d) *Permitted disclosure by a central registry to prevent a multiple enrollment.* When a member program asks a central registry if an identified patient is enrolled in another member program and the registry determines that the patient is so enrolled, the registry may disclose—

(1) The name, address, and telephone number of the member program(s) in which the patient is already enrolled to the inquiring member program; and

(2) The name, address, and telephone number of the inquiring member program to the member program(s) in which the patient is already enrolled. The member programs may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollment.

(e) *Permitted disclosure by a detoxification or maintenance treatment program to prevent a multiple enrollment.* A detoxification or maintenance treatment program which has received a disclosure under this section and has determined that the patient is already enrolled may communicate as necessary with the program making the disclosure to verify that no error has been made and to prevent or eliminate any multiple enrollment.

§ 2.35 Disclosures to elements of the criminal justice system which have referred patients.

(a) A program may disclose information about a patient to those persons within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody if:

(1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or posttrial release, probation or parole officers responsible for supervision of the patient); and

(2) The patient has signed a written consent meeting the requirements of § 2.31 (except paragraph (a)(8) which is inconsistent with the revocation provisions of paragraph (c) of this section) and the requirements of paragraphs (b) and (c) of this section.

(b) *Duration of consent.* The written consent must state the period during which it remains in effect. This period must be reasonable, taking into account:

(1) The anticipated length of the treatment;

(2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and

(3) Such other factors as the program, the patient, and the person(s) who will receive the disclosure consider pertinent.

(c) *Revocation of consent.* The written consent must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified,

ascertainable event. The time or occurrence upon which consent becomes revocable may be no later than the final disposition of the conditional release or other action in connection with which consent was given.

(d) *Restrictions on redisclosure and use.* A person who receives patient information under this section may redisclose and use it only to carry out that person's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

Subpart D—Disclosures Without Patient Consent

§ 2.51 Medical emergencies.

(a) *General Rule.* Under the procedures required by paragraph (c) of this section, patient identifying information may be disclosed to medical personnel who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention.

(b) *Special Rule.* Patient identifying information may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers.

(c) *Procedures.* Immediately following disclosure, the program shall document the disclosure in the patient's records, setting forth in writing:

(1) The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;

(2) The name of the individual making the disclosure;

(3) The date and time of the disclosure; and

(4) The nature of the emergency (or error, if the report was to FDA).

(Approved by the Office of Management and Budget under control number 0930–0099)

§ 2.52 Research activities.

(a) Patient identifying information may be disclosed for the purpose of conducting scientific research if the program director makes a determination that the recipient of the patient identifying information:

(1) Is qualified to conduct the research;

(2) Has a research protocol under which the patient identifying information:

(i) Will be maintained in accordance with the security requirements of § 2.16 of these regulations (or more stringent requirements); and

(ii) Will not be redisclosed except as permitted under paragraph (b) of this section; and

(3) Has provided a satisfactory written statement that a group of three or more individuals who are independent of the research project has reviewed the protocol and determined that:

(i) The rights and welfare of patients will be adequately protected; and

(ii) The risks in disclosing patient identifying information are outweighed by the potential benefits of the research.

(b) A person conducting research may disclose patient identifying information obtained under paragraph (a) of this section only back to the program from which that information was obtained and may not identify any individual patient in any report of that research or otherwise disclose patient identities.

[52 FR 21809, June 9, 1987, as amended at 52 FR 41997, Nov. 2, 1987]

§ 2.53 Audit and evaluation activities.

(a) *Records not copied or removed.* If patient records are not copied or removed, patient identifying information may be disclosed in the course of a review of records on program premises to any person who agrees in writing to comply with the limitations on redisclosure and use in paragraph (d) of this section and who:

(1) Performs the audit or evaluation activity on behalf of:

(i) Any Federal, State, or local governmental agency which provides financial assistance to the program or is

authorized by law to regulate its activities; or

(ii) Any private person which provides financial assistance to the program, which is a third party payer covering patients in the program, or which is a peer review organization performing a utilization or quality control review; or

(2) Is determined by the program director to be qualified to conduct the audit or evaluation activities.

(b) *Copying or removal of records.* Records containing patient identifying information may be copied or removed from program premises by any person who:

(1) Agrees in writing to:

(i) Maintain the patient identifying information in accordance with the security requirements provided in § 2.16 of these regulations (or more stringent requirements);

(ii) Destroy all the patient identifying information upon completion of the audit or evaluation; and

(iii) Comply with the limitations on disclosure and use in paragraph (d) of this section; and

(2) Performs the audit or evaluation activity on behalf of:

(i) Any Federal, State, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate its activities; or

(ii) Any private person which provides financial assistance to the program, which is a third part payer covering patients in the program, or which is a peer review organization performing a utilization or quality control review.

(c) *Medicare or Medicaid audit or evaluation.* (1) For purposes of Medicare or Medicaid audit or evaluation under this section, audit or evaluation includes a civil or administrative investigation of the program by any Federal, State, or local agency responsible for oversight of the Medicare or Medicaid program and includes administrative enforcement, against the program by the agency, of any remedy authorized by law to be imposed as a result of the findings of the investigation.

(2) Consistent with the definition of program in § 2.11, program includes an employee of, or provider of medical services under, the program when the employee or provider is the subject of a civil investigation or administrative remedy, as those terms are used in paragraph (c)(1) of this section.

(3) If a disclosure to a person is authorized under this section for a Medicare or Medicaid audit or evaluation, including a civil investigation or administrative remedy, as those terms are used in paragraph (c)(1) of this section, then a peer review organization which obtains the information under paragraph (a) or (b) may disclose the information to that person but only for purposes of Medicare or Medicaid audit or evaluation.

(4) The provisions of this paragraph do not authorize the agency, the program, or any other person to disclose or use patient identifying information obtained during the audit or evaluation for any purposes other than those necessary to complete the Medicare or Medicaid audit or evaluation activity as specified in this paragraph.

(d) *Limitations on disclosure and use.* Except as provided in paragraph (c) of this section, patient identifying information disclosed under this section may be disclosed only back to the program from which it was obtained and used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities, as authorized by a court order entered under § 2.66 of these regulations.

Subpart E—Court Orders Authorizing Disclosure and Use

§ 2.61 Legal effect of order.

(a) *Effect.* An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290ee–3, 42 U.S.C. 290dd–3 and these regulations. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under these regulations.

(b) *Examples.* (1) A person holding records subject to these regulations receives a subpoena for those records: a response to the subpoena is not permitted under the regulations unless an authorizing court order is entered. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under these regulations.

(2) An authorizing court order is entered under these regulations, but the person authorized does not want to make the disclosure. If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure. Upon the entry of a valid subpoena or other compulsory process the person authorized to disclose must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of these regulations.

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]

§ 2.62 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.

A court order under these regulations may not authorize qualified personnel, who have received patient identifying information without consent for the purpose of conducting research, audit or evaluation, to disclose that information or use it to conduct any criminal investigation or prosecution of a patient. However, a court order under § 2.66 may authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records.

§ 2.63 Confidential communications.

(a) A court order under these regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

(b) [Reserved]

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) *Application.* An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrunity.

(b) *Notice.* The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) *Review of evidence: Conduct of hearing.* Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a

manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) *Criteria for entry of order.* An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) *Content of order.* An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

§ 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

(a) *Application.* An order authorizing the disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by the person holding the records or by any person conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws. The application may be filed separately, as part of an application for a subpoena or other compulsory process, or in a pending criminal action. An application must use a fictitious name such as John Doe, to refer to any patient and may not contain or otherwise disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(b) *Notice and hearing.* Unless an order under § 2.66 is sought with an order under this section, the person holding the records must be given:

(1) Adequate notice (in a manner which will not disclose patient identifying information to third parties) of an application by a person performing a law enforcement function;

(2) An opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order; and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a person performing a law enforcement function.

(c) *Review of evidence: Conduct of hearings.* Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or the person holding the records. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) *Criteria.* A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

(2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

(3) Other ways of obtaining the information are not available or would not be effective.

(4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(5) If the applicant is a person performing a law enforcement function that:

(i) The person holding the records has been afforded the opportunity to be

represented by independent counsel; and

(ii) Any person holding the records which is an entity within Federal, State, or local government has in fact been represented by counsel independent of the applicant.

(e) *Content of order.* Any order authorizing a disclosure or use of patient records under this section must:

(1) Limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime specified in the application; and

(3) Include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]

§ 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a program or the person holding the records.

(a) *Application.* (1) An order authorizing the disclosure or use of patient records to criminally or administratively investigate or prosecute a program or the person holding the records (or employees or agents of that program or person) may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

(2) The application may be filed separately or as part of a pending civil or criminal action against a program or the person holding the records (or agents or employees of the program or person) in which it appears that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has given a written consent (meeting the requirements of § 2.31 of these regulations) to that disclosure.

(b) *Notice not required.* An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) *Requirements for order.* An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64 of these regulations.

(d) *Limitations on disclosure and use of patient identifying information:* (1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.

(2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient, or be used as the basis for an application for an order under § 2.65 of these regulations.

§ 2.67 Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of a program.

(a) *Application.* A court order authorizing the placement of an undercover agent or informant in a program as an employee or patient may be applied for by any law enforcement or prosecutorial agency which has reason to believe that employees or agents of the program are engaged in criminal misconduct.

(b) *Notice.* The program director must be given adequate notice of the application and an opportunity to appear and be heard (for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order), unless the application asserts a belief that:

(i) The program director is involved in the criminal activities to be investigated by the undercover agent or informant; or

(2) The program director will intentionally or unintentionally disclose the proposed placement of an undercover agent or informant to the employees or agents who are suspected of criminal activities.

(c) *Criteria.* An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find:

(1) There is reason to believe that an employee or agent of the program is engaged in criminal activity;

(2) Other ways of obtaining evidence of this criminal activity are not available or would not be effective; and

(3) The public interest and need for the placement of an undercover agent or informant in the program outweigh the potential injury to patients of the program, physician-patient relationships and the treatment services.

(d) *Content of order.* An order authorizing the placement of an undercover agent or informant in a program must:

(1) Specifically authorize the placement of an undercover agent or an informant;

(2) Limit the total period of the placement to six months;

(3) Prohibit the undercover agent or informant from disclosing any patient identifying information obtained from the placement except as necessary to criminally investigate or prosecute employees or agents of the program; and

(4) Include any other measures which are appropriate to limit any potential disruption of the program by the placement and any potential for a real or apparent breach of patient confidentiality; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

(e) *Limitation on use of information.* No information obtained by an undercover agent or informant placed under this section may be used to criminally investigate or prosecute any patient or as the basis for an application for an order under §2.65 of these regulations.