

## Confidentiality of Substance Abuse Treatment Records

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### NC Judicial College--Basic Substance Abuse for District Court Judges

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## Accessing SA Treatment Information

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For the court or others to access information, you need either a

- Law
- Patient authorization, or
- Court order

that, under the particular circumstances, permits or requires disclosure

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## Topics

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- Part I: Applicable confidentiality laws
- Part II: Disclosures required by law
- Part III: Subpoenas and court orders

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## Applicable Confidentiality Laws

- State law governing MH/DD/SA providers—GS 122C
- Federal law governing health care (HIPAA Privacy Rule)—45 CFR Parts 160, 164
- Federal law governing substance abuse programs—42 CFR Part 2
- Evidentiary privileges—GS 8-53, -53.3, -53.7, -53.8

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## State Mental Health Law—GS 122C—Covered Providers

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

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## State Mental Health Law—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

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## State Mental Health Law— Duty Imposed

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No “individual” having access to confidential information may disclose it except as authorized by G.S. 122C-51 through -56 and 10A NCAC 26B

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## Privacy Rule—Covered Health Care Providers

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- Any health care provider that transmits any health information in electronic form for the purpose of carrying out financial or administrative activities related to health care
- Health care provider: any person who . . . furnishes, bills or is paid for . . . services, or supplies related to the health of an individual

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## Privacy Rule—Protected Health Information—any info

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

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## Privacy Rule—Duty

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- Covered entities may use and disclose PHI only as permitted or required by the privacy rule
- A use or disclosure that is not permitted or required by the rule is prohibited

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## 42 CFR Part 2—Covered Programs

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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 federal financial assistance

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## 42 CFR Part 2—Covered Information

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Applies to information

- that would identify a “patient”—one who has applied for or received SA services—as a substance abuser and
- is substance abuse information obtained by a covered program
- for the purpose of treating substance abuse, making a diagnosis for that treatment, or making a referral for that treatment

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## 42 CFR Part 2—Duty

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The regulations prohibit any disclosure *or use* of patient records that is not permitted by the regulations

- Information may not be used to criminally investigate or prosecute a patient without a court order authorizing such use

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## 42 CFR Part 2—Duty Applies to Recipients of Info

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- Restrictions on disclosure apply to anyone who receives records from a substance abuse program and is notified of the restrictions
- Prohibition on use for criminal purposes applies regardless of status of person who obtained the information or how it was obtained

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## 42 CFR Part 2—relationship to state law

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No state law may authorize or compel a disclosure prohibited by the federal law. § 2.20

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Part II

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Disclosures  
Required by Law

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Child Protective Services—  
Reporting—GS 7B-301

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Anyone who has cause to suspect that a child is abused, neglected, or dependent, or has died as a result of maltreatment, shall report the case to the department of social services

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State Law—GS 122C-54(h)

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A facility shall disclose confidential information for purposes of complying with

- Article 3 of Chapter 7B
- Article 6 of Chapter 108A
- Or as required by other state or federal law

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**Privacy Rule—45 CFR  
164.512(b)**

Permits the disclosure of protected health information to a government authority authorized by law to receive reports of suspected child abuse or neglect

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**Federal Substance Abuse  
Rule on “Required by Law”**

42 CFR 2.12(c)(6) and 2.15(b) permit programs to disclose patient identifying information when necessary to comply with state law

- requiring the reporting of child abuse or neglect, or
- permitting or requiring inquiry into the cause of death

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**Assessment and Protective  
Services—GS 7B-302**

The director 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 provision of protective services . . . any public or private agency or individual shall provide access to and copies . . .

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## State Law—GS 122C-54(h)

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A facility shall disclose confidential information for purposes of complying with Article 3 of Chapter 7B

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## Privacy Rule—45 CFR 164.512(a)

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Permits a disclosure without an individual's permission when the disclosure is required by law

"Required by law" means a mandate in law that compels a covered entity to make a use or disclosure of PHI and that is enforceable in a court of law

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## Federal Substance Abuse Law—42 CFR Part 2

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- Patient records may be disclosed or used only as permitted by these regulations. § 2.13
- There is no provision permitting the disclosure of information in the circumstances described in 7B-302.
- No state law may authorize or compel any disclosure prohibited by these regulations. § 2.20

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**Summary: Assessment & Protective Services—GS 7B-302**

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- State law mental health law requires disclosure—GS 122C-54(h)
- HIPAA Privacy Rule permits disclosure—45 CFR 164.512(a)
- Federal law prohibits disclosure without client consent or a court order compelling disclosure

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**Summary: GAL Access to Records—GS 7B-301**

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- State mental health law requires disclosure—GS 122C-54(h)
- HIPAA Privacy Rule permits disclosure—45 CFR 164.512(a)
- Federal law prohibits disclosure; the form order, AOC-J-300, does not meet the court-order requirements of 42 CFR 2

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**Interagency Sharing about Juveniles—GS 7B-3100**

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Designated agencies shall share with one another . . . information in their possession that is relevant to any assessment of a report . . . or the provision or arrangement of protective services . . . or to any case in which a petition is filed

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## Interagency Sharing about Juveniles—GS 7B-3100

- The Department must adopt rules designating agencies that must share information
- Agencies that may be designated include local mental health facilities
- 28 NCAC 01A.0301 designates “area MH/DD/SA authorities” and “county” MH/DD/SA facilities and programs

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## Summary: Interagency Sharing—GS 7B-3100 Disclosures

- State mental health law requires “area authorities” and “county” programs to disclose—GS 122C-54(h)
- HIPAA Privacy Rule permits disclosure—45 CFR 164.512(a)
- The federal SA law does not permit the disclosure of patient-identifying information pursuant to GS 7B-3100

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## Class Exercises

- Does the information identify a “patient”—one who has applied for or received SA services—as a substance abuser?
- Was the information obtained by a substance abuse program for the purpose of treating, diagnosing, or referring for treatment?

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### Part III

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## Subpoenas and Court Orders

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### Subpoenas

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- A subpoena, alone, does not permit disclosure of MH/DD/SA information
- Disclosure is not permitted unless:
  - A court orders disclosure
  - The client consents to disclosure, or
  - The applicable confidentiality law makes an exception to confidentiality that applies to the particular circumstances

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### Court Order—122C and HIPAA

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

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### Court Order—Evidentiary Privileges—GS 8-53.3

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

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### Four Purposes—Four Kinds of Court Orders—42 CFR Part 2, Subpart E

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

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### Court Order—SA Records

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

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### "Good Cause" for Non-Criminal Purposes

- Other ways of obtaining the information are not available or would not be effective
- The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient privilege, and the treatment services. 42 CFR 2.64

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### Court Order—Confidential Communications § 2.63—Only if:

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

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### Class Exercise

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