

Confidentiality of Substance Use Disorder (SUD) Treatment Records

District Court Judges

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Government

Confidentiality Laws

HIPPA

- Health
 - MH
 - IDD
 - SUD

G.S. 122C

- Mental Health
 - IDD
 - SUD

42 CFR 2

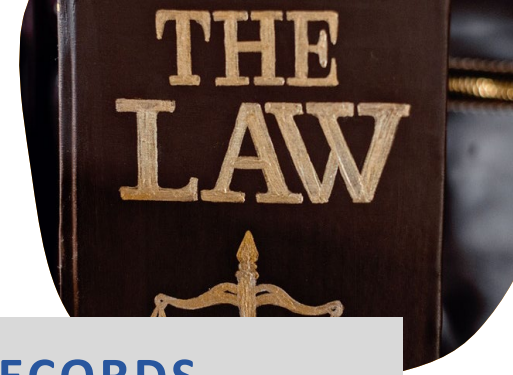
- SUD



Three-Step Approach

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

What Info is Confidential?



FEDERAL HIPAA PRIVACY RULE 45 C.F.R. PARTS 160, 164

Information created or received by a health care provider or other "covered entity" that identifies an individual and relates to the

- Physical or mental health of the individual
- Provision of health care to the individual, or
- Payment for the provision of health care to the individual

STATE MENTAL HEALTH ACT—G.S. 122C

Information identifying an individual as an applicant or recipient of services from a provider of mental health, intellectual/developmental disabilities, or substance use disorder services

FEDERAL SUD RECORDS LAW—42 C.F.R. PART 2

Information

- That would identify a patient of substance use disorder services as having, or having had, a substance abuse disorder (SUD), and
- Is drug or alcohol abuse info obtained by a SUD program
- For the purpose of treating or diagnosing SUD or making a referral for SUD treatment.



"that woman who
was in that awful
car accident last
week"

INFORMATION THAT "IDENTIFIES"

- Information that *directly* identifies a patient
- Information that *indirectly* identifies a patient by reference to publicly known or available information

WHETHER RECORDED OR NOT

- Written
- Digital
- Oral



It's still confidential

Question for Class

- CPS worker investigating report of child abuse or neglect requests access to child's mental health record pursuant to GS 7B-302(e), which authorizes access to "any information, whether or not confidential ..."
- The family/social history section of child MH record states that Mom, during intake of child, disclosed that she is "hooked on pain pills."

**IS THE INFORMATION PERTAINING TO MOM'S OPIATE
DEPENDENCY PROTECTED BY 42 C.F.R. 2? YES OR NO**

Who is Bound by these Laws?



HIPAA PRIVACY RULE 45 C.F.R. PARTS 160, 164

Providers of healthcare services and health plans/payors ("covered entities")

STATE MENTAL HEALTH ACT—G.S. 122C

- Providers of mental health, intellectual/developmental disabilities, and substance use disorder services (MH/IDD/SUD providers)
- **AND** anyone who has access to confidential MH/IDD/SUD information

FEDERAL SUD RECORDS LAW—42 C.F.R. PART 2

- Providers of substance use disorder services (SUD providers or "part 2 programs")
- **AND** those who receive information from SUD providers

Who has the duty of confidentiality?



STATE MENTAL HEALTH LAW

The restrictions on disclosure apply to both

- MH/DD/SUD service providers, **AND**
- Any “individual having access to” confidential information. G.S. 122C-52(b).

FEDERAL SUD LAW

The restrictions on disclosure apply to both

- Programs (part 2 programs), **AND**
- “Lawful holders” of “patient identifying information”—those who receive patient information from a program and who are notified by that program about the restrictions on disclosure.

GS 122C—State Law

Court orders Jackie to *mental health* treatment at Acme Counseling Center as part of a plan to see if she might regain custody of her children. Jackie authorizes Acme to share patient information with DSS “to provide DSS with the information it needs to determine if I have made sufficient progress in treatment so as to regain custody of my children.”

- Is DSS bound by G.S. 122C confidentiality law with respect to Jackie’s mental health treatment information received from Acme?

42 CFR Part 2

The federal confidentiality law governing information that identifies a person as a patient of substance use disorder treatment services (42 C.F.R. Part 2) applies to which of the following:

- a. Providers of substance use disorder (SUD) services.
- b. Those who receive information from SUD providers.
- c. Both a. and b.

Lawful Holder



Lawful Use



Special Category of Lawful Holders



STATE MENTAL HEALTH LAW

When state mental health law information is disclosed to a **HIPAA covered entity**—as permitted by the state confidentiality law—the HIPAA covered entity may redisclose it in compliance with HIPAA alone.

FEDERAL SUD LAW

A **HIPAA covered entity** receiving SUD information—pursuant to patient consent for treatment, payment, and health care operations—may further use and disclose the info as permitted by HIPAA alone

- There is an important exception

With One Notable Exception

42 CFR Part 2 prohibits using or disclosing SUD information for any civil, criminal, administrative, or legislative proceeding against the patient, unless that use or disclosure is authorized by **patient consent** or **court order**.



applies to SUD programs and *all* lawful holders, including HIPAA covered entities who received SUD info pursuant to patient consent and, therefore, do not have to adhere to other SUD law provisions governing use and disclosure

DSS

Mom, in a protective services phase of a child welfare case, agrees to get SUD treatment and signs a consent for the treatment program to disclose information to DSS so that DSS can monitor Mom's attendance and progress in treatment. A CPS worker receives SUD info from the program orally and writes it down in her case file. Subsequently, the CPS worker wants to disclose this info to a court. In this scenario:

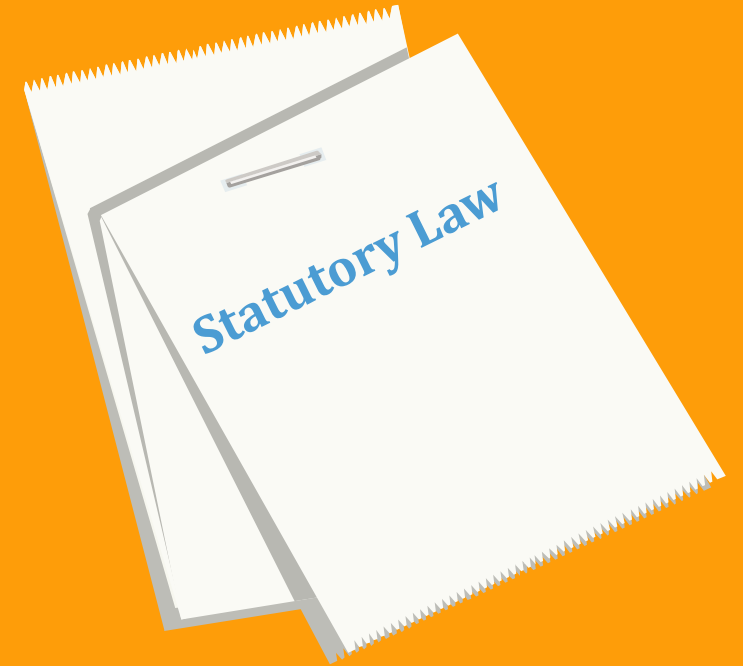
1. Is the information confidential under 42 CFR Part 2? ✓
2. Is DSS a lawful holder of that info (i.e., bound by 42 CFR 2)? ✓
3. Is there an exception to confidentiality that permits or requires a use or disclosure in the circumstance at hand? ?

Three-Step Approach

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Provision of Law

A policy expression that certain public
interests outweigh patient
confidentiality



NC Laws Requiring Disclosure

- Reporting child abuse, neglect, dependency—GS 7B-301
- DSS assessment of abuse, neglect, and dependency report—GS 7B-302(e)
- Child guardian ad litem access to info—GS 7B-601(c)
- Designated agency sharing in child welfare and juvenile cases—G.S. 7B-3100, 14B NCAC 11A.0301, Administrative Order



Required-by-Law Disclosures Recognized by Confidentiality Laws

- State MH/DD/SUD confidentiality law—A provider shall disclose confidential information as required by other state or federal law—GS 122C-54(h)
- HIPAA—A covered entity may disclose PHI to the extent the disclosure is required by law—45 CFR 164.512(a)



Scenario 1: Child Welfare

Investigation—MH Information

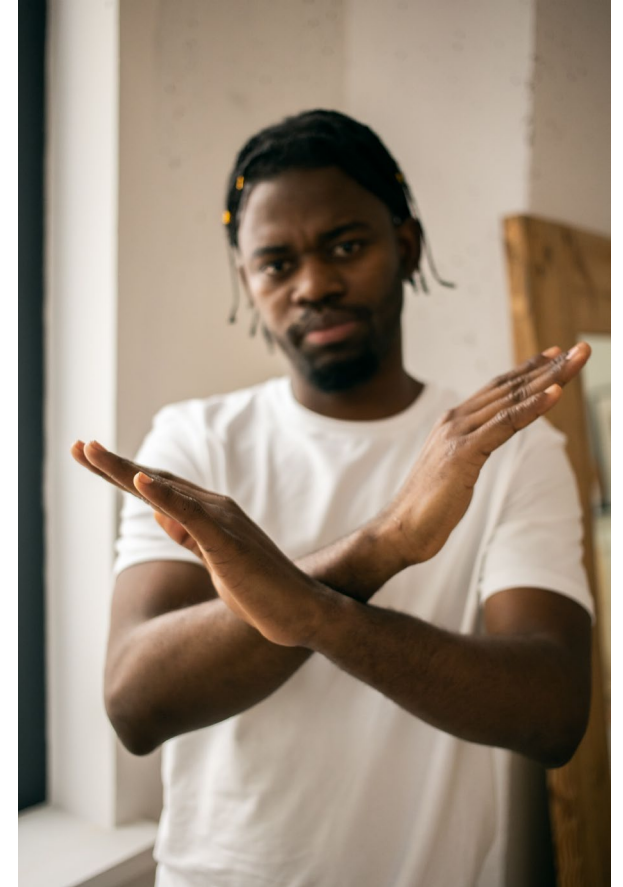
Someone has called DSS with a report alleging that the child of a client of mental health services has been neglected, including some allegations that the child's mother (a MH treatment client) is acting erratically. To assess the report, DSS calls the mental health treatment provider and asks for the client's mental health history. Can the mental health provider release this information to DSS?

Yes, and in fact, they are required to provide this information under G.S. 7B-302(e), (information relevant to assessing a report of abuse, neglect, or dependency) and G.S. 122C-54(h) creates confidentiality exception.

42 CFR Part 2

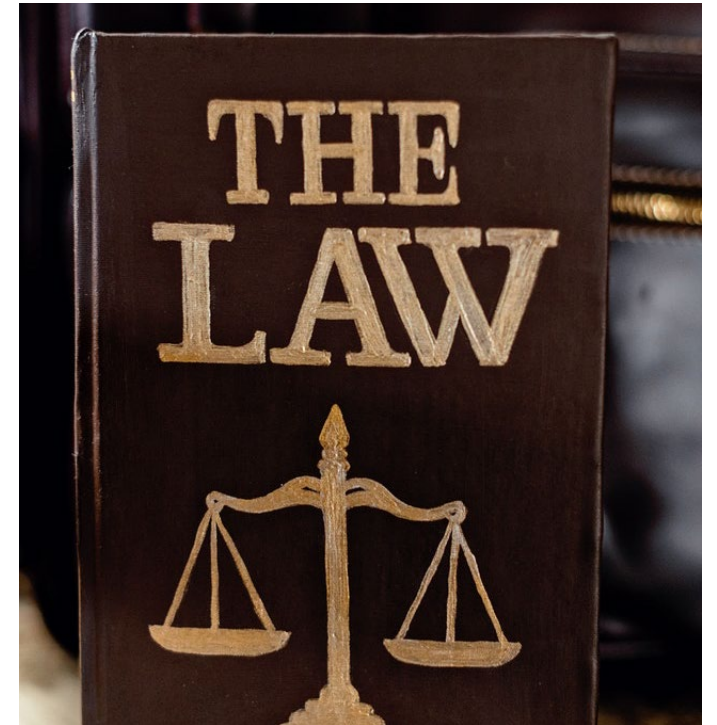
There is no catch-all provision permitting the disclosure of information when “required by other law”

- No state law may authorize or compel a disclosure not permitted by these regulations. § 2.20
- Prohibits any use or disclosure that is not expressly permitted by the regulations. § 2.13
- Where state law authorizes or compels a disclosure not permitted by these regulations, the federal prohibition on disclosure stands.



Federal SUD Law—Two Permitted Disclosures When Required by Law

- when necessary to comply with state law requiring the reporting of child abuse or neglect—42 CFR 2.12(c)(6)
- relating to the cause of death under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death—42 CFR 2.15(b)



Scenario 2: Child Welfare Investigation—SUD Info

Same child welfare scenario as Scenario 1, above, but DSS mother is a patient of a Part 2 (SUD) program. When DSS asks the SUD program for Mom's record to carry out its duty to assess the report, *G.S. 7B-302(e)*, can the program disclose it to DSS?

Patient Consent



Resource: [Creating Release of Information Forms.](#)

Patient Consent



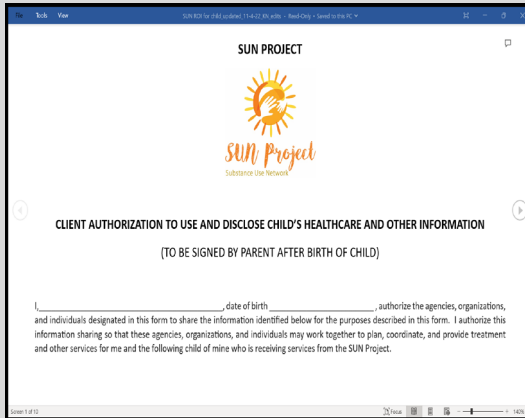
**Must be
Informed**

What will be disclosed

To whom

For what purpose

Patient Consent



SUN PROJECT

CLIENT AUTHORIZATION TO USE AND DISCLOSE CHILD'S HEALTHCARE AND OTHER INFORMATION
(TO BE SIGNED BY PARENT AFTER BIRTH OF CHILD)

I, _____, date of birth _____, authorize the agencies, organizations, and individuals designated in this form to share the information identified below for the purposes described in this form. I authorize this information sharing so that these agencies, organizations, and individuals may work together to plan, coordinate, and provide treatment and other services for me and the following child of mine who is receiving services from the SUN Project.

Must Be In Writing

Content elements required by law:

- G.S. 122C-53(a) (State Law)
- 45 C.F.R. § 164.508(c) (HIPAA);
- 42 C.F.R. 2.31 (SUD)

Disclosures and uses must comply with the terms of consent

Patient Consent

A screenshot of a web browser displaying the SUN Project Client Authorization form. The form is titled "SUN PROJECT" and features a logo with a sun and the text "SUN Project Substance Use Network". The main heading is "CLIENT AUTHORIZATION TO USE AND DISCLOSE CHILD'S HEALTHCARE AND OTHER INFORMATION (TO BE SIGNED BY PARENT AFTER BIRTH OF CHILD)". Below this, there is a line for the parent's name and date of birth, followed by a paragraph of text explaining the purpose of the form and the authorization process. The form is presented in a clean, professional layout with a white background and blue text.

Must Be Voluntary

Patient must sign

Patient may revoke at any time

Question

SUD patient information may be disclosed pursuant to the patient's *written consent*

➤to another health care provider for purposes of coordinating care and treatment?



➤to a health plan to obtain payment for services?



➤to DSS to establish a parent's attendance and progress with treatment?



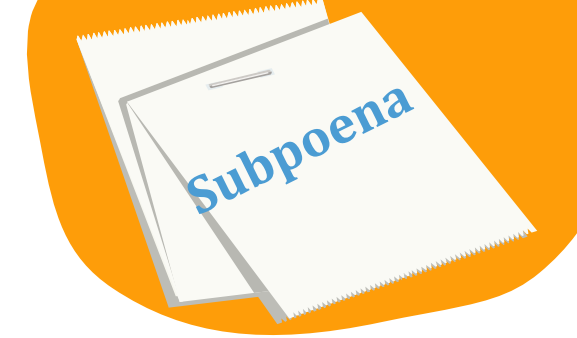
➤to a probation officer to establish that the patient is complying with treatment



Subpoenas and Court Orders



Subpoenas



HIPAA PRIVACY RULE

Permits disclosure in response to a subpoena. 45 CFR 164.512(e)

STATE MENTAL HEALTH ACT

Does not permit disclosure in response to a subpoena

FEDERAL SUD RECORDS LAW

Does not permit disclosure response to a subpoena

Court Order



- What procedural requirements must be met?
- What legal standard or test must be met?
- What findings must be recorded?

HIPAA and 122C

- HIPAA, 45 CFR 164.512(e), permits a covered entity to disclose in response to a court order.
- GS 122C-54(a) requires a facility to disclose in response to a court order.

Standard for Health, Mental Health, and IDD



- HIPAA and state MH/DD/SA law do not express any particular legal standard or procedure for a court order to disclose.
- Rule of Thumb—generally, you should balance the public's interest in disclosure—so that the truth can be known and justice administered—with the individual's interest in privacy

Is the information relevant?

Is the information necessary?

Is the Information Relevant?



- What are the questions before you?
- Will the information help answer these questions?

Mother's mental health records admissible in termination of parental rights action. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005)(trial court found mental health issues (1) seriously impeded her ability to provide minimally acceptable parenting of child and(2) had detrimental impact on child) See also, *In re J.S.L.*, 177 N.C. App. 151, 628 S.E.2d 387 (2006).

Is the Information Necessary?

- Do you need it to understand or decide an issue that is essential to adjudicating the case?



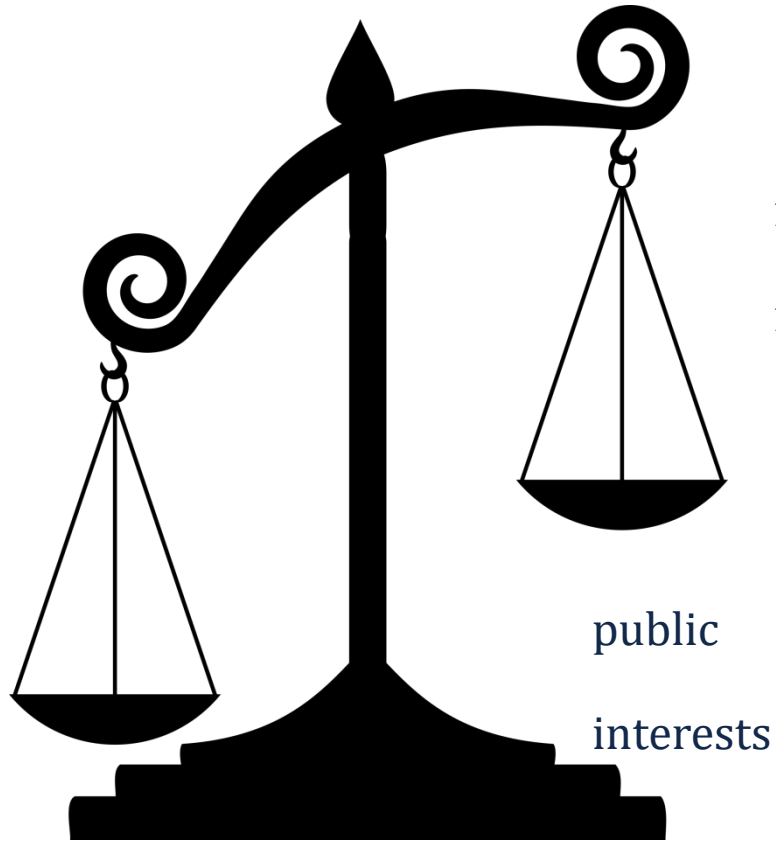
A court may compel disclosure of privileged information if, in the court's opinion, disclosure is “*necessary to the proper administration of justice.*” G.S. 8-53.3, et seq. [Evidentiary privileges.]

- 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. Efir*, 309 N.C. 802, 309 S.E.2d 228 (1983).

The Balancing Test



privacy
interests



public
interests

relevant
necessary

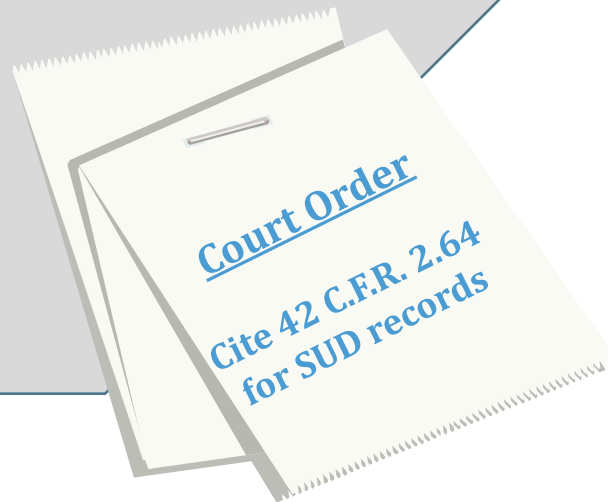


Court Orders—SUD Info—42 CFR 2

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

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

Court Order to Disclose in Civil Cases—§ 2.64



Notice to the Patient

Opportunity to be heard

Make particular findings

Limit scope of disclosure

Court Must Find “Good Cause”

To order disclosure, the court must find that:

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

42 CFR 2.64(d)

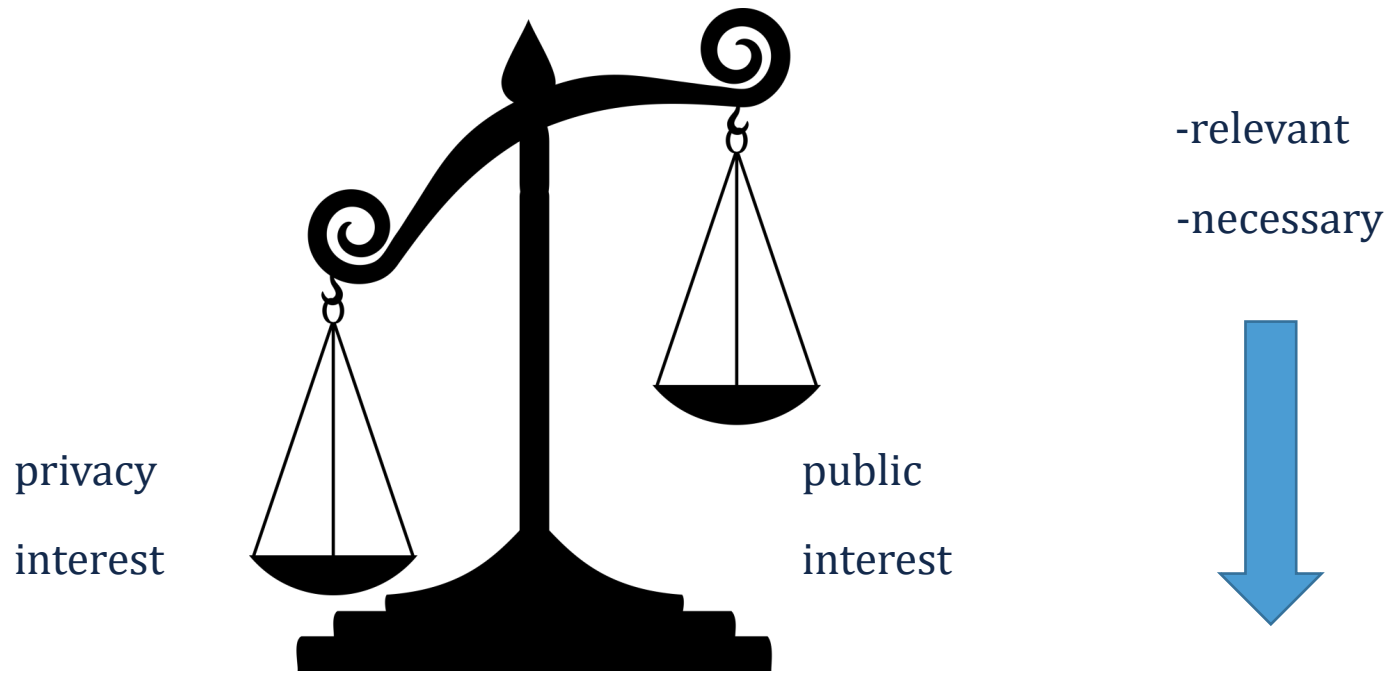
Good Cause Finding # 1

“Other ways of obtaining the information are not available or would not be effective”

SUD records of parents were not relevant [necessary] during the adjudication stage of neglect and dependency proceeding. County DSS had sufficient evidence of parent's substance abuse without including their substance abuse records, and nothing indicated that the records would provide additional evidence regarding the neglect and dependency of the children. *In re E.P., M.P.* 183 N.C. App. 301, 645 S.E.2d 772 (2007)

Good Cause Finding # 2 –Balancing Test

“The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the program’s ability serve other patients.”



The Case of Jackie Jones

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

Questions—42 CFR § 2.64

1. Can the SA counselor testify in response to the subpoena?
 - a. Yes
 - b. No
2. Can the court order disclosure?
 - a. Yes
 - b. No
3. If so, what findings must the court make?
 - a. Other ways of obtaining the information are not available
 - b. The public interest and need for the disclosure outweigh the potential injury to the patient and program
 - c. Both a. and b.



SUD Records Procedural Requirements

Review:

- SUD: Any judicial review of records—including any hearing or oral argument on the disclosure question—must be *in camera*



Notice:

- SUD: The patient and person holding the records must be given adequate notice and opportunity to file a written response or to 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.



Summary of Standards

HIPAA, GS 122C, GS 130A

- (Information is relevant to a question before the court)
- (Information is necessary to adjudicate an issue in the case)



GS 8-53 thru -53.13

- Information is necessary to the proper administration of justice

42 CFR 2

- Other ways of obtaining information are not available or effective
- The public interest and need for the disclosure outweigh the potential injury to the patient's privacy interests, the physician-patient privilege, and the treatment services.



Additional Elements—SUD Order

Court must limit disclosure to:

- Those parts of the record that are essential to fulfilling the objective of the order
- Those persons whose need for the information forms the basis for the order



Order must include:

- Such other measures as are necessary to limit the 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 been ordered. 42 C.F.R. § 2.64.



Court Order—Confidential Communications § 2.63— Higher Threshold for Disclosure

- **Necessary to the investigation or prosecution of an extremely serious crime**, e.g., one that threaten loss of life or serious bodily injury, inc., homicide, rape, kidnapping, armed robbery, assault w/deadly weapon, or child abuse or neglect, or
- **Necessary to protect against an existing threat to life or of serious bodily injury**, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties, or
- In connection with litigation in which **patient offers testimony or other evidence pertaining to content of confidential communications**.

Spangler v. Olchowski, 187 N.C.App. 684, 654 S.E.2d 507 (2007) (plaintiff waived G.S. 122C, GS 8-53 and 42 CFR 2 confidentiality). Midkiff v. Comptom, COA09-254, May 18, 2010 (implied waiver).

Questions?

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Online video resource:

[Behavioral Health Confidentiality Laws](#)