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CONFIDENTIALITY AND USE OF SUBSTANCE USE DISORDER TREATMENT INFORMATION

SOCIAL SERVICES ATTORNEYS' WINTER CONFERENCE
FEBRUARY 24, 2022



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Chapter 14—Confidentiality

Abuse, Neglect, Dependency, and Termination of Parental Rights,
Sara DePasquale, School of Government

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Confidentiality Laws Applicable to SUD Treatment Providers

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



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Terminology

State MH Law	HIPAA Privacy Rule	SUD Law
client	individual	patient
facility	covered entity	part 2 program
consent	authorization	consent
confidential information	protected health information	patient identifying information



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42 CFR Part 2—Relationship to State Law

No state law may authorize or compel any disclosure prohibited by these regulations. 42 C.F.R. § 2.20

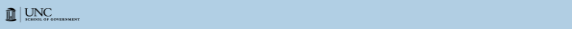
- Just because state law says you are entitled to information, that does not mean you get it.
- Just because a court orders an SUD evaluation, doesn't mean it can see it



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Two Step Analysis

1. Is the information confidential under one or more confidentiality laws?
 - Is the entity or person holding the records bound by confidentiality law?
 - Is the information confidential?
2. If confidential, 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



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HIPAA Privacy Rule

- Covered provider—any health care provider that transmits any health information in electronic form in connection with a HIPAA transaction
- Protected information—info 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

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



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State Mental Health Act—GS 122C—Covered Providers (“facilities”)

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

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



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State Mental Health Act— “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

No individual having access to confidential information may disclose it except as authorized by the state confidentiality law itself and its implementing regulations.

- G.S. 122C-51 through -56
- 10A NCAC 26B (APSM 45-1)



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The Case of Jackie Jones

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



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

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

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Covered Entities

Restrictions on disclosure apply to

- Programs (part 2 programs)
- “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.

42 C.F.R. § 2.32

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Which of the following are “lawful holders?”

- a. A primary care provider who receives SUD patient information pursuant to patient consent.
- b. A DSS that receives SUD patient information pursuant to the consent of a patient who is a parent in the protective services phase of a child welfare case.
- c. A Juvenile Justice employee who receives, pursuant to the juvenile and parent’s consent, a comprehensive clinical assessment (CCA) containing SUD information.
- d. All of the above.

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Patient Identifying Information—

42 CFR § 2.12(a)

Restrictions on disclosure apply to any info

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

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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 information protected by 42 C.F.R. 2?

YES or NO

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Basic Legal Duty

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Basic Duty of Programs and Lawful Holders

May not disclose confidential information, unless they have

- A provision in the confidentiality regulation,
- A patient authorization, or
- A court order

that permits or requires disclosure under the particular circumstances

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The Case of Jackie Jones

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

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Question

A law enforcement officer requests information about Jackie from Acme. Officer explains that he is conducting a criminal investigation related to Jackie’s abuse of her children. Can Acme comply with the officer’s request?

YES or NO

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Question

Instead of going to Acme, the officer goes to DSS and requests information about Jackie that DSS has received from Acme. The officer explains that he is conducting a criminal investigation of Jackie. Can DSS comply with the officer's request?

YES or NO

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The Case of Jackie Jones

- Is the information sought by the officer restricted from disclosure by 42 CFR 2?
 - Held by program or lawful holder?
 - Patient identifying information?
- Is there an applicable exception to confidentiality?
 - Does 42 CFR 2 permit Acme or DSS to disclose patient information to the law enforcement officer in these circumstances?
 - Does Jackie's written authorization permit disclosure to the law enforcement officer?
 - What does the officer need to obtain Part 2 program information from Acme or DSS?

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Basic Analysis—Ask Yourself:

1. Is the information confidential under one or more confidentiality laws?
2. If so, is there an exception to confidentiality that permits or requires disclosure in the circumstance at hand?
 - Law (a policy exception to confidentiality)
 - Patient authorization
 - Court order

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Disclosures Required by State Law



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NC Disclosures Required by Law

- 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



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Disclosures Required by Law

- State confidentiality law—A facility 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)



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42 CFR Part 2—Relationship to State Law

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

- Prohibits any use or disclosure that is not expressly permitted by the regulations. § 2.13
- No state law may authorize or compel any disclosure prohibited by these regulations. § 2.20
- Where state law authorizes or compels a disclosure not permitted by 42 C.F.R. 2, the federal prohibition on disclosure stands.



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Federal SUD Law—Two Permitted Disclosures When Required by Law

Permits programs to disclose patient identifying information

- 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)
- when necessary to comply with state law requiring the reporting of child abuse or neglect—42 CFR 2.12(c)(6)



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DSS as a Legally Responsible Person

“Upon request the legally responsible person of a client *shall* have access to confidential information in the client’s record” unless

- The LRP assented to a confidentiality agreement between a provider and a minor
- Provider believes that disclosure would be injurious to client’s physical or mental well-being
- The minor gave consent to the treatment

G.S. 122C-53(d), G.S. 122C-4



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LRP for Minors

- Parent
 - Guardian
 - Person standing in loco parentis, or
 - Legal custodian other than a parent who has been granted specific authority
 - by law
 - or in a custody order
- to consent to medical care, including psychiatric treatment. See GS 122C-3(20).



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Legal Custodian Authorized by Law to Consent to Treatment

When a juvenile is placed in the legal custody of DSS, the director may arrange, provide, or consent to:

- Routine medical and dental care
- Emergency medical, surgical, psychiatric, psychological, or mental health care
- Testing and evaluation in exigent circumstances.

G.S. 7B-505.1, 7B-903.1(e)



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Legal Custodian Authorized by Court Order to Consent to Treatment

- Court may authorize DSS to consent to treatment if court finds that the care, treatment, or evaluation is in the juvenile's best interest
- Treatment requiring such order:
 - Prescriptions for psychotropic medications
 - Comprehensive clinical assessments, or other mental health evaluations
 - Psychiatric, psychological, or mental health care

G.S. 7B-505.1, -903.1(e)



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Does LRP Have Right of Access to Minor’s SUD Records?

- “These regulations do not prohibit a program from giving a patient access to his or her own records.” See § 2.23.
- Regulations only address who may consent to disclosures
 - Guardian for a patient who has been adjudicated incompetent. § 2.15
 - Minor who has consented to her own treatment
 - When parent/guardian/other (LRP) consents to treatment—the minor and LRP

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Patient Authorization to Disclose

See Part III of Class Handout entitled, “Confidentiality Laws Governing Substance Use Disorder Treatment Records”

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Restriction on “Disclosure” and “Use”

- Restrictions on “disclosure” mean you cannot disclose except as permitted by 42 CFR 2.
- Restriction on “use” means SUD program information cannot be used in any *criminal* proceeding against a patient without a court order authorizing the disclosure and use of the information for that purpose.

42 C.F.R. § 2.12

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CARES Act—March 2020

- Adds to the prohibition on *using* SUD information in any criminal investigation and proceeding—except by court order
- A bar to using SUD information in any *civil* proceeding conducted by any federal, state, or local authority against the patient—except by court order or *patient consent*

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Subpoenas and Court Orders

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Subpoenas

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

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Court Orders—122C and HIPAA

- GS 122C-54(a) requires a facility to disclose in response to a court order
 - In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387 (2006). Mother’s mental health records admissible in termination of parental rights action
- HIPAA, 45 CFR 164.512(e), permits a covered entity to disclose in response to a court order

Neither law expresses any procedure, standard, or required findings



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

A court may compel disclosure of privileged information if, in the court’s opinion, disclosure is *“necessary to the proper administration of justice”*

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



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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



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Court Order to Disclose SUD Info

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



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Good Cause—Disclosures for Non-Criminal Purposes

To order disclosure, the court must find that:

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

42 CFR 2.64, 2.65



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Good Cause Finding # 1

SUD records of parents were not relevant 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)



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Good Cause Finding # 2 –Balancing Public and Privacy Interests



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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.

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Questions

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.

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Court Order—Confidential Communications § 2.63—Only if:

- **Necessary to the investigation or prosecution of an extremely serious crime**, . . . (See 42 CFR 2.63)
- **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. Compton*, COA09-254, May 18, 2010 (implied waiver).



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42 C.F.R 2—Summary

If the federal confidentiality law applies, disclosure is not permitted unless

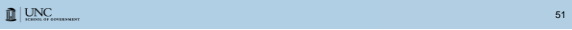
- 42 CFR 2 makes an exception to confidentiality under the particular circumstances, or
- The patient consents to disclosure, or
- A court orders disclosure



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Discovery—GS 7B-700

- DSS is *authorized* to share with any other party information relevant to action.
- Chief district court judge may adopt local rules or enter an administrative order addressing the sharing of information among parties and the use of discovery
- Any party may file a motion for discovery.
- Party served with a motion for discovery may request denial or protective order and shall submit, for in camera inspection, the materials the party seeks to protect.
- Info obtained through discovery or sharing of information under this section may not be redisclosed if the redisclosure is prohibited by State or federal law



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Part 2 Program Definitions A Self-Study

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“Substance Use Disorder”

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

42 C.F.R. § 2.11

(Does not include tobacco and caffeine.)

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“Program”—Definition One

An individual or entity (other than a general medical facility) that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment.

- A private practitioner who provides, and holds herself out as providing, diagnosis and referral for treatment is covered by the regulations even though she does not treat SUD.

“Program”—Definition Two

An identified unit *within a general medical facility* that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment

- If a general hospital has promoted an identified unit, such as a detox unit, to the community as a provider of such services, the identified unit, but not the rest of the general hospital, would be a program

“Program”—Definition Three

Personnel in a *general medical facility* whose primary function is the provision of SUD diagnosis, treatment, or referral for treatment and who are identified as such

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

Question

Patient treated for an apparent drug overdose is transferred from ED to a medical floor. A substance abuse counselor visits and evaluates the patient for substance use disorder and possible referral for treatment.

- Is the substance abuse counselor a “program” under 42 C.F.R. Part 2?
- Answer: YES

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“General Medical Facilities”

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

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“General Medical Facilities”

Health care providers who work in these facilities would only be a “program” if they

- Work in an identified unit within the facility that provides and holds itself out as providing SUD diagnosis, treatment or referral for treatment, or
- The primary function of the provider is the provision of such services and they are identified as providers of such services.

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Question

Dr. Mallory is an addictions specialist who works in a community health center that provides primary care, pregnancy care, and geriatric care. Dr. Mallory treats patients who have substance use disorders and prescribes buprenorphine for opiate addiction as part of her practice.

- Is Dr. Mallory covered by 42 C.F.R Part 2?
YES
- Is the community health center covered?
NO

Adapted from Legal Action Center, 9-19-13 webinar, Karla Lopez, JD

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Question

Hospital ED treating a trauma patient performs a blood test that identifies cocaine in patient's blood

- Does this alone make the hospital ED a "program" under 42 C.F.R. Part 2?
NO
- Are the drug test results protected by 42 C.F.R. Part 2?

NO, not obtained for purpose of diagnosing or treating SUD, or referring for SUD treatment

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END

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