

Confidentiality of Substance Abuse Treatment Records

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

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Accessing SA Treatment Information

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 to specified persons for specified purposes

Topics

- Part I: Applicable confidentiality laws
- Part II: Disclosures required by law
- Part III: Subpoenas and court orders
- Part IV: Patient authorization to disclose

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

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

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

State Mental Health Law— Duty Imposed

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

Privacy Rule—Covered Health Care Providers

- 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, in the normal course of business, furnishes, bills or is paid for care, services, or supplies related to the health of an individual

Privacy Rule—Protected Health Information—any 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

Privacy Rule—Duty

- 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

42 CFR Part 2—Covered Programs

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

42 CFR Part 2—Covered Programs Includes:

- Any independent physician or therapist with a specialty in SA diagnosis or treatment
- Any part of a broader organization that is identified as providing SA services
- Programs providing only diagnosis and referral for treatment

42 CFR Part 2—Covered Information

- 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

Diagnosis

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

42 CFR Part 2—Duty

- The regulations prohibit any use or disclosure of patient records that is not permitted by the regulations
 - Prohibits the use of information to criminally investigate or prosecute a patient without a court order authorizing such use

42 CFR Part 2—Duty
Applies to Recipients of Info

- 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

42 CFR Part 2—relationship
to state law

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

Part II

Disclosures
Required by Law

**Child Protective Services—
Reporting—GS 7B-301**

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

State Law—GS 122C-54(h)

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

**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

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
- There is no general provision that permits disclosure when otherwise required by law

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 . . .

Privacy Rule—45 CFR 164.512(a)

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

Federal Substance Abuse Law—42 CFR Part 2

- Patient records may be disclosed or used only as permitted by these regulations. § 2.13
- No state law may authorize or compel any disclosure prohibited by these regulations. § 2.20
- Contains no provision permitting the disclosure of information for purposes of complying with 7B-302.

Assessment and Protective Services—GS 7B-302

- 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

GAL Access to Records-GS 7B-301

- 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 Part 2

Interagency Sharing about Juveniles—GS 7B-3100

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

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

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

**Adult Protective Services—
Reporting—108A-102**

- State law mental health law requires disclosure—GS 122C-54(h)
- HIPAA Privacy Rule permits disclosure—45 CFR 164.512(c)
- Federal law prohibits disclosure

**Adult Protective Services—
Evaluation—GS 108A-103(a)**

- State mental health law requires disclosure of records maintained by a “caretaker”
- HIPAA Privacy Rule permits disclosure of PHI from “caretaker” records
- Federal law prohibits disclosure

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Class Exercises

42 CFR Part 2—Covered Information

- 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

Part III

Subpoenas and Court Orders

Subpoenas

- HIPAA privacy rule permits providers to disclose in response to a subpoena
- GS 122C and the NC privilege statutes do not recognize subpoenas as an exception to confidentiality
- 42 CFR 2.61(a): Program may not disclose records in response to a subpoena without a court order issued in accordance with these regulations

Subpoenas

- 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

Court Order—122C and HIPAA

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

Court 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"

Spangler v. Olchowski, 187 N.C.App. 684, 654 S.E.2d 507, (2007)

- Medical malpractice action for physical pain and emotional distress
- Issue on appeal--whether trial court erred in ordering disclosure of substance abuse treatment information
- Court applied GS 122C, GS 8-53, and 42 CFR 2 confidentiality laws
- Court relied on its analysis of GS 8-53 to conclude that plaintiff had waived GS 122C confidentiality

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

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

"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

"Good Cause" - For Criminal Inv/Pros of Patient, Add

- Crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury inc. homicide, rape, kidnapping, armed robbery, assault w/deadly weapon, and child abuse and neglect
- There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution
- Person holding records had opportunity to be represented by independent counsel. 42 CFR 2.65

"Good Cause" - Program is Target of Criminal Inv/Pros

- 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 2.66

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.

Class Exercise

Part IV

Patient Authorization to Disclose

Authorization Must Be Informed

- The individual signing the authorization to disclose information must understand what information will be disclosed, with whom it will be shared, and for what purpose
- Any disclosure by a provider must be consistent with the terms of the authorization—the provider is bound by statements in the authorization

Authorization Must Be Voluntary

- Generally, a provider may not condition the provision of treatment on receiving an authorization
- An individual may revoke an authorization at any time except to the extent that the provider has taken action in reliance on the authorization

Criminal Justice System Referrals

- 42 CFR 2: Permits use of irrevocable patient authorization when participation in treatment is a condition of disposition of criminal proceeding
- HIPAA and GS 122C: Do not permit irrevocable authorizations
- Solution: Combine the use of 42 CFR 2 irrevocable authorization form with a court order issued in compliance with HIPAA and GS 122C
