



**SCHOOL OF
GOVERNMENT**

District Court Judges

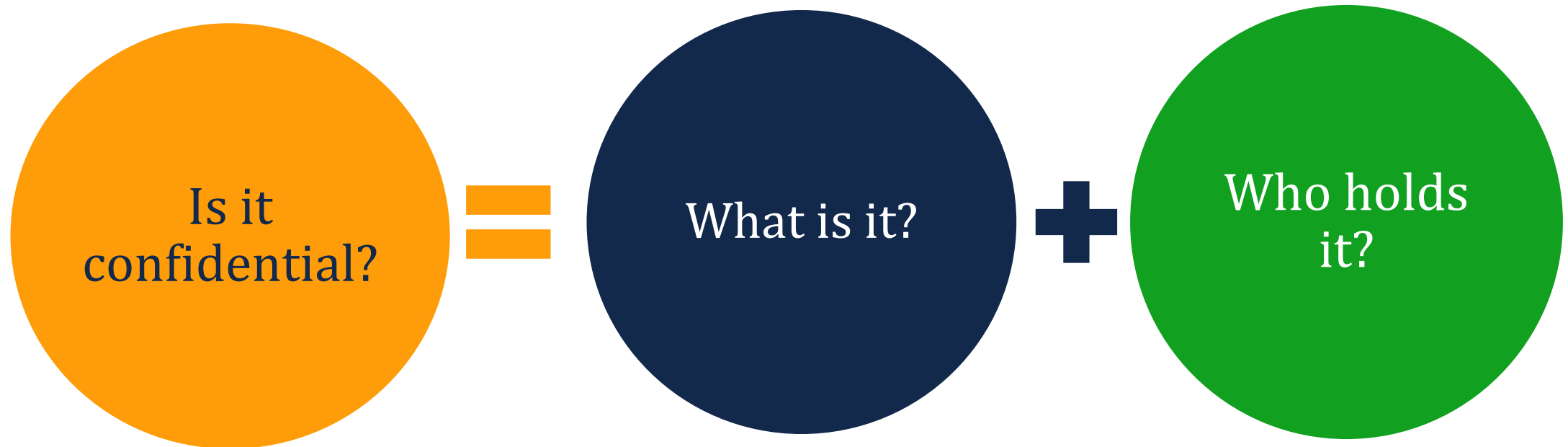
**The Confidentiality of
Substance Use Disorder (SUD)
Treatment Records**

Feb. 5, 2024

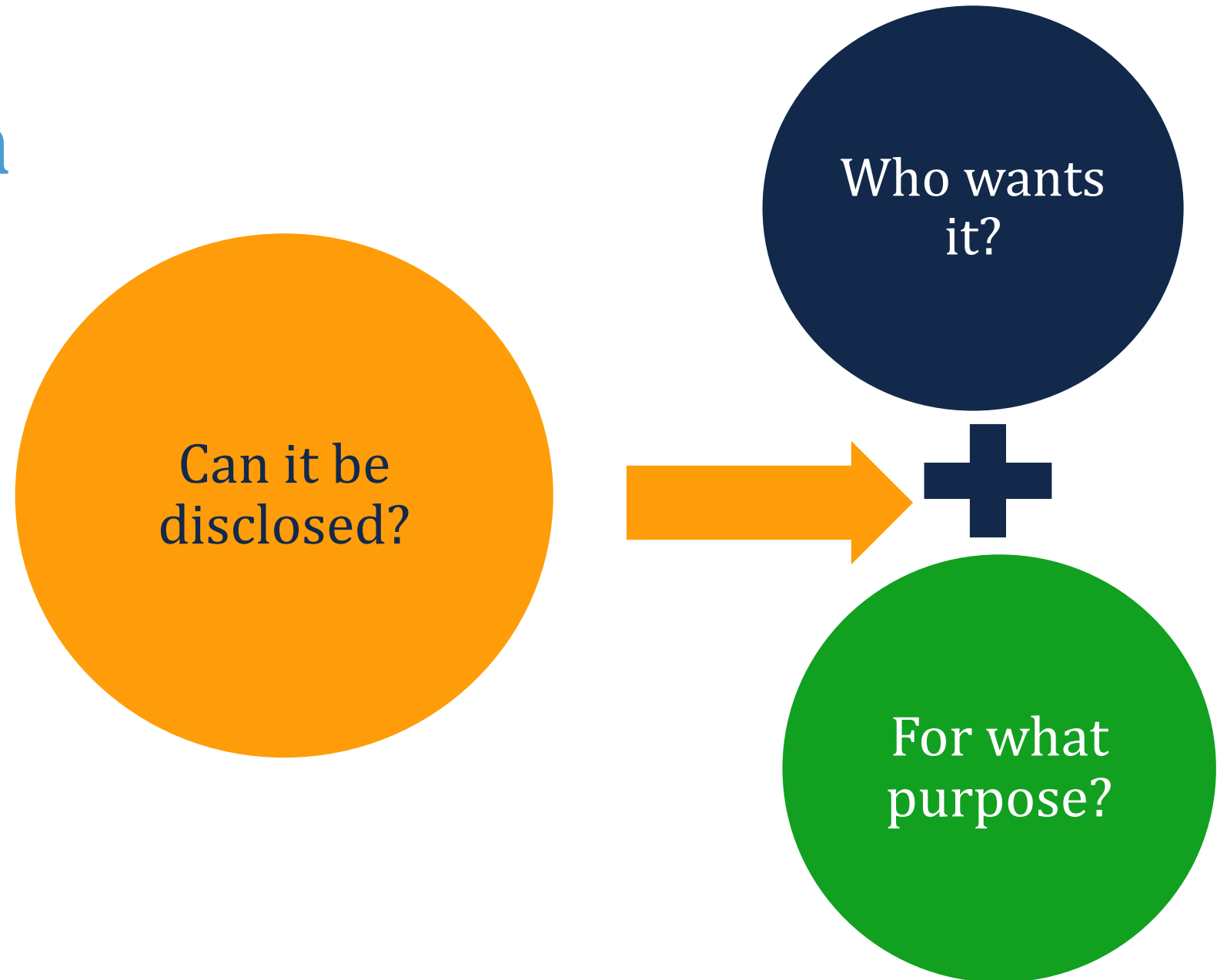
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Public Law and
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Information



Information



Two-Step Analysis

1. Is the information confidential under one or more confidentiality laws?
 - Does it fall within the law's definition of "confidential information"?
 - Is the entity or person holding the records bound by confidentiality law?
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

Confidentiality Laws Applying to Treatment Information

Confidentiality Laws

HIPPA

- Health
- MH
- IDD
- SUD

G.S. 122C

- Mental Health
 - IDD
 - SUD

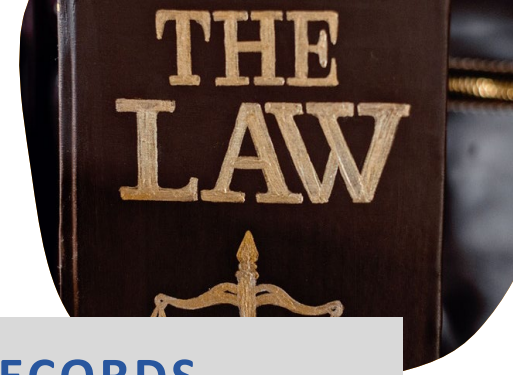
42 CFR 2

- SUD

THE
LAW



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

It's Still Confidential!

WHETHER RECORDED OR NOT

- Written
- Digital
- Oral



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
- Holders of information identifying someone as an applicant or recipient of such services

**Exception: HIPAA covered entities receiving info disclosed as permitted by the state confidentiality law may redisclose it in compliance with HIPAA alone.*

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.

**Exception (proposed change): HIPAA covered entities receiving info pursuant to patient consent for treatment, payment, and health care operations may further use and disclose the info as permitted by HIPAA alone.*

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 b. and c.

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.

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.

Lawful Holder



Lawful Use



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:

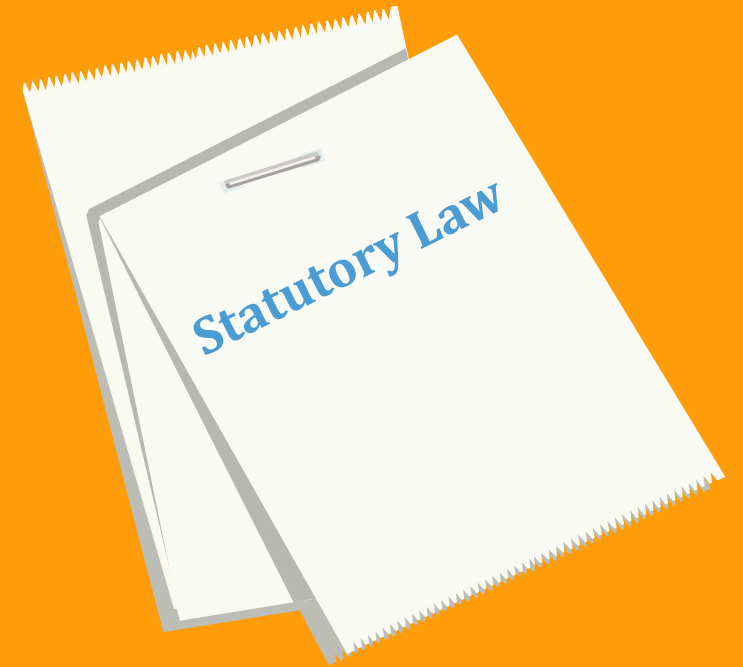
1. Is the information confidential under 42 CFR Part 2? ✓
2. Is DSS a lawful holder of that info (i.e., bound by 42 CFR 2)? ✓
3. Is there an exception to confidentiality that permits or requires a use or disclosure in the circumstance at hand? ?

Two Step Analysis

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



Provisions of Law



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

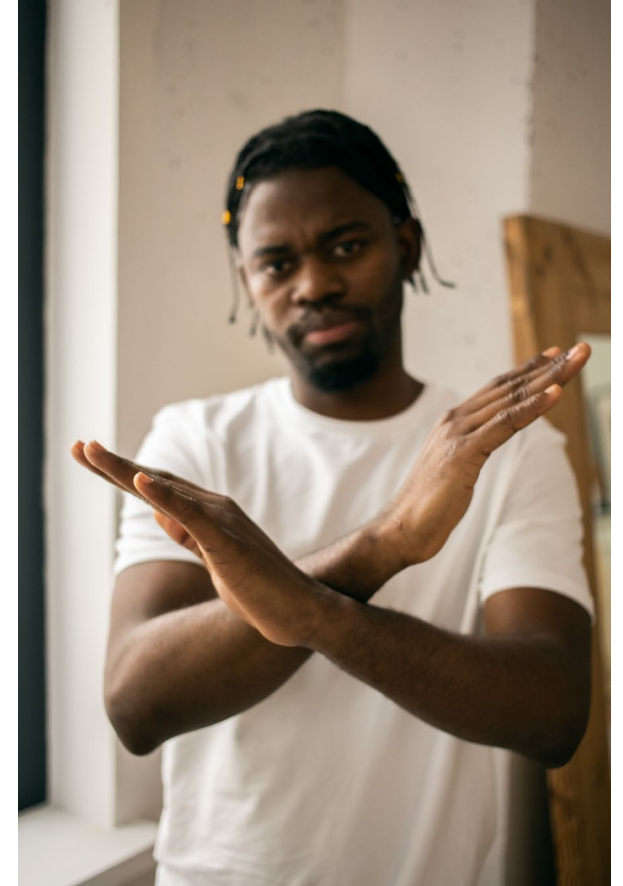
Someone has called DSS with a report alleging that the child of a client of mental health services has been neglected, including some allegations that the child's mother (a MH treatment client) is acting erratically. To assess the report, DSS calls the mental health treatment provider and asks for the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

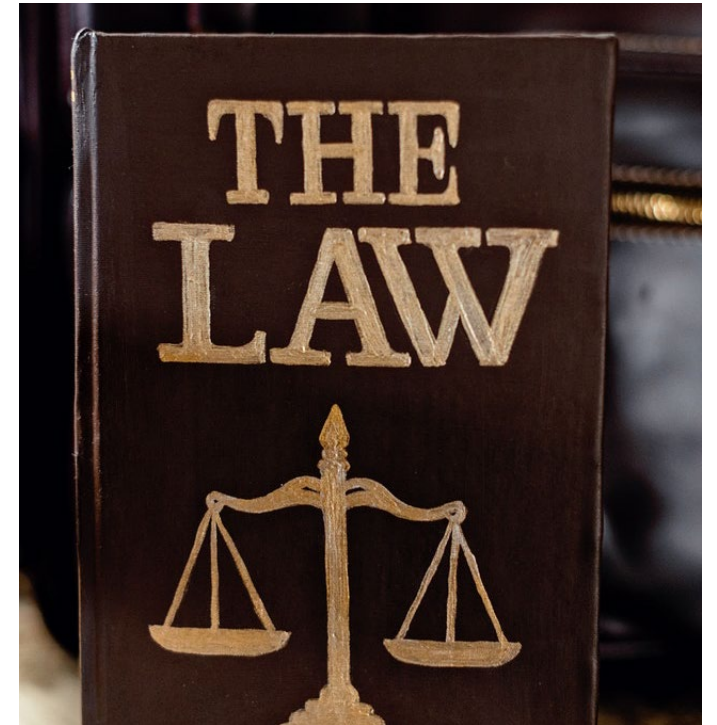
There is no catch-all provision permitting the disclosure of information when “required by other law”

- 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, can the program disclose it to DSS?

Question

An SUD program may disclose patient information in which one of the following situations where state law requires disclosure:

- a. To report suspected child abuse, neglect, or dependency under GS 7B-301. ✓
- b. To respond to a DSS request for info when necessary for DSS to assess a report of child abuse, neglect, or dependency under GS 7B-302(e). ✗
- c. When an agency designated in an administrative order—entered under G.S. 7B-3100 and requiring the sharing of information in child welfare and juvenile cases—requests information from another agency designated in the order. G.S. 7B-3100, 14B NCAC 11A.0301 ✗

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

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 *patient consent* or court order

Patient Consent



Patient Consent



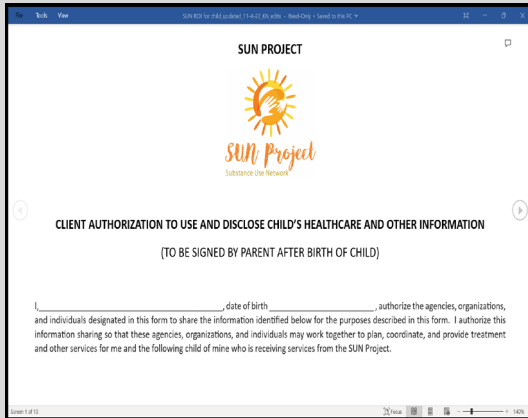
Must be
Informed

What will be disclosed

To whom

For what purpose

Patient Consent



Must Be In Writing

**Elements required by law—10A NCAC
26B.0202 (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**

**Disclosures must be limited to that
information which is necessary to
carry out the stated purposes**

Patient Consent



Must Be Voluntary

Patient must sign

Must indicate date or event upon
which consent will expire

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? ✓

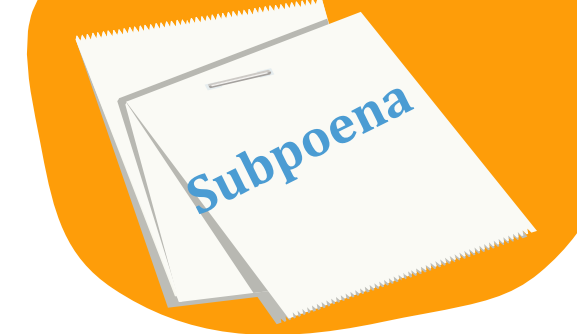
➤ to DSS to establish a parent's attendance and progress with treatment? ✓

➤ 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

- All 3 confidentiality laws discussed in this session authorize disclosure pursuant to a court order
- What criteria must be met for the court to order disclosure?
 - What procedural requirements must be met?
 - What legal standard or test must be met?
 - What findings must be made?



Court Orders—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
- ***Neither law expresses any procedure, standard, or required findings***

G.S. 122C: 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).

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.

Is the Information Relevant?



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

Is the Information Necessary?

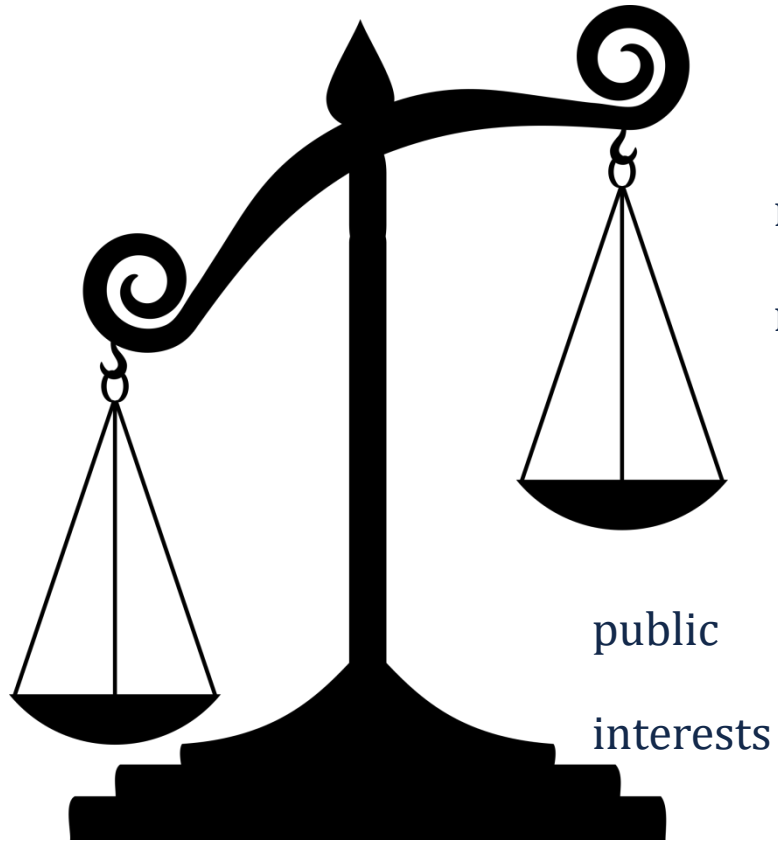


- Do you need it to understand or decide an issue that is essential to adjudicating the case?
- Or, does the information speak to a question that has already been answered?
- Or, are there other ways of getting the information?

The Balancing Test



privacy
interests



relevant
necessary



public
interests

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

*never disclose pursuant to a subpoena alone

Notice to the Patient

Opportunity to be heard

Specific court findings

Limited scope of disclosure

Court Order

Cite G.S. 122C-54(a) for state law governing MH,IDD,SUD

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.

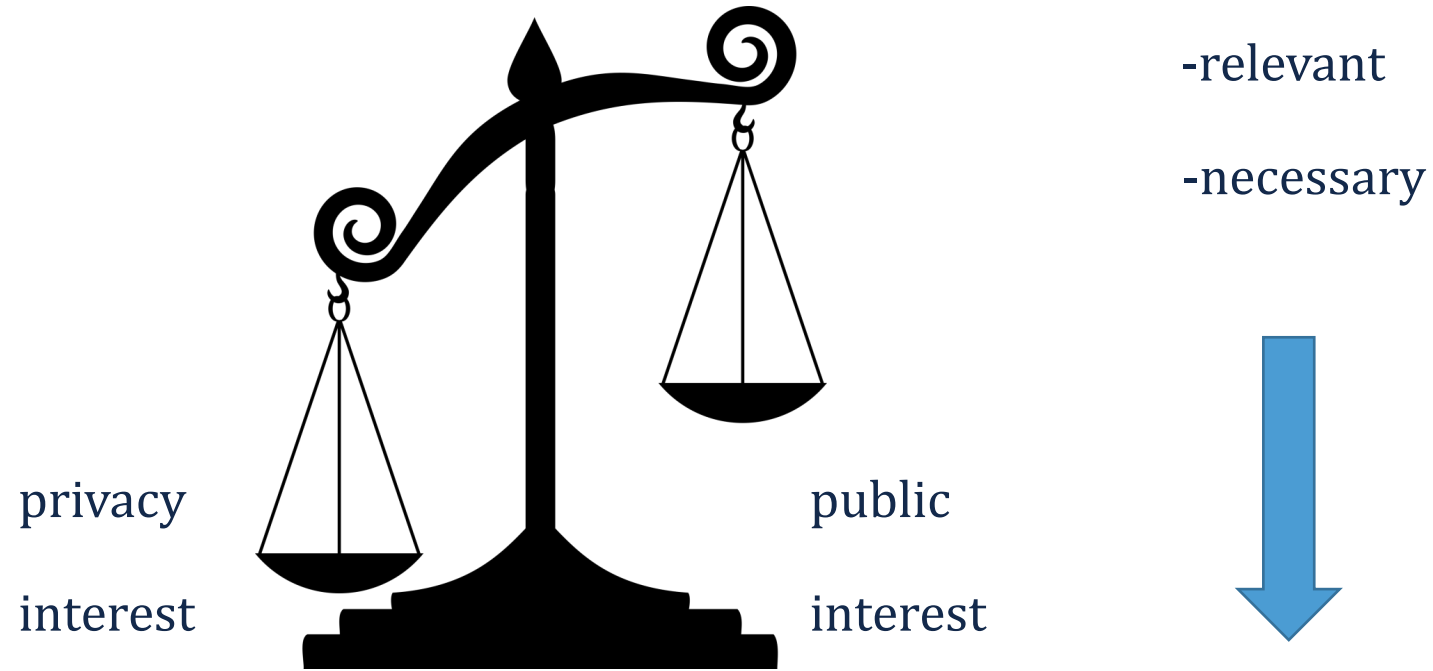
42 CFR 2.64, 2.65

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)

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.



Court Order—Confidential Communications § 2.63—

Only if:

- **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).

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.



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.



Questions?

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