

DSS Attorneys Conference

Subpoenas and Court Orders for MM/DD/SA Information

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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

Subpoenas

- HIPAA privacy rule permits disclosure in response to a subpoena
- GS 122C and 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

Court Order—State Law 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"

Four Kinds of Court Orders for SA Information—42 CFR Part 2

- 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

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.