DISCLOSURE OF CONFIDENTIAL HEALTH INFORMATION IN COURT PROCEEDINGS

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SUMMARY

There are many laws addressing the confidentiality of individually identifiable health information. The federal HIPAA privacy rule applies to most health care providers and prohibits them from disclosing any patient information except as specifically allowed by the rule. In addition, much patient information is privileged under state laws. HIPAA and state privilege laws both allow disclosures of patient information for court proceedings if certain conditions are met. The conditions set by HIPAA and the state laws are not exactly the same, but they overlap to produce a general rule: A health care provider may disclose a patient's individually identifiable health information for a court proceeding pursuant to either of the following:

- *A valid authorization form.* To be valid, the form must be in writing, contain certain elements specified in the HIPAA privacy rule, not be combined with any other document, and be signed by the proper person—either the patient or the patient's personal representative.[1]
- *A court order to disclose the information*. A court may order disclosure of patient information after determining that the disclosure is necessary to a proper administration of justice.

Sometimes information is not privileged under state law, but it is still protected under HIPAA. A health care provider who is asked to disclose such information for a court proceeding may not make the disclosure without either the patient's written authorization, a court order, or a subpoena, discovery request or other lawful process accompanied by notice to the patient or a qualified protective order. For more information, see section V in the outline that follows.

Sometimes information to be disclosed is subject to a law providing heightened protection, with the result that additional steps may be required before it may be disclosed in court. Two categories of information that may be particularly likely to present this issue in NC courts are (1) information about a person with a reportable communicable disease, such as HIV, and (2) information maintained by a federally assisted substance abuse program.

[1] To satisfy HIPAA, the personal representative must be a person who is authorized by applicable law to make health care decisions for another individual. 45 CFR 164.502(g). Examples of persons who may constitute personal representatives under NC law include the parent of a minor child, a legal guardian, or a person named as health care agent in a health care power of attorney, among others. If the person is deceased, the person who may authorize disclosure of information is the executor or administrator of the estate, or if there is no executor or administrator, the next of kin. GS 8-53.

OUTLINE

I. **Laws protecting the confidentiality of health information** – Most of the health information that is collected or maintained by a health care provider is subject to more than one confidentiality law. There are federal and state laws that may apply. Some of the laws are generally applicable, while others apply only to information associated with particular types of providers, programs/services, or categories of health information (such as genetic information, or information about particular conditions).

a. Federal laws in general

i. *HIPAA Privacy Rule (45 CFR Parts 160 and 164)*. This federal regulation governs the use and disclosure of individually identifiable health information by health plans (insurers), health care clearinghouses (entities such as billing services that process data for health insurance transactions), and health care providers who engage in electronic transactions related to patients' insurance eligibility or claims.

ii. *Program-specific laws.* A number of health care programs or services receive federal financial assistance and thus become subject to federal regulations that address the confidentiality of the patient information they acquire. Such programs and services are typically subject to HIPAA and state privilege laws as well, and generally HIPAA and the privilege laws govern the disclosure of information in court proceedings (see section IV, below). However, the regulation that applies to federally assisted substance abuse programs (42 CFR Part 2) contains specific procedures and criteria for both patient authorizations and court orders for disclosures of information (see section VI, below).

b. State laws in general

i. *Privilege statutes.* Information acquired by health care providers in the course of treating patients is usually privileged. NC's physician-patient privilege statute (GS 8-53) applies to physicians, surgeons, and persons working under their direction and supervision. There are also privilege statutes applying to other types of health care providers, including

psychologists, optometrists, nurses, social workers, and counselors. When health information is privileged, it may not be disclosed in court proceedings without either the patient's authorization or a court order (see section IV, below).

ii. *Provider or facility-specific laws.* NC statutes and regulations contain dozens of provisions that address the confidentiality of information acquired or maintained by different types of health care providers or facilities, including hospitals, nursing homes, hospice agencies, home health agencies, emergency medical services, pharmacies, public health agencies, and mental health care providers or facilities. The facility-specific laws typically do not affect whether or how information may be disclosed for court proceedings—that will generally be governed by HIPAA and the privilege laws (see section IV, below).[2]

iii. *Category-specific laws.* Relatively few NC laws address the confidentiality of specific categories of health information. However, one that may be particularly important to court proceedings is the state communicable disease confidentiality statute (GS 130A-143). This law applies to all information or records that identify a person who has or may have a reportable communicable disease—a category that includes HIV, tuberculosis, hepatitis, and many sexually transmitted infections. The law provides heightened protection for such information when it is to be disclosed in court proceedings (see section VI, below).

II. **HIPAA and court proceedings** – The HIPAA privacy rule governs the use or disclosure of "protected health information," defined as individually identifiable information that pertains to any of the following: (1) the individual's physical or mental health status or condition, (2) provision of health care to the individual, or (3) payment for the provision of health care to the individual. HIPAA applies to health care providers only if they transmit health information electronically in connection with certain insurance transactions. It is likely that most health care providers in NC are subject to HIPAA, but some are not.

[2] Mental health facilities and providers that are subject to the confidentiality provisions of GS Chapter 122C may disclose confidential information about clients for court proceedings only pursuant to the client's written consent or a court order, regardless of whether the information is protected by a statutory privilege. If the facility or provider is also subject to HIPAA, the written consent must be on a HIPAA-compliant authorization form, as described in section II of the outline. GS 122C-53 (written consent), 122C-54 (court order).

a. Disclosure with patient authorization – The general rule under HIPAA is that the patient's authorization is required to disclose protected health information (45 CFR 164.508). The authorization must be in writing, include specific elements, and usually must be a separate, free-standing form (not combined with a consent to treatment form or other document). It must be signed by the patient, or if the patient lacks capacity to authorize disclosure, the patient's personal representative. (Personal representative has a specific meaning under HIPAA—see footnote 1.) A health care provider may disclose protected health information for a court proceeding pursuant to a written authorization that meets all of HIPAA's requirements.

b. Disclosure without patient authorization – There are several exceptions to the general rule that the patient's written authorization is required for disclosure, including an exception that specifically addresses judicial proceedings [45 CFR 164.512(e)]. A health care provider who is subject to HIPAA may disclose protected health information without the patient's authorization if the disclosure is for a judicial proceeding and is made pursuant to any of the following:

    i. *A court order*. The provider may disclose only the protected health information expressly authorized by the order.

    ii. *A subpoena, discovery request, or other lawful process.* The provider may disclose information pursuant to a subpoena, discovery request, or other lawful process other than a court order if (and only if) either of the following conditions is satisfied:
        1. The person who is the subject of the protected health information receives written notice that the information has been requested and is given the opportunity to raise an objection to the court; or
        2. A qualified protective order is obtained from a court before the information is produced. HIPAA describes a qualified protective order as either a court order or a stipulation by the parties that:
            a. Prohibits the parties from using or disclosing the information for purpose other than the litigation or proceeding for which it was requested, and
            b. Requires that the information and any copies made of it be returned to the health care provider who produced the information at the end of the litigation or proceeding.

III. **State privilege laws and court proceedings** – Generally information that health care providers acquire in the course of treating patients is privileged and may be disclosed in court proceedings only with the patient's authorization or a court order.

a. Physician-patient privilege (GS 8-53): Information that a licensed physician acquires in the course of attending a patient, and that is necessary to the physician's treatment of the patient, is privileged. The physician-patient privilege extends to nurses, technicians and others assisting or acting under the direction of a physician. *See, e.g., State v. Etheridge*, 319 NC 34 (1987). Generally the information may be disclosed in court proceedings only with the patient's (or personal representative's) authorization; however, the court may order disclosure if in the judge's opinion disclosure is necessary to a proper administration of justice. Such an order may compel disclosure before trial or before the filing of criminal charges when necessary to provide for the proper administration of justice. *In re Albemarle Mental Health Center,* 42 NC App 292 (1979). It is within the judges' discretion to determine whether disclosure is necessary. *E.g., Roadway Express v. Hayes,* 178 NC App 165 (2006).

b. Other privilege statutes that may protect health information: Other state statutes create privileges for relationships between patients/clients and their psychologists (GS 8-53.3), marital and family therapists (GS 8-53.5), private social workers (GS 8-53.6), counselors (GS 8-53.8), optometrists (GS 8-53.9), and nurses (GS 8-53.13).

c. When privilege does not apply

i. *Waiver.* A plaintiff who puts her medical condition at issue waives the privilege, permitting disclosure of her confidential information to the extent necessary for the defendant-physician to reasonably defend against the action. *Jones v. Asheville Radiological Group,* 129 NC App 449 (1998). A patient may otherwise waive the privilege expressly or by implication. *E.g., Cates v. Wilson*, 321 NC 1 (1987) (plaintiff waived the privilege by implication when she testified about her condition and her communications with her physician); *Adams v. Lovette*, 105 NC App 23, *aff'd per curiam,* 332 NC 659 (1992) (defendant impliedly waived the privilege when he objected to the plaintiff's request for his medical records not on the ground of privilege, but relevance).

ii. *Privilege removed by another law.* Several NC statutes provide that the physician-patient or other health care provider privileges do not apply in certain circumstances.

1. Child abuse – No privilege except the attorney-client privilege constitutes a ground for failing to report child abuse. GS 7B-310. Neither the physician-patient privilege nor the nurse-patient privilege may be invoked to exclude evidence about the abuse or neglect of a child under age 16. GS 8-53.1; s*ee also State v. Etheridge*, 319 NC 34 (1987); *State v. Efird*, 309 NC 802 (1983).
2. Victim's compensation – The physician and counselor/therapist privileges do not apply to communications or records concerning the physical, mental, or emotional condition of a claimant or victim if the condition is relevant to a claim for compensation. GS 15B-12(b).
3. Emancipation of a minor – The physician-patient privilege is not a ground for excluding evidence in an emancipation hearing. GS 7B-3503.

IV. **Information that is protected under HIPAA <u>and</u> privileged under state law** – Both HIPAA and state privilege laws permit a health care provider to disclose patient information for a court proceeding with the patient's authorization, or pursuant to a court order. If the disclosure is made with patient authorization, HIPAA requires the authorization to be in writing and on a form meeting specific criteria. If the disclosure is made pursuant to a court order, state law requires that the order be issued by a judge who has determined that disclosure is necessary to a proper administration of justice. A health care provider may therefore disclose information that is both protected under HIPAA and privileged under state law pursuant to either of the following:

a. <u>A valid (HIPAA-compliant) authorization form:</u> The form must be in writing, contain certain elements specified in the HIPAA privacy rule, not be combined with any other document, and be signed by the proper person—either the patient or the patient's personal representative.

b. <u>A court order</u>: A judge may order disclosure of patient information after determining that the disclosure is necessary to a proper administration of justice.

V. **Information that is protected under HIPAA but <u>not</u> privileged** – Patient information may not be subject to a privilege for a variety of reasons. The information may be outside the scope of the privilege, *see Prince v. Duke University,* 326 NC 787 (1990) (only clinical information necessary to treat the patient is protected by the privilege); or the privilege may have been waived or removed by action of another law (see section III, above). However, if the health care provider who has the information is subject to HIPAA, the information is still protected health information under HIPAA and the health care provider may not disclose it except as permitted by that law. The health care provider may disclose the information for court proceedings only if one of the following circumstances applies:

a. <u>Patient authorization</u>: The health care provider may disclose information to the extent the patient (or personal representative) has authorized disclosure in writing on an authorization form that meets HIPAA's criteria as described in section II, above. *A written statement from the patient that is sufficient to authorize disclosure under the privilege laws is not automatically sufficient under HIPAA as well—it must satisfy all of HIPAA's criteria for patient authorizations. If it does not, the health care provider has no authority to disclose the information.* In this situation the health care provider should, and likely will, refuse to disclose the information. The health care provider may suggest that the person seeking the information obtain a HIPAA-compliant authorization form from the patient or a court order for the information, but the provider has no duty to do so.

b. <u>Court order</u>: The health care provider may disclose information to the extent disclosure is expressly authorized by a court order.

c. <u>Subpoena, discovery request, or other lawful process</u>: The health care provider may disclose information pursuant to a subpoena, discovery request, or other lawful process *provided* it is accompanied by notice to the patient or a qualified protective order as described in section II, above. *In the absence of notice or a qualified protective order, the health care provider has no authority to disclose protected health information*. The provider may be obliged by a subpoena or other process to take some action—such as appearing at a time and place designated in the subpoena—but he or she may not disclose protected health information in response to a subpoena alone. In the absence of proper notice to the patient or a qualified protective order that satisfies HIPAA's requirements, the provider needs something else authorizing disclosure: most likely either the

patient's written authorization on a HIPAA-compliant authorization form, or a court order. See John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, Health Law Bulletin No. 82 (Sept. 2005), available at http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf.

VI. **Information that has heightened protection under a specific federal or state law** – Sometimes the information sought is subject to a law that provides heightened protection, with the result that additional steps may be required before the information may be disclosed in court. (This is in addition to satisfying HIPAA and state privilege law requirements, if they apply.) Two circumstances that may be particularly likely to arise are:

a. The information sought identifies a person who has or may have a reportable communicable disease (such as HIV). Any information or record that identifies a person who has or may have a reportable communicable disease is strictly confidential and not a public record for purposes of GS Chapter 132. The person who is the subject of the information may request in camera review of the records. During testimony about such information, the judge may exclude from the courtroom all persons except officers of the court, the parties. GS 130A-143(6).

b. The information or records sought are maintained by a federally assisted substance abuse facility. Court orders for such information are subject to procedures and limits set forth in subpart E of 42 CFR Part 2. *See also Spangler v. Olchowski,* 187 NC App. 684 (2007) (interpreting and applying those provisions). Patient authorizations to disclose such information must meet specific criteria set forth in subpart C.