

## Confidentiality Laws Governing Substance Abuse Treatment Records

*North Carolina Judicial College*  
Basic Substance Abuse for Judges

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### Part I: Applicable Confidentiality Laws

- I. State mental health law - G.S. 122C:** The Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, G.S. Chapter 122C, governs providers of mental health, developmental disabilities, and substance abuse services (MH/DD/SA services).
- A. Covered providers:** Any “facility”—meaning any individual, agency, company, area authority (local management entity), or state facility—at one location *whose primary purpose* is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers.<sup>1</sup>
- B. 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 is confidential and may not be disclosed except as authorized by G.S. 122C<sup>2</sup> and implementing regulations at 10A NCAC 26B.<sup>3</sup>
- C. Duty:** No individual having access to confidential information may disclose it except as authorized by G.S. 122C and the confidentiality rules.<sup>4</sup>
1. Unauthorized disclosure of confidential information is a Class 3 misdemeanor punishable by a fine up to \$500.<sup>5</sup>
  2. Employees of area and state facilities that are governed by the State Personnel Act are subject to suspension, dismissal, or other disciplinary action if they disclose information in violation of G.S. 122C and the confidentiality rules at 10A NCAC 26B.<sup>6</sup>
  3. The unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee disclosing the records.<sup>7</sup>

<sup>1</sup> See G.S. 122C-3(14) for the full definition, including examples, of “facilities”.

<sup>2</sup> The pertinent statutes are G.S. 122C-51 through 122C-56.

<sup>3</sup> These regulations apply to area authorities (local management entities), state facilities, and the providers that contract with area and state facilities. The regulations also appear in a publication of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, entitled “Confidentiality Rules” (APSM 45-1).

<sup>4</sup> See G.S. 122C-52(b). Area and state facilities or individuals with access to or control over confidential information must take affirmative measures to safeguard such information in accordance with the state confidentiality rules, which require a secure place for storage of records, written policies and procedures regarding controlled access to paper and electronic records, and staff supervision of client review of records. See 10A NCAC 26B .0102 and .0107.

<sup>5</sup> See G.S. 122C-52(e).

<sup>6</sup> See 10 NCAC 26B .0104.

<sup>7</sup> The unauthorized disclosure of a patient’s confidences by a physician, psychiatrist, psychologist, marital and family therapist, or other health care provider constitutes medical malpractice. See *Watts v. Cumberland County Hosp.*

- II. HIPAA<sup>8</sup> privacy rule – 45 CFR Parts 160, 164:** The federal “privacy rule”<sup>9</sup> governs the privacy of health information.
- A. Covered health care providers:** Any “health care provider” that transmits any health information in electronic form in connection with a HIPAA transaction.<sup>10</sup> “Health care provider” is defined broadly to include any person who, in the normal course of business, furnishes, bills or is paid for care, services, or supplies related to the health of the individual.<sup>11</sup>
- B. Protected health information:** health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that
1. is created or received by a health care provider, health plan, or health care clearing house
  2. identifies an individual (or with respect to which there is a reasonable basis to believe the information can be used to identify an individual), and
  3. relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual<sup>12</sup>
- C. Duty:** A covered entity, including a covered health care provider, may use and disclose PHI only as permitted or required by the privacy rule.
1. **Monetary penalties.** The Office of Civil Rights (OCR) in U.S. DHHS enforces the privacy rule, investigates complaints, conducts compliance reviews, and may impose civil monetary penalties for violations. State attorneys’ general may bring a civil action to enforce the HIPAA Privacy Rule in order to (1) enjoin further violations or (2) obtain damages for individuals harmed (calculated pursuant to a statutory formula).
  2. **Filing complaint.** Any person or organization may file a complaint with OCR by mail or electronically. Individuals may also file a complaint with the covered entity.
- III. Federal substance abuse records law - 42 C.F.R. Part 2:** Restricts the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. (42 U.S.C. 290dd-2; 42 C.F.R. Part 2).

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System, Inc., 75 N.C. App. 1, 9-11, 330 S.E.2d 242, 248-250 (1985) (holding that malpractice consists of any professional misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev’d in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

<sup>8</sup> “HIPAA” stands for The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d-1320d(8). This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

<sup>9</sup> The term “privacy rule” in this outline refers to the final rule published in Volume 67, Number 157 of the Federal Register on August 14, 2002.

<sup>10</sup> 45 CFR 160.103, 164.500. “Transaction” means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to determine if an enrollee is covered by the health plan.

<sup>11</sup> 45 CFR 160.103.

<sup>12</sup> See the definitions of “protected health information” and “individually identifiable health information” at 45 CFR 160.103.

- A. Covered programs:** The federal law applies to 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 direct or indirect federal financial assistance.<sup>13</sup> Applies to:
1. Any free-standing substance abuse facility or independent substance abuse program, including
    - an outpatient substance abuse clinic
    - a residential drug or alcohol treatment facility
    - an independent physician or other therapist with a specialty in substance abuse treatment or diagnosis
  2. Any part of a broader organization that is identified as providing SA services, e.g.,
    - a school-based program, but not an entire school or school system;
    - a detox unit or substance abuse program of a general hospital, but not the entire hospital.<sup>14</sup>
  3. Not only treatment programs, but also programs providing diagnosis or referral for treatment, e.g.,
    - employee assistance programs that provide no treatment but evaluate whether a person has a substance abuse problem and then refer the person to treatment at an independent program.
    - a managed care company that evaluates whether a person has a drug or alcohol problem and then refers the person to treatment at an independent program that has a contract with the managed care company.

- B. Confidential information:** The federal prohibition against *disclosure*, except where permitted by the federal law, applies to any information, whether recorded or not, that:
1. would identify a “patient”—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser
  2. is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program
  3. for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

"Identify" means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

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<sup>13</sup> See 42 CFR 2.11 for definition of “program.” The regulations apply only to programs that receive, directly or indirectly, federal financial assistance, including programs that receive federal grants or Medicare or Medicaid reimbursement; through federal revenue sharing or other forms of assistance, receive federal funds which could be (but are not necessarily) spent for an alcohol or drug abuse program (e.g., programs operated or funded by state or local government); are licensed or certified by the federal government (e.g., certification of provider status under the Medicare program, authorization to conduct methadone treatment, or registration to dispense a controlled substance for substance abuse treatment); or organizations exempt from federal taxation.

<sup>14</sup> A general medical care facility (general hospital) is not a "program" unless it has an identified unit that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment, or has staff whose primary function is to provide substance abuse services and who are identified as such providers. In this case, only the identified unit or staff would constitute a “program.”

"Diagnosis" means 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.

- a. Includes any record of a diagnosis prepared in connection with treatment or referral for treatment of substance abuse but which is not so used.
- b. Does not include a diagnosis that is made solely for the purpose of providing evidence for use by law enforcement authorities, or a diagnosis of drug overdose or alcohol intoxication that clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

**C. Restrictions on Use of Information to Bring Criminal Charges.** In addition to restricting disclosure, the federal regulations restrict the "use" of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. Any information which is

1. alcohol or drug abuse information obtained by a federally assisted substance abuse program
2. for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment

cannot be used to criminally investigate or prosecute a patient without a court order authorizing the disclosure and use of the information for that purpose. See 42 C.F. R. 2.12(2) and 2.65.

**D. Duty imposed by federal substance abuse records law.** The regulations prohibit the disclosure and use of patient records except as permitted by the regulations themselves. Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to \$500 for first offense, up to \$5,000 for each subsequent offense).<sup>15</sup>

**E. Applicability to recipients of information.**

1. **Use:** The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct a criminal investigation of a patient applies to any person who obtains that information from a federally assisted substance abuse program regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations. Without a court order authorizing use for this purpose, the information cannot be so used.
2. **Disclosure:** The restrictions on disclosure apply to persons who receive records directly from a substance abuse program and who are notified of the restrictions on redisclosure of the records. See 42 C.F.R. 2.12(d) and 2.32. Such notice must accompany any disclosure made with the patient's written consent.

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<sup>15</sup> A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. See 42 C.F.R. §§ 2.3 and 2.16.

#### IV. Relationship of federal substance abuse law to state law.

**A. 42 C.F.R 2 controls where it is more restrictive:** No state law may authorize or compel any disclosure prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that the 42 CFR 2 prohibits, 42 CFR 2 must be followed. 42 C.F.R. § 2.20.

Example: The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code. G.S.7B-302. This state law says that the director of social services (or the director's representative) 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 to *the provision of protective services*. Upon such demand, the law requires an agency to provide access to and copies of confidential information to the extent permitted by federal law.

- State mental health law says that providers are required to disclose confidential information when necessary to comply with G.S. 7B-302. See G.S. 122C-54(h).
- No provision of the federal substance abuse law permits disclosure of patient identifying information for purposes of complying with G.S. 7B-302. Thus, absent the patient's *written consent* or a *court order* issued pursuant to 42 C.F.R. 2, the federal law prohibits disclosure of confidential information in response to a DSS demand for information under G.S. 7B-302.

**B. State law controls where it is more restrictive:** The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.

**E. Class Exercise—Patient-identifying information:** The restrictions on disclosure apply only to information that would identify a “patient”—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as a substance abuser or a recipient of substance abuse services. A substance abuse program may provide information about a particular, identified person if doing so would not identify a patient, directly or indirectly, as an alcohol or drug abuser or a recipient of alcohol or drug services.

1. Adult protective services: A substance abuse counselor who works at Triangle Behavioral Healthcare (MH/DD/SA service provider) wants to report to DSS that a substance abuse patient of hers appears to be a disabled adult in need of protective services. The employee knows that a state law, G.S. 108A-102, requires any person having reasonable cause to believe that a disabled adult is in need of protective services to report such information to the department of social services. The federal law, 42 C.F.R Part 2, does not permit the disclosure of patient-identifying information for this purpose. Can the employee comply with both GS 108A-102 and 42 CFR 2?

2. Same scenario as above, but the substance abuse counselor works for a free-standing drug program, a halfway house called Addiction Recovery Services. Can the counselor comply with the state law mandating an adult protective services report and comply with the federal rules prohibiting the disclosure of patient-identifying information for this purpose?
  
3. Child protective services: Pursuant to GS 7B-302, a child protective services worker assessing a report of child abuse makes a written demand to an MH/DD/SA service provider for the child's mental health record. The social/family history section of the child mental health record describes the mother's abuse of crack cocaine that the mother reported to the child's mental health professional information during the child's intake to services. Does 42 C.F.R. Part 2 permit the MH professional to turn over the record to the CPS worker?
  
4. Child protective services: Pursuant to GS 7B-302, a child protective services worker assessing a report of child neglect makes a written demand to an MH/DD/SA service provider for the child's mental health record. The child's mother is also being treated by the MH/DD/SA provider. The child mental health record contains information about the mother's drug addiction and treatment that the MH professional recorded in the child record following a discussion with the mother's substance abuse counselor. Can the facility treating the child release the child record to the CPS worker?

## Part II: State Laws Requiring Disclosure for Child Welfare Purposes

**I. Introduction:** This part discusses disclosures that are required by law. For the most part, "required-by-law" disclosures arise from provisions of state statutes or rules intended to regulate matters other than the confidentiality or privacy of medical records. For example, state statutes requiring the reporting of communicable diseases or child abuse and neglect are intended for the protection of public health or child welfare. This outline discusses *some* of the laws that require disclosure of information otherwise protected by confidentiality law and the relationship of those state mandates to each of the three confidentiality laws governing substance abuse patient records.

## II. Child welfare laws:

- A. Reporting child abuse and neglect:** Anyone who has cause to suspect that a child is abused, neglected, or dependent, or has died as a result of maltreatment, has a legal duty to report the case to the department of social services in the county where the child resides or is found. G.S. 7B-301. A report may be made in person, by telephone, or in writing. The report must include as much of the following as the person reporting knows:
- the child's name, age, and address;
  - the name and address of the child's parent, guardian, custodian, or caretaker;
  - the names and ages of other children in the home;
  - the child's location if the child is not at the home address;
  - the nature/extent of any injury or condition resulting from abuse, neglect, or dependency; and
  - any other information that might be helpful to establish the need for protective services or court intervention.
- 1. Information confidential under state law, G.S. Chapter 122C:** G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-301). Thus, providers must disclose confidential information when necessary to comply with the child abuse reporting statute.
  - 2. Information confidential under the HIPAA privacy rule:** The privacy rule permits a covered provider or other covered entity to disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. 45 CFR 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, GS 7B-301.
  - 3. Information confidential under federal law, 42 C.F.R. Part 2:** The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities. 42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law, even if compliance means disclosing patient identifying information.
- B. Investigation of child abuse and neglect:** The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code. G.S.7B-302. The director of social services (or the director's representative) 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 to *the provision of protective services*. Upon such demand, an agency is required to provide access to can copies of confidential information to the extent permitted by federal law.
- 1. State confidentiality law, G.S. 122C:** G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-302). Thus, whether or not the information sought by DSS falls within the scope of G.S. 122C, MH/DD/SA providers must provide

access to and copies of the requested information, unless disclosure is prohibited by federal law and regulations.

2. **Information confidential under the HIPAA privacy rule:** The privacy rule permits a covered provider to disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the department of social services when that department demands the information pursuant to GS 7B-302.
3. **Federal confidentiality law, 42 C.F.R. Part 2:** Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make the report mandated by G.S. 7B-301, they may *not* provide information beyond the initial report when DSS demands further information pursuant to G.S. 7B-302. The federal rules do not permit disclosure of further information for follow-up investigations or for court proceedings that may arise from the report, absent the patient's written *consent* or a *court order* issued pursuant to Subpart E of the federal regulations. 42 C.F.R. § 2.12(c)(6). "No state law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. 2.20.
  - a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." An inquiring party may be given a copy of the federal regulations and advised that they restrict the disclosure of substance abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. 42 CFR 2.13(c)(2).

**C. Guardian Ad Litem access to confidential information: G.S. 7B-601** authorizes the court to appoint a guardian ad litem (GAL) to represent children alleged to be abused, neglected, or dependent in Juvenile Court proceedings. The same statute gives the GAL the authority to obtain "any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case."

1. **Information confidential under state law, G.S. Chapter 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information for purposes of complying with other state law. Thus, when a court order appoints someone to be a GAL under G.S. 7B-601, the GAL must be granted access to any information, whether or not protected by G.S. 122C, that the GAL believes is relevant to the case.
2. **Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the guardian ad litem as necessary to comply with GS 7B-601.



**3. Information confidential under federal law, 42 C.F.R. Part 2:** Although a federal or state court may authorize the disclosure of information protected by federal law, courts issuing the standard form order appointing a GAL (AOC-J-300) usually do not issue the order according to the specific procedures and criteria required by the federal regulations for court-ordered disclosures. Substance abuse programs must not disclose confidential information to a GAL unless presented with a court order issued according to the special procedures and criteria set forth at 42 C.F.R. §§ 2.61-2.67.

- a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way “that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse.” 42 CFR 2.13(c)(2). See B, 3, a, above.

**D. Interagency sharing about juveniles:** G.S. 7B-3100 directs the Department of Juvenile Justice and Delinquency Prevention to adopt rules designating local agencies that are required to “share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is *relevant to any assessment* of a report of child abuse, neglect, or dependency or *the provision or arrangement of protective services* in a child abuse, neglect, or dependency case by a local department of social services . . . or to *any case in which a petition is filed* alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed . . . , or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court.” The Department rules, 14B NCAC 11A .0301, designate area MH/DD/SA authorities among the agencies required to share information pursuant to the statute, as well as any “local agency designated by an administrative order issued by the chief district court judge of the district court district in which the agency is located.”

- 1. Information confidential under state law, GS 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information as required by other state law. Therefore, area authorities (known also as “local management entities” or “LMEs”) must disclose information as required by G.S. 7B-3100. Information shared must
  - be used only for the protection of the juvenile or others or to improve educational opportunities of the juvenile;
  - remain confidential, and
  - be withheld from public inspection
- 2. Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered health care provider to disclose protected health information as required by G.S. 7B-3100 and 28 NCAC 01A. 0301.
- 3. Information confidential under federal law, 42 CFR 2:** G.S. 7B-3100 and **14B NCAC 11A .0301** do not authorize or compel the disclosure of information protected by the federal

drug and alcohol confidentiality law, and the federal law does not permit the disclosure of patient-identifying information pursuant to these state laws.

- a. Unless a provision in the federal law applies that would permit disclosure, substance abuse programs should not, in response to a request for information under the rules, disclose information protected by the federal drug and alcohol confidentiality law.
- b. At the request of the agency soliciting information protected by the federal law, the agency refusing the request must inform “that agency of the specific law or regulation that is the basis for the refusal.” 14B NCAC 11A .0302(b). Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way “that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse.” 42 CFR 2.13(c)(2). See section B, 3, a, above.

### Part III: Subpoenas and Court Orders

- I. Subpoenas.** A subpoena, alone, does not permit the disclosure of MH/DD/SA records. Generally, the disclosure of records relating to MH/DD/SA services is not permitted unless a court specifically orders disclosure, the person who is the subject of the records consents to the disclosure, or the applicable confidentiality law makes a specific exception to confidentiality under the particular circumstances. A court is not entitled to a patient’s treatment information merely because the court ordered the patient into treatment.
- A. State confidentiality law governing MH/DD/SA records.** GS 122C does not permit the disclosure of confidential information in response to a subpoena alone. A subpoena compels disclosure of confidential information only if it is accompanied by the client’s authorization to disclose or a court order to disclose (or some other legal mandate, such as a statute or regulation that requires disclosure under the circumstances).
- B. HIPAA privacy rule.** The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 CFR 164.512(e). However, because HIPAA does not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone.
- C. Federal substance abuse confidentiality law.** A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing order under Subpart E of 42 CFR Part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances).
- II. Court Order—State confidentiality law.** A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure. GS 122C-54(a).

- A. Standard: GS 122C-54(a) provides no guidance to the court for determining whether to order disclosure, nor is there any case law interpreting the provision.
- B. The evidentiary privilege statutes for psychologists and other mental health professionals, however, provide that a judge may order disclosure of privileged information when “necessary to the proper administration of justice.”<sup>16</sup> See 8-53.3 (psychologists), 8-53.5 (marital and family therapists), and 8-54.7 (social workers) and case annotations.

**III. Court Order—HIPAA privacy rule.** A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 CFR 164.512(e). However, records that are governed the federal substance abuse confidentiality law (42 CFR Part 2) should not be disclosed pursuant to court order unless the court order complies with Subpart E of 42 CFR Part 2 (outlined below).

**IV. Court Order—Federal substance abuse records law.** Under Subpart E of the federal regulation, a federal, state, or local court may issue an order requiring an alcohol or drug treatment program to disclose patient-identifying information only after following certain procedures and making particular findings. See 42 C.F.R. §§ 2.63-2.67.

**A. Application.** An application may be filed separately or as part of a pending action and must use a fictitious name, such as John Doe, to refer to any patient and may not contain or disclose any patient identifying information unless the court orders the record of the proceeding sealed from public scrutiny.<sup>17</sup> Where an application is deficient because it contains the patient’s name or other patient-identifying information the deficiency may be cured by the court ordering the record to be sealed. See unpublished opinion, *S M. K v. J F*, 2005 WL 4674284 (Del.Fam.Ct).

1. Non-criminal purposes. An order authorizing disclosure for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure.
2. Criminal investigation/prosecution of patient. An order authorizing disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by the person holding the records or by any person conducting investigative or prosecutorial activities related to criminal law enforcement.
3. Criminal investigation/prosecution of program. An order authorizing disclosure or use of patient records to criminally or administratively investigate or prosecute a program or person holding the records may be applied for by any administrative, regulatory, supervisory,

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<sup>16</sup> Judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. *Flora v. Hamilton*, 81 F.R.D 576 (M.D.N.C 1978). The statute affords the trial judge wide discretion in determining what is necessary for the proper administration of justice. *State v. Efird*, 309 N.C. 802, 309 S.E.2d 228 (1983) (interpreting the analogous physician-patient privilege statute, GS 8-53).

<sup>17</sup> When applying for disclosure for non-criminal purposes, the patient’s name or other patient-identifying information may be disclosed if the patient is the applicant or has given written consent to the disclosure. 42 C.F.R. § 2.64(a). When applying for disclosure to investigate or prosecute a program or person holding the records, the patient’s name or other patient-identifying information may be disclosed if the patient has given written consent to the disclosure. 42 C.F.R. § 2.66(a).

investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

**B. Notice and opportunity to respond.**

1. Non-criminal purposes. When the information is sought for non-criminal purposes, the patient and person holding the records must be given (a) adequate notice in a manner that will not disclose patient identifying information to other persons, and (b) an opportunity to file a written response to the application or to appear in person must be notified and given an opportunity to file a written response, or 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.
2. Criminal investigation/prosecution of patient. When the records are sought for the purpose of criminally investigating or prosecuting a patient and the application is made by a person performing a law enforcement function, the person holding the record must be given (a) adequate notice, (b) an opportunity to appear and be heard for the limited purpose of providing evidence on the criteria for issuance of the court order, and (c) an opportunity to be represented by counsel independent of the counsel for the applicant. 42 C.F.R. § 2.65.
3. Criminal investigation/prosecution of program. When the records are sought for the purpose of investigating or prosecuting a program or person holding the records, no notice is required to the program, to the person holding the records, or to any patient whose records are to be disclosed. 42 C.F.R. § 2.66.

**C. *In camera* review.** Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record. The judge may examine the records before making a decision.

**D. Criteria.** To order disclosure, the court must determine that "*good cause*" exists for the disclosure.

1. **Non-criminal purposes.** For an order authorizing disclosure for purposes other than criminal investigation or prosecution, the court must find that:
  - a. Other ways of obtaining the information are not available or would not be effective, and
  - b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient's-program relationship, and the program's ongoing treatment services. 42 C.F.R. § 2.64.
2. **Criminal investigation/prosecution of patient.** To authorize disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient, the court must find that:

- a. The crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect;
  - b. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
  - c. Other ways of obtaining the information are not available or would not be effective;
  - d. The potential injury to the patient, the physician-patient relationship, and the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
  - e. If the applicant is a person performing a law enforcement function, that (i) the person holding the records has been afforded an opportunity to be represented by independent counsel independent; and (ii) any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant. 42 C.F.R. § 2.65.
- 3. Criminal investigation/prosecution of program.** For orders authorizing use and disclosure of records to investigate or prosecute a program or the person holding the records, the court must find that:
- a. Other ways of obtaining the information are not available or would not be effective, and
  - b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. 42 C.F.R. § 2.66.

**E. Limiting disclosure.**

- 1. Non-criminal.** Any order authorizing disclosure must (i) limit disclosure to those parts of the patient record that are essential to fulfill the objective of the order (ii) limit disclosure to persons whose need for the information forms the basis for the order, and (iii) include such other measures as are necessary to limit 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).
- 2. Criminal investigation/prosecution of patient.** An order authorizing disclosure to criminally investigate or prosecute a patient must (i) limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, (ii) limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime as specified in D. 2, above, and (iii) include such other measures as are necessary to limit disclosure and use to only that public interest and need found by the court. 42 C.F.R. § 2.65(e)(2).
- 3. Criminal investigation/prosecution of program.** An order authorizing disclosure to investigate or prosecute a program or person holding the records must limit disclosures in the same manner as orders authorizing disclosure for non-criminal purposes (no. 1, above) and require the deletion of patient identifying information from any documentation made

available to the public. No information obtained pursuant to the court order may be used to investigate or prosecute the patient or be used as the basis for an application for an order to disclose information for the purpose of investigating or prosecuting a patient. 42 C.F.R. § 2.66(c),(d).

**F. Confidential communications.** A court may order disclosure of “confidential communications” made by a patient to a program in the course of diagnosis, treatment, or referral to treatment only if the disclosure is

1. Necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties; or
2. Necessary to the investigation or prosecution of an extremely serious crime, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect; or
3. The disclosure is in connection with litigation or an administrative hearing in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. § 2.63.

## Part IV: Patient Authorization to Disclose

### I. General Rules

**A. Rules applicable to all three confidentiality laws:** A covered provider *must* obtain an individual’s written authorization for disclosure of confidential information, unless the use or disclosure is required or otherwise permitted by the applicable law.

1. The authorization must be in writing.
2. The individual’s authorization must be *voluntary*.
3. The individual’s authorization must be *informed*. That means the individual signing the authorization must understand what information will be exchanged, with whom it will be shared, and for what purpose.
4. An authorization to disclose confidential information *permits*, but does not require, the covered provider to disclose the information. [Disclosure is mandatory only when the patient requests disclosure to an attorney. G.S. 122C-53(i).]
5. When a covered provider obtains or receives an authorization for the disclosure of information, such disclosure must be consistent with the authorization. This means that covered providers are bound by the statements provided in the authorization.
6. An individual may revoke the authorization at any time except to the extent that the covered provider has taken action in reliance on the authorization.

## **B. Rule applicable to state mental health law and HIPAA privacy rule:**

1. Conditioning of authorizations: Generally, the covered provider may *not* condition the provision of treatment or eligibility for benefits on the individual's provision of an authorization.<sup>18</sup>

## **II. Disclosure with Patient Authorization—State Mental Health Law**

**A. Consent form:** “Area facilities” (facilities operated by or under contract with an area mental health authority or county mental health program) must use consent forms that contain the information listed below.<sup>19</sup> A consent for release of information does not have to be on the agency form utilized by area or state facilities. However, the area or state facility receiving a consent form must determine that the content of the form conforms to the requirements listed below. A clear and legible photocopy of a consent form is considered as valid as the original.<sup>20</sup>

1. client's name;
2. name of facility releasing the information;
3. name of individual or individuals, agency or agencies to whom information is being released;
4. information to be released;
5. the purpose for the release;
6. length of time consent is valid (may not exceed one year);
7. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;<sup>21</sup>
8. signature of the client or the client's legally responsible person; and
9. date consent is signed.

### **B. Redisclosure:**

1. Redisclosure prohibited: Except as provided by G.S. 122C-53 through G.S. 122C-56, no individual having access to confidential information may disclose it.
2. Notice: Area or state facilities releasing confidential information must inform the recipient that redisclosure of such information is prohibited without client consent. A stamp may be

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<sup>18</sup> 10A NCAC 26B .0205 (state law) and 45 CFR 164.508(b)(4) (HIPAA privacy rule). The HIPAA privacy rule provides that a covered health care provider may condition the provision of health care—that is solely for the purpose of creating information for disclosure to a third party—on receipt of an authorization for such disclosure.

- Example: John's employer requires periodic drug testing for his continued employment. A health care provider can condition the administration of the drug test on John's authorization to disclose the drug test to his employer, as the test is administered solely for the purpose of disclosing the results to a third party (and not for treatment purposes).
- Example: Jane is applying for life insurance and the application requires that Jane receive and report the results of a physical exam to the life insurance company. A health care provider can condition the conducting of the exam on Jane's authorization to disclose the exam results to the life insurance company, as the exam is provided solely for the purpose of creating PHI for disclosure to a third party.

<sup>19</sup> See 10A NCAC 26B.0202.

<sup>20</sup> 10A NCAC 26B.0202.

<sup>21</sup> "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

used to fulfill this requirement.

### III. Disclosures with Patient Authorization—HIPAA Privacy Rule

**A. Content of authorization form:** To help ensure that individuals give their authorization on an informed basis, the privacy rule sets out elements that must be included in any authorization. 45 C.F.R. § 164.508(c). To be valid, an authorization to disclose protected health information must contain the elements listed below. A valid authorization may contain elements or information in addition to the required elements, so long as the additional elements or information are consistent with the required elements. § 164.508(b)(1). Required elements are:

1. The name or other specific identification of the person(s), or classes of persons, authorized to make the requested use or disclosure.
2. The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
3. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
4. A description of each purpose of the requested use or disclosure.
  - a. The statement “at the request of the individual” is a sufficient description of purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of purpose.
5. An expiration date or event that *relates* to the individual or the purpose of the use or disclosure. (An authorization that purports to expire on the date when the stock market reached a specified level would not be valid, as the expiration event would not relate to the individual or purpose of the use or disclosure.)
6. Signature of the individual (the person who is the subject of the protected information) and date.
  - a. If the authorization is signed by a “personal representative” of the individual, a description of such representative’s authority to act for the individual must also be provided. The privacy rule requires that covered providers verify and document a person’s authority to sign an authorization on an individual’s behalf.
7. A statement that notifies the individual of the right to revoke the authorization in writing.<sup>22</sup>
8. Either:
  - a. A statement that treatment, payment, enrollment, or eligibility for benefits may not be conditioned on obtaining the authorization (where such conditioning is prohibited by the privacy rule), or
  - b. A statement about the consequences of refusing to sign the authorization (if conditioning is permitted by the privacy rule)
9. A statement about the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer protected by the privacy rule. This statement is necessary because the recipient of the information might not be a covered provider and, therefore, not subject to the privacy rule.

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<sup>22</sup> The statement must include either (a) the privacy rule’s exceptions to the right to revoke and a description of how the individual may revoke the authorization, or (b) to the extent that the information referred to in “a.” is included in the provider’s “Notice of Privacy Practices,” a reference to the provider’s notice.



**B. Redisclosure:** Unlike the state mental health law and federal substance abuse records law, once the recipient has received the information, the HIPAA privacy rule contains no prohibition against the recipient redisclosing the information unless the recipient happens to be a covered provider under HIPAA. If the recipient is not a covered provider under HIPAA, the privacy law does not bind the recipient.

**C. Compound Authorizations:** Except in certain circumstances set forth in the privacy rule, an authorization for use or disclosure of protected health information cannot be combined with any other document to create a compound authorization. 45 C.F.R. § 164.508(b)(3). For example, a treatment provider cannot combine an authorization to assign financial benefits (insurance payments) with an authorization to disclose information.

#### **IV. Disclosure with Patient Authorization—Substance Abuse Records Law**

**A. General rules:** The content of any record may be disclosed in accordance with the prior written consent of the patient, but only to the extent, under such circumstances, and for such purposes as permitted by the written consent.

**B. Consent form must include<sup>23</sup>:**

1. patient's name;
2. name of facility or person disclosing the information;
3. name of individual or individuals, agency or agencies, to whom information is being disclosed;
4. information to be released (how much and what kind);
5. the purpose of the disclosure;
6. the date, event, or condition upon which the consent will expire if not revoked before;
7. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;<sup>24</sup>
8. signature of the patient and, when required for a patient who is a minor, signature of the patient's legally responsible person; and
9. date consent is signed.

**C. Redisclosure.** Each disclosure made with the patient's written authorization must be accompanied by a written notice prohibiting any further disclosure unless further disclosure is expressly permitted by the written authorization of the person to whom it pertains or as otherwise permitted by the federal regulations. 42 C.F.R. 2.32. Persons who receive records directly from a substance abuse program and who are notified of the restrictions on redisclosure of the records are bound by the federal confidentiality regulations. See 42 C.F.R. § 2.12(d).

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<sup>23</sup> See 42 C.F.R. 2.31.

<sup>24</sup> "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

**D. Irrevocable Criminal Justice System Authorizations.** A substance abuse program may disclose information about a patient to those persons in the criminal justice system who have made participation in the program a condition of the disposition of any criminal proceedings against the patient or a condition of the patient's parole or other release from custody. 42 C.F.R. § 2.35.

1. **Written authorization required.** The patient may authorize disclosures to individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against a patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient).
2. **Irrevocable.** Under 42 C.F.R. Part 2, a criminal justice system authorization may be made irrevocable during the period of its intended use if the written patient authorization states
  - a. the period during which it remains in effect. (This period must be reasonable and take into account the anticipated length of the treatment; the type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and such other factors as the program, the patient, and the person(s) who will receive the disclosure consider pertinent.)
  - b. that it is revocable only upon the passage of a specified amount of time or the occurrence of a specified ascertainable event. This time or event must be no later than the final disposition of the conditional release or other activity in connection with which the patient consent is given.
3. **Redisclosure.** A person who receives patient information pursuant to a criminal justice system authorization may redisclose and use it only to carry out that person's official duties with respect to the patient's conditional release or other activity in connection with which the patient consent is given.
4. **Conflicting HIPAA provision.** The HIPAA Privacy Rule does not permit irrevocable authorizations. However, the HIPAA Privacy Rule does permit disclosures in response to a court order issued without satisfying the more rigorous criteria and procedural requirements for court orders under 42 C.F.R. Part 2. Thus, a court could issue an order requiring a substance program to provide information on the progress of patients mandated into treatment by the criminal justice system. This order would authorize the disclosure of HIPAA-protected information. The irrevocable criminal justice system authorization recognized by 42 C.F.R Part 2 would then permit the program to disclose substance abuse patient-identifying information to the court during the period of the offender's treatment, and continue to report to a probation officer or at a court hearing until final disposition of the criminal case even if the patient ceased treatment and no longer wanted to cooperate with the court or program or no longer wanted such information to be disclosed.