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NCBLPC Professional Brief

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Brief Overview/Description:

According to 42 CFR (Code of Federal Regulations) Part 2, there is federal protection of confidentiality for any alcohol and drug abuse client records maintained by a program that receives federal assistance. In NC, these protections are similar for all clients receiving counseling, and indeed this Federal Law is the basis for most confidentiality practices today. First written in 1970 for alcohol abuse and expanded in 1975 to include drug abuse, this regulation was designed to assist in removing the stigma of seeking substance abuse treatment by providing special protections of confidentiality. This covers anyone who has applied for, been interviewed, or receives any treatment and protects a client's identity, address, any records, disclosures, or communications while seeking or receiving substance abuse treatment including someone who, after arrest, is identified as an eligible alcohol or drug abuse client during evaluation. Generally, the regulation requires notification of confidentiality, signed consents, and prohibition of re-disclosure by anyone who is granted permissible access to a client's information. When a permissible disclosure of a client file is made to a third party under CFR 42, it must be accompanied by the specific language on the records: "This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient".

The regulation requires that all physical records be "maintained in a secure room, locked file cabinet, safe or other comparable container" and organizations should adopt written procedures which regulate and control access to and use of written records subject to these regulations. Any permissible disclosed information must be limited to that information which is necessary to carry out the purpose of the disclosure. Permissible disclosures may occur if: (a) The participant consents in writing, (b) the disclosure is allowed by a court order, (c) the disclosure is made to medical personnel in a medical emergency or (d) to qualified personnel for research, audit, or program evaluation. For those times that information is released in accordance with (d), personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner. Although these regulations protect a participant's information related to substance abuse treatment during criminal investigations prior to entering treatment, these laws and regulations do not protect any information about a crime committed by a program participant either (a) at the treatment program (b) against any person who works for the treatment program, or (c) for any threat to commit such a crime. In other words, only a court order would allow criminal activity disclosed during treatment to be re-disclosed, but criminal activity at the treatment program or against staff may be disclosed.

CFR 42 Part 2 requires that written consent for disclosure signed by the recipient includes:

- 1) The specific name or general designation of the program or person permitted to make the disclosure.

The information contained herein is an overview of North Carolina laws, federal laws, and regulations. It is not intended to be a comprehensive list of all laws or regulations that govern the practice of counseling. The material is not to be taken as legal advice. Any interpretation of a statute or regulation expressed in the materials is created for educational purposes only. The NCBLPC does not issue advisory opinions, and the materials are not to be construed as such.

- 2) The name or title of the individual or the name of the organization to which disclosure is to be made.
- 3) The name of the patient.
- 4) The purpose of the disclosure.
- 5) How much and what kind of information is to be disclosed.
- 6) The signature of the patient (in NC, minors are qualified to consent under NC Gen. Stat. § 90 21.5).
- 7) The date on which the consent is signed.
- 8) A statement that the consent is subject to revocation at any time.
- 9) The date, event, or condition upon which the consent will expire if not revoked before.

A 1986 Congressional Amendment to CFR 42 Part 2 makes clear that abuse and neglect reporting is only permissible when there is indication of harm or imminent harm to a child, and not merely because a parent is using drugs or alcohol. In other words, substance abuse by a parent or guardian is not a basis for a report of child abuse or neglect on its own; rather, suspected or imminent harm to a child is the only permissible disclosure to a third party under this law. These stipulations for reporting only applies to initial reports to authorities and not to open or on-going investigations.

Key Legal Factors:

The Title 42, Part 2 of the CFR criminalizes disclosures related to substance abuse counseling that are outside of strict and narrow circumstances. The first offense carries a fine of no more than \$500 and subsequent violations may carry fines up to \$5,000.

LPCAs, LPCs, and LPCSs must take extra care in making disclosures to courts and law enforcement for substance abuse counseling if their practice or agency accepts federal assistance, including accepting federal funds for services, receiving tax considerations from the IRS, dispenses controlled substances of any kind (whether medical facility or methadone/suboxone clinic), part of the VA or Armed Forces, operates in conjunction with state government who accepts federal assistance, or has a facility license or certification from the US Government. In other words, this law pervades virtually every aspect of substance abuse service delivery in NC.

42 CFR Part 2 limits the grounds upon which a court may authorize or order a program to make disclosures and sets out guidelines on the scope of such disclosures. It also prohibits treatment programs from disclosing information concerning current or former clients in response to subpoenas. A subpoena by itself is not legally sufficient to authorize or compel a program to testify or turn over any client records. Instead, CFR 42 often requires a special hearing to determine if a court order requiring release of information is justified and from an appropriate jurisdiction. This regulation also prohibits confidential informants from gaining information by posing undercover in treatment programs as either staff or another patient.

Real Issues to Consider:

Thoroughness of policies and practices for releasing confidential information of substance abuse clients should be carefully examined to be sure full compliance is achieved. Extra care should be given in responding to a subpoena or engaging with law enforcement in criminal investigations. Criminal activity disclosed during treatment programs (e.g., using illicit substances, forging prescriptions, theft, driving while intoxicated) is protected under this law. There are specific examples of information forms, releases of information and specific phrases that should be used on substance abuse records and releases within 42 CFR Part 2.

Catch 22:

If responding to a subpoena on a client's behalf, a signed release of information is needed to speak with an attorney. If the client does not consent, then the LPCA/LPC/LPCS must decide whether to violate the rule in speaking with the attorney or to violate the rule in cooperating with the subpoena.

Child abuse and neglect reporting can be challenging, in that the fact that a parent is abusing substances does not warrant reporting; however, substance use of parents can often present risky circumstances for children, which LPCA/LPC/LPCSs are mandated to report in NC.

Finally, working with particular types of substance abuse clients can present difficult situations, such as those clients referred for DWI assessments or treatment that arrive for an evaluation or outpatient treatment group impaired and having driven themselves to the appointment. It is known that the person has a history of driving impaired and is currently doing so. Contacting the police and giving the person's description and vehicle description will clearly violate their confidentiality; however, allowing them to leave and drive presents a serious danger to themselves and others.

Summary Statement:

Because the requirements of this federal law are fairly strict, prescriptive, and consistent with the ethical principles of autonomy and non-maleficence, the regulations have formed core practices related to informed consent and releasing confidential information for all counseling clients in most helping professions.