

Confidentiality of MH/DD/SA Service Records: Client Authorization to Disclose Information

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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.¹

¹ 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.

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.² 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.³

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;⁴
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 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

² See 10A NCAC 26B.0202.

³ 10A NCAC 26B.0202.

⁴ "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

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.⁵
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.

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

⁵ 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.

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 include⁶:

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;⁷
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 consent must be accompanied by a written notice prohibiting any further disclosure unless further disclosure is expressly permitted by the written consent 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).

⁶ See 42 C.F.R. 2.31.

⁷ "Action in reliance" includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.