

## **Issuing Subpoenas for Patient Records of a Drug or Alcohol Treatment Center: Traps for the Unwary**

*By Melissa Seifer Briggs and Mark C. Hoyt\**

Most lawyers do not regularly subpoena patient records from drug and alcohol treatment facilities. Those lawyers that do are probably aware of a federal law that strictly regulates disclosure of such records. A subpoena to a treatment center for patient records alone is insufficient. A court order authorizing disclosure, as discussed below, is necessary in conjunction with the subpoena. For those lawyers who rarely serve a subpoena on a treatment center, the following overview of how to subpoena substance abuse treatment records may save time, money and headaches.

### What is protected?

Section 543 of the Federal Public Health Services Act, 42 U.S.C. § 290dd-2, and its implementing regulations, 42 C.F.R. Part 2, strictly protects the confidentiality of patient records in substance abuse programs that are federally conducted, regulated or assisted. Records of the identity, diagnosis, prognosis or treatment of patients relating to substance abuse education, prevention, training, treatment, rehabilitation or research may only be disclosed if expressly authorized. 42 U.S.C. § 290dd-2(a). This restriction on disclosure applies to any information, recorded or not, that would identify a patient as an alcohol or drug abuser or that is drug or alcohol abuse information obtained by a federally assisted drug or alcohol abuse program. 42 C.F.R. 2.12. A federally assisted program is defined broadly enough to include most, if not all, treatment centers. *See* 42 C.F.R. 2.12(b).

The presence of a patient in a facility which is publicly identified as a place where only alcohol or drug abuse diagnosis, treatment, or referral is provided may be acknowledged only if the patient's written consent or an authorizing court order is obtained, as described below. 42 C.F.R. 2.13(c)(1). In fact, requests for information that do not comply with these laws and regulations must be answered in a way that neither confirms nor denies that the individual has been or is being diagnosed or treated for drug or alcohol abuse. 42 C.F.R. 2.13(c)(2).

### When is disclosure authorized?

The disclosure and use of patient records relating to drug and alcohol abuse is prohibited "unless certain circumstances exist." 42 C.F.R. 2.3(b)(1). If those circumstances exist, the prohibition on disclosure is removed, but disclosure is not compelled. *Id.* Disclosure is not required by the regulations under any circumstances. *Id.*

Four circumstances exist under which the prohibition on disclosure is removed. First, disclosure is authorized if a patient consents. 42 U.S.C. § 290dd-2(b)(1). Such consent must include specific information, including the purpose of the disclosure and what information is to be disclosed. 42 C.F.R. 2.31(a). A sample consent form, which would comply with all the requirements, is provided by the regulations. *Id.* at (b). Disclosure with a patient's consent

must be accompanied by language set out in the regulations informing the recipient of the disclosure that the patient information must be kept confidential. 42 C.F.R. 2.32.

Confidential patient information may be disclosed to medical personnel in case of a medical emergency, even without the patient's consent. 42 U.S.C. § 290dd-2(b)(2)(A); 42 C.F.R. 2.51. Disclosure is also authorized without patient consent for scientific research, program evaluation or audit purposes, but any report of such research, evaluation or audit may not disclose a patient's identity. 42 U.S.C. § 290dd-2(b)(2)(B); 42 C.F.R. 2.52 - 2.53.

The fourth circumstance that will allow disclosure is when a court order is obtained. 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. 2.61. The only purpose of the order is to authorize the disclosure, not to compel the disclosure. 42 C.F.R. 2.61(a). A valid subpoena or legal mandate must be issued at the same time as the court order in order to compel disclosure. *Id.* Accordingly, a subpoena issued without the court order will not allow disclosure. 42 C.F.R. 2.61(b)(1).

#### How is an authorizing court order obtained?

Confidential patient records may be disclosed:

“If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.” 42 U.S.C. §290dd-2(b)(2)(c).

Thus, before the records may be ordered released, the court must find a showing of good cause, which demonstrates the public interest in the records outweighs the injury to the patient, and the patient's treatment. If disclosure is granted, the court must narrowly tailor that disclosure to information necessary to carry out the purpose of the disclosure. 42 C.F.R. 2.13(a).

The regulations set forth both procedural and substantive requirements for the issuance of court orders authorizing the release of drug and alcohol treatment records.

#### *i. Procedural Requirements.*

An application for the court order may be filed separately or as part of a pending civil action that requires the patient records as evidence. 42 C.F.R. 2.64(a). The application must use a fictitious name when referring to the patient. *Id.*

For orders authorizing disclosure for noncriminal purposes, notice of the application must be given to the patient and to the holder of the records sought without identifying the patient to other persons. 42 C.F.R. 2.64(b)(1). In criminal cases, notice need not be given to the patient. *See* 42 C.F.R. 2.65(b)(1). After notice of the application is given, the patient and/or the party holding any records must be given an opportunity to file a written response to the application and/or appear in person for the purpose of providing evidence on the criteria for the issuance of the court order. 42 C.F.R. 2.64(b)(2); 42 C.F.R. 2.65(b)(2). Any hearing held on the application must be held in chambers or in some other manner which ensures that the information will not be disclosed to anyone other than a party to the proceeding, the patient or the person holding the records, unless the patient requests an open hearing in the manner prescribed by the rules. 42 C.F.R. 2.64(c); 42 C.F.R. 2.65(c).

*ii. Substantive Requirements.*

Prior to the issuance of the court order authorizing disclosure, specific criteria must be met for the court to determine that good cause exists. 42 C.F.R. 2.64(d). The court must specifically find that the information cannot be obtained through other means and the public interest and need for disclosure outweigh the potential injury to the patient and the patient's treatment. 42 C.F.R. 2.64(d)(1)-(2).

Further, confidential communications made by a patient to a program in the course of treatment may only be authorized for disclosure under one of the following three circumstances:

- The disclosure must be necessary to protect existing threats to life or of serious bodily injury. 42 C.F.R. 2.63(a)(1). The threat to serious bodily injury may include suspected child abuse and neglect, as well as verbal threats against third parties. *Id.*
- The disclosure must be necessary to investigate or prosecute an extremely serious crime. 42 C.F.R. 2.63(a)(2). An extremely serious crime may be one that directly threatens death or serious bodily injury, such as homicide, rape, child abuse or neglect, etc. *Id.*
- The patient offers testimony or other evidence pertaining to the content of the confidential communications in the course of litigation or an administrative proceeding. 42 C.F.R. 2.63(a)(3).

What may be disclosed?

Patient records may only be disclosed or used as permitted by the regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceeding conducted. 42 C.F.R. 2.13(a). Disclosure must be limited to that information which is necessary to carry out the purpose of the disclosure. *Id.* The court order authorizing disclosure must limit the information disclosed to those parts of the patient's records which are essential to the purpose of the order, limit disclosure to those persons whose need for the information is the source of the order; and include measures necessary to limit disclosure for the protection of the patient and the patient's treatment. 42 C.F.R. 2.64(e); 42 C.F.R. 2.65(e).

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