

Obtaining Substance Use Treatment Records: The Good Cause Exception

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Confidentiality of Substance Use Treatment Records

- Public Health Service Act of 1912, as amended
- 42 U.S.C.A. § 290dd-2(a)
- 42 C.F.R. 2.1 *et seq.*
- *Ellison v. Cocke County, Tennessee*, 63 F.3d 467, 470 (6th Cir. 1995)
 - Strict adherence to the confidentiality provision is needed, lest individuals in need of drug abuse treatment be dissuaded from seeking help.

When do nursing boards need substance use disorder treatment records?

- Self-report
- Family member allegations
- Consumer complaints
- Employer reports
- Anonymous allegations
- Treatment provider reports
- Prescription Drug Monitoring Data

Hypothetical Fact Pattern – Part 1 of 2

- Hospital patients complain of lack of pain relief
- Tampering with hydromorphone patient-controlled analgesia (PCA) vials is discovered
- All employees who accessed automated medication dispensing system, except one, submit to drug testing with negative results
- John Doe, who refused to submit to testing, is terminated by the hospital
- A BON complaint is filed, and John Doe denies any and all wrongdoing and any history of substance abuse or treatment

Hypothetical Fact Pattern – Part 2 of 2

- BON receives a second complaint, an anonymous allegation that John Doe relapsed on opiates and was discharged from A New Day, Inc., a federally assistance substance use disorder treatment program
- BON sends a subpoena to A New Day, Inc., seeking John Doe's treatment records
- A New Day, Inc., objects to the subpoena, without admitting to the existence of responsive records

State Board of Medical Examiners v. Fenwick Hall, Inc., 419 S.E.2d 222 (S.C. 1992)

- South Carolina Medical Board investigated physician's medical treatment of patient injured in motor vehicle accident
- Investigation revealed patient received care during time period physician was prescribed narcotics for treatment of pain related to a knee injury
- Physician acknowledged a history of SUD and treatment
- Physician alleged successful completion of treatment at Fenwick Hall
- SCMB alleged that the physician left Fenwick Hall AMA after only 5 days

42 U.S.C.A. § 290dd-2

Public Health Service Act of 1912, as amended

- Protects against disclosure of “identity, diagnosis, prognosis, or treatment” records of federally assisted substance use disorder treatment programs, unless patient consent is obtained
- Authorizes disclosure pursuant to a court order upon a finding of good cause and implementation of safeguards
- Authorized the U. S. Dept. of Health and Human Services to enact regulations implementing the “good cause exception”

42 C.F.R. § 2.1 *et seq.* – Part 1 of 4

- Federal assistance – 42 C.F.R. § 2.12(b)
- Are hospital emergency rooms federally assisted SUD treatment programs?
 - *U. S. v. Zamora*, 408 F.Supp.2d 295 (S.D. Tex. 2006)
 - *Center for Legal Advocacy v. Earnest*, 320 F.3d 1107 (10th Cir. 2003)

42 C.F.R. § 2.1 *et seq.* – Part 2 of 4

- Petitioner's primary burden – 42 C.F.R. § 2.63
 - Existing threat to life or of serious bodily injury; or
 - The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of confidential communications.

42 C.F.R. § 2.1 *et seq.* – Part 3 of 4

- *In camera* review by the court, and resulting findings, are a helpful component in determining whether the requisite showing has been met
- Does inadequate pain control constitute a serious bodily injury?
- Analysis of hypothetical facts

42 C.F.R. § 2.1 *et seq.* – Part 4 of 4

- Requirement for limited disclosure – 42 C.F.R. § 2.13
- Subpoena required – 42 C.F.R. § 2.61
 - Subpoenas and the Nurse Licensure Compact
- Consideration of state law protections – 42 C.F.R. § 2.20
- Information is not obtainable from another source – 42 C.F.R. § 2.64
- Information that is merely cumulative need not be produced

Litigation Strategy – Part 1 of 2

- Adequate notice and opportunity to respond
 - *Jane H. v. Rothe*, 488 N.W.2d 879 (N.D. 1992)
- Maintain confidentiality in pleadings
- In camera review
 - *In re B.S.*, 659 A.2d 756 (Vt. 1995)
 - *Heartview Foundation v. Glaser*, 361 N.W.2d 232 (N.D. 1985)
- Injunctive relief
 - *Skakel v. Benedict*, 738 A.2d 170 (Conn. App. Ct. 1999)

Litigation Strategy – Part 2 of 2

- Prohibit redisclosure
- Protective order
- Redaction of records
 - *In re B.S.*, 659 A.2d 756 (Vt. 1995)
- Discovery v. admissibility
- Suppression
 - *People v. Barrett*, 135 Cal.Rptr.2d 103, 109 Cal.App.4th 437 (Cal. Dist. Ct. App. 2003)

CONCLUSION

- Questions
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