

Obtaining Substance Use Treatment Records: The Good Cause Exception

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Boards of nursing may obtain substance use disorder treatment records over the objection of the treatment provider and/or the licensee upon a “good cause” showing that the requested records are relevant to determining if the licensee is able to safely practice nursing. This article sets forth a hypothetical fact pattern for this type of specialized subpoena enforcement action and examines the procedural steps and substantive considerations relevant in such cases.

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In discipline cases, a licensee’s participation in inpatient or outpatient substance use disorder treatment, and the corresponding documentation from the course of treatment, may be directly relevant to a licensee’s ability to safely perform the essential functions of the profession. Notwithstanding self-reporting requirements, licensees sometimes decline to share such information with regulatory boards. In addition, treatment providers typically object to administrative subpoenas seeking treatment records. The Public Health Service Act (1912), as amended through enactment of 42 U.S.C.A. § 290dd-2(a), referred to herein as the Public Health Service Act, 1912, provides a mechanism to obtain federally assisted treatment program (FATP) records, even when the licensee and the treatment program object. In these situations, the court in the county where the records are located may issue an order for release, but only after finding “good cause” (Public Health Service Act, 1912). In *Ellison v. Cocke County, Tennessee* (1995), the Sixth Circuit discussed the basis for a robust good cause requirement:

The confidentiality of medical records maintained in conjunction with drug treatment programs are essential to that endeavor. Congress felt “the strictest adherence” to the confidentiality provision was needed, lest individuals in need of drug abuse treatment be dissuaded from seeking help.

Considering this purpose, courts presented with good cause petitions must weigh the public interest and the need for disclosure against the injury that could result from the disclosure, more particularly, the injury to:

- the treatment recipient
- the patient-provider relationship
- the FATP.

Regulations enacted to implement the Public Health Service Act state that “good cause” also requires that “[o]ther ways of obtaining the information are not available or would not

be effective” (Regulations on confidentiality of substance use disorder patient records, 2017).

Based upon an analysis of these statutory and regulatory provisions, this article presents the avenues that are available to licensing boards when they seek a licensee’s treatment records, even when the licensee and the FATP object to the disclosure. The procedures for obtaining a good cause order are discussed, as are relevant judicial decisions. An order finding good cause for disclosure of FATP records is referred to herein as a *good cause order*, and a petition seeking issuance of such an order is referred to as a *good cause petition*.

Petition and Appeal Decisions

In State (South Carolina) Board of Medical Examiners v. Fenwick Hall, Inc. (1992), a licensing board investigating complaints of physician misconduct was found to be entitled to disclosure of FATP treatment records. This case arose from a licensing board disciplinary complaint filed against a physician related to care provided to a person injured in a motor vehicle accident. The board held a confidential initial investigation and discovered the physician had been treated for substance abuse at Fenwick Hall, Inc., a FATP. At the time the physician provided care to the patient injured in a motor vehicle accident, he was on leave from a hospital due to a fractured knee; however, he continued to see patients in his office, which is where he provided care to the patient referenced above. As a result of his fractured knee, the physician was prescribed a painkiller, which he testified he only took on weekends. The physician acknowledged that he had been previously treated for alcohol and substance abuse “a number of times.” The physician also testified that he entered Fenwick Hall because he wanted to be completely drug free before returning to work at the hospital. The typical treatment at Fenwick Hall is 30 days. Both the physician and his wife testified that he stayed at Fenwick Hall the full 30 days and completed treatment. The board, however, alleged that

the physician left against medical advice after 5 days. The board filed a petition for disclosure of the FATP treatment records.

The South Carolina trial judge denied the board petition. The board appealed to the Supreme Court of South Carolina, which reversed the trial court. The opinion found that the board had no other way to obtain the desired information, and that public interest and need for disclosure due to possibility of harm posed by the physician practicing under the influence outweighed the potential injury to the physician and the FATP. Notably, the Supreme Court of South Carolina cited and relied upon *United States v. Hopper* (1977), a decision that focused on disclosures sought for the purpose of criminal prosecution. The court held that the same criteria applied to a disclosure request during a criminal prosecution would be useful in civil proceedings, such as discipline cases. This decision is helpful to boards, as few published cases are related to 42 U.S.C.A. § 290dd-2 in the context of board discipline proceedings. Conversely, many published cases are related to good cause petitions under 42 U.S.C.A. § 290dd-2 for purposes of criminal prosecution (Public Health Service Act, 1912).

Good Cause Petition: Hypothetical Fact Pattern

In light of few published cases interpreting 42 U.S.C.A. § 290dd-2 (Public Health Service Act, 1912) in the context of discipline proceedings, consideration of the following hypothetical fact pattern helps illustrate the legal issues relevant when a good cause petition is filed. Our hypothetical scenario begins when numerous postoperative hospital patients report a lack of pain relief. Hospital management discovers that sometime during the previous 48 hours, an unidentified employee has tampered with hydromorphone patient-controlled analgesia (PCA) vials by substituting a portion of the contents with water and returning the diluted vials to the automated medication dispensing system. Hospital management direct all staff who accessed the automated medication dispensing system within this period to submit to drug screening. All but one of those staff members consents to being tested, and the results of the laboratory analyses for those tested are negative. John Doe, a registered nurse, refuses to submit to drug testing, and his employment at the hospital is terminated. The hospital files a complaint with the board of nursing (BON). John Doe responds to the complaint and denies any wrongdoing, denies any history of substance use disorder or treatment, and states that he refused to submit to the drug test because he was offended by the request. Three months later, the BON receives a second complaint against John Doe. An anonymous allegation indicates that John Doe relapsed on opiates 2 weeks prior and, as a result, he was discharged from the treatment program at A New Day, Inc., a FATP, due to noncompliance with program rules. After unsuccessfully pursuing all other avenues of corroborating the anonymous complaint, the BON sends a sub-

poena to the treatment program requesting all records related to John Doe. The treatment program objects to the subpoena pursuant to 42 U.S.C.A. § 290dd-2 (Public Health Service Act, 1912) and 42 C.F.R. § 2.1 *et seq.* (Regulations on confidentiality of substance use disorder patient records, 2017), without admitting the existence of any requested records. The BON attorney is asked to enforce the subpoena served upon A New Day, Inc.

The Governing Statute

Consideration of this hypothetical scenario starts with a careful review of the governing statute, 42 U.S.C.A. § 290dd-2 (Public Health Service Act, 1912). This statute protects disclosure of the “identity, diagnosis, prognosis, or treatment,” of an individual receiving treatment, unless the treatment recipient agrees to the disclosure from FATP records. However, disclosure may be ordered by a court in conjunction with a finding of good cause and upon imposition of “appropriate safeguards against unauthorized disclosure.” Subsection (g) of the statute authorizes the U.S. Department of Health and Human Services to enact administrative regulations to implement the Public Health Service Act, including the good cause requirement.

In the hypothetical scenario, the BON seeks to obtain a licensee’s substance use disorder treatment records from a FATP, but the licensee and the FATP object to the disclosure. Therefore, 42 U.S.C.A. § 290dd-2 (Public Health Service Act, 1912) clearly precludes disclosure, unless the BON first obtains a good cause order from the court in the county where the records are located. Although the statute sets forth the overall legal burden applicable to a health care licensing board’s request for a good cause order, the administrative regulations provide more detailed guidance (Regulations on confidentiality of substance use disorder patient records, 2017).

The Governing Regulations

At the outset, and while not at issue in our hypothetical scenario, a licensing board seeking treatment records should determine whether the holder of the needed records receives federal assistance. 42 C.F.R. § 2.12(b) provides a broad definition of “federal assistance,” but it does state that the confidentiality protections do not apply to records generated by emergency room personnel, unless: (a) “the primary function of such personnel is the provision of substance use disorder diagnosis, treatment, or referral for treatment and they are identified as providing such services” or (b) “the emergency room has promoted itself to the community as a provider of such services” (Regulations on confidentiality of substance use disorder patient records, 2017).

In U.S. v. Zamora (2006), the federal government charged Ms. Zamora with driving intoxicated on Corpus Christi Naval Air Station. The government served a subpoena to Corpus Christi Medical Center-Bay Area (“CCMC”) seeking Zamora’s medical records for the preceding 7

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