

POLICY STATEMENT:

Alameda County Behavioral Health Care Services recognizes the special protection afforded sensitive information relating to treatment of psychiatric problems or substance abuse, and this policy sets forth the procedures for responding to subpoenas for the production of mental health records.

California law places strict limitations on the release of mental health records. The applicable law is found in the Welfare & Institutions Code §5328, *et seq.* (also known as the Lanterman-Petris-Short Act). This law applies to mental health records generated by any facility that admits patients for the purpose of receiving psychiatric care, whether voluntary or involuntary.

Federal law governs the restrictions imposed on the release of information regarding treatment for AOD conditions. In order to qualify for protected status, the facility must be part of a formal program for diagnosis/treatment of AOD disorders which is tax-exempt and receives federal funding or has federal certification of some sort. Programs that treat Medicare beneficiaries and accept Medicare payments meet these criteria. The applicable law can be found in the Code of Federal Regulations at 42 CFR, Part 2. These records can only be released with a court order (42 CFR 2.61 and California Health & Safety Code §5328(f)).

PROCEDURE: A facility may respond to a subpoena for psychiatric or substance abuse records ONLY IF:

- *the subpoena requires that the records be released directly to the Court, OR*
- *the subpoena is accompanied by a valid written authorization for the release of the records sought, OR*
- *the subpoena is accompanied by a court order.*

SUBPOENA FOR RELEASE TO COURT includes Workers' Compensation Appeal Board) WITHOUT A COURT ORDER:

Release of records to the court is designed to afford the patient the benefit of judicial review so that the judge might determine if the patient's right to confidentiality is outweighed by the subpoenaing party's interest in disclosure. In order to prevent the inadvertent or automatic release of records by the court to the subpoenaing party without the proper judicial review, the custodian of records should take the following steps:

- Prepare a copy of the records.
- Prepare two copies of the court order for release of records.
- Take the original records, copies, and court order to the court.
- Inform the Clerk of the Court that it is necessary to speak with the judge in chambers (an "*in camera*" hearing)
- Explain to the judge that the records are believed to contain information which is protected by the Lanterman-Petris-Short Act, or by the Federal or State AOD confidentiality laws, and perhaps by the physician-patient privilege; ask that the court review the record in order to determine if it should be released.
- Present the two copies of the court order for the release of records to the judge, and ask for "conformed copies," that is a copy bearing the judge's signature and the date signed.
- If the judge orders that the records be retained by the court, leave the copy of the records (unless the original is required), and retain one copy of the court order for the facility's files.

RELEASE WITH WRITTEN AUTHORIZATION:

A routine authorization for the release of medical information is sufficient for disclosure of psychiatric records. Federal law requires a specific authorization covering such points as the information to be released and the period of time for which the release is effective. The authorization may be signed by the patient or the patient's legal representative.

RELEASE WITH COURT ORDER:

Records may be released to a party to an action only with a court order in the case of requests for psychiatric or substance abuse records.

RESPONSE TO IMPROPER SUBPOENA:

A subpoena seeking production of psychiatric or substance abuse treatment records with release *to an entity other than the court* is improper **unless accompanied by a written authorization or court order.**

A careful response to the issuing attorney is mandatory, because *the mere statement that the records either exist or do not exist contains privileged information.* The proper response is to contact the attorney and state that the facility cannot confirm or deny that such records exist, and that if the records were to exist, they might contain information protected from disclosure under California W&IC §5328 or 42 CFR § 2.61 and cannot be released without a court order.

PRIVILEGED INFORMATION:

Psychiatric or substance abuse treatment records that are produced pursuant to a court order may contain material that is protected by the physician-patient or psychotherapist-patient privilege. While not legally mandated, courtesy notification of the clinician and patient is recommended so that either or both might decide to assert the privilege. Documents containing privileged information may also be redacted as necessary in order to conceal subject areas. A written explanation should accompany redacted records.

CONSULTATION WITH COUNSEL:

The custodian of records should consult with the facility's legal counsel in the event that the validity of a court order or subpoena is questioned.

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Application: Alameda County Behavioral Health and AOD Services