LAW OFFICES

SONOSKY, CHAMBERS, SACHSE MILLER & MUNSON, LLP
302 GOLD STREET
JUNEAU, ALASKA 99801
(907) 586-5880
TELEFAX (907) 586-5883

RICHARD D. MONKMAN E-MAIL: dick@sonoskyjuneau.com

HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY
LLOYD BENTON MILLER*
DONALD J. SIMON
DOUGLAS B. L. ENDRESON
MYRA M. MUNSON*
ANNE D. NOTO
MARY J. PAVEL
JAMES E. GLAZE*
DAVID C. MIELKE
GARY F. BROWNELL
COLIN C. HAMPSON
DOUGLAS W. WOLF
RICHARD D. MONKMAN**
MARISSA K. FLANNERY*
WILLIAM STEPHENS
JENNIFER J. THOMAS
MICHAEL E. DOUGLAS**
JAMES V. DEBERGH

OF COUNSEL

ARTHUR LAZARUS, JR.
ROGER W. DUBROCK*
MATTHEW S. JAFFE
KAY E. MAASSEN GOUWENS*
PETER G. ASHMAN*
JESSICA R. ABERLY

MARVIN J. SONOSKY (1909-1997)

ANCHORAGE OFFICE
900 WEST FIFTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377 • FAX (907) 272-8332

SAN DIEGO, CA OFFICE
750 B Street, Suite 3130
San Diego, CA 92101
(619) 546-5585 • FAX(619) 546-5584

WASHINGTON, D.C. OFFICE
1425 K STREET, SUITE 600, N.W.
WASHINGTON, D.C. 20005
(202) 682-0240 • FAX (202) 682-0249

ALBUQUERQUE, NM OFFICE
500 MARQUETTE AVE, N.W., SUITE 700
ALBUQUERQUE, NM 87102
(505)247-0147 • FAX (505)843-6912

*ALASKA BAR
**ALASKA AND WASHINGTON BAR

October 6, 2010

TO: Participants in Alaska Bar Ass'n Health Law Section CLE re Subpoenas

FROM: Richard D. Monkman
Sonosky, Chambers, Sachse, Miller & Munson, LLP

RE: Subpoena Issues

The following is a brief synopsis of the laws, regulations and court rules applicable to disclosure of health, substance abuse and mental health records in response to Alaska subpoenas.

1.0 Subpoena Requirements Generally.

The Alaska Civil and Criminal Rules have nearly identical procedures. The principal differences are that the Civil Rules (1) allow for service of subpoenas by certified mail to locations outside the State and (2) allow the court to assess costs of complying with subpoenas against the requesting party.

1.1 Civil Rules. Alaska Rule of Civil Procedure 4(c), governing service of process, states that "[a] subpoena may be served as provided in Rule 45 …." Civil Rule 45(a) states "[e]very subpoena shall be issued by the clerk …." Civil subpoenas may be served by a peace officer or a person who is not a party and is at least 18 years of age, and must be served either in person or "by registered or certified mail. …." Civil Rule 45(c). It is important to note that the Civil Rules do not allow for service of subpoenas by fax or by electronic mail. *Id.*

Civil Rule subpoenas may command the attendance of witnesses in court or at depositions.[1] Documentary evidence, such as medical records, may be subpoenaed under Civil Rule 45(b):

> **(b) For the Production of Documentary Evidence**. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) void or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

Civil Rule 45(b) allows the court to "(a) void or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the [documents]."

1.2 Criminal Rules. Alaska Rule of Criminal Procedure 17(a)(1) states that "[s]ubpoenas shall be issued by the clerk under the seal of the court, …" Subpoenas may be issued for attendance of witnesses or for the production of documents. Criminal Rule 17(a), (c). Criminal Rule 17(d) also requires personal service "by any peace officer or any other person who is not a party and who is not less than 18 years of age," and allows service "upon a person *of known residence within the state* by registered or certified mail…." Criminal Rule 17(d) – (e) (emphasis added). Criminal Rule 17 does not allow for service by fax or by electronic mail.

2.0 Federal Privacy Act.

The Privacy Act, 5 U.S.C. § 552a, has strict provisions. HRSA Section 330 clinics, Tribal health organizations operating pursuant to the Alaska Tribal Health Compact and many Alaska social service non-profit agencies and health care federal grant recipients are required to comply with the Privacy Act before disclosing "patient medical records, financial records and personnel records." Note, this applies to all such records, not just those relating to health, substance abuse or mental health treatment. The Privacy Act is not widely understood by state judges, district attorneys, probation and children's agency personnel.

5 U.S.C. § 552a(b) states that "[n]o agency shall disclose any record . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be – (11) pursuant to the order of a court of competent jurisdiction." There are federal civil and criminal penalties for violation of the Privacy Act.[2]

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[1] Alaska R. Civ. P. 45(d) – (e); Alaska R. Civ. P. 30(a)(1) (depositions). With exceptions not relevant to service of subpoenas, the Rules of Civil Procedure apply in child in need of aide proceedings, Alaska CINA Rule 8(b), and the Rules of Criminal Procedure apply in delinquency proceedings, Alaska Delinq. Rule 1(e).

[2] 5 U.S.C. § 552a(g) (civil) and (i) (criminal).

2.1 Consent. The Privacy Act allows disclosure with written consents by the subject individual: "No agency shall disclose any record … *except pursuant to a written request by, or with the prior written consent of, the individual* to whom the record pertains," unless disclosure of the record fits within one of the Act's enumerated exceptions.[3] A parent or legal guardian may consent for a minor or incapacitated person:

> **(h) Rights of legal guardians.**--For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.[4]

If the individual (or parent or guardian) consents, presumably the agency will receive a release and not a subpoena. It is a good practice to serve subpoenas for records together with a signed consent. In those instances, the consent suffices to authorize release while the subpoena assures that the witness or records custodian will appear to produce the records. Regardless, with or without a subpoena, the individual's consent resolves Privacy Act concerns.

2.2 Absent Consent, Court Order Required. Without consent from the person involved, the Privacy Act requires a court order to release information. It is important to note that a subpoena signed by the clerk of court is <u>not</u> sufficient under the Privacy Act. Only subpoenas signed by a judge, or court orders signed by a judge, are considered to be "pursuant to the order of a court of competent jurisdiction" and sufficient under the Act.[5]

3.0 HIPAA Privacy Rule.

Covered entities must comply with the "Standards for Privacy of Individually Identifiable Health Information" final rule, known as the HIPAA Privacy Rule, pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Parts 160 and 164, Subparts A and E. Most health care law practitioners are familiar with HIPAA's labyrinthine provisions and exceptions, and we will not go into great detail here on all those points. The principal areas relevant to subpoenas are discussed below.

3.1 Court Orders. Under the HIPAA Privacy Rule, a health care provider may release protected health information only in accordance with certain detailed conditions. If a court orders disclosure, protected health information may be released "provided that the covered entity discloses

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[3] 5 U.S.C. § 552a(b) (emphasis added).

[4] 5 U.S.C. § 552a(h).

[5] 5 U.S.C. § 552a(b)(11). *See also Doe v. DiGenova*, 779 F.2d 74, 84-87 (D.C. Cir. 1985) (holding that while a subpoena is a "judicial process" issued in the name of a court and subject to enforcement by the court, it is nonetheless not an "order of court" for purposes of the Privacy Act); *Moore v. U.S. Postal Service*, 609 F.Supp. 681, 682 (D.C. N.Y. 1985) (concluding that personnel records of an employee of the postal service were properly released in a state divorce proceeding where the subpoena was prepared by an attorney and signed by a judge); *Stiles v. Atlanta Gas Light Co.*, 453 F.Supp. 798, 800 (D.C. Ga. 1978) (determining that a subpoena, even though subject to the power of the court to quash or limit, is not an "order of a court of competent jurisdiction" for purposes of the subsection (b)(11) Privacy Act); *In Re Motion for a Standing Order*, 1 Vet.App. 555, 558-559 (Vet. App. 1990).

only the protected heath information *expressly authorized* by such order."[6]

3.2 Subpoenas Without Court Order. If the request is in the form of a "subpoena, discovery request or other lawful process" not "accompanied by an order of court," HIPAA requires that the health care provider receive "satisfactory assurance" that reasonable efforts have been made to give notice of the subpoena to the person whose information is the subject of the request[7] or receive "satisfactory assurances" that the party seeking the information has made reasonable efforts to secure a qualified protective order.[8]

"Satisfactory assurance" requires a written statement accompanying the subpoena that demonstrates the party requesting the information has made a good faith attempt to provide notice to the individual, or mailed notice to the individual's last known address if the current address is unknown;[9] or that the individual had an opportunity to object[10] and the time for objection has passed and no objection was filed,[11] or that any objection was resolved by the court, and the disclosure sought is consistent with the court's resolution.[12] These steps can be accomplished but are difficult for the busy practitioner to follow.

3.3 Disclosure Subject to Protective Order. Alternately, HIPAA allows the party requesting disclosure to seek a protective order from a court of competent jurisdiction, directing the provider to release protected health information subject to stated confidentiality provisions. The health care provider may disclose protected information if it is provided "a written statement and accompanying documentation demonstrating" that the party seeking disclosure has made "reasonable efforts … to secure a qualified protective order."[13]

The party requesting the information must show that it has made "a good faith attempt" to provide notice of the request to the individual involved, and that either the individual did not object and the time for doing so has expired or that a court or tribunal has resolved all objections in the requesting party's favor. The protective order must prohibit the parties from using or disclosing the protected health information for any purpose other than the proceeding it was requested for[14] and must require the return or destruction of the protected health information and all copies made.[15] The provider may also seek a protective order itself or, alternately, may disclose after making its own attempts to notify the individual of the request.[16]

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6 45 C.F.R. § 164.512(e)(1)(i) ("Standard: Disclosures for judicial and administrative proceedings") (emphasis added).

7 45 C.F.R. § 164.512(e)(1)(ii)(A).

8 45 C.F.R. § 164.512(e)(1)(ii)(B).

9 45 C.F.R. § 164.512(e)(1)(iii)(A).

10 45 C.F.R. § 164.512(e)(1)(iii)(B).

11 45 C.F.R. § 164.512(e)(1)(iii)(C)(*1*).

12 45 C.F.R. § 164.512(e)(1)(iii)(C)(*2*).

13 45 C.F.R. § 164.512(e)(1)(ii)(A) – (B), (iv)(A)-(B). The HIPAA Privacy Rule allows a party to obtain protected health information without actually having protective order in hand, so long as the party can show that it made "reasonable efforts … to secure a qualified protective order." Id. Where the Privacy Act is applicable, however, "reasonable efforts" are insufficient: an actual judicial order from "a court of competent jurisdiction" must be obtained before disclosure. 5 U.S.C. § 552a(b)

14 45 C.F.R. § 164.512(e)(1)(v)(A).

15 45 C.F.R. § 164.512(e)(1)(v)(B).

16 45 C.F.R. § 164.512(e)(1)(vi). *N.b.*, specific patient authorization is required for "any use or disclosure of psychotherapy notes," "[n]otwithstanding any provision of this subpart." 45 C.F.R. § 164.508(a)(2).

3.4 Consent. As with the Privacy Act, authorization by the patient generally allows the provider to disclose information. But, while the Privacy Act only requires "prior written consent," HIPAA's consent requirements are more detailed. HIPAA states that "a covered entity may not use or disclose protected health information without an authorization that is valid" under 42 CFR § 164.508 ("Uses and disclosures for which an authorization is required."). The requirements for authorization include:

> (i) a description of the information to be used or disclosed "that identifies the information in a specific and meaningful fashion, …"

3.5 Other Exceptions. There are a variety of "permitted disclosures" for law enforcement purposes listed in 42 CFR § 164.508(f). These include reporting wounds or other physical injuries to law enforcement "as required by law"; pursuant to court orders, warrants "or a subpoena issued by a judicial officer"; in response to grand jury subpoenas; within strict limits, as required by administrative subpoenas; about victims of a crime; and about decedents to aid a coroner in identifying a deceased and determining a cause of death. As always, before disclosing HIPAA protected health information, double check to assure that it is disclosable.

3.6 Minimum Necessary. The most important principle to keep in mind is that, regardless of whether disclosure is pursuant to a court order or the individual's consent, HIPAA only allows disclosure of the minimum necessary information required to comply with law and to respond to the request.[17] This is a point worth emphasizing to one's clients in many situations.

4.0 Privacy Rule "Part Two" Regulations.

Perhaps the most commonly faced situation is when a subpoena implicates the federal rules on disclosure of drug and alcohol abuse treatment records, 42 C.F.R. Part 2 ("Part Two").[18] Part Two is substantially stricter than the Privacy Rule. Part Two specifies detailed requirements that must be met before a court may lawfully order disclosure of treatment records or require testimony from a counselor concerning confidential communications made in the course of substance abuse treatment:

> (a) A court order under these regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if:
>
> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

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[17] 42 C.F.R. § 164.502(b)(1)(" When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.").

[18] Statutory authority for Part Two is found in the Public Health Service Act, 42 U.S.C. §§ 290dd-3 and 290ee-3. These statutes are set out in the regulations at 42 C.F.R. §§ 2.1 and 2.2 and are required separately by State law for records pertaining to "a patient being treated for alcohol or drug abuse in a facility that receives federal assistance." 7 AAC 72.150. State laws and regulations, which in this case include Part 2, are not preempted by HIPAA unless they conflict or HIPAA is more stringent. 45 C.F.R. § 160.203; *see also*, 45 C.F.R. §164.524(a)(2)(iv).

> (2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or
>
> (3) 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 the confidential communications.
>
> (b) [Reserved].[19]

4.1 Court Order and Subpoena Required. Uniquely, Part Two requires both a court order authorizing disclosure and a subpoena or other compulsory process to release of drug and alcohol abuse treatment records.[20]

Any person having a legally recognized interest in the records may apply for a court order to release the records for purposes other than criminal investigation or prosecution.[21] The patient and the provider must be given adequate notice[22] and an opportunity to file a written response or to appear in person for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of a court order.[23]

Before ordering disclosure, the court must determine there (1) is good cause for the release of the information, (2) is no other means of obtaining the information and (3) the public interest and need for disclosure outweighs the potential injury to the patient and the physician-patient relationship.[24] The court's order must limit the disclosure to the parts of record that are necessary, limit disclosure of the record to the person requesting the information, and include any other necessary measures for the protection of the patient and protection of the physician-patient relationship.[25]

4.2 Special Provisions for Criminal Investigations. In a criminal investigation of a patient, Part Two requires that either the person conducting the investigation or the person holding the records may apply for an order for release of the records.[26]

The person holding the records must be given adequate notice, an opportunity to appear and be heard on the issue of statutory and regulatory criteria for issuing the order, and an opportunity to

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19 42 C.F.R. § 2.63.

20 42 C.F.R. § 2.61(a) ("An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 USC 290ee-3, 42 USC 290dd-3 and these regulations. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure.").

21 42 C.F.R. § 2.64(a).

22 42 C.F.R. § 2.64(b)(1).

23 42 C.F.R. § 2.64(b)(2).

24 42 C.F.R. § 2.64(d).

25 42 C.F.R. § 2.64(e).

26 42 C.F.R. § 2.65(a).

be represented by counsel independent of the counsel representing the law enforcement officer seeking the records.[27] The order must limit the disclosure to those parts of the patient's record that are essential to fulfill the objective of the order and limit disclosure to the law enforcement and prosecutorial officials who are conducting or prosecuting the investigation.[28] The order must limit the use of the information to investigation of an extremely serious crime and include other measures necessary to limit disclosure.[29]

4.3 Minor Consent. Part Two also requires consent of a minor prior to disclosure in circumstances where State law gives the minor capacity to consent to treatment. 2 CFR § 2.14(b). The substance abuse program director may, however, authorize disclosure of "[f]acts relevant to reducing a threat to the life or physical well being of the applicant or any other individual … if the program director judges that" the minor lacks capacity, due to "extreme youth or mental or physical condition to make a rational decision" or poses a "substantial threat" of harm to himself, herself or others. 2 CFR 2.14(d).

5.0 Additional State Law Issues Regarding Mental Health Treatment.

The next point concerns Alaska rules on disclosure of mental health treatment records. HIPAA preempts inconsistent State laws unless the State law "is more stringent" than HIPAA's regulations or "provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health . . . ."[30]

Mental health treatment is the principal area in which Alaska law is more stringent than HIPAA. Patients undergoing mental health treatment in Alaska have a broad range of statutory rights.[31] In particular, information and records "obtained in the course of a [mental health] screening investigation, evaluation, or treatment" may only be released to "a person authorized by a court order" or in several other very limited circumstances.[32] Those include disclosure to:

> (1) a physician or a provider of health, mental health, or social and welfare services involved in caring for, treating, or rehabilitating the patient; …
>
> (6) a governmental or law enforcement agency when necessary to secure the return of a patient who is on unauthorized absence from a facility where the patient was undergoing evaluation or treatment;
>
> (7) a law enforcement agency when there is substantiated concern over imminent danger to the community by a presumed mentally ill person;
>
> (8) the department in a case in which services provided under AS 47.30.660 - 47.30.915 are paid for, in whole or in part, by the department, or in which a person has applied for or received

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27 42 C.F.R. § 2.65(b).
28 42 C.F.R. § 2.65(e).
29 *Id*..
30 45 C.F.R. § 160.203.
31 AS 47.30.840 ("Right to Privacy and Personal Possessions.").
32 AS 47.30.845.

assistance from the department for those services.

AS 47.30.845(1), (6) – (8).

Under Alaska's mental health rules, in a phrase similar to HIPAA, "[o]nly the minimum identifiable client information necessary to the intended purpose may be released."[33]

Please note that facilities designated as Community Health Facilities and Community Mental Health Centers are specifically required to keep all records and information about a mental health patient confidential, and may only release records and information (1) with the patient's consent, or (2) without the patient's consent to "a person authorized by court order," (3) to emergency medical care providers, (4) anonymously for research projects or (5) to "other persons to whom disclosure is required by law."[34]

In the case of a subpoena to appear at deposition, the Alaska rules allow a person to whom the subpoena is directed to serve upon the attorney designated in the subpoena written objection to inspection or copying of the designated materials.[35] If such an objection is made, the party serving the subpoena will not be entitled to inspect or copy the documents unless the requesting party obtains an order of the court.[36] The written objection must be made within 10 days after service or, if service is made less than 10 days before the date specified in the subpoena, at any time before the date designated in the subpoena.[37]

In the case of a request for drug and alcohol abuse treatment records, as noted above, both a court order and a subpoena are required.[38] If the records are sought for a noncriminal purpose, both the patient and the provider must be given notice that someone has applied for a court order for the release of the records.[39] The provider must be given an opportunity to file a written response to the application or the chance to appear in person for the limited purpose of providing evidence on the statutory and regulatory criteria for the release of the information.[40] The order must be limited in scope to only that information which is necessary to fulfill the objective of the order.[41]

We note that agencies that operate integrated behavioral health programs may have great difficulty in separating out substance abuse records subject to Part 2 and mental and behavioral health records subject to the Alaska mental health rules. For those agencies, requests for documents and for testimony will need to comply with both sets of rules.

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33 7 AAC 71.215(d).
34 7 AAC 13.130(b)(1); 7 AAC 71.215(b).
35 Alaska R. Civ. P. 45(d)(1).
36 *Id.*
37 *Id.*
38 42 C.F.R. § 2.61.
39 42 C.F.R. § 2.64(b).
40 42 C.F.R. § 2.64(b)(2).
41 42 C.F.R. § 2.64(e).

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

//s// Richard D. Monkman

By: Richard D. Monkman