

## SAMPLE LETTER IN RESPONSE TO A SUBPOENA - CIVIL

Dear

We have received your subpoena requesting [any records] [testimony from program personnel] concerning [name of patient]. As you may know, our program is governed by state and federal statutes and regulations, which govern how we are permitted to release confidential client records or any other client-identifying information. 42 U.S.C. § 290dd-2; 42 C.F.R. Part 2. Upon reviewing your subpoena, it appears the requirements in the laws and regulations have not been met. The confidentiality laws and regulations therefore prohibit this program and its personnel from complying with your request or even acknowledging whether or not this individual is or ever was a patient in our program unless [he/she] executes a proper consent form or the court issues an order authorizing disclosure in accordance with Subpart E of the federal confidentiality regulations. (42 C.F.R. § 2.13.)

The federal confidentiality law and regulations permit the release of information about current or former patients with written patient consent in a particular form specified in the regulations (See 24 C.F.R. § 2.31.) A general medical release is not sufficient. We enclose a sample consent form for your review and use.

The federal law and regulations prohibit a program from disclosing information in response to a subpoena (even a judicial Subpoena) unless the subpoena is accompanied by a proper consent or a court issues an order in compliance with the procedures and standards set forth in Subpart E of the regulations, § 2.61 – 2.67.

Subpart E of the regulations provides that before the court may issue an order authorizing a program to release patient information, both the alleged patient (or his/her representative) and the program must be notified that a hearing will be held to decide whether and authorizing court order will be issued, and both the patient and the program must be given an opportunity to appear in person or file a responsive statement. (42 C.F.R. § 2.64(b).)

In order to issue an authorizing order the court must find, at or after the required hearing, that “good cause” exists to issue the order (§ 2.64(d)). Section 2.64 provides:

[T]o make this [good cause] determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

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The federal regulations also limit the kind and amount of records/information that a court may order a program to release. Sections 2.64(e) provides that an order must “limit disclosure to those parts of the patient’s record which are essential to fulfill the objective of the order” and that only those persons having a need for the information may receive patient records. Section 2.63 provides that a court may not order any disclosure of confidential communications made by a patient to program staff unless one of the three additional conditions is met: (1) the disclosure is necessary to protect against an existing threat to life or serious bodily injury, (2) the disclosure is necessary in connection with the investigation or prosecution of a very serious crime, such as homicide or rape, or (3) the patient has already offered evidence about confidential communications.

Thus, for the court to issue a court order permitting program personnel to release records/information containing confidential communications by a patient or to testify about any communications made by a patient, it would first have to find that:

- (1) there is no other way to obtain the necessary information, or other ways would be ineffective;
- (2) disclosure would not harm the public interest in attracting people to substance abuse treatment; and
- (3) one of the three specific conditions of § 2.63 has been met.

Since this program has not yet received a proper written consent form from the individual about whom [records/testimony] [is/are] sought, or an authorizing court order that was obtained under 42 C.F.R. Part 2, Subpart E, federal law prohibits us from releasing any information.

This letter is a result of thorough review of the federal law and regulations governing the confidentiality of alcohol and drug abuse patient records. Please understand that we do not intend to impede justice.

Sincerely,

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Program Director

Enclosure (sample consent form)