N.D.A.G. Letter to Haskell (March 25, 1991)

March 25, 1991

Mr. Bruce Haskell
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer
Bismarck, ND 58501

Dear Mr. Haskell:

Thank you for your letter dated December 20, 1990, concerning problems experienced by respondents' attorneys in obtaining information about their clients from hospitals and treatment facilities in connection with involuntary commitment proceedings. The facilities most often advise that they are prohibited from disclosing records by 42 C.F.R. pt. 2 (1989) relating to confidentiality of alcohol and drug abuse patient records. The facilities claim they cannot release the records to the respondent's attorney without a release from the client or respondent. You advised that N.D.C.C. § 25-03.1-43 seems to allow access to these records without a release.

You also enclosed a uniform commitment law form titled Order Appointing Attorney and advised that the Burleigh County Court adds language to the form providing as follows: "Respondent's attorney shall have access of [sic] all information and records obtained in the course of investigation, evaluation, examination, or treatment in this involuntary commitment action."

You specifically ask "what is required in order for a respondent's attorney to obtain treatment facility records relating to the respondent." You also inquire whether a treatment facility may refuse to disclose records to the respondent's attorney if the respondent has not signed a release of information.

State law specifically provides for access to a respondent's records in connection with an involuntary commitment proceeding. N.D.C.C. § 25-03.1-43 provides that "[a]ll information and records obtained in the course of an investigation, evaluation, examination, or treatment [may be disclosed] as the requirements of a hearing under [N.D.C.C. ch. 25-03.1] may necessitate."

The commitment form titled "Order Appointing Attorney" is sufficient to meet the requirements of N.D.C.C. § 25-03.1-43(3) even in the absence of language added by the Burleigh County Court.

A treatment facility may require a release signed by the attorney for a client together with a copy of the order appointing the attorney as counsel in an involuntary commitment proceeding. North Dakota Department of Human Services (NDDHS) Manual section

110-01-06-20.

Thus, state law poses no impediment to access by a respondent's attorney to a client's records at a treatment facility, in connection with an involuntary commitment proceeding under N.D.C.C. ch. 25-03.1 whether the client is being treated for mental illness or alcohol or drug addiction.

If the respondent or client has been treated for alcohol or drug abuse problems, the federal statutes and regulations carry a strong presumption against disclosure. United States v. Cresta, 825 F.2d 538, 551-52 (1st Cir. 1987).

The federal statutes essentially provide that records of the identity, diagnosis, prognosis or treatment of any patient in connection with "any drug abuse prevention function" or "alcoholism or alcohol abuse . . . treatment shall . . . be confidential and be disclosed only . . . under the circumstances expressly authorized under subsection (b) of this section." 42 U.S.C. §§ 290ee-3(a) and 290dd-3(a).

42 U.S.C. §§ 290dd-3(b) and 290ee-3(b) provide that records may be disclosed under limited circumstances including prior written consent of the patient or court order. United States v. Johnston, 810 F.2d 841, 842 (8th Cir. 1987).

The accompanying regulations generally prohibit disclosure of "all information about patients, including their attendance or absence, physical whereabouts, or status as patients, whether or not recorded, in the possession of program [treatment] personnel" 42 C.F.R. § 2.13(c).

> In providing for confidentiality, Congress focused on the custodians of the patient records. See 42 U.S.C. § 290ee-3(a); 42 C.F.R. § 2.13(a). Because these custodians, not law enforcement officials, have "control over or access to patients' records[, they] must understand that disclosure is permitted only under the circumstances and conditions set forth in [the statute and regulations]."

United States v. Johnston, 810 F.2d at 843.

The regulations further provide that "no State law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. § 2.20 (1989). North Dakota Department of Human Services confidentiality policies emphasize the preeminence of the federal regulations governing records of alcohol or drug abuse patients: "The regulations contained in 42 CFR Part 2 are stringent. They supersede anything in this manual to the contrary in any situation where they apply." NDDHS Manual section 110-01-03-90.

The North Dakota Supreme Court considered the application of the federal regulations in a case concerning the attempted discovery of the names and addresses of patients of an alcohol and drug treatment facility in a civil malpractice suit.

In Heartview Foundation v. Glaser, 361 N.W.2d 232 (N.D. 1985), the district court ordered the treatment facility and a counselor to answer an interrogatory seeking patients' names and addresses. The district court assumed that if federal statutes and regulations applied they did not bar disclosure because there was "good cause" for disclosure.

The supreme court specifically found that 42 U.S.C. §§ 290-dd3 and 290ee-3 and the complementary federal regulations, 42 C.F.R. pt. 2, governed the disclosure of information acquired in connection with alcohol and drug treatment. Id. at 234.

The supreme court advised that the federal statutes and regulations prohibit disclosing certain patient information unless the patient waives the right of confidentiality by a written consent for disclosure or disclosure is ordered by a court. As no written consent was given by any patient, disclosure could be had only by court order pursuant to the federal regulations. Id. at 234.

The court found that the federal regulations required notice be given to the patients in connection with the proceeding to obtain a court order authorizing disclosure in view of the legislative history. The court concluded the district court erred in compelling Heartview to answer the interrogatory in question because "the district court order did not comply with the dictates" of the federal regulations with respect to "notice to the relevant patients." Id. at 235.

In the exercise of its superintending jurisdiction the supreme court directed the court to vacate the order compelling answers to the interrogatory. Id. at 235-236. The court required compliance with the federal regulations in connection with proceedings on remand to determine if there was good cause to release the information.

Presumably the language added to the Order Appointing Attorney Form by the Burleigh County Court was made without an application by any party, without notice, and without a hearing in which the court "looks at the applicant's 'good cause' and balances the public interest and the need for disclosure, against the injury to the patient, to the physician-patient relationship, and to the treatment services." U.S. v. Cresta, 825 F.2d at 552; 42 C.F.R. § 2.64 (1989). In my opinion, the order for disclosure does not comply with the dictates of 42 C.F.R. pt. 2 (1989) in these respects. It is not effective to compel disclosure of records of alcohol and drug abuse treatment.

In summary, the Order Appointing Attorney Form together with a release signed by the attorney for a client is sufficient for a treatment facility to provide that attorney access to a client's records where the client is being treated for mental illness. Where the client is being treated for alcohol or drug abuse problems the release must be signed by the client. If the client refuses to sign or is unable to sign a release, an order of the court permitting the attorney access to treatment facility records must be preceded by application, notice, and the hearing wherein the court will determine if good cause exists to compel the disclosure.

Sincerely,

Nicholas J. Spaeth

vkk