

## **Legal Guidance on HIPAA Exception for Health Oversight Activities**

This memorandum responds to a circumstance in which an Advanced Practice Registered Nurse (“APRN”) has provided medical and/or psychiatric treatment to another nurse. This treatment was provided in a medical setting and in the proper course and scope of the APRN’s employment at a healthcare facility. In the course of this treatment, the APRN discovered information which indicates that the nurse/patient has engaged in doctor shopping and/or the abuse of prescription drugs. For example, the APRN reviewed a record of duplicative prescriptions filled by the nurse/patient, which prescriptions were prescribed by multiple different practitioners during the same time period. The APRN reported this to her healthcare facility employer, and the healthcare facility employer directed the APRN to refrain from disclosing her knowledge regarding the misconduct of the nurse/patient to the Kentucky Board of Nursing or other law enforcement officials. This action by the healthcare facility employer generally contravenes KRS 314.031, which states:

It shall be unlawful for a nurse, employer of nurses, or any person having knowledge of facts to refrain from reporting to the board a nurse who: ... (j) is suspected of abusing controlled substances, prescription medications, illegal substances, or alcohol.

The APRN has contacted KBN out of a concern that her healthcare facility employer has instructed her to violate KRS 314.031. She has advised us that the healthcare facility employer bases its noncompliance with KRS 314.031 upon the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d et seq. HIPAA includes provisions that seek to preserve the confidentiality of patient information in certain instances. The purpose of this memorandum is to explain that HIPAA does not preempt the mandatory disclosure requirement set forth at KRS 314.031.

### **1. HIPAA Exemption for Disclosures To Health Oversight Agencies**

Subpart (d) of HIPAA provides when health information may be used and disclosed for health oversight activities including licensure and disciplinary actions. 45 C.F.R. § 164.512(d) (2009). There can be no reasonable dispute, the Kentucky Board of Nursing is a health oversight organization as defined in Subpart (d). Under the express terms of Subpart (d), disclosure of confidential patient information, however, is permitted for oversight activities authorized by law, including administrative investigations necessary for the Board’s oversight of the practice of nursing within the Commonwealth of Kentucky and the Board’s enforcement of KRS Chapter 314, which sets the standard of conduct for nurses in the Commonwealth of Kentucky. It should be noted that there is an exception within Subpart (d) which protects patient information from disclosure to healthcare oversight agencies in instances where the agency investigation is not related to the receipt of healthcare; however, the exception does not apply in the present context. In the present circumstance, evidence indicates that the nurse/patient was engaging in doctor

shopping and in the abuse of prescription drugs. The nurse/patient was inappropriately and simultaneously seeking prescription drugs from multiple practitioners for the same alleged ailment. Additionally, the evidence calls into question the nurse/patient's competence to provide medical care safely and in a manner consistent with the standards set forth within KRS Chapter 314. Based upon the foregoing, the action of the healthcare facility employer violates KRS Chapter 314. HIPPA is not a foundation for anyone's failure to report the nurse/patient's misconduct to the Kentucky Board of Nursing in the present context.

## **2. Psychotherapist-patient Privilege**

Based upon the limited information received from the APRN, it is unclear whether or not the APRN was providing treatment to the nurse patient for a mental condition or a physical condition. For this reason, a discussion of the psychotherapist-patient privilege is warranted. Pursuant to Kentucky Rule of Evidence 507, an RN or APRN who practices psychiatric or mental health nursing may not be compelled to disclose confidential communications made between the nurse and the patient for the purpose of diagnosis or treatment of the patient's mental condition. The policy basis for this privilege is self-evident. The treatment of mental conditions depends upon a level of trust and confidence between a patient and psychotherapist, and the open disclosure of information between patient and practitioner.

This memorandum concludes that, even if the APRN is a psychotherapist as defined by Kentucky Rule of Evidence 507, the psychotherapist-patient privilege does not pertain to the knowledge acquired by the APRN when she reviewed a record of duplicative prescriptions filled by the nurse/patient, which prescriptions were prescribed by multiple different practitioners. Put simply, this discovery was not made in the course of communication between patient and practitioner.

## **3. Federally Funded Treatment Programs**

It should be noted that, under federal law, disclosure of medical records relating to the treatment of drug and alcohol abuse patients in federally funded treatment programs is governed by the provisions of Title 42 U.S.C. § 290dd-2 ("Public Health Service Act")

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the

circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd–2(a).

In *Ellison v. Cocke County, Tennessee*, the Sixth Circuit discussed the statute's purpose:

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.

63 F.3d 467, 470 (1995) (citation omitted).

There are, however, circumstances when disclosure is appropriate. For example, disclosure is permitted if the patient provides prior written consent. *See* 42 U.S.C. § 290dd–2(b)(1). Even if the patient fails or refuses to consent, disclosure is permitted in some circumstances:

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 U.S.C. § 290dd–2(b)(2)(C). A party seeking disclosure of the substance abuse treatment records bears the burden of establishing “good cause.” *See United States v. Cresta*, 825 F.2d 538, 552 (1st Cir. 1987); *Fannon v. Johnston*, 88 F. Supp. 2d 753, 756-58 (E.D. Mich. 2000). Based upon the foregoing statute, an employee of a federally funded drug/alcohol treatment program is not obligated to report to the Kentucky Board of Nursing pursuant to KRS 314.031(4), as the federal confidentiality statute preempts the mandatory reporting provision pursuant to the Supremacy Clause of the U. S. Constitution. An inquiry by KBN staff has determined that the APRN who has contacted the Board does not and has not provided federally funded drug/alcohol treatment to the nurse at issue, and the medical services provided to the nurse at issue were in no way related to federally funded drug/alcohol treatment.

#### **4. Statutory Immunity Protects Those Who Comply With KRS 314.031**

One additional statutory provision warrants mention here. KRS 314.093 states that persons or agencies that file a complaint, provide sworn or written statements, or otherwise participate in an investigation or administrative proceeding instituted pursuant to Chapter 314 of the Kentucky Revised Statutes “shall have immunity from civil or criminal prosecution that is based upon such information unless the person or agency committed perjury, acted in bad faith, or acted with gross negligence, recklessness or malicious purpose.” This express grant of statutory immunity protects anyone who in good faith reports misconduct to the Kentucky Board of Nursing.

#### **CONCLUSION**

Based upon the foregoing analysis, and should you concur, it is my recommendation that this memorandum be provided to the APRN who has contacted us, with direction that she share this document with her employer. If the employer persists in its noncompliance with the reporting requirement of KRS 314.031, the Kentucky Board of Nursing has broad legal authority to initiate an administrative enforcement action and/or to file an appropriate enforcement proceeding in circuit court. I am confident that either a judicial or administrative determination regarding this matter will confirm the conclusion set forth herein, namely that the confidentiality provisions of the Health Insurance Portability and Accountability Act do not preempt the reporting requirement of KRS 314.031 and the broad investigative authority of the Kentucky Board of Nursing as set forth in KRS 314.031.

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3/8/12

Note: The attorneys for the Kentucky Board of Nursing provide legal opinions to assist the public in the interpretation of the provisions of KRS Chapter 314 and the regulations enacted in accordance with the provisions of KRS Chapter 314. These legal opinions do not have the force of law and should not be cited as legal authority. Rather, these opinions constitute the legal opinion of the KBN attorney who authored the legal opinion as of the date of the issuance of the opinion.