

## **Social Workers, HIPAA, and Subpoenas**

One of the legal questions most commonly asked by social workers is “What should I do if I am served a subpoena for my client’s records?” With the implementation of the HIPAA medical privacy regulations (the Privacy Rule) social workers will have even more questions about this issue.

### **The NASW Code of Ethics Standard for Release of Client Information**

The *NASW Code of Ethics* states that client records should only be disclosed without client consent in order to protect the client or others from harm or under court order. Additional interpretations of the *NASW Code* have also indicated that disclosures of client records may be made if they are mandated by law (e.g. child abuse reporting). Generally, the NASW standard is highly protective of clients’ privacy and the HIPAA Privacy Rule has clarified that practitioners can voluntarily hold themselves to a higher standard, as is required by professional ethics.

### **HIPAA Standard for Disclosure of Client Information in Legal Proceedings**

The HIPAA Privacy Rule allows social workers (and others) to use and disclose client information without client permission for a number of purposes. It should be noted that disclosing client information in this way is not required by HIPAA. If client information needs to be disclosed for legal purposes such as judicial or administrative proceedings then certain procedures in the HIPAA Privacy Rule must be followed.

### **Disclosure Based on a Court Order**

If the disclosure of confidential client information is ordered by a court or hearing officer, then the records can be released without client permission.<sup>[1]</sup> This is consistent with the HIPAA Privacy Rule and the *NASW Code of Ethics*. Typically, this would occur at or after a legal hearing where the court would consider arguments for and against the release of the client records. In some instances, this would require that a social worker retain legal counsel to argue on behalf of protecting the client’s (or former client’s) privileged and confidential psychotherapy records.

If information is released subject to a court order, the *NASW Code of Ethics*, Standard 1.07(j), spells out additional precautions to be taken to protect clients:

When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection.

### **HIPAA Rules for Disclosure Based on a Subpoena**

The HIPAA Privacy Rule gives practitioners, such as social workers, the option of releasing information based on a subpoena alone (without a court order or client permission) if certain actions are taken by the social worker or if the party that is seeking the disclosure of records provides adequate assurances to the social worker that proper HIPAA procedures have been

followed.<sup>[2]</sup> Releasing records based on a subpoena is not required by HIPAA and disclosing information before a court order is obtained (and without client consent) would be inconsistent with the *NASW Code of Ethics* standards. However, it may be useful for social workers to have knowledge of the HIPAA guidelines for subpoena-based disclosures. In order to release confidential client information under the HIPAA regulations based on a subpoena alone:

- The requesting party or the social worker must make reasonable efforts to notify the client and give them an opportunity to raise objections in court. A written statement from the third party to the social worker and documentation of the good faith attempts to notify the client is required.<sup>[3]</sup>

OR

- The party seeking the disclosure of the information or the social worker must make reasonable efforts to obtain a “qualified protective order” from the court that would limit the information disclosed to use for this one proceeding only, and require the return or destruction of the client information at the end of the litigation. Before making any disclosures in reliance on the third party’s assurances of reasonable efforts to obtain a “qualified protective order,” HIPAA requires practitioners to obtain a written statement and documentation from the third party.<sup>[4]</sup>

### **Disclosure of Records and State Law**

If a social worker’s state law is more protective of client privacy than the HIPAA Privacy Rule, then the stricter state standard should be followed. For instance, if a state requires consent for disclosure of client records (absent a court order or imminent harm to the client) then records should not be disclosed based on a subpoena alone, even if the HIPAA procedures are followed.

Information about whether to follow state law or the HIPAA Privacy Rule in a given situation is available online in a number of instances.

### **Conclusion**

It is always important for social workers to keep in mind the standards of the *NASW Code of Ethics* when making decisions about releasing confidential client information. The HIPAA Privacy Rule takes into account professional standards and many states also incorporate or reference provisions of the *NASW Code*. When assessing the proper course of action to follow upon receipt of a subpoena for client records it is critical to make a distinction between subpoenas and court orders. Releasing records under the terms of a court order is permitted by both the HIPAA Privacy Rule and the *NASW Code of Ethics*. Releasing records under the terms of a subpoena requires special procedures by HIPAA and is inconsistent with the *NASW Code* unless it is accompanied by client consent, a court order or meets other mandatory disclosure requirements.

Social workers are encouraged to continue upholding the highest standards of confidentiality when responding to subpoenas, and to seek the advice of competent legal counsel when needed to do so.

### **Resources**

## NASW Code of Ethics

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[1] 45 CFR § 164.512 (e)(1)(I).

[2] 45 CFR § 164.512 (e)(1)(ii), (iv).

[3] Social workers need to receive from the party requesting the records documentation demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and: (1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution. 45 CFR §165.512 (e).

[4] If the social worker does not attempt to obtain a qualified protective order, but instead relies on the party requesting the records to do so, HIPAA requires practitioners to obtain documentation from the requesting party demonstrating that: (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal. 45 CFR §165.512 (e).

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