

SOCIAL WORKERS AND SUBPOENAS

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SOCIAL WORKER-PATIENT PRIVILEGE

Privilege is a right owned by clients to prevent their confidential information from being used in legal proceedings. Absent client consent (or some legal exception), social workers have a duty to claim privilege on behalf of their clients before releasing any information.

STATE LAW

Under Louisiana law, a social worker may not disclose information obtained from a patient in her professional capacity *except*:

- With written consent of the patient or an authorized representative
- A social worker may be required to testify at trial when s/he has information that a child was the victim or subject of a crime
- When disclosure is necessary to protect a person from a clear, imminent risk of serious mental or physical harm, or to prevent a serious threat to public safety
- When the patient waives the privilege by bringing any public charge against the social worker

A social worker may testify voluntarily regarding matters of adoption, child abuse, child neglect or other matters pertaining to children, the elderly or physically or mentally impaired adults, except as prohibited under state or federal law.

SOCIAL WORK ETHICS AND SUBPOENAS

The NASW Code of Ethics requires social workers to wait until ordered by the court before disclosing information in legal proceedings, absent client consent or an imminent threat of harm.

WHAT IS A SUBPOENA

A subpoena is a mandate to provide evidence (Subpoena Duces Tecum) or testimony (Subpoena Ad Testificandum). Most subpoenas are issued by attorneys. A subpoena is **not** a final ruling or order by the court on the legal requirement to provide information or admissibility of evidence.

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COMMON SCENARIOS FOR SUBPOENAS

- Child custody or visitation disputes
- Criminal victimization
- Criminal prosecution
- Medical malpractice
- Personal injury claims
- Disability benefits
- Employment discrimination or wrongful termination

APPLICABLE STANDARDS FOR DISCLOSURE UNDER SUBPOENA

- NASW Code of Ethics
- Federal HIPAA Privacy Regulations
- State social worker-patient privilege laws
- Client self-determination

SERVICE OF SUBPOENAS

- Social workers may receive a subpoena in connection with their role as custodian of patient records or as a non-party witness
- Special rules apply to subpoenas for patient records whereby the patient must have advance notice and an opportunity to object to the release of the information.

RESPONDING TO A SUBPOENA – CONSENT

- Communicate with your client – determine if the client has consented to release the information requested. Obtain a copy of the signed authorization to release information.
- Communicate with your client – clarify what information you possess and confirm that the client is prepared for disclosure of detailed personal information in court
- Information about third parties requires protection.

RESPONDING TO A SUBPOENA – NO CONSENT

- Absent client consent (or some other legal exception), social workers have a duty to claim privilege on behalf of their clients.
- Privilege is a right owned by the client to prevent their confidential information from being used in legal proceedings.

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PRACTICE POINTER

If the client withholds consent to release the subpoenaed records, seek written permission to speak with the client's lawyer. The client's attorney may be a useful resource in blocking the subpoena.

MOTION TO QUASH

- A "motion to quash" is the legal procedure for blocking a subpoena
- If the client doesn't have an attorney, or the attorney will not assist in blocking the subpoena, the social worker may need to retain her own counsel
- The judge will convene a hearing on the motion and it is likely that the social worker will have to be present
- At the end of the hearing, the judge will determine whether to order disclosure of the client's records.

COURT ORDERED DISCLOSURES

- The NASW Code of Ethics requires limiting to disclosure to the least amount of information necessary for the purpose, even in legal proceedings
- During the hearing, the social worker may request that the court order be narrowly drawn
- NASW Code of Ethics requires social workers to request that the court seal documents disclosed under a court order and/or ask for the return or destruction of any released documents at the end of the litigation.

COURT ORDERED DISCLOSURES AND HIPAA

Disclosing confidential client information under court order is consistent with the HIPAA Privacy Rule and the NASW Code of Ethics.

HIPAA SUBPOENA OPTIONS

A social worker may release information based on a subpoena (without a court order or client permission) if:

- Party seeking disclosure or social worker make reasonable efforts to notify the client and give them an opportunity to raise objections in court. Written statement of effort to notify patient must be provided.
- Party seeking disclosure or social worker must make reasonable efforts to obtain a "qualified protective order" from the court that would limit disclosure to use for this proceeding only, and require return or destruction of the client information at the end of the litigation.

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PRACTICE POINTER

- 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.
- Social workers can comply with HIPAA and the Code of Ethics by waiting for a court order.

PSYCHOTHERAPY NOTES

- Notes of a mental health provider documenting or analyzing the conversation during a counseling session
- Excludes:
 - Medication prescription or monitoring
 - Counseling session start and stop times
 - Modalities and frequencies of treatment
 - Results of clinical tests
 - Summary of diagnosis, functional status, treatment plan, symptoms, prognosis, progress
- **Must be maintained separately from the client record to be considered “psychotherapy notes”.**

DISCLOSURE OF PSYCHOTHERAPY NOTES

- Separate authorization required for release of psychotherapy notes.
- Authorizations for psychotherapy notes may not be combined with authorizations for use/disclosure of other protected health information

PRACTICE POINTER

- Social workers conducting psychotherapy should review record keeping and storage practices.
- HIPAA privacy protection for client notes requires that they be maintained in a file separate from the client record.

PERMITTED USE OF PSYCHOTHERAPY NOTES

Authorization for use of psychotherapy notes is not required for:

- Use by originator
- Use in training students and practitioners
- Defending legal action brought by a client
- Use/disclosure for oversight of originator
- Use/disclosure for enforcement of the Rule or as required by law

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- Disclosure to coroner or medical examiner
- Disclosure to avert a serious and imminent threat to health or safety

PSYCHOTHERAPY NOTES AND SUBPOENAS

- Psychotherapy notes may be subpoenaed.
- A general consent or authorization is not sufficient under HIPAA to disclose separately maintained psychotherapy notes.
- If separate consent for release of psychotherapy notes is not provided, they should be withheld with an indication that they are not included.