



Responding to a Subpoena

Introduction

One of the most common legal inquiries made by social workers to the NASW legal office concerns how to respond when a social worker receives a subpoena that requests confidential client information, either in the form of records (*subpoena duces tecum*) or through oral court testimony (*subpoena ad testificandum*). As the legal environment of social work practice becomes more complex, it can be challenging for the practitioner to identify the appropriate course of action in a given situation. Social workers' clients may engage in the legal process through various types of litigation such as child custody or visitation disputes, employment discrimination or wrongful termination actions, applications for disability benefits, medical malpractice claims, personal injury claims, defense of criminal prosecutions and participation in criminal prosecution as a victim/witness. This Legal Issue of the Month article will address the basics of handling a subpoena in the midst of clients' legal actions that are not complaints against the social worker, and will suggest options for responding, in addition to contacting local counsel, and identify potential resources. This article distills key points from a number of existing NASW Legal Defense Fund publications that offer a more thorough treatment of subpoenas and related issues. These publications are listed as resources at the end of the article and are recommended as aids for further analysis and decision-making.

What is a Subpoena?

A subpoena is a mandate to provide evidence or testimony – but it is not a final ruling or order by a court on the legal requirement to provide information or admissibility of the evidence. It is important for social workers to clearly understand this concept. Most subpoenas are issued by attorneys, and the legality of the subpoena has not been reviewed or analyzed by a judge prior to serving it on the social worker. Although some type of a response is required, a careful evaluation of the factors surrounding the subpoena is needed to determine the best course of action.

Service of the Subpoena

Social workers who receive a subpoena are generally in the role of a custodian of patient records or as a non-party witness. Laws about proper service of a subpoena upon a witness vary from state to state as to what constitutes acceptable service and who may serve a subpoena. In many states, service by U.S. Mail is now permitted (see Social Workers and Subpoenas, NASW Office of General Counsel Law Note). A small witness fee is usually required to cover minimal expenses and is set by statute. Court rules may require that the check be attached to the subpoena. In most cases, social workers are subpoenaed as "fact witnesses," in order to provide specific information about a client and a client's personal circumstances or emotional condition. Less often, social workers are retained or subpoenaed to testify as "expert witnesses" and compensation is negotiated in advance with the attorney who issued the subpoena. In some rare instances a court may award fees to a witness who testifies in a professional capacity as an expert and this is guided by court rules.

Applicable Standards

When responding to a subpoena for client information, it is likely that the social worker will need to take into consideration several applicable standards, such as:

- *The NASW Code of Ethics*
- Federal HIPAA Privacy Regulations
- State social worker – privilege laws
- The client's stated intent regarding the possible disclosure of information

- Social work agency policies.

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. (Standard 1.07).

Privilege is a right owned by clients to prevent their confidential information from being used in legal proceedings. This is established in many states by statute and in the federal courts through Rule 501 of the Federal Rules of Civil Procedure as applied by the U.S. Supreme Court in the *Jaffee v. Redmond* decision. Absent client consent (or some legal exception), social workers have a duty to claim privilege on behalf of their clients to protect client information from release. In some types of cases, particularly where the client is a plaintiff, the client may have waived (or “given up”) the right to privilege by filing a legal claim that is based on emotional or psychological conditions, necessitating the release of mental health records as evidence. In instances where a client has waived privilege, it is still best for the social work to obtain a written consent to the release of information in order to document the client’s waiver.

Options for Responding to a Subpoena

Client Consent Available

Client consent is a highly accepted standard for releasing patient information, as articulated in the *NASW Code of Ethics*, state social worker laws and regulations, and HIPAA. It is appropriate upon receiving a subpoena to communicate with the client about the receipt of the subpoena, to determine if the client consents to release the information requested and to request a signed authorization to release information. When releasing information based on a subpoena, it is important to clarify with the client what information is contained in the record and to confirm that the client is prepared for the disclosure of detailed personal information in court. This assures that the client’s signed consent is fully informed. In some circumstances a client may provide consent, even though the social work has concerns about the client’s decision. A client’s informed decision may be viewed as an exercise of self-determination, if a client is a legally competent adult, another principle articulated in the *NASW Code of Ethics*. Other options for protecting the clients’ privacy may include offering a summary in lieu of the entire record, although the client is not required to accept a summary if he or she has authorized the entire record to be disclosed.

No Client Consent

If the client does not provide consent to release subpoenaed records or is not available to do so, an option is for the social worker to contact the attorney that issued the subpoena (preferably in writing) with a simple acknowledgement that the document was received and a general statement to the effect that information about all clients is confidential and privileged and cannot be released without written client consent or a court order. This puts the issuing attorney on notice that there may be a legal issue regarding compliance with the subpoena. In some instances, this is sufficient to compel the attorney to seek the necessary written consent and submit it to the social worker.

If the client is available but unwilling to consent to release information, it may be beneficial to seek written permission from the client to speak to her/his lawyer. The client’s attorney may be a useful resource in blocking a subpoena from the opposing party by filing a “motion to quash” the subpoena in court. This permits a judge or magistrate the opportunity to review the legal issues involved in the subpoena, the applicable privileges and any exceptions. Social workers who have provided services to more than one family member (such as a couple) who then become legal adversaries, may find themselves in a direct conflict of interest if they receive a subpoena for any of the records or treatment information without having the consent of both parties for the release of any clinical records. In such cases, the social worker should seek independent legal counsel, rather than rely on the counsel for either of their former clients.

Court Orders

After all reasonable means to protect the client’s interests have been exhausted, a judicial order to produce the records or give testimony may still be issued by the court. Social workers are obligated by the *NASW Code of Ethics* to request that the court limit the order as narrowly as possible and maintain the records under seal, unavailable for public inspection and/or to order that the attorneys involved return the records at

the close of the case or provide a statement that the records have been destroyed. In the unusual circumstance that a social worker anticipates that a court order to disclose records may not meet legal requirements, it is necessary to be prepared in advance with legal counsel to appeal the order, as the timeframe for such appeals are typically very short. In most instances, compliance with a valid court order will not form the basis for a professional complaint against the social worker.

Provisions for Psychotherapy Notes

Some social workers have been confused when they received a signed patient consent that accompanied a subpoena when the consent form contained language that authorized the disclosure of the mental health record followed by a clause that says, "excluding psychotherapy notes." The term "psychotherapy notes" is specifically defined in the HIPAA medical privacy regulations as the "notes of a mental health provider documenting or analyzing the conversation during a counseling session" and that are *maintained separately* from the client record.

Social workers should understand that although psychotherapy notes may be subpoenaed, a general consent or authorization to release all mental health information in the record is not sufficient to disclose separately maintained psychotherapy notes. If a clinical social worker possesses separate therapy notes, they may only be released if a second, separate signed authorization is provided by the client. If a separate authorization from the client to release "psychotherapy notes" is not provided, the separate notes should be withheld when responding to the subpoena for records.

Available Resources

Members of NASW who have purchased professional liability insurance through NASW's Assurance Services, Inc. (via the insurance carrier, American Professional Agency), have policy coverage that includes at least \$5,000 for legal representation related to a response to a subpoena for client records. Thus, if a social worker needs independent legal counsel to assist with a problematic subpoena, they may contact the American Professional Agency for assistance with costs and identifying an attorney.

The NASW Legal Defense Fund provides financial assistance for legal costs for members who are engaged in legal action that involved upholding standards of the profession such as the NASW Code of Ethics confidentiality provisions. Members of NASW who expend personal funds to block a subpoena may be eligible for LDF assistance.

Social workers who need to locate an attorney may also contact their state or county bar association for a referral to an attorney with experience representing mental health providers.

NASW Office of General Counsel Law Notes

(order form available at www.socialworkers.org/ldf/lawnotes/default.asp)

- *Social Workers and Subpoenas*
- *Client Confidentiality and Privileged Communications*
- *The Social Worker and Protection of Privacy*
- *Social Workers and Clinical Notes*
- *Social Workers as Expert Witnesses*

NASW Legal Defense Fund "Legal Issue of the Month" Articles

(available at

www.socialworkers.org/ldf/legal_issue/default.asp)

- [Social Workers and Confidentiality for Couples Counseling](#) (November 2007)
- [Social Workers and Psychotherapy Notes](#) (June 2006)
- [Children's Rights to Confidentiality](#) (May 2006)
- [Social Workers and Psychotherapist-Patient Privilege: *Jaffee v. Redmond* Revisited](#) (March 2005)

- [Social Workers, HIPAA, and Subpoenas](#) (July 2003)

References

National Association of Social Workers (2008). *NASW code of ethics*. [Online]. Available at <http://www.socialworkers.org/pubs/code/default.asp>

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