

Release of Records and Client Privacy

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Introduction

Social workers who receive a request for client records from a third party or a subpoena will have a number of questions. These may reflect concerns regarding the client's privacy, the social worker's obligations and/or rights, potential liability, the social worker's role in responding to clients' legal matters and questions concerning the scope of the request, such as:

- Am I allowed or required to release the client's information?
- How much information must I disclose?
- What type of client information should be released?

This Legal Issue of the Month article will address questions related to making well-reasoned decisions when responding to requests for confidential client information. This review does not address situations where the social worker is the target of a lawsuit or complaint.

Basic Client Privacy Considerations

Client's privacy rights are embedded in professional healthcare provider standards, the U.S. and state constitutions and other state and federal laws addressing patient records (Morgan, Polowy, Carvino & Kraft, 2007). Clients' rights to exercise self-determination (NASW, Standard 1.02, 2008) are at the core of decisions regarding the release or disclosure of client information. However, these rights may be impacted by the requirements of certain legal proceedings or court orders or may be affected by the requirements of insurers, employers, or other requesting entities (Polowy, Morgan, Bailey & Gorenberg, 2008). It is the social worker's obligation to maintain the client's confidences, as guided by the client, to the extent permitted by law (NASW, Standard 1.07, 2008).

It is generally helpful whenever confidential information has been requested by a third party to communicate directly with the client or former client about the request, if possible, so that the client's consent to release information (or withholding of consent) is fully informed (NASW, Standard 1.07(b),(d) and (e), 2008). Social workers who receive a request for records from an attorney or law firm may also find it necessary to seek more information before responding, including:

- What is the type of legal action involved and who are the parties? Is the client suing or being sued? Is the client a criminal defendant? Is the client applying for public benefits?

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- Does the social worker have any concerns about the details of the client's information that are contained in the records? Is the information contained in the record likely to portray the client in a negative light or negatively affect the outcome of their legal case?

Informed Consent

In any situation where a client's record is to be released, it is the social worker's obligation to ensure that the client's consent is fully informed. In order to accomplish this, the client needs to be fully aware of the content of the record that is to be disclosed. It is not unusual for clients to have little awareness of the information that has been documented in the course of therapeutic sessions. After a discussion or review of the contents of the clinical record with the social worker, the client will be in a better position to determine whether to agree to a potential release of information or to revoke an authorization that they may have already signed (Reamer, p. 54 – 56, 2006).

Requests from Clients' Legal Counsel

Because the client's attorney has an obligation to vigorously represent the client's legal interests, it is often valuable to the client for their attorney to have access to complete information about the client's mental health. Client consent is a primary consideration whenever confidential information is released. There is no legal barrier to releasing the client's records if the client has signed a valid authorization to release them to the attorney. In some states, health care providers are obligated to release the records to the client's legal counsel upon receipt of a written authorization signed by the client. If a social worker has concerns about sending a copy of the client's records to the client's designated attorney, two options may be considered:

1. Offer to provide the records directly to the client. Client's have a legal right to access their own information and the client will then have the sole decision making role as to further disclosing the information to the attorney.
2. Request that the attorney put the request in the form of a subpoena. Most subpoenas are issued by attorneys, so this is a routine procedure within a law firm. A written release from the client will still be needed to document the client's consent. With a subpoena, the social worker may have additional justification to support the release of information in the event it is later challenged as improper.

Subpoenas

A subpoena is a special type of request for client information, usually issued by an attorney representing a party in a legal matter. Similar issues concerning the client's informed consent apply to subpoenas. This is addressed in an earlier Legal Issues of the Month article, *Responding to a Subpoena* (Morgan & Polowy, 2009). When a social worker has received a subpoena, it is important to note which party is requiring the disclosure of information: Is it the client (through their attorney) or the opposing party? Additional caution and review are required when responding to subpoenas from opposition counsel, as an improper or unauthorized release of information could have a lasting and damaging impact on the client's legal matter and be a potential basis for a malpractice complaint against the social worker.

How Much Information Should a Social Worker Disclose?

With few exceptions, social workers are generally advised to release confidential client information only with a written release signed by the client or their authorized representative (such as the parent of a minor, guardian, etc.). The release form typically describes the scope of the information requested,

which may vary considerably. Reviewing the description of the information contained in the signed release form is informative; however, if additional questions remain about what is requested the social worker may consult with the client as to their intentions and/or with the individual who sent the request. The range of responses may include:

- A treatment summary
- Invoices showing dates of treatment and amounts charged
- Completion of a pre-prepared checklist of specific questions concerning the client's mental health and/or history
- A complete copy of the entire client file
- A copy of the entire clinical file, as well as copies of appointment calendar dates, all health plan claims and correspondence and all reimbursements received
- A copy of the complete clinical file, financial records and separate psychotherapy notes.

Factors for determining how much and which information to release may include the following:

- **Is the requesting person or the client willing to accept a treatment summary in lieu of the entire client chart?** Sometimes an attorney wants the clinician to make specific statements to support a legal strategy, but that may create the appearance of bias. An objective and complete summary will present an accurate overview of the client's treatment.
- **Is the confidentiality of other individuals compromised by releasing the client's record?** For any therapy sessions where multiple clients were present, each individual's privacy rights also need to be protected. Each individual may need to consent to release of information before joint sessions records are released, although parents can generally consent on behalf of their minor children. Notes of joint therapy sessions often present complexities and may raise potential conflicts of interest, requiring legal and ethical consultation by the social workers.
- **Is it feasible to redact information in the client's record that identifies other individuals?** One approach is to make a copy of the client chart, then blank out the other individual's information (e.g. with a heavy marker or "Wite-Out") and then make a copy of the redacted version of the chart. Whenever a portion of a record is withheld it is appropriate to indicate in a cover letter the nature of the information redacted and the basis, such as, "This copy contains the records of Client X; however, it excludes references to other individuals based on ethical requirements," or, "This copy contains confidential information about the services provided to Client X as an individual. Information from sessions where other individuals may have been present is not included due to lack of written consent." It is never appropriate to re-write a redacted or revised record and present it as a complete copy of the original.
- **Were the social worker's personal notes maintained in a separate file, so they are protected by HIPAA as "psychotherapy notes"?** Detailed session notes that are maintained separately from the primary client chart may meet the definition as "psychotherapy notes" under HIPAA and would not be subject to release unless the client has signed a separate consent form specific to those notes. This topic is further discussed in *Social Workers and Psychotherapy Notes* (Morgan & Polowy, 2006). Psychotherapy notes do not have ironclad protection from disclosure under all circumstances (and a court may order their release in some situations); however, they

do require a separate review and analysis before disclosure. NASW strongly recommends the use of separate psychotherapy notes to increase the privacy protections available to clients' information.

- **Does the client's record contain specific information that would be harmful to their case if it were released?** If the record contains clearly negative information about the client (e.g. evidence of malingering, deception, violence, etc.) it is particularly important to discuss with the client the possible implications of releasing the record and obtain a clear statement of the client's intention, including a written revocation of consent if they decide not to pursue the matter that prompted the request. Clients who revoke a prior consent may suffer negative consequences, so they should be encouraged to consult their legal counsel about the legal effect of withholding or revoking consent to the release of information.

Analysis and Conclusions

Social workers who receive a request for confidential client information and have also received a written consent from the client to release the information are in a good position to handle the request by communicating clearly with the client and/or the requestor to clarify uncertainties. Situations where client contact is not possible, where multiple clients (or former clients) may be involved, or other concerns are present may require consultation with legal counsel, respected peers and/or ethics professionals. If a client objects to a subpoena, a social worker may need additional assistance such as consultation with an attorney in order to file a motion to quash (or block) the subpoena. Resources available to NASW members include a risk management hotline (available through NASW Assurance Services, Inc. at 800-897-0033), ethics consultations with the Office of Ethics & Professional Review (available Tuesdays, 10 a.m. – 1 p.m. and Thursdays, 1 p.m. - 4 p.m., Eastern Time, at 800-638-8799, Ext. 282) and legal consultations available from the Office of General Counsel/Legal Defense Fund (800-638-8799, Ext. 290). In addition, NASW members who have the NASW ASI professional liability insurance may have coverage for legal consultation related to the receipt of a subpoena for client records. Confirmation of coverage can be obtained by calling the ASI 800 number above.

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