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Anuj K. Goel. Esq.
Vice President, Legal and Regulatory Affairs
Massachusetts Health and Hospital Association
500 District Avenue
Burlington, MA 01803

Re: Section 35 of Chapter 123

Dear Anuj:

You have asked me for my advice concerning the privacy law aspects raised by the participation of a hospital and its physicians in commitment proceedings commenced under Section 35 of Chapter 123. In particular, you have asked whether a physician who has learned of a patient's alcohol or substance abuse disorder as a result of an encounter in a hospital emergency room or an inpatient unit, and who has determined that the patient is likely to suffer serious harm as a result of such condition, may disclose protected health information concerning the patient's disorder to a court in connection with a commitment proceeding brought under Section 35.

The short answer to your question is that such disclosure is permitted by federal and state law.

Discussion

Section 35 of Chapter 123, as amended by the Section 4 of Chapter 8 the Acts of 2016, permits a physician (among others) to petition any district court or the juvenile court for an order of commitment of a person whom he has reason to believe has an alcohol or substance abuse disorder. If after a hearing, which shall include expert testimony and related medical records, the court determines that the individual suffers from an alcohol or substance abuse disorder and there is a likelihood of serious harm as a result of such disorder, the court may order the commitment of such individual.

A commitment hearing under Section 35 will necessarily involve the disclosure of protected health information about the individual, and that information will necessarily include topics that are generally considered highly sensitive due to the stigma associated with a diagnosis of alcoholism or substance abuse. Accordingly, your members and their associated physicians have asked for some assurance that they can provide such information to the court in accordance with applicable privacy laws.

Federal HIPAA Standards

In this regard, I have reviewed the HIPAA privacy regulation, case law involving the privacy obligations of physicians, and, since social workers often practice in hospital emergency departments, the regulations governing the practice of licensed clinical social work.

The HIPAA privacy regulation, 45 C.F.R. 164.512(j) states, in relevant part:

> (j) *Standard: Uses and disclosures to avert a serious threat to health or safety* (1) *Permitted disclosures.* A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure: (i)(A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat . . .
>
> (4) *Presumption of good faith belief.* A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(I) or (ii) of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

The disclosure of protected health information to a court in order to prevent "serious harm" is permitted by the privacy regulation.

The federal Office of Civil Rights ("OCR") has provided guidance on this point, as follows:

> Q: What constitutes a "serious and imminent" threat that would permit a health care provider to disclose PHI to prevent harm to the patient, another person, or the public without the patient's authorization or permission?
>
> A: HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health or safety posed by a patient. OCR would not second guess a health professional's good faith belief that a patient poses a serious and imminent threat to the health or safety of the patient or others and that the situation requires the disclosure of patient information to prevent or lessen the threat. Health care providers may disclose the necessary protected health information to anyone who is in a position to prevent or lessen the threatened harm, including family, friends, caregivers, and law enforcement, without a patient's permission.

HIPAA should not be a barrier to a hospital's or physician's participation in the Section 35 process so long as they act in good faith.

As we have discussed, information gathered in the emergency department or medical surgical unit of a general services hospital is not subject to the federal regulations governing the privacy of substance abuse treatment records, 42 C.F.R. Part 2. Accordingly, I have not considered the application of these regulations to Section 35 proceedings. If the information to be submitted

has been received by the hospital from a substance abuse disorders treatment facility or a unit of the hospital that specializes in substance abuse treatment, then the Part 2 rules must be observed.

Massachusetts Privacy Laws

All persons in Massachusetts have a right against the unreasonable, substantial or serious interference with their privacy. M.G.L. Ch. 214 § 1B. In my view, where a treating physician discloses information to prevent serious harm to the individual, a court would find that the disclosure was not unreasonable, and would find that such disclosure would not violate the privacy statute.

The leading case in Massachusetts on a physician's obligation to preserve the confidentiality of medical information is *Alberts v. Devine,* 395 Mass. 59 (1985). The Court in *Alberts* held:

> In Massachusetts, the Legislature has demonstrated its recognition of a policy favoring confidentiality of medical facts by enacting G.L. c. 111, §§ 70 and 70E, to limit the availability of hospital records. Furthermore, G.L. c. 233, § 20B, creates an evidentiary privilege as to confidential communications between a psychotherapist and a patient. The fact that no such statutory privilege obtains with respect to physicians generally and their patients . . . does not dissuade us from declaring that in this Commonwealth all physicians owe their patients a duty, for violation of which the law provides a remedy, not to disclose without the patient's consent medical information about the patient, *except to meet a serious danger to the patient or to others.* [Citations omitted].

Given this exception, the Massachusetts common law rule set forth in *Alberts* should not prevent a physician from providing testimony as part of a proceeding under Section 35.

As noted by the Court in *Alberts*, Massachusetts has established a privilege for communications between a psychotherapist and a patient. This privilege has an exception for commitment proceedings, as follows:

> (*a*) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities. M.G.L. c. 233 § 20B (a)

I note that an emergency room physician, for example, would not typically be a psychotherapist, but the existence of this exception underscores the ability of a physician to disclose confidential information to protect a patient from harm.

The regulations of the Board of Registration in Social Work are also instructive. These regulations expressly permit a licensed clinical social worker to disclose information as

necessary to prevent the client from harming himself. 258 CMR 22.04(2). The regulation states:

> (2) Disclosure Necessary to Prevent Harm to Client. (a) A social worker may disclose client communications, information or records without the prior written consent of the client, to the extent authorized by 258 CMR 22.04(2)(b) and (c), if: 1. The client's behavior creates a clear and present danger of harm to the client himself or herself; 2. The client has explicitly refused to voluntarily accept further appropriate treatment or services; 3. Disclosure of the communications, information or records is reasonably necessary to protect the safety of the client; and 4. The disclosure of client communications, information or records is limited to that authorized by 258 CMR 22.04(2)(b) and (c).
>
> (b) In any situation where disclosure of client communications, information or records without the written consent of the client is authorized by 258 CMR 22.04(2)(a), if the social worker has a reasonable basis to believe that the client can be committed involuntarily to a hospital or other health care facility for appropriate treatment or services pursuant to M.G.L. c. 135, § 12, that social worker shall take all appropriate actions which are within the lawful scope of practice for his or her licensure level, as set forth in 258 CMR 12.00: Scope of Practice, to initiate proceedings for involuntary hospitalization of that client. In so doing, the social worker may disclose any and all client communications, information or records reasonably necessary to carry out his or her obligations under 258 CMR 22.04(2)(b).
>
> (c) In any situation where disclosure of client communications, information or records without the written consent of the client is authorized by 258 CMR 22.04(2)(a), and whether or not the social worker has a reasonable basis to believe that the client can be committed involuntarily to a hospital or other health care facility for appropriate treatment or services pursuant to M.G.L. c. 135, § 12, the social worker may disclose client communications, information or records to members of the client's family or other individuals if, in the reasonable exercise of his or her professional judgment, the social worker believes that disclosure of the particular communications, information or records in question would assist in protecting the safety of the client.

It is clear that under state law, either a physician or a social worker may disclose otherwise privileged information pursuant to a proceeding under Section 35 to prevent a client from suffering serious harm.

Maintaining Confidentiality of Court Records

The Association has been discussing the administration of this Section 35 commitment process with the judiciary. In this regard, I note that M.G.L., Chapter 123, Section 36A states, in relevant part:

> All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court. Each court shall keep a private docket of

the cases of persons coming before it believed to be mentally ill, including proceedings under section thirty-five;

Based on the legislative language and the guidance provided to MHA by the Department of Mental Health ("DMH") General Counsel, it seems clear that the information provided to the DMH court forensic clinicians is used to by the court to determine the appropriateness of a Section 35 petition. Medical information that is provided to the forensic court clinicians should fall under the protection of Section 36A, which in turn should prevent that information from being exposed to the public, unless the presiding judge determines otherwise.

I trust this is helpful.

Sincerely yours,

David S. Szabo