



Physicians Must Be Cautious When Responding To A Subpoena or Request for Medical Records

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Doctors must educate themselves and particularly their staff on the legal obligations to protect the confidentiality of medical records and how to properly respond to subpoenas and requests for patients' health information. It is a huge mistake for physicians to automatically assume that a subpoena or request is properly executed. Improperly releasing a patient's medical records can result in a civil suit by the patient, an administrative fine by the federal government or disciplinary action by the state medical board.

Civil and criminal courts in the state of Alabama have the right to summon witnesses into court and require them to testify under oath. Subpoenas are issued to non-parties to a lawsuit; therefore, the healthcare provider is not a party to the pending litigation. Consequently, the method for securing the attendance of witnesses and records is by the issuance of a subpoena or a subpoena duces tecum, respectively. A subpoena is a written order compelling a person to appear and give testimony at a trial or other proceeding. The subpoena duces tecum is a subpoena compelling a person to appear, give testimony and bring all books, documents, papers or records described in the notice. A failure to respond could subject the health care provider to contempt of court. A patient's medical records are generally secured by a subpoena duces tecum, which is served on the person having actual custody or possession of the records, and typically request a patient's chart, x-rays and billing documents. In most cases, the party seeking the information is not requesting the physician or his staff to physically appear in court to produce the records.

A subpoena is generally issued by an attorney or the clerk of court, which means that you will often receive a subpoena without an accompanying court order or any documents signed by the judge. A properly issued subpoena for patient records is generally as valid as any other properly issued subpoena with one important exception. That exception relates to subpoenas requesting health care information that is afforded special protection under state or federal law such as records relating to the testing for or treatment of HIV, AIDS, STDs; and mental health, behavioral health or treatment records of substance abuse programs. A subpoena requesting such information without a court order or patient authorization is generally not proper. Typically, the subpoena must be accompanied by an authorization signed by the patient authorizing release of that specific protected information or an order signed by the judge authorizing release of that information. Stated another way, if the medical record contains information that relates to the testing or treatment of HIV, AIDS, STDs or psychiatric records, such as mental health or behavioral health, then the physician will need either (1) a court order signed by a judge specifically ordering the records related to these specially protected areas or (2) an authorization signed by the patient specifically authorizing the doctor to release that portion of the record.

The HIPAA Privacy Rules also require additional steps before a physician can release records containing protected health information ("PHI") pursuant to a subpoena. A physician may disclose PHI in the course of any judicial or administrative proceeding by either obtaining an order of a court or in response to a subpoena if the physician obtains satisfactory assurances from the party issuing the subpoena. For the purposes of obtaining "satisfactory assurances" from a party seeking PHI, the physician must receive documentation demonstrating that (1) the party requesting the information has made a good faith attempt to provide

written notice to the individual, (2) the notice to the individual includes sufficient information about the litigation to permit the individual to raise an objection to the court, and (3) the time for the individual to raise objections has lapsed and no objections were filed or all objections that were filed by the individual had been resolved by the Court.

Physicians or their offices may receive subpoenas from out of state courts in matters involving mass tort claims such as asbestos. A subpoena from another state's court does not have the authority to compel production in Alabama. Thus, a physician who receives a subpoena in Alabama by another state's court should not respond to the subpoena unless the subpoena is domesticated by (accompanied by an order from) a circuit court in Alabama.

Physician and physician practices may also receive requests for medical records prior to a lawsuit being filed. These requests may come from the patient or a law firm. HIPAA governs the release of these records and whether the request is authorized. Records should only be released to authorized individuals. If the patient is living, authorized individuals include the patient or his Personal Representative. Pursuant to HIPAA, "Personal Representative" is defined by state law and would include someone who has a Power of Attorney for the patient. If the patient is deceased, the Personal Representative of the patient's estate may obtain the records. In 2013, HIPAA expanded authorized individuals of deceased patients to include family or individuals involved in the patient's care, if the request is relevant to their involvement in the patient's care, unless releasing the records is inconsistent with prior expressed preference of the individual. Therefore, a deceased patient's family member may request the records even if she is not appointed as the personal representative of the patient's estate, and a physician may release the records if it determines the individual is authorized under this provision.

The problem for physicians and their staff is that they often do not know the requirements necessary to make a subpoena or request valid or lawfully enforceable. Therefore, it is prudent for the physician to educate his/her staff about subpoenas and requests for records and when not to respond or release the records. In certain circumstances, it may be wise for the physician to consider having a subpoena or request reviewed by legal counsel to determine the appropriate response. The relatively small expense can save a tremendous amount of trouble later on.

For more information, please contact:



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