**Know Your Obligations When Responding to**

**Third Party Requests for Medical Records**

Healthcare providers receive requests for medical records from third parties on a near daily basis. Although such requests are commonplace, medical practices are often uncertain as to how to respond. Too frequently records demanded by a subpoena or discovery request are released without a second thought as to whether disclosure is permissible under HIPAA or state privacy laws. This article will help providers and their staff better understand their legal obligations with respect to various types of subpoenas and third-party requests for medical records so that they can avoid any compliance failures when responding to these requests.

**Court Orders and Court-Issued Subpoenas.** If you receive a court order or a subpoena that is *signed by a judge, magistrate, or administrative tribunal*, you must comply with the court order or subpoena and disclose the information. Failing or refusing to comply could result in being held in contempt of court. When responding to the court order or court-issued subpoena, you may disclose only the PHI that is expressly requested, and no more.

 **Attorney-Issued Subpoenas or Discovery Requests.** A subpoena issued by someone other than a judge, magistrate, or administrative tribunal – e.g., a court clerk or an attorney – is not a court order. If you receive a subpoena or discovery request that is signed by someone *other than* a judge, magistrate, or administrative tribunal, you may not disclose information unless and until you do one of the following:

1. *Obtain satisfactory assurances from the party seeking the PHI that he or she has made reasonable efforts to notify the individual whose PHI is sought by the request.*

A covered entity receives “satisfactory assurances” from a party seeking PHI if it receives from the requesting party a written statement and accompanying documentation demonstrating that the requesting party has made a good faith attempt to provide written notice to the patient (or, if the patient’s location is unknown, to mail a notice to the individual’s last known address) that the patient’s PHI is being sought in connection with a legal proceeding. The notice must include sufficient information about the proceeding to permit the patient to raise an objection to the court or administrative tribunal. Additionally, the notice must contain representations that that the time period for the patient to object has expired and that either no objections were filed, or that all objections filed have been resolved and that the disclosures sought are consistent with such resolution.

1. *Obtain satisfactory assurances from the party seeking the PHI that he or she has made reasonable efforts to secure a qualified protective order from a court or administrative tribunal.*

A qualified protective order is an order of a court or of an administrative tribunal, or a stipulation by the parties to the litigation or administrative proceeding, that (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (2) requires the return or destruction of the PHI at the conclusion of the litigation or proceeding.

A covered entity receives “satisfactory assurances” that the requesting party has made reasonable efforts to secure a qualified protective order if it receives a written statement and accompanying documentation demonstrating that: (1) the requesting party has sought a qualified protective order from the court or administrative tribunal with jurisdiction over the litigation or proceeding, or (2) the parties to the litigation have agreed to a qualified protective order and have presented it to the court or administrative tribunal.

1. *Make reasonable efforts to (a) notify the patient of the subpoena and give him or her a chance to object or (b) seek a qualified protective order sufficient to meet the requirements of the Privacy Rule.*

If you have not received satisfactory assurances from the requesting party that the party has given notice or made reasonable efforts to obtain a qualified protective order, you may give the notice or obtain the protective order yourself. Reasonable efforts to notify the individual may include telephoning the patient or sending him or her a letter and explaining that you’ve received a subpoena requesting disclosure of PHI and advising that you are required to respond unless the patient has the subpoena quashed or set aside before the time for responding has expired and notifies you that the subpoena has been quashed.

1. *Obtain a signed HIPAA authorization from the patient for the release of the subpoenaed medical records.*

You must ensure that the authorization accompanying the subpoena is a valid HIPAA authorization. As a reminder, an authorization is not valid, and does not permit the release of PHI, unless it includes the following:

* a description of the health information to be disclosed;
* the identity of the person or entity who will disclose the information;
* the identity of the person or entity who will receive the information
* the purpose(s) of the disclosure
* a statement informing the patient of (1) his or her right to revoke the authorization in writing, (2) how to revoke the authorization, and (3) any exceptions to the right to revoke
* a statement that the covered entity cannot require the patient to sign the authorization in order to receive treatment or payment or to enroll in or be eligible for benefits
* a statement that information disclosed pursuant to the authorization may be re-disclosed by the recipient and no longer protected by the HIPAA Privacy Rule
* a statement that the authorization will expire: (1) on a specific date, (2) after a specific amount of time (e.g., 5 years), or (3) upon the occurrence of some event related to the patient; and
* the signature of the patient and the date (if the patient’s personal representative signs the authorization, the authorization also must include a description of that person’s authority to act for the patient).

If you cannot satisfy one of the foregoing, you may not disclose protected health information pursuant to the subpoena or discovery request. This does not mean that you should not ignore the subpoena, however, as doing so may subject you to possible contempt sanctions. Instead, you should consult with an attorney who can help you assert an objection(s) to the subpoena or file a motion to quash. You can then wait for the court to order disclosure before releasing the records.

**Federal Grand Jury Subpoenas.** Federal grand jury subpoenas are issued in connection with federal criminal investigations. A federal grand jury subpoena may command a witness to appear and give testimony and/or to produce documents or other tangible items to the grand jury. If you receive a *federal* grand jury subpoena requesting PHI, you must comply with the subpoena and disclose the information sought. Failure to comply with a grand jury subpoena can result in being held in civil contempt or convicted of criminal contempt, or both. Note that state laws of privilege do not apply in federal proceedings. Rather, questions of privilege are governed by federal law, which does not recognize a physician-patient (or hospital-patient) privilege. Consequently, any physician-patient or hospital-patient privilege that may exist under state law will not shield you from having to comply with a federal grand jury subpoena.

**State Grand Jury Subpoenas.** State grand jury subpoenas are issued in connection with investigations into violations of *state* law. Whether a covered entity may disclose medical records to a state grand jury depends upon the breadth and applicability of the state’s medical privacy and privilege laws. Although HIPAA specifically authorizes a covered entity to release a patient’s medical records in response to a grand jury subpoena, HIPAA also requires covered entities to comply with “more stringent” state laws that relate to the privacy of individually identifiable health information. Because state privacy laws apply in state proceedings, including state grand jury investigations, they must be analyzed to determine whether they would allow disclosure of the PHI. If, for example, a state’s privacy law is more stringent than HIPAA – for example, it precludes the disclosure of information protected by the physician-patient privilege and does not contain any exception for disclosure of such information in response to a grand jury subpoena – then that state law will be applied to prevent disclosure. Accordingly, if you receive a state grand jury subpoena requesting medical records, you should not assume that you must comply, but neither should you ignore the subpoena. Instead, you should seek the advice of qualified counsel in your state to determine whether your state has laws relating to the privacy of individually identifiable health information and if so, whether those laws provide a basis for objecting to the subpoena.

**Administrative Subpoenas.** Administrative subpoenas are issued by federal agencies, without judicial oversight, and may compel the production of documents or testimony. A “HIPAA subpoena” is an administrative subpoena issued pursuant to 18 U.S.C. § 3486, which is a provision of the federal criminal code. These subpoenas are authorized whenever the Department of Justice is investigating *criminal* federal health care offenses, generally fraud offenses related to health care benefits, and may compel the production of documents but not deposition testimony or interrogatory responses. Because administrative subpoenas are issued by federal agencies rather than courts, they must be accompanied by a written statement that: (1) the information demanded is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and (3) de-identified information could not reasonably be used.

In the case of noncompliance with an administrative subpoena, a federal district court may compel compliance by issuing an order requiring you to appear before the Attorney General to produce records. Failure to obey the court’s order may subject you to contempt penalties. The statue also gives any person who receives and in good faith complies with the subpoena (that is, produces the documents sought), may not be held liable for such production or nondisclosure. Finally, protected health information that is obtained under this statute for health oversight purposes may not be used against the individual in an unrelated investigation by law enforcement unless a judicial officer finds good cause.

**Civil Investigative Demands.** Civil investigative demands (CIDs) are issued by the Department of Justice in connection with *civil* False Claims Act investigations. Unlike administrative subpoenas, CIDs can demand interrogatory responses and deposition testimony in addition to documents. However, like administrative subpoenas, CIDs are issued without judicial involvement and must therefore contain the same statements related to relevance and materiality, scope, and inadequacy of de-identification. Therefore, if you receive a CID, you must comply with the request if the issuing entity confirms that (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited to the extent reasonably necessary for the purpose of the request; and (3) de-identified information could not reasonably be used. When responding, provide only the information expressly demanded by the CID. Qualified counsel

In conclusion, the appropriate response after receiving a subpoena or discovery request for medical records is not to automatically and immediately disclose the records. Rather, you must make sure that compliance with the subpoena or request is consistent with your duty to protect the privacy of your patients’ protected health information. If you are unsure of your legal obligations, you should engage an attorney who can review the subpoena and advise you how best to proceed. Of course you should immediately contact qualified counsel if you receive a subpoena from a government agency (such as in the case of a grand jury subpoena, an administrative subpoena, or a CID), if you are subpoenaed as a party to a lawsuit, or if you are subpoenaed to give oral testimony.