

PHYSICIAN RESPONSE TO SUBPOENAS

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Frequently, physicians receive requests from attorneys for the production of medical records. In responding to these requests, the physician must be very careful to do so in full compliance with HIPAA and state privacy rules. The complexity of the situation may require contacting legal counsel in particular situations.

The following is a brief outline of standard responses that is helpful in most circumstances:

A subpoena/request from an attorney with an authorization signed by the patient. If an authorization is received, the physician may release any and all information requested in the written authorization.

Subpoena/attorney letter without patient's authorization. A subpoena is the equivalent of a Court Order and cannot be ignored (even though you may want to). If it is not self evident from the face of the subpoena or your personal knowledge from the treatment (such as a patient with orthopaedic injuries as a result of a traffic accident and the subpoena relates to the traffic accident) the law permits a release of information by a treating physician in connection with a personal injury claim for which the treating physician provided the services. Even though a release is permitted, it is a safer course to communicate with the requesting attorney, indicate the records will be made available upon the receipt of an authorization from the patient or alternatively a specific Court Order (something more than a subpoena) to release the records. If it is not clear, the physician should not release the records.

Remember that under HIPAA, a request for medical records needs to be specific and the physician should release only the "minimum necessary" records to meet the response. For example, a family practitioner treating a patient for personal injury should release only that portion of the records related to that particular treatment and not records relating to other unrelated health conditions. You can request a check be tendered in advance of the copying for the fees permitted under the Ohio Revised Code for copy charges.

Original versus copies. Occasionally, an attorney may request the original file of the office. We routinely decline to make original records available but rather photocopy the records and make the photocopies available. If there is any question as to authenticity or legibility of the copies, we will make the originals available for inspection in the physician's office with supervision while the attorney or the agent compares the two records. We strongly recommend that the original records never leave the physician's office except pursuant to an express Court Order in the rarest of circumstances.

Psychotherapy notes special conditions. Psychotherapy notes can be withheld by a treating physician even with an appropriate authorization from the patient if the physician believes the contents of such notations may be harmful to the patient. The same care must be exercised in responding to a subpoena or request for medical records.

Custodian Situations. Occasionally subpoenas may be issued to mental healthcare providers or pediatricians seeking medical records of minors. The same rule of disclosure applies to responding to subpoenas as applied to discussions regarding their care. If the physician would have disclosed information to the parent pursuant to the custody arrangements or the like, information can be released to that requesting parent. In those situations, unfortunately, the burden is on the healthcare provider not to disclose until such time as the healthcare provider has been fully satisfied as to the rights of the person requesting the records.

Protective Orders. We strongly recommend to our healthcare clients that if responses cannot be worked out quickly between the physician and the requesting attorney, that the physician immediately contact his/her attorney to advise the requesting attorney of the legal issues involved and explaining the process necessary to achieve the requested records. If those efforts are unsuccessful, the physician is duty bound to file a motion with the court requesting a protective order be issued to protect the confidentiality of the patient.

We have extensive experience in preparing and pursuing these matters on behalf of our healthcare clients and are happy to work with you if the need arises. If you have any questions about these issues, please contact Scott Sandrock at (330) 253-4367 or email address: spsandrock@bmdllc.com.