

# Is Your Practice HIPAA Compliant When Responding To Subpoenas for PHI?

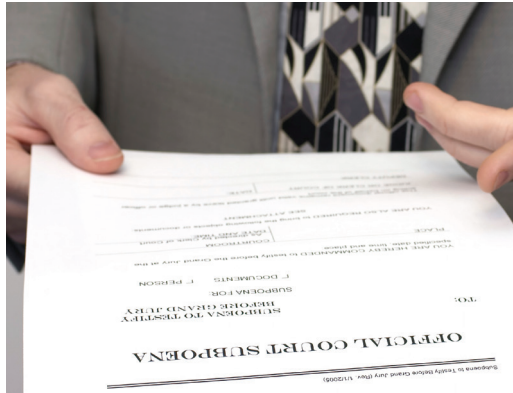
by Sheba E. Vine, Esq.

Subpoenas are a common and critical tool used by attorneys to obtain medical records from third parties for use in a variety of federal civil lawsuits; from personal injury to employment law to medical malpractice claims. Consequently, a physician practice and other practices offering healthcare services may be faced with responding to a subpoena for medical records of a current or former patient. Failing to respond to a valid subpoena puts the practice at risk for contempt sanctions. On the other hand, automatic compliance with a subpoena may constitute an unlawful disclosure of protected health information (PHI) under HIPAA, placing your practice at risk for hefty fines and litigation. Therefore, it is imperative to understand the relevant laws to ensure your practice is responding appropriately to such legal requests.

## Where Does The Subpoena Power Come From?

The subpoena power comes from Rule 45 of the Federal Rules of Civil Procedure. Rule 45 allows a subpoena to command a physician practice to give oral testimony for deposition or trial purposes (known as a subpoena ad testificandum), command the production or inspection of documents and information (known as a subpoena duces tecum), or both. In the alternative, a subpoena may command the production or inspection of documents by a specified date in lieu of providing oral testimony. This article only addresses third party subpoenas for the production of documents. You should immediately contact an attorney if you are subpoenaed to provide oral testimony or you receive a subpoena as a party to a lawsuit.

A valid subpoena must specify the documents sought, the name of the issuing court, the title of the lawsuit and the civil action number, and the time and place for production or inspection of documents. Rule 45 allows a court clerk or an attorney to sign the subpoena. Before the subpoena can be served on a practice, Rule 45 requires that the issuing attorney provide advance notice of the subpoena to all other parties to the lawsuit. The purpose of this rule is to allow time for the



parties to work out any objections regarding the validity or scope of the subpoena. Once a subpoena is served on a practice, Rule 45 allows the practice to object to the subpoena if the documents requested are confidential or privileged, among other grounds.

## Wait...What About The HIPAA Regulations?

It is likely that you already know that the disclosure of PHI without a written authorization from the patient is generally prohibited under HIPAA, with a few limited exceptions. One of those exceptions applies to the disclosure of PHI pursuant to a valid subpoena. Specifically, HIPAA permits disclosure in response to a subpoena if one of the following conditions is satisfied:

1. The practice must receive a written statement and accompanying documentation from the attorney issuing the subpoena demonstrating that:
  - a. A good faith attempt was made to provide written notice of the subpoena to the patient or his or her attorney;
  - b. The written notice included sufficient information to allow the patient to raise an objection to the subpoena;
  - c. The time for objecting to the subpoena has passed; and
  - d. The patient did not object to the subpoena or that any objections by the patient were adequately resolved by the court.
2. The practice must receive a *written statement and accompanying*

*documentation* from the attorney issuing the subpoena demonstrating that:

- a. All parties to the lawsuit have agreed to a qualified protective order and have presented it to the court or that the attorney issuing the subpoena has filed for a protective order. A qualified protective order limits the use of the requested PHI to the lawsuit and requires the PHI to be returned or destroyed when the lawsuit ends.
3. The practice makes reasonable efforts to provide notice of the subpoena to the patient and the patient does not make any objections to the release of his or her PHI.
4. The practice obtains a signed HIPAA authorization from the patient for the release of the subpoenaed medical records.

These conditions can be found in Title 45 of the Code of Federal Regulations, Section 164.512(c)(1)(ii), (e)(1)(iii)-(vi). If the information contained in the subpoena does not meet one of the listed conditions then it is incumbent upon the practice to contact the issuing attorney for the necessary written documentation, as required by HIPAA. In the alternative, the practice may contact the patient directly to obtain authorization.

In the event that the issuing attorney cannot produce the necessary documentation or if the patient does not allow the practice to make the disclosure then the practice is simply not authorized to disclose the subpoenaed medical records. In this case, the practice should immediately contact an attorney, as it will need to object to the subpoena in writing, detailing the reasons for its objections, including the documentation needed to comply with HIPAA.

In addition to HIPAA, physician practices and other practices providing healthcare services must be aware of and comply with their respective federal and state laws that provide heightened confidentiality for certain types of medical records. For example, Title 42 of the Code of Federal Regulations § Part 2 limits the disclosure of drug and alcohol treatment records.

And certain state laws may limit the disclosure of records relating to HIV/AIDS records, mental health records and other sensitive records. Accordingly, a careful review of the medical records must be conducted to redact any such sensitive information prior to disclosure.

### **Confusing a Subpoena with a Court Order**

Despite its legal language, a subpoena signed by an attorney or a court clerk differs from a court order or subpoena that is signed by a judge or magistrate. Be careful not to confuse the two as the distinction is important because of the exceptions carved out by the HIPAA regulations. If a practice receives a subpoena signed by a judge or magistrate, a court order signed by a judge or magistrate, a court-ordered warrant, or grand jury subpoena, it **must** disclose the requested documents. Whereas a subpoena signed by an attorney or a court clerk requires additional assurances under HIPAA. In either case, the practice must pay careful attention not to disclose more than what is expressly authorized by the document to maintain compliance with HIPAA.

### **So What Does This Mean For Your Practice?**

Physician practices and other practices

providing healthcare services have to take specific measures to protect a patient's right to privacy when responding to subpoenas for medical records. Upon receiving a subpoena, immediately calendar the date on which the documents must be produced or inspected. If the amount of time to respond is not adequate then request an extension of time from the issuing attorney, making sure to document the request and approval in writing for your records. Evaluate the subpoena against the HIPAA required documentation and make any necessary requests for additional information to the issuing attorney in a timely fashion. The subpoena, accompanying documentation, and any written correspondences between the practice and the issuing attorney should be retained in case of an investigation or audit.

If the practice has not already done so, it is important to develop policies and procedures that address disclosures pursuant to a subpoena and conduct proper training. In addition, employees that are specifically responsible for handling and responding to subpoenas must be trained on such policies and procedures. Taking these steps is vital to minimizing the risk of unlawful disclosures and fostering a culture of compliance in your practice. By doing so, you are protecting the

reputation of your practice and mitigating the risk of a government investigation initiated by a patient complaint that alleges his or her PHI was improperly disclosed.

*This article does not address subpoenas issued by state courts. And to the extent state law is more restrictive than HIPAA, state law controls, which may require additional steps to be taken before disclosing such information.*



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