Reducing Risk

A Publication on Healthcare Risk Management from Princeton Insurance

Subpoenas for Medical Records in New Jersey State Court Civil Actions

General Information

Physicians and other healthcare providers often receive subpoenas directing them to produce medical records and to testify regarding patient care they provided. It is important that practitioners know the purpose of a subpoena and their duties and rights in responding to one, as well as their legal obligations to protect the confidentiality of patients' medical records.

A healthcare practitioner may release medical records anytime upon receipt of a HIPAA-compliant, signed authorization from a patient or the patient's authorized representative. Records specified in the patient authorization must be produced, including reports and letters from other providers.

New Jersey State Board of Medical Examiners regulations require that a copy of the requested records be supplied within 30 days of receipt of the request and permit a charge of $1.00 per page, with a maximum charge of $100 and a minimum charge of $10.00.

A subpoena is a command for a person to appear at a specified time and place to give testimony. Despite its appearance and legal language, it is not reviewed or issued by a judge, unless otherwise indicated. Subpoenas may be served in civil (non-criminal), criminal, and administrative agency proceedings.

Subpoenas are either for discovery (deposition) or trial purposes. A subpoena *ad testificandum* requires that the subpoenaed person give testimony. A subpoena *duces tecum* requires that the individual testify and produce specified documents or other evidence at that time.

Medical records may be *subpoenaed* for production only at the time testimony is to be given for a deposition or for a trial. A subpoena for drug or alcohol abuse-related treatment records generally is invalid on its own unless accompanied by a court order directing the production of the records.

Unlike a subpoena, a court *order* is issued by a judge who reviews the request and may conduct a hearing on the matter. A court order directing a healthcare practitioner to produce medical records must be followed.

The majority of subpoenas served on healthcare practitioners in New Jersey are issued in state and federal court civil actions. A subpoena issued by the Federal District Court for the District of New Jersey in a civil action has legal force in the entire state. A subpoena served by a federal court in a criminal action has legal force anywhere in the US. Federal courts outside the state of New Jersey have jurisdiction in civil actions over individuals who reside, work or do business within 100 miles of the court proceeding. Subpoenas from state courts and administrative agencies outside New Jersey are without effect in New Jersey.

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Lessons from the Crescenzo v. Crane Case

Despite the official appearance and legal language of a subpoena, a prudent healthcare practitioner will not assume that a subpoena is valid and must be honored without question. Releasing a patient's medical records in response to a subpoena that is not accompanied by a signed authorization from the patient may place a practitioner in legal and professional jeopardy.

The risks of doing so are dramatically presented in the case of *Crescenzo v. Crane*, 350 *N.J. Super*. 531 (App. Div. 2002), *cert. den*. 174 *N.J.* 364 (2002) in which the appellate court ruled that physicians can be legally liable for disclosing medical records in response to an improper subpoena without the patient's consent or knowledge.

In *Crescenzo*, the attorney for a husband in a divorce action served the wife's family practice physician with a subpoena *duces tecum* for the wife's medical records which contained notes regarding treatment for depression. The subpoena did not satisfy the legal requirements for a valid subpoena, and it was not accompanied by a signed authorization from the wife permitting the release of her medical records.

No notice of a scheduled deposition was included with the subpoena. A cover letter sent by the attorney with the subpoena stated that if the doctor forwarded the medical records, there would be no need for his testimony. The attorney did not obtain an authorization from the wife for the release of her medical records, nor did he send a copy of the subpoena cover letter to either his opposing counsel or the wife.

The physician forwarded the records to the husband's attorney who later introduced them at a custody hearing as evidence on the issue of the wife's fitness as a parent.

The wife sued her physician for claims arising from the disclosure of her medical records including medical malpractice; breach of confidentiality; and violation of the physician-patient privilege. She later moved to amend her complaint to add a claim against her husband's attorney. The trial court dismissed the plaintiff's action. The Appellate Division court reversed the decision of the trial court and permitted the plaintiff to pursue her claims against both her physician and the attorney.

The appellate court specifically rejected the physician's argument that failure to comply with the subpoena would have placed him in legal jeopardy and he could have been held in contempt of court.

The appellate court noted several options available to a physician to resolve a conflict between preserving the confidentiality of a patient's medical records and complying with a subpoena for the records:

- Obtain a signed authorization from the patient
- Contact the patient or the attorney who served the subpoena
- Seek legal advice from personal counsel before responding to the subpoena

Pursuing any of the above options would have revealed the legal deficiencies with the subpoena and averted the legal claims against the physician for the disclosure of his patient's medical records.

A Valid Subpoena

A valid subpoena in a civil action in the Superior Court of New Jersey (state court) must meet the following requirements:

- Be served in person by an individual at least 18-years-old
- Name on its face the court and the title of the action, including names of the parties and the court docket number and type of action (civil, criminal or administrative)
- Be signed by either the clerk of the court or by an attorney for one of the parties, or by a party in the name of the court clerk, and list the address and telephone number of the attorney or party who issued the subpoena
- Direct properly when and where the witness is to appear:
  - Trial—anywhere within New Jersey
  - Deposition—the county in which the witness lives, works or does business in person and "only at a reasonably convenient time"
  - State Agency—anywhere within New Jersey consistent with the agency's powers
- Be accompanied by payment of a witness fee and mileage

A Valid Subpoena Duces Tecum

In addition to the general requirements for a valid subpoena, the New Jersey Rules of Court specify the requirements for a valid discovery subpoena in a civil action in the New Jersey state courts. *Rule* 4:14-7(c) which pertains to a subpoena *duces tecum* requires:

- The subpoena must compel attendance at a deposition simultaneously with the production of the subpoenaed evidence at a designated time and place
- The subpoena must state that the subpoenaed evidence shall not be produced or released until the date specified for the deposition
- The subpoena must state that if the subpoenaed witness is notified that a motion to quash the subpoena has been filed, the subpoenaed evidence shall not be produced or released until ordered by the court, or all parties to the action consent to the release
- The subpoena must be served simultaneously at least 10 days prior to the date of the scheduled deposition on the witness and all parties to the action who shall have the right to inspect and copy the subpoenaed evidence
- If evidence is produced by a subpoenaed witness who does not attend the deposition, the party who receives the evidence must notify all the other parties of the nature and contents of the evidence, and make it available for inspection and copying.

A witness subpoenaed to give deposition testimony may also be entitled to additional fees including reimbursement for out-of-pocket expenses and lost earnings.

A Note of Caution: Some attorneys disregard the court rules and attempt to improperly use a subpoena *duces tecum* to obtain medical records without paying for them. A "discovery" or "records subpoena" improperly directs a physician to produce a copy of a patient's records and send them to the attorney's office in lieu of attendance at a deposition. *This practice is not sanctioned by the courts*. If served with such a subpoena, contact the attorney who served the subpoena. Request that the attorney either provide a signed authorization from the patient and payment of the fee allowed by the Board of Medical Examiners regulations, or that the records be produced at a deposition or trial.

The HIPAA Privacy Rule and Subpoenas for Medical Records

Disclosure of protected health information (PHI) consistent with the scope of a signed authorization by the patient or the patient's authorized representative is permitted by the HIPAA Privacy Rule. The Privacy Rule also permits a healthcare provider to disclose PHI in response to a court order. Information disclosed in response to an authorization or a court order must be limited to that expressly specified in the authorization or the order.

If served with a subpoena for PHI that is not accompanied by a court order or signed authorization, the Privacy Rule requires that a practitioner receive "satisfactory assurances" from the party seeking the PHI that reasonable efforts have been made to either ensure that the patient whose records are being requested has been given notice of the request, or to secure a qualified protective order as defined by HIPAA. These assurances are required to be in writing with accompanying documentation.

HIPAA defines "satisfactory assurances" as follows:

- The party requesting the PHI has made a good faith attempt to provide written notice to the individual whose PHI is being sought
- The notice includes sufficient information about the litigation or proceeding to which the requested PHI pertains to permit the person to raise an objection with the court or administrative tribunal
- The time for the person to raise objections in court or with the administrative tribunal has passed and no objections were filed, or all objections filed by the individual have been resolved and the disclosures being sought comport with the resolution.

A "qualified protective order" is defined by HIPAA as an order of a court or administrative tribunal, or a stipulation by the parties in the litigation, that prohibits the parties from using or disclosing the PHI for any purpose other than the legal proceeding for which the information was requested, and mandates the return or destruction of the PHI at the end of the litigation or proceeding.

The Privacy Rule also permits a practitioner to disclose PHI in response to a subpoena without receiving satisfactory assurances if he or she makes "reasonable efforts" to provide notice to the individual. However, as demonstrated by the ruling in the *Crescenzo* case discussed above, the New Jersey state courts are moving in the direction of requiring that a signed patient authorization to release medical records accompany a valid subpoena for the records.

It is strongly recommended that healthcare practitioners adopt a policy requiring a HIPAA compliant, signed authorization from the patient as a condition for releasing medical records requested by a subpoena. In the absence of an authorization, contact the patient or the attorney who issued the subpoena to discuss the situation and request a signed authorization.

A Few Words about Trial Subpoenas

Trial subpoenas are not covered by the requirements that apply to discovery subpoenas. The Court Rules permit *ex parte* service of a trial subpoena, meaning that notice to the other parties to the lawsuit is not required. A fact witness subpoenaed to testify at trial is paid an appearance fee and mileage, but is not entitled to reimbursement for lost wages. A healthcare practitioner who is served with a trial subpoena should contact the attorney who issued the subpoena to attempt to work out a mutually agreed upon appearance time.

If subpoenaed only to produce medical records at trial, you may be able to substitute in your place the records custodian for your office. Sometimes the parties to a lawsuit may consent to receipt of a certified copy of the original records without a court appearance by either the practitioner or the records custodian. Contact the attorney who served the subpoena to discuss these options. If the attorney who served the subpoena makes unreasonable demands on you, contact the court or personal counsel.

Conclusion

Healthcare practitioners served with a subpoena commanding them to produce medical records of their patients should *not* assume that the subpoena is valid and must be obeyed without any further thought or action on their part.

Where a proper signed authorization from a patient whose records are subpoenaed accompanies the subpoena, the healthcare provider may produce the requested medical records, consistent with the scope of the authorization, without fear of violating the law, medical ethics, or professional licensing standards.

Absent a proper signed authorization from the patient, the prudent practitioner will contact the patient or the attorney who served the subpoena to discuss the situation and request an authorization. If no authorization is provided, or if the subpoena does not appear valid, the subpoenaed practitioner should contact his or her personal attorney or Princeton Insurance Company for advice and guidance before producing a patient's confidential medical records.

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