MICHIGAN family physician

WINTER 2016–2017

Served with a Subpoena? What To Do Next

No Dollar Left Behind: Maximize Medicare Payments for Your Practice

State Innovation Model: Health System Reinvention in Michigan

MAFP
MICHIGAN ACADEMY OF FAMILY PHYSICIANS

By Michael F. Matheson, Attorney
Loomis, Ewert, Parsley, Davis & Gotting, PC
mfmatheson@loomislaw.com
(MAFP's Legal Counsel)

Served with a Subpoena? What to Do Next

In our litigious society, medical professionals frequently receive subpoenas to testify or to produce patient records. Even third-party providers who possess protected health information can receive subpoenas. Understanding what a subpoena is, what it is not, and the purposes it serves can help you avoid those moments of cold sweats when the subpoena first arrives in your office. This article addresses issues related to the production of protected health information and other medical records. The next article in this series will discuss issues surrounding a subpoena for testimony.

The Basics of a Subpoena

A subpoena is a document most often generated in the context of a civil court case, but it can also be issued in connection with criminal, administrative and other types of legal proceedings. A "subpoena" is defined as a writ, issued by a court and often signed by an attorney, to compel testimony from a witness or to produce records under a penalty for failure to comply. The subpoena form will include dates for when and where the subpoenaed party is expected to produce the requested records, the case involved, what records are being requested, and who is requesting the records.

Despite what some issuers of subpoenas may contend, flexibility often exists with the timing of the production of records, so long as it is approached in a reasoned fashion. Often times, it is as simple as a telephone call to the issuer of the subpoena with a request for additional time to produce the records. This phone call is only to address the timing for the production of records and should not be used as an opportunity to address the reasons for the subpoena or your knowledge of the case, since doing so could jeopardize important rights and responsibilities you may have.

The worst response to a subpoena is no response. Ignoring the subpoena will put you at risk for being monetarily sanctioned by the Court for not responding. If you respond and do so improperly, you are not only subject to monetary penalties but you are also subject to a civil action by the patient. Action against your license is also possible. Understanding how to correctly respond to a subpoena is critical to avoiding these consequences.

HIPAA versus Michigan Privilege

It is important to realize that disclosures permitted under the Health Insurance Portability and Accountability Act (HIPAA) may not be permitted under the Michigan Privilege. While analyzing each of the differences between the permitted disclosures under HIPAA and the Michigan Privilege is beyond the scope of this article, the general rule of thumb is to follow the law that is more restrictive in terms of the disclosures allowed to be made. This will often be the Michigan Privilege.

For example, HIPAA permits disclosures, even in the absence of a patient authorization, if the disclosure is "required by law." The disclosures "required by law" under HIPAA include court orders and warrants, as well as subpoenas or summonses issued by a court or governmental agency. Unlike HIPAA, the Michigan Privilege does not expressly permit disclosure of protected health information without patient authorization, even under a similar "required by law" provision. As such, if a subpoena was issued in a case for patient records, under HIPAA it would not be a violation to make the disclosure; however, under the Michigan Privilege, producing the same records would be a violation in the absence of patient authorization.

You may recall reading in "Unlocking the Physician Employment Agreement

and Complexities of Non-Compte Provisions," published in the Winter 2016 issue of *Michigan Family Physician*, about a lawsuit over an alleged violation of a non-compete agreement. In that case, the former employer requested a list of patients the former employee had treated since leaving its employment. The physician objected to the former employer's efforts to obtain this information by asserting that HIPAA and Michigan law protected this information from disclosure in the absence of a written authorization from each patient. The former employer sought to compel production of the information. On appeal, the Michigan Court of Appeals determined the Michigan Privilege was more restrictive than HIPAA and the patient lists were not required to be produced, even though under HIPAA a valid argument existed that the patient lists should have been disclosed without a patient authorization because it was "required by law."

While this is but one example, the practical implication is that in most, but not all, instances the Michigan Privilege will be more restrictive and will override compliance under HIPAA. It also serves to show that patient authorizations are often key to determining when information is permitted to be disclosed.

Patient Authorizations

The disclosure protections afforded to patients under the Michigan Privilege arise by operation of law. This means that the patient does not have to take any affirmative steps to invoke the privilege. Indeed, the privilege is considered to belong to the patient and can only be waived through affirmative action, such as a written authorization.

A patient authorization to release protected health information should, among other matters, (a) provide a description of the information permitted to be disclosed, (b) identify who is entitled to receive the information and (c) provide an expiration date or event that must occur to terminate the authorization. The authorization should alert the patient with a written statement that the information is no longer protected health information once it's disclosed, and that the patient has the right to revoke the authorization. A signed copy of the authorization should be provided to the patient and a copy maintained in the patient's health records.

A patient authorization will address many of the concerns in disclosing health records, whether under HIPAA or the Michigan Privilege. When possible, a patient authorization should be obtained.

Document Disclosures

In most instances, you should not prepare any independent documents or analysis in response to a request for medical records. The analysis would not be considered confidential and may not be based on all known facts and circumstances surrounding the matter. Also, the analysis could later be used against you if a party subsequently wants to take testimony on the medical information and analysis that was produced. Any independent analysis should be reserved for expert witnesses. You should also not discuss the case with the issuer of the subpoena because of the confidentiality of the information and the possibility that the information could later be used against you or be a violation of the law if authorization to disclose the information has not already been received.

Additionally, if there are defects in the scope of the subpoena or uncertainty in other aspects that cannot be resolved with the issuer, the court rules permit you to file objections to the subpoena. Filing objections with the court or governing agency will likely require an attorney. You should not provide information in response to the subpoena before any objections have been resolved, because once the disclosure is made, you cannot un-ring the bell.

Generally, the issuer of the subpoena will accept patient records being mailed or delivered by courier in place of having to physically appear with the records. If documents are produced, make sure an accounting of the disclosures is being kept so that it can be provided to the patient, if requested.

A subpoena will usually require the production of patient records even if they are maintained solely in electronic form. The subpoena could also require "metadata" contained within the electronic record, to show when the record was created and the computer used to create the record. Also, only respond to the specific requests made in the subpoena and do not make assumptions about other records you believe would be helpful but which were not requested.

Recovery of Costs

The time and expense associated with responding to a subpoena can be significant. In most cases where the number of records is small and the time and expenses for reproducing the records are nominal, it may not even be worth the effort to press for recovery of your costs if not volunteered by the issuer of the subpoena. In other cases, however, it may be necessary to recover the copying and personnel costs consumed to comply with the subpoena. Common practice will generally allow for the recovery of a reasonable fee for the time and expense associated in connection with complying with the subpoena. The actual cost to produce the requested records has been awarded by the courts but should be based on quantifiable data or a formula to calculate the actual cost.

On the surface, compliance with a subpoena for health information seems quite simple. The privacy rules and privileges, however, create a web of potential pitfalls that could result in significant monetary penalties and other detrimental action. Any analysis into how to respond and address the disclosure of personal health information includes both HIPAA and the Michigan Privilege. Obtaining authorization for the disclosure from the patient is always the preferred route.

This article was prepared for informational purposes only. It is not legal advice. This article is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act upon this information without first seeking professional counsel.