

How to Respond to Subpoena and Discovery Requests

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By Ron Hedges, JD

Health information management (HIM) professionals are frequently pulled into litigation due to their role as custodians of health records and protected health information. This role also can categorize them as parties to civil litigation, which obligates them to produce any relevant information to a party's claim or defense. Under the Federal Rules of Civil Procedure (FRCP), generally speaking, the obligation to produce arises when one party serves a request for production on another party or when a party serves a subpoena on a non-party.

Requests for production are made in writing and are served to the attorney representing the party asked to produce information. Subpoenas are also in writing and are usually served to a representative of an organization authorized to accept service, who may or may not be an attorney.

HIM professionals must understand the scope of their responsibilities to produce requested information. This column is intended to provide a basic understanding of production obligations imposed on litigation parties and non-parties under the FRCP and their state equivalents. These obligations can be technical in nature and can require objections or applications to the court that are made in relatively short timeframes.

What Might Be Requested

The FRCP allow parties to seek discovery of anything "relevant to any party's claim or defense." This means that a party can be asked to produce any information that bears on what a party wants. This scope of discovery extends to non-parties. Non-parties can be subpoenaed for production of anything relevant to claims or defenses asserted in a civil action.

For example, a civil action is launched to recover damages sustained by the plaintiff in a car accident. The records of medical care and treatment given to the injured plaintiff by a doctor or hospital not directly tied to the lawsuit are relevant to the claim for damages, and may also be relevant to a defense premised on the minor nature of the injuries.

Limitations on Information Requests

The scope of discovery allowed by the FRCP is broad. However, the rules do establish limitations on what information must be produced. Possible limitations on requests for production served by one party to another can include:

- Information need only be produced if it is within the "possession, custody, or control" of a party. In other words, a party need not search for information that it does not have. A word of warning: Organizations may allow third-party providers to maintain their records. It is very likely that a court would require the organizations to produce information maintained by such a vendor.
- With electronic health information, there may be circumstances under which a party need not produce data from "sources that the party identifies as not reasonably accessible because of undue burden or cost." Bear in mind, however, that the party must prove the existence of undue burden or cost and that, even if it provides that proof, a court could still require production.
- The FRCP also incorporate a principle of proportionality into discovery. A court "must limit the extent of discovery if it determines that:
 - The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive
 - The party seeking discovery has had ample opportunity to obtain the information by discovery in the action
 - The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the

importance of the discovery in resolving the issues”

The burden is on organizations to establish that production would be disproportionate under one or more of the above. Moreover, the FRCP require that written—and timely—objections be made to requests for production.

It is essential that whenever asked to look at a request, HIM professionals do at least two things:

- Understand exactly what is being sought, so that the attorney can be aware
- Explain to legal counsel exactly what burden and cost might be imposed in complying with the request

Limitations of Non-Party Requests

The limitations described above apply to information sought from a third party through subpoena. However, there is an additional protection afforded to non-parties by the FRCP:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.

Production Can Include Electronic Information

Traditional documents as well as electronically stored information (ESI) could be requested. Assuming that a party seeks the production of ESI, either from a party or a non-party through a subpoena, the FRCP establish the manner in which ESI should be produced.

When a request for production is made by one party against another, the federal rules provide that “Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request
- If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms
- A party need not produce the same electronically stored information in more than one form.”

Similar language in the FRCP applies to requests for production of ESI served on non-parties through subpoenas:

- **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing ESI, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form.
- **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

In other words, both with regard to requests for production and subpoenas, the requesting party can specify a form or forms in which ESI should be produced and the producing non-party is given a default form if nothing is specified.

Takeaway Lessons for HIM

What does all this mean for HIM professionals and their organizations in practical terms? There are some lessons that can be drawn:

- Don’t respond to a request to produce or a subpoena without conferring with an attorney.
- When asked to review a request to produce or a subpoena, HIM professionals should understand exactly what is being requested and communicate their understanding to legal counsel.
- There are limitations on production. If appropriate, organizations should discuss those limitations with their attorney and, if their attorney wants to secure the benefit of any limitation, they should provide accurate estimates of costs and

burdens that organizations expect to incur in production.

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