Subpoena by Any Other Name Might Not be Legal

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by Jo Ellen Whitney, JD

Generally when an opposing party is seeking medical records from a care provider, the first request is accompanied by a subpoena, which can be difficult for an HIM department to assess in terms of what-if any-records can be produced.

A subpoena accompanied by a HIPAA-compliant consent is substantially different than a subpoena that stands alone. Subpoenas and their enforcement are governed by a wide variety of rules, including the Federal Rules of Civil Procedure and individual state law. Further, there are multiple subpoena forms, ranging from an administrative law subpoena to a grand jury subpoena or prosecuting attorney's subpoena, which require confidentiality.

Given that all states are slightly different, there are some general rules that HIM professionals can use in assessing any subpoena request.

Who is issuing the subpoena? Is the subpoena coming from a place that would typically be entitled to receive records? Is it from the court? Is it issued from an individual or a law firm? Note that all subpoenas are not necessarily court orders. In many states, subpoenas can be obtained by anyone going online, printing out a form, and filling out the proper documentation. Courts are developing some rules to limit this practice, but these are not yet uniform.

Subpoenas are not generally reviewed by a court for issuance unless there is a second court order attached to the subpoena signed by a judge or person of similar authority. It is not unheard of for individuals who want to find out information about ex-wives or new boyfriends to simply download a subpoena and submit a false request for information.

Is the subpoena accompanied by any additional authority? When a subpoena is accompanied by an actual court or agency order or a consent form, the ability of the person sending the subpoena to compel the production of information is broader than a subpoena alone. Courts may specifically waive a wide variety of privileges including those relating to HIV/AIDS or mental health records and may also direct that documents be provided to third parties, such as guardian ad litems or conservators who have an interest in the case.

Are they asking for one of the big four? HIM professionals should always consider whether records being requested are one of the "big four" that are typically tendered special protection under state and federal law. These include HIV/AIDS information, substance abuse treatment information, mental health information, and genetic testing information. Individual state law may protect the release of this information in its entirety or may require that the court order and subpoena include very specific reasoning in order to allow the release of records.

Substance abuse testing, particularly drug treatment testing information, is governed by federal law and may be released only in extremely limited circumstances, with a specific prohibition regarding release of the records to law enforcement.

What records are they requesting? Broad and unspecific record requests have more perils related to them (particularly if accompanied only by a subpoena) than do specific and targeted requests that may relate to an individual case.

Very broad requests are frequently made by defense attorneys or those involved in workers compensation claims in an attempt to uncover items that might affect a plaintiff's claim for damages. In malpractice cases they are used quite broadly in an attempt to discover pattern and practice of malfeasance. A subpoena for a broad claim may require a request for limitation. Requests are sometimes more effective if accompanied by a statement of the costs of copying the record in its entirety.

Given the advent of electronic health records and the new Federal Rules of Civil Procedure relating to electronically stored information, more subpoenas specify how records are to be produced. If a specific method is requested, such as paper copies, and an organization is unable to meet that request, the organization can contact the issuer to indicate that the request is not reasonable given the records. An organization's obligations as a third party (someone who is not a party to the litigation itself)

are different than those of parties to the litigation. Organizations are typically not required by law to create new forms, formats, or methods of producing records that are not already readily available.

Is it a specialty subpoena? Almost universally, grand jury subpoenas are afforded complete confidentiality, and organizations are prohibited from telling the patient that the information has even been requested. Further, organizations are prohibited from discussing the fact that they have produced information to a grand jury.

Other types of subpoenas may also have similar confidentiality protections. In some states, prosecuting attorneys can issue a subpoena from a district attorney's office that prohibits an organization from telling the patient that the information has been subpoenaed. Subpoenas of this type are frequently used in criminal assaults and drug-related cases and carry with them a penalty for disclosure, which ranges from a fine to jail time. If an organization is in doubt regarding the nature and type of a subpoena received, it can contact the court or the issuing party regarding its expectations.

Have they given your organization adequate time to respond? Attorneys are notorious for short deadlines, overly broad requests, and little or no specificity as to what they want or why they want it. A subpoena allowing only limited time to comply may be in violation of the state or Federal Rules of Civil Procedure regarding production of records. All jurisdictions require that parties be given a reasonable time period to fulfill requests, and a day or an afternoon is simply not reasonable. For the most part, rules provide between seven and 14 days to comply with any subpoena.

How is it issued? Only a limited number of jurisdictions require that a subpoena actually be formally served upon a party. In general, a subpoena can be mailed or electronically sent.

With court changes more lawyers are serving subpoenas by e-mail. An e-mail request alone has no more validity than a letter. A subpoena attached to an e-mail in most instances will have the same validity as a paper copy as more courts move to all-electronic record systems. This varies from court to court, so organizations should check with their local counsels on this issue.

Subpoenas from other jurisdictions. A subpoena that comes from an entity such as a mental health agency located in another state can pose issues regarding its validity. This can be further complicated for a multistate organization that has "minimum contacts" with the state where the subpoena has been issued.

In general, state subpoenas are not valid outside of their locality, so a state court subpoena issued in Nebraska is not effective in Tennessee. A federal subpoena may be effective from jurisdiction to jurisdiction depending upon the nature and type of subpoena issued and the information requested. In general, any time an organization receives a subpoena from a foreign jurisdiction, it needs to look carefully at whether or not the entity has jurisdiction.

Subpoenas from agencies may face some of the same problems. A national agency such as the Centers for Medicare and Medicaid Services can obtain by administrative order, request, or subpoena a wide variety of documents; a local agency, such as the Dallas Mental Health Coalition, probably can't obtain information from alternate jurisdictions and states.

Attorneys and others sometimes think that subpoenas are magic wands-they open the door and let you obtain any information you want, regardless of how the subpoena is constructed. Subpoenas, quite simply, are not magic, and they don't allow anyone to access information without careful review and consideration of the validity of the subpoena itself.

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Article citation:
Whitney, Jo Ellen. "Subpoena by Any Other Name Might Not be Legal" *Journal of AHIMA* 78, no.5 (May 2007): 52-53.

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