

THE HEALTHCARE PROFESSIONALS LEGAL CHECK-UP

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HOW SHOULD A HEALTHCARE PROVIDER RESPOND WHEN SERVED WITH A SUBPOENA?

This two-part article will deal primarily with subpoenas for medical records and depositions, though it will also touch on trial subpoenas. We will examine when and whether the healthcare provider should contact their attorney or malpractice insurance company on receipt of such subpoenas. In this issue, Part One of this article will deal with subpoenas seeking medical records only. Part Two of this article will appear in the next issue of this publication.

Aside from the service of the summons and complaint when a lawsuit has been filed, physicians and other healthcare providers may be served with other legal papers, most commonly subpoenas. There are several types of subpoenas which are more commonly received. The most common subpoena is usually one demanding that medical records be produced for a patient who is involved in a lawsuit. Less often, a physician or other healthcare provider will be served with a subpoena demanding he or she personally appear

for deposition for testimony to be taken in a pending litigated case. Less often, the healthcare provider may be served with a subpoena in which they are ordered to appear and give testimony at trial.

With regard to subpoenas seeking medical records, these will usually come in the form of a Subpoena Duces Tecum. Often, this is addressed to the "Custodian of Records" for the physician or medical practice. This is frequently accompanied by a Notice of Deposition for the Custodian of Records

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Kristopher Rath is a partner at Hutchison & Steffen who leads the Firm's Healthcare Professionals Advocacy Group. He practices primarily in medical malpractice, healthcare professionals advocacy, administrative law, commercial and business litigation, insurance coverage, and insurance defense. Kristopher and other attorneys at the Firm work closely with healthcare professionals (including physicians, chiropractors, dentists, and nurses)

and healthcare organizations on a range of legal issues, from practice formation and compliance and employee relations, to practitioner licensing and board representation, to collections, creditor rights, and asset protection.

This newsletter highlights topics of interest for healthcare professionals. We invite you to contact the Firm to learn more.



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which requires the Custodian of Records to appear in a certain location, typically a law office, and provide the originals of the medical records requested. However, in the vast majority of the cases, the requesting attorney is simply seeking a copy of the medical records and an affidavit or declaration that they are authentic and genuine. Typically, the office manager or other Custodian of Records at the practice can work with the requesting attorneys and supply the medical records, with the authenticating declaration or affidavit, with little trouble and without the need for someone to appear before a court reporter. As is often the practice, the subpoena is typically accompanied with a HIPAA compliant release for the medical records. If a release does not accompany the subpoena, a telephone call to the requesting attorney can usually lead to one being provided.

In general, subpoenas requesting medical records are fairly straightforward and there is often no need to contact an attorney. However, if a subpoena for medical records arrives, or a letter requesting medical records arrives with a release, when there is no litigation pending, and the physician or healthcare provider is aware that the patient for whom the records have been requested has some issue with the practice, then some caution needs to be exercised. For example, if the patient had complaints about

the treatment by the doctor or the office staff, or suddenly stopped seeing the physician without any explanation, or has previously complained to a medical board or insurance company, then receipt of such a subpoena could be a signal that a lawsuit is coming. In such cases, it may be wise to consult with an attorney. Also, the provider's malpractice insurance company should be notified of a potential claim to secure coverage for any later lawsuit by the patient. The records will likely still need to be provided per the request, but, if they suggest that the patient is going to file a lawsuit, then the necessary steps can be taken to prepare for any lawsuit or claim which may be brought.

The second portion of this article, which will appear in our next newsletter, will cover the topics of deposition and trial subpoenas.

The foregoing discussion presents the general guidelines on receipt of subpoenas. You should consult an attorney or, in some cases, your medical malpractice insurance company, for any specific questions related to specific issues.

Article to be continued in next issue...■

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