Another Reason To Be Careful With Med. Records Subpoenas

Susan Huntington

Law360, New York (March 26, 2015, 10:29 AM ET) -- Medical records are frequently key pieces of evidence in civil litigation, especially personal injury, workers compensation, medical malpractice, estate and family law cases. Every time personal injuries or an individual's competence is at issue, medical records will be required. Whenever a subpoena for medical records arrives at a health care provider's office, it creates angst for the medical records custodian. Often, the subpoena sets forth a relatively short response deadline, which in itself creates pressure on the recipient. The receipt of a subpoena for medical records is often followed by a telephone call from the issuing attorney's office that frequently becomes an argument about whether the subpoena provides enough authority to release the records.

This fact pattern creates pressure on medical records custodians who understand their obligations and liabilities under state and federal regulations, particularly the Health Insurance Portability and Accountability Act and its subsequent regulations. The cost of making a mistake in responding to a medical records subpoena and not complying with HIPAA requirements just got higher in Connecticut.

A Connecticut Supreme Court case[1] is getting a lot of attention for allowing state negligence claims based on noncompliance with HIPAA standards. For health information management professionals, however, the case has an additional message and underscores the need to resist releasing clinical information merely on the basis of a subpoena or at the insistence of an attorney. The court ruled that state court pretrial practices must be HIPAA compliant and that HIPAA requirements extend to responses to subpoenas.[2] The court cited HIPAA regulations, 45 C.F.R. § 164.512(e)(1)(ii), to reaffirm that a health care provider cannot transfer protected health information to an outside entity without receiving satisfactory assurances that the person whose medical records are the subject of the subpoena has been given notice of the request. [45 C.F.R. §165.512(e)(1)(ii)(A)] Usually the subpoena includes some notice language, but, satisfactory assurances requires all of the following:

1. Written notice to the affected individual;

2. Sufficient information for the individual to raise an objection; and

3. Time for the individual to raise an objection or confirm that there are no objections or that all objections have been resolved.

Thus, before the requested medical record can be released, the provider needs to make sure there are no objections from the affected individual.

Alternatively, a provider may release PHI if it receives satisfactory assurances from the party seeking the information that it has made reasonable efforts to secure a qualified protective order. [45 C.F.R. §165.512(e)(1)(ii)(B)] Satisfactory assurances requires:

1. The parties have agreed to a qualified protective order; or

2. The party seeking the PHI has requested a qualified protective order. [45 C.F.R. § 164.512(e)(1)(vi)]

Thus, it is not enough for the subpoena to include a statement that a protective order will be filed or to include draft language for the protective order. The party seeking the PHI needs to have filed the qualified protective order with the court.

Under this Connecticut Supreme Court case, any health care provider in Connecticut who fails to comply with the HIPAA requirements outlined above is now risking a lawsuit by the patient and possible damages for negligence and emotional distress under state law as well as a complaint and possible investigation for noncompliance with HIPAA requirements. It is important to note that this analysis could be applied by any state court that finds the HIPAA requirements create the applicable standard of care for releasing records under state law.

A reasonable and simple best practice in responding to subpoenas for PHI is (1) call and/or write the person whose PHI is the subject of the subpoena, (2) inform him/her of the subpoena for PHI, and (3) request authorization to release the PHI. The person may agree to the release. If the person agrees, the medical records department may follow its normal process for release of PHI. If the person disagrees, the medical records department should not release the information and should inform the requesting attorney of the individual's objection to the release of his/her PHI. These communications, both call and response, should be documented.

If the patient cannot be contacted, the medical records custodian may contact the patient's attorney they are identified in the subpoena or accompanying papers. The attorney should be asked whether they are the legal representative of the patient and whether their client (the patient) will consent (or not) to the requested release of PHI. As with any conversation with the patient, the attorney's responses should be documented. If the attorney states (1) that they have power of attorney to consent on behalf of their client, or (2) that their client would not object, the medical records department may reasonably rely on such representations and follow its normal processes in releasing the PHI.

If, for some reason, the attorney for the patient is not identified in the subpoena or accompanying papers, the best practice is, as noted above, to call or write the patient, inform him/her of the subpoena, and request authorization to release the PHI. In the absence of such representations from either the patient's lawyer or the patient himself/herself, the PHI cannot be released. In such cases, the health care provider may need to consider filing a motion to quash the subpoena.

—By Susan Huntington, Day Pitney LLP

Susan Huntington is counsel in Day Pitney's Hartford, Connecticut, office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Byrne v. Avery Ctr., 314 Conn. 433 (2014).

[2] A subpoena issued by an attorney or "officer of the court" is not the same as a subpoena issued by a judicial officer (usually a judge or a magistrate) or a grand jury, which would be considered a court order and allowed under 45 C.F.R. §165.612(f)(1)(ii).