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# Connecticut Supreme Court Case Creates Another Reason to Be Cautious About Medical Records Subpoenas

Every time a subpoena for medical records arrives, it creates angst. The medical records custodian experiences pressure to release records from the moment he/she receives a call from the requesting attorney's office, often arguing about whether the subpoena provides enough authority to release the records.

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, the case 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 healthcare provider cannot transfer protected health information (PHI) 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. However, *satisfactory assurances* requires all of the following:

- Written notice to the affected individual;
- Sufficient information for the individual to raise an objection; and
- 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:

- The parties have agreed to a qualified protective order; or
- 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 the new CT Supreme Court case, any healthcare 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 violation of HIPAA requirements.

A reasonable and simple best practice in responding to subpoenas for PHI is (1) call 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 can agree to the release or not. If the person agrees, the medical records department can 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 there are questions about the application of the CT Supreme Court case, you should consult with a HIPAA attorney.

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[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).