Patient records subpoenaed? Be careful how you answer or lose in court

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If a lawyer hits you with a subpoena for a patient's protected health information (PHI), don't panic — or you may not only violate the patient's privacy rights under HIPAA, but also be subject to civil action under state law.

In December 2018, after years of litigation, *Byrne v. Avery Center for Obstetrics and Gynecology*, was settled with a jury award of $853,000 to the plaintiff for breach of contract, negligence and other charges relating to the Westport, Conn., Center's decision to release, after receiving a subpoena from her ex-boyfriend's lawyers, patient Emily Byrne's medical records relating to a pregnancy, in contradiction of her express wishes.

The suit had twice been brought before the Connecticut Supreme Court on the issue of federal preemption — that is, whether the HIPAA violation preempted Byrne's claims of negligence and negligent infliction of emotional distress. At first the court agreed that because there is no private right of action under HIPAA, the plaintiff could not claim damages because, as federal law, HIPAA preempted the state law charge.

But on a second reading, the court decided that was only true if the state law were in conflict with HIPAA — that is, if compliance with the state law excluded or posed an obstacle to HIPPA compliance. Because it did not, the court allowed the suit to go ahead.

Avery Center had a lot of what lawyers call bad facts — including the fact that patient had explicitly told the Center not to release her records. But could there have been circumstances under which the Center had to release the files? Experts say yes, but they're narrow and specific.

Three types of approach

First, the litigant's attorneys might give you an order from the court overseeing the litigation, in which case you are legally compelled to turn over the documents, says Lora L. Zimmer, an attorney with McCarty Law in Appleton, Wis. But the chances that the lawyers would do that first are slim — you're more likely to get a subpoena.

For the subpoena to be compelling, one of two factors must be in play. For one, the subpoena must show that the patient or patient's lawyers agreed to the release of the records — either unilaterally or in an agreement between the parties called a HIPAA qualified protective order, an example of which appears in the Resources section.

This order should provide "satisfactory assurance" to the health care provider that there are no relevant objections to the release and indicate which specific PHI is cleared for release, says Zimmer. "The attorney would meet this requirement if she provides a written statement and accompanying documentation to the health care provider showing that she has reached an agreement with the other parties in the litigation as to a qualified protective order and has presented that agreement to the court or that she has requested this order directly from the court."

Note: These orders are usually very specific: "They won't say 'give me all the medical records for John Doe from birth until present,'" says Marie Breyer, a partner with The Hive Law in Atlanta.

Another compelling subpoena type would contain a written statement and accompanying documentation that show the lawyer has "made a good-faith attempt to provide written notice to the individual" whose records are requested, says Zimmer. HIPAA regulations require of such a subpoena that:

- the notice include sufficient information about the litigation or proceeding in which the PHI is requested to permit the individual to raise an objection to the court; and
- the time for the individual to raise objections to the court has elapsed, and no objections have been filed or any objections that were filed have been resolved.

The regulations do not say what exactly "sufficient" information and response time would be. You (or, preferably, your lawyer) would apply common sense. Seven to 10 days should be enough time — however, this time frame should be confirmed with the court that has jurisdiction over the subpoena, says Sanja Ord, an attorney with Greensfelder, Hemker & Gale, P.C., in St. Louis.

3 things to do before responding to subpoenas

Before complying even with subpoenas that look right, experts recommend do the following:

- **Contact administration and counsel** ASAP, says Daniel J. Sullivan, M.D., JD, president and CEO of The Sullivan Group in Denver.
- **Check where the subpoena came from.** "Is it a subpoena signed by the plaintiff's attorney?" says Breyer. "Or is it signed by the judge herself? A signed subpoena from the judge carries a lot more weight than the one signed by a civil litigator."
- **Call the patient.** See whether she's aware that someone is asking for her records and what her wishes are, says Breyer. "An authorization from the patient can simplify the process, which prevents the need to determine what types of records are involved and how federal and state privacy protections apply," says Breyer. You might also call the attorney who signed the subpoena and ask her to confirm what they've claimed.

But whatever you do, don't just sit on the subpoena, says Ord — "Depending on state law, that could be contempt of court." Take action but be cautious about which actions you take.

Resources:

- Connecticut Supreme Court finding: *https://jud.ct.gov/external/supapp/Cases/AROcr/CR327/327CR110.pdf*
- Example of a HIPAA qualified protective order: *www.govinfo.gov/content/pkg/USCOURTS-mied-2_08-cv-14130/pdf/USCOURTS-mied-2_08-cv-14130-0.pdf*

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