THE JOURNAL OF THE MINNESOTA MEDICAL ASSOCIATION

MINNESOTA MEDICINE

MAY/JUN 2016 • $9.99

Scholar in chief

*Can **Brooks Jackson** help the University of Minnesota Medical School become one of the nation's top institutions? A look at the dean's progress so far.*

PAGE 18

The **OPIOID EPIDEMIC** and the **MINNESOTA BMP**
PAGE 39

What to do if you're **SERVED WITH A SUBPOENA**
PAGE 36

FIVE TIPS for being an **EFFECTIVE TEACHER**
PAGE 42

Student, resident and fellow **RESEARCH**
PAGE 47

Minnesota Medical Association

You've been served with a subpoena *Now what?*

Answers to physicians' frequently asked questions

BY CHRISTINE HINRICHS, JD, AND JESSICA KLANDER, JD

Most medical professionals can expect at least once in their career to be served with a subpoena demanding that they provide protected health information. This can be intimidating for those who are unfamiliar with the law and the way the courts work. Most physicians are keenly aware of the importance of keeping a patient's health information private, but they are unsure about what information they should or should not provide in response to a subpoena. This article answers common questions about subpoenas. It also addresses how you can protect yourself if you are served.

What is a subpoena and what is its purpose?

A subpoena is essentially a demand that you provide information in the form of documents and/or oral testimony. Being served with one does not mean you have been or will be sued by your patient (only service of a Summons and Complaint can commence a lawsuit). That being said, a subpoena should be taken seriously and handled quickly and correctly.

You may be served with a subpoena *duces tecum*, a subpoena for an appearance, or both. A subpoena *duces tecum* requires you to produce documents (likely your patient's medical records) by a certain date. If you have received a subpoena *duces tecum,* forward it to your organization's health information office. Your patient's medical records belong to the organization, and only the organization is authorized to release them.

A subpoena for an appearance requires your attendance at a legal proceeding to provide oral testimony. The proceeding could be an informal conference, a deposition, a court hearing or a trial. The subpoena should include the date, time and location of the appearance. It also should include contact information for the attorney who is requesting the documents and/or your oral testimony.

What should I do if I am subpoenaed?

Your first call should be to your manager and/or your in-house or outside legal counsel. Although you do not necessarily need an attorney to represent you, it may be best to have one review the subpoena and assist you in responding. Your organization's representative or legal counsel can provide guidance regarding: 1) whether or how you should respond to the subpoena; 2) how to prevent improper and/or inadvertent disclosure of protected health information; and 3) how to avoid waiving your rights when responding to the subpoena.

It is not uncommon for a subpoena to be accompanied by a letter from the attorney requesting that you contact him or her directly to discuss it. Although you are not prohibited from calling the attorney or the patient, it may be unwise to do so, as the attorney requesting the information does not represent you, cannot give you legal advice, and does not have you or your organization's best interests in mind. And while you are not prohibited from contacting the patient to discuss the subpoena, there may be legal reasons why you shouldn't.

What if the patient's attorney calls me directly and asks for information?

If you receive an informal request for records or information about your patient's care without a subpoena, hang up and notify your manager or attorney immediately. Without the patient's authorization permitting release of the requested health information (a requirement under the federal Health Insurance Portability and Accountability Act [HIPAA] and Minnesota Health Records Act),[1,2] you should never answer questions or provide documents about a patient. And if you provide off-the-cuff responses to the attorney's questions, you may unwittingly become part of the lawsuit.

What are my rights and responsibilities when responding to a subpoena?

Both federal and state rules state that a party cannot place an "undue burden" on the person being subpoenaed.[3] However, what constitutes an "undue burden" is not clearly defined and varies depending on the state and/or federal rules that apply in your situation. That caveat aside, there are some general principles that apply. For instance, a subpoena should provide a "reasonable time" for you to comply.[4] This will certainly depend on the type of information being sought. A request for you to show up to testify or provide documents the next day is generally considered unreasonable. In addition, you generally should not be required to drive any further than 100 miles to provide testimony or documents.[5] Moreover, you may be entitled to

compensation for the time you spend preparing for and responding to a subpoena.[6] Under most circumstances, the attorney serving the subpoena should be willing to work with you on location, timing and reimbursement in order to accommodate you and your schedule.

What happens to the information or testimony I provide in response to a subpoena?

It is important to remember that all conversations you have about a subpoena or the information requested by it, *other than communications with your legal counsel*, can be discovered and inquired about in a deposition, hearing or trial.[7] Such information has the potential to be harmful, unflattering or, at the very least, unnecessary. Plus, the more you talk about the subpoena, the more questions you will be asked during the proceeding. Although you are free to discuss the subpoena to coordinate your absence at work, you would be well-advised to limit any other discussions/questions/communications to those with your legal counsel as those communications will remain confidential.[8]

What is my obligation regarding medical records?

As a physician, you do not have the authority to release a patient's medical records, as they belong to your organization. If you are responsible for providing health records, remember that any request for documents, even with a subpoena, must be accompanied by a qualifying court order authorizing disclosure of the information being requested or the patient's written consent.[9] If you are being asked to provide documents and oral testimony, you should obtain separate authorizations for the release of the medical records.[10]

When authorization is obtained, the disclosure is subject to the "minimum necessary" standard.[11] That means you must only provide the documents expressly authorized by the court order or patient's consent. For instance, if the authorization consents to the disclosure of records within a certain time frame, only provide the documents specified and not the entire medical record. If the subpoena request is inconsistent with the authorization, seek clarification from the court or the patient's attorney, if possible. When in doubt, rely on the authorization, not the subpoena, when determining which documents to disclose. Also, remember that authorizations do expire, so be sure that the authorization you have received is still effective.

Many requests seek disclosure of the "entire medical file." The "medical file" includes all health information contained in the patient's written or electronic file, including billing statements, progress notes, imaging/labs and physician notes.[12] It does not include internal investigations or peer review notes, which may be prohibited from disclosure by federal and state peer review protections.[13]

In addition, an authorization for consent to release "the entire medical file" does not permit the release of information pertaining to a patient's chemical/substance abuse treatment records or psychotherapy notes. A separate release is required expressly consenting to the release of such records or notes.[14] Moreover, there are situations in which a court order may be insufficient to release chemical/substance abuse treatment records[15] or where a patient's authorization may not justify the release of psychotherapy notes.[16] For instance, if a physician determines that providing information would be detrimental to the patient's physical or mental health or is likely to cause the patient to inflict self-harm or to harm another, the physician must not disclose the information. Under those circumstances, it is best to seek the advice of an attorney.

What should I do if I am unable or unwilling to comply with the subpoena?

If you decide you are unable or unwilling to comply with a subpoena, you should seek the advice of an attorney regarding how best to proceed. You should never ignore the subpoena, even if it fails to comply with state or federal laws or fails to provide the proper authorization. Your failure to comply with the subpoena's terms without adequate cause may result in your being held in contempt of court.[17] There are, however, certain actions that can be taken to prevent problems. For instance, you could contact the attorney who issued the subpoena to determine whether the deficiencies can be rectified. If your concerns are not adequately addressed by the patient's attorney, you can seek relief from the court. You (or, preferably, your attorney) may initiate a proceeding, referred to as a "motion to quash," which asks the court to release you from all or some of your obligations to respond to the subpoena.[18]

What should I do to prepare for oral testimony?

You may or may not remember the patient or the treatment you provided that is the subject of the subpoena request. But even if you do, you should review the patient's chart to refresh your memory and prepare for your testimony. HIPAA allows for the use of protected patient health information for "health care operations," which includes conducting legal services.[19] Under these HIPAA provisions, you do not need the patient's consent to review the chart.

You should avoid talking to the patient or about the patient with your colleagues in order to help you remember. Testimony about a patient based on such a conversation is speculative. The general rule in these proceedings is to tell the truth, and the truth is only what you remember. If you do not remember details beyond what is in the patient's medical record, it is perfectly acceptable to say "I do not recall."

Can I bring a patient's medical record to the hearing?

Not unless you are specifically ordered to do so and your organization received a court order or written authorization from the patient permitting the release of those records. In most instances, the attorney asking you questions will have a copy of the relevant patient records. If you need to refresh your memory, ask to see the records during the proceeding. If you are not provided with the documents and you do not have an independent recollection,

simply say you don't know or cannot remember.

What should I do if I'm asked about the care given by another physician?

It is unnecessary for you to comment about another physician's treatment decisions, which may be outside your area of expertise, if you were not present at the time and if you do not have the full story. Unless you have first-hand knowledge of the situation (for example, if you were involved in the decision or you saw the patient at that time), such testimony would be considered speculative. Some attorneys may try to get around this by asking hypothetical questions. Often, hypotheticals are incomplete or missing information you might need in order to make a treatment decision. Think carefully before responding or decline to answer hypothetical questions all together.

What if I'm asked my opinion about standard of care or the cause of a patient's injuries?

In general, you are not obligated to answer opinion questions. You are being called to testify as a treating physician, not as an expert witness. Additionally, expert opinions are considered proprietary and without compensation, you are not obligated to divulge any opinions. If you are asked about the standard of care or causation in a particular case, tread carefully and think about whether you have the information necessary to provide a full and complete answer. If you don't, simply say so.

Being asked to appear at an "informal conference" is different. An informal conference allows attorneys to ask treating physicians about their treatment and care of patients who have brought a medical malpractice case against another physician.[20] You may be asked to give opinions on standard of care or causation, but there are limits as to what sort of opinions you are obligated to provide. If you are asked to appear at such a conference, you should obtain legal counsel to represent you and offer guidance on your rights and responsibilities.

The bottom line

If you have an understanding of the process, being served with a subpoena can be less painful. Although there are many variables to consider when responding to a subpoena, perhaps the most important thing to remember is that you need proper authorization to provide a patient's protected health information—no matter what. If you are ever unsure of what is being requested or how to respond, ask your organization's leadership and/or your legal counsel for assistance. **MM**

Christine Hinrichs practices health care and appellate law. Jessica Klander focuses on professional liability. Both are associates at Bassford Remele, PA, in Minneapolis.

REFERENCES

1. Minn. Stat. § 144.293, subd. 2.
2. 45 C.F.R. § 164.502(a), 45 C.F.R. § 164.508(a).
3. Minn. R. Civ. P. 45.03(a); Fed. R. Civ. P. 45(d).
4. Minn. R. Civ. P. 45.03(c); Fed. R. Civ. P. 45(c)(1), (d).
5. Minn. R. Civ. P. 45.03(c)(1)(B); Fed. R. Civ. P. 45(c)(1)(A).
6. Minn. R. Civ. P. 45.03(d); Fed. R. Civ. P. 45, (c)(1), (d).
7. Minn. R. Civ. P. 26.02(b), 45.04; Fed. R. Civ. P. 26(b), 45(e).
8. Minn. R. Civ. P. 45.03(c); Fed. R. Civ. P. 45(d)(3).
9. Minn. Stat. § 144.293.
10. Minn. Stat. § 144.293, subd. 10.
11. Minn. Stat. § 144.293, subd. 10; 45 C.F.R. § 165.502(b).
12. Minn. Stat. § 144.291(c); 45 C.F.R. §165.501(1).
13. Minn. Stat. § 145.64; 42 U.S.C. § 1320c-9.
14. Minn. Stat. § 254A.09; Minn. Stat. § 144.293, subd. 10; 45 C.F.R. §§ 164.501, 165.502(b); 165.508(a)(2).
15. 42 C.F.R. § 2.64.
16. Minn. Stat. § 144.294, subd. 3(c); 45 C.F.R. §164.524(a)(i), (a)(ii)(3).
17. Minn. R. Civ. P. 45.05; Fed. R. Civ. P. 45(g).
18. Minn. R. Civ. P. 45.03(c); Fed. R. Civ. P. 45(d).
19. 45 C.F.R. § 164.506(c)(1); 45 C.F.R. § 164.501 (defining "health care operations" to include legal services).
20. Minn. Stat. § 595.02, subd. 5.