SUBPOENA Compliance

Releasing Protected Health Information

California Health Information Association

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This edition of the *SUBPOENA Compliance – Releasing Protected Health Information* publication reflects changes in state and federal subpoena regulations since 2005. In February 2009, President Obama signed The American Recovery and Reinvestment Act of 2009, abbreviated ARRA. ARRA included funding for Health Information Technology and tightening of privacy and security for Health Information Management in general. Breach notification requirements also were tightened as a result of ARRA. The California Confidentiality of Medical Information Act (also known as California Civil Code § 56 *et seq.*) has numerous updates and additions since the last publication of this manual. The California Code of Civil Procedure § 1985.8 was added to the code in 2009 allowing electronically stored information to be subpoenaed. Many other state and federal laws were repealed or revised and this publication updates those sections affected by those repeals and revisions.

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FOREWORD

Health information managers encounter subpoenas every day. Most often, they appear in the course of civil disputes between private parties before California courts. However, they can be issued in criminal cases and in formal hearings before administrative agencies conducted by hearing officers or administrative law judges. They also can be served by government agencies in the course of investigations where there is no hearing pending. Nor is that all. Subpoenas can come from courts or investigators from other states or from the federal system. Even then, the response will be different if the materials being sought are subject to special protections, such as mental health records and HIV test results.

Despite the bewildering array in which they can appear, subpoenas share certain common characteristics and therefore are subject to certain general principles and approaches. A health information manager who understands those principles and follows those approaches is in a position to respond appropriately when a subpoena is received. In so doing, the health information manager will be balancing – and harmonizing – two competing legal considerations. The first is embodied in the laws providing for the discovery of evidence in the course of adjudications and investigations. These favor access to any information that may be relevant to the issues at hand. They make it mandatory for a party receiving a valid subpoena to comply with its terms under penalty (the literal translation of the Latin words "sub poena") of legal sanctions. The second consideration is embodied in the laws, both federal and state, governing the confidentiality of patient health information. They establish strict rules for protecting the privacy of medical records and other patient-identifiable materials in a provider's hands. At the same time, they provide avenues for the disclosure of information in response to a subpoena that follows stated requirements. It is for the health information manager to navigate between these considerations when served with a subpoena of any kind.

Even as they appreciate the broad considerations, health information managers will be justifiably wary of the many technical rules governing the creation and service of subpoenas. These include the form of the subpoena, the materials that must accompany it, the time for response, and the fees that can be collected. It is perhaps fortunate that these rules mostly remain constant from year to year, thereby allowing the average health information manager to build up a body of knowledge about them. In some cases, it is definitely unfortunate, as with the California rules setting the fees due for labor and photocopying charges, which have remained unaltered for two decades even as methods and costs of reproducing records have changed. This Manual provides an up-to-date explanation of those rules, making it an indispensable reference to health information managers seeking to understand their obligations and to comply with them.

At the same time, health information managers should remember that subpoenas, unlike many other legal documents, are remarkably flexible. Subpoenas, at least, are capable of being adapted to a particular situation if the players are prepared to do so. Unlike a court order, a subpoena can be varied by agreement between the subpoenaing and subpoenaed parties. Accordingly, a health information manager is not necessarily stuck with a subpoena in exactly the form in which it was served. It is always possible to approach a subpoenaing party with a candid explanation of whatever is impeding the provider's response and to work out a mutually agreeable resolution that removes the impediment. By doing so, the health information manager becomes an active and creative participant not only in protecting health information from unwarranted disclosures but also in allowing the justice system to achieve its ends.

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APPENDICES

INTRODUCTION

All health care providers have the ethical and legal responsibility to protect the patients' privacy and the confidentiality of information obtained or developed during the course of treatment. State and federal legislation further defining this responsibility and adding more positive protection has become increasingly common.

The flip side of this charge, to protect the privacy and confidentiality of patients' health information, is the obligation to release health information to requestors as permitted by law or statute. The health information practitioner bears a major responsibility for assuring that both the duty to protect and the duty to release are carried out according to legal requirements.

The subpoena duces tecum is a legal instrument that overrides the usual criteria for disclosure when patient care information is needed for the administration of justice. A variety of laws define the circumstances under which information is to be released in response to a subpoena as well as describing certain situations that require special handling. The health information practitioner's concern is to act within the law, not to defeat disclosure.

The purpose of this manual is to provide sufficient background information and specific guidelines for proper and adequate disclosure of information in response to a subpoena duces tecum. Although addressed primarily to the health information practitioner acting as "custodian of records" in an acute care hospital, it is designed to be equally useful for those who have this responsibility in other health care settings and to individual providers of health care. Where the manual is silent or when there is a situation where further information is needed or where legal action may be required, always consult the health care provider's legal counsel.

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At this time, there are no California or Federal laws specifically related to subpoena of the Electronic Health Record. It will likely not be long before they exist.

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