

Hixon: Medical records and privacy

By: Philip D. Hixon



Many people mistakenly believe that their medical files maintained by their physicians are 100 percent private. However, there are legal scenarios in which those files are under subpoena and that require physicians to comply and provide a prompt legal response, including disclosure or medical information.

Subpoenas are legal commands to appear at a certain time to give testimony on a certain matter and to produce information, such as documents or records. Physicians can receive a variety of subpoenas, given the scope of their work. They receive subpoenas in state and federal court litigation, from state agencies, such as the Oklahoma State Department of Health, from licensure boards and from grand juries. Depending on the type of subpoena, there are different rules that apply for how a physician can and should respond given state and federal privacy and confidentiality laws.

Subpoenas can ask physicians for a patient's protected health information, or PHI, such a diagnostic or billing records. However, PHI is subject to federal HIPAA laws. HIPAA permits disclosure of PHI for public health activities that could fall under a government agency subpoena, for health oversight activities that could fall under a licensing board subpoena, and for judicial and administrative proceedings, which could be related to state or federal civil or criminal matters or something like a workers' compensation subpoena.

It is important to note that in matters related to state or federal civil or criminal litigation, HIPAA contains certain safeguards that must be satisfied before disclosure of PHI. For example, before a physician discloses PHI in response to a subpoena, the requesting party is required to provide the physician with satisfactory assurances required by HIPAA. These satisfactory assurances may take the form of notice of the subpoena to the patient about the litigation and time for the patient to object to disclosure of a PHI through the appropriate legal channels.

A physician who either does not respond to or comply with a subpoena is in contempt of legal process. In such cases, a judge may order the physician to comply with the subpoena or, alternatively, issue a bench (arrest) warrant or impose sanctions on the physician. That is not to say that if a physician or records are under subpoena, it is a foregone conclusion the testimony will occur and the medical information will be disclosed. It does mean, however, that physicians who object to a subpoena need to respond to the party requesting the PHI, which may require filing a motion to quash with aid of legal counsel and proceed as the court ultimately determines.