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DOCTORS Rx

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A Letter from the Chair of the Board

Dear Colleague:

We frequently receive questions from our members regarding the issue of medical records requests from patients, attorneys and other entities. This issue of Doctors RX *will discuss the various ways in which these requests may come and provide guidance on how to handle them without running afoul of either your patient or the law.*

George S. Malouf, Jr., M.D.
Chair of the Board
Medical Mutual Liability Insurance Society of Maryland

Handle With Care

A Guide to Records Requests in Maryland

Consider the following scenario: You've made your morning rounds at the hospital. You're back in your office. You have a lobby full of patients waiting to see you. Your day is planned: appointments until 2:00 p.m.; a meeting with that sales representative who won't stop pestering you; review of your P.A.'s chart notes after that, and then:

You make the mistake of looking in your in-basket.

It's there.

You hear the roar of the ocean in your ears. This isn't the soothing, primordial sound of beach-bound breakers and hovering gulls; this is the sea noise that turns into the arcing shriek of a speeding train that is about to plunder your last shred of sanity.

It's the sound of a subpoena for medical records.

So, here you are in your office, holding this terribly official-looking pile of papers, complete with photocopied seals of the Clerk of the Court, commanding you to produce the medical records of a patient under your care.

The speeding train is coming down the hallway of your office building.

Continued on next page

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Even worse, this pile of papers in your hand seems to require your appearance for a deposition or a court appearance or a trial unless you hand over the records.

> *The speeding train is at the entrance to your office; it's getting faster.*

And, if all of this wasn't enough, you have been given a deadline to comply!

In addition to subpoenas, you probably routinely receive a variety of medical record requests from patients, their guardians or family members, other providers, and attorneys. What to do? In whatever way the request for records is packaged, this issue of *Doctors RX* will provide you with what you need to know in order to respond in an appropriate and timely manner.

When you receive a request for medical records, it typically will fall into one of two categories – you will either have permission from the patient to release the records, or you will not have the patient's permission to release the records. If the request comes with an "authorization" signed by the patient or an appropriate patient surrogate – i.e., a "Person in Interest," that provides the necessary permission to release the records. If there is **not** an authorization, you will need to follow certain steps, explained in this issue of *Doctors RX*, before you release the records.

Medical Records Requests with Authorization

Requests from a patient, a patient's representative or guardian, or attorney, most often will come with an accompanying authorization. If that is the case, you will need to determine if the authorization is valid, and then provide the records accordingly.

A Valid Authorization: An appropriate authorization is one signed by a "Person in Interest." In **most** cases, the Person in Interest is the patient. When the patient is deceased, the Person in Interest is the Executor of the patient's estate. The authorization should be accompanied by Letters of Administration that establish that the person who signed the authorization is, in fact, the Executor of the patient's estate. When the patient is a minor, the Person in Interest may be a parent or legally-appointed guardian (with some exceptions). When the patient is incompetent, the Person in Interest may be (1) a legally-appointed guardian; (2) a surrogate decision-maker appointed in a Durable Power of Attorney or an Advanced Directive; or (3) a statutorily-defined surrogate decision-maker in the absence of a legal document appointing someone else. In each of these cases, you will want to look for accompanying documents that establish the authority of the Person in Interest.

Duty and Time to Disclose: When you receive a request for records with an appropriate authorization, you have a statutory duty to disclose the records.[1] These records must be disclosed "within a reasonable time," which cannot exceed 21 working days.[2]

Payment for Records: You also have the right to be paid for your administrative costs in reproducing the records; however, you may not charge a "retrieval" fee.[3] You are entitled to "the reasonable cost of providing the information requested."[4]

The "reasonable cost" cannot exceed the following:

1. A copying fee of .76 cents for each page of the medical record;
2. A $22.88 "preparation fee" that may not be charged to the patient; and
3. Actual postage.

Please also note that the patient has a right under the HITECH Act[5] to request a **digital** copy of his or her records if you maintain digital/electronic records. If such a request is made, you cannot charge a per-page copying fee. You can charge for the costs associated with the time you or your employees spend in preparing the copy.

Again, you may not charge a "retrieval" fee.[6] You may also charge a reasonable amount for any item of data formatting – i.e., the cost of the DVD, CD, zip-drive or other format onto which you transfer the data.

If the patient for whom the records have been requested is enrolled in the Maryland Medical Assistance Program, the fees that you charge for copying the records cannot exceed $20, **unless** the request for records comes from an attorney appointed in writing by the patient.

Two important reminders:

> You **may** refuse to disclose the records for failure to pay for the records.
> You **may not** refuse to disclose records for failure to pay for medical care.[7]

Penalties for Refusal to Disclose: Failing or refusing to disclose records in response to a valid authorization may subject you to a claim for "actual damages."[8] A knowing and willful violation of the duty to disclose (and any other duty under the Maryland Medical Records Statute) also may result in criminal misdemeanor charges carrying fines of up to $1,000 for first offenses and up to $5,000 for subsequent violations.[9]

Medical Records Requests Without Authorization Subpoenas

If a patient or authorized person of interest will not grant the release of the medical records, an attorney or opposing party will have to go through the court system to attempt to gain access to the records. When that happens, you are likely to receive the dreaded subpoena for medical records. A subpoena is a court-ordered command to produce documents or appear in a legal proceeding. Although it is sent through the court and looks very official, there is a set of steps you must follow before you disclose any records.

Subpoenas for records in the State of Maryland are governed by at least two statutes: The Maryland Medical Records Statute[10] and federal HIPAA regulations. With a few exceptions, which will be addressed on the next page, the Maryland statute will give you all the guidance you need for responding to a subpoena for patient medical records. First and foremost, you need to be aware that the rules guiding your response to a subpoena for records will change for different types of records. Records concerning mental health or substance abuse treatment are handled differently than physical health records. The rules also are different for subpoenas issued in civil suits as compared with criminal cases.

Subpoenas for Physical Health Records in Civil Suit: The 30-Day Waiting Period

For a subpoena in a civil suit seeking a medical record that does not contain mental health or substance abuse records, the attorney issuing the subpoena for the record is required to go through a three-step process with a 30-day waiting period.

First, when you receive the subpoena, it should state that a copy of the subpoena has also been delivered to your patient or his or her attorney. The subpoena should include specific language that explains the subpoena is seeking disclosure of medical records, and that the patient has a right to object to the disclosure of the records by responding with a Motion to Quash/Motion for Protective Order.[11] If a motion isn't filed by, or on behalf of, the patient within 30 days, the Physician will be required to disclose the records.

Subpoena or Court Order?

A subpoena is different than a Court Order. A subpoena is signed (in pre-stamped fashion) by the Clerk of the Court. A Court Order is titled "Order" and is signed by a judge. The two documents should not be confused with one another.

Second, you will need to wait 30 days to see if an objection to disclosing the records is filed. Thus, as a general rule, you should not respond to a subpoena in less than 30 days, unless the patient or patient's attorney states in writing that she or he does not object to the disclosure or you receive a Court Order requiring you to disclose the records.

Third, you should receive a follow-up letter from the attorney who sent the subpoena. It should advise you of one of the following: 30 days have passed since the initial subpoena and no objection was filed; an objection **was** filed and the Court has denied the Motion (with a copy of the Court Order); or the patient/patient's attorney has indicated in writing that she or he does not object to the disclosure of records, and you have a copy of the written consent.

When all three steps have transpired, and **only** when all three steps have transpired, you may then disclose the record to the requesting attorney. Under those circumstances, you should make a copy of the medical record and forward the copy to the requesting attorney. You should include copies of the subpoena, a cover letter, and anything else that bears on the issue of disclosure. For example, if a Motion to Quash/Motion for Protective Order was filed and denied, you should include a copy of the Order of the Court directing you to disclose the record (bearing in mind that if such a Motion is granted, you will not be disclosing the medical record).

Subpoenas for Records in a Criminal Matter

In criminal matters, a subpoena that is issued by the government and its agents – police, prosecutors, grand juries and the like – does not trigger the 30-day waiting period that a civil case does. A criminal case always is prosecuted by a governmental entity, and this will help you determine if it is a subpoena in a criminal matter. A criminal case will always be given a title such as "*The State of Maryland vs. John Smith*" or "*The United States vs. Joe Doe.*" A civil case, by contrast, will almost always be framed as one or more human beings vs. one or more human beings (or entities such as a hospital or business) – *"Jane Roe, et al. vs. John Doe, et al."*

Conversely, if the subpoena is issued by a defense attorney rather than the governmental entity, and seeks records of a person other than her or his client, it will be subject to the 30-day waiting period and all of the other requirements outlined above.

If you are confronted by a subpoena in a criminal matter and (1) you are having trouble determining who issued it; (2) you are not sure whether you need to wait 30 days or not; or (3) you have a return date of less than 30 days in any event, your best approach may be to contact MEDICAL MUTUAL or seek advice of legal counsel.

Subpoenas for Records of Mental Health Treatment

Mental health records are governed by a different statute than physical health records. Consequently, the way you respond to a subpoena for mental health records will be different from your response to a subpoena for physical health records. You may, and you should, disclose mental health records in response to a subpoena **only** under two circumstances that should be clear from the subpoena itself.

The first situation in which you are permitted to provide mental health records is when the subpoena is issued by a health professional licensing board to investigate a health care professional for licensure or certification purposes. The second situation is if the subpoena was issued by a law enforcement agency for the **sole purpose** of investigating

a health care professional for having committed a specified crime against the patient who is the subject of the record, and the crime is one of the following: theft; fraud; obstruction of justice; perjury; unlawful distribution of CDs; criminal assault; criminal neglect; patient abuse; or sexual offense.

All other requests for disclosure of mental health records in the course of a criminal or civil proceeding that are not accompanied by the patient's authorization (or that of the patient's surrogate decision-maker) require a Court Order.

STOP *If you have received a subpoena which does not fall into one of these circumstances or it does not make it clear that it is for this designated purpose, then you should not disclose the records. Instead, you should contact MEDICAL MUTUAL or seek advice of legal counsel.*

Subpoenas for Records of Substance Abuse Treatment

Requests for records regarding treatment of substance abuse – alcohol and drugs – are governed by an entirely different set of federal rules and regulations. Generally, a simple subpoena for those records is not enough authority to permit you to disclose either type of records. Disclosure of such records almost always requires either an authorization signed by the patient or the patient's legal surrogate, or a Court Order.

If you receive a subpoena for records that concern drug abuse or alcohol abuse treatment, and the subpoena is **not** accompanied by either a Court Order directing you to disclose those records, or a signed authorization of the patient or authorized person in interest, the law probably precludes you from disclosing those records.

STOP *Under those circumstances, you should not disclose the records; you should contact MEDICAL MUTUAL or seek advice of legal counsel.*

Subpoenas Requiring Deposition Appearances

One of the most common items you may find in your mail is a Notice of Deposition requiring you to appear at a law office on a specific date and time to testify regarding a matter about which you may know nothing. A careful read of the subpoena may reveal a cryptic proviso that if records of your patient are provided by an earlier designated date, you will not need to attend the deposition in person.

You may be tempted to send along a copy of the record as an easy way of eliminating any need to worry about appearing for deposition.

The bad news about this approach is that all of the rules outlined above apply with equal force to the subpoena accompanied by the Notice of Deposition. For requests without authorization, you are still required to wait 30 days and disclosure of the record is still restricted by laws governing the confidentiality of physical health information, mental health information, and substance abuse treatment.

STOP *When you find yourself facing a Notice of Deposition, contact MEDICAL MUTUAL or seek advice of legal counsel.*

Subpoenas Requiring Court Appearances

The subpoena that requires you to appear in court – tomorrow or the next day or any other day for that matter

– presents an entirely different set of issues and potential problems.

Rule 1: You cannot ignore such a subpoena.
Rule 2: You cannot delay dealing with such subpoenas.
Rule 3: You cannot ignore Rules 1 and 2.

The situations in which such subpoenas arise are varied and complex. You should contact MEDICAL MUTUAL or seek advice of legal counsel as soon as you become aware of the subpoena requiring you to appear in court.

Medical Records of Minors

When Minors Aren't Minors: You may receive a request for records concerning treatment of a minor – a person under the age of 18. That request may be accompanied by an authorization signed by the minor. You may think that the minor does not have the legal right to authorize the disclosure of medical records because she or he is a minor.

In most instances, you will be correct – a parent or legal guardian will need to authorize the disclosure. However, there are several instances in which a minor may authorize the disclosure of his or her records.

Instances where a minor can authorize disclosure of his or her records include:

- The Minor is married;
- The Minor is the parent of a child;
- The Minor is emancipated and self-supporting; or
- The treatment concerned the following specific matters:
  - Drug or alcohol abuse;
  - Sexually transmitted disease;
  - Pregnancy;
  - Contraception (other than sterilization);
  - Rape or sexual offense;
  - Exams on or after admission to detention centers; or
  - Mental health treatment of a minor who is 16 years old or older.

Please note that if the request for medical information about a minor has been submitted by the parent of the minor, you are **permitted, but not required,** to make such disclosures. This is true even if the minor has objected to the disclosure. Thus, if you believe it is in the minor's best interest for disclosure to be made, you may do so. Conversely, if you believe that disclosure would **not** be in the minor's best interest, you are not compelled to make the disclosure.

When in doubt, contact MEDICAL MUTUAL or seek advice of legal counsel.

Minors Caught in the Middle: An equally common request for records is one that comes from the non-custodial parent of a minor patient. You may think that because the parent who has requested the medical record is non-custodial, she or he has no right to see the records.

In fact, the non-custodial parent does have the right to seek the records of his or her child as long as that right has not been specifically limited or denied by a court order or a valid separation agreement. If there is no dispute between the parents regarding disclosure to the non-custodial parent, then you are safe in disclosing the records.

In the event you receive such a request, you should first check the medical record to determine if there is guidance in this regard – i.e., a copy of a court order or separation agreement that limits the right of the non-custodial parent in this respect. You also should check the medical record to determine if the custodial parent has otherwise registered concerns or objections to disclosure of records or information to the non-custodial parent. If the custodial parent does voice objections or concerns, and there is not a court order or valid separation agreement, then the custodial parent may not be able to prevent disclosure without taking legal action.

If that is the case, or you find you are becoming embroiled in a dispute between the parents, then you likely will need to contact MEDICAL MUTUAL or seek advice of legal counsel to navigate the various issues arising from this scenario. You will be glad you did.

In Conclusion

There are a number of issues and questions that may arise when you receive a subpoena. The purpose of this article is to provide guidance regarding the most common requests for medical records with which you are likely to be confronted.

For those not included in this article, or specific situations you are unsure of how to handle, your best approach is to contact MEDICAL MUTUAL or seek advice of legal counsel. As time-consuming as it may seem, it is still easier than dealing with the consequences of ignoring such requests.

[1] *See,* Md. Health Gen. Code Ann. § 4-303 and 4-309 (a) (2015).

[2] *See,* Md. Health Gen. Code Ann. § 4-309 (a) (2015).

[3] *See,* HIPAA Regulations, 45 CFR 164.524.

[4] *See,* Md. Health Gen. Code Ann. § 4-304 (c) (3) (2015); these costs may be adjusted annually. For up-to-date charges, visit the Maryland Board of Physicians website at: http://www.mbp.state.md.us/pages/faq_records.htm

[5] Health Information Technology for Economic and Clinical Health, 42 U.S.C. 201, et seq.; 45 CFR 160 et seq., (2015).

[6] *See* footnote 3 above.

[7] *See,* Md. Health Gen. Code Ann. § 4-304 (d) and 4-309 (b) (2015).

[8] *See,* Md. Health Gen. Code Ann. § 4-303 and 4-309 (a) (2015).

[9] *See,* Md. Health Gen. Code Ann. § 4-309 (d) (2015).

[10] Md. Health Gen. Code Ann. §§ 4-301, et seq.

[11] A copy of the statute – *Md. Health Gen. Code Ann. § 4-306 (6) B* – that establishes this right to object also should be included.

Doctors RX

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Instructions – to receive credit, please follow these steps:

1. Read the articles contained in the newsletter and then answer the test questions.
2. Mail or fax your completed answers for grading:

   Med•Lantic Management Services, Inc.
   225 International Circle
   P.O. Box 8016
   Hunt Valley, Maryland 21030
   Attention: Risk Management Services Dept.

   Fax: 410-785-2631

3. One of our goals is to assess the continuing educational needs of our readers so we may enhance the educational effectiveness of the *Doctors RX*. To achieve this goal, we need your help. You must complete the CME evaluation form to receive credit.
4. Completion Deadline: March 31, 2016
5. Upon completion of the test and evaluation form, a certificate of credit will be mailed to you.

You can disclose mental health records in the following situations:

A. You receive a Court Order
B. You receive a subpoena from an attorney
C. You have authorization from your patient to release the records
D. A and C

There are no circumstances where a minor can authorize release of their own records.

A. True B. False

When a subpoena is issued in a civil case, the patient has no way to prevent disclosure of their records.

A. True B. False

A non-custodial parent can still access their child's medical record.

A. Always true
B. Never true
C. True, unless there is a Court Order or valid separation agreement in place
D. True, unless the custodial parent doesn't want them to have access

A subpoena for records that include substance abuse treatment usually require:

A. Patient authorization
B. A Court Order
C. An attorney's signature
D. A and B

When a patient requests their records with an appropriate authorization, how much time do you have to disclose the record?

A. 10 days
B. No less than 30 days
C. No more than 21 days
D. Five years

As a general rule, you should wait 30 days before disclosing a record at the request of a subpoena in a civil suit unless:

A. You have written authorization from the patient
B. You receive a Court Order
C. A and B
D. You should always wait 30 days

The 30-day waiting period after receiving a subpoena applies:

A. In civil cases where there is no Court Order or appropriate authorization
B. In all criminal cases
C. Documenting the decision-making process
D. All of the above

A Court Order is signed by a judge, and a subpoena is signed by the Clerk of the Court.

A. True B. False

You can refuse to disclose records if the patient has outstanding medical bills.

A. True B. False

CME Evaluation Form

Statement of Educational Purpose

Doctors RX is a newsletter sent twice each year to the insured Physicians of MEDICAL MUTUAL/Professionals Advocate.® Its mission and educational purpose is to identify current health care related risk management issues and provide Physicians with educational information that will enable them to reduce their malpractice liability risk.

Readers of the newsletter should be able to obtain the following educational objectives:
1) Gain information on topics of particular importance to them as Physicians,
2) Assess the newsletter's value to them as practicing Physicians, and
3) Assess how this information may influence their own practices.

CME Objectives for "Handle With Care"

Educational Objectives: Upon completion of this enduring material, participants will be better able to:
1) Identify the various categories of medical records requests
2) Understand applicable state and federal law regarding these requests
3) Respond to medical record requests in an appropriate and timely manner

	Strongly Agree				**Strongly Disagree**
Part 1. Educational Value:	5	4	3	2	1
I learned something new that was important.	❑	❑	❑	❑	❑
I verified some important information.	❑	❑	❑	❑	❑
I plan to seek more information on this topic.	❑	❑	❑	❑	❑
This information is likely to have an impact on my practice.	❑	❑	❑	❑	❑

Part 2. Commitment to Change: What change(s) (if any) do you plan to make in your practice as a result of reading this newsletter?

_____

_____

_____

Part 3. Statement of Completion: I attest to having completed the CME activity.

Signature: _____ Date: _____

Part 4. Identifying Information: Please PRINT legibly or type the following:

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