

CHAPTER IV: SUBPOENAS & COURT ORDERS

Disclaimer: The information contained in this manual is not intended to be used as legal advice. Please refer to the most current specific state statutes and your own legal counsel when warranted. Some statutes will be referred to throughout this manual.

When confidential medical information is at issue in a lawsuit, criminal proceedings, or investigation by a government agency, the health information management (HIM) professional may be confronted with a subpoena or court order. The information in this chapter is designed to help the HIM professional understand these instruments; however, it is *not* a substitute for good legal advice. Whenever possible, legal counsel should be involved in guiding the facility's response to subpoenas or court orders.

SUBPOENAS: A subpoena is a command to testify in court (subpoena ad testificandum) or to produce specified records or documents (subpoena duces tecum). Subpoenas may be issued by a state or a federal court, for a civil or a criminal case, or by a federal or state government agency for investigative purposes. Requirements for civil subpoenas are contained in Rule 45 of the Maine Rules of Civil Procedure and Rule 45 of the Federal Rules of Civil Procedure. Subpoenas in criminal cases are covered by Rule 17 of the Maine Rules of Criminal Procedure and Rule 17 of the Federal Rules of Criminal Procedure. HIPAA privacy rule §164.512 (e) discusses the rules for disclosing information in receipt of a subpoena. For information specific to substance abuse records see also the chapter titled Disclosure of Information Pertaining to Drug or Alcohol Abuse Records, section titled Court Orders, and for mental health and mental retardation records see also the chapter on Mental Health and Mental Retardation Records, section titled Court Orders.

CIVIL SUBPOENAS: The type of subpoena most likely to be encountered by the HIM professional is the civil subpoena issued by a state court. Because these subpoenas are signed by the Clerk of the Court, they may convey the impression that a judge has determined that the information being requested is essential to the court case. In actuality, however, blank subpoenas can be obtained by any party to a suit and can be issued by any attorney, without any judicial involvement. In contrast, a court order is signed by a judge and basically must be obeyed, as long as it specifically indicates what is to be disclosed and to whom.

REQUIREMENTS FOR VALID CIVIL SUBPOENAS: Each subpoena must state the name of the court from which it is issued, the title of the case, and the docket number. It must also "command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents, or tangible things, or permit inspection of premises, in the possession, custody or control of that person at a time and place therein specified."¹

A subpoena may be issued only when there is a case pending before the court. It cannot be used to conduct a "fishing expedition" prior to deciding whether legal action is warranted. For this reason the HIM professional should always check to see that a docket number is listed on the subpoena before

¹ Maine Rules of Civil Procedure, Rule 45.

taking action upon the subpoena, and that the patient is listed in the caption.

The subpoena may be served (delivered to the person to whom it is addressed) by any person who is at least 18 years old and who is not a party to the case. The rule requires that subpoenas be hand-delivered; it may not be mailed or left with some other party. However, very often attorneys and HIM professionals will agree to waive these delivery requirements.

If the subpoena requires attendance by the recipient at a trial, hearing, or deposition, the server must "tender" (offer to pay) one day's witness fee and mileage to the recipient. It is not required that the recipient accept the fee, only that it be offered.

The subpoena duces tecum is served upon the person who has the desired documents or records in his or her "possession, custody or control." The person does not need to be the legal owner of the documents for the subpoena to be valid, nor do the documents need to be located in the same place as the person. The "possession, custody, or control" requirement means that a subpoena for hospital records cannot be legitimately served upon the patient's physician or other clinician. The physician or clinician may be subpoenaed to testify, but the subpoena duces tecum for the hospital records must be served upon the hospital employee who is responsible for the records. A subpoena duces tecum does not require the recipient to appear in person with the documents unless the person is also being subpoenaed for testimony or deposition.

Very often physicians and others who are called to testify will wish to review records prior to their court appearance and may ask for copies. Both options are fine as long as

1. The reviewer is prepared to answer truthfully if questioned about whether he/she has recently reviewed the record.
2. Copies, if supplied are not brought to court and are disposed of in accordance with facility confidentiality policies.

INVALIDATION OF SUBPOENA: There are two ways in which subpoenas can be invalidated. First, the recipient of any civil subpoena (either for testimony or for production of documents) may file a motion with the court to quash (invalidate) the subpoena. The court may quash a subpoena for any one of a number of possible reasons which are set forth in Rule 45, the Maine Rules of Civil Procedure. A subpoena may be quashed (a) if it fails to allow a reasonable time for compliance; (b) requires a resident of this state who is not a party or an officer of a party to travel to attend a deposition outside the county wherein that person resides or is employed or transacts business in person or a distance of more than 50 miles one way, whichever is greater, unless the court otherwise orders; (c) requires a nonresident of the state who is not a party or an officer of a party to attend outside the county wherein that person is served with a subpoena, or farther than 50 miles from the place of service, unless some other convenient place is fixed by an order of court; (d) requires disclosure of privileged or other protected matter and no exception or waiver applies; or subjects a person to undue burden. Also, (a) if a subpoena requires disclosure of a trade secret or other confidential research, development or commercial information; or (b) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or (c) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 50 miles one way to attend trial, the court may, to protect a person subject to or affected by the

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subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions. The motion to quash must be filed prior to the date on which the records are to be produced. An individual may file a motion to quash with the court, but it is advised to consult your facility's legal counsel to do this for you.

Secondly, Rule 45 permits the recipient of a subpoena duces tecum to object to the subpoena. The objection must be filed in writing, within 14 days after receipt of the subpoena, with the party or attorney designated in the subpoena. (If the date for production of the documents is less than 14 days after the date of service, the objection must simply be filed prior to the date of production.) Once the objection has been filed, the party which subpoenaed the documents must obtain a court order to gain access to them.

CRIMINAL SUBPOENAS: Subpoenas in criminal cases carry different requirements for tendering of witness fees. When a subpoena is issued by the state, no witness fee is required. When it is issued by the defendant, witness fees must be tendered unless the defendant has been ruled by the court to be indigent, in which case no fees need be paid.

INVESTIGATIVE SUBPOENAS: Certain state and federal agencies have the statutory power to issue subpoenas. At the state level, for example, the Board of Registration in Medicine can subpoena records relevant to investigation of physicians' competence to practice. The Department of Health and Human Services (DHHS) can subpoena records relevant to investigation of child or elder abuse or threats to the public health. In some cases the statutes providing subpoena power also confer immunity from prosecution on those complying with the subpoena. This is not a universal standard, however, and HIM professionals should consult legal counsel.

In the case of suspected child abuse or neglect, the statute (22 MRSA § 4021) permits DHHS to subpoena records which are "necessary and relevant" to the investigation. This includes medical records of the child's parents, siblings, or other family members. Records which are not clearly relevant should not be released *without* a court order. It is acceptable to call DHHS to clarify information requested in a subpoena. As with all disclosures of information, attempts should be made to disclose only the minimum necessary to accomplish the stated purpose of the request.

As was explained in the chapter titled Disclosure of Information Pertaining to Drug or Alcohol Abuse Records, an investigative subpoena is not sufficient to compel release of drug or alcohol abuse records without a court order. However, an investigative subpoena does compel release of mental health information.

GRAND JURY SUBPOENAS: Grand jury subpoenas are ranked higher than any other subpoena and it is recommended to comply with them as you would a court order. However, it is always best to consult legal counsel when presented with a grand jury subpoena.

OUT- OF- STATE SUBPOENAS: Subpoenas issued by a state court are valid only in that state. When a HIM professional receives a subpoena for records from an out of state court, the issuing attorney

should be notified in writing or by phone that the subpoena cannot be honored.

SUBPOENAS FOR PHOTOS AND VIDEOS: Subpoenas for photographs or videotapes may be served on health care facilities. The items subpoenaed may include photographs of injuries suspected to have been caused by child abuse, photographs or videotapes of arthroscopic or laparoscopic surgery, x-ray films, fetal monitor strips, etc. Facilities should have policies to guide staff in handling such subpoenas. When photographs are subpoenaed, the facility should, whenever possible, release prints and retain the negatives. The facility may wish to have double prints made of all photographs of injuries, so that one set of prints can be released and one retained by the facility.

The health care facility should clearly define in its policies the conditions under which videotaping may be performed, and the ownership of the videotape. If the surgeon is to have custody of the videotape, the facility may wish to specify that the tape is the property of the surgeon. Otherwise, if the facility is served with a subpoena for the tape, the facility will be held liable if the surgeon is unable or unwilling to produce it. AHIMA's Practice Brief on this subject is an excellent resource.

COURT ORDER: A court order is a document signed by the Judge (as opposed to another individual or a dedimus), which mandates that the practitioner produce records.

PROCEDURE ON RECEIPT OF SUBPOENA OR COURT ORDER: Upon receipt of a subpoena for records, the HIM professional should follow established administrative protocols which will guide him/her in determining how and when legal counsel should be notified. In most cases, facility policies and procedures will dictate the appropriate steps to take. However, the minimum steps should include the following:

- While the individual who served the subpoena is still present, review the subpoena to ensure that all the required elements are present. If any element is missing, contact the attorney who caused the issuance, indicating the document was improperly issued.
- Check the master patient index to verify that the records being subpoenaed actually do exist. If there is no record of the patient, contact the attorney who issued the subpoena.
- Review the record for presence of information pertaining to substance abuse, psychiatric treatment and/or HIV. *If present inform your facility attorneys. Inform the requesting party that, due to the sensitive nature of the information in the record, the subpoena cannot be honored and that authorization from the patient is required.*
- If there is any possibility that the records are being requested for a malpractice suit notify the facility's risk manager and secure the record.
- If the record is stored on optical or other electronic media (microfilm, optical disk, etc.), advise the attorney who subpoenaed the record.
- It is permissible to charge the person who issued the subpoena for reproduction costs and for the costs of creating a hard copy from microfilm, optical disk, etc. Please refer to your facility policy

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as well as Maine law Title 22 1711-A that restricts copying fees.

- Facility policy should direct the handling of photographs and videotapes when involved. Refer to AHIMA's Practice Brief on Photographs and Videotapes.

PREPARING THE RECORD FOR COURT: When a paper record has been subpoenaed, the HIM professional should:

- ❑ Check the chart for completeness and accuracy (i.e., all reports on the chart belong to the proper patient). If the chart is incomplete, notify the responsible physician so that it can be completed promptly.
- ❑ Number all pages of the record in ink and keep a record of the number.
- ❑ Remove from the folder any correspondence, copies of records from other facilities, and non-medical record documents, or any other documents not included in your facility's designated record set.
- ❑ Follow the directions on the subpoena for delivery of records. If the original record is requested for court, place a call to the Clerk of the Court and ask whether, as is usually the case, the certified copy can be submitted rather than the original. If the certified copy is acceptable, this can often be delivered to the court prior to the trial, making a court appearance unnecessary. If the original record is required to be presented in court, take along the certified copy and request that the copy be retained rather than the original. If the original must be left in court, be sure to get a receipt for it from the Clerk of the Court. Original hospital records which are left in court have on occasion been lost, leaving the facility with only the photocopy for its permanent files.
- ❑ Certification letters generally do not need to be notarized, simply signed to the effect that this is a true and accurate copy of records for the dates requested. If records are not inclusive of all information requested, this must be stated.

ROLE OF THE HEALTH INFORMATION PROFESSIONAL: The HIM professional is only qualified to testify in court to the fact that the record was kept in the normal course of business, to identify the various components of the record, and to describe the record completion process. Occasionally, the HIM professional may be requested to read portions of the record. The HIM professional should *not* attempt to interpret entries to make any judgment as to their medical significance.

CONDUCT AS A WITNESS: If called as a witness in court, the HIM professional should:

- Be familiar with the record in question.
- Behave in a professional manner.
- Be sure the question is understood before answering.
- Reply in a succinct, thoughtful, and accurate manner.
- Limit replies to the information requested. (If additional information is required, questions will be posed.)

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- Answer questions with "yes" or "no" when requested. If it appears that a simple "yes" or "no" will cause incorrect inferences to be drawn, request permission to further elaborate.
- Not react to attempts by the examining attorney to confuse or irritate.
- When the answer to a question is not known, inform the questioner.
- Leave the courtroom only after being excused.

THE MAINE RULES OF CIVIL PROCEDURE

(Including amendments effective July 1, 2004)

(www.courts.state.me.us/rules_forms_fees/rules/MRCivP%207-04.htm)

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things, or permit inspection of premises, in the possession, custody or control of that person at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena for the Superior Court may issue from the court in any county, and for the District Court from the court in any district.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to the Maine Bar may also issue and sign a subpoena as officer of the court.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age, including the attorney of a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) A subpoena may be served at any place within the state.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court for which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings, a reasonable attorney fee, and other reasonable expenses incurred in seeking the sanction.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises, need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena a written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of any justice or judge of the court for which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow a reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to attend a deposition outside the county wherein that person resides or is employed or transacts business in person or a distance of more than 100 miles one way, whichever is greater, unless the court otherwise orders; requires a nonresident of the state who is not a party or an officer of a party to attend outside the county wherein that person is served with a subpoena, or farther than 100 miles from the place of service, unless some other convenient place is fixed by an order of court;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles one way to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to a Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Motions. Motions concerning subpoenas issued in discovery or pretrial proceedings shall be made under Rule 26(g). Motions concerning subpoenas issued to command appearance or production of documents or tangible things at trial or hearing shall be directed first to the judge or justice presiding at such trial or hearing.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court in which the action is pending or in the county in which the deposition is taken. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A). Punishment for contempt under this subdivision (f) shall be in accordance with Rule 66 and 16 M.R.S.A. § 102.

**The Maine Rules of Criminal Procedure
(Including amendments as of August 1, 2004)**

(http://www.courts.state.me.us/rules_forms_fees/rules/MRCrimP%208-23-04.htm)

RULE 17. SUBPOENA

(a) For Attendance of Witnesses; Form; Issuance. A subpoena may be issued by the clerk under the seal of the court or by a member of the Maine Bar. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the place and during the time period specified therein. The time period shall not exceed the period covered by the trial list scheduling the case. The attorney for the subpoenaing party shall make arrangements to minimize the burden on the subpoenaed person. Upon the request of a member of the Maine Bar, the clerk shall provide a subpoena, signed and sealed but otherwise in blank. The bar member shall fill in the blanks before it is served. Although a person representing themselves may not be provided a subpoena in blank, that person has the right to secure the issuance of a subpoena by the clerk for obtaining favorable witnesses whose testimony is relevant and material.

(b) Indigent Defendants. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to subpoena an in-state witness without payment of the witness fee, mileage and cost of service of the subpoena. Such fees and costs shall be paid out of Judicial Department funds. A request to the sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

A defendant who is financially unable to pay the fees and costs to subpoena an out-of-state witness may move ex parte for an order dispensing with payment of fees and costs. The court shall grant the motion if it finds the defendant is unable to pay the fees and costs and that the presence of the witness is necessary to an adequate defense.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable, oppressive or in violation of constitutional rights. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the sheriff, by the sheriff's deputy, by a constable or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and, except in the case of a person subpoenaed on behalf of the state or a person subpoenaed on behalf of an indigent defendant pursuant to Rule 17(b), by tendering to the person the fee for one day's attendance and mileage allowed by law.

(e) Place of Service.

(1) *In State.* A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Maine.

(2) *Out of State.* A subpoena directed to a witness outside the State of Maine shall issue under the circumstances and in the manner and be served as provided in the Uniform Act to Secure Attendance of Witnesses from Without the State.

(f) For Taking Deposition; Place of Examination.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described therein.

(2) *Place.* A resident of this state shall not be required to travel to attend an examination outside the county where the

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resident resides, or is employed, or transacts business in person, or a distance of more than fifty miles one way, whichever is greater, unless the court otherwise orders. A non-resident of the state may be required to attend only in the county wherein the non-resident is served with a subpoena, or within fifty miles from the place of service, or at such other convenient place as is fixed by order of court.

(g) Enforcement of Subpoena. If a person fails to obey a subpoena served upon that person, the court may issue a warrant or order of arrest.