KANSAS HOSPITAL ASSOCIATION

HIPAA UPDATE

WHAT YOU NEED TO KNOW BEFORE RESPONDING TO A SUBPOENA

If the subpoena is not a court-ordered subpoena you may not respond without receiving authorization from the person whom the protected health information is about OR satisfactory assurances from the requesting party.

1. **Responding to a Subpoena Request.**[i] Whenever a subpoena request is received by your organization, the Privacy Officer and/or the Medical Records Manager should determine whether the subpoena is a court order[ii], a subpoena accompanied by a court order or simply an attorney request for medical records.[iii] How can you tell which type of subpoena you received?

- A court order should have the following or similar phrase somewhere at the top of the document: "Order of the Court", "Order", etc; and
- Be signed by a judge, Administrative Law Judge (ALJ) or a Hearing Officer. A court clerk's or attorney's signature is NOT enough.
- A **subpoena with a court order** attached will most likely contain the actual subpoena document with the phrase "Subpoena" somewhere at the top of the document, followed by a court order as described above.
- An **attorney requested subpoena** will most likely contain the actual subpoena document with the phrase "Subpoena" somewhere at the top of the document and be signed by the court clerk or other officer of the court or the requesting attorney, but not be signed by a judge, ALJ or hearing officer.
- **NOTE:** Most subpoenas sent to Hospitals, physician groups, etc. are **NOT** court orders or subpoenas with a court order attached.

2. If the subpoena is a court order or a subpoena with a court order attached, then under the HIPAA Privacy Rule, you are permitted (not required) to disclose the information the order specifically authorizes you to disclose.

3. If the subpoena is an attorney request for medical records, then you may only release such information if you receive satisfactory assurances from the requesting party **before** disclosure is made. (Please note that HIPAA allows you to disclose the information if you obtain satisfactory assurance, but does not require that you do so.)

The Kansas Hospital Association provides updates to its members on topics of interest. These updates are for general information and educational purposes. The updates do not constitute legal advice. KHA appreciates the assistance of Steve A. Schwarm, Polsinelli Shalton Welte, in the preparation of this update.

4. Satisfactory assurances are those assurances described in 1-3 in the flow chart on the third page of this alert.

5. Assuming you can obtain satisfactory assurances from the requesting party, then under the HIPAA Privacy Rule you may (but are not required to) disclose the information sought by the subpoena. However, before making a final decision to disclose or not disclose, you must analyze whether the physician-patient privilege exists and if, under such privilege, you are prohibited from disclosing the requested medical records. Further, you must determine if any special laws limit or prohibit the disclosure.

6. **Physician-Patient Privilege**.[iv] To the extent a physician-patient privilege exists, any information sought is protected from discovery under the privilege, unless the privilege is waived.[v] The privilege belongs to the patient and not to the physician, hospital, etc., and can only be waived by the patient.[vi] The privilege applies to physicians, hospitals,[vii] those assisting the physician in treating the patient and also to medical records.

A physician, hospital, etc. must assert the privilege on the patient" behalf when it appears as if it is available. Thus, when an organization receives a subpoena for records (or a deposition request), it must also determine in addition to the HIPAA analysis above, whether a privilege exists and if so, how to assert such privilege on behalf of the patient or if the privilege has been waived.

- Immediately notify the patient and seek his or her authorization.

- Immediately notify the requesting party in writing, within 10 days of receipt of the subpoena or before the time specified in the subpoena, whichever is earlier, that you are attempting to obtain authorization from the patient, but until then, are asserting the physician-patient privilege and cannot comply with the subpoena request until you receive written authorization from the patient.

- Send the notice to all parties involved in the action (see the subpoena for such information).

- Seek additional guidance from legal counsel if any questions remain.

7. **Verification of Identity and Authority.** After the completion of the above-described HIPAA disclosure analysis, an entity in receipt of a subpoena must be sure to verify the identity and the authority of the requesting party seeking the information such verification is required under Section 164.514(h) of HIPAA.

8. **Special Laws.** Certain types of medical records may be protected by special laws. One such law is 42 C.FR. § Part 2 relating to drug and alcohol treatment records. Records containing drug treatment, alcohol treatment, HIV status, and mental illness treatment need to be independently reviewed to determine if such special laws may apply.

CONCLUSION: Subpoenas can be complicated and confusing at best. The HIPAA and privilege analyses can be very difficult and complicated to struggle through. At a minimum, remember to seek satisfactory assurances, determine whether a privilege must be asserted on behalf of a patient and if a special law applies.

HIPAA Court Order or Subpoena

(Does not address relevancy or privileges - See also 45 CFR 164.514(h) verification of identity & authority)

Is the Court Order signed by a Judge, ALJ, or Hearing Officer?

Is the Subpoena accompanied by A Court Order signed by a Judge, ALJ, or Hearing Officer?

YES

HIPAA Privacy Rule, 45 CFR 164.512(e)(1)(i), permits the release ("disclosure") of Protected Health Information ("PHI) which the order expressly authorized to be disclosed.

NO

The Covered Entity (health care provider) may only release PHI in such instances if at least **one of the following three events** has occurred [45 CFR 164.512(e)(1)(ii)]:

1. You have received written **"satisfactory assurance"** from the party requesting the information that reasonable efforts have been made by such party to ensure that the patient who is the subject of the PHI has been given notice of the request. This requires a **written statement and accompanying documentation of notice** to the patient, the notice contained enough info to allow the patient to make an informed objection to the court or administrative tribunal regarding the release of the patient's PHI, AND the time to raise objections has passed PLUS no objections were filed, or all objections filed by the patient have been resolved & disclosures being sought are consistent with the court's resolution.

2. You have received written satisfactory assurance from the requesting party that reasonable efforts have been made by such party to secure a ***qualified protective order***. This is either an actual order of a court/administrative tribunal OR a stipulation by the parties to the proceedings that prohibits the parties from using or disclosing PHI for any purpose other than the proceeding for which the information was requested AND requires the parties to return the PHI (including all copies made) at the end of the proceeding. Documentation that a *qualified protective order* has been asked for is sufficient.

3. The covered entity itself may (without satisfactory assurances from a party) provide notice to the patient OR may seek a *qualified protective order* from the involved court or administrative tribunal or convince the parties to stipulate to such order.

[i] All of you are undoubtedly familiar with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Privacy Regulations ("Privacy Rule") imposed under HIPAA, which went into effect as of April 14, 2003. Under the privacy Rule there are certain requirements that must be met before disclosing medical records pursuant to a subpoena request. Such requirements are not easily understood and sometimes difficult to interpret. Additionally, further complicating matters, is the existence of the physician-patient privilege, which may prohibit an entity from disclosing records without the patient's consent. What are organizations to do? How do you know when it is appropriate to disclose medical records and when you should refuse to disclose such information? This alert attempts to answer such questions by focusing your attention towards simple steps that should be implemented with your organization prior to and when responding to a subpoena request for medical records. (also refer to the flow chart on the previous page).

[ii] The same analysis applies to administrative proceedings (thus, you must determine if the subpoena received is in the course of an administrative tribunal hearing and whether it was signed by the ALJ) and requests for depositions. As an example the Kansas Board of Healing Arts may issue a subpoena to a hospital for Peer Review records, Risk Management records, or both. Each administrative agency subpoena must be reviewed to determine if that agency has the legal authority to access the records requested in the subpoena. Verification of the legal authority of the person wanting access to the records is required by the HIPAA Privacy Rule, 45 C.F.R. § 164.514(h). BOHA subpoenas will have a blue ink Board seal on them to to identify them as authentic.

[iii] If the subpoena is accompanied by a valid authorization that complies with the HIPAA requirements, you may rely on such authorization for disclosure without further analysis. You may only disclose the records specified in the authorization and in the manner so authorized.

[iv] Once you complete the HIPAA disclosure assessment, you must determine if a privilege exists before disclosing the requested information. However, in the December 2000 preamble of HIPAA, it states that it is not a covered entity's responsibility to explain the procedures (if any) available to the individual to object to disclosure. In such cases, there is a presumption that the parties will have ample notice and opportunity to raise objections, including asserting the physician-patient privilege.

[v] The purpose of the privilege is to enable patients to secure complete and appropriate medical treatment by encouraging candid communication between the patient and the physician, free from fear of the possible embarrassment and invasion of privacy caused by an unauthorized disclosure of information.

[vi] Generally a patient may waive his or her privilege by consenting to the disclosure (obtaining authorization under HPAA) or by placing his or her physical or mental condition in issue under the pleadings in the instant case. In such an instance, the party waives his or her privilege with respect to any information that has a bearing on the case in questions. Examples of when a patient may waive his or her privilege include personal injury or malpractice cases filed by the patient.

[vii] *Wesley Medical Center v. Clark*, 234 Kan. 13, 669 P.2d 209 (1983) (While it is true that the physician, or in this case the hospital, is not the "holder of the privilege" that does not mean that a physician, absent statutory authority, may reveal, *ex parte*, information subject to the privilege without the knowledge and consent of the patient or holder of the privilege. Similar restraints apply to confidential records of hospitals and other treatment facilities unless otherwise provided by statute. Records in the possession of Wesley which are subject to the physician-patient privilege under K.S.A. 60-427(b) would not ordinarily be discoverable without notice to and the consent of the holder of the privilege. In any instance where there is a valid question as to whether the privilege applies, the court should hold an in camera inspection to determine if the information sought is actually subject to the privilege and what protective orders should be issued. However, the existence of a valid physician-patient privilege as to some of the documents or proceedings of the peer review committees does not compel or justify a blanket protective order refusing discovery of all records and documents. The determination of the existence of the physician-patient privilege must be determined upon a case-by-case or document-by-document basis after the assertion is made that the requested information is actually subject to the privilege. 234 Kan. at 20.)