

ATTORNEY REQUESTS FOR MEDICAL RECORDS

COPIC frequently receives inquiries from health care providers after they receive a medical records request from an attorney. These requests can occur in a variety of situations:

- ➔ When you are treating a patient involved in a motor vehicle accident, or a patient who is under investigation in a criminal situation such as a DUI or an assault and battery.
- ➔ Custody battles between parents also result in requests for records from attorneys involved.
- ➔ Requests may involve an attorney investigating whether to bring a medical malpractice claim.



Different legal rules may apply depending on who makes the request, whether it is an informal request or a subpoena, or if the request is tied to a criminal case.

INFORMAL REQUESTS BEFORE A LAWSUIT:

Who usually requests the records:
The patient or the patient's attorney.

What to know: If the patient, or the patient's personal representative¹ asks you to send medical records to an attorney, then the patient's "right of access" under HIPAA applies and the records must be provided as soon as reasonably possible, but no later than 30 days. If unusual circumstances exist, beyond the control of the provider, one additional 30-day extension may be obtained by notifying the patient of the circumstances and the extension. If the request doesn't come through the patient, then the provider must have a HIPAA-compliant authorization signed by the patient, before care is discussed or copies of records are provided.

REQUESTS AFTER A LAWSUIT IS FILED:

Who usually requests the records:
One or more of the attorneys involved.

Informal requests: A HIPAA-compliant authorization signed by the patient or the patient's personal representative must be obtained before any information may be disclosed, oral or in writing.

Subpoenas: Under HIPAA, providers can disclose protected health information (PHI) in response to a subpoena, and without a signed patient authorization, as long as there is a written statement certifying that reasonable efforts were made (1) to notify the patient of the subpoena, or (2) to secure a qualified HIPAA protective order. For notice to the patient, the certification must

show that a good faith attempt was made to provide written, sufficient information about the litigation to permit the patient to raise an objection, that the time to raise an objection has elapsed, and that no objections were filed or all objections filed were resolved and the request is consistent with the resolution.

For the protective order, the written certification must demonstrate that the parties have agreed to a qualified protective order and have presented it to the court; or that the party seeking the PHI has requested a qualified protective order. With either option, providers should check with an attorney to determine if the law in their state imposes more stringent requirements.

OUT-OF-STATE SUBPOENAS

Providers may receive subpoenas from out-of-state attorneys or record retrieval services. **Generally, a subpoena, whether civil or criminal, is not valid in any state except the state in which the action is pending** (unless the attorney goes through a special process to issue a subpoena for the out-of-state proceeding). Providing records to an invalid subpoena could result in civil claims for breach of confidentiality and administrative action for violation of HIPAA.

CONCLUSION

Many providers are unfamiliar with the rules pertaining to responding to subpoenas. We encourage you to discuss these principles and educate your staff about properly responding to an attorney request for information. COPIC-insureds can contact the COPIC Legal department, and we will be happy to help you walk through these requirements or recommend an attorney who can represent you in responding to a request.

¹ Under HIPAA, a person authorized to act on behalf of the patient in making health care related decisions is the patient's "personal representative." Typically, this is a person holding a medical power of attorney. An attorney does not usually have the authority to make health care decisions for a patient-client and would not normally be a "personal representative."