



## #BI4613 HIPAA Compliant: Medical Deposition Subpoenas

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## BI4613 HIPAA Compliant: Medical Deposition Subpoenas

This document has two major divisions:

Law summary and report on HIPAA Title II<sup>1</sup> requirements; and

Checklist for HIPAA compliant issuance of a subpoena to obtain medical information. Includes form language to use for the notice of issuance and for the reasonable assurance certificate.

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<sup>1</sup> Title 1 of the Health Insurance Portability and Accountability Act (HIPAA) protects health insurance coverage for workers and their families when they change or lose their jobs. Title II of HIPAA, known as the Administrative Simplification (AS) provisions, contains the provisions relevant to the protection of medical records from unauthorized disclosure.

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## Law summary and report on HIPAA requirements

### The HIPAA ground rules

*HIPAA rules are not a prohibition against the use of subpoenas for medical records, but HIPAA does set out some ground rules that absolutely have to be followed. You have to know the HIPAA ground rules. HIPAA:*

- Gives patients a legal right to access to their medical records plus authorizes patient-initiated changes in the content of medical records;<sup>2</sup>
- Gives patients more control over their personal health information by preventing unauthorized disclosure by the health providers; and
- Forbids health care providers disclosing personal health information unless the HIPAA specified formalities and authorization have been met.

The federal HIPAA standards are a national uniform federal floor of privacy protections and patient access to records.

State laws providing additional or different protections and access to medical records still exist. In general, the state laws are less protective of privacy than the federal law, but more expansive on access to medical records. The usual conflict of laws resolutions apply: if the state law grants more protection or access to the patient than the federal law grants to the patient, the state law controls. If the state law grants less protection or access, the federal law trumps and controls.

This report is to help understand:

- The HIPAA basic premises and the core regulation at 45 *CFR* Subtitle A, § 164.512s;
- The patient's HIPAA right of access and correction of his/her medical records; and
- The HIPAA requirements for discovery, for trial court orders, and for a subpoena duces tecum (deposition or trial).

### Background of how the medical provider views your attempt to use a subpoena for HIPAA protected records of their patient.

Until 2003, health care providers automatically honored a deposition subpoena to provide copies of the medical records. Then along came HIPAA - a federal statute with penalties aimed at every health care provider!

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<sup>2</sup> Under HIPAA medical providers can charge a reasonable fee for copies of records. You can be charged for postage or delivery fees if you ask that records be sent to you. HIPAA allows 30 days for a provider to respond to a patient's request for records, with one 30-day extension for good reason

Every medical provider has to have “adequate documentation” that they released every record properly in accordance with HIPAA requirements. Medical providers have to have this “adequate documentation” in their records. Every hospital has endured on-site audits of their procedures in order to obtain accreditation to be a licensed hospital. Medical providers receiving Medicare payments (practically every hospital and doctor or those providing medical services) are subject to on-site audits of their procedure. Moreover, to get medical malpractice insurance, most doctors and other medical providers are subject to an insurer’s audit. Part of each of those audits includes whether they are complying with HIPAA. Furthermore, medical providers are constantly warned by their professional associations and journals about the penalties for violating the federal law on privacy.

The threat to the medical provider is that releasing medical information improperly can cause federal imprisonment, fines, and being barred from participation in Medicare payments. No excuses, and ignorance or carelessness of an employee are not defenses to the federal penalties. That threat is enough to make any medical person paranoid. So — medical providers have become excessively cautious. Their perception of what they must do is often exaggerated. HIPAA medical record privacy provisions are less restrictive than most medical providers think they are. The fact of legal life is that if you have a personal injury case you are going to run into paranoiac, excessive, HIPAA - based refusals from medical providers.

### Understand the HIPAA basic premises

As you investigate medical facts about the injured person (whether your client or the other side’s client) understand the basic premises of HIPAA.

1. HIPAA is directed only at health providers and health insurers (and medical clearing houses), not to other persons.<sup>3</sup>
2. HIPAA prevents health care providers from disclosing medical information (“protected information” ) without the patient’s informed authorization. HIPAA does this by requiring the authorization to be in writing and follow federal specifications. For two examples: the authorization cannot allow disclosure of psychiatric records unless they are specially mentioned; and the authorization must “self-expire” by a set date so it is not used years later.
3. HIPAA adds a statutory layer to the federal rules regarding procedure for serving subpoenas. HIPAA requires the party issuing a subpoena or setting a deposition of a medical provider to give “documentation of satisfactory assurance” to the involved medical care provider that reasonable efforts have been made to ensure that the patient has been given notice of the request, and prevents the health provider from disclosing the medical information in a deposition unless such


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<sup>3</sup> Title 1 of the Health Insurance Portability and Accountability Act (HIPAA) protects health insurance coverage for workers and their families when they change or lose their jobs. Title II of HIPAA, known as the Administrative Simplification (AS) provisions, requires the establishment of national standards for electronic health care transactions and health insurance plans, and employers. The privacy regulations are meant to encourage the widespread use of electronic data interchange *within* healthcare providers and insurers, by adopting privacy rules to prevent the data unintentionally being disclosed *outside* the health providers.

“documentation of satisfactory assurances” have been given. That “documentation of satisfactory assurance” is what the medical provider has to keep in their file, waiting for the audit of government, accreditation team, or insurer.

4. Under HIPAA, an order or subpoena that is signed by a judge is treated just like any other court order, and the records are to be produced without any other requirements or procedures. (However, note this is the effect of a subpoena or order actually signed by a judge. Most subpoenas are signed by a clerk or by an attorney, and there still is debate over the HIPAA-avoidance power of the usual subpoenas which are not actually signed by a judge.)

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 **WARNING.** It is clearly established that if you are the attorney for a health care provider, you as the attorney, are defined by HIPAA as a “health care business associate.” Persons and entities who are “business associates” of a health provider are subject to the federal HIPAA regulations. The regulations provide that the health care provider can give their business associates protected information only if they sign a business associate agreement in which they agree to be bound by the same HIPAA privacy regulations as the health care provider client. This impacts you, if you are the medical malpractice defense attorney for a hospital or you are suing to collect a bill for a doctor.

We repeat: an HIPAA “business associate” agreement is required for a health provider to give their attorney – or their insurer – medical information about the plaintiff suing them. The health care provider’s attorney, because of signing the agreement, is bound by the same HIPAA privacy regulations as his/her client, and cannot disclose the “protected information” to anyone else, such as counsel for a co-defendant or the insurer for the client. The provider’s client’s insurer technically should be able to sign a separate “business associate” agreement with the insured’s attorney who has signed a “business associate” agreement, but to avoid some traps, have the insurer for a provider get the information directly from the insured, not from the insured’s attorney. Tread carefully --- and read the current regulations — if you are the attorney for a health care provider.

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### The patient has an HIPAA right of access and correction of medical records

The legal fact that a patient owns his/her own medical information, and the patient’s health information should be released to that patient is codified in the HIPAA regulations. HIPAA, a federal law that applies to medical care providers, provides that patients generally are able to:

- (1) see and obtain copies of their medical records<sup>4</sup> and

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<sup>4</sup> CFR § 164.524 “Access of individuals to protected health information. (a) Standard: Access to protected health information. (1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set, *except for: (i) Psychotherapy notes; (ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding; and . . .*”

- (2) request corrections if they identify errors and mistakes.<sup>5</sup>

This second point is important to a plaintiff in a personal injury case. It is altogether too frequent that medical records contain errors of fact in recording medical history, to the subsequent disadvantage of the plaintiff in presenting the case to the jury. Before your personal injury client goes to court, check the medical records and demand correction of errors and mistakes in the record that will present erroneous information to the jury. Furthermore, if you do not demand correction of errors in the medical record, you will have a tough time convincing a jury that there is an error after the defense points out that you had the record for a year and never requested a correction as authorized under federal law.

### HIPAA impacts ex-parte interviews of patients' doctors by defense attorneys

In past years, in some jurisdictions, some judges have denied defense attorneys the opportunity to interview claimants' doctors without permission or knowledge of the claimant. The denial has been based on legal ethics and a revulsion against secret cooperation between an adverse attorney and a person's own doctor.

Other judges have held that defense attorneys can interview plaintiffs' doctors outside of formal discovery and without the knowledge or participation of the plaintiff's attorney. The rationale has been that the lawsuit automatically waived the doctor-patient privilege, and so the medical doctor was just like any other witness - fair game for an investigator to interview outside of formal discovery.

Even when medical privilege is waived by the patient — HIPAA does not waive the federal prohibitions and penalties directed to the health care provider about disclosing patients' records without certain protections being in place. It would seem logical that the courts should look at HIPAA's penalties against the medical providers for unauthorized disclosures, and require defense attorneys to obtain patient authorization to have a conference with plaintiff's doctor outside formal discovery. (As a matter of legal ethics, defense lawyers should not be allowed to ask doctors to break federal law on disclosure of medical information without complying with HIPAA.) However, the trial courts' rulings in various states have not been uniform.

### HIPAA requirements for trial orders and subpoenas duces tecum

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[Emphasis supplied. It's a good idea to read the full set of exceptions.]

<sup>5</sup> CFR § 164.526 "Amendment of protected health information. (a) Standard: Right to amend. (1) Right to amend. An individual has the right to have a covered entity amend protected health information or a record about the individual in a designated record set for as long as the protected health information is maintained in the designated record set. (2) Denial of amendment. A covered entity may deny an individual's request for amendment, if it determines that the protected health information or record that is the subject of the request: (i) was not created by the covered entity, unless the individual provides a reasonable basis to believe that the originator of protected health information is no longer available to act on the requested amendment; (ii) is not part of the designated record set; (iii) would not be available for inspection under § 164.524; or (iv) is accurate and complete. . . ."

The regulations allow you as an adverse attorney to get protected health information for judicial proceedings, such as a deposition or trial, using a subpoena or court order. But let's face it: health providers have had an easy to follow rule drilled into them: "Don't disclose medical information without the patient's signed request." That may be an incomplete statement of the law, but it's easy to remember and therefore has been memorized by most medical providers and their employees. Therefore, medical providers tend to resist perfectly legal requests that do not involve patients signing an authorization.

If you are an attorney using a subpoena or a notice of taking deposition to get records, you need to be ready to convince the health provider to testify or produce records. So read and know the federal regulations before you demand medical information. The core information you need to know for a discovery order or subpoena duces tecum is at 45 *CFR* Subtitle A, § 164.512. It reads as follows. [We have cut out rarely used portions, given bolding emphasis, and added some formatting to help you skim more quickly through the government mumbo-jumbo!]

**(A)....(e) Disclosures for judicial and administrative proceedings. (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:**

**(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or**

**(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:(A) The covered entity receives satisfactory assurance, as described in paragraph(e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; ....**

**(B).... (iii) For the purposes of paragraph(e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); ( B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and ( C ) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:(1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.**

**(iv)....(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under**

paragraph (e)(1)(ii) of this section, **an order of a court or of an administrative tribunal** or a stipulation by the parties to the litigation or administrative proceeding **that: (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.**

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

What the above obtuse HIPAA regulation boils down to is that:

- either (1) serve the medical provider with a court order:
  - directed to the medical provider,
  - which order specifies the protected health information to be produced, and
  - which order prohibits the use of the information outside the litigation.
- or (2) use a deposition subpoena or a trial subpoena.

If you take the second route, then (a) you must tell the patient beforehand of your expected action to see the medical records, then (2) give the medical provider written “reasonable assurances” that you have complied with the law and that more than 10 days previously you had served the patient (or his/her attorney) with a copy of the notice of deposition and the subpoena duces tecum now being served on the medical provider. Specifically: the HIPAA “reasonable assurances” requirement places the burden on the requesting party to provide documentation showing:

- A good faith attempt was made to give the patient written notice of the records request;
- The notice contained sufficient information about the litigation or proceeding to enable the patient to make any available objection to the proper court or tribunal; and
- The time to object has expired, and no objections have been made.

The following checklist puts all this into check the box format.

## Checklist: Serving Subpoena on Medical Provider

When you are serving a subpoena on a medical provider: 99% of the time the following five step checklist is applicable.

[In the unusual circumstances when you cannot perform one of the items in the checklist (e.g., you cannot find the patient to give the required 10 days advance notice of service of the subpoena on his/her medical provider) – then read the current HIPAA regulation for your alternative.]

If the patient does not have an attorney, simply direct the notices to the patient him/her self, instead of an attorney.

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**Step 1. Prepare the Subpoena.** The subpoena must name the patient involved and reasonably describe the medical records you are requesting. (HIPAA regulations may mystify you because they refer to a “document of request” instead of the simple word “subpoena”.)

**Step 2. Prepare a Cover Letter to Patient’s Attorney** that contains all the items shown in the following form letter.

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[Date of Letter]

Re: [Case Name] and your client - [Patient's Name]

[Use an inside address which gives the Patient's Attorney's full name.]

Enclosed is a copy of a subpoena duces tecum which I have prepared. The subpoena directs [Deponent's Name] to produce medical information and records pertaining to your client, [Patient's Name].

If no objection is made within ten (10) days, I will serve the subpoena on [Deponent's Name].

Yours truly,

[Your usual signature block, with your personally affixed signature]

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**Step 3. Send Cover Letter to Patient’s Attorney (with required enclosure):**

- the Cover Letter to Patient's Attorney, and;
- a copy of the subpoena.

✉ Send these by certified mail, *return receipt requested*, to the patient's attorney.

✉ Also send copies of the subpoena and the Cover Letter to Patient's Attorney to all other attorneys involved in the litigation.

**Step 4. Prepare your “reasonable assurance certificate”**

A “reasonable assurance certificate” is, simply put, a letter signed by you personally that contains language such as the following form language (your “reasonable assurance” to deponent).

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[Use your firm letterhead]

[Date of Letter]

Re: [Case Name] and your client - [Patient's Name]

[Use an inside address which gives the name of the person (or institution) being subpoenaed (i.e., use the name that is on the subpoena)]

You are being served with a subpoena which legally authorizes you to attend and deliver the medical information called for by the subpoena.

For your benefit and records, we are enclosing documentation showing previous notice and service of the attached document of request (subpoena) on the attorney of record for the person whose health information has been requested (patient).

The notice to the patient (1) contained sufficient information about the proposed action regarding the health information to allow the patient to bring an objection, and (2) provided a time period during which an objection should be raised. This time period expired and no objection has been raised.

This is your reasonable assurance that reasonable efforts have been made by the party serving this document of request to give notice to the patient who is the subject of the requested health information.

Please phone me if you have any questions.

Yours truly,

[Your usual signature block, with your personally affixed signature]

**Step 5. Wait 10 days after the patient’s attorney actually received your “Cover Letter to Patient’s Attorney,” then serve the deponent with four items.**

Ten days after the patient’s attorney actually received the “cover letter to patient’s attorney” (not when you mailed it out!) you can take the final step of actually serving the subpoena on the deponent. So after you have received the return receipt back from the post office, count off the 10 days from the date of the post office delivery date. That is the date after which you can serve the deponent.

You must have these four items served together on the deponent.

- Your reasonable assurance certificate;
- The deponent’s copy of the subpoena being served on him/her/it;\,
- A copy of your cover letter to the patient's attorney;, and
- A copy of the post office return receipt showing delivery to the patient’s attorney.

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