

YOU'VE BEEN SERVED

A Practical Guide to Managing Subpoenas

What is a Subpoena?

- Definitions:
 - Subpoena: a command to appear at a certain time and place to give testimony upon a certain matter (civil or criminal). Failure to obey a subpoena may result in civil penalties (\$\$\$) or in rare cases, criminal sanctions for contempt.
 - Deponent: one who testifies to the truth of certain facts, e.g. giving under oath testimony which is later reduced to writing.

Your Speaker



- Partner, Gordon & Rees, Scully, Mansukhani, LLP
 - District Hospitals
 - Outpatient Diagnostic Facilities
 - Residential Care Facilities
 - Licensing Proceedings (BRN, BOP, BBS, CMB)
- Vice Chair, CA State Bar, Health Law Comm.
- Counsel to the San Diego Psychological Assoc.
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Types of Subpoenas

- A subpoena may command either:
 - Testimony Only [*Subpoena ad testificandum*]
 - Oral testimony at deposition or trial, including by video
 - Records Only [*Subpoena duces tecum*]
 - May compel production of documents and other items which are in the custody of the deponent
 - Medical, employment and educational records;
 - The allegedly defective ladder in a defective ladder case
 - Electronically stored information (ESI), photos, emails, texts
 - Records and Testimony

What is a Subpoena?

- See examples attached at back of slides
 - Deposition Subpoena for the Production of Business Records (State Court)
 - Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Federal Court)
 - Notice to Consumer or Employee and Objection
 - Attachment 3 (or "A" if for Federal Court)

Content of Subpoenas

- Most Common: business records only
 - Directed to custodian of records or other person who can personally authenticate the records
 - Specifically describe each individual item or category of items sought
 - Specify the date by which the deponent must comply, no sooner than 15 days from the date of service and at least 5 days after the notice of privacy rights has been served on the consumer

What should come with a subpoena?

- Personal records (e.g. student medical or employment records) - subpoena must be accompanied by:
 - The consumer’s written release of records; **or**
 - Proof of service of the Notice to Consumer that the records are being subpoenaed so he or she can seek counsel and/or a protective order

Sanctions

- Subpoenas may be challenged but not ignored
 - Bench warrant for the deponent’s arrest (rare)
 - Up to \$1,000, 5 days in jail, or both
 - Payment of attorneys fees
 - Additional monetary sanctions for “flouting discovery process”
 - Potential civil action by aggrieved party
- Truly inadvertent failure generally excused

How do I get “served” with a subpoena?

- “Served” and “service” refer to the manner in which a subpoena is delivered
- Strict legal requirements:
 - All required documents included (see prior slide);
 - Personally delivered (not by mail or email)
 - On the deponent or custodian, or any agent or employee authorized to accept service;
 - By any person (need not be over 18 and may be by a party to the action)

Privacy Issues

- FERPA
 - The Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; 34 CFR Part 99)
 - Protects the privacy of student education records
 - Gives parents rights with respect to their children's education records. These rights transfer to the student when he or she turns 18 or attends a school beyond the high school level.
 - Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.

Can I just ignore the subpoena?



Privacy Issues

- FERPA Cont’d . . .
 - School records cannot be released without the written consent of the parent, or for students over 18, the eligible student, **except** in response to:
 - School officials with legitimate educational interest;
 - Other schools to which a student is transferring;
 - Specified officials for audit or evaluation purposes;
 - Appropriate parties in connection with financial aid to a student;
 - Organizations conducting certain studies on behalf of the school;
 - Accrediting organizations;
 - **To comply with a judicial order or lawfully issued subpoena;**
 - Appropriate officials in cases of health/safety emergencies; and
 - State and local authorities, within a juvenile justice system

Privacy Issues (Medical Records)

- CMIA
 - Confidentiality of Medical Information Act (Cal. Civ. Code § 56 et seq.)
 - A provider of health care . . . shall not disclose medical information regarding a patient . . . without first obtaining an authorization, except that the provider shall/must disclose medical information if the disclosure is compelled by any of the following:
 - By a court pursuant to an order; or
 - By a party to a proceeding before a court or administrative agency pursuant to a subpoena . . .

Privacy Issues

- HIPAA Privacy Rule
 - provides for confidentiality of medical records and governs the use and disclosure of protected health information (PHI) by covered entities that have access to that information and that conduct certain electronic health care transactions. 45 C.F.R. § 164.502.

Privacy Issues

- Key CMIA Definitions
 - Medical information
 - any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment.
 - "Individually identifiable" means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, email address, phone number, or SSN, or other information that, alone or in combination with other publicly available information, reveals the individual's identity.

Privacy Issues

- HIPAA Privacy Rule
 - A covered entity (CE) or business associate (BA) may not use or disclose PHI, except as permitted

Privacy Issues

- Key CMIA Definitions
 - "Patient" means any natural person, **whether or not still living**, who received health care services from a provider of health care and to whom medical information pertains

Privacy Issues

- HIPAA Privacy Rule
 - Allows disclosure of PHI without a patient's authorization or opportunity object
 - A CE **may** disclose PHI in the course of a judicial or administrative proceeding, in response to:
 - an order of a court or administrative tribunal, provided that the covered entity discloses only the PHI that is expressly authorized by such order; or
 - a subpoena . . . that is not accompanied by an order of a court or administrative tribunal, if the CE receives a written statement and accompanying documentation showing that
 - » The individual has received notice of the request and been provided an opportunity to object or seek protective orders

Practical Pointers

- To do immediately
 - communicate with risk (manager or department)
 - seek legal counsel if appropriate
 - Confirm you have a written auth by the consumer
 - Identify where the record (and all its parts) are kept
- Do not . . .
 - put off or bury in inbox
 - call subpoenaing party/atty without legal counsel
 - release records without approval from risk or counsel
 - alter records in any way although they should be reviewed with risk/counsel for completeness

- Questions

Practical Pointers

- May notify individual of receipt of subpoena
- May review records with the individual for consent
 - Consent must be informed and voluntary, so query if consent is informed if individual does not know content
 - Obtain written authorization where possible – This may be an ethical obligation e.g. psych records
- If notified in any way that individual refuses, records should not be produced
- Discussions with risk/counsel do not go in the chart

Contact Information

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Special Considerations

- Psychotherapy Records
- Drug and Alcohol Treatment Information
- Information related to sexual assault
- Disagreements with institution re release