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CSI: Your office

What to do when you get a subpoena, CID, or search warrant

Do you and your staff know what to do if you are served with a subpoena? Do you know what a Civil Investigative Demand (CID) is? How should you respond if a government investigator appears with a search warrant? As Douglas Adams (of “Hitchhiker’s Guide to the Galaxy” fame) would say, DON’T PANIC. More importantly, contact your attorney right away.

It is important to understand the differences between these investigative tools. A subpoena is a command to either appear to testify in a legal proceeding, to produce documents, or both. A subpoena that requires the production of documents is known as a subpoena duces tecum. In Latin, “subpoena” means “under penalty,” and refusal to comply with a valid subpoena may result in fines or even imprisonment. A subpoena may be issued by an attorney on behalf of a court, or by the court itself.

Your attorney should be able to determine if the subpoena is valid and enforceable. A subpoena must generally be served personally, i.e., hand-delivered, either to the person named in the subpoena or to another party at their place of business, although it also may be served via certified mail if the recipient signs a verification. Many subpoenas for patient charts are simply addressed to

the custodian of medical records.

Your attorney also should verify that the subpoena was issued by a court with appropriate jurisdiction. Physicians sometimes receive subpoenas from out-of-state courts, which in most cases are not enforceable. Don’t try to determine this on your own – let your attorney make the call.

Grand jury subpoenas may request testimony or documents or both. Unlike a trial jury (“petit jury”), the role of a grand jury is to determine whether there is sufficient evidence (probable cause) to return an indictment, i.e., charge someone with a crime. A grand jury may be investigating a number of unrelated criminal violations at the same time. If you receive a grand jury subpoena, that generally means a criminal investigation is underway. Witnesses called to testify before a grand jury may not take attorneys with them into the grand jury room, and grand jury proceedings are subject to strict secrecy rules.

Civil Investigative Demands (CIDs) are similar to civil subpoenas, and may be issued by the Office of Inspector General (OIG) of the Department of Health and Human Services, the FBI, the U.S. Attorney’s office, and certain other government agencies. They may include interrogatories, which are a list of questions that must

be answered under the penalty of perjury, as well as in-person testimony and/or demands for production of documents.

Search warrants must be approved by a judge or magistrate upon a showing of probable cause, based on a sworn affidavit made by a law enforcement officer attesting that a criminal offense has been committed or is about to take place. The warrant must describe in detail the areas to be searched and the items to be seized. Although you may request that the government agents wait until your attorney arrives or is consulted by telephone before beginning the search, they are not obligated to honor that request. (Or as the Grateful Dead famously admitted, “If you’ve got a warrant, I guess you’re going to come in.”) In either event, it is important to advise the agents that the search may include documents or information protected by the attorney-client privilege, the attorney work product doctrine, the physician-patient privilege or other applicable privilege, and flag those documents if possible. You should identify the agent in charge and the agency he or she represents, and get a copy of the warrant and inventory of seized items to transmit to your attorney immediately. You cannot obstruct or interfere with the search, but if the agents seize items you believe are

privileged, you should identify them so that your attorney can file a motion to suppress those documents.

If the search warrant includes computers, you may want to ask the agents if they can copy the hard drives and leave them in your possession so that you can retain the information necessary to operate your practice. Many investigators have the technical capability to image a hard drive on-site, which makes an exact copy of its contents.

When serving a subpoena, CID or warrant, agents may ask you and your staff questions. Although you should be cooperative and professional, you are under no obligation to answer their

inquiries. You may not discourage or forbid your employees from speaking to the agents, but you may advise them that they are not obligated to answer questions if they do not want to do so. Many practices and other organizations will close for business and send patients and non-essential personnel home during a search. It is common but not required for an employer to offer to pay for separate legal representation of staff who are questioned in a government investigation. It also is common for investigators to visit individuals at their home in the early morning hours or in the evening, in hopes of eliciting unguarded statements. The best approach is to politely decline to

answer questions until your attorney is present and refer the investigators to your attorney.

Document preservation and retention

Once you are aware of a subpoena, CID or search warrant, you have certain obligations regarding preservation and retention of documents. Your attorney may recommend a Document Hold Memorandum, which advises all personnel to preserve relevant information and not to delete any relevant electronic records, even if those records would otherwise be deleted

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in accordance with your regular document retention/destruction policy. This includes computer hard drives as well as external storage media such as USB drives, SD cards, cell phones, tablets and other similar devices which may contain evidence that has been requested in the investigation.

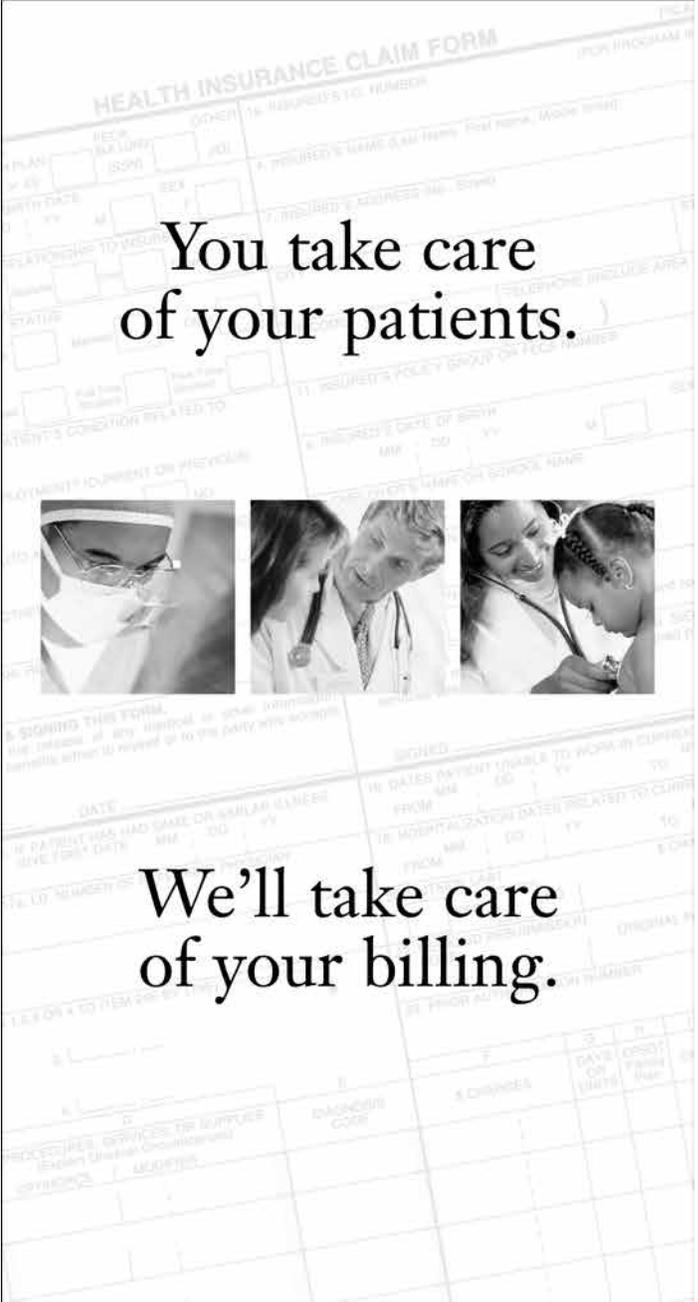
HIPAA compliance

If patient information has been requested, what about HIPAA? There is a specific exception that applies to law enforcement subpoenas and other enforceable, official demands for production of protected health information (PHI). Under that exception, a covered entity may disclose PHI for a law enforcement purpose to a law enforcement official in compliance with and as limited by the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer; a grand jury subpoena; or an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that: the information sought is relevant and material to a legitimate law enforcement inquiry; the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and de-identified information could not reasonably be used.

Note: Subpoenas issued by an attorney on behalf of a private litigant in connection with discovery for a lawsuit require additional protections before you produce PHI. In general, you must comply if the requestor provides assurances that they have notified the patients whose records were requested; the requestor has sought a protective order; or the patient has signed a valid authorization.

Government investigations of physicians are becoming more frequent, but they don't have to cause pandemonium in your professional practice. Experienced legal counsel can help you respond to these investigations and steer you away from making regrettable mistakes.

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