How to Efficiently & Ethically Discover Medical and Personnel Records

July 11, 2017
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AGENDA

• Ethics Basics
• How to Obtain Records
• Meet and Confer Tips
• Using Records
• Sharing Records
• Questions

No portion of this presentation is intended to constitute legal advice - be sure to perform independent research and analysis.

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PRESERVE CLIENT SECRETS

• Rules of Professional Conduct, Rule 3-110
  • Competence = diligence, learning/skill and ability reasonably necessary to perform legal services

• B&P Code § 6068(e)(1)
  • Duty to preserve the secrets of client

• California Ethics Opinion 2016-195
  • “No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one.” Wutchumna (1932) 216 Cal. 564
GUIDELINES OF PROFESSIONALISM


• Non-Binding

• Adopted by local courts

• “An attorney should respect the privacy rights of parties and nonparties.”

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PROFESSIONALISM GUIDELINES

“If an attorney must inquire into an individual’s private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.”

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Attorneys not precluded from inquiry into sensitive matters relevant to an issue, as long as the inquiry is pursued as narrowly as possible.
BASIC COMPETENCE TIP

• Monitor ethics opinions, case law, local rules and other sources to keep abreast of new rules that may apply to records discovery

• The State Bar Rules of Professional Conduct

• Business and Professions Code pertaining to attorneys

• State and Local Ethics Opinions
THE “HOW”: DIFFERENT APPROACHES

Records discovery differs across practice areas:
- Personal Injury
- Medical Malpractice
- Employment
- Other

Example: Seeking records from the employer directly (Labor Code § 1198.5 and others)
THE “HOW”: DIFFERENT METHODS

• Authorization v. Subpoena

• HIPAA Compliant Authorization

Section 164.508 of the final privacy rule states that covered entities may not use or disclose protected health information (PHI) without a valid authorization, except as otherwise permitted or required in the privacy rule.

• Out of State complications
ROLE OF THE SUBPOENA VENDOR

• Act as Deposition Officer
• Obtain the Records Efficiently and Timely
• Ensure Code Requirement Compliance
• Memorialize, Retain and Distribute
• Support Client’s Discovery Efforts
Digitally Stored Signatures

Electronically Stored Information Specification

States to Include the Affidavit from Custodian
DEPOSITION OFFICER
OBJECTIVE THIRD PARTY

- CCP § 2020.420

- Must be Professional Photocopier as defined in the California Business and Professions Code and is an entity that has access to the documents and reproduces it for compensation.

- Registered by the County Clerk

- Must employ a Notary Republic
BASIC HIPAA REQUIREMENTS

• What is HIPAA?
• Privacy Rule
• Security Rule
• Covered entities
• Business Associate Agreements
• Beware of Penalties
Health Insurance Portability and Accountability Act (HIPAA)

- Also known as the Kennedy-Kassembaum Bill
- Signed by President Clinton in 1996.
HIPAA: PRIVACY RULE

Privacy Rule defines and limits the circumstances in which PHI may be used or disclosed.

- To Individuals/Representatives (Authorizations)
- As required by Law (Subpoena, Court Order)
- Incidental Use & Disclosure (Minimum Necessary Rule)
- To HHS (Investigations)
HIPAA SECURITY RULE

Security Rule – intends to ensure security safeguards are adopted to protect PHI which may be at risk.

- Administrative Safeguards
- Technical Safeguards
- Physical Safeguards

Reasonable and Appropriate Standard
COVERED ENTITIES

Healthcare Providers:
- Doctors
- Clinics
- Psychologists
- Dentists
- Chiropractors
- Nursing Homes
- Pharmacies

*If they transmit information in electronic form.*
Business Associate: (45 CFR § 160.103)

A person who is not a member of the Covered Entities Workforce and

- Arranges, creates, receives, maintains, or transmits protected health information (PHI),
  or

- Provides, legal, actuarial, accounting, consulting, data, aggregation, management, administration, accreditation, or financial services to or such covered entity and where the services involve the disclosure of protected health information.
COMPLIANCE REQUIREMENTS
"RULE 45"

• The HIPAA privacy rule
  (45 CFR § 164.501 et seq.)

• Sufficient Notice to Person Involved
• Assurance Forms and Requirements
• Require Authorization in Addition to Subpoena
THE “HOW”: SUBPOENA WORDING

How do you word request so you receive all relevant information?

• Start with standard verbiage (vendor will have this)

• Some facilities have formal description for what constitutes records

• Be mindful that some records are not in the standard file, and to ask for specific records as necessary (specific brain scan, fetal monitoring strips)

• The trick is to know what may be missing (competence)

• Follow up is key
REAL WORLD EXAMPLE: MEDICAL

- Know patient treated with provider 10 years
- Receive 8 years of records
- Compare notes to production (lab order)
- Compare billing to production
- Patient questionnaires
- Emails / Texts
PERSONNEL RECORDS – WHAT CAN PLAINTIFF GET?

Question of scope of discovery and privacy laws, varies by case.

• Other employees’ records in discrimination case?
• Harassment
  • Harasser’s file?
  • Me-too evidence?
• Records of class members in employment class actions?
• Prior discipline in excessive force case?
• Criminal case – peace officer’s personnel records?
PERSONNEL RECORDS – WHAT CAN DEFENDANT GET?

• Plaintiff’s records from prior jobs?
• Plaintiff’s records from subsequent jobs?
• Evidence from all class members?
  • Pre-class cert?
  • Post-class cert?
  • FLSA opt-in plaintiffs?
MEET AND CONFERENCE: POLL

• Garden variety injury in MVA

• Specifically lists one visit with mental health provider in response to Form Rog 6.4 or 6.6

• Are provider’s records fair game?
FIRST LOOK AGREEMENTS

• Tool for plaintiff attorney to competently preserve client’s secrets

• Benefit to both parties - avoid court battle

• Terms
  • Timing
  • Scope
  • Privilege/Redaction Log
  • Logistics for production
  • Preserve rights
  • Cost shifting
  • Consider attorneys eyes only clean copy*
FIRST LOOK EXAMPLE

• Patient claims negligent knee operation

• Defense subpoenas primary care

• Plaintiff requires first look

• Plaintiff heavily redacts

• Redactions relate to medical condition that makes no difference in case

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MEET AND CONFERENCE:
PROTECTIVE ORDER

• Role of Stipulated Protective Orders
  • Start early to avoid delays
  • Bear in mind how protective order relates to filing under seal
  • Standard protective order in jurisdiction?

• Role of Contested Motion for Protective Order in Preventing Invasive Discovery
  • Particularly necessary for third-party discovery
REVIEWING RECORDS

• Check for COR Affidavit
• Determine What May Be Missing
• How digital records changed the game**
• How vendor partners with you to follow up
REVIEWING RECORDS: EXAMPLES

• Medical
  • Plaintiff contends physician did not order medication … proof may be in missing digital record or audit trail

• Employment
  • Labor Code ambiguity with respect to what must be produced
SHARING RECORDS

• HIPAA BAA requirement for medical records

• How to Share - encrypted
  • Example Password – Don’t use birthdate or SSN
  • Cloud
  • Flash drive
  • CD

• Email – Not without password!
Before using a particular technology, take appropriate steps to evaluate:

1) Security
2) Legal ramifications of interception
3) Degree of Sensitivity of the Information
4) What happens if inadvertent disclosure?
5) Urgency of the situation; and
6) Client’s instructions and circumstances
SHARING RECORDS: EXAMPLE

Attorney needs to send medical records to expert today

• May attorney use Google Docs or Dropbox?

• Need HIPAA BA Agreement with expert

• Need HIPAA BA Agreement with vendor

• Plan in advance
Attorney’s deadline to file motion is today

• Attorney just now realizes attached records contain SSNs

• May attorney e-file without redacting?

• Do you really need the exhibit?

• Read every single page of your exhibits and avoid attaching the wrong documents
TOP 5 TIPS

1. Be aggressive in fulfilling your ethical duty to protect client confidences and respect privacy rights of parties and nonparties

2. Plaintiffs: Take advantage of pre-litigation right to request employee personnel file

3. Defense: Consider the value of a first look agreement

4. Identify what’s missing and follow up

5. Make it a priority to understand HIPAA and identify any actions your office needs to take to be compliant
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HIPAA MEDICAL RECORDS AUTHORIZATION
AUTHORIZATION TO DISCLOSE HEALTH INFORMATION
(14-point Authorization)

Patient Name: ___________________  Health Records Number: ______________
Date of Birth: ___________________

1. I authorize the use or disclosure of the above-named individual's health information as
described below:

2. The following individual or organization is authorized to make the disclosure:

   Address: ____________________________

3. The type and amount of information to be used or disclosed is as follows: (include
dates where appropriate)
   - Problem list
   - Medication list
   - List of allergies
   - Immunization record
   - Most recent history and physical
   - Most recent discharge summary
   - Laboratory results from (date) _______ to (date) _______
   - X-ray and imaging reports from (date) _______ to (date) _______
   - Consultation reports from (date) _______ to (date) _______
   - Entire records
   - Other __________________________

4. I understand that the information in my health records may include information
relating to sexually transmitted disease, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus (HIV). It may also include information
about behavioral or mental health services, and treatment for alcohol and drug abuse.

5. This information may be disclosed to and used by the following individual or
organization:
   Address: ____________________________
   For the purpose of: ____________________

6. I understand I have the right to revoke this authorization at anytime. I understand if I
revoke this authorization I must do so in writing and present my written revocation to
the health information management department. I understand the revocation will not 
apply to information that has already been released in response to this authorization. I 
understand the revocation will not apply to my insurance company when the law 
provides the insurer with the right to consent a claim under my policy. Unless 
otherwise revoked, this authorization will expire on the following date, event or 
condition: _________________________________. If I fail to specify an 
expiration date, event of condition, this authorization will expire in six months.

7. I understand that authorizing the disclosure of this health information is voluntary. I 
can refuse to sign this authorization. I need not sign this form in order to assure 
treatment. I understand I may inspect or copy the information to be used or disclosed, 
as provided in CFR 164.524. I understand my disclosure of information carries with it 
the potential for an unauthorized re-disclosure and the information may not be 
protected by federal confidentiality rules. If I have questions about disclosure of my 
health information. I can contact (insert HIM director, privacy officer, or other officer 
or individual’s name or contact information).

8. A copy of this authorization is as valid as the original. Member/Patient has a right to 
a copy of this authorization.

______________________________ Date

Signature of Patient of Legal Representative

If signed by Legal Representative,
Relationship to Patient

Signature of Witness
Legal Requirements

HIPAA

Section 164.508 of the final privacy rule states that covered entities may not use or disclose protected health information (PHI) without a valid authorization, except as otherwise permitted or required in the privacy rule.

**General Authorization content:** The rule states that a valid authorization must be in plain language and contain at least the following core elements:

- A specific and meaningful description of the information to be used or disclosed
- The name or other specific identification of the person(s) or class of persons authorized to use or disclose the information
- The name or other specific identification of the person(s) or class of persons to whom the covered entity may make the use or disclosure
- A description of each purpose of the requested use or disclosure. The statement “at the request of the individual” is sufficient when an individual initiates the authorization and does not provide a statement of the purpose
- An expiration date or event that relates to the individual or the purpose of the use or disclosure.
  - **For research purposes only** – The statement “end of the research study,” “none,” or similar language is sufficient if the authorization is for a use or disclosure for research, including for the creation and maintenance of a research database or repository
- Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of the representative’s authority to act for the individual must be provided

In addition to the core elements, the rule states that a valid authorization must include:

1. A statement of the individual’s right to revoke the authorization, in writing, and either:
   - A reference to the revocation right and procedures described in the notice, or
   - A statement about the exceptions to the right to revoke, and a description of how the individual may revoke the authorization

   Exceptions to the right to revoke include situations in which the covered entity has already taken action in reliance on the authorization, or the authorization was obtained as a condition of obtaining insurance coverage.

2. A statement about the ability or inability of the covered entity to condition treatment, payment, enrollment, or eligibility for benefits on the authorization:
• The covered entity must state that it may not condition treatment, payment, enrollment, or eligibility for benefits on whether the individual signs the authorization, or

• The covered entity must describe the consequences of a refusal to sign an authorization when the covered entity conditions research-related treatment, enrollment or eligibility for benefits, or the provision of healthcare, solely for the purpose of creating protected health information for a third party on obtaining an authorization

3. A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and may no longer be protected by the rule

**When a Covered Entity Requests Patient Authorization:** The covered entity must provide the individual with a copy of the signed authorization when the covered entity seeks the authorization.

**When a Non-Covered Entity Requests Patient Authorization:** If a non-covered entity (i.e. pharmaceutical company, attorney’s office) solicits a patient’s authorization to release PHI to the non-covered entity, the authorization must contain all elements of a General Authorization as required. See research authorization guidance below.
The officer for a deposition seeking discovery only of business records for copying under this article shall be a professional photocopier registered under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code, or a person exempted from the registration requirements of that chapter under Section 22451 of the Business and Professions Code. This deposition officer shall not be financially interested in the action, or a relative or employee of any attorney of the parties. Any objection to the qualifications of the deposition officer is waived unless made before the date of production or as soon thereafter as the ground for that objection becomes known or could be discovered by reasonable diligence.
SAMPLE BELAIRE WEST NOTICE

UNITED STATES DISTRICT COURT [X],
DISTRICT OF [X]

[case name & number]

NOTICE OF REQUEST FOR DISCLOSURE OF YOUR CONTACT INFORMATION

PLEASE READ THIS ENTIRE NOTICE CAREFULLY.
YOUR RIGHTS MAY BE AFFECTED.

You are receiving this letter because you are, or were, an “Assistant Store Manager” at an ABC Company retail store in [state] at any time between [date] and the present. Three former ABC Company Store Managers, [names], have filed a potential class action lawsuit that is currently pending in the United States District Court, [X] District of California, entitled [name] (the “Lawsuit”). In the Lawsuit, Plaintiffs are seeking unpaid overtime wages for Assistant Store Managers. Plaintiffs’ counsel has requested your contact information because you may be member of the potential class. You are being sent this notice to advise you of your right to opt-out of having your contact information shared with Plaintiffs’ counsel by returning the enclosed post-card by [Insert Date]

Plaintiffs and their attorneys are investigating issues relating to the Lawsuit, including whether Assistant Managers were correctly classified as “exempt” from the overtime laws. To assist in the investigation, the attorneys for the Plaintiffs wish to gather information from potential class members. This notice is to inform you that they have asked to obtain your name, address, and telephone number (“contact information”).

The Court has not yet made any determination regarding the merits of the Lawsuit or whether the Lawsuit should be a class action. However, if the Court does decide that the case should proceed as a class action and that you are included within the definition of that class, you may receive a separate notice. At that time, you may still have the option of being a part of that class, even if you choose not to share your contact information now. You are not obligated to speak with Plaintiffs’ attorneys, ABC Company, ABC Company’s attorneys, or anyone else about the Lawsuit. Whether or not you choose to speak to anyone about the Lawsuit is entirely your choice.

If you DO NOT WANT ABC Company to provide your contact information to Plaintiffs’ attorneys, you must mail in the enclosed postcard no later than ______________ [30 calendar days after mailing].

If you are willing to have ABC Company provide your contact information to Plaintiffs’ attorneys to assist in the Lawsuit on your behalf, you do not need to do anything in response to this notice.

If you have any questions about this notice or the lawsuit, you may contact the attorneys for Plaintiffs at the following addresses and/or telephone numbers.

Plaintiffs’ Attorneys:

[names, contact information, etc.]

DO NOT CONTACT THE COURT
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• Employment
  - Labor Code ambiguity with respect to what must be produced

SHARING RECORDS

- HIPAA BAA requirement for medical records
- How to Share - encrypted
  - Example Password – Don’t use birthdate or SSN
  - Cloud
  - Flash drive
  - CD
  - Email – Not without password!

CAL ETHICS OPINION 2010-179

Before using a particular technology, take appropriate steps to evaluate:
1) Security
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3) Degree of Sensitivity of the Information
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- Need HIPAA BA Agreement with expert
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