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## **To Send or Not to Send:**

*Understanding Your Reporting Obligations in Response to Subpoenas*

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## To Send or Not to Send:

*Understanding Your Reporting Obligations in Response to Subpoenas*

Have you ever received a subpoena or court order requesting or requiring you to send a medical record and been unsure of how to proceed? Or more likely, you had an idea of the steps involved but simply didn't have time to do the research, verification and legwork required to properly address this type of seemingly formal request for records. The legal language used in these documents is often complex, making it difficult for a practice staff to distinguish if it is necessary, and even legal, to produce patient health records in response to the subpoena.

To make matters worse, subpoenas are sometimes drafted to look like a court order, when in actuality they have only been signed by a court clerk. Therefore these subpoenas must be treated differently than a court order. Law offices sometimes use this as a scare tactic to get practices to release patient health information; however, practices need to be wary. If the document you have been served is NOT an actual court order and you release the patient information without proper consent, you could find your practice in violation of HIPAA – or worse, find your practice facing hefty financial consequences for a breach of information.

The privacy rules established by HIPAA impact the way practices must respond to requests for disclosure of a patient's protected health information (PHI). This is no exception when it comes to court ordered and subpoenaed requests for PHI. The devil is in the details, and often your actions must be determined based on a combination of elements: who signed the subpoena or court order, the notice given to the patient, and the patient's wishes.

Understanding how to read these subpoenas and court orders and weighing your obligation under HIPAA to protect patient information is of utmost importance. Yet this task often weighs as a heavy burden on practices trying to comply with HIPAA, distinguish their court ordered obligation, and fulfill the preferences and desires of their patients. When it comes to subpoenas, health care providers and practice administrators often find themselves in the unenviable position of having to choose between responding to a subpoena that is not HIPAA-compliant and in violation of federal law or facing a show cause hearing for failing to respond to the subpoena. This educational article outlines your reporting obligations in different subpoena situations and presents an alternative workflow to evolve records fulfillment in the EMR/EHR age – thereby reducing or eliminating the risk of HIPAA violations by transferring the analysis, fulfillment and liability of records requests/subpoenas.

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## Determining Your Obligation to the Court and Your Patient

When your practice is served a subpoena for protected health information, the first thing to be done is determine whether the subpoena was issued pursuant to a judicial or administrative tribunal order. It is critical to have an understanding of the differences between subpoenas signed by a court clerk versus one that is actually executed as a court order, as these two different situations must be acted upon differently as they relate to your HIPAA obligation.

Another important thing to do is determine whether the issuing court or administrative tribunal has jurisdiction over your practice. Be aware that a practice has no obligation to respond to out of state subpoenas or court orders. The following section details your obligation to the court and your patient in relation to your HIPAA obligations and provides a guide to responding to subpoenas in different situations.

### Obligation to the Court

For many practices, determining the obligation to the court versus the obligation to comply with HIPAA regulations is a gray area. Does the court trump HIPAA, or does HIPAA trump the subpoena? Well, the answer is “it depends”. A practice must act differently based on who signed the document and what notifications have been attached to it.

#### *Court Orders Trump HIPAA*

Subpoenas issued pursuant to a judicial or administrative tribunal order override a practice’s HIPAA obligation. The key here is that the subpoena has been signed by a judge with jurisdiction over your practice – not a court clerk or an attorney – signifying that the court order takes priority over HIPAA. Keep in mind if the judge who signed the court order is out of state, you are NOT obligated to respond to the subpoena.

In the situation of a court order, your practice’s obligation to the court has trumped your HIPAA requirements, but what is your obligation to your patient? These types of subpoenas and court orders are treated like any other court order, and require no further assurances or notification to the patient. This means the patient health information can be released, without telling the patient you have done so, and without causing a HIPAA violation.

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### *HIPAA Trumps Court Clerk Signatures*

A subpoena issued by someone other than a judge, such as a court clerk or an attorney, is different from a court order. In this case, the court clerk or attorney signature does NOT trump HIPAA. Releasing a patient's protected health information in this case would be a breach of information and put you in violation of HIPAA. In order to disclose patient information to the party that has issued the subpoena, the subpoena must be a "Subpoena with Notice" or contain a Qualified Protective Order for the information from the court.

A practice receiving Subpoenas with Notice can only disclose PHI to the issuing party if the requirements of the Privacy Rule have been met and the following elements have been satisfied in the subpoena:

*Proof of Service* – notification that the patient or patient's attorney was served a copy of the subpoena and a reasonable time to object has expired. Note that a Notice to Consumer document also satisfies this requirement.

*Declaration* – statement by the requesting party (typically a law office) showing that reasonable efforts have been made to ensure that the patient has been given notice of the request for their protected health information. In this case, the Declaration must prove that the requesting party has made a good faith attempt to provide written notice to the patient, which included sufficient information about the litigation or proceeding for which their PHI is requested, and that the patient has had the opportunity to raise an objection to the court. The Declaration must also state that either the time for the patient to raise objections to the court has expired, that no objections were filed, or that any objections that were filed by the patient have been resolved by the court and the disclosures being sought are consistent with such resolution.

In summary, if the subpoena is not a court order or does not contain a Qualified Protective Order from the court, the only way a practice is allowed to disclose PHI is when the notification requirements of the Privacy Rule have been met. Furthermore, before you can respond to the subpoena, the Privacy Rule requires that you receive evidence that reasonable efforts were made to either notify the person who is subject of the information about the request so the person has a chance to object to the disclosure, or to seek a qualified protective order for the information from the court. Only then, can you release the information being requested in the subpoena.

## Obligation to the Patient

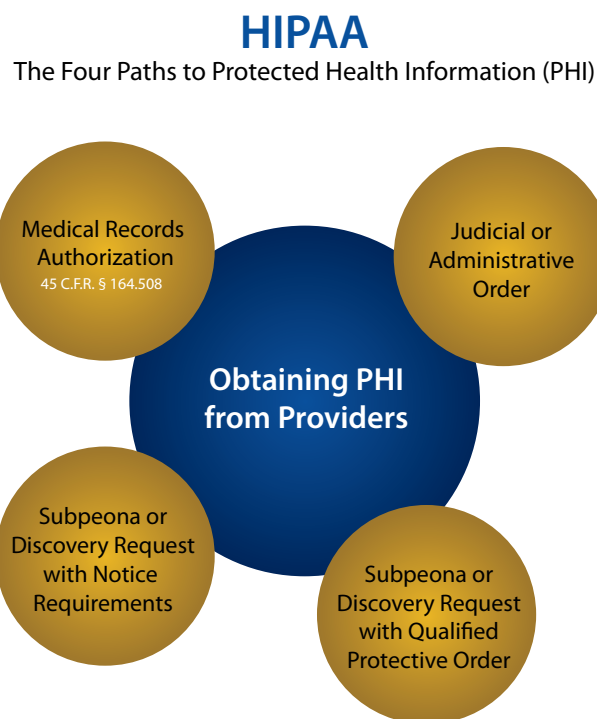
As previously discussed, when the subpoena is not a court order, your practice must default to fulfilling your HIPAA obligation and protect a patient's health information. This means the practice must perform its due diligence and determine if the patient actually wants their PHI released before acting upon the subpoena. Some pertinent questions to ask are the following:

- *Has the patient signed a HIPAA compliant release of information form?*
- *Did the patient receive the proper notice about the subpoena pursuant to the Privacy Rule detailed above?*
- *Did the patient raise an objection to the information being requested in the subpoena? If so, was it resolved?*

Once you have the answers to these questions, and have arrived at the conclusion that the patient received the correct notice and has no objections to the release of their PHI, the next step is to know what patient information can be released. To stay HIPAA compliant, a practice is only allowed to disclose the minimum information specifically identified in the subpoena. This is the same for a court order as well. Disclosing any information above and beyond what is defined in the court order or subpoena is considered a breach of information and exposes your practice to serious fines and civil penalties under HIPAA regulations.

### *Be Aware*

When a practice receives a subpoena for patient information, it must take the utmost care in deciphering all the pertinent parts of the document in order to determine the correct action to take. This task in and of itself is often complex, yet there are a few trends that are making this undertaking even more confusing for practices. The first is that most attorneys may not be well-versed in the nuances of HIPAA and therefore may believe they are doing the right thing by sending a subpoena. The other less common occurrence involves litigators using subpoenas as a scare tactic to get access to patient health information from unsuspecting practices.



For many lawyers, subpoenas are the most obvious and common method of obtaining medical records. In the course of their services to clients they may feel they need PHI and therefore send some form of legal documentation, unaware that HIPAA may actually trump their order. However, sometimes they use subpoenas as a way to put pressure on health care providers to release patient health information without the proper legal notice or language in the subpoena. When a practice is unsure in the first place of the differences in subpoenas and their obligation to the courts, this added pressure sometimes causes them to take actions that put them in violation of HIPAA.

To make matters worse, litigators sometimes draft subpoenas to look like a court order to intimidate and, in some cases, deceive practices and other health care providers into releasing patient records. Occasionally litigators push their intimidation tactics further and even threaten “contempt of court” sanctions to scare practices into providing records. Providers must be aware these tactics are nothing more than attempts at gaining information through lack of experience or intimidation, and practices should take caution before acting on the subpoena.

Analyzing the documents you receive and performing the necessary research and due diligence, although a burden for many practices, will help you determine the appropriate response and limit your liability of HIPAA violation or risk of other legal action.

## Removing the Burden & Transferring Liability

While some health care providers choose to continue to fulfill requests for information themselves in response to court orders and subpoenas, misrepresentation and confusing legal diction makes it challenging for practices. Not to mention the workflows, headaches and possible legal fees involved in fulfilling the subpoena request or getting legal advice on the appropriate way to respond can cause wasted time and resources that could have been focused elsewhere for the benefit of the practice.

In today’s EMR/EHR enabled practice, there are smarter workflows and better options for practices seeking to offload the costs and inefficiencies of records fulfillment and subpoena analysis. Electronic medical record fulfillment services (eROI), such as those provided by DataFile Technologies, offer practices a way to transfer the liability of HIPAA

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violations, eliminate non-patient facing “busywork” and improve overall patient satisfaction. eROI from DataFile can help your practice stay focused on exemplary patient care and remain profitable, and gives you a valuable free consultative resource in the face of the rapidly evolving landscape of electronic records.

### Transfer Liability

Choosing a medical records fulfillment provider like DataFile Technologies allows you to transfer the liability and legal analysis to a Business Associate, removing the risk of violation from your practice. In the case of a subpoena, as a DataFile client you would simply send your subpoena record request to us as soon as you receive it. We will analyze the request and take appropriate action to either fulfill it or perform additional verification steps. We are experts at determining when it is prudent to release patient information and when not, as well as when the situation requires further legal support. You can feel confident that if the subpoena was not executed properly, the associated consequences are ours to bear, not yours.

### Manage Workflows

DataFile also manages the day-to-day and routine record fulfillment workflow and dissemination of information for you as well as handling the specialized requests like subpoenas. We work directly within your EMR/EHR system to analyze and confirm compliant request forms, identify the requested documentation, and securely send the records data. What’s more, we process your records requests daily which yields less busywork for your staff and fewer phone calls to the front desk asking about records status.

### Executive Compliance Consultants

Lastly, DataFile can act as the consultative arm of your practice when it comes to subpoenas, saving you substantially in legal fees. Your compliance officer is often faced with making hard decisions on subpoenas, but he/she can take advantage of DataFile’s executive compliance consultants and entrust the processing of subpoenas to an expert resource.

## About DataFile Technologies

DataFile Technologies is your health care technology partner that offers strategic release of information and scanning solutions. We offer a superior electronic medical record fulfillment process as well as a proven EMR/EHR implementation scanning service. We serve practices that still operate paper-based file systems (non-EHR practices) as well as clients across the nation that are converting to EHR or have EHR platforms already in place. DataFile has trained users in over 15 different major EHRs, which enables us to seamlessly integrate our services with your platform of choice.

At our core, DataFile Technologies provides a unique and highly valuable suite of solutions to free up your staff, free up your time and free up your space. We're looking forward to sharing our knowledge and expertise on subpoenas and HIPAA compliance to help your practice or health system reach the next level of risk mitigation and profitability—please learn more at <http://datafiletechnologies.com>.

**Leverage an entire team** of records specialists from DataFile and focus your staff on exemplary patient care.

