



Document #4208

CMA Legal Counsel

Subpoenas: Guide for Responding

January 2014

Most subpoenas that physicians receive arise out of civil lawsuits during the discovery process prior to trial, and ask for the production of medical records only. This type of request is called a Deposition Subpoena for Production of Business Records. Because patients have a right of privacy with respect to medical information, special requirements apply to subpoenas for medical records.

The following is a step-by-step guide on what to do when a deposition subpoena for medical records is received. It discusses how to check the validity of a subpoena and describes how to respond. Special circumstances and issues which may arise, such as the confidentiality of mental health, drug and alcohol abuse, and HIV test records, are reviewed. There is also a brief discussion of subpoenas issued in other contexts, including workers' compensation cases.

Although the federal privacy regulations enacted to implement the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule) cover subpoenas, they do not change the rules imposed by California law except as noted below.

CAUTION: The mere fact that a physician receives a subpoena for medical records does not mean that the physician must turn over those records. To the contrary, physicians often have a duty *not* to turn over subpoenaed records. Physicians should contact their professional liability carriers and/or attorneys for legal advice.

INDEX TO SUBPOENA DISCUSSION

PAGE

| | |
|---|----|
| Deposition Subpoena Checklist..... | 2 |
| Is Subpoena Valid? | 3 |
| Documentation of Patient Notification..... | 4 |
| Responding to Subpoena | 6 |
| Minors' Medical Records..... | 9 |
| Special Confidentiality Requirements | 12 |
| Lanterman-Petris-Short Act Records (Mental Health)..... | 12 |
| Alcohol or Drug Abuse Records..... | 13 |
| HIV Test Results..... | 13 |
| Records of Deceased Patients..... | 16 |
| Physician-Patient Privilege..... | 15 |
| Enforcement..... | 19 |
| Miscellaneous Subpoenas..... | 19 |
| Subpoena Requiring Delivery of Records to the Court..... | 19 |
| Other Non-Criminal Subpoenas | 20 |
| Workers' Compensation Subpoenas..... | 20 |
| Coroners' Subpoenas..... | 20 |
| Criminal Subpoenas..... | 21 |
| Sample Form - Response to an Invalid Subpoena..... | 23 |
| Sample Form - Privacy Notice to the Patient | 24 |
| Sample Form - Authorization for Disclosure Pursuant to Subpoena | 25 |

CHECKLIST FOR RESPONDING TO SUBPOENAS FOR PRODUCTION OF MEDICAL RECORDS.

Each question in the following checklist is designed to help you respond to a subpoena for medical records. The checklist will refer you to the page in this section where you will find a discussion of the issue, as well as sample forms to assist you in your response.

CAUTION: If the attorney subpoenaing the records disagrees with you at any point, you should contact your professional liability carrier and/or personal attorney.

1. Do you have the records requested (*see* p. **3d**)?
Yes: go to 2.
No: return affidavit stating you have none of the records requested (*see* p.**8**).
2. Was the subpoena issued in a pending civil action in a California court, and not by a governmental agency or an out-of-state or federal court (face of subpoena, *see* p. **3**)?
Yes: go to 3.
No: *see* p. **19** on "Miscellaneous Subpoenas," and contact your professional liability carrier and/or personal attorney.
3. Are you not a party to the suit (face of subpoena, *see* p. **3**)?
Yes: go to 4.
No: if you are named as a party, contact your professional liability carrier and/or personal attorney.
4. Is the subpoena valid (*see* p. **3, i-v**)?
Yes: go to 5.
No: call and inform attorney for subpoenaing party that you are unable to comply with a defective subpoena; follow up with confirming letter. (*See* Sample Form, p. **23**.)
5. Have you received either a written authorization or a proof of service demonstrating that the patient has been notified of the subpoena (*see* p. **3, v**, and p. **4**)?
Yes: go to 6.
No: call and inform attorney for subpoenaing party that you are unable to comply without the required documentation; follow up with confirming letter. (*See* p. **23** for Sample Form.)
6. Is the patient whose medical records are being requested a minor?
Yes: *see* discussion on minors, p. **9**, then go to p. 7.
No: go to p. 7.
7. Do the medical records requested include mental health records, records relating to alcohol or drug abuse patients, or records indicating test results for HIV antibodies?
Yes: *see* discussion of "Special Confidentiality Rules for Subpoenas," p. **12**, then go to 8.
No: go to 8.
8. Has the patient waived the physician-patient privilege (*see* p. **18**)?
Yes: **a)** produce records as requested (*see* p. **6**), **b)** sign affidavit (*see* p. **8**), and **c)** submit statement for costs incurred in responding to the subpoena (*see* p. 7).
No: contact the patient. If the patient states that the records may be disclosed, confirm in a letter to the patient and produce the records. If not, and the patient does not agree to send a letter opposing disclosure (if a non-party to the action) or bring a motion to quash the subpoena (if a party to the action), you should contact your professional liability carrier and/or personal attorney.

DETERMINING WHETHER THE SUBPOENA IS VALID

Deposition subpoenas are generally on a Judicial Council form, similar to the one shown. There are different forms. The rules governing deposition subpoenas are set forth at Code of Civil Procedure §§2020.010 *et seq.* If the subpoena you receive is not on a standard form, or if the subpoena requests your personal appearance; you should contact your professional liability carrier or personal attorney.

CAUTION: The subpoena must be personally served on you or someone authorized by you to accept a subpoena. (Code of Civil Procedure §2020.220.) *You should keep a record of the date you are served.* If the subpoena is not personally served, it is invalid. See Sample Form on page 28.

The subpoena:

i) Must be issued by clerk of the court or attorney handling the lawsuit – (a).

ii) Must be addressed to you, your custodian of records or other person who is qualified to certify the requested medical records – (b).

iii) The date specified for production of records (c1) must be at least 20 days after the subpoena was issued (c2) and at least 15 days after it was served on you and at least 20 days after notice of the subpoena was received by the patient. These limits are to allow a reasonable time for the patient to object to the subpoena, and for you to produce the records.

iv) The designation of records requested must identify, or specify with "reasonable particularity" each item or category of items to be produced – (d).

v) Documentation must be attached to the subpoena demonstrating that the patient has been informed of the request for medical

records. Either a written authorization or a proof of service on the patient is required (*see p. 5*).

For a sample letter responding to an invalid subpoena, see Sample Form p. 22.

SUBP-010

| | |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR (Name): _____ | To keep other people from seeing what you entered on your form, please press the Clear This Form button at the end of the form when finished. |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____ | |
| PLAINTIFF/PETITIONER: _____ DEFENDANT/RESPONDENT: _____ | |
| DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS | CASE NUMBER: _____ |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

| | |
|---|------------------|
| To (name of deposition officer): _____ On (date): _____ Location (address): _____ | At (time): _____ |
| Do not release the requested records to the deposition officer prior to the date and time stated above. | |

- a. by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - b. by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - c. by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):

Continued on Attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: _____

c2
a

(TYPE OR PRINT NAME)
(SIGNATURE OF PERSON ISSUING SUBPOENA)

(Proof of service on reverse)
(TITLE)

Documentation of Patient Notification

For a deposition subpoena for medical records to be valid, it must include documentation that the patient received notification that the records are being subpoenaed. (Code of Civil Procedure §2020.410(d).) Specifically, the law requires that the subpoena be accompanied by either a written authorization for the release of the medical records subpoenaed or a "proof of service" demonstrating that the patient has been "served" with a copy of the subpoena. The only exception is where the patient is subpoenaing the patient's own medical records. (Code of Civil Procedure §1985.3.) Note, however, that the court in [Foothill Federal Credit Union v. Superior Court](#) (2007) 155 Cal.App.4th 632, ruled that the litigation privilege, Civil Code §47, immunizes a physician who responds to a subpoena which is not accompanied by such a "proof of service" or written authorization from any liability for damages in connection with the release of that medical information. This decision is consistent with the California Supreme Court's decision in [Jacob B. v. County of Shasta](#) (2007) 40 Cal.4th 948, that the litigation privilege established by Civil Code §47(b), applies even to claims based on the constitutional right of privacy.

Written Authorization

If there is a specific written authorization for the release of the medical records subpoenaed signed by the patient or the patient's attorney, then you generally can respond to the subpoena. Although the HIPAA Privacy Rule does not expressly acknowledge this alternative, *see* 45 C.F.R. §164.512(e)(1)(ii), many attorneys believe California law controls because it is more protective of patient's rights in this regard. With a written authorization you do not have to worry about the physician-patient privilege, since the patient has consented to the release of the records. Before releasing the records, however, make sure that the medical information contained in the records requested is not protected by special confidentiality considerations (*see* p. 12). Additionally, if the medical records relate to a minor patient, special rules concerning notification and authorization may apply (*see* p. 9).

The following must be on a written authorization for it to be valid:

- It must be signed and dated by either the patient, the legal representative of the patient, the personal representative of a dead patient, or the patient's attorney who is handling the lawsuit. If it is signed by the attorney representing the patient in the lawsuit, you may presume that the patient has consented to the release of the records. (Code of Civil Procedure §1985.3.)
- It must contain a statement that release of the medical records being subpoenaed is authorized.
- It must meet the other requirements imposed by the HIPAA Privacy Rule for authorizations. For more information, *see* [CMA ON-CALL document #4207, "Request by Other Third Parties: CMIA, IIPPA, and the HIPAA Privacy Rule."](#) For a copy of a sample form meeting all these requirements, *see* p. 24.

Proof of Service

If there is no written authorization, then you must receive documentation that the patient has been notified of the subpoena before complying. (Code of Civil Procedure §§1985.3 and 2020.410; 45 C.F.R. §164.512(e)(1)(ii).) This requirement applies to the State, and to county and other local agencies except to the extent the proceedings involve certain bank records. ([Lantz v. Superior Court \(Kern\)](#) (1994) 28 Cal.App.4th 1839.) This documentation will be in a format similar to this "proof of service."

The proof of service must have the following to be valid:

(1) The date of the proof of service **(a)** must be at least 20 days (or if served on the patient by mail **(b)**: in **(c)** California-25 days; in another state-30 days; in a foreign country-35 days), before the date for production of records **and** at least 5 days prior to service upon you or your custodian of records (or if served on the patient by mail **(b)**: in **(c)** California-10 days; in another state-15 days; in a foreign country-20 days). Check your record of the date you were served. *See* p. 5.

(2) A list of the documents which the patient received **(d)**, including a copy of the subpoena and a notice of the patient's right to object, also called "Privacy Notice Pursuant to C.C.P. §1985.3." *See* p. 24.

(3) Be addressed **(e)** to the patient or the patient's attorney.

CAUTION: Except where the minor is emancipated (*see* discussion on minors' records, p. 9), if the patient is a minor, service must be made on the minor's parent, guardian or similar fiduciary, or if one of them cannot be located with reasonable diligence, then on any person having care or control of the minor or with whom the minor resides or by whom the minor is employed and, if the

minor is at least 12 years old, on the minor. Code of Civil Procedure §1985.3(b)(1).

| |
|--|
| <p>PROOF OF SERVICE PURSUANT TO C.C.P. §1985.3</p> <p>I, the undersigned, certify and declare as follows:</p> <p>I am over the age of 18 years and not a party to this action</p> <p>My business address is _____</p> <p>On <u> a </u> (date), I served the attached (d) "Privacy Notice Pursuant to C.C.P. §1985.3," enclosing a copy of the deposition subpoena for business records, as follows:</p> <p>[<u> </u>] by personal delivery of a true copy thereof to: <u> e </u> ("consumer" or attorney of record if "consumer" is a party to the action) at <u> c </u> (address where served)</p> <p>_____</p> <p>or</p> <p>[<u> b </u>] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at _____, California, addressed as follows: <u> e </u> (name of "consumer" or attorney of record if "consumer" is a party to the action) at <u> c </u> (address)</p> <p>_____</p> <p>I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.</p> <p>Executed at _____, California on _____ (date).</p> <p>_____</p> <p>Signature</p> |
|--|

RESPONDING TO THE DEPOSITION SUBPOENA

1. Produce the records in the manner (a) and place (b) requested. . . .

Most commonly, the subpoena will tell you to make the original business records available for inspection at your business address by the attorney, attorney's representative or deposition officer (c) and to permit copying at your business address under reasonable conditions during business hours. You must designate not less than six continuous hours on a date certain for the copying of records, provided you have received at least five business days advance notice (which will almost always occur). (Evidence Code §1560(e).) Many attorneys use "copying services," which generally bring portable copying equipment to the physician's office to copy records.

If the subpoena requests that you mail the copies, you should be aware that there are special rules governing how copies of medical records must be mailed. **Never send out the originals.**

The physician must furnish: (1) a true, legible and durable copy of all records described in the subpoena which are under the physician's control and (2) the affidavit (*see* next page). These must be enclosed in an inner sealed envelope clearly inscribed with the title and number of the action, the name of the physician or custodian of records and the date of the subpoena. This envelope must then be enclosed and sealed in an outer envelope addressed to the deposition officer whose name and address is designated on the face of the subpoena (b, d).

Rarely will you or your records custodian be required to deliver the records personally. If you receive a subpoena requesting your personal appearance, and the attorney subpoenaing the records is not willing to agree to allow you to comply by mailing copies, you should contact your professional liability carrier and/or personal attorney.

SUBP-010

| | | |
|--|----------|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): C | | To keep other people from seeing what you entered on your form, please press the Clear This Form button at the end of the form when finished. |
| TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (Name): | FAX NO.: | |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: | | |
| PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: | | |
| DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS | | CASE NUMBER: |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

| | | |
|----------------------------------|----------|------------|
| To (name of deposition officer): | d | At (time): |
| On (date): | e | |
| Location (address): | b | |

Do not release the requested records to the deposition officer prior to the date and time stated above.

- a** by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
 3. The records to be produced are described as follows (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):

Continued on Attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: _____
 _____ (TYPE OR PRINT NAME) _____ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(Proof of service on reverse) (TITLE) Page 1 of 2

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-010 (Rev. January 1, 2012)

DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

Code of Civil Procedure, §§ 2020.410-2020.440;
Government Code, § 68097.1
www.courts.ca.gov

2. . . . On the date specified

You should comply with the subpoena by producing the records as requested by the date of production of records or 15 days after you receive the subpoena, whichever is longer (e) or any other time frame which you work out with the person issuing the subpoena, (Evidence Code §1560(b)) provided that the date for production may not be earlier than the date and time specified in the subpoena unless you obtain the patient's written consent to the earlier disclosure. If you do reach an agreement with the subpoenaing party to release the records at a date *later* than that set by the subpoena, you should send a confirming letter reflecting the agreement.

If you receive notice prior to producing the records that the subpoena has been withdrawn or the patient has brought a motion to quash or modify the subpoena, you should not produce the records: wait for a subsequent court order or a valid written authorization. (Code of Civil Procedure §1985.3(g), 45 C.F.R. §164.512(e)(1)(iii)(C).)

3. . . .with an affidavit. . . ,

An affidavit must be included with all copies of medical records produced in response to a subpoena, regardless of how they are produced. If some or all of the records requested are unavailable, the affidavit must state that. The law is very specific as to what must be included in such an affidavit. A sample for your use may be found on the next page.

4. . . .and with an itemized statement of costs.

You must submit an itemized statement of your costs to the requesting party. You may demand payment simultaneously with delivery of the records, and you need not produce the records until payment is received. If the subpoena is withdrawn, quashed or modified, you are still entitled to all reasonable costs incurred before you were so notified. The following "reasonable costs" are authorized by law (Evidence Code §1563):

- **Copying Costs:** \$0.10 per page for standard reproduction of documents of a size of 8½" x 14" or less, or \$0.20 per page for records copied from microfilm, or actual costs for reproduction of oversize documents or those which require special processing, and
- **Clerical Costs:** Reasonable clerical costs incurred in locating and making the records available (clerical costs incurred in making the copies are included in the copying costs set forth above), billed at the maximum rate of \$6 per ¼ hour, \$24 per hour, and
- **Postage Costs:** Actual postage costs, and
- **Retrieval Costs:** Actual costs, if any, charged to you by a third person for retrieval and return of records held by that third person, and
- **Copying Service:** If the records are to be produced at your place of business for photocopying or inspection, you may collect a fee of no more than \$15 plus actual costs, if any, charged to you by a third person for retrieval and return of records held by that third person. The \$15 payment must accompany the subpoena when it is served. (Code of Civil Procedure §2020.230(b).) The costs of the copy service are paid by the party seeking the records. (Evidence Code §1563.)
- **HIPAA Covered Physicians:** The HIPAA Privacy Rule allows covered physicians to charge a "reasonable, cost-based fee" for responding to patient access requests. The fee can only include the cost of: (i) labor for copying the PHI requested by the individual, whether in paper or electronic form; (ii) supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media; (iii) postage, when the individual has requested the copy or summary be mailed; and (iv) preparing an explanation or summary of PHI, if agreed to by the individual. (45 C.F.R. §164.524(c)(4).) Note that HIPAA does not allow charges for searching for and retrieving the PHI or for processing the request.

Subpoena Affidavit To Accompany Subpoenaed Medical Records - Sample Form

The information provided in this sample form does not constitute, and is not a substitute for legal or other professional advice. Users should consult their own legal or other professional advisors as necessary for individualized guidance with respect to each particular situation.

To use this document, replace all text that appears in brackets ("["and""]) with the correct information and make sure all blank spaces are filled correctly.

Affidavit to Accompany Subpoenaed Medical Records – Sample Form

AFFIDAVIT

I _____ (custodian of records) do hereby declare:

- 1. I am the duly authorized custodian of the medical records of _____, M.D., or other qualified witness with authority to certify the records.
- 2. The records you seek may or may not contain information regarding certain alcohol or drug abuse records, the results of a blood test for HIV, or information subject to the Lanterman-Petris-Short Act (certain psychiatric, mental health or developmental disability records). This information, if it exists, is protected by special state and federal laws and cannot be released without specific written authorization by the patient or pursuant to other procedures established by law. A subpoena or general authorization for release of medical records is not sufficient.
- 3. [Insert one of the following as appropriate:]

[I do not have the records described in the subpoena which are allowed by law to be produced. This certification is limited to the information in the subpoena; records may exist under other identifying data.] **or**

[These medical records are true copies of all the records in my possession described in the subpoena served on me on _____ (date) which are allowed by law to be released.] **or**

[The records described in the subpoena and authorized by law to be released were delivered to _____ (name of deposition officer, attorney or attorney's representative) for copying at the custodian's or witness's place of business on _____ (date) pursuant to Evidence Code §1560(e).]

- 4. The records contained herein are medical records which were prepared by physicians or other authorized personnel of this office were prepared in the ordinary course of business at or near the time of the act, condition or event described in these records. To the extent these records were prepared by other health care providers, they were obtained by this office during the ordinary course of business.
- 5. These medical records were transcribed from dictation, written by the physician or other health care professional who examined the patient or other (specify) _____.
- 6. I declare under penalty of perjury that the above statements are true and correct and that this declaration was made at _____, California, on _____ (date).

Signed: _____

© California Medical Association 1995-2014

As a public service of the California Medical Association, reproduction of this document by individuals for personal use and not for commercial purposes is authorized as long as each copy clearly includes this copyright notice.

HIPAA PRIVACY RULE

The HIPAA Privacy Rule applies to physicians and other "covered entities" that use electronic means to perform HIPAA-covered transactions, such as the transmission of health claims, remittance or payment advice or any of the other electronic transactions included in the HIPAA Transaction Rule. The HIPAA Privacy Rule applies with respect to all "protected health information" (PHI), whether in paper, oral or electronic form. For more detailed information on HIPAA, including the definition of "covered entity," *see* [CMA ON-CALL document #4100, "HIPAA Overview/Enforcement."](#)

As noted above, the HIPAA Privacy Rule does not materially affect this process, as they authorize the disclosure of protected health information in response to a valid subpoena as described above, without requiring the authorization of the patient or the patient's legal representative. (45 C.F.R. §164.512(e)(1)(ii).)

HIPAA Minimum Necessary Rule Does Not Apply

The HIPAA Privacy Rule generally requires that physicians covered by HIPAA "make reasonable efforts to limit protected health information to the minimum necessary to accomplish the purpose for which the disclosure is sought." However, the minimum necessary rule does not apply to uses or disclosures required by law. (45 C.F.R. §164.502(b)(2)(v).) Because disclosure in response to a valid subpoena is required by law, physicians may disclose the information requested by the subpoena without regard to the minimum necessary rule.

Accounting of Disclosure to Patient

Under the HIPAA Privacy Rule, with some exceptions, a patient has the right to receive an accounting of disclosures of protected health information for the six (6) year period prior to the request. (45 C.F.R. §164.528.) This includes responses to subpoenas for medical information, unless the subpoena was accompanied by the patient's or patient's legal representative's written authorization. For more information on how to comply with the HIPAA Privacy Rule accounting requirements, including a form for logging these disclosures, *see* [CMA ON-CALL document #4001, "Accounting of Disclosures."](#)

HIPAA Provisions Regarding Protective Orders Preempted

Under the HIPAA Privacy Rule, a physician covered by HIPAA is also authorized to produce PHI in response to a subpoena if the physician has received "satisfactory assurance" that the party subpoenaing the information has made "reasonable efforts" to secure a "qualified protective order," that is a court or administrative order or stipulation by the parties that the information will only be used in the proceeding for which the information is being subpoenaed and that the information will be destroyed or returned to the physician at its end. *See* 45 C.F.R. §164.512(e)(1)(ii)(B). Since California law does not authorize production of documents under these circumstances, in the opinion of many attorneys this alternative is not available in California. Under HIPAA, any provision of state law relating to the privacy of PHI that is more stringent preempts HIPAA. (45 C.F.R. §160.203.) "More stringent" is broadly defined as any law that prohibits or restricts a use or disclosure that is otherwise permitted under HIPAA. (45 C.F.R. §160.202.) On the other hand, physicians are authorized to respond 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." (45 C.F.R. §164.512(e)(1)(i); [Lee v. Superior Court](#) (2009) 177 Cal.App.4th 1108 (qualified protective orders are not required when a court orders a covered entity to disclose certain PHI).)

SUBPOENAS FOR MINORS' MEDICAL RECORDS

Physicians should be careful when the records requested concern treatment for which a minor has consented. Generally speaking, when a minor has the right to consent to treatment, that minor also has the right to control the medical records concerning that treatment. When such records are involved, you would be well advised to obtain authorization for the release of the records from the minor. Authorization by the minor's parent or guardian may not be sufficient.

California Law

There are generally two types of statutes which authorize minors to consent to medical treatment. First, there are statutes which authorize minors who have attained a certain status to consent to virtually all types of health care, except certain irreversible and highly invasive procedures such as psychosurgery. Minors authorized to give legal consent to medical treatment under these statutes include:

- Married (or divorced) minors (Family Code §§7002, 7050(e)(1));
- Minors on active duty with the U.S. Armed Forces (Family Code §§7002, 7050(e)(1));
- Minors emancipated by a court order (Family Code §7120);
- Self-sufficient minors (minors 15 years or older living away from home and managing their own financial affairs (Family Code §6922).

Where the minor is emancipated (a, b and c above), the written authorization for the release of medical records must be from, or the proof of service must have been directed to, the minor, not the parent or guardian. With respect to "self-sufficient minors" (d, above), while the law is not clear, physicians would be well advised to discuss the subpoena with the minor and obtain the minor's consent to the release of the records.

Second, there are a number of statutes which authorize minors to consent to certain types of medical treatment. Medical treatment covered by these statutes includes:

- **Pregnancy, Contraception, and Abortion.** Care for the prevention or treatment of pregnancy (including contraception and abortion, **but not sterilization**) for minors of any age (Family Code §6925). The law which would have established a parental or court approval requirement for abortion was overturned as unconstitutional by the California Supreme Court in [American Academy of Pediatrics v. Lungren](#) (1997) 16 Cal.4th 307. The right of a minor to consent to pregnancy related services includes genetic counseling and testing services which, under the law, must be offered to all pregnant women. (Health & Safety Code §125000.)
- **Contagious Diseases.** Care of any infectious, contagious, or communicable disease of the type which must be reported to the local health officer if the minor is twelve (12) or older (Family Code §6926);
- **Sexually Transmitted Diseases.** Care of a sexually transmitted disease if the minor is twelve (12) or older (Family Code §6926);
- **Rape.** Care related to the diagnosis or treatment of rape if the minor is twelve (12) or older (Family Code §6927);

- **Sexual Assault.** Care related to the diagnosis or treatment of sexual assault for a minor of any age (but treating physician must attempt to contact the child's parents or legal guardian unless the physician "reasonably believes" that the parent or guardian committed the sexual assault) (Family Code §6928);
- **Mental Health.** Mental health treatment or counseling on an outpatient basis (not including convulsive therapy, psychosurgery or psychotropic drugs), or residential shelter services, if the minor is twelve (12) or older and mature enough to participate intelligently and either (1) the minor is an alleged victim of incest or child abuse or (2) there is danger of serious physical or mental harm to the minor or others without such treatment. The treating physician must contact and involve the parents unless the physician believes such contact would be inappropriate (Family Code §6924). "Residential shelter services" are defined to mean the provision of residential and other support services to minors on a temporary or emergency basis in a facility which services only minors by a governmental agency or other specified entities or individuals. (*Id.*)
- **Drug or Alcohol Abuse.** Care related to the diagnosis or treatment of drug or alcohol-related problems (not including treatment with methadone or levoalphacetylmethadol) if the minor is twelve (12) or older. The treating physician must contact the parents or guardian and give them an opportunity to participate unless the physician believes such contact would be inappropriate. Moreover, parents have the right to seek such care and obtain the resulting medical information, over their child's objection (Family Code §6929). However, federal laws prohibiting the disclosure of certain substance abuse records may control over this state law. For a further discussion of issues raised by disclosure of this information over a minor's objection, *see CMA ON-CALL document #4205, "Patient Access to Medical Records."*
- **HIV Tests.** The performance of an HIV test for minors twelve (12) or older. (Health & Safety Code §121020.)

These statutes generally authorize a physician to rely on a minor's informed consent. In addition, except as otherwise provided in the statutes or pursuant to a written authorization signed by the minor, the physician is generally prohibited from disclosing medical information concerning such care to the minor's parents or legal guardian. With respect to mental health treatment provided pursuant to Family Code §6924, the minor is the holder of the psychotherapist-patient privilege and a minor's records concerning this treatment must not be disclosed absent the minor's consent. While the law is not entirely clear in these other cases, physicians who receive a subpoena for records concerning such treatment would be well advised to discuss the subpoena with the minor and obtain the minor's consent to the release of the records. For more information on minor consent, *see CMA ON-CALL document #3107, "Consent by Minors."*

In the event a minor who is legally authorized to consent to medical treatment under either type of statute objects to the release of the records, and does not agree to send a letter objecting to the disclosure (if the minor is not a party to the action) or to bring a motion to quash the subpoena (if the minor is a party to the action), you should contact your professional liability carrier and/or personal attorney.

In all other instances, a minor's parent or guardian is legally authorized to make health care decisions, and thus authorized to sign a release for medical records. If a proof of service is provided instead of a written authorization, service must have been made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, on any person having the care and control of the minor or with whom one minor resides or by whom the minor is employed, and, if the minor is at least twelve (12) years of age, on the minor. (Code of Civil Procedure §1985.3(b)(1).)

If the minor is alleged to be a dependent child or ward of the juvenile court as defined in Welfare & Institutions Code §§300, 601 or 602, and the minor is not in the custody of the parent or guardian, regardless of the minor's age, service must also be made on the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed. (Code of Civil Procedure §1987.)

When service with respect to an un-emancipated minor has not been made on the minor's parent or guardian, you would be well advised to contact the parent or guardian and obtain consent for the release of the records. In the event such contact cannot be made, or the parent or guardian objects to the release of the records but refuses to send a letter objecting to the disclosure (non-parties) or to bring a motion to quash the subpoena (parties), the physician should contact his or her professional liability carrier and/or personal attorney.

HIPAA Privacy Rule

The HIPAA Privacy Rule does not affect this analysis, as they essentially defer to state law governing minor's consent to medical care. (45 C.F.R. §164.502(g)(2) and (3).)

CAUTION: Subpoenas for minors' mental health, drug or alcohol abuse or HIV test records may be subject to additional confidentiality requirements. Such records should not be disclosed unless and until these additional requirements are met. *See* discussion below.

SPECIAL CONFIDENTIALITY RULES FOR SUBPOENAS

There are special state and federal laws protecting information pertaining to the results of an HIV test, information subject to the Lanterman-Petris-Short Act (certain psychiatric, mental health or developmental disability records), psychotherapy notes and alcohol or drug abuse records. Depending on the circumstances, you may not be authorized to release such information even if you have a valid subpoena and the written authorization or proof of service on the patient. A court order may be necessary. Because of the complexities of these laws, you would be well advised to contact your professional liability carrier and/or personal attorney if they receive a request for information protected by these special confidentiality requirements. The HIPAA Privacy Rule requires that these state laws which are more protective of confidentiality be followed. (45 C.F.R. §160.203.)

Lanterman-Petris-Short Act Records

The Lanterman-Petris-Short (LPS) Act (Welfare & Institutions Code §§5000 *et seq.*) severely limits the disclosure of information and records obtained in the course of providing mental health services to patients who are either voluntarily or involuntarily treated in an institutional setting, including any private institution, hospital, clinic or sanitarium which is conducted for or includes a department or ward conducted for the care and treatment of persons who are mentally disordered, or pursuant to a community mental health treatment program funded pursuant to the Bronzan-McCorquodale Act, or in the course of providing intake, assessment, or services to persons with developmental disabilities by a regional or state developmental center, or on behalf of such center. (Welfare & Institutions Code §5328.)

The LPS Act has been interpreted by the courts to permit disclosure only under the narrow circumstances set forth in the Act. The LPS Act does not permit release of LPS records pursuant to a subpoena, even with a signed authorization from the patient. Subpoenaed information may be released to the court directly, pursuant to a court order. (Welfare & Institutions Code §5328(f).)

For further information on Lanterman-Petris-Short Act Records, *see* [CMA ON-CALL document #4250, "Confidentiality of Sensitive Medical Information."](#)

Alcohol or Drug Abuse Records

Alcohol or drug abuse records are protected by both federal and state law. *See* the Drug Abuse Prevention, Treatment and Rehabilitation Act and the Comprehensive Alcohol and Alcoholism Prevention, Treatment and Rehabilitation Act (42 U.S.C. §290dd-2; 42 C.F.R. §§2.1 *et seq.*); and Health & Safety Code §§11812 and 11845.5. Information protected by federal law may not be released pursuant to a subpoena unless there is also a court order for release which complies with specific requirements spelled out in the federal regulations. A violation of the law may result in hefty penalties.

California's Health & Safety Code §11845.5 applies to information maintained by "any alcohol and other drug abuse treatment or prevention effort or function conducted, regulated, or directly or indirectly assisted by the [State Department of Alcohol and Drug Programs]." Such programs must be registered with the county, and a physician can easily determine whether the program falls within this category. These records can only be released by court order.

Additionally, Health & Safety Code §11812, provides that "[a]ll personal information and records obtained by the county, any program which has a contract with the county, or the [State Department of Alcohol and Drug Programs]" pursuant to the provision of alcohol treatment services, are confidential and may be disclosed only in the same circumstances as information protected by the Lanterman-Petris-Short Act (*see* Welfare & Institutions Code §5328).

Furthermore, effective September 29, 2010, any individuals or entities that contract with the Department of Consumer Affairs (DCA) or with any board within the DCA, including the Medical Board of California, for the provision of services relating to the treatment and rehabilitation of licensees impaired by alcohol or drugs shall retain all records and documents pertaining to those services for three (3) years from the date of the last treatment or service rendered to that licensee. Such records and documents provided to DCA or any of its boards pertaining to drug and alcohol treatment and rehabilitation services of licensees shall be kept confidential and are generally not subject to discovery or subpoena. (Business & Professions Code §156.1.)

For further information on Drug or Alcohol Abuse Records, *see* [CMA ON-CALL document #4250, "Confidentiality of Sensitive Medical Information."](#)

HIV Test Results

No health care provider (or any other person) can be compelled in any state, county, city, or other local, civil, criminal, administrative, legislative, or other proceedings to provide identifying characteristics of a person who has taken an HIV test except for the mandatory name-based reporting to the local health officer. (Health & Safety Code §§120975 *et seq.*) Therefore, a health care provider cannot be forced by subpoena to disclose a patient's HIV test results without the patient's written authorization. The unauthorized disclosure of HIV test results can bring fines from \$2,500 for negligent disclosure to \$10,000 or more, plus imprisonment, for willful disclosure as well as liability for all damages suffered by the individual. (Health & Safety Code §120980.) For more information, *see* [CMA ON-CALL document #4253, "Confidentiality of HIV/AIDS Information."](#)

Authorization For Disclosure of HIV Test Results - Sample Form

If your patient or patient's legal representative asks you to make this information available, you may wish to provide them with a copy of the form on the next page which, if fully completed and properly executed meets all legal requirements. The information provided in this sample form does not constitute, and is not a substitute for legal or other professional advice. Users should consult their own legal and other professional advisors as necessary to individualized guidance with respect to each particular situation.

To use this document, replace all text that appears in brackets ("["and"]") with the correct information and make sure all blanks are filled in correctly.

Subpoena Authorization For Disclosure Of HIV Test Results - Sample Form

AUTHORIZATION FOR DISCLOSURE OF HIV TEST RESULTS

As required by the Health Information Portability and Accountability Act of 1996 (HIPAA) and California law, this practice may not use or disclose your individually identifiable health information except as provided in our Notice of Privacy Practices without your authorization. Your completion of this form means that you are giving permission for the uses and disclosure described below. Please review and complete this form carefully. It may be invalid if not fully completed.

I hereby authorize this medical practice to use and disclose the HIV test results of

_____ (Patient name and address) as follows:

This health information may be disclosed to:

_____ (Name and address of person to use or receive the health information)

The information may be used only for the following purposes* (if you do not want to explain the purpose, write "At the request of the individual"):

I understand that I may revoke this authorization at any time notifying this medical practice in writing. My revocation will not affect actions taken by this medical practice prior to its receipt.

I understand that although federal law does not protect health information which is disclosed to someone other than another health care provider, health plan or health care clearinghouse, under California law all recipients of health care information are prohibited from re-disclosing it except as specifically required or permitted by law.

Effect of Refusal to Sign Authorization: I understand that my health care treatment or benefits will not be affected whether I sign or do not sign this form.

This authorization is effective now and will remain in effect until _____

(Expiration event or date)

I understand that I have the right to receive a copy of this authorization.

Signed: _____ Dated: _____

Print Name: _____

If not signed by the patient, please indicate relationship:

parent or guardian of minor patient under 12 years.

guardian or conservator of an incompetent patient.

*A separate authorization is required for each release of HIV test results.

© 2005-2014 California Medical Association

As a public service of the California Medical Association, reproduction of this document by individuals for personal use and not for commercial purposes is authorized as long as each copy clearly includes this copyright notice.

Records of Deceased Patients

Generally speaking, a subpoena for the records of a deceased patient should be handled exactly the same way as a subpoena for the records of a live patient, except that it is the personal representative of the deceased patient who holds the privilege. (Health & Safety Code §§123110 and 123105(e).) Thus you need to ensure that the personal representative of the deceased patient has either authorized release of the records in writing or has received a copy of the proof of service that the subpoena has been served and has not objected to production of the records. The HIPAA Privacy Rule is the same. (See 45 C.F.R. §164.502(g)(4).) For information regarding coroners' cases, see section entitled "Miscellaneous Subpoenas, Other Non-Criminal Subpoenas: Coroners' Subpoenas."

PHYSICIAN-PATIENT PRIVILEGE

The fact that records have been subpoenaed does not necessarily mean that the information in them is no longer protected by the physician-patient privilege. If the patient signs an authorization for the release of the records, you can assume that he or she has waived the privilege. Generally speaking, you can also assume that the privilege has been waived if the patient receives notice of the fact that his or her medical records are being subpoenaed and does not object. Nevertheless, depending on the circumstances, you may wish to take special steps to insure that the patient has in fact waived the privilege.

Privilege Defined

1. What is the physician-patient privilege?

The "physician-patient privilege" generally dictates that confidential communications between patient and physicians in the course of a professional relationship are privileged, and hence non-disclosable. (Evidence Code §994.) The privilege encompasses "confidential communication between patient and physician," which is defined as information transmitted between a patient and his or her physician "in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted." The privilege covers information obtained by an examination of the patient, a diagnosis made, and the advice given by a physician in the course of that relationship. (Evidence Code §992.) The privilege applies regardless of where the patient is treated and regardless of whether the patient can communicate. ([Hale v. Superior Court \(DeFelice\)](#) (1994) 28 Cal.App.4th 1421.)

Physician-Patient and Psychotherapist-Patient Privileges Compared

2. Is there a distinction between a physician-patient privilege and a psychotherapist-patient privilege?

The psychotherapist-patient privilege applies to confidential communications between psychotherapists and their patients. (Evidence Code §1012.) A physician or other psychotherapist who devotes or who is reasonably believed by the patient to devote a substantial portion of his or her time to the practice of psychiatry or psychotherapy is considered a psychotherapist. (Evidence Code §1010.) In some respects, the psychotherapist-patient privilege is broader than the physician-patient privilege. It extends to examinations by psychotherapists for the purpose of scientific research on mental or emotional problems, in addition to treatment activities. (Evidence Code §1011.) It also extends to criminal proceedings ([People v. Hammon](#) (1997) 15 Cal.4th 1117), and to psychotherapy a patient is required to undergo as a condition of probation ([Story v. Superior Court](#) (2003) 109 Cal.App.4th 1007). In [Jaffee v. Redmond](#) (1996) 518

U.S. 1, the U.S. Supreme Court ruled that the psychotherapist-patient privilege also applies in federal courts, to federal claims. The Ninth Circuit Court of Appeals has applied the federal psychotherapist-patient privilege to communications with unlicensed EAP counselors. (*Oleszko v. State Compensation Insurance Fund* (9th Cir. 2001) 243 F.3d 1154.) Moreover, the Ninth Circuit has concluded that there is no "dangerous patient" exception to the federal common law psychotherapist-patient privilege. (*United States v. Chase* (9th Cir. 2003) 340 F.3d 978.)

People Authorized to Claim the Privilege

3. Who can claim the privilege?

The "holder of the privilege," for the physician-patient privilege, is: (1) the patient when the patient has no guardian or conservator; (2) a guardian or conservator of the patient when the patient has a guardian or conservator; or (3) the personal representative of the patient if the patient is deceased. (Evidence Code §993.) Physicians have an affirmative obligation to raise the privilege on behalf of the patient. (Evidence Code §995.)

The psychotherapist-patient privilege can be claimed by (1) the holder of the privilege; (2) a person who is authorized to claim the privilege by the holder of the privilege; or (3) the person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. (Evidence Code §1014.)

A minor receiving mental health treatment pursuant to Family Code §6924 is the holder of the psychotherapist-patient privilege with respect to such treatment. (Evidence Code §§1010 and 1014.) Moreover, a child who is a dependent of the court may invoke the physician-patient or psychotherapist-patient privilege if that child is "of sufficient age and maturity to so consent, which shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over twelve (12) years of age." (Welfare & Institutions Code §317.)

Exceptions to Privilege

4. Are there any exceptions to the privilege?

The privilege does not apply in all cases. For example, "there is no privilege ... if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort." (Evidence Code §997 and §1018.)

The psychotherapist-patient privilege does not exist when the psychotherapist reasonably believes a patient under the age of sixteen (16) has been the victim of a crime and the disclosure of the communication is in the best interest of the child. (Evidence Code §1027.) Nor does it apply where the psychotherapist reasonably believes the patient to be dangerous and that disclosure is necessary to prevent the threatened danger. (Evidence Code §1024; [Menendez v. Superior Court](#) (1992) 3 Cal.4th 435.) However, this exception does not apply to waive the testimonial privilege in federal court. (*United States v. Chase* (9th Cir. 2003) 340 F.3d 978.)

In a criminal action, only the psychotherapist-patient and attorney-client privileges apply. (Evidence Code §§954 and 998.) *See generally* [People v. Gurule](#) (2002) 28 Cal.4th 557.

This is not an all-inclusive list of exceptions.

Waiver of Privilege

5. When is the privilege waived?

The privilege is waived when the patient consents to the disclosure or discloses a significant part of the communication when such disclosure is not itself privileged or reasonably necessary for the accomplishment of the medical treatment. *See e.g., Manela v. Superior Court*, (2009) 177 Cal.App.4th 1139 (in child custody suit the father waived the privilege with respect to a physician's examination because the wife was also present and the father did not produce any evidence that the wife's presence was "reasonably necessary" for the physician's treatment and diagnosis of the father). A patient may "consent" to disclosure either expressly or by implication. A failure to claim the privilege in a proceeding when the patient has the opportunity to do so constitutes a waiver of the privilege by implication. (Evidence Code §912.)

When the patient puts his or her condition "at issue" in a lawsuit, such as in a personal injury case, the privilege is deemed waived as a matter of law. (Evidence Code §996; *see e.g., E.E.O.C. v. California Psychiatric Transitions* (E.D. Cal. 2009) 258 F.R.D. 391 (a plaintiff claiming damages for emotional distress waived the psychotherapist-patient privilege because the very nature of her claim put her emotional condition at issue in the lawsuit).) By filing a malpractice suit, a child may waive the privilege with respect to the child's mother's prenatal records relating to the child. (*Palay v. Superior Court* (1993) 18 Cal.App.4th 919.) If the privilege has been "waived," it no longer applies. On the other hand, a defendant's deposition testimony that she was being treated for anxiety by a psychiatrist, was taking medications, and had filed a workers' compensation claim does not "disclose any significant part of her communications with her psychiatrist," and thus does not constitute a waiver of the privilege. (*San Diego Trolley Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083.)

6. How can I tell if the privilege has been waived?

A specific written authorization for records release signed by the patient and/or his or her attorney is generally considered a "waiver" of the privilege. When, with a subpoena, a physician receives a proof of service on the patient rather than a written authorization for release of the records, the physician's duty to assert the privilege is probably satisfied if the physician does not hear an objection from the patient prior to the date for production of the records. This is because the patient waived the privilege by failing to claim the privilege when he or she had an opportunity to do so. *See Inabnit v. Berkson* (1988) 199 Cal.App.3d 1230 (patient's failure to assert privilege after receiving notice pursuant to Code of Civil Procedure §1985.3 that his psychiatric records had been subpoenaed constituted a waiver of the psychotherapist/patient privilege); *Colleen M. v. Fertility and Surgical Associates of Thousand Oaks* (2005) 132 Cal.App.4th 1466 (disclosure pursuant to a subpoena permitted after patient's attorney was served with a notice to object to disclosure of records pursuant to Code of Civil Procedure §1985.3, and patient did not file an objection).

7. What should I do if I am unsure if the privilege has been waived?

If you have reason to doubt that a patient has waived the privilege, you should contact the patient and discuss the subpoena. If the patient has no objection to release of the records, you may wish to send the patient a confirming letter or obtain the patient's written authorization. If the patient does object to the release, you should first inform the patient that the patient should, if the patient is not a party to the lawsuit, send a letter to the person requesting the records (with a copy to you) objecting to the subpoena and listing the reasons why the records should remain confidential, or, if the patient is a party to the lawsuit, bring a motion to "quash" the subpoena. You should then send a letter to the attorney who subpoenaed the records stating that in light of the patient's objection, you will not produce the records. If the patient or the

subpoenaing attorney demands that you either produce the records or file a motion to quash the subpoena, or threatens to bring a motion to compel your compliance with the subpoena, you should contact your professional liability carrier and/or attorney immediately.

ENFORCEMENT OF SUBPOENAS

If you do not comply properly with a subpoena that you are required to respond to, the attorney requesting the subpoena has several remedies available.

If the fees requested by or paid to you for responding to the subpoena are excessive, the requesting party may petition the court to recover all or a part of the costs. If the court finds that the fees demanded exceed the amount authorized by law, it will order you to remit the amount in excess. If the court finds the fees excessive and charged in bad faith, the court will order you to remit the full amount of the costs demanded and collected, or excuse the party from any payment of costs charged. In addition, the court will order you to pay the party the reasonable expenses incurred in obtaining the order remitting the costs, including attorney's fees. If the court finds that the costs were not excessive, the court will order the requesting party to pay you the amount of the reasonable expenses incurred in defending the petition, including attorney's fees. (Evidence Code §1563.)

If you disobey a subpoena you may be punished for contempt. You may also be required to pay \$500 plus all damages which the party aggrieved may sustain by your failure to produce the documents. (Code of Civil Procedure §§1992, §2020.240.) You may also face monetary, issue, evidence, terminating, or contempt sanctions under Code of Civil Procedure §2023.030, or paying the subpoenaing party's attorneys fees in compelling production pursuant to Code of Civil Procedure §1987.2.

Criminal sanctions can be brought against a person who prepares false documents with intent to use them at trial or knowingly destroys or conceals documentary evidence. (Penal Code §§134, 135.)

There are additional penalties relating to subpoenas that require personal appearance. For example, disobedience to such a subpoena may result in a warrant being issued for your arrest. (Code of Civil Procedure §1993.)

MISCELLANEOUS SUBPOENAS

Subpoena Duces Tecum (Subpoena Requiring Delivery of Records to The Court)

If a subpoena requires delivery of the records to a court, it must, in addition to meeting all of the requirements for a deposition subpoena described above (other than the time limits), be accompanied by an affidavit. The affidavit must describe the "exact documents" to be produced, state that these documents are under your control, explain how the records are relevant to the lawsuit and why there is "good cause" for their production. (Code of Civil Procedure §1985.) Although it need not accompany the subpoena, before the date for production of the records, the person subpoenaing the records must forward either a written authorization for the release of the records or a proof of service on the patient in compliance with Code of Civil Procedure §1985.3. If a proof of service pursuant to section 1985.3 is provided in lieu of a written authorization, it must indicate service of the affidavit as well as the subpoena and the privacy notice pursuant to section 1985.3.

The time frames for responding to a subpoena duces tecum are sometimes shorter than those applicable to deposition subpoenas. However, in the absence of a patient's written authorization or a court order, you should not release records in a civil proceeding in state court unless the patient will have had at least ten (10) days to object, that is, unless the patient received the subpoena, affidavit and privacy notice at least ten

(10) days before the date specified for production. Moreover, the law requires that you be given "a reasonable time to locate and produce records." A subpoena demanding production of records on very short notice (e.g., less than a week) may be subject to challenge on the grounds that it does not provide such a reasonable time, particularly if some or all of the records are stored offsite.

Other Non-Criminal Subpoenas

If the subpoena is issued by: (1) a state or local governmental agency; (2) the State Bar of California; (3) a federal court; or (4) seeks information which will not identify an individual patient, different laws apply. These subpoenas may have a different format, but they will have basically the same information in them. Generally, in order to be valid, these subpoenas must be accompanied by an affidavit, similar to the one described above, establishing good cause for the disclosure of the records.

Additionally, there may be no statutory requirement that patients be notified of these types of subpoenas, so the physician must be sure to determine if the information requested is privileged, although subpoenas issued in connection with administrative hearings covered by the Administrative Procedures Act must comply with the same patient notification requirements applicable to civil subpoenas. (Government Code §§11450.10, 11450.20 and 11450.40.)

Even where there is no statutory notification requirement, the law requires that a patient be notified through some means of the subpoena and of his or her opportunity to challenge the requested disclosure. *See [Sehlmeier v. Dept. of Gen. Services](#) (1993) 17 Cal.App.4th 1072* (ruling that, in light of a person's constitutional right of privacy, before confidential third-party personal records may be disclosed in the course of an administrative proceeding, the party issuing the subpoena must take reasonable steps to notify the third-party and afford the third-party a fair opportunity to object to the disclosure). In light of [Sehlmeier](#), physicians should ensure that the subpoenaing party has included proof of notification to the patient and should wait a reasonable period of time to allow the patient to contest disclosure before releasing the records. *See* discussion above with respect to time periods for responding to a subpoena duces tecum. If the subpoena is proper in form and the information sought is not privileged or subject to the heightened confidentiality requirements and proper patient notice has been given, or if the physician obtains the patient's written authorization to disclose the records, the records may be produced.

Out-of-State Subpoenas

Occasionally, physicians receive subpoenas issued by the courts of states other than California. Out-of-state subpoenas are not enforceable in California, unless they have been issued by a federal court.

The Workers' Compensation Subpoena

The subpoena for medical records in a workers' compensation case, entitled "Workers' Compensation Appeals Board Subpoena Duces Tecum," must bear the official stamped signature of a representative of the Workers' Compensation Appeals Board (WCAB), the administrative body responsible for adjudicating disputes involving work-related injuries or deaths, to be valid. For more information on workers' compensation subpoenas, *see* [CMA ON-CALL document #7307, "Workers' Compensation Subpoenas."](#)

Coroners' Subpoenas

Coroners have the authority to issue subpoenas. (Government Code §27498.) If the coroner's subpoena requires the production of documents, it must meet the requirements set forth above for a subpoena duces tecum. Generally speaking, coroners' subpoenas are enforceable in the same manner as civil subpoenas.

However, a witness served with a coroner's subpoena who "willfully and without reasonable excuse" fails to attend and testify at the inquest is guilty of misdemeanor. (Government Code §27500.)

Under Government Code §27491.8, when a coroner seeks and subpoenas a confidential communication of a deceased person that is privileged (e.g., under the physician-patient privilege) for the purpose of inquiry into, and determination of, the circumstances, manner and cause of death or for the sole purpose of introducing the information as evidence in a coroner's inquest proceeding, the coroner must provide notice to the decedent's court appointed personal representative, or at his or her last known address, not less than 15 days prior to the date the records are required to be delivered to the court. The custodian of the records must deliver them to the court in a confidential manner. After an inspection, the judge will determine which records are relevant to the coroner's inquest and, after the proceedings the judge must seal the records as necessary to protect their confidentiality.

CAUTION: The Confidentiality of Medical Information Act requires physicians and other healthcare providers to disclose information requested by the coroner when authorized by the decedent's representative, or for the purpose of identifying the decedent or locating next of kin, or investigating deaths that may involve public health concerns, organ or tissue donation, child or elder abuse, suicide, poisoning, accident, sudden infant death, suspicious deaths, unknown deaths or criminal deaths, or upon notification of, or investigation of, imminent deaths that may involve organ or tissue donation. Medical information requested by the coroner shall be limited to information regarding the decedent who is the subject of the investigation or who is the prospective donor and shall be disclosed to the coroner without delay upon request. (Civil Code §56.10(b)(8).) As this section requires physicians to disclose this information "without delay upon request," it apparently eliminates the requirement that the coroner issue a coroner's subpoena in these circumstances.

To the extent that the information is necessary to establish identity or locate next of kin, or involves situations where the physician would have a mandatory duty to report if the physician were aware of the injury, such disclosure would not appear to raise confidentiality concerns. Physicians asked to disclose information in other circumstances should discuss the issue with their professional liability carrier. In no event should a physician disclose such information to the coroner if the decedent's representative has instructed the physician not to respond, or disclose information which involves anyone other than the decedent who is the subject of the investigation. For more information on mandatory reporting obligations to coroners, *see* [CMA ON-CALL document #3402, "Determination and Pronouncement of Death and Death Certificates"](#); [CMA ON-CALL document #3651, "Reporting Dependent Adult and Elder Abuse"](#); [CMA ON-CALL document #3653, "Reporting Injuries by a Deadly Weapon, Criminal Act, Health Facility Neglect, or Emergency Department Violence,"](#) and other CMA ON-CALL documents pertaining to the reporting of abuse or reporting of diseases, conditions, and events.

Criminal Subpoenas

A physician may be served with a criminal subpoena. (Penal Code §§1326 *et seq.*) Service of a criminal subpoena does not have to be in person (although such service is not effected until the recipient acknowledges receipt of the subpoena and identifies himself or herself by reference to his or her date of birth and driver's license or DMV identification card number to the sender by telephone, mail, over the Internet via e-mail or online form, or in person). (Penal Code §1328d.) The physician-patient privilege does not apply in criminal cases, but unless it has been waived, the psychotherapist-patient privilege does apply.

If you receive a criminal subpoena, you should consult an attorney. A criminal subpoena may require that the physician personally appear as well as supply documents. To the extent it requires the production of documents from a physician practice which is not a party to the case nor the place where the criminal act

took place, the physician may produce the records as described on pages 6-8 above, except that the deadline is generally five (5) days from the subpoena's receipt. It is unclear if a physician is entitled to reimbursement for copying costs incurred in complying with the criminal subpoena. If the physician is required to attend and be a witness in a criminal case, the court may allow witness fees at a rate as low as \$12 per day and a reasonable sum for necessary expenses of the witness. For information on obtaining expert witness fees in criminal proceedings, *see* **CMA ON-CALL document #0501, "Expert Witness Issues."**

We hope this information is helpful to you. CMA is unable to provide specific legal advice to each of its more than 39,000 members. For a legal opinion concerning a specific situation, consult your personal attorney.

For information on other legal issues, use CMA ON-CALL, or refer to CMA's *California Physician's Legal Handbook*. This book contains legal information on a variety of subjects of everyday importance to practicing physicians. Written by CMA's Legal Department, the book is available on a fully searchable CD-ROM, or in a seven-volume, softbound format. To order your copy, call (800) 882-1262 or visit CMA's Bookstore at www.cmanet.org.

SUBPOENA—INVALID DEPOSITION SUBPOENA FOR BUSINESS RECORDS - SAMPLE RESPONSE

If you receive a subpoena which does not meet all the requirements discussed on pp. 3-4 above, you should let the subpoenaing party know, preferably in writing. Following is a sample response for this purpose. The information provided in this sample form does not constitute, and is not a substitute for legal or other professional advice. Users should consult their own legal and other professional advisors as necessary to individualized guidance with respect to each particular situation.

To use this document, replace all text that appears in brackets ("["and"]") with the correct information and make sure all blanks are filled in correctly.

INVALID DEPOSITION SUBPOENA FOR BUSINESS RECORDS

We received a subpoena on _____ (date) in the case of _____ (name of case) requesting production of the medical records of _____ (patient). This subpoena does not comply with the following statutory requirement(s):

- The subpoena was not personally served. (C.C.P. §1987)
- The subpoena was not accompanied by the required proof of service on or written authorization from the patient. (C.C.P. §1985.3.)
- The subpoena was not served on the patient at least 5 days (if served on the patient by mail: in California—10 days; in another state—15 days; in a foreign country—20 days) before it was served on us. (C.C.P. §1985.3.)
- The subpoena required the production of records on a date which was less than 20 days after the subpoena was issued. (C.C.P. §2020.410.)
- The subpoena required the production of records on a date which was less than 15 days after the subpoena was served on us. (C.C.P. §2020.410.)
- The subpoena was not served on the patient at least 10 days (if served on the patient by mail; in California—15 days; in another state—20 days; in a foreign country—25 days) before the date for production. (C.C.P. §1985.3.)
- Other: _____

We may not release a patient's medical records in response to an invalid subpoena. I have returned the subpoena (and retained a file copy for our records) so you may correct these problems.

Please don't hesitate to call if you have any questions about this letter.

Sincerely,

© California Medical Association 1995-2014

As a public service of the California Medical Association, reproduction of this document by individuals for personal use and not for commercial purposes is authorized as long as each copy clearly includes this copyright notice.

SUBPOENA—PRIVACY NOTICE TO THE PATIENT- SAMPLE FORM

This is the document that the patient must receive telling them that his or her records are being subpoenaed, if the subpoena is not accompanied by the patient's signed consent to release of the records. It is referred to in the proof of service that the physician will receive, page 5.

The notice to the patient must be in a typeface designed to call attention to it, indicating that:

- Records of the patient are being sought from the person named on the subpoena;
- If the patient objects to the release of the records to the party seeking the records, the patient must file papers with the court prior to the date specified for production on the subpoena; and
- If the party seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the patient's interest in protecting his or her rights of privacy.

This will be in a document substantially similar to the one on this page.

NOTE: If your deposition is also being sought, this notice may be combined with the deposition notice in a single document.

| |
|--|
| <p>PRIVACY NOTICE PURSUANT TO C.C.P. §1985.3</p> <p>TO _____ (consumer) AND TO YOUR ATTORNEY OF RECORD:</p> <p>PLEASE TAKE NOTICE THAT:</p> <p>(1) RECORDS PERTAINING TO YOU ARE BEING SOUGHT by _____ from _____ M.D. as set forth in the Deposition Subpoena For Production of Business Records, a copy of which is attached to this Notice.</p> <p>(2) IF YOU OBJECT to this physician furnishing all or any of the records described in this Deposition Subpoena For Production of Business Records to the party seeking such records, YOU MUST FILE PAPERS WITH THE ABOVE-NAMED COURT PRIOR TO _____.</p> <p>(3) YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED, as the attorney for the party seeking to examine such records, to determine whether the undersigned is willing to agree in writing to cancel or limit this subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY to advise you about your rights of privacy.</p> <p>Signed: _____ Dated: _____</p> <p>Attorney for: _____</p> |
|--|

SUBPOENA—AUTHORIZATION FOR DISCLOSURE PURSUANT TO SUBPOENA - SAMPLE FORM

If your patient or the patient's legal representative asks you to make records available pursuant to a subpoena, you may wish to provide them with a copy of the following form which, if fully completed and properly executed, meets all legal requirements for a written authorization for the disclosure of PHI.

The information provided in this sample form does not constitute legal or other professional advice. Users should consult their own legal and other professional advisors as necessary for individualized guidance with respect to each particular situation.

To use this document, replace all text that appears in brackets ("["and"]") with the correct information and make sure all blank spaces are filled in correctly.

**AUTHORIZATION FOR USE OR DISCLOSURE OF PROTECTED HEALTH INFORMATION
RESPONSE TO SUBPOENA**

As required by the Health Information Portability and Accountability Act of 1996 (HIPAA) and California law, this practice may not use or disclose your individually identifiable health information except as provided in our Notice of Privacy Practices without your authorization. Your completion of this form means that you are giving permission for the uses and disclosure described below. Please review and complete this form carefully. It may be invalid if not fully completed.

I hereby authorize this medical practice to use and disclose health information concerning: _____

(patient name and address) as follows:

Health information to be used or disclosed (check only one box): *

Any and all health information other than psychotherapy notes may be released, including, but not limited to, mental health records protected by the Lanterman-Petris-Short Act, drug and/or alcohol abuse records and/or HIV test results, if any, except as specifically provided below:

All psychotherapy notes may be released, except as specifically provided below:

This health information may be disclosed as specified in response to the Deposition Subpoena for Business Records issued in the case entitled _____ on _____ (date subpoena issued).

© PrivaPlan Associates, Inc. and the California Medical Association 2006 – 2014

As a public service of the California Medical Association, reproduction of this document by individuals for personal use and not for commercial purposes is authorized as long as each copy clearly includes this copyright notice.

I understand that I may revoke this authorization at any time notifying this medical practice in writing. My revocation will not affect actions taken by this medical practice prior to its receipt.

I understand that although federal law does not protect health information which is disclosed to someone other than another health care provider, health plan or health care clearinghouse, under California law all recipients of health care information are prohibited from re-disclosing it except as specifically required or permitted by law.

Effect of Refusal to Sign Authorization. I understand that my health care treatment or benefits will not be affected whether I sign or do not sign this form.

This authorization is effective now and will remain in effect until _____.
(Expiration event or date).

I understand that I have the right to receive a copy of this authorization.

Signed: _____ Dated: _____

Print Name: _____

If not signed by the patient, please indicate relationship:

- parent or guardian of minor patient (to the extent minor could not have consented to the care)
- guardian or conservator of an incompetent patient
- beneficiary or personal representative of deceased patient **
- spouse or person financially responsible (where information solely for purpose of processing application for dependant health care coverage)

*Signed: _____ Date: _____

Treating Physician

** For the release of records (1) protected by the Lanterman-Petris-Short Act (LPS) or (2) containing HIV test results, a separate authorization is required for each separate disclosure. Further, the LPS Act often requires that both the patient's treating physician and the patient sign the authorization form before information may be released. Under HIPAA, an authorization for release of psychotherapy notes may not be combined with an authorization involving any other type of health information (except other psychotherapy notes).*

*** It is unclear whether the beneficiary or personal representative of a deceased patient can obtain and disclose certain records containing HIV test results.*