

**A GUIDE TO
MEDICAL DISCOVERY
FOR PHYSICIANS
AND ATTORNEYS**



MEDICAL DISCOVERY FOR CIVIL LITIGATION

I. Requests for Records

A. Purpose

In civil actions, the parties often need medical records. In lawsuits where injury to one or more of the parties is an issue, medical records are used by both sides to evaluate liability, establish damages, and address other issues. In these cases, neither side can properly prepare and present their case without obtaining the necessary medical records.

B. Methods

1. Authorizations by Patient

- a. Medical records can be obtained by any party to a lawsuit if the patient authorizes the records to be produced to the requesting party. Authorizations must comply with the requirements of HIPAA.
- b. Authorizations may be given by the patient or by an authorized representative of the patient.

2. Subpoenas

Rule 45 of the Alabama Rules of Civil Procedure allows parties to the litigation to obtain, by subpoena, records from an entity that is not a party to the litigation, including medical providers.

- a. The party issuing the subpoena must first issue a “Notice of Intent” to all parties to the litigation and to the entity being subpoenaed, so that objections can be made. If no objections are made within ten (10) days from the date the notice is sent out, or if any objections made have been resolved, the subpoena itself may then be sent out fifteen (15) days after the notice is served. Objections to subpoenas can be made by either party or by the physician to whom the subpoena is sent or directed. If a physician knows that an objection has been made, the

physician should not produce the requested information until the physician receives or becomes aware of either a court order directing the physician to release the records or written verification from both parties that the objection has been withdrawn.

- b. Under Ala. R. Civ. P. 45(e), failure to comply with subpoenas without adequate excuse places the non-complying entity in contempt of court.
- c. Charges for Production of Medical Records

The maximum charges that may be levied for producing medical records are governed by an Alabama statute, Alabama Code § 12-21-6.1:

- No more than \$1.00 per page for the first 25 pages
- \$.50 per page for every page after 25 pages
- A maximum \$5.00 search fee
- Actual cost of postage
- Actual cost for producing x-rays and other special medical records

- d. Subpoenas must comply with the HIPAA privacy regulations if the subpoena seeks protected health information.
- e. Pay special attention to the medical records requested by a subpoena. Often, a subpoena requests a patient's *entire* file or "all medical records". The physician is to produce only those records requested and should seek advice from an attorney if the physician is unclear as to what documents should be produced. Certain medical records (psychiatric, peer review, alcohol and substance abuse records) are protected from disclosure by law and should not be disclosed pursuant to a civil subpoena absent a specific Court Order.
- f. Medical records and the testimony of treatment providers of certain drug and alcohol abuse programs are subject to special confidentiality requirements in addition to those requirements imposed by HIPAA and state law. See 42 U.S.C. § 290dd-3 and 42 C.F.R. §§ 2.1 through 2.67. In general, the disclosure and re-disclosure of drug and alcohol abuse treatment records is prohibited without the patient's written consent in a form prescribed in 42 CFR § 2.31 or unless authorized by a court order.

3. Court Orders

Records may be produced if the producing entity receives a court order requiring the production. Some civil courts, Jefferson County civil courts for example, issue subpoenas for medical records only if there is a "HIPAA Order." The HIPAA Order

in Jefferson County is a standard order with language that has been derived through input from both the plaintiff and defense sides of the bar.

II. Requests for Testimony

A. Purpose

If the medical condition of a party or witness is at issue in a lawsuit, evidence of that condition must generally be presented through testimony. Accordingly, attorneys must often request testimony from medical providers through either a deposition or live testimony at trial, or both.

B. Methods

1. Depositions

- a. Depositions are formal proceedings to which all counsel to the litigation are invited.
- b. Testimony is recorded by a court reporter, who places the deponent under oath prior to the start of the deposition.
- c. A medical provider may be asked to voluntarily submit to a deposition. Doing so allows the medical provider to work with the parties to the litigation to establish a time and place for the deposition that is convenient to everyone involved.
- d. If the medical provider does not cooperate with the attorneys requesting a deposition, or other circumstances warrant, an attorney may ask the Court to issue a subpoena requiring the medical provider to appear for a deposition and give testimony. A person failing to comply with a subpoena without adequate excuse may be deemed to be in contempt of court.
- e. Although providing a deposition does not necessarily eliminate the need for a medical provider to give additional testimony at trial, deposition testimony may be used as trial testimony, thus eliminating the need for the medical provider to appear live at trial, if the parties to the litigation agree.
- f. Ordinarily, all witnesses including medical witnesses are to testify in person at trials. If arrangements for a deposition cannot be arranged or agreed upon, the physician will be subject to subpoena for live testimony for a deposition and/or at trial.

4. Trial Testimony

On occasion, medical providers may be required to give testimony live at trial.

- a. To ensure attendance, the party to the litigation who is requesting the trial testimony may ask the court to issue a subpoena ordering the medical provider to appear at trial.
 - b. Again, a failure to obey the subpoena without an adequate excuse may be deemed contempt of court.
 - c. If an attorney has asked or subpoenaed a medical provider to appear at trial, the attorney can work with the medical provider and give him a general idea of when he expects the medical provider to be called to testify. The attorneys should work with the medical provider and the Court to try and ensure that the medical provider is called to testify at a time that is the least inconvenient to the medical provider.
 - d. Due to the nature of trial proceedings, attorneys can rarely give assurances or guarantees as to when a medical provider will be called to testify or as to how long the medical provider will be at the courthouse. Most attorneys, however, are conscious of the fact that appearing at court to testify is disruptive to a medical provider's schedule (as it is to any witness' schedule) and will therefore make reasonable efforts to minimize the inconvenience of the witness.
3. Subpoenas for documents to be produced at trial

Often, parties to litigation will need to have an "official" copy of medical records sent to the trial court. A records custodian will also be asked to come down and testify that the records are complete and correct, and kept in the normal course of business (or in other words, "authenticate" the records). A physician may also be considered the "records custodian."

- a. Under Alabama law, hospital records may be certified as authentic copies and sent to the court without the need for a witness to appear to testify as to their authenticity. Unfortunately, the law does not give physicians similar means of certifying records.
- b. On occasion, the parties may "stipulate" to a set of medical records, meaning that the parties agree the records are admissible, thus eliminating the need for a records custodian to testify as to their authenticity.
- c. If testimony from a records custodian is necessary to authenticate records, attorneys are generally willing to work with the records custodian to identify when the custodian is expected to be called as a witness or to arrange for the custodian to testify at a time that is least inconvenient to the custodian.

C. Other Considerations

1. Payment for time

- a. Generally, fact witnesses at deposition or trial, including medical providers, are not entitled to compensation for their time, except for a witness fee of \$1.50/day and \$0.05/mile pursuant to Alabama Code § 12-19-131 and Ala. R. Civ. P. 45. A medical provider who is a fact witness may ask for a reasonable fee for his time as a witness at trial or deposition. A fee is typically set by the physician, but may be negotiated between the medical provider and the attorney requesting the medical provider's time. This fee should be consistent with the actual time spent and the time away from patient care. If arrangements for a deposition cannot be arranged or agreed upon, the physician will be subject to being subpoenaed.
- b. It is in the best interest of all, but especially the medical provider, if the medical provider and attorney are able to work out an agreeable time for meetings and depositions and an agreeable fee for the medical provider's time. Otherwise, the only alternative left the attorney is to subpoena the medical provider and force his appearance at deposition or at trial, and at a time that may be inconvenient to the medical provider.
- c. Under no circumstances may a medical provider charge a fee for an examination or testimony that is contingent upon the outcome of the litigation in which he testifies, nor should an attorney request that a medical provider do so.

III. Disputes

The Alabama Rules of Civil Procedure provide for a formal method of resolving disputes between doctors and attorneys regarding medical discovery. In addition, the Jefferson County Medical Society offers an informal and perhaps easier method of addressing any such disputes.

- Any doctor who has a dispute with an attorney regarding producing records or providing testimony, either at trial or in deposition, may contact the director of the Jefferson County Medical Society. The Director may then direct the matter to the Presiding Judge of the Circuit Court of Jefferson County, Alabama, who will provide instruction to the parties on how to resolve the dispute or issue.
- Utilizing this method of dispute resolution offers doctors and lawyers the opportunity to settle disagreements in a less confrontational, less time consuming, and less expensive manner than may otherwise be possible through formal proceedings.