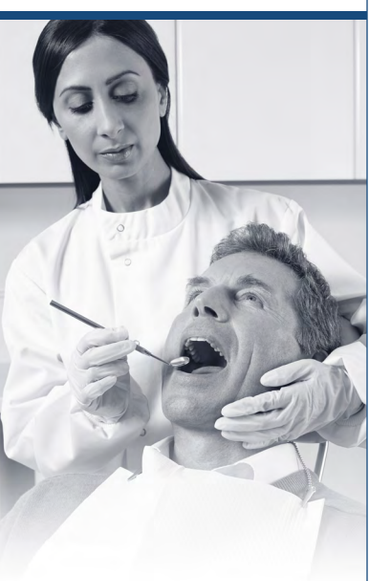
MLMIC

Dental DATELINE

A NEWSLETTER FOR MLMIC-INSURED DENTISTS

Fall 2014

Inside



Dental Dateline **is published under the auspices of MLMIC's Patient Safety & Education Committee.**

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MLMIC Honored with Old Ironsides Flag

Robert A. Menotti, MD, FACS, President
Medical Liability Mutual Insurance Company

Gerald F. Danaher, DDS, Past President of the Onondaga County Dental Society, recently presented Robert A. Menotti, MD, President of Medical Liability Mutual Insurance Company (MLMIC), with a United States flag. This flag flew over the USS Constitution, affectionately referred to as "Old Ironsides," which was launched in 1797 and is the oldest continuously active ship in the US Navy.

The flag was presented at the MLMIC regional office in Syracuse, New York. Dr. Danaher thanked Dr. Menotti and MLMIC for its continuous service and dedication in representing dentists throughout Onondaga County and New York State. Dr. Danaher referred to the skilled, professional work by MLMIC staff in joint effort with the Society in order to provide the best liability protection available at the lowest possible premiums consistent with fiscal responsibility. Dr. Menotti conveyed his appreciation and thanks on behalf of the Company and its staff. He stated that MLMIC was honored by Dr. Danaher's thoughtful gift and noted Dr. Danaher's view echoes our belief that MLMIC provides a superior level of personalized service.

Dr. Danaher, a Captain in the US Naval Reserve, obtained the flag and ship's coin on a recent visit to the USS Constitution, which is anchored in Boston harbor. The flag and mementos of the presentation will be placed in a prominent location in MLMIC's Syracuse office. ◆

Understanding Subpoenas

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A dentist may receive a subpoena to either appear and provide testimony or to provide copies of patient records. How one should respond to a subpoena depends upon the type of subpoena, the information being requested, and the place where the subpoena is returnable. This outline will examine the legal principles governing subpoenas issued by New York state courts, tribunals, and officials.[1]

What is a Subpoena?

A subpoena is simply a legal command. A subpoena commands a person to show up and give testimony at a certain place on a certain date and time. A "judicial subpoena" is returnable in a court. A "subpoena duces tecum" requires production of books, papers, and/or other things, and is commonly used to request patient medical records.[2] New York law allows a subpoena duces tecum to be served either separately or joined with a subpoena for testimony.[3]

Technically speaking, a subpoena duces tecum requires the personal appearance of the custodian of the records to give testimony sufficient to authenticate the documents being produced. The requirement of a personal appearance has largely been substituted by the acceptance of certified copies, so that now, in most cases, the issuer of a subpoena duces tecum is satisfied with receiving copies of the documents requested with a certification by the custodian.

In New York practice, subpoenas are generally governed by Article 23 of the Civil Practice Law and Rules (CPLR) or Article 610 of the Criminal Procedure Law (CPL).

Who may issue a subpoena?

A subpoena is not an independent legal process. It is always connected with some type of legal action, administrative proceeding, or governmental investigation. Subpoenas may be issued (i.e., signed) by an attorney at law under the authority of the court, by a clerk of a court, by administrative and governmental officials, by an arbitrator, or by a judge.

What information is contained in the subpoena?

When you receive a subpoena you should read it carefully. At the top of the subpoena, it will state the name of the court or administrative body, the names of the parties to the action or the proceeding, and perhaps a case reference number. This is commonly referred to as the "caption." The subpoena will state to whom it is directed, which may be a dentist, a facility, or simply "custodian of the records." In the case of a subpoena duces tecum, it will describe what documents are being sought. The subpoena will set a date, time, and place for an appearance to give testimony or for production of the records. The face of the subpoena will bear a warning that failure to comply may be punished by contempt of court. Finally, the subpoena should be signed by the issuer under the authority of the appropriate court or administrative body.

Where the subpoena commands a personal appearance, it will often contain a note to call the attorney who issued it. The attorney may simply wish to schedule your testimony at the most convenient time. It is appropriate to call the attorney's office to facilitate this

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1. The information contained in this article is primarily directed to New York State subpoenas, although subpoenas may be issued on behalf of Federal courts and administrative agencies. Federal subpoenas are governed by the Federal Rules of Civil Procedure and have different requirements. If you receive a subpoena from a Federal tribunal you should contact legal counsel to determine its validity.
2. The term "medical records" includes records of dental treatment.
3. CPLR § 2305(b).

Case Study

The Importance of Special Equipment Training

Siobain Feyler
Claims Examiner
Medical Liability Mutual Insurance Company

The defendant, who was a general dentist, attended several courses in laser dentistry conducted by a manufacturer of laser equipment. These courses ranged from one to several days in length, but consisted only of observation of technique. There was no clinical "hands on" training. At the end of these courses, the manufacturer administered an examination and presented a certificate of completion to each attendee.

Subsequently, the defendant saw the plaintiff, a 12-year-old male, for an examination, prophylaxis, and x-rays in March of 2010. His examination was normal. However, the plaintiff's mother advised the defendant that the patient did not talk very much and was shy. The mother believed this was due to "a tight tongue." The defendant examined the plaintiff's tongue carefully. He documented that although the plaintiff's tongue was somewhat tight, it was not severely so. Further, the plaintiff could extend his tongue out of his mouth.

Despite these findings, the defendant recommended that the plaintiff undergo a laser lingual frenectomy. The plaintiff's mother consented to the procedure. However, the defendant did not fully explain the potential risks of the procedure to the mother. No informed consent document was signed. The defendant did not believe this was necessary because, according to the didactic courses he completed, there were no serious risks or complications associated with this procedure.

On April 2, 2010, the defendant performed a laser lingual frenectomy under local anesthesia, using 3% mepivacaine without epinephrine. Again, there was no informed consent discussion with the plaintiff's mother during this appointment. The defendant set the YSGG laser at 2.5 watts, 15% water, and 15% air. The defendant documented that he maintained hemostasis laser precautions but failed to document any other precautions he had taken to prevent injuries. He further documented that he went only to about 4 millimeters above the floor of the mouth, discontinued use of the laser, and used no sutures. The defendant failed to describe the plaintiff's pre-operative status in his records, failed to generate an operative report, and failed to take pre- and post-operative photographs. The plaintiff's mother was given post-operative instructions, which consisted only of giving Tylenol for pain.

On July 29, 2010, the plaintiff complained of a "bubble" on the floor of his mouth. Defendant's examination confirmed that plaintiff had a lesion under his tongue around tooth #29. This lesion was approximately 8-9 mm and oval in shape. The defendant's diagnosis, which he did document, was "rule out mucocele or fibroma." The defendant recommended evaluation by an oral surgeon, ENT surgeon, or oral pathologist to determine the cause of the lesion. The defendant had no further contact with the plaintiff after this visit.

The plaintiff's mother made an appointment with an oral surgeon for August 5, 2010. Prior to this appointment, the lesion apparently filled with fluid and ruptured twice. The oral surgeon documented that the "bubble" was due to an injury caused by the laser frenectomy. Scar tissue had developed at the site of the laser procedure. The oral surgeon performed marsupialization of a right ranula at this visit. He also discussed with the plaintiff's mother the potential need to remove the plaintiff's sublingual gland, if the ranula recurred.

Unfortunately, the plaintiff returned to the oral surgeon on September 11, 2010 due to recurrence of the ranula. He underwent a second marsupialization. The site seemed to heal well, until November 14, 2010, when the ranula again recurred. The plaintiff's mother was advised to promptly obtain a second opinion from either another oral surgeon or an ENT surgeon. On November 24, 2010, plaintiff was seen by a second oral surgeon to evaluate the recurrent ranula. His examination revealed a non-plunging ranula. Because marsupialization had twice failed, this oral surgeon recommended excision of the plaintiff's sublingual gland,. The procedure was scheduled for December 14, 2010, but the plaintiff's mother cancelled the procedure because she felt her son was improving.

The plaintiff returned emergently to the second oral surgeon on January 3, 2011, with acute swelling of the right floor of his mouth. There was a large, bulbous fluid-filled mass suggestive of a giant ranula. Further, his tongue had been swollen for 3 days. The oral surgeon

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Case Study

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immediately sent the plaintiff to the emergency room because he suspected an abscessed ranula. The plaintiff was promptly admitted to the hospital and underwent a bilateral incision and drainage of both the floor of his mouth and a right sublingual gland mucous retention cyst, as well as marsupialization of the ranula. The plaintiff was admitted to the Pediatric Intensive Care Unit (PICU) after surgery and remained sedated and intubated for 24 hours. After he was extubated and discharged from the PICU, he received IV antibiotics until he was discharged on January 5, 2011.

On April 13, 2011, the plaintiff again returned to the oral surgeon. He had a large recurring ranula of the right floor of his mouth, which extended to the posterior right lingual vestibule. The oral surgeon performed an incision and drainage and placement of a drain in his office. Two days later, the oral surgeon removed the drain. He documented that the swelling had decreased. However, he strongly recommended that the plaintiff be evaluated by an ENT surgeon to determine whether his lingual and sublingual glands should be removed because of the continuing recurrence of the ranula.

The plaintiff saw the ENT surgeon on April 28, 2011. An MRI revealed a plunging ranula that had submerged deep into the floor of the mouth and significant scar tissue. The surgeon recommended trans-oral surgery to incise, drain, and dissect the ranula. On May 17, 2011, plaintiff underwent the recommended surgery. However, because of the large amount of scar tissue, trans-oral dissection was too difficult. The surgeon then converted the procedure to an open trans-cervical approach. He removed the submandibular, lingual, and sublingual glands as well as the plunging ranula. The plaintiff was discharged on May 21, 2011.

Although the plaintiff recovered from this surgery, he sustained chronic xerostomia and permanent scarring of his neck. Further, he was no longer able to pursue the saxophone studies in which he had been deeply engaged. His parents then commenced a lawsuit on behalf of this minor plaintiff alleging that the defendant failed to provide informed consent for the procedure and negligently employed the laser.

All of the dental experts who reviewed the case for MLMIC concurred that the care would be extremely difficult to defend. They criticized the defendant's failure to provide informed consent to the plaintiff's mother, his failure to initially refer the plaintiff to an oral surgeon to determine whether a laser lingual frenectomy was in fact indicated, and his use of a laser despite inadequate training and experience. In addition to the deficits in the clinical aspects of the care provided, the defendant's documentation of what had occurred during the procedure was also inadequate.

A specialist in the field of laser dentistry also reviewed the case. He opined that, because the training courses offered by laser manufacturers provided no hands-on clinical experience, the defendant should not have used the laser. Proper credentialing of a dentist in the use of a laser requires both an academic course, as well as clinical experience. The defendant should have been required to pass the type of examination offered by the Academy of Laser Dentistry, not the manufacturer's exam. This expert further criticized the defendant's failure to take proper precautions to prevent injury to the floor of the plaintiff's mouth, based upon the defendant's failure to document that he had done so. He also indicated that laser procedures of this nature should be performed under general anesthesia to prevent movement by the patient, which may well result in laser injury. Finally, the expert concluded that the damages suffered by the plaintiff in this case were consistent with the direct use of the laser on the floor of the mouth, which was a clear departure from good and accepted practice. Due to the very serious deficits in defendant's care, there clearly were far too many significant obstacles to mount a viable defense. Therefore, this litigation was settled on behalf of the defendant for $275,000.

A Legal & Risk Management Perspective

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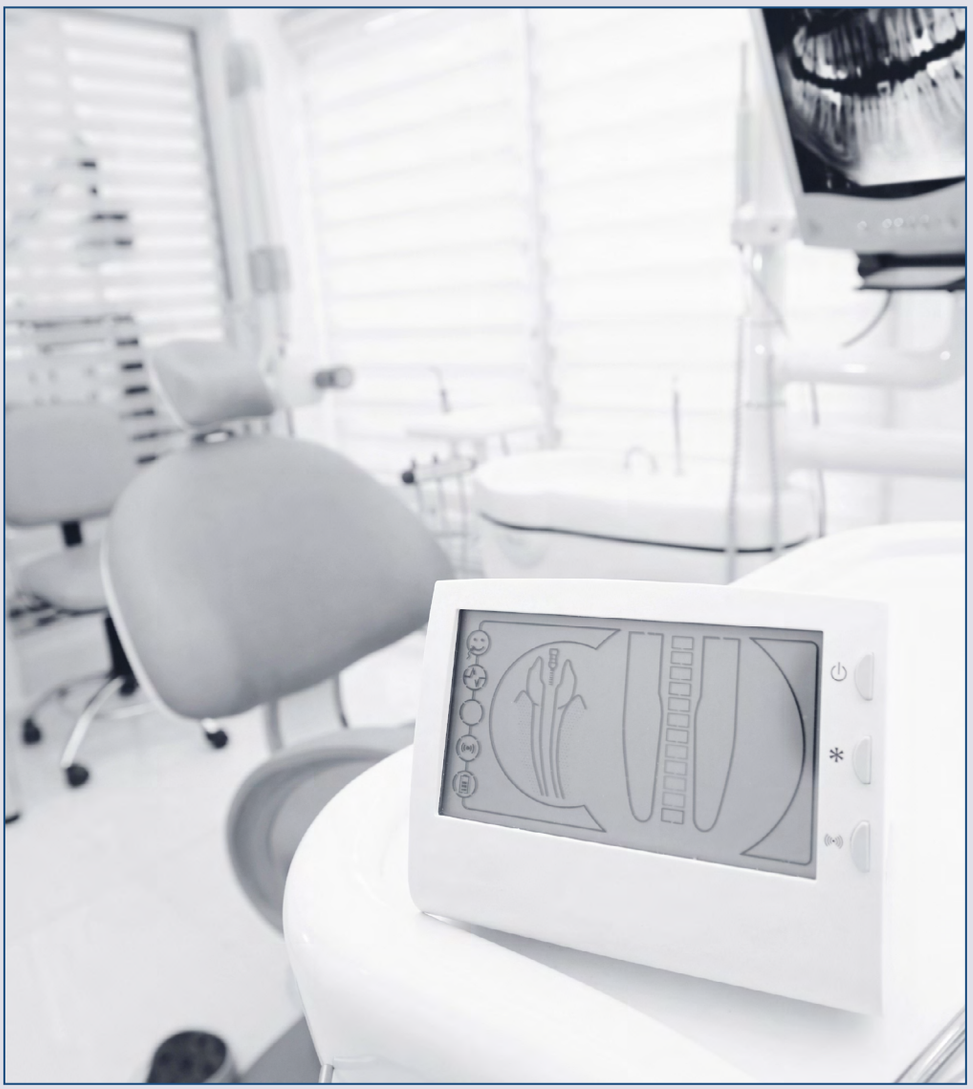
This case clearly confirms the risks of performing a procedure without adequate training and experience, and how poor documentation can seriously impact the ability to defend a case.



In this case, although it is not known precisely what training was given to the defendant in the use of lasers, it was known that the program he attended did not include a hands-on training component. This was a serious flaw in his training. Proper education is essential for using lasers in dentistry. The Academy of Laser Dentistry (ALD) has adopted the Curriculum Guidelines and Standards for Dental Laser Education. There are four levels of proficiency, but the Standard Proficiency is considered the "basic" level of education and defines the standard of care for the dental professional. This level includes laboratory knowledge, hands on training, and an online examination.[1] Although equipment manufacturers provide training, not all courses will meet the ALD Standard Proficiency level. Given the very clear guidelines published by the ALD, the plaintiff could easily establish that the defendant did not have the requisite training to perform this laser procedure in the office. Instead, he should have referred the patient to an oral surgeon for evaluation and treatment.

Many laser injuries can be traced back to poor adherence to established safety protocols. This case is no different. As one of the expert reviewers noted, the patient should have been sedated to avoid movement during the procedure. The defendant was negligent in his technique because he injured the floor of the patient's mouth, which directly led to the damages sustained by the patient.

Further, the failure of the defendant to take both preoperative and postoperative photographs, together with his failure to accurately and fully document what he did and how the site looked before and after the procedure, allowed the plaintiff's counsel to claim the procedure was not indicated and then was negligently performed.

Finally, there was an obvious failure to obtain informed consent to the frenectomy from the patient's mother. The lack of any informed consent itself forms the basis of a claim for malpractice under New York Public Health law § 2805-d. Lack of informed consent means the defendant failed to disclose to the patient the reasonably foreseeable risks and benefits of the procedure, as well as any alternatives. A reasonable dental practitioner under similar circumstances would have disclosed this information in a manner permitting the patient to make a knowledgeable evaluation in determining to undergo the procedure. Here, there was no documentation that any risks were discussed with the mother, or that alternatives were considered. Even if the defendant did have adequate expertise in performing a laser frenectomy, he should have asked the patient's mother to sign an informed consent document outlining the risks, benefits, and alternatives to the treatment. Had he done so, he would have eliminated that claim from the malpractice suit brought against him. ◆

1. www.laserdentistry.org/index.cfm/professionals/Certification

Understanding Subpoenas *continued from page 2*

scheduling. Sometimes the attorney will request a telephone conference to discuss your testimony before your appearance. Be aware that you are not required to participate in a discussion with the attorney about your testimony and, more importantly, you should not do so without the patient's explicit authorization.

The subpoena is most often returnable at the courthouse or the offices of the administrative body. A subpoena may also be returnable at an attorney's law office, usually in connection with a deposition or arbitration on the date listed on the subpoena.

A note of caution: an out-of-state subpoena, that is, one that is issued from a sister state court or tribunal, is not valid in New York unless certain formalities are observed.[4] The subpoena will only be valid if it is issued by a New York State county clerk or a New York State attorney.[5] The subpoena will still bear the title of the out-of-state proceeding, but it will be signed by either a county clerk in the state of New York or a New York attorney. Such subpoenas may be issued for pre-trial proceedings (such as depositions and discovery), but not for trial appearances, and are limited to court proceedings. A subpoena signed by out-of-state officials, administrative bodies, arbitrators, or attorneys are not valid in New York unless they comply with New York rules. However, if an out of state subpoena is accompanied by a properly executed authorization for medical records, you may honor the terms of the patient authorization as you would any other request for records.

4. This refers to other State courts. A Federal Court subpoena bearing the name of a U.S. District Court outside of New York may be valid and you should always contact legal counsel when you receive one.
5. CPLR § 3119.

It should be emphasized that any time you have a subpoena that is not accompanied by the patient's written authorization, you should contact legal counsel to ensure that the subpoena is valid and to determine how you should respond.

How should a subpoena be served?

A subpoena must be served in the same manner as a summons.[6] This means that it must be served by 1) personal delivery; or 2) by delivery to a person of suitable age and discretion with a second copy mailed to either your place of business or last known residence; or 3) delivery to a designated agent; or 4) if service by any of the above methods cannot be made by due diligence, then by affixing a copy to the door of either your actual place of business or residence and mailing a second copy.[7]

Because subpoenas are frequently time sensitive, most are delivered in person. Service by fax is not sufficient. Service by first class mail is not generally valid with one specific exception: if the subpoena is mailed, it must be accompanied by two copies of a Statement of Service by Mail and Acknowledgement of Receipt, and a return postage prepaid envelope.[8] If you receive a subpoena in the mail, you should contact legal counsel to verify that the statutory Statement and Acknowledgment procedure has been properly followed.

Subpoenas may be served statewide in proceedings in the higher courts and state administrative agencies. In the lower courts (city, town, and village courts), service is geographically limited to the county where the court is located, unless the court issues an order permitting service in an adjoining county.[9]

6. CPLR § 2303.
7. CPLR § 2303(a), CPLR §§ 307-312-a.
8. CPLR § 312-a.
9. UJCA § 1201, UCCA § 1201.

Witness Fees

Subject to certain limited exceptions,[10] a person subpoenaed is entitled to receive, in advance, travelling expenses and one day's witness fee. The dollar amounts are specified in the law. At present, the New York state witness fee is $15.00 plus 23¢ per mile for travel outside of a city.[11] Usually, the subpoena is accompanied by a check, but payment may be made within a reasonable time after service. You should never ignore a subpoena even if witness fees are not tendered.

State law does not require payment for copying the records to be produced in response to a subpoena, nor is there any provision for payment of other expenses.[12] If production of records is unduly burdensome or unusually expensive, such that you wish to receive reimbursement, then you must raise those matters with the presiding judge or official by means of a formal motion to quash the subpoena, modify it, or fix conditions.[13]

Advance Notice

Some subpoenas have specific notice requirements. A subpoena issued in connection with a deposition must be served with 20 days notice.[14] Subpoenas for hospital records must give at least 3 days notice.[15] Outside of these specific situations, there is no stated minimum or maximum time period. A subpoena should, however, give "reasonable notice" to appear in court or produce documents.

10. For example, a witness subpoenaed by the defendant in a criminal action is not entitled as a matter of right to witness and mileage fees except by court order. CPL § 610.50.
11. CPLR § 8001. A person who is not a party to an action but is subpoenaed for a pre-trial deposition is entitled to an additional $3.00 per day for each day's attendance.
12. CPLR § 8001(c) allows a charge of 10¢ per folio when a transcript of records is required to comply with a subpoena. Producing a copy of the record is not the same as preparing a transcript.
13. CPLR § 2304.
14. CPLR § 3106.
15. CPLR § 2306.

What "reasonable notice" is may vary with the circumstances, but it could be as little as 24 hours.

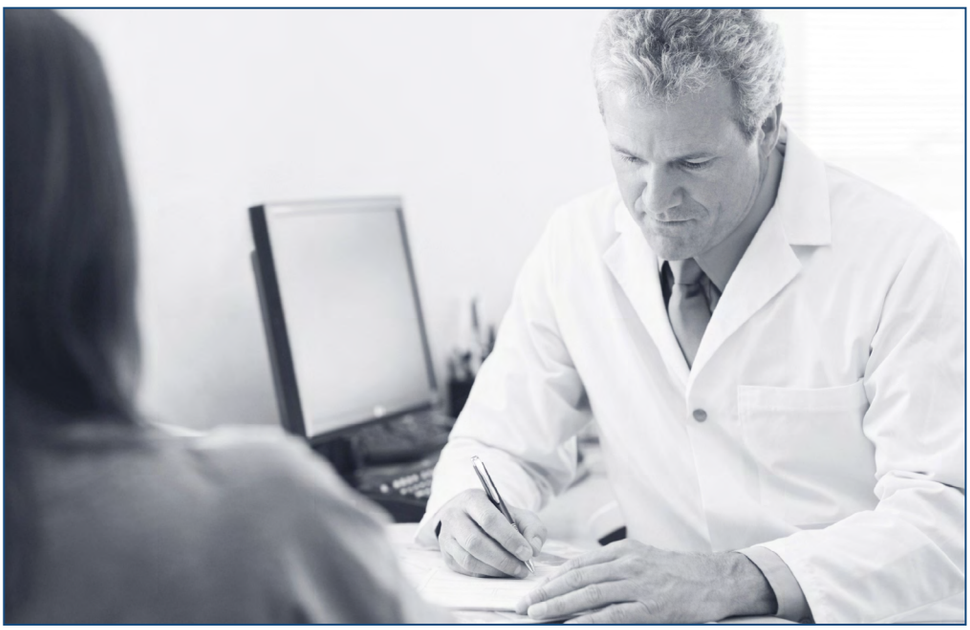
Confidentiality Issues

Subpoenas should not be blindly obeyed. A subpoena cannot command the release of legally privileged information.[16] Personal health information is legally privileged under New York law and, therefore, specific rules apply to its release. The privilege extends to information provided to physicians, nurses, dentists, podiatrists, chiropractors, and medical practices as long as such information was acquired in a professional capacity and was necessary for treatment purposes.[17] This doctrine is commonly referred to under New York law as "the physician patient privilege." In addition, for covered entities, personally identifiable health information (PHI) is also subject to HIPAA privacy rules.[18] Therefore, you should release information only when there has been full compliance with both New York State law and HIPAA requirements.

HIPAA Rules: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) imposes strict procedural requirements regarding disclosure of PHI pursuant to a subpoena. A subpoena will be HIPAA compliant if it complies with one of the following requirements:

1) the subpoena is accompanied by an authorization permitting disclosure and signed by the patient or the patient's legal representative; or
2) the issuer provides, in writing, satisfactory assurance that the patient has been placed on notice of the issuance of the subpoena in time to object to it and no objection was made; or
3) the issuer provides, in writing, satisfactory assurances that reasonable efforts have been made to secure a qualified protective order. "Satisfactory assurance" in this case means either a written statement and documentation that either the parties to the dispute have agreed upon a protective order limiting the use and disclosure of the PHI and its destruction or return to the covered entity at the end of litigation, or that the requesting party has asked the court to issue such an order; or
4) the subpoena is court-ordered.[19]

Under these rules, a subpoena which is accompanied by the patient's signed authorization will always be HIPAA-compliant. Further, under CPLR § 2303(a), each party who has appeared in a civil action should receive a copy of any subpoena for medical records. Therefore, if the patient whose record is requested is a party to the proceeding, he or she (or his/her lawyer) should receive a copy of the subpoena and HIPAA would be satisfied.



It is not enough, however, to determine whether the subpoena is HIPAA-compliant. You must also determine whether the subpoena complies with New York State law.

New York Rules: Prior to the enactment of HIPAA, New York permitted the release of patient medical records pursuant to subpoena only in situations where the patient had waived his or her physician-patient (or other related) privilege. There had to be evidence that the patient waived the privilege either by an affirmative act (i.e., signing an authorization to release information) or by law according to the circumstances.[20]

16. Matter of Grand Jury Investigation v. Morgenthau, 749 N.Y.S.2d 462 (2002); Matter of Grand Jury Investigation in Onondaga County, 59 N.Y.2d 130 (1983)
17. CPLR § 4504. There are also statutory privileges for psychologists, social workers and rape crisis counselors. CPLR §§ 4507, 4508 and 4510.
18. HIPAA privacy rules are found at 45 CFR Parts 160 and 164, effective on April 14, 2003.
19. 45 CFR § 164.512(e). The HIPAA subpoena rules will not apply if the disclosure is otherwise permitted under HIPAA without the patient's authorization.
20. For example, a person who commenced a lawsuit to recover money for his or her personal injuries was deemed to have waived the physician patient privilege with respect to those injuries. E.g., Hoenig v. Westphal, 52 N.Y.2d 605 (1981). Therefore, prior to HIPAA, release of the plaintiff's medical record in response to a subpoena in an action claiming compensation for injuries was held to be appropriate.

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Understanding Subpoenas *continued from page 7*

In 2003, New York law was changed to promote compliance with HIPAA requirements. CPLR § 3122(a) now states that any subpoena for medical records must be accompanied by the patient's signed HIPAA authorization and, further,

> [a] medical provider served with a subpoena *duces tecum* requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.

Stated another way, a subpoena for patient records should be accompanied by an authorization and should also state in boldface type that the records should not be produced if no authorization is supplied. As a result of this legislation, most subpoenas are now accompanied by a HIPAA compliant authorization, and therefore there are fewer issues regarding compliance.[21] Unfortunately, CPLR § 3122-a does not clearly address all situations. The wording of the statute applies to subpoenas for medical records, leaving open the question as to whether the law was intended to cover situations where verbal testimony is sought from a provider. In addition, CPLR § 3122-a technically applies to the pre-trial phase of a legal action and not the trial phase. Although the question has not been entirely settled, the weight of authority has held that CPLR § 3122-a should apply to all civil subpoenas, at all stages of litigation.[22]

Under a recent amendment to the New York civil practice statute, if the subpoena requests medical records for use at a trial (as opposed to pre-trial proceedings), and there is no patient authorization, it must be issued by a court. The subpoena must bear the signature of a judge.[23]

Subpoenas Without Authorizations: If the subpoena is not accompanied by a written authorization, you should contact the issuer and request that he/she provide one. You always have the option of contacting the patient yourself to obtain an authorization. If you cannot obtain an authorization, and the issuer insists upon compliance, then legal counsel should be consulted for an appropriate response to the subpoena.

Subpoenas Seeking Non-Confidential Information: It is possible that a subpoena could ask for information related to a patient which is not legally privileged. There are a number of exceptions to the New York State dentist-patient privilege. For example, CPLR § 4504(b) states that a dentist shall be required to disclose information necessary for identification of a patient, as well as information indicating that a patient who is under the age of 16 has been the victim of a crime. Other exceptions are in the form of mandatory reporting requirements.[24] Other circumstances may exist where the information does not fall within the New York State privileges. You should always consult with legal counsel before releasing any information under these circumstances.

How Should you Respond to a Subpoena?

Subpoenas requesting testimony require you to show up at the specified time and place. Quite often, the subpoena also requests that you bring with you the patient's record. Generally, the subpoena will ask for certified copies of the records because, in most cases, certified copies will suffice for legal purposes. The custodian of the record should complete a certification form and attach it to the record. The certification is simply a statement that the medical record was maintained in the ordinary course of business and that the copies being produced are true, accurate, and complete.

You should not release your original dental chart for a court proceeding. Producing the original record for use in court is risky because it is likely that the record will be marked as an exhibit and will not be returned. In any case where the original record is requested, you should contact the issuer of the subpoena and ask if a certified copy will suffice. If the issuer insists upon the original record and will not agree to accept a copy, make a complete copy of whatever is produced to keep in your files. You should also keep all documentation showing that you were compelled to deliver your original record to court.

All records delivered to the court, along with the certification form, should be placed in a sealed envelope, with a copy of the subpoena attached on the outside.[25] It is recommended that you send the records via certified mail, courier, or other service which will provide a delivery confirmation.

21. The Worker's Compensation Board has also adopted this requirement in an official memorandum published on its website. Procedures for Subpoenaing Medical Records in Worker's Compensation Proceedings, Subject 046-129, issued April 12, 2004, accessed at: www.wcb.state.ny.us/content/main/SubjectNos/sn046_129.jsp

22. Campos v. Payne, 2 Misc. 3d 921 (Civ. Ct. Richmond Co. 2003), Worker's Compensation Board Bulletin, Procedures for Subpoenaing Medical Records in Worker's Compensation Proceedings, Subject 046-129, supra.

23. CPLR § 2302.

24. For example, under § 265.25 of the Penal Law, every case of a wound apparently inflicted by a firearm and every knife wound which is likely to result in death must be reported to law enforcement. In addition, a medical provider is required to disclose suspected cases of child abuse or maltreatment (Social Services Law §§ 413 and 415) The Family Court Act states that there is no privilege in child abuse or neglect proceedings (Family Court Act, § 1046(a)(vii)).

25. CPLR §§ 2301, 2306(b).

You may contact the attorney who issued the subpoena to discuss any questions you have about the subpoena, or any logistical and administrative matters (fees, time of appearance, etc). Do not discuss any protected health information without the patient's authorization.

When a Subpoena is Not Enough

Certain information must never be released pursuant to a subpoena. Confidential HIV information can only be released if there is a court order or a specific authorization by the patient.[26] All written disclosures of confidential HIV-related information must also be accompanied by a statement prohibiting re-disclosure.[27]

Psychiatric information is another area demanding careful attention. New York case law has indicated that because of the sensitive nature of psychiatric records, heightened protections should apply. Such information can only be released with a specific authorization from the patient or a court order.[28]

Motion to Quash

If it appears that the subpoena was improperly issued, or if it requests information which you believe to be privileged, you cannot remain silent but must act to avoid potential legal consequences. Willful failure to comply with a valid subpoena may make you liable for contempt of court, which could mean a fine, or even imprisonment.

If the subpoena is not returnable in a court, New York law requires that you first contact the issuer and make a request to withdraw or modify the subpoena.[29] If the issuer will not agree, then you should contact legal counsel who will make a determination whether a motion must be made to quash the subpoena.

Common Agency and Criminal Subpoenas

You may receive a Grand Jury subpoena or judicial subpoena in a criminal matter. While HIPAA would permit the release of information in response to these subpoenas,[30] note that there is no exception under New York law to the physician patient privilege for Grand Jury proceedings or criminal investigations.[31] Therefore, the stricter New York rule must be followed. If the subpoena is not accompanied by an authorization from the patient, and there is no court order, you should not release any information without first consulting legal counsel. Even if you believe that the information sought in the subpoena is technically not privileged under New York law (such as dental identification of a patient), you should always obtain a legal opinion on the scope of the requested information.

New York law permits oversight agencies, such as the Department of Health and the Office of Professional Discipline, to issue subpoenas for patient information without providing a patient authorization.[32] A county coroner, coroner's physician, or medical examiner also has the power to subpoena and examine witnesses under oath to investigate a person's death without an authorization on behalf of the deceased.[33] Investigatory subpoenas from these agencies are generally valid, but it is always a good

26. Public Health Law § 2785. The required offer of an HIV test to individuals between the ages of 13 and 64 is not considered confidential HIV information and therefore a court order is not required for release if such information is contained in the dental record. See, http://www.health.ny.gov/diseases/aids/providers/testing/law/faqs.htm
27. Public Health Law § 2782(a).
28. Cynthia B. v. New Rochelle Hospital Medical Center, 60 N.Y.2d 452 (1983). Be aware that for these purposes, a subpoena signed by a judge containing the words "SO ORDERED" may not be a sufficient court order. You should always consult with legal counsel to determine the validity of any document signed by a judge seeking highly sensitive information.
29. CPLR § 2304.
30. HIPAA allows release of PHI to comply with a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena. 45 CFR § 164.512(f)(1)(ii)(A)-(B).
31. Matter of Grand Jury Investigation in Onondaga County, 59 N.Y.2d 130 (1983).
32. Public Health Law § 12-a, NYS Education Law § 6507.
33. County Law § 674(4).

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Treatment of Minor Patients: Delegated Consent by Parents

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One of the quandaries facing dental offices today is what to do when a minor patient comes to the office for treatment accompanied a person who is not their parent or legal guardian. Sometimes the child is brought in by a relative, a spouse of a parent who has remarried, or simply a friend. Since only certain legally authorized individuals may give consent for general health-related treatment for a minor, the dentist must decide whether to proceed with the visit or reschedule the patient. Often, the dentist will attempt to contact the parent or legal guardian by telephone at the time of the visit, but this may not always be successful.

Fortunately, New York law provides a mechanism by which a parent may designate another person to make healthcare decisions for minors and even incapacitated adult children. Under New York General Obligations Law § 5-1551, a parent of a minor or incapacitated person may designate another person as a "person in parental relation for purposes of consenting to immunizations and other healthcare treatment."[1] A designation may specify the treatment or diagnosis for which consent is authorized, may limit any treatment or diagnosis for which consent is not authorized, and may contain other restrictions on the authority of the designee. Even if a parent has appropriately designated another person to consent to healthcare treatment, the parent still retains ultimate authority. The statute provides that any decision that a designee makes can be superseded by a contravening decision of a parent.

The designation of another person must be in writing. In order to be valid, there must be no court order prohibiting the parent from himself or herself exercising the right to consent on behalf of the minor. If a court has issued an order granting only one parent the right to make medical decisions for the minor, then the other parent cannot sign a designation. Additionally, if a court has ordered that both parents must agree on healthcare decisions, both parents must sign the designation.

If these requirements are met, then a written designation will be valid for 30 days. Note, however, that there are additional requirements for a designation to be valid beyond a 30-day period. The document must include:

a. an address and telephone number where the parent can be reached;
b. an address and telephone number where the designee can be reached;
c. the date of birth of each person with respect to whom the designation is made;
d. the date or event upon which the designation commences;
e. the written consent of the designee;
f. a statement that there is no prior order of any court prohibiting the parent from making the designation; and
g. notarization of all signatures.

If all of the above requirements are met, a designation may be valid up to six months. It automatically will expire at the end of the six-month period. Once a designation has expired, a new form must be completed.

The law also contains a process for revoking a designation of authority. A parent may revoke a designation at any time by notifying the healthcare provider either orally or in writing, or by any other act showing a specific intent to revoke the designation. It may also be revoked if the parent signs a subsequent designation. If both parents originally signed the designation, the later revocation by one parent is enough to be a complete revocation of the authority of the designee. A designee is required to notify a healthcare provider of any revocation of their authority. A designation is automatically revoked upon the death or incapacity of the parent who signed it.

The statute provides protection for a dentist who relies upon a written designation of another person to give consent. The law states that a person who acts reasonably and in good faith in reliance upon a designated consent is not deemed to have acted negligently, unreasonably, or improperly, as long as they have no knowledge of any facts indicating that the designation was not valid.

A sample designation form may be obtained from Fager Amsler & Keller, LLP. If you have any questions regarding this information, please feel free to call Fager Amsler & Keller in Syracuse (315-428-1380 or 877-426-9555), Latham (518-786-2880) or Long Island (516-794-7340). ◆

1. The word "parent" is specifically used in the statute, and therefore it is questionable whether a non-parent legal guardian has the power to delegate this authority under the law.

Understanding Subpoenas *continued from page 9*

idea to check with legal counsel first. Because HIPAA also contains an exception for health oversight activities, these subpoenas are exempt from HIPAA requirements.[34]

State agencies or officials authorized to investigate Medicaid fraud may issue subpoenas for patient information, and may even do so under a Grand Jury Subpoena. Courts have held the physician-patient privilege does not apply to Medicaid fraud investigations. [35] Thus, investigators need not provide an authorization, and are usually entitled to access the medical records of Medicaid recipients unless the information is exceptionally sensitive and is unnecessary to the Medicaid investigation. If you feel the subpoena asks for such information, you should consult with legal counsel for an appropriate response.

In sum, the rules governing release of information to governmental agencies can be complicated, depending on the nature of the proceeding or investigation. When you receive a subpoena from an administrative agency, it is best to contact legal counsel to determine its validity and whether you may release the information requested.

Checklist for Complying with Subpoenas

When you receive a subpoena for a patient's clinical records, you should always follow these steps:

1. Verify that the subpoena has been appropriately served.
2. Review the caption to obtain as much information as you can regarding the nature of the legal proceeding. Determine whether the subpoena was issued by an attorney, administrative agency, a court, or a governmental official.
3. Verify the identity of the person or entity to whom the subpoena is directed.
4. Determine whether the subpoena calls for verbal testimony or records. If it appears that the subpoena requests pre-trial deposition testimony in a malpractice case, you should immediately send the subpoena to MLMIC for review.
5. Check to see if the patient signed an authorization. Review any accompanying authorization for HIPAA compliance.
6. If no authorization was supplied, ask for one. If you question whether an authorization is required under the circumstances, check with legal counsel.
7. Call the issuer with any questions concerning the validity of the subpoena or how to comply.
8. Review the medical records to determine if there is any highly sensitive information which requires a court order or a specific patient authorization for release (such as HIV). If such information exists, do not comply with the subpoena and check with legal counsel for an appropriate response.

In short, when it comes to subpoenas, you should always exercise caution. If you are not certain as to whether you may release the patient's information under the specific circumstances, always consult legal counsel. ◆

34. 45 CFR § 164.512(b) allows covered entities to disclose, without individual authorization, protected health information to public health authorities " . . . authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions . . . ".
35. E.g., Matter of Grand Jury v. Kuriansky, 69 N.Y. 2d 232 (1987).

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Fager Amsler & Keller's attorneys are available during normal business hours to assist MLMIC insureds with a wide range of legal services, including, but not limited to, advisory opinions concerning liability issues, liability litigation activities, lecture programs, and consulting services.

Healthcare law, regulations, and practices are continually evolving. The information presented in Dental Dateline *is accurate when published. Before relying upon the content of a* Dental Dateline *article, you should always verify that it reflects the most up-to-date information available.*

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