

CHAPTER 43

Release of Health Information: Subpoena

I. POLICY

Health Record Services (HRS) shall ensure that health care staff complies with a legally-served Subpoena Duces Tecum that mandates the release of related health information. The HRS Supervisor or Designee shall have the responsibility to accept and respond to all subpoenas requesting health information/health records. The HRS Supervisor or Designee shall accept subpoenas when the institution is a party to the suit; however, the Litigation office shall be immediately notified. Sufficiently-trained HRS staff shall be available to respond to valid service of subpoenas. Subpoenas requesting nonclinical information shall be managed by the Litigation office.

II. PROCEDURE

- A. HRS staff shall verify that the service of the subpoena is correct:
 1. Service of subpoenas may be at any time during regular HRS staff working hours.
 2. Personal service of the subpoena is required except for State criminal proceedings.
 3. Mail service is permitted for State criminal proceedings only.
 4. A photocopy of a subpoena is acceptable if all other criteria are met.
 5. Note: If a subpoena indicates the institution or an institution physician is a party to the action, immediately notify the Health Care Manager and the Litigation office.
- B. Review the subpoena carefully to determine its validity and to resolve any problems with the subpoena while the server is present.
 1. A photocopy is acceptable.
 2. Verify the presence of an affidavit or declaration if the subpoena is for a personal appearance at a State administrative proceeding, trial or deposition.
 3. If the subpoena does not specify, a personal appearance shall be made.
 4. Verify that the subpoena is directed to the HRS.
 5. Determine if the subpoena indicates "civil" and if "duces tecum" is somewhere on the form.
 6. Verify that the patient whose records are requested has been, or still is, a patient at the institution and ascertain his current housing.
 - a. If the patient has been transferred to another California Department of Corrections (CDC) facility, it may be necessary to have the requesting party issue a new subpoena. Determine which records are needed. The subpoena may indicate an incident at the institution, even if the patient has been transferred to another institution.
 7. Check for the name, address, and phone number of the attorney responsible for issuance of the subpoena and the Docket number.

8. Telephone or notify the requesting party as to the present location of the patient and of his records, if necessary. Explain that the UHR accompanies the patient at the time of his transfer.
9. Request additional information if needed.
10. Return the subpoena, if appropriate, to the server with current patient information.
11. Verify that the following data elements are present before accepting the subpoena:
 - a. Issuing authority:
 1. State or federal court.
 2. Administrative agency.
 3. Attorney for either party to the action.
 - b. The signature present may be a typewritten signature, e.g., S/J. Doe, Attorney:
 1. Attorney.
 2. Judge.
 3. Clerk of the court.
 4. Official of administrative agency.
 - c. Documents requested are described:
 1. Individual patient.
 2. All health-related records or partial records.
 3. Other documents such as x-ray films, billing records, etc.
 - d. Type of response requested:
 1. Copy of records (most common).
 2. Personal appearance with records.
 3. Mailing copies if neither of the above is specified.
 4. Note: Check with the requesting attorney to clarify if a mailed copy will comply.
12. Location for production of records is usually within 75-150 mile radius of the facility; however, as CDC is a statewide system, subpoenas are to be accepted for anywhere in California [California Code of Civil Procedures 2025 (e)(2)].
13. The law provides that an authorized delegate of a corporation may make the personal appearance.
14. Call Central Office, Health Care Operations, for an authorized delegate if the mileage exceeds 75 miles. Central Office will arrange for an authorized delegate personal appearance by staff from the closest CDC facility.
15. Arrangements for transfer of the "prepared" records will be made between the subpoenaed institution and the authorized delegate.
16. Date and Time of Response. There must be sufficient reasonable time allowed to locate the records, prepare the records and travel. The following are factors to consider:
 - a. Accessibility of all data requested; may be in Archives or Parole Regions.
 - b. Circumstances of the request.
 - c. Urgent need, so trial is not prolonged.
 - d. If the time of the service is on Friday night at 1630, and the personal appearance is for the following Monday at 0900, this is not reasonable allowable time.

- e. Note: Always note date and time of service on the subpoena.
- C. If a personal appearance is required, call the subpoenaing party and request "on-call" status for the trial in lieu of appearing at the time stated on the subpoena.
- D. If a personal appearance is required, fee must be requested at the time of service.
 - 1. Request witness fee for one (1) day and mileage (see subsection P - Charges).
 - 2. Fees must be paid immediately if for a trial.
 - 3. Fees may be paid at time of service or deposition, at the discretion of the subpoenaing party (see subsection P-6 - Deposition Subpoena).
 - 4. Note: There are no fees for any subpoena issued by the State Attorney General's Office or any other agency representing the CDC.
- E. A civil subpoena issued in connection with State Court proceedings and issued by parties other than State and local agencies is not properly served unless it includes notification to the patient of the subpoena of records in a timely manner (CA Code of Civil Procedures 1985.3). This "Proof of Notice to Patient" is required for civil subpoenas unless:
 - 1. The party responsible for the subpoena is a government agency/state or local, including county, city, district, school, local board or commission, and any state office, department, division, board or commission including the legislature (CA Government Code #7465),
 - 2. A valid written authorization is presented, either signed by the patient or his attorney, or
 - 3. A patient is a party to the suit.
 - 4. Note: A "Proof of Notice" applies only to civil proceedings.
- F. A "Proof of Notice" or a written authorization for the release of records provided by the requesting attorney:
 - 1. Attests that the patient has knowledge that records are to be released.
 - 2. Informs the patient of the right to object to release of records.
 - 3. HRS staff calculates time for the patient objection from the date the notice was personally delivered or placed in the mail.
 - a. Personal delivery -- 10 days.
 - b. Mail notice within California -- 15 days.
 - c. Mail notice outside California -- 20 days.
 - d. Mail notice outside the US -- 30 days.
 - 4. Written authorization for release of records rather than a "proof of notice" may be signed by the representing attorney [California Code of Civil Procedures 1985.3 (c)(2)] acting on behalf of the patient; however, it does not suffice for release of HIV tests, substance abuse, psychiatric or other protected information.
- G. A patient may bring a motion to "quash" or modify the subpoena (release of records) in response to the Proof of Notice - in this case records CAN NOT be released.
 - 1. May accept oral information about motion to quash.
 - 2. Attempt to get confirmation in writing.
- H. A confirming letter is sent to the patient with a copy to the requesting attorney of any records not released through a motion to quash.
- I. A Court Order supersedes the motion to quash.

1. Records are released to judge of court.
2. Patient agrees to release. Request all agreements in writing.
- J. If no notice to quash is received by the release date, proceed with the release of records.
- K. Notify the subpoenaing party of any failures to respond to subpoena for any records not released by the date on subpoena.
- L. Time Period - Time to Produce Records - Records can not be released before date and time of subpoena [California Code Civil Procedures 2020 (d)(4) effective 1/1/93].
 1. Subpoena form must state, "Do not release the requested records to the deposition officer prior to the date and time stated." The patient shall have the full time available to object to release under "consumer notice" law (CA Code Civil Procedures 1985.3).
 2. Note: The above statute to "produce" records on the date and time in the subpoena is interpreted to mean: "release records on date and time in subpoena."
 3. Clarify with the subpoenaing party that records will be released on the date and time specified in subpoena, e.g.:
 - a. Ensure that records are available in the office and that a copy of the records is available.
 - b. Transmitting copies _ personal delivery _ same day as specified.
 - c. Parties and patient may "stipulate to an earlier date" for release of records.
 - d. Note: Patient must agree to earlier date and time (it is best to have this in writing).
- M. Out of State Subpoena:
 1. Is subject to same rules that apply within California (CA Code of Civil Procedures 2029) and must comply with validity/service (out-of-state attorneys may not be familiar with California law).
 - a. Verify that the subpoena includes a proof of notice to the patient that complies with California law. California law requires an attorney issuing a civil subpoena for the disclosure of health records to give notice of the subpoena to the patient or the patient's legal representative and to inform them of their right to object (CA Code of Civil Procedures 1985.3). Out-of-state attorneys may not be aware of this requirement.
 - b. Check that the subpoena is issued and signed (a typewritten signature is acceptable) by a person authorized to do so under California law. This includes a state court, an administrative agency, or, as is generally the case, an attorney for either parties to the action.
 - c. Verify that the subpoena was served personally. Mail service is permitted only in state criminal proceedings.
 - d. Contact the requesting party to explain deficiencies in the subpoena that are the result of unfamiliarity with California rules and procedures.
 - e. Comply with the subpoena when California requirements are met.
 2. Travel distance is limited to within California, or outside California if the place of the deposition or hearing is within 75 miles of the principal executive or business office in California, e.g., Oregon, Nevada, or Arizona.

3. Note: An institution employee who is subpoenaed to appear at a criminal proceeding may be required to travel up to 150 miles from his or her place of residence, irrespective of whether the hearing or deposition is being held in the county in which the criminal proceeding is pending. Reimbursement is allowed at California rates.
- N. Act upon each service of a subpoena since it requires prompt attention to avoid a citation for contempt of court. **DO NOT IGNORE ANY SUBPOENAS.**
- O. Telephone the requesting attorney if any problems are identified, such as the following: patient identification, service is improper, time to respond is insufficient, distance for travel (out-of-state or within state).
1. Note: "Improper Subpoena" is a subpoena requesting records which enjoy special protections under the law, e.g., those that can not be released without a written authorization or Court Order including psychiatric, substance abuse, HIV.
 2. Note: "Invalid Subpoena" occurs if the delivery was improper or the subpoena lacked data elements, if the request is for sensitive records, or as noted above.
 3. Obey any order of the court since the Court always has the final word. If there are questions, legal counsel should be obtained.
- P. Charges may be computed as follows:
1. Reproduction costs of \$0.10 per page for documents 8-1/2 x 14 inches or less.
 2. Reproduction costs of \$0.20 per page for reproduction from microfilm, oversized documents or documents that require special processing.
 3. Clerical cost for locating and making records available at the rate of \$4.00 per quarter hour or fraction thereof, plus actual costs if any, charged by a third person for retrieval of records.
 4. Total cost should include postage for certified, return receipt mail.
 5. If the records are copied by an attorney or his or her representative, a maximum of fifteen dollars (\$15.00) plus costs, if any, for retrieval by a third person may be charged.
 - a. Note: If the higher reproduction fee is charged, the extra time taken to copy the records is included in the higher fee and may not be billed separately.
 6. Deposition Subpoena: Payment may not be requested until records are ready to be delivered. It should be demanded simultaneously with such delivery.
 7. Subpoena Duces Tecum: Once the records have been prepared, payment should be demanded prior to delivering the records.
 8. Personal Delivery: HRS staff should prepare the itemized statement in advance and request the payment prior to releasing the records to the court or to the officer taking the deposition.
 9. If Subpoena Withdrawn, Quashed, Modified or Limited: If expenses are incurred prior to the subpoena being withdrawn, quashed, modified or limited, the party requesting the records should be billed for these expenses.
- Q. In preparing the patient health record for release to the Court, Attorney General, or Litigation office, HRS staff shall take the following steps:

1. A photocopy of the record shall be made and submitted to the Court or Litigation office with a certification statement meeting state regulations. If the Court will not accept a photocopy, retain the copy at the institution and take the original to court.
 2. Obtain a copy of the subpoena to determine the information needed for any records requested by the Litigation office.
 3. Pull only those records specifically named in the subpoena. Obtain records from other sources if directed to do so by the subpoena.
 4. Verify record organization and completeness, neatness, security of the documents, another patient information misfiled in the record, and other inappropriate findings. Note: The printout of a computerized record shall be accepted as the original. These documents, which have been authenticated electronically, do not require additional signatures
 5. Remove all correspondence, release of information authorizations and other subpoenas if these are not covered by the description of the documents contained in the subpoena.
 6. Remove all data covered by other specific statutory protections, such as HIV tests, psychiatric information, and substance abuse information (Exception: the Attorney General has access to this information).
 7. Remove any mention of HIV antibody results unless a valid written consent has been presented. (Exception: the Attorney General has access to this information).
 8. Determine that all pages are identified with the patient's name, date of birth, and CDC number.
 9. Ascertain that all data elements are incorporated into the patient's record, e.g., diagnostic results, dental information, etc. If data elements overlap, such as chronos and lab results, remove these sheets and replace (secure them to a sheet of paper) so that all information is readily available and easy to copy.
 10. Number all pages of the record (front and back, if written on) in pencil.
 11. Make a single-sided photocopy of all sheets (front and back or original, if both sides contain information). Also copy the front sheet of the subpoena to enclose with the record.
- R. Mailing Photocopies:
1. In some instances, the subpoena may direct that the records may be forwarded by mail (Evidence Code 1561).
 2. The institution must not be the place where any cause of action is alleged to have arisen.
 3. The subpoena does not specify a personal appearance must be made.
 4. If there are questions, call the attorney listed in the subpoena and request permission to mail a copy of the record.
 5. Prepare an itemized statement.
 - a. For Court subpoenas only, complete:
 1. Stipulation original and one copy (only for the original record).
 2. Letter to the court requesting return of a copy of stipulation.
 3. One copy of the affidavit.

4. Self-addressed stamped envelope.
 - b. For Deposition and Arbitration subpoenas only, complete:
 1. Letter requesting return of records.
 2. A receipt for records.
 3. Original and one copy.
 4. One copy of affidavit.
 6. Mail the subpoena according to the manner specified in Section 1560 Evidence Code.
 7. Prepare an Inner Envelope. This envelope contains:
 - a. The photocopy of the record.
 - b. A stipulation and order for the return of the record (only for the original record).
 - c. A receipt for the release of the record (only for the original record).
 - d. A letter requesting completion of the stipulation and receipt (only for the original record).
 8. Seal this Inner Envelope.
 9. The face of the Inner Envelope must indicate:
 - a. The Title of the action (e.g., Smith vs. XYZ Corp.).
 - b. The number of the action (e.g., No H- 1000).
 - c. The name of the witness (i.e., the name of the institution HRS Supervisor).
 - d. The date of the subpoena as given on the subpoena.
 10. Prepare an Outer Envelope. Put the sealed enveloped in this Outer Envelope and address as follows:
 - a. If the subpoena directs attendance in court:
 1. The clerk of the court or, if there is no clerk, the Judge.
 2. The name of the court.
 3. The address of the court.
 - b. If the subpoena directs attendance at a deposition:
 1. The name of the officer before whom the deposition is to be taken.
 2. The address of the place designated in the subpoena for the taking of the deposition.
 11. Mail the record or copy with all enclosures, "Certified Mail, Return Receipt Requested." Complete appropriate forms for Certification and affix to Outer Envelope.
- S. Delivery of Records to Clerk of the Court (court subpoenas only) prior to trial: In those cases where the institution would comply with the subpoena by mailing photocopies, and where a lack of time precludes mailing photocopies, or if it is more convenient for the institution, the records may be delivered to the clerk of the court in the room designated on the subpoena of the County Courthouse, or to the clerk's office in any of the branch districts, in the same manner as if the record were actually mailed. Obtain receipt from clerk verifying delivery.
- T. Personal court appearance:
 1. Follow the above for preparation of record.
 2. If personal court, deposition or arbitration hearing appearance is required by subpoena, or type of case indicates personal appearance, call the attorney and ask to

- be placed on call so that time will not be lost waiting in court for records to be called into evidence.
3. If the original record is to be left with the clerk of the court, complete the stipulation and order for the return of the record to the institution. Complete the affidavit and take it to court with the record.
 4. Staple the photocopy of records to a manila folder labeled with the patient's name, subpoena number and "the name of the institution."
 5. If the court will not accept a photocopy, retain the copy at the institution and take the original to court.
 6. Prepare inner and outer envelope as previously outlined.
 7. If the institution is on call, record the time, date, etc. on a calendar.
 8. Staff shall appear in court about ten minutes before time specified by the attorney (not the time given on subpoena, unless it was impossible to be placed on call) and shall take the stipulations, affidavits and original records.
 9. Contact the clerk of the court and ask to have the stipulation signed by both attorneys and the Judge.
 10. After stipulations have been signed, and one signed copy has been returned, release the records to the clerk of the court.
 11. Occasionally staff will be requested to take the stand. They should always tell the truth, but not offer additional information, and not be afraid to say they do not know the answer if that is truthful.
- U. If personal deposition or arbitration hearing appearance, staff should follow the previous steps for preparation of records and:
1. Staple original records to manila folder labeled with the patient's name, subpoena number and institution.
 2. Take original records, photocopy of records and a prepared receipt.
 3. Make sure both attorneys are present. If either is absent, ask that your inquiry (about both attorneys) appear in the record.
 4. When appearing as a witness, tell the truth but not offer additional information. Staff should not be afraid to say they cannot answer the question if that is truthful.
 5. DO NOT leave original records with the attorney or notary public who subpoenaed the records. Offer to leave a photocopy of the record. If this is rejected, offer to accompany reporter to photocopier and wait for original records, or wait until attorney reads the record into record of deposition.
 6. Ask the attorney or notary public who subpoenaed the records to sign the receipt for it and bring the receipt and original record back to the institution.
 7. A deposition subpoena is a subpoena that requires the production of records for a deposition (during the discovery phase of a lawsuit). A deposition subpoena will clearly include the words "deposition subpoena" somewhere on the form.
 - a. No affidavit is required for a deposition subpoena.
 - b. A deposition subpoena does require either:
 1. The patient's written authorization for release of records, or
 2. A copy of proof of service that the patient received notice of the subpoena.

V. Return of Records:

1. When a personal appearance is required or mailing the original record is permitted, there must be procedures followed to assure the return of any original records to the HRS Department. There must be a:
 - a. "Stipulation and Order for Return of Exhibits to the Institution" form.
 - b. "Receipt for Release of Institution Records" form.
 - c. A letter requesting return of the stipulation, receipt and records, as appropriate.
2. After action on the case by the court, the original record must be returned to the institution.
3. If the Clerk of the Court does not return the record within 10 days after the completion of the court case, the HRS Supervisor shall make arrangements with the court and claim the original record.
4. If the photocopy was accepted by the court, at the completion of the court case, the original record may be removed from the locked file and returned to the files.

W. A subpoena that has requested release of any of the following requires specific actions as noted below:

1. HIV Test Results.
2. Substance Abuse (drug/alcohol) Information.
3. Psychiatric Records.
4. Medical Staff Records.
5. If a record that is requested is protected by Section 5328 or 4514 of the California Welfare and Institutions Code (psychiatric/ICF/DD records), a subpoena duces tecum signed by a clerk of the court is not sufficient. There must be a court order for release of the record. The record must be handed or addressed to the Judge hearing the case.
6. Note: As CDC institutions do not receive Short Doyle funds, a subpoena duces tecum is sufficient for the release of information.
7. Note: the institution does not operate a program whose primary purpose is to provide alcohol/drug abuse treatment and does not receive federal funds; a subpoena duces tecum is sufficient for the release of information.
8. Note: The following information may apply to the institution. Refer all questions to the HRS Supervisor.
9. Refer any subpoenas for medical staff records immediately to the Health Care Manager.
10. The following steps are taken when the subpoenaed patient health record contains information related to the treatment of psychiatric or substance abuse or the results of HIV tests.
 - a. Health records of patients treated for either psychiatric or substance (drug/alcohol abuse) or records specific to HIV tests have special protections under the law. Records can be released:
 1. Directly to Court or if the subpoena is also supported by either a court order or an appropriate authorization.
 - a. Remove this information from the record prior to release or prior to copying the record for release and attach a declaration to indicate that

- certain records that may be covered by State HIV laws, State substance abuse laws or State mental health laws are not included.
2. Release of Records to the Court Without Court Order. Release of this sensitive information may require informing the Judge of the court of the special protections. To inform the Judge:
 - a. Prepare a copy of the records.
 - b. Prepare two (2) copies of the court order for release.
 - c. Take the originals, copies and court order to the court personally.
 - d. Notify the clerk of the court that it is necessary to talk to the judge "in chambers," e.g., in private, usually in chambers.
 - e. Explain to the Judge that records are believed to contain information that is protected by the Lanterman-Petris-Short (LPS) Act, or State substance abuse confidentiality laws and perhaps the physician patient relationship. Ask that the records be reviewed to determine whether they should be released.
 - f. Present the two (2) copies of the court order to the Judge and ask for a "conformed" copy, which will include the date signed, and the name of the Judge signing it.
 - g. Leave a copy of the records if the Judge so orders, or the original, if required, and retain one (1) copy of the court order for institution use.
 - b. Release of this information may be in writing.
 1. Written information may be given to the Judge of the court relative to confidentiality laws, e.g., special protections for this sensitive information.
 2. Prepare a copy of the records.
 3. Prepare two (2) copies of the court order.
 4. Prepare a letter to court.
 5. Send all materials, together with a copy of subpoena to the court.
 6. Send copies of the letter to attorneys for both parties.
- X. To respond to an Improper Subpoena for psychiatric or substance abuse records or records specific to HIV tests:
1. Notify subpoenaing attorney that while the institution may have such records, they are protected (CA Welfare and Institutions Code 5328 and/or the state substance abuse act).
- Y. Investigative Subpoena:
1. Investigative subpoenas differ from other subpoenas in that they are issued before any formal proceeding has been instituted. They are issued to assist with determining whether there is evidence to suggest that formal action should be initiated.
 2. If there are any questions regarding the legality of an investigative subpoena, request that the issuing agency furnish its legal authority for such a subpoena. If after review, questions remain, request legal opinion.
 3. The institution must reply to a subpoena for general clinical records unless it chooses to challenge the legality of the subpoena.

4. The court does not have authority to issue a court order for production of psychiatric records in response to an investigative subpoena. Therefore, an institution should not disclose psychiatric records pursuant to an investigative subpoena, even with a court order. Request assistance from the Litigation office.
 5. Alcohol and drug abuse records can not be released in response to an investigative subpoena, but must be disclosed if there is also a court order.
 6. Proof of notice is not required for response to an investigative subpoena.
 7. Investigative subpoenas must justify the request for records by indicating why the information is necessary to resolve the question under investigation.
 8. The investigative subpoena should designate the specific portions of the record being subpoenaed.
 9. When complying with an investigative subpoena, follow the guidelines for complying with a general subpoena.
 10. Take special note of these requirements.
- Z. Worker's Compensation Appeals Board Subpoenas:
1. Process as stated above for acceptance of subpoenas and preparation of records.
 2. For mailing of photocopies, process as for deposition including a self-addressed, stamped envelope.
 3. If photocopies are delivered, also deliver affidavit. Have clerk stamp "Received" on subpoena.
- AA. Subpoenas served from outside reproduction service:
1. Verify that records subpoenaed are those of the institution. Ask for additional information if unable to locate name of patient in files.
 2. Verify that the subpoena is directed to Custodian of Records and that it has been dated and signed by appropriate parties.
 3. Obtain correct fee for processing record.
 4. Remove all correspondence, release of information authorizations and other subpoenas only if these documents are not covered by the description of the documents contained in the subpoena.
 5. If the subpoena is against CDC, contact the Litigation office and the Health Care Manager. Proceed with the above procedures with his/her approval.
- BB. Maintain a Log.
1. Log receipt of all subpoenas and the disposition.
 2. Record the following on Receipt of subpoena:
 - a. Record CDC number of the patient.
 - b. Note case number on the subpoena.
 - c. Note Plaintiff vs. Defendant.
 - d. Note attorney's name, address and phone number.
 - e. Note date received, court date, response to the subpoena within 15 days, date sent and fee paid.
 3. Record the date the case was closed and the original records returned, if the original records were sent, otherwise mark non-applicable (NA).

4. Keep a record of contacts with the attorney(s), courts, and the response information on the back of the subpoena. Keep the subpoena on file. Put one copy in the patient health record and a copy with the subpoena log.