



Subpoenaed Medical Records - What should Practitioners do?

Share 

26 Jul 2018

Published by: Michael Gorton AM and Stephanie McHugh

Medical practitioners are often requested to release their patients' medical records to court under subpoenas. However some medical organisations have concerns that some subpoenas issued for improper purposes have the potential to stigmatise vulnerable people and damage patient-practitioner relationships.

This article explains what a subpoena is and what practitioners can do if they want to object to their patients' medical records being used as evidence in court proceedings.

What is a subpoena?

A subpoena is a court order issued to a person at the request of a party in a court proceeding. A party may seek a subpoena as a way to obtain relevant information for use as evidence in a court matter. Subpoenas can be issued to compel a person to give evidence in court, produce documents to the court or both. A subpoena for production requires a person to provide the court with the documents outlined in the subpoena by a specified date and time. Importantly, these documents are provided to the court, and not to the party who requested that they be produced.

What does a practitioner need to provide?

If a practitioner has been issued with a subpoena for production of documents, the schedule to the subpoena will outline the specific documents that need to be provided to the court. Medical practitioners are often requested to produce patients' clinical notes, test results, reports and referrals.

Confidentiality and patient consent

The obligation for practitioners to maintain patient confidentiality is overridden when the law compels the disclosure of a patient's medical record.

If a medical practitioner receives a subpoena to produce the whole or a part of a patient's medical record, it is advisable that the patient should be informed promptly of the disclosure where appropriate. However, patient

People that can help



Stella Richards

Lawyer

+61 3 8637 9404

SRichards@rk.com.au

Stella works broadly across the commercial s
advises both private clients and those in the .

[Learn More](#)

informed promptly of the disclosure where appropriate. However, patient consent is not required when producing medical records under a subpoena. Even if a patient does not consent to the disclosure, a practitioner who is issued with a subpoena for production of a patient's medical record must provide the requested documents to the court.

Failure to do so may result in contempt of court. The onus is on the patient to take action to oppose the subpoena and prevent the information being released.

Can a medical practitioner object to a subpoena?

If a medical practitioner believes that the whole or a part of a patient's medical record should not be disclosed because it contains clinically sensitive information or for some other reason, they can make an objection to the court. Practitioners wanting to object to the production of their patient's medical record will need to write to the court specifying the ground under which the objection is made. Grounds include irrelevance, abuse of process, oppression or privilege. Subpoenas will not be valid if they amount to a mere "fishing expedition". This means that subpoenas cannot be issued to obtain documents which fall outside the scope of the issues in the proceeding. Patients whose medical records have been produced to the court under a subpoena can also object to their inspection under the same grounds.

If a patient's medical record contains sensitive information which may impact their patient's mental health if released, a practitioner may request that the court use their discretion to limit access to those records. In forwarding information to the Court, doctors can in a covering letter identify to the Court the sensitive material, and suggest that the Court consider how, when and to whom the information is provided.

Objections should be made by the patient before the day specified for the production of the material in the subpoena

Where an objection is made, a judge will conduct a hearing to determine whether the material should be produced. As such, practitioners wanting to object to the content of a subpoena should seek legal advice or advice from their indemnity insurer.

In any case, subpoenaed material should be produced to the court and the material objected to should be placed in a separate sealed envelope with a covering letter asking for the objection to be considered by the court before allowing inspection.

Position of peak medical bodies

Medical organisations have voiced their concerns about the potential for patient confidentiality to be undermined in the context of subpoenas.

Concerns have been expressed in [submissions](#) to the [Australian Law Reform Commission's](#) review of the family law system. They said that medical records are often improperly sought in custody disputes in order to damage the relationship between the children and one parent. It has been emphasised that effective psychiatric treatment requires patients to trust their practitioner – and when medical records containing highly sensitive information are produced in court, this can re-traumatise vulnerable patients and irrevocably damage the patient–practitioner relationship.

In their [Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties](#), the AMA makes clear their position that the public benefit of disclosing a patient's medical record must outweigh the risk that, because of such a disclosure, a patient may not seek medical attention or falsify information given to practitioners in the future.

What you need to know:

- Subpoenas are legal documents issued by courts which require a person to attend court and give evidence or provide

Related Services

[Corporate & Commercial Advisory](#)

[Dispute Resolution](#)

[Information Technology](#)

[Intellectual Property](#)

[Property & Development](#)

[Property & Development Sales and Acquisitions experience](#)

[Prosecutions](#)

[Public & Administrative Law](#)

[Royal Commissions](#)

[Workplace Relations, Employment & Safety](#)

[View all services](#)

documents to the court.

- A patient's right to confidentiality is overridden when medical records are requested under a subpoena.
- Practitioners must comply with subpoenas and seek advice in the event they wish to make an objection to the court.
- A failure to comply with a subpoena can result in a contempt of court.

If in doubt consult your medical defence organisation or legal adviser.

For more information, please contact [Michael Gorton AM](#), Principal on (03) 9609 1505.

If you'd like to stay up to date with Russell Kennedy's insights, please sign up [here](#).

View related insights



Health Alert - Medical Colleges deal with bullying, discrimination and sexual harassment

15 Feb 2024

Much has been made in recent years of the pervasive nature of bullying, discrimination and sexual harassment (BDSH) in the medical profession, and in particular in medical training.

[View](#)



Health Alert - Reform of mental health systems: what does the future look like and how to get there?

1 Feb 2024

A recent article in the International Journal for Quality in Healthcare (2024,36(1)), by Michael and David Greenfie (School of Population Health, UniNSW), highlights the challenges for improving the ...

[View](#)

- Leadership Team
- Awards
- Community
- Diversity and inclusion
- Russell Kennedy Women's Network

- Available positions
- Law Graduates
- Seasonal Clerkship Program
- Paralegal Pathway Program