Service of a Subpoena: What Does It Mean and What Should I Do?

By Brett M. Littman, *Esq.*

While going about your daily routine, shuttling from patient to patient, coordinating with home health agencies, hospitals, skilled nursing facilities, and families, an envelope arrives via personal delivery. Enclosed is a document entitled "Subpoena," which states that you are "commanded" or "ordered" to appear at an attorney's office, at a specific time and place, to offer testimony in a legal matter involving a patient whom you may have advised several years prior. The Subpoena may also ask you to bring any documents that you have "in your possession or control" regarding this patient.

There is an excellent chance that when you receive this very official-appearing document, it will come out of the blue. It is also likely that you saw this patient on only one occasion, and that may have been years ago. You may not recognize this patient's name at all, or you may have only a vague recollection of a name that invokes hazy glimpses of a face or brief moments from a conversation. The questions you ask yourself likely range from "Am I in trouble?" to "How can they expect me to take time out of my busy life to testify?"

When you receive a subpoena in a medical malpractice or professional liability lawsuit, all you can know for sure is that a lawsuit has been filed regarding care that someone provided to one of your patients, and that one of the attorneys involved in the case is interested in what you may have to say about your role in that patient's care.

Why Me? or How Did They Get My Name?

Once you have digested the fact that you have been served with a subpoena, many additional questions likely come to mind, including, "What could they possibly want from me?" or "How did they get my name?" To answer that question, it is important to understand the process that defense attorneys undertake when they represent a medical provider in a medical malpractice or professional liability lawsuit. By way of example, take the hypothetical case of The Estate of Sylvia Smith v. Gentle Pines Nursing Home:

A lawsuit begins when a plaintiff files a Complaint, which is a legal document that outlines the case against a defendant, with the Court. This Complaint is then served upon the defendant, who retains an attorney to represent them. In our case, the Administrator of Gentle Pines receives a Complaint, which alleges that the nursing home acted negligently in the care of Sylvia Smith, a then 84-year-old resident of Gentle Pines.

According to the Complaint, Ms. Smith was a confused woman who suffered from progressive dementia. In the middle of the night, she attempted to ambulate to the bathroom without asking for help, and she fell and broke her hip. This required surgery. After the surgery, Ms. Smith returned to Gentle Pines, her condition quickly deteriorated, and she died a month later. According to the plaintiff, the negligence of Gentle Pines Nursing Home consisted of, among other things, a failure to implement a proper care plan to provide a safe environment for a resident with Ms. Smith's cognitive deficiencies. Further, Gentle Pines admitted Ms. Smith knowing full well that they could not provide the level of care that she needed. Ms. Smith's family alleges that this negligence caused Ms. Smith to fall and suffer a broken hip, which led to her untimely and premature death.

The Administrator or nursing home management company then chooses an attorney to represent the facility, to whom they send the Complaint, along with Ms. Smith's medical records from Gentle Pines. When the attorney receives Ms. Smith's medical records from Gentle Pines, he or she would review them to identify other medical providers who treated Ms. Smith before, after, and during her admission to Gentle Pines. This would include any outside consultants who cared for Ms. Smith at the nursing home, the hospital from which Ms. Smith was transferred when she first arrived at the home, the hospital where she had her hip surgery, and perhaps the hospital where Ms. Smith was ultimately discharged prior to her death.

In order to prepare a defense, it is vital for the attorney to have as much information as possible regarding the resident's condition. In this case, the attorney would need to know whether the resident had fallen before, what her mental state was prior to admission, whether she had displayed poor safety awareness or refusal to comply with physician's orders in the past, and ▶

If your employer has a legal or risk management department, this should be your first stop.

whether she suffered from any additional medical conditions or disease processes. After identifying these providers, the attorney sends requests for these records, asking that the providers send all records in their possession related to Ms. Smith. Upon reviewing these records, the attorney would make a note of any individuals who may have relevant knowledge about Ms. Smith.

When reviewing the medical records from the hospital where Ms. Smith had been admitted prior to moving to Gentle Pines, the attorney finds, in the midst of lab results, progress notes, and orders for medications, a social services note by a case manager. That note describes Ms. Smith's overall physical condition and mental status, her family situation, and the reason that Gentle Pines would be an ideal destination for her. Specifically, the note states that Ms. Smith was "alert and oriented x3, w/ occasional moments of confusion. Daughter wanted her mother to be as independent as possible because 'Mom is still able to enjoy life.'" The attorney may file the name of the author of this note in a mental file in case he or she ever decides that it may be helpful to have more information regarding this note. This particular note may peak the attorney's interest because it is contrary to the allegations in Plaintiff's Complaint.

As the case moves through the long process known as "discovery," which is the time that both parties gather as much information as possible regarding the case, Ms. Smith's daughter is called upon to offer her own deposition testimony, during which she states that, before her mother went to Gentle Pines, she could not understand simple instructions, did not know her own name or where she was, and should have been placed on one-to-one surveillance 24 hours a day.

Now, the defense attorney is faced with a decision. Ms. Smith's medical records, including the case manager's note, states that she was alert and oriented, and that Gentle Pines was fully equipped to handle Ms. Smith's needs. Ms. Smith's daughter told a very different story, as she testified that Ms. Smith needed more help than Gentle Pines could ever have provided, a fact that will allow Plaintiff's attorney to support his argument, at trial, that Gentle Pines was negligent for admitting a resident who required one-to-one care, which Gentle Pines could not provide on a consistent basis.

In order to defend the nursing home at trial, the defense attorney will display the social manager's note, perhaps blown up to the size of a poster, to the jury. But more effective than that, the attorney may wish to have the person who actually wrote the note explain to the jury exactly what she meant. This is where the author of the note comes in. But before putting a witness on the stand at trial in front of a jury without knowledge of what she may say, the attorney will want to know how the case manager will answer those questions at trial. Thus, the attorney will issue a subpoena requesting that she appear at a deposition.

What Should I Do?

So now you can hazard at least an educated guess of why you received the subpoena. The next question is: What should you do about it? The first step is not to worry or panic about this unexpected development and to accept it as a rare and perhaps inconvenient component of your work. Then, if your employer has a legal or risk management department, this should be your first stop. It will also be helpful to pull the patient's chart and bring it to the meeting with the legal department. If the attorney decides that it is appropriate, you should take time to review the chart with the attorney and identify any entries that you made in the chart. This might refresh your recollection of the patient and help prepare for the deposition process.

The legal department will assist you in identifying the capacity in which you are being deposed. In most cases, you are going to provide testimony as a "fact witness," which means that you are simply being called upon to explain what you may recall about a patient.

It is likely that the attorney will explain that in his or her capacity as the attorney for your employer, he or she is now your attorney as well. This means that, with rare exceptions, anything that you speak about in your private meetings is protected by the attorney-client privilege and is not subject to disclosure during the course of the deposition.

When speaking with your attorney, be as candid as possible, and ask any questions or concerns that come to mind. For example, ask whether there is a chance that, based on your testimony, you or your employer could be named as a defendant in this lawsuit. If the time or location of the deposition is inconvenient for you, ask whether they can possibly be changed to accommodate your schedule. Unless there are pressing deadlines or time constraints, attorneys are usually flexible with regard to the scheduling of depositions of non-party fact witnesses.

It is also likely that your attorney

will take the opportunity to call the attorney who issued the subpoena to determine exactly what he or she is attempting to gain from the deposition. It is possible that the attorney may say simply "We can't read her note – we need her to decipher the handwriting and identify her signature." If that is the case, it may be a very short deposition. It is even possible that you were identified as the author of a note that you did not even write. If that is the case, your deposition may not be needed at all; a simple confusion that can be cleared up with a phone call from your attorney.

Deposition Testimony

Your attorney will explain what to expect by providing you with a general road map of how depositions often proceed. While rules for depositions vary from state to state, there are several general principles that are universal. First, a deposition is a question and answer session, in which attorneys for all parties in a litigation are allowed to ask questions, which you then answer, to the best of your ability, under oath.

When you and your attorney arrive at the deposition, there will be a court reporter present, who will type everything that is said during the course of the deposition. Because there is a reporter memorializing everything that you and the attorneys say, it is important to enunciate and to speak with as much precision as possible. It is also important that you allow the attorney to finish his or her entire question before providing an answer, and that you do not speak over the attorney. Also, all of your responses must be verbal, so if you shake or nod your head to indicate "yes" or "no," you have to make sure that you also say "yes" or "no," because the reporter cannot transcribe gestures. These steps are important to remember because they allow the reporter to accurately take down everything that is said.

After the deposition, all of the questions and answers are printed in a booklet, which is called a deposition transcript. In some states, the witness will then have the opportunity to review her testimony and make the appropriate changes if the reporter did not transcribe precisely what she said.

The most important thing to remember at a deposition is that you are under oath to tell the truth. That means that even though the deposition is taking place in a conference room in an attorney's office, or perhaps even in the familiar confines of the hospital where you are employed, you are offering testimony as though you were in a court of law before judge and jury. It also means that if you do not know the answer to a question, or if you simply do not recall the answer, you can simply state "I don't know" or "I don't remember." Another important rule to remember is that if you do not understand a question, you can ask the questioning attorney to clarify it, because if you do answer, the attorneys will assume that you fully understood the question and provided an accurate response. Do not answer a question that does not make sense simply to be polite, or to move onto the next question.

In some cases, it may be appropriate to tell the attorney what you would normally do in a given circumstance. Thus, your response may be, "I do not recall what I did in this specific case, but it would be my normal custom and practice to consult with the patient and his family before suggesting that the patient moves to a skilled nursing facility."

It is likely that the deposition will begin with questions about your background and employment. These questions may focus briefly on your education, your work experience, and what the typical day in the life of a case manager entails. The attorney may then ask if you have any independent recollection of the patient involved in the case and whether you reviewed any documents in anticipation of the deposition. If you have reviewed your notes or selected portions of the patient's chart, simply tell the attorney what you reviewed. The attorney may ask whether you are taking any medications that might affect your ability to testify truthfully and accurately. While it may seem to be an odd and intrusive question, its purpose is to ensure that you are able to offer reliable testimony on that date.

It is likely that the attorney will ask you to read any notes that you wrote in the plaintiff's chart. You may be sitting at your deposition, wondering why you should take the time to simply read aloud what is plainly written on the paper in front of you. The reason is that no matter how much care you may have taken to write legibly, it is possible that the attorneys are not able to decipher every word from your note. This ensures that everyone knows exactly what you wrote. It also gives you the opportunity to inform the attorneys if you did not actually write some of the notes that the attorney has attributed to you. This sometimes occurs when signatures have similar appearances.

The attorney may then ask you questions about what you meant in your note. If you have a specific recollection of what you meant when you wrote a note about that patient, then simply explain. If you do not recall this patient, but know what you would usually mean when you write a certain phrase, that is the opportunity for you to testify as to your normal practice. Thus, your answer may be, "I do not recall exactly what I meant when I wrote this note, which states that Ms. Smith is alert and oriented x3, but when I write that a patient is alert and oriented x3, that means that they know their name, they know where they are, and they know what day it is."

After the attorneys for both the plaintiff and the defendant(s) have asked you questions regarding yourself and the patient, the deposition will be adjourned. Your testimony will be printed as a deposition transcript and

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Step Up to the Plate: New Stroke Standards Require Field Review *continued from page 4*

hear from a substantial number of case managers since so many of you work with individuals with stroke.

Your Input Can Only Make the Standards Better

Please participate in the CARF Field Review of the Stroke Specialty Programs October 11 to November 1, 2010.

The final set of standards will be printed in the *2011 CARF Medical Rehabilitation Standards Manual* as well as the *2011 CARF Aging Services Manual.* The standards will be applied to all organizations seeking accreditation as a stroke specialty program on July 1, 2011.

If you have questions please contact Chris MacDonell at cmacdonell@carf.org. CM

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memorialized for the attorneys to use as the case continues toward trial. There is still a possibility that, down the road, you may be called upon once again to testify at trial. If this does occur, and you provide testimony at trial that is different from the testimony that you offer at trial, you may be called upon to account for the difference in your testimony.

Because of the possibility that you could be called as a witness at trial, it would be helpful to keep in touch with your attorney, who in turn could communicate with the attorneys involved in the litigation to determine how likely it is that you will be called to Court and give you some idea of when the trial might take place. This way, you will not be greeted with the same sense of surprise when you are called upon to testify the second time.

It can certainly be stressful to receive a Subpoena, which commands or orders you to appear at the office of an attorney, whom you have never met or spoken with, to provide testimony without prior warning. By following these steps and consulting with an attorney beforehand, you will know exactly what to expect even before you arrive at the deposition. CEU

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Rolling With the Changes: How Health Plans Can Approach New Behavioral Health Care Management Regulations *continued from page 13*

further in advance than they actually did, or how many would simply develop compliance plans period if given another opportunity. There will always be more immediate crises and concerns that need to be addressed. It's simply the nature of the business, but an endeavor as encompassing as behavioral health compliance is best executed through a thoughtful, incremental plan and a consistent, methodical approach.

It has been said many times and in many different situations that change is the only constant. In the coming months and years, the health care industry will feel the effects of change like never before. Savvy health insurers can consider the implementation of new behavioral health regulations a dry run for the more sweeping and significant regulatory evolution that will soon unfold. By taking the right approach, insurers have an opportunity to manage behavioral health care management revisions smoothly and efficiently with little or no disruption to existing practices. And since behavioral health reform shares with larger reform efforts the fundamental principle of maximizing efficiencies by establishing a more comprehensive and holistic view of patients, it can be seen as the perfect lead-in; an appropriate appetizer to the entrée of heartier reform.

Health plans should really evaluate the need to outsource behavioral health initiatives versus managing them in-house. Doing so will further enhance efficiencies and streamline the entire care management process to the benefit of all involved. Technology will be key. It is the means through which health plans can easily and effectively merge behavioral health care management practices with existing medical care management programs to fulfill requirements and create the all-important holistic patient view. There are a number of factors for health plans to consider, and the ability of a technical platform to interface with other technologies and to offer flexibility and adaptability are among the most important. The security and confidentiality of sensitive behavioral health information is, of course, paramount as well. Working with a single vendor that can provide comprehensive services and solutions will also be to the health plan's advantage, as will developing an effective plan.

It may seem like a long and exhaustive list, but in reality it's not. Taking a measured and informed approach to behavioral health compliance will ensure success and help set the stage for more complex efforts that are likely to arise in health care's era of unprecedented change. CEU

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