GREATER DAYTON AREA HOSPITAL ASSOCIATION

POLICY AND GUIDELINES

FOR RESPONDING TO

SUBPOENAS FOR MEDICAL RECORDS

There has been a recognized variance in the method of releasing medical records pursuant to subpoena among the members of GDAHA. The members of GDAHA, wishing to operate in a consistent manner, have authorized and approved the following policy and guidelines for responding to subpoenas for medical records.

The general policy and procedure for the release of medical records in all cases will be to secure a signed patient authorization or a court order authorizing the disclosure. It is the responsibility of the party requesting the record to supply the signed patient authorization or the court order. It is the responsibility of the party requesting the record to supply a reason with the appropriate documentation why a signed authorization or court order is not necessary.

The purpose of this policy and these guidelines is to protect the privacy of Hospital patients and to assist Hospitals in compliance with the law regarding the disclosure of confidential patient information.

This policy and the guidelines contain the following:

- 1. General Information
- 2. Sample Policy and Protocol for Responding to Subpoenas for Medical Records
- 3. Subpoena Response Guidelines for:
 - a. Civil Subpoenas
 - b. Criminal Subpoenas
 - c. Administrative Subpoenas
 - d. Grand Jury Subpoenas
 - e. Federal Subpoenas
- 4. Sample Response Letters for:
 - a. Civil Subpoenas
 - b. Criminal Subpoenas
 - c. Administrative Subpoenas
 - d. Federal Subpoenas

Please note that these Policy and Guidelines do <u>not</u> include material on the HIPAA Privacy Regulations affecting disclosures of protected health information pursuant to subpoenas. See, 45 CFR §164.512(e) and (f).

Revised: December 3, 2001

GENERAL INFORMATION

- 1. Medical records are specifically protected by the physician-patient privilege (ORC 2317.02(B)) and protected by the patient's constitutional right to privacy.
- 2. Drug / alcohol treatment records from a licensed treatment program are given extra protection by both Ohio and federal law. ORC 3793.13; 42 USC 290dd-2. Under Ohio law such records are not subject to a court order they may only be released by a patient authorization. ORC 3793.13. Federal law permits disclosure pursuant to a court order under certain circumstances. 42 USC 290dd-2(b)(2)(C).

<u>Note</u>: These statutes protect records of licensed treatment programs. Medical records from departments or facilities other than licensed treatment programs (e.g., a record from an emergency room visit) are not covered by these statutes even if the records concern drug / alcohol treatment.

Note: Under Ohio law, Hospitals are required to produce the results of drug and blood alcohol testing to law enforcement officials if pursuant to criminal investigation. To obtain these records, the law enforcement officer must provide the Hospital with a written statement requesting these drug and blood alcohol testing records. The written statement should comply with the language given in ORC 2317.02(B)(2)(a). This written statement does <u>not</u> need to be accompanied by a subpoena, patient authorization or court order.

- 3. Psychiatric / mental health treatment records are given extra protection by Ohio law. ORC 5122.31. A court may order disclosure of these records.
- 4. AIDS/ HIV treatment records are given extra protection by Ohio law. ORC 3701.243. A court may order disclosure of these records in certain circumstances defined by ORC 3701.243. All releases of AIDS/HIV information, even those pursuant to subpoena or court order, should bear the written statement on confidentiality and redisclosure in ORC 3701.243(E).

Note: A Hospital may disclose information regarding the results of HIV tests or the identity of a patient on whom an HIV test was performed to law enforcement authorities in response to a subpoena (without a court order or patient authorization) when issued by a law enforcement authority, prosecuting attorney or grand jury in connection with a criminal investigation or prosecution. ORC 3701.243(B)(1)(h).

5. A Hospital should produce copies of a medical record within a reasonable period of time after receipt of a patient authorization requesting medical records. ORC 3701.74. Generally, sixty (60) days should be considered a reasonable period of time. If a court orders production of medical records or if a patient authorization is accompanied by a subpoena for the medical records, the court order or subpoena will set a legally enforced deadline dictating when a copy of the medical record must be produced. The deadline set by a court order or a subpoena might be less than sixty (60) days.

- 6. There are different procedural rules for criminal and civil courts in responding to subpoenas. Civil and juvenile rules of procedure are identical. Ohio Rule of Civil Procedure 45(C) and Ohio Rule of Juvenile Procedure 17(D) allow a person to object to a subpoena requesting privileged information without doing anything further. But Ohio Rule of Criminal Procedure 17(C) does not allow this "objection only" procedure and, therefore, in criminal proceedings the process for responding to a subpoena is different. Nevertheless, the physician-patient applies in both civil and criminal court proceedings, and the privilege should be invoked in response to either a civil or criminal subpoena despite the difference in the process. Also, different counties have different local rules and some counties (e.g., Franklin County) permit a civil procedure objection in response to a criminal subpoena.
- 7. Hospitals may charge for copies of records. The maximum rates for copies are specifically set by statute. ORC 3701.741.
- 8. A Hospital that is authorized by a patient authorization or a court order to disclose medical records should do so only in the manner and to the extent specifically authorized. A patient authorization or court order may authorize disclosure of the entire medical record, but specially protected information (mental health, AIDS/HIV, drug and alcohol treatment from a licensed treatment program) must be specifically identified in a patient authorization or court order to be disclosed.

<u>Note</u>: It is advisable that a disclosure of a medical record, or part thereof, in response to a court order or a patient authorization, include a statement that the Hospital has produced a copy all information the Hospital has been authorized to disclose but has <u>excluded</u> any information the Hospital has not been authorized to disclose. This statement, however, should not identify what records are excluded, if any, and should state that the statement serves only to explain the limits of the Hospital's authority to release medical records and does not necessarily mean that excluded records exist.

<u>Note</u>: Also, if the Hospital has internal policies that limit the information disclosed or serve to withhold medical records (e.g., a policy not to re-release medical records from another provider), such policies should be acknowledged in a statement accompanying the disclosure of the medical record. This statement should also be supplemented with the notice that the statement serves only to explain the limits of the Hospital's authority to release medical records and does not necessarily mean that excluded records exist.

- 9. In response to a subpoena received from a municipal traffic court, a Hospital should follow the guidelines pertaining to civil subpoenas or criminal subpoenas depending on the individual case. The Hospital should call the court if unable to determine the nature of the proceeding.
- 10. Notary subpoenas may command an appearance at a deposition only. Medical records should be taken to the deposition, but the physician-patient privilege

- should be asserted, and the medical records should not be disclosed unless a patient authorizes disclosure or a court order authorizing disclosure is given.
- 11. Based on Ohio Rule of Civil Procedure 45, ORC 2317.422, and Rules of Evidence 901 and 902, if a Hospital is permitted to disclose a medical record (either by a patient authorization or a court order), a certified copy of a medical record is acceptable in court in lieu of the appearance by the medical records custodian. ORC 2317.422 provides for the automatic authentication of medical records in a court proceeding if the party seeking to use the medical records at trial provides copies to the other parties at least five (5) days prior to trial. This procedure eliminates the need for an attorney to force a medical records custodian to appear at trial for the purpose of authenticating medical records. Therefore, the custodian is generally not needed at trial. If an attorney fails or refuses to use this procedure and attempts to use a subpoena to force the medical records custodian to attend the trial for the purpose of authenticating medical records, the Hospital may file a motion to quash the subpoena based on undue burden. This applies in both civil (Rule of Civil Procedure 45(C)(3)(d)) and criminal proceedings (Rule of Criminal Procedure 17(C)). Alternatively, the Hospital may comply with the subpoena by having the medical records custodian appear at the trial to authenticate the medical records. While this is a burden for the Hospital, it may be less expensive and time consuming than filing a motion to quash, Note: the foregoing section 11 pertains to a subpoena compelling a custodian to appear at trial solely to authenticate medical records (as opposed to having the custodian appear for the purpose of producing medical records which should be handled according to the other policies and guidelines in this document regarding subpoenas for medical records).

AUTHORITIES

Statutes:

ORC 2317.02(B) - Physician-patient Privilege. Expressly defines a privileged communication to include the medical record.

ORC 2317.422 – Authentication of Medical Record at Trial

ORC 3701.243 – Disclosure of HIV Test Results or Diagnosis

ORC 5122.31 – Disclosure of Psychiatric Treatment Information

ORC 3793.13 – Disclosure of Alcohol and Drug Treatment Information

42 USC 290dd-2 - Confidentiality of Records of Substance Abuse Treatment

ORC 3701.74 – Hospital to Prepare Finalized Medical Record

ORC 3701.741 – Maximum Fees for Copies of Medical Records

ORC 119.09 – Authority of Administrative Agencies

ORC 149.43 - Public Records. Medical records are exempted from definition of public records. Medical records are not subject to access under "public records" law.

Case law:

In re Wieland, 89 Ohio St. 3d 535 (2000)

Mann v. University of Cincinnati, 824 F. Supp. 1190 (S.D. Ohio 1993)

Pacheco v. Ortiz, 11 Ohio Misc. 2d 1 (1983)

State v. Smorgala, 50 Ohio St. 3d 222 (1990)

State Medical Board v. Liss, 1988 Ohio App. LEXIS 1924 (1988)

POLICY AND PROTOCOL RESPONDING TO SUBPOENAS FOR MEDICAL RECORDS

Whenever the Hospital is served with a subpoena duces tecum asking for the production of medical records, the subpoena should be immediately taken to the individual designated as responsible for handling subpoenas for medical records. Never ignore a subpoena. The Hospital must always respond to a subpoena; however, the Hospital may not have to comply with the subpoena, and circumstances may exist that require the Hospital to object to the subpoena.

Upon receiving a subpoena, the following steps will be followed:

- 1. Review the subpoena to determine if it meets legal requirements.
- 2. Review the subpoena to determine if privileged information is requested.
- 3. When privileged information (e.g., a medical record) is requested, determine if the request is accompanied by a valid patient authorization or a valid court order authorizing the disclosure of the medical information.
- 4. Respond to the subpoena or seek the advice of legal counsel to determine what appropriate action should be taken.

These procedures apply to all subpoenas issued in any action, whether civil, criminal or a grand jury request. Each of these steps is more fully described below. This policy specifically applies to handling subpoenas duces tecum for medical records.

Step 1: Review the subpoena to determine if it meets legal requirements.

There are two parts to the validity of a subpoena: form and service.

<u>Form.</u> A subpoena must contain certain elements:

- (1) It must be issued under the seal of the court;
- (2) It must contain the name of the court and the title of the action;
- (3) It must list the time and place specified for the trial, hearing, deposition, or production of records;
- (4) It must identify the records or items to be produced, if any;
- (5) It should identify the attorney or judge who caused the subpoena to be issued and give his or her address and phone number.

<u>Service</u>. The law also dictates how a subpoena must be served, depending whether it is issued by a state or federal court.

(1) State Court. A state court subpoena will bear a case number from a municipal or county court.

A state court subpoena can be served in three ways: (i) by delivery of a copy of the subpoena to the person addressed in the subpoena in person; (ii) by reading the subpoena to the person to whom it is addressed; or (iii) by leaving it at the usual place of residence of the person to whom it is addressed.

Service may be made by a law enforcement officer, an attorney, or any other person who is at least 18 years of age and who is not a party to the lawsuit.

State law also provides when witness fees and mileage must be tendered to the witness. For example, if the location of the testimony is outside the county of the individual's residence, witness fees and mileage, as determined by local court rule, must be tendered with the subpoena.

(2) Federal Court. A federal court subpoena will typically bear a case number from a United States district court.

A federal court subpoena may only be served by delivery of the subpoena to the person to whom it is addressed. This must be by personal service.

Service may be made by a federal law enforcement officer or by a person who is not a party and who is at least 18 years of age.

Witness and mileage fees <u>must</u> be tendered with the subpoena.

Step 2: Review the subpoena to determine if privileged information is requested.

Even if the subpoena has been properly served, the Hospital must still determine whether the records exist, and if they do exist, whether the medical records requested are privileged.

No Records. If the Hospital does not have any medical records in its possession as requested in the subpoena, the Hospital should respond to the subpoena by written notice to the attorney issuing the subpoena to advise him or her that the Hospital has no records responsive to the subpoena.

Privilege. Medical records maintained by a Hospital are specifically protected by the physician-patient privilege (ORC 2317.02(B)) and the patient's constitutional right to privacy. A Hospital should presume that all medical records and medical information are privileged under the patient-physician privilege until otherwise directed by a court. If the subpoena duces tecum requests information other than the medical record, such information may or may not be privileged. This subpoena policy specifically covers requests for medical records since these are the most common subpoena requests received by the Hospital. The Hospital should confer with legal counsel to determine if information other than medical records is privileged or there is a reason to object to the subpoena (e.g., peer review information is generally privileged and not subject to discovery). The

Hospital should <u>not</u> assume that information requested by a subpoena is not privileged just because the information is not a medical record.

Step 3: If privileged information (e.g., medical record) is requested, determine if the request is accompanied by a valid authorization from the patient or a valid court order.

- <u>Valid Authorization</u>. If the Hospital has been given a valid patient authorization permitting release of the information, there is no reason to object to disclosure. A valid authorization:
 - (1) Is in writing and signed by the person whose medical records are sought or, in the case of a minor or incompetent, by the person's legal representative;
 - (2) Is dated within sixty (60) days prior to receipt by the Hospital; and
 - (3) Specifically identifies and describes the medical records to be released (in order to authorize disclosure of mental health treatment records, AIDS/HIV testing and treatment records, or drug/alcohol abuse treatment records from a licensed treatment program, the authorization must specifically state which of these types of records are included in the authorization).
- No Authorization or Court Order. If the subpoena is not accompanied by a patient authorization, the Hospital generally may not disclose medical records, even in response to a subpoena duces tecum, unless a court orders the disclosure of the medical records.

Note: Although the Hospital may generally not disclose medical records without a patient authorization or court order, there are exceptions provided in federal and state statutes and case law. If the party seeking disclosure of medical records claims that such an exception exists, the Hospital should obtain as much information as possible about the exception claimed (most importantly: the reason for exception and a citation to legal authority) and contact legal counsel to evaluate the claimed exception. Claimed exceptions should be evaluated by legal counsel on a case-by-case basis.

Step 4: Either comply with the terms of the subpoena if authorized to do so or respond to the person issuing the subpoena regarding why, and on what grounds the Hospital will not comply. The Hospital may seek the advice of legal counsel to determine what appropriate action should be taken.

Complying with Subpoena. If appropriate (i.e., pursuant to a patient authorization or court order or other circumstance allowing disclosure), the Hospital may comply with the production of medical records. Special rules govern how records related to certain conditions (e.g., AIDS, drug and alcohol treatment, etc.) may be

disclosed. The Hospital may request reimbursement for the reasonable cost of production in accordance with ORC 3701.741.

Responding Without Complying. Depending on the type of subpoena (civil, criminal, grand jury, administrative, etc.) and jurisdiction (Ohio or federal) the Hospital may desire to – and sometimes is obligated to – object to the subpoena, move to quash the subpoena, communicate with the court or administrative agency, or take other action.

The following documents attached are guidelines providing more detailed descriptions of how to respond to different types of subpoenas, including procedures to follow when the Hospital has determined that it should <u>not</u> comply with the subpoena (e.g., privileged information is sought and no patient authorization or court order accompanies the subpoena).

CIVIL SUBPOENAS

(including Juvenile Court)

Identification: Case number includes -CV-, -JV- or -DR-

General: A civil subpoena from an attorney or notary is <u>not</u> equivalent to a court order for the purposes of producing medical records. Issuance of a civil subpoena for medical records does <u>not</u> give the person issuing the subpoena the right to access medical records without a valid patient authorization or court order, and receipt of a subpoena alone does <u>not</u> give permission for a Hospital to disclose information protected by the physician-patient privilege without a valid patient authorization or court order.

Procedure:

- 1. Determine if the subpoena is accompanied by a valid patient authorization or a court order authorizing disclosure of the information. If a valid patient authorization or court order authorizing disclosure is provided to the Hospital, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the patient authorization or court order authorizing disclosure.
- 2. If no patient authorization or court order is provided, contact the attorney issuing the subpoena and inform him/her that the medical record is protected by the physician-patient privilege. Request that he or she obtain a valid patient authorization or a court order authorizing disclosure to the attorney (often this is possible for the attorney to obtain and will resolve the situation informally).
- 3. If informal resolution is unsuccessful, issue a written objection to the subpoena pursuant to Civil Rule 45(C)(2)(b) and (D)(2). Objection must be made in writing within fourteen (14) days of receipt of the subpoena or, if production of the medical record is due in fewer than fourteen (14) days, anytime before production is due. The written objection must expressly state the nature of the objection and be supported by a description of the nature of the documents to be produced. See attached sample objection letter for civil subpoenas.

Appearance of Custodian: If the medical records <u>are</u> disclosed to the attorney pursuant to a valid patient authorization or court order, and the medical records custodian is still commanded to appear personally, request should be made to the attorney issuing the subpoena that the medical records custodian be released from appearance. Explain why it is an undue burden to have the medical records custodian appear since the Hospital has already disclosed the medical records. <u>Reasoning</u>: ORC 2317.422 provides for the automatic authentication of medical records if the party seeking to use the medical records at trial provides copies to the other parties five (5) days prior to trial. Since the law provides a way for medical records to be authenticated at trial without the medical records custodian, it is an undue burden to also require appearance of the medical records custodian. If an attorney refuses to release the medical records custodian from

appearance, the Hospital may file a motion to quash the subpoena based on undue burden and Rule of Civil Procedure 45(C)(3)(d). A motion to quash must be filed with the court and served on the issuing party promptly or in any event at or before the time of production specified in the subpoena. A motion to quash should be prepared and signed by an attorney. Hospitals should consult with legal counsel regarding preparation of a motion to quash. If the Hospital does not file a motion to quash, the custodian should appear as directed by the subpoena. Note: This section applies only to whether a custodian must appear to authenticate records when demanded by an attorney; it does not apply to whether medical records should be produced which is governed by the "Procedure" section above.

Cost: The Hospital may charge fees for copies of medical records in accordance with ORC 3701.741. If an attorney refuses to pay costs, it may then be an undue burden to produce the medical records, and the Hospital may want to file a motion to quash.

Questions: If time is critical or if you have questions, contact legal counsel or the court.

CRIMINAL SUBPOENAS

Identification: Case number included -CR- or "Criminal" may be checked on subpoena.

General: A criminal subpoena from an attorney or notary is <u>not</u> equivalent to a court order for the purposes of producing medical records. Issuance of a criminal subpoena for medical records does <u>not</u> give the person issuing the subpoena the right to access medical records without a valid patient authorization or court order, and receipt of a subpoena alone does <u>not</u> give permission for a Hospital to disclose information protected by the physician-patient privilege without a valid patient authorization or court order.

Unlike the Rules of Civil Procedure, there is no mechanism in the Rules of Criminal Procedure to serve written objections directly on the party issuing a subpoena for records. However, this does <u>not</u> mean the Hospital should produce the medical records. The Hospital is still obligated by law to invoke the physician-patient privilege, which applies in both criminal and civil cases; it is only the process of responding that is slightly different.

Procedure:

- 1. Determine if the subpoena is accompanied by a valid patient authorization or a court order authorizing disclosure of the information. If a valid patient authorization or court order authorizing disclosure is provided to the Hospital, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the patient authorization or court order authorizing disclosure.
- 2. If no patient authorization or court order is provided, contact the attorney issuing the subpoena and inform him/her that the medical record is protected by the physician-patient privilege. Request that he or she obtain a valid patient authorization or a court order authorizing disclosure to the attorney (often this is possible for the attorney to obtain and will resolve the situation informally; however, because there is no mechanism to file written objections to a criminal subpoena, an attorney may refuse to cooperate and insist that the Hospital comply with the subpoena).
- 3. If informal resolution is unsuccessful, the Hospital should respond using one of these two (2) options:
 - (i) Comply with the subpoena by appearing at court at the designated time, bringing certified copies of the requested medical records. However, the person appearing with the medical records should invoke the physician-patient privilege in response to requests to disclose the medical records and should <u>not</u> release the records until a valid patient authorization or an order from the court authorizing disclosure is received. In this scenario, the judge might verbally issue an order instructing the person appearing to

- release the records, and the person appearing should comply with such a verbal order from the judge.
- (ii) The Hospital may file a motion to quash if the production of the medical records would be unreasonable, oppressive, or contrary to law.

 Reasoning: A criminal subpoena for medical records that is not accompanied by a patient authorization or court order is unreasonable because it will subject the Hospital to civil liability for breach of confidentiality and invasion of privacy. Additionally, if the medical record is that of a defendant or an accused in a criminal proceeding, the defendant or accused may have a fifth amendment protection against self-incrimination that would prevent disclosure of the medical record. A motion to quash must be filed with the court and served on the issuing party promptly or in any event at or before the time of production specified in the subpoena. A motion to quash should be prepared and signed by an attorney. Hospitals should consult with legal counsel regarding preparation of a motion to quash.

Note: Some exceptions allow Hospitals to disclose medical records to law enforcement officials without a patient authorization or court order. Such exceptions should be handled on a case-by-case basis with consultation with legal counsel.

Appearance of Custodian: If the medical records are disclosed to the attorney pursuant to a valid patient authorization or court order, and the medical records custodian is still commanded to appear personally, request should be made to the attorney issuing the subpoena that the medical records custodian be released from appearance. Explain why it is an undue burden to have the medical records custodian appear since the Hospital has already disclosed the medical records. Reasoning: ORC 2317.422 provides for the automatic authentication of medical records if the party seeking to use the medical records at trial provides copies to the other parties five (5) days prior to trial. Since the law provides a way for medical records to be authenticated at trial without the medical records custodian, it is an undue burden to also require appearance of the medical records custodian. If an attorney refuses to release the medical records custodian from appearance, the Hospital may file a motion to quash the subpoena based on undue burden and Rule of Criminal Procedure 17(C). A motion to quash must be filed with the court and served on the issuing party promptly or in any event at or before the time of production specified in the subpoena. A motion to quash should be prepared and signed by an attorney. Hospitals should consult with legal counsel regarding preparation of a motion to quash. If the Hospital does not file a motion to quash, the custodian should appear as directed by the subpoena. Note: This section applies only to whether a custodian must appear to authenticate records when demanded by an attorney; it does not apply to whether medical records should be produced which is governed by the "Procedure" section above.

Cost: The Hospital may charge fees for copies of medical records in accordance with ORC 3701.741. If an attorney refuses to pay costs, it may then be an undue burden to produce the medical records and the Hospital may want to file a motion to quash.

Questions: If time is critical or if you have questions, contact legal counsel or the court.

ADMINISTRATIVE SUBPOENAS

Identification: The subpoena should indicate the administrative agency involved (e.g., Medical Board, Human Services, Government Agencies, etc.).

General: ORC 119.09 governs the procedures of "Adjudication Hearings" by administrative agencies. An administrative agency may require the attendance of witnesses and production of records pursuant to a subpoena or subpoena duces tecum. The statute provides that a court of common pleas may compel a response to an administrative subpoena when a person refuses to comply. This statute does <u>not</u> automatically grant administrative agencies the power to order production of medical records protected by the physician-patient privilege. An agency must have <u>additional</u> statutory authority to compel disclosure of privileged materials. An agency should expressly cite this authority in a subpoena requesting disclosure of privileged materials. When a Hospital receives an administrative subpoena for privileged medical records with no other supporting documentation authorizing disclosure, the Hospital should refuse to produce the medical records. See, *State Medical Board v. Liss*, 1988 Ohio App. LEXIS 1924 (1988).

ORC 119.09 establishes a procedure analogous to Ohio Rules of Civil Procedure regarding subpoenas, requiring the agency to move to compel production when refused by the party subpoenaed. It is, therefore, appropriate to use the Rules of Civil Procedure in responding to administrative subpoenas, including Rule 45(C) objections to administrative subpoenas.

Procedure:

- 1. Determine if the subpoena is accompanied by a valid patient authorization or a court order authorizing disclosure of the information. If a valid patient authorization or court order authorizing disclosure is provided to the Hospital, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the patient authorization or court order authorizing disclosure.
- 2. If there is no patient authorization or court order, determine if the administrative agency is authorized to compel production of privileged material through an administrative subpoena for the particular circumstance. The agency should generally convey such information with the administrative subpoena by citing a statute granting it this authority. If the agency is authorized by statute to obtain privileged medical records, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the subpoena and the statute authorizing disclosure.
- 3. If it cannot be confirmed that the agency is authorized to access privileged medical records through an administrative subpoena (and there is no release of information or court order), contact the agency issuing the administrative subpoena and inform the agency that the medical record is protected by the

- physician-patient privilege. Request citation to statutory authority authorizing the agency to obtain privileged medical records, or that the agency produce a valid patient authorization or a court order authorizing disclosure to the agency.
- 4. If informal resolution is unsuccessful, issue a written objection to the subpoena pursuant to Rule of Civil Procedure 45(C)(2)(b) and (D)(2). Objection must be made in writing within fourteen (14) days of receipt of service of the subpoena or, if production of the medical record is due in fewer than fourteen (14) days, anytime before production is due. The written objection must expressly state the nature of the objection and be supported by a description of the nature of the documents to be produced. See attached sample objection letter for Administrative Subpoenas.
- 5. If the agency seeks to compel production of the medical records, the agency must file a motion in a court of common pleas, which will then determine if the Hospital must comply with the administrative subpoena. The Hospital should contact legal counsel to communicate to the court why the Hospital was unable to comply with the administrative subpoena. Subsequently, the Hospital should follow the court's order regarding production of the medical records.

Note: Determining whether an agency has special statutory authority to compel disclosure of privileged materials is a complex process requiring detailed knowledge of Ohio law.

Hospitals should consult with legal counsel regarding complying with or objecting to administrative subpoenas.

Note: Not all administrative subpoenas are issued from an administrative agency. Private attorneys (e.g., an attorney for a defendant in an administrative proceeding) may also issue administrative subpoenas for medical records during an agency hearing. Private attorneys will <u>not</u> have additional authority to access privileged material through administrative subpoenas. Administrative subpoenas from private attorneys (not from an agency) should <u>always</u> be treated like a civil subpoena and receive a response in accordance with the Guidelines for Civil Subpoenas.

Children's Services Board: The children's services board of a county is an administrative agency. Generally, administrative subpoenas from a children's services board are handled like all other administrative subpoenas, and the Hospital should respond accordingly. However, because the children's services board may have custody of a child, either temporary or permanent, or is in the process of obtaining custody, the agency may be considered to be the child's guardian. If the children's services board is the legal guardian of the child, the children's services board may authorize the release of that child's medical records.

Note: By law, the Hospital, its physicians, interns, residents, podiatrists, nurses and other health care professionals who know or suspect that a child under eighteen (18) years of age (or twenty-one (21) if physically or mentally handicapped) has suffered or faces a threat of suffering any injuries that reasonably indicate abuse or neglect of the child <u>must</u> report that information to the children's services board, the county department of children services or a municipal or county peace officer in the county in which the child resides without regard to a patient authorization or court order or subpoena.

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Cost: The Hospital may charge an agency fees for copies of medical records in accordance with ORC 3701.741. If an agency refuses to pay costs, it may then be an undue burden to produce the medical records and the Hospital may want to file a motion to quash.

Questions: If time is critical or if you have questions, contact legal counsel or the agency.

GRAND JURY SUBPOENAS

Identification: Subpoena will state that it is "Grand Jury."

General: A grand jury is authorized to compel production of documents; however, privileged material is exempted from such disclosure. Evid. R. 101(B). The physician-patient privilege is not subject to a waiver on public policy grounds. State v. Smorgala, 50 Ohio St. 3d 222 (1990) and In re Wieland, 89 Ohio St. 3d 535 (2000). A court can order disclosure of privileged medical records based on a statutory exception to the physician-patient privilege, but the Hospital should not assume that a grand jury subpoena will automatically qualify for such an exception to the physician-patient privilege. Grand jury subpoenas often come from prosecuting attorneys, not from a court. In order for a Hospital to disclose medical records based on a grand jury subpoena, the subpoena should come from a court (not a prosecutor or other attorney) or be accompanied by a valid patient authorization or a court order. Because of the nature of grand jury proceedings, it may not be possible or practical for a prosecutor to obtain a valid patient authorization. In such cases, it may be necessary for a court to conduct an in camera inspection of the medical records to determine whether or not the medical records should be disclosed in light of the physician-patient privilege.

Procedure:

- 1. Determine if the grand jury subpoena is accompanied by a valid patient authorization or a court order authorizing disclosure of the information. If a valid patient authorization or court order authorizing disclosure is provided to the Hospital, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the patient authorization or court order authorizing disclosure.
- 2. If the grand jury subpoena is not accompanied by a patient authorization or court order, contact the attorney (usually a prosecutor) issuing the subpoena and inform him/her that the medical record is protected by the physician-patient privilege. Request that he or she obtain a valid patient authorization or a court order authorizing disclosure to the attorney.
- 3. If this is unsuccessful, the Hospital should respond to the grand jury subpoena by one of these two methods:
 - (i) The Hospital may file a motion for *in camera* inspection with the court, asking the court to determine which, if any, medical records should be disclosed in light of the physician-patient privilege. A motion for *in camera* inspection should be prepared and signed by legal counsel.
 - (ii) The Hospital may file a motion to quash if the production of the medical records would be unreasonable, oppressive or contrary to law. Reasoning: A grand jury subpoena for medical records that is not accompanied by a

patient authorization or court order is unreasonable because it will subject the Hospital to civil liability for breach of confidentiality and invasion of privacy. Additionally, if the medical record is that of a defendant or an accused in a criminal proceeding, the defendant or accused may have a fifth amendment protection against self-incrimination that would prevent disclosure of the medical record. A motion to quash must be filed with the court and served on the issuing party promptly or in any event at or before the time of production specified in the subpoena. A motion to quash should be prepared and signed by an attorney. Hospitals should consult with legal counsel regarding preparation of a motion to quash.

Note: Grand jury proceedings are generally secret. A Hospital should not inform a patient that his/her medical records have been requested by grand jury subpoena. Only raise the issue with the attorney issuing the subpoena and/or the court.

Questions: If time is critical or if you have questions, contact legal counsel or the court.

FEDERAL SUBPOENAS

Identification: The subpoena will typically state that it is from a United States district court.

General: The physician-patient privilege is a state law of Ohio. Whether and to what extent the Ohio physician-patient privilege applies in federal proceedings will generally be unknown to the Hospital if the Hospital is not a party to the litigation. However, state law regarding privilege will often apply in federal proceedings. Also, the United States Constitution protects a patient's right to privacy in federal proceedings. See, *Mann v. University of Cincinnati*, 824 F. Supp. 1190 (S.D. Ohio 1993). Because the issue of whether the physician-patient applies will likely be unclear to the Hospital, the Hospital should invoke the privilege and permit the court to decide if it does or does not apply. The federal rules of civil procedure allow objection to subpoenas on the basis of privilege in a similar manner to the Ohio rules of civil procedure.

Procedure:

- 1. Determine if the subpoena is accompanied by a valid patient authorization or a court order authorizing disclosure of the information. If a valid patient authorization or court order authorizing disclosure is provided to the Hospital, the Hospital should produce certified copies of the medical record to the extent permitted by and in accordance with the patient authorization or court order authorizing disclosure.
- 2. If no patient authorization or court order is provided, contact the attorney issuing the subpoena and inform him/her that the medical record is protected by the physician-patient privilege. Request that he or she obtain a valid patient authorization or a court order authorizing disclosure to the attorney (often this is possible for the attorney to obtain and will resolve the situation informally).
- 3. If this is unsuccessful, issue a written objection to the subpoena pursuant to Federal Civil Rule 45(c)(2)(B) and (d)(2). Objection must be made in writing within fourteen (14) days of receipt of service of the subpoena or, if production of the medical record is due in fewer than fourteen (14) days, anytime before production is due. The written objection must expressly state the nature of the objection and be supported by a description of the nature of the documents to be produced. See attached sample objection letter for federal subpoenas.

Cost: Hospital may charge fees for copies of medical records in accordance with ORC 3701.741. If an attorney refuses to pay costs, it may then be an undue burden to produce the medical records and the Hospital may want to file a motion to quash.

Questions: If time is critical or if you have questions, contact legal counsel or the court.

OHIO CIVIL

Date Attorney's Name Attorney's Address

VIA FACSIMILE AND REGULAR U.S. MAIL

RE: Name of Case / Case Number Name of Court

Dear Attorney,
Hospital received your subpoena for the medical record of dated I have contacted you or attempted to contact you to explain that the Hospital cannot release these medical records pursuant to the subpoena unless accompanied by a properly executed, written authorization from the patient or a court order. Because your subpoena was not accompanied by the required authorization or court order, the Hospital is not able to comply with the subpoena. ORC §2317.02(B) protects Hospital medical records under the physician–patient privilege. The Hospital has no ability, nor authority, to determine whether the privilege applies in this particular situation; only a court may do so.
Under Civil Rule 45(C) and/or Juvenile Rule 17(D), a person commanded to produce records pursuant to a subpoena may file written objections within fourteen (14) days of service of the subpoena or before the time for production, after which the party serving the subpoena is not entitled to production absent a court order. This letter is Hospital's written objection to production of the medical records and testimony regarding the medical record on the grounds indicated above.
It is never the intention of Hospital to deny medical records when requested in accordance with the law. Once you have produced a valid, signed authorization from the patient or a court order authorizing disclosure, Hospital will be pleased to furnish you with a certified copy of the medical record at our customary copying fee.
Keep in mind also that if the records you are seeking include any information regarding either mental health records (ORC §5122.31) or drug/alcohol treatment programs (ORC 3793.13) or AIDS/HIV treatment (ORC §3701.243), any patient authorization or court order for the records must state specifically that it includes those types of records and properly allows the Hospital to release these records. Otherwise, without this type of authorization, the Hospital may neither confirm nor deny whether the person was ever a patient in this Hospital for that type of treatment.
If you have any questions, please feel free to contact me at any time.
Sincerely,
Medical Records Custodian
cc: Risk Manager or Legal Department

OHIO CRIMINAL

Date Attorney's Name Attorney's Address

VIA FACSIMILE AND REGULAR U.S. MAIL

RE: Name of Case / Case Number Name of Court Dear Attorney, Hospital received your subpoena for the medical record of dated . I have contacted you or attempted to contact you to explain that the Hospital cannot release these medical records pursuant to the subpoena unless accompanied by a properly executed, written authorization from the patient or a court order. Because your subpoena was not accompanied by the required authorization or court order, the Hospital is not able to comply with the subpoena. ORC §2317.02(B) protects Hospital medical records under the physician-patient privilege. The Hospital has no ability, nor authority, to determine whether the privilege applies in this particular situation, only a court may do so. Under Criminal Rule 17(C), a court may quash or modify a subpoena if compliance would be unreasonable or oppressive. It is unreasonable for you to subject the Hospital to liability for breach of confidentiality when there are appropriate mechanisms at your disposal to obtain the medical record. Further, it is unreasonable and oppressive to force the Hospital's medical records custodian to attend the trial to invoke the privilege when we have explained the matter to you fully. This is notice of Hospital's attempt to resolve the claim of undue burden without having to file a Motion to Quash. If the Hospital does not receive an authorization or court order permitting disclosure of these medical records, the Hospital reserves the right to file a Motion to Quash for the foregoing reasons. We request that you provide a response within five (5) days, or before the production date if sooner, as to whether you will resolve this matter by supplying a valid authorization or court order. Hospital to deny medical records when requested in It is never the intention of accordance with the law. Once you have produced a valid, signed authorization from the patient or a court order authorizing disclosure, Hospital will be pleased to furnish you with a certified copy of the medical record at our customary copying fee. If you have any questions, please feel free to contact me. Sincerely, Medical Records Custodian

777379v4

cc: Risk Manager or Legal Department

OHIO ADMINISTRATIVE

Date
Agency Name
Address

VIA FACSIMILE AND REGULAR U.S. MAIL

RE: Name of Case / Case Number Name of Agency Dear Agency, Hospital received your subpoena for the medical record of dated . I have contacted you or attempted to contact you to explain that the Hospital cannot release these medical records pursuant to the subpoena unless accompanied by a properly executed, written authorization from the patient or a court order. Because your subpoena was not accompanied by the required authorization or court order, the Hospital is not able to comply with the subpoena. ORC §2317.02(B) protects hospital records under the physician-patient privilege. The Hospital has no ability, nor authority, to determine whether the privilege applies in this particular situation, only a court may do so. The subpoena was not accompanied by any legal authority indicating the agency has authority to subpoena privileged materials. See, State Medical Board v. Liss, 1988 Ohio App. LEXIS 1924. Under Civil Rule 45(C), a person commanded to produce records pursuant to a subpoena may file written objections within fourteen (14) days of service of the subpoena or before the time for production, after which the party serving the subpoena is not entitled to production absent a court order. The Ohio rules for administrative subpoenas are analogous to Rules of Civil Procedure as they require the administrative agency to move a court to compel production of materials withheld in response to a subpoena. This letter is Hospital's written objection to production of records and testimony regarding the record on the grounds indicated above. It is never the intention of Hospital to deny medical records when requested in accordance with the law. Once you have produced a valid, signed authorization from the patient or a court order authorizing disclosure, _____ Hospital will be pleased to furnish you with a certified copy of the medical record at our customary copying fee. Keep in mind also that if the records you are seeking include any information regarding either mental health records (ORC §5122.31) or drug/alcohol treatment programs (ORC 3793.13) or AIDS/HIV treatment (ORC §3701.243), any patient authorization or court order for the records must state specifically that it includes those types of records and properly allows the Hospital to release these records. Otherwise, without this type of authorization, the Hospital may neither confirm nor deny whether the person was ever a patient in this Hospital for that type of treatment. If you have any questions, please feel free to contact me at any time. Sincerely, Medical Records Custodian

777379v4 22

Risk Manager or Legal Department

cc:

FEDERAL

Date Attorney's Name Attorney's Address

VIA FACSIMILE AND REGULAR U.S. MAIL

RE: Name of Case / Case Number and Name of Court
Dear Attorney,
Hospital received your subpoena for the medical record of dated I have contacted you or attempted to contact you to explain that the Hospital cannot release these medical records pursuant to the subpoena unless accompanied by a properly executed, written authorization from the patient or a court order. Because your subpoena was not accompanied by the required authorization or court order the Hospital is not able to comply with the subpoena. ORC \$2317.02(B) protects Hospital medical records under the physician–patient privilege. Ohio law also protects mental health treatment information (ORC §5122.31) and AIDS/HIV information (ORC §3701.243) from disclosure and Ohio and federal law protect drug/alcohol treatment information (ORC §3793.13, 42 USC §290dd-2) from disclosure.
The Hospital recognizes that this is a federal court proceeding, however, state privilege laws can apply in federal cases (Federal Rule of Evidence 501), and the Hospital has no ability, nor authority, to determine whether the Ohio physician-patient privilege applies in this particular situation. For these reasons, the Hospital is obligated to raise the privilege in response to your subpoena. Further, the patient has a constitutional right to privacy in his/her medical records. <i>Mann v. University of Cincinnati</i> , 824 F. Supp. 1190 (S.D. Ohio 1993).
Under Federal Rule of Civil Procedure 45(c), a person commanded to produce records pursuant to a subpoena may file written objections within fourteen (14) days of service of the subpoena or before the time for production, after which the party serving the subpoena is not entitled to production absent a court order. This letter is Hospital's written objection to production of records and testimony regarding the record on the grounds indicated above.
It is never the intention of Hospital to deny medical records when requested in accordance with the law. Once you have produced a valid, signed authorization from the patient or a court order authorizing disclosure, Hospital will be pleased to furnish you with a certified copy of the medical record at our customary copying fee.
Keep in mind also that if the records you are seeking include any information regarding either mental health records (ORC §5122.31) or drug/alcohol treatment programs (ORC 3793.13) or AIDS/HIV treatment (ORC §3701.243), any patient authorization or court order for the records must state specifically that it includes those types of records and properly allows the Hospital to release these records. Otherwise, without this type of authorization, the Hospital may neither confirm nor deny whether the person was ever a patient in this Hospital for that type of treatment.
Sincerely,
Medical Records Custodian
cc: Risk Manager or Legal Department

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