I was just served with a subpoena! What do I do?

Tips on responding to requests for your involvement in legal proceedings

As a health care professional[i], you may be asked or compelled to participate in legal proceedings involving a current or past patient by serving as a witness or by releasing your patient's clinical record. Knowing how to balance your professional obligations to your patient with your participation in a legal proceeding can often lead to questions. Below are some tips and advice to help you navigate your involvement in the legal system when faced with such a request.[ii]

(The comments in this article are not intended to apply to situations where you are the subject of a legal proceeding or investigation by your regulator. There are some differences with respect to the rules regarding the disclosure of personal health information of a patient when you are the focus of an investigation or lawsuit.)

YOUR DUTY TO MAINTAIN PATIENT CONFIDENTIALITY REMAINS PARAMOUNT

Only your patient can consent to the release of their personal health information ("PHI") unless there is an exception under the applicable privacy legislation or by order of a Court or other legislative authority. You should not assume that simply because a lawyer makes a request for records or you receive a summons to witness/subpoena to appear in Court that you are free to discuss or produce your patient's PHI without consent.

Generally, requests for the production of your notes and clinical records from a third party, such as a lawyer, require the consent of your patient. While verbal consent is acceptable, we recommend obtaining written consent. If obtaining verbal consent, you should discuss with your patient the risks and benefits associated with releasing their PHI to a third party. For example, your patient should be made aware of the possibility that their PHI may be accessible in the public record if being disclosed as part of a legal proceeding. Once you have confirmed consent verbally, you should also make note that consent was confirmed in the clinical record.

You also need to be cognizant of any Court orders or agreements that exist that address who is entitled to production of records (such as custody and access agreements). If you are aware of such an order or agreement at the time you receive a request for production of records, you should ensure they are current, retain copies of them in the clinical file, and review them carefully to satisfy yourself that you are in a position to fulfil that request.[iii]

Usually a summons to witness or subpoena will require you to attend in Court at a designated time and place and to bring your notes and chart with you. Review the details of the summons to witness or subpoena carefully to ensure that you only bring with you that which is necessary to satisfy its terms.

Simply because you have been served with a summons to witness or subpoena does not mean you are permitted to disclose the records and/or PHI of your patient prior to the hearing. In most cases, you will still need consent from your patient to produce records or discuss the care and treatment you provided to the party making the request prior to the hearing.[iv]

You are permitted to produce records without consent if you are served with a Court order, warrant or other direction from a Court, professional regulator or other authority. In addition, once you appear as a witness during a hearing, the Judge or adjudicator can direct you to disclose the records or provide testimony about your involvement with your patient. Absent consent from your patient, you should not disclose prior to being directed by the Court, professional regulator or other authority.

YOU ARE NOT A GATEKEEPER

Generally, if you are provided with a valid consent from your patient, you are obligated to produce your notes and clinical records. Even if you have concerns about how the records might be used by your own patient, the lawyers for the opposing party or the Court, that does not permit you to ignore or decline a request to produce records.

In some jurisdictions, there are exceptions that permit you to decline a request from your patient to produce documents, even where they have consented. However, these exceptions are usually limited to you concluding that there is a risk of harm to your patient if the records are produced. If you refuse to produce documents based on an exception under the privacy legislation in your jurisdiction, you will likely be required to advise your patient in writing as to why you have refused to do so and that your patient has a right to file a complaint with the Information and Privacy Commissioner (if applicable) if they take issue with your decision. On that basis, you need to exercise caution (and seek legal advice) when considering whether to decline a request for records when your patient has consented to do so.

Additionally, if you receive a request for your records and there are no limits set out in the request (ie. a defined time period), you need to produce your entire chart (subject to the exceptions noted above). You are not in a position to determine what is relevant or remove documents from your chart that you believe should not be produced. Ultimately, it is the decision of the Court or other authority as to what is relevant and admissible.

If you have concerns about the impact that the production of documents might have on your patient, it is appropriate to raise your concerns with your patient (or their legal counsel if they consent) to ensure they understand what your concerns are.

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If you have concerns about whether your patient has capacity to consent to the release of their records or was under duress when they consented to their production, you can also address this with your patient. If you appear in Court and have concerns about the impact your testimony (or the release of the records) may have, you can raise those concerns with the Judge at that time. However, once you raise your concerns and a decision is made, you need to comply with that decision.

EXERCISE CAUTION WHEN PROVIDING ADDITIONAL SUPPORT TO A PATIENT

Health care professionals are often asked to provide additional materials for a legal proceeding, such as a letter with an overview of treatment, an opinion on prognosis, a letter of support or an affidavit. Regardless of the nature of the request, you must always keep in mind your professional obligations. When responding to a request, you should:

- Ensure you have consent from your patient;
- Ensure you understand what is being requested;
- Ensure you have all of the pertinent information;
- Be objective and factual in your statements;
- Do not go beyond what has been asked of you;
- Avoid language that may give the impression you are taking sides.

Always remember that you may be questioned by a lawyer or the Court about anything you put in a letter, report or affidavit. Do not hesitate to ask questions and/or seek clarification from the lawyer or other party asking you for assistance before completing the task.

DO NOT IGNORE A SUMMONS TO WITNESS/SUBPOENA

While you may question why you have been served or what benefit your testimony will have in the proceeding, if you are served with a summons to witness or subpoena to attend in Court, you must comply with the directive and bring with you any documents set out in the summons to witness or subpoena. You are subject to sanction by the Court if you do not comply.

It is appropriate for you to contact the lawyer or party that has served you with the summons to get clarification as to when you should attend. Often, the date and time on a summons to witness or subpoena will correspond with the beginning of the hearing of the case.

The lawyer who served you with the summons to witness or subpoena should be able to provide you with more specific details as to when you are expected to attend. If that clarification is not provided, attend on the date at the time set out in the summons to witness or subpoena.

If the date you are required to attend conflicts with another commitment you have, it is appropriate for you to raise this concern with the lawyer who served you with the summons to witness or subpoena. If the lawyer is not prepared to accommodate your schedule, you can also seek direction from the Court, although you should seek out legal advice before doing so.

Finally, in some cases, you will receive "attendance money" when served with a summons to witness or subpoena. Attendance money will likely not cover the income you may lose as a result of your attendance in Court. Unfortunately, other than "attendance money", you do not have a right to demand to be compensated for your time as a condition of your attendance should you be served with a summons to witness or subpoena.

BE OBJECTIVE AND FACTUAL WHEN TESTIFYING

As a treating health care professional, you are appearing in Court as a fact witness, which means you are not there to provide opinion evidence to the Court on the issues that it is required to make a decision about. On that basis, your testimony should be factual and objective. You should try and refrain from taking "sides" or appearing to advocate for your patient. On occasion, the Court may ask you to provide your opinion with respect to your patient's prognosis or other issue within your area of expertise. However, you should wait until you are directed to provide your opinion before doing so.

This article is for general information purposes and should not be interpreted as the provision of legal advice. If you require specific advice with respect to the service of a summons to witness or subpoena or a request for documents, we recommend you seek out legal advice from a qualified lawyer in your jurisdiction or contact the Gowling WLG pro bono hotline offered through your professional association, if applicable.

[i] This article is addressed to health care professionals who are not medical professionals regulated by medical Colleges in Canada, including the College of Physicians and Surgeons of Ontario.

[ii] In most cases, your involvement in legal proceedings is usually as a result of your professional relationship with a patient. You may also be asked to participate in a legal proceeding as an expert, qualified to give opinion evidence. The commentary in this article is generally applicable to those situations where you are participating as a fact witness given your role as the treating health care professional. If you are participating as an expert, you will generally receive guidance from the legal representative who has retained you regarding what is required of you and your obligations.

[iii] You may also face a similar situation where you have been retained to carry out a third party assessment for an insurer or other entity in the context of a legal proceeding as you may be precluded from providing documents to anyone other than the entity that retained you. We would recommend you speak to the entity that retained you and/or seek legal advice when faced with a request for documents from a party involved in the legal proceeding.

[iv] Some privacy legislation permits disclosure of PHI without consent if necessary for a legal proceeding. However, you should exercise caution and seek legal advice before producing PHI to a third party if you do not have the consent of your patient to do (prior to a hearing).

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