What to do when the lawyer calls

BY SEAN BYRNE AND LUCIEN ROBERTS

A telephone call from an attorney or paralegal requesting information or assistance from a health care practice or professional is often an unwelcome overture. Providing attorney assistance inevitably takes administrative and clinical staff away from their core functions. And questions are likely to arise about whether the requestor is friend or foe and what assistance or information should or must be provided consistent with patient privacy laws, other legal obligations and principles of reasonable cooperation and professionalism.

Here's a guide to spotting issues as you field and respond to common requests for records and testimony.

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Record requests

Most practices are well familiar with routine record requests, and the health information team is ready to respond. It is imperative that your process evaluates each request for disclosure of records to ensure it is compliant with state and federal law and then responds with proper disclosure.

The fees that can be charged for record production are specified in Virginia Code for both electronic and paper production. A wrinkle that arises here is what to do if the request for production contains items beyond the standard designated record set for the patient. For example, requests for policies and procedures, scheduling logs, metadata from or about your EHR, patient incident or event investigation, data (even if deidentified) about other patients and the like should raise a concern, and practices are advised to seek advice from their risk management professional and legal counsel.

Just because something is requested by an attorney does not mean you are obligated to disclose it. And if the process of searching for and compiling the requested information is going to be burdensome (i.e., expensive), you may be entitled to reimbursement for that effort. Finally, a document request may be so broadly worded as to include information that is protected by legal privilege, and attorney action may be needed on your behalf to protect your confidential information.

Deposition requests

In civil litigation a party is generally entitled to take sworn testimony by deposition (before trial) or at trial, from anybody who has factual knowledge about relevant topics. In personal injury, medical malpractice, employment dispute, domestic relations and other lawsuits, people with factual knowledge often include treating health care providers. This testimony is authorized as a limited exception to patient privacy protections. Testimony requests often start with a letter or phone call, sometimes followed by a subpoena. The subpoena is a court order mandating that the witness appear at a given time and place to answer questions, and it can also require the production of documents. It is important to give these requests priority and a response.

Virginia law draws a distinction between information that a practitioner may have acquired in attending, examining or treating the patient in a professional capacity – and opinions that the practitioner might otherwise form afterward or outside the actual treatment relationship. The former – diagnoses, signs and symptoms, observations, evaluations, histories, and treatment

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plans obtained or formulated as contemporaneously documented during the course of treatment together with the facts learned by the practitioner – are fair game and the subject of lawful disclosure to: 1) patients or their counsel with patient consent, or 2) other parties to the litigation, but only with patient consent or, more likely, via formal discovery and trial testimony. In essence, providers can voluntarily speak with a patient's attorney (with proper patient consent) about their care of the patient. But they cannot disclose PHI to other parties in the litigation absent specific legal authorization, which generally occurs via a deposition or court proceeding.

A provider is not obligated to go beyond the body of information identified and provide expert opinions, analysis, observations, compliments or criticisms of care provided by others. Doing so moves the provider over the line from a "treater" to a consulting "expert." Serving as a volunteer consulting expert can be educational, intellectually challenging and lucrative, and it provides an important service to patients and attorneys alike.

Not everybody has the time, interest or stomach for weighing in as a consulting expert in contested litigation, but most who do find it to be rewarding. The medical legal system needs practitioners who are willing to serve as objective analysts, in particular, to combat hired-gun consultants who may be less scrupulous and whose opinions may change to fit the theory of the hiring party.

Fact witness fees

It is well-established that a physician is entitled to a reasonable fee for the time expended reviewing medical records, preparing reports, attending attorney-physician conferences and providing expert testimony. But Virginia law does not define how much can be charged. Reasonableness, in this context, is measured by reference to the physician's compensation for a similar measure of time in ordinary practice and as is usual and customary in the community. It makes good business sense to establish a fair and reasonable fee schedule for this service and to consistently provide it when responding to proper requests for attorney consultation. Virginia law also allows any fact witness to seek reimbursement for mileage, tolls and reasonable attendance fees when summoned to testify.

Expert witness fees

When a provider (or practice administrator) is consulting in a legal case and volunteering to go beyond facts and to offer opinions, a market rate can be set and freely negotiated with the attorney. Rates vary widely from one practice, geographic area and circumstance to another. But there are times where a court might step in – for example, if a physician agrees to consult as an expert witness for the patient and charges the patient $250 an hour but then charges the opposing attorney a flat fee of $4,000 to give a deposition. The attorney requesting the deposition may intervene and ask the court to reduce the proposed fee to a reasonable charge.

Again, reasonableness is in the eye of the beholder (the judge). Factors might include providers' specialties and the value of their time if spent caring for patients and how much of their schedule will be disrupted by the deposition. The circumstances of the deposition – including location, duration, time of day, flexibility of scheduling, remote video or in-person and other convenience versus disruption variables – might be considered by a court when resolving a fee contest.

Phone a friend

Other resources to consider when your antennas go up in response to a legal request include: your HIPPA privacy officer, your in-house or external corporate counsel, your professional liability insurance carrier and its risk management department and – to the extent you have established a relationship with a medical malpractice litigation defense attorney – you can always call that attorney to point you in the right direction.

While in theory, practitioners' fact witness testimony is intended to be confined to the scope of their care as documented in the records, attorneys are often quite skillful at blurring that boundary. Witnesses are always entitled to have their own attorneys. In the setting of a health care practitioner giving fact witness testimony in litigation, having your own attorney can help you:

- potentially avoid the deposition altogether through attorney-attorney communication;
- schedule the deposition or court appearance so as to minimize disruption of your professional and personal time;
- meet and prepare for the deposition to go over the expected topics and questions so as to avoid surprises;
- evaluate practitioners' potential legal exposure so that they do not unwittingly get caught up in the cross fire and become a target; and
- protect and advocate for practitioner witnesses during the testimony if one side or the other seeks to obtain information in the deposition that is outside the legal boundaries of required or permissible fact witness testimony.

In the most recent Virginia General Assembly session, Senate Bill 1446 proposed to set some requirements regarding litigation assistance by practitioners. The proposals included mandatory scheduling of meetings or calls between practitioners and patient attorneys, deposition participation, fee schedules and estimates, and prepayment requirements. While it did not pass out of the judiciary committee and did not become law, the bill highlights the challenges in this area for practitioners and attorneys and hints at potential regulation to come. R

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