

How To Get Medical Records Under HIPAA
Bob Scofield
December 19, 2012 Version

The first thing to do when attempting to get a person's medical records from a medical provider is to consider the proceeding you want the records for. Do you want the records for a criminal action or a special proceeding of a civil nature? The Civil Discovery Act applies to special proceedings of a civil nature. (Code Civ. Pro. § 2016.020(a).) "We hold that, subject to constitutionally mandated use limitations described later in this opinion, these provisions of the Civil Discovery Act apply to section [Penal Code section] 1368 hearings." (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 491 [122 Cal.Rptr.2d 673].) And the Civil Discovery Act applies to the Sexually Violent Predator Act. (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 983 [114 Cal.Rptr.2d 760].) That means that you will probably be using a civil subpoena duces tecum for the personal records of a consumer under Code of Civil Procedure section 1985.3. (See *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108 [99 Cal.Rptr.3d 712].)

While I know of no case on point, California civil practitioners believe that a subpoena issued under Civil Procedure Code section 1985.3 will be HIPAA compliant. I agree with this view. (See the discussion in *State v. Downs* (La.App. 2005) 923 So.2d 726.)

If you want medical records for a criminal case, here is the best procedure to follow. (The use of the highlighted regulation was developed by Garrick Byers of the Contra Costa County Public Defenders Office.)

1) Photocopy 45 C.F.R. § 164.512.

See if you can get 45 C.F.R. § 164.512 here:

<http://www.gpo.gov/fdsys/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-sec164-512.pdf>

2) Take a yellow highlighter and highlight 45 C.F.R. § 164.512(e)(i).

3) Take the following to your judge: (a) the highlighted regulation, and (b) a court order for the judge to sign that complies with 45 C.F.R. §164.512(e)(i). You might also cite the following authority. HIPAA clearly anticipates disclosures of medical records under a court order. (*Holmes v. Nightingale* (Okla. 2007) 158 P.3d 1039, 1041.) "HIPAA's privacy regulation specifically provides that information may be disclosed 'in the course of any judicial or administrative proceeding' under court order. 45 C.F.R. § 164.512(e)(1)(l)." (*State v. Weilert* (Kan. 2010) 225 P.3d 767, 772.)

If you have already tried to use a criminal subpoena duces tecum and the medical

provider has refused to comply with it, then also take the provider's letter of refusal to the judge.

Draft the 45 C.F.R. §164.512(e)(i) court order in a way that specifically references HIPAA and 45 C.F.R. § 164.512(e)(i). You want to look good, and let the hospital know that you know this stuff.

To protect yourself from a civil suit and state bar disciplinary proceedings make sure the court order has the hospital send the records to the court (not your office). (See *Mansell v. Otto* (2003) 108 Cal.App.4th 265 [133 Cal.Rptr.2d 276]; *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290 [67 Cal.Rptr.2d 42]; The State Bar Court Case No. 95-O-17054-CEV.)

4) After the records arrive at court give notice to the DA that you are going to move the court to examine the records.

5) When giving notice to the DA you should given notice to the person alleged to be the victim, if the records pertain to this person. See the last paragraph of *Kling v. Superior Court* (2010) 50 Cal.App.4th 1068 [116 Cal.Rptr.3d 217, 239 P.3d. 670].)