

Akerman Practice Update

HEALTHCARE

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When the Police Ask For Your Pharmacy Patient Records

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With the recent increase in “doctor shopping” and allegations of the over prescribing and over dispensing of controlled substances, we have seen an increase in the frequency and type of requests for pharmacy patient records by law enforcement. While pharmacies wish to cooperate with law enforcement to help curb illegal practices, they have to weigh this desire to help against their legal obligations to their patients under state and federal privacy laws. This article reviews selected applicable laws and describes what should and should not be produced pursuant to law enforcement requests. It does not and cannot review every situation and you should consult your Akerman health care attorney for advice as needed.

Florida Law

Both the Florida Pharmacy Practice Act and the Florida statutes governing medical quality assurance state that, in general, a pharmacy may release patient records only upon receipt of a signed authorization from the patient. An exception granted in these statutes is that patient records may be released upon the issuance of a subpoena and actual notice to the patient. These statutes do not state how long the notice must be, but the general consensus is that the entity serving the subpoena must give at least ten day’s notice to the patient so the patient has an opportunity to object to having their records produced. Pharmacies can be disciplined for violating these provisions.

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In summary, to release records to law enforcement there should be:

- signed patient authorization; or
- a subpoena; and
- actual notice to the patient of not less than ten days

HIPAA

Types of legal documents that a health care provider can rely on under HIPAA to release patient records for law enforcement purposes include:

- A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
- A grand jury subpoena; or
- An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:
 - The information sought is relevant and material to a legitimate law enforcement inquiry;
 - The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
 - De-identified information could not reasonably be used

In summary, to release records to law enforcement there should be:

- signed patient authorization; or
- a subpoena; and
- actual notice to the patient of not less than ten days.

As to controlled substance records, law enforcement may:

- inspect and copy these records; and
- obtain a copy of the report of controlled substances dispensed in the prior 60 days.
- In compliance with a HIPAA administrative request.

Some law enforcement authorities attempt to obtain these records using an administrative request since it requires little effort on their part to claim they are making an administrative request. If the pharmacy complies, law enforcement can quickly obtain the needed records. However, under Florida law, pharmacies should not release patient records without an authorization, a properly noticed subpoena, or court order. HIPAA imposes additional requirements when there is an ongoing criminal proceeding and has enforcement provisions which can result in fines and criminal prosecution for violations.

Florida Controlled Substances

Florida allows law enforcement representatives to come to a pharmacy and inspect and copy controlled substance records required by the Florida Controlled Substances Act (Section 893.07, FS) for the prior two years or obtain a copy of the report showing the controlled substance prescriptions dispensed by the pharmacy in the prior sixty (60) days as required by the Board of Pharmacy Rules.

Thus, as to controlled substance records, law enforcement may:

- inspect and copy these records; and
- Obtain a copy of the report of controlled substances dispensed in the prior 60 days.

Some pharmacies take the position that since law enforcement can come to the pharmacy and inspect and copy these controlled substance records anyway, then there is really no reason not to respond to law enforcement's informal faxed requests for patient controlled substance records. We recommend to our clients that provide

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this additional cooperation to require law enforcement to state that they are making a HIPAA administrative request that meets the three above requirements (1. relevant and material; 2. specific and limited; and 3. de-identified information could not be used) and that it is a request to copy controlled substance records under Section 893.07, Florida Statutes. However, pharmacies are not required to produce patient records in response to such informal written and faxed requests and can require law enforcement officers to come to the pharmacy to copy and inspect these records as required by the Controlled Substances Act. Regardless, whenever there is a faxed request, the identity of the law enforcement officers and the fax number should be confirmed. Below are common situations that we have seen with our pharmacy clients:

Questions and Answers

Question: The Florida Department of Law Enforcement and the Federal Drug Enforcement Administration both issued subpoenas to my pharmacy requiring me to produce all of Jane Doe’s pharmacy records. They don’t mention whether they provided notice to the patient. Do I still have to provide the records?

Answer: No. Florida law requires the entity issuing the subpoena to provide notice to the patient. If they cannot show you that the notice was provided to the patient or the patient’s attorney, then you do not have to produce them. If notice is given, make sure that you have allowed time for the patient to respond to the subpoena (generally ten days from receipt) and object.

Question: What if law enforcement is conducting a top secret investigation and it doesn’t want to provide notice to the patient?

Answer: Tell the officer(s) to inspect and copy controlled substance records on-site (they get copies, not originals). Be sure to document which records are disclosed. Have them include an administrative request.

Question: What if law enforcement needs the records that day?

Answer: Again, law enforcement can inspect and copy controlled substance records on-site by visiting the pharmacy. Have them include an administrative request.

Question: Law enforcement says it doesn’t need a subpoena or court order to obtain copies of patient records.

Answer: They are wrong. They may come to the pharmacy and obtain copies of controlled substance records.

Question: What if they threaten me with obstruction of justice for not giving them records without a subpoena?

“Law enforcement can either subpoena the records or come to the pharmacy and inspect and copy the controlled substance records, but not patient records relating to drugs that are not controlled substances.”

Answer: Call your lawyer.

Question: What if a pharmacy receives a properly issued subpoena from a Florida court with a cover letter advising that ten day’s earlier notice was provided to the patient or the patient’s lawyer?

Answer: Produce the requested records.

Question: Do pharmacies have to give law enforcement original documents?

Answer: If the properly noticed subpoena specifies original documents then yes, but try to get them to accept copies so that you will have the originals for Board of Pharmacy inspections and Medicaid audits. Copy whatever they take and have them sign for it.

Question: A pharmacy receives a fax from a local police department requesting all pharmacy records on patient Jane Doe. Do I have to provide the records?

Answer: No. Law enforcement can either subpoena the records or come to the pharmacy and inspect and copy the controlled substance records, but not patient records relating to drugs that are not controlled substances. If the pharmacy decides to produce the records without law enforcement coming to the pharmacy, the pharmacy should request that law enforcement put in writing that this is a HIPAA administrative request (with the three requirements detailed) to copy controlled substance records under Section 893.07, Florida Statutes, so the pharmacy can defend its decision to release the controlled substance records without a subpoena if need be. The pharmacy should also make sure that it confirms the identity of law enforcement officers and the location to which the fax transmission is going.

Question: What if law enforcement tells the pharmacy that it is an administrative request under HIPAA?

Answer: Tell them to get a subpoena (with notice to the patient) or come to the pharmacy and inspect and copy the controlled substance records themselves.

Conclusion

In most cases, pharmacies should only release patient records pursuant to patient authorization, subpoena and proper notice to the patient, or court order. Law enforcement may inspect and copy controlled substance records. However, there are a myriad of laws that interplay in this area and penalties for not complying. Therefore, if you are not sure how these laws apply you should consult your Akerman health care attorney for advice.

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