

The Medical Practice's Quick Action Guide to Releasing Patient Records



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Additional copies of this guide can be requested at
www.CAPphysicians.com/RecordsRelease

This quick guide is a publication of the Cooperative of American Physicians, Inc. (CAP). The information provided in the articles and content in this publication is current as of the publication date.

The information in this publication should not be considered legal or medical advice applicable to a specific situation. Legal guidance for individual matters should be obtained from a retained attorney.

Responding to Requests for Medical Records

Medical practices frequently receive medical record release requests from multiple groups and entities for a variety of reasons. As the chief custodian of the highly protected and private information in your patient records, you should be aware of how to safeguard yourself from the inappropriate release of records and potential violations of patient privacy and confidentiality.

Requests for medical records can come from individuals, subpoenas, attorney's letters, law enforcement, regulatory agencies, and patients themselves. The Health Information Portability and Accountability Act (HIPAA) of 1996 and California law provide guidance on the release of medical records. It is important to know when you can, and cannot, release records, and when to seek guidance from your medical professional liability carrier.

Tips and Risk Mitigation Strategies for Common Requests

■ PATIENT REQUEST

Description

The HIPAA Privacy Rule and California law state that individuals have a right to their protected health information (PHI). Patients, or their legal representatives, generally have a right to inspect and copy their medical records.^{1,8}

Reduce Your Risk

- Written requests do not require “formal” release forms, but must include signature, printed name, date, and records desired.
 - Release a copy only, not the original.
 - The physician may prepare a summary of the medical record, *if* acceptable to the patient.
 - Another provider’s records incorporated into the chart and used in the course of treatment are considered the “patient’s record” and subject to release.
-

■ ATTORNEY LETTER

Description

A letter from an attorney requesting medical records on behalf of a patient. This type of request may indicate the patient is seeking legal advice in anticipation of litigation.

Reduce Your Risk

- Letter must be accompanied by a signed HIPAA compliant release or authorization from your patient.
- CAP recommends comparing the patient’s signature with existing records, or you may call the patient to confirm.
- Contact your medical professional liability carrier if in doubt.

■ SUBPOENA DUCES TECUM (AKA *Subpoena for Records*)

Description

A request for a production of records. It is a court ordered command.² The term “subpoena” literally means “under penalty.”³

Reduce Your Risk

- Review subpoena for:
 - Notice to Consumer or Employee. This document confirms your patient has been notified and you are not obligated to notify the patient of the request.
 - Proof of Service.
 - Contact your medical professional liability carrier if in doubt.
 - Do not release records prior to the deadline specified in the subpoena.
-

■ WORKERS’ COMPENSATION SUBPOENA FOR MEDICAL RECORDS

Description (*same as Subpoena Duces Tecum*)

A request for a production of records. It is a court ordered command.² The term “subpoena” literally means “under penalty.”³

Reduce Your Risk (*same as Subpoena Duces Tecum*)

- Review subpoena for:
 - Notice to Consumer or Employee. This document confirms your patient has been notified and you are not obligated to notify the patient of the request.
 - Proof of Service.
- Contact your medical professional liability carrier if in doubt.
- Do not release records prior to the deadline specified in the subpoena.



■ HEALTH PLAN ACCESS TO MEDICAL RECORDS

Description

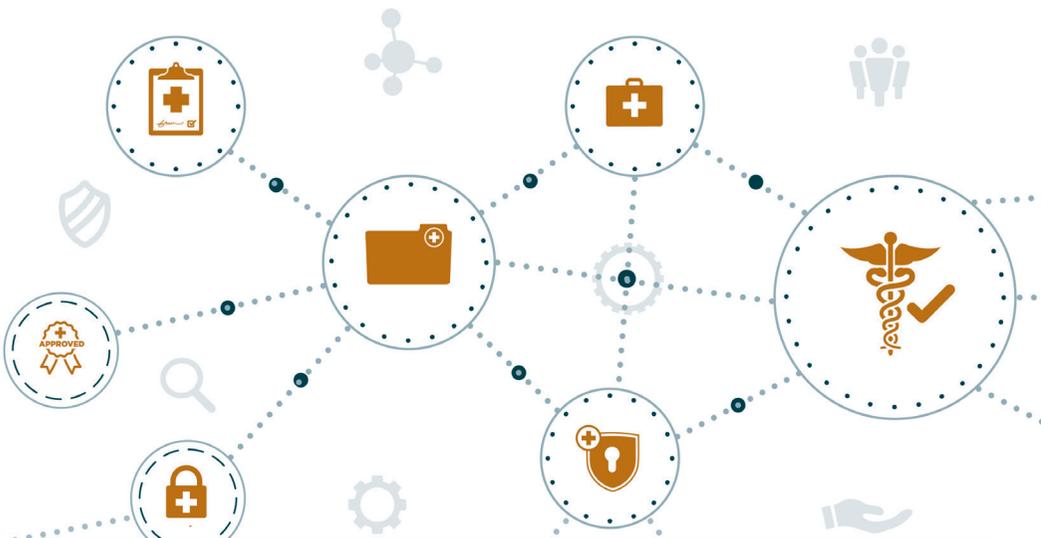
Federal privacy regulations (HIPAA) permit the disclosure of confidential medical information to health plans in certain situations without the patient's authorization for several purposes, such as diagnosis/treatment, payment purposes, peer review activities, etc.⁴

Reduce Your Risk

- Ensure all patients have a signed HIPAA Notice of Privacy Practice. Find a sample here:
www.CAPphysicians.com/SamplePrivacyNotice

What if your patient requests information not be disclosed to a health plan?

- Effective February 17, 2010, the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 requires physicians covered by HIPAA to comply with an individual's request to restrict disclosure of protected health information (PHI) to a health plan:⁴
 1. For the purposes of payment or healthcare operations.
 2. If the healthcare service was paid out-of-pocket in full.⁵
- Contact your medical professional liability carrier if in doubt.



■ REQUEST FOR MINORS' RECORDS

Description

Pediatric offices have a special challenge. Divorced, separated, and/or parents in the process of a divorce may attempt to restrict the other parent's rights to access. In general, parents have a right to their child's medical records regardless of their marital status except for a court order restricting release or other minor confidentiality laws that apply, e.g., emancipated minor, pregnant minor, etc. See section on Special Confidentiality Requirements.⁶

Reduce Your Risk

- Request to view any court document denying parental access. In general, persons having responsibility for decisions respecting the healthcare of a minor should have access to information on the minor patient's condition and care. (Health & Safety Code §123110.)^{1,6}

■ LAW ENFORCEMENT

Description

Many agencies fall under Law Enforcement and guidance varies.

Reduce Your Risk

Contact your medical professional liability carrier.



Special Confidentiality Requirements

Many requests for medical records must also satisfy special confidentiality requirements.

Special confidentiality requirements are laws that require additional specific authorization to protect the release of medical records involving the diagnosis and/or treatment of the following patients and conditions: Minors, HIV, psychiatric/mental health conditions, and alcohol/substance abuse.

If a patient does not authorize the release of this specific medical information, the office must declare in writing the following:

“This disclosure does not contain patient medical information, if any, that is protected by special state and/or federal confidentiality laws and which cannot be disclosed without specific written consent.”

Once the requesting party has been given notice that this information may be withheld from the release, the burden of obtaining the patient’s consent shifts to the requesting party.⁷



How Much Can You Charge a Patient for Medical Records?

Healthcare providers are typically allowed to charge a fee for providing patients with a copy of their records.

Since most, if not all, medical offices are “covered entities” under the federal HIPAA privacy laws, it is important for physicians and their staff to be aware of the differences in state and federal law and know which to follow.

Fees Under California Law

- When the patient requests his or her own medical records, California law (Health & Safety Code §123110) allows healthcare providers to charge a patient a maximum of \$0.25 per page or \$0.50 per page for records copied from microfilm.
- A reasonable clerical fee is also allowed if the amount charged does not exceed the actual costs of preparing the medical records.⁸

Fees Under the Federal HIPAA Privacy Rules

- Physicians can charge a “reasonable, cost-based fee” which means they can only charge for:
 - Labor for copying the medical records, whether paper or electronic;
 - Supplies for copying the medical record on paper or portable electronic media if the patient requests the records be provided in electronic format (if the medical office maintains patient information in an electronic health record, federal law requires it to be provided to the patient in electronic format if the patient makes that request);

- Postage, if applicable; and
 - Preparing a summary of the medical record if the patient agrees to that process in lieu of obtaining their actual medical record.
- Clerical fee not allowed.



Important Alert: Some medical offices charge the patient a fee for the staff to locate the medical records, especially if the medical records are off-site. Although this is allowed under California law, it is not allowed under federal law (the one you should likely be following). Therefore, this is not allowed.

Fees for Electronic Records

When the patient requests electronic health records or paper charts maintained in electronic format, the HIPAA Privacy Rule does not allow the physician to charge more than the actual costs of labor. In other words, per page fees are not permitted for paper or electronic copies of medical records maintained electronically. The HIPAA Privacy Rule does not allow for charging a retrieval fee for the medical records if they must be located.

An office may charge a flat fee for patients who request a copy of their medical records. However, this fee cannot exceed \$6.50, including postage, labor, and supplies.

Copy Charges NOT Allowed

It is just as important for physicians and staff to know when they cannot charge a patient for a copy of their medical records. Patients, former patients, or their representatives are entitled to one free copy of the relevant portion of the patient's record necessary to support an appeal regarding eligibility for a public benefit program, such as Medicaid or Social Security disability benefits.

Almost every medical practice will need to follow federal law under the HIPAA Privacy Rule, which applies only when the patient is requesting their medical records. It does not apply when the request comes from a subpoena, a health or life insurance plan, an attorney request, or any other situation.

Guidelines provided by the California Medical Association (CMA) for allowable copying costs related to an attorney's request, subpoena, and request from health insurers are published by their legal team in CMA's *California Physicians' Legal Handbook* (CPLH) available at www.cmadoocs.org.

Please refer to Health & Safety Code §123110 for further information related to providing medical records to patients during the appeal of a public benefit program denial.

Medical Records Retention

It is recommended that the minimum amount of time for record retention be 10 years after the last date the patient was seen.

Here's why:

- Due to federal fraud and abuse laws, investigations of billing fraud of Medi-Cal and Medicare patient records may go back 10 years.
- Data provided by professional liability carriers note that 99 percent of claims are filed within 10 years of the incident resulting to the claim.

Additional considerations for records pertaining to minors and pregnancy:

- Pediatric records should be kept for 10 years after date of last treatment or until the minor turns 19 – *whichever period is longer*.

- Records of pregnant women should be retained at least until the child reaches the age of maturity.



Important Alert: Your office records retention policy should include medical records, billing records, employment records, and other administrative records and set clear guidelines on how records should be maintained, stored, and destroyed.

Summary

Ensuring your practice has proper policies and procedures in place for responding to requests for the release of records will decrease your risk of violating federal or state patient privacy laws.

The risk management and patient safety team at the Cooperative of American Physicians (CAP) is committed to supporting physicians with resources and tools to help them navigate the most pressing and frequently encountered issues in their practices.

Since 1977, CAP has served California physicians with the highest quality medical malpractice coverage and value-added programs to support practice success.

Upon joining CAP, physician members receive uncompromised service and benefits that include access to free risk reduction services, adverse event management help, and outstanding practice management programs. CAP's seasoned team members offer real solutions to the issues impacting doctors through practice consults, events, communications, online tools and education, and so much more.

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For more information about CAP, or to get a no-obligation quote on medical malpractice protection, please call **800-356-5672** or email **MD@CAPphysicians.com**.

¹CMA California Physician's Legal Handbook (01/2021), Document #4205 Patient Access to Medical Records.

²Cornell Law School; Legal Information Institute. https://www.law.cornell.edu/wex/subpoena_duces_tecum

³FindLaw (2018), What is a Subpoena? <https://www.findlaw.com/litigation/going-to-court/what-is-a-subpoena.html>

⁴CMA California Physician's Legal Handbook (01/2020), Document #4202 Health Plan Access to Medical Records

⁵U.S. Department of Health & Human Services FAQ. [https://www.hhs.gov/hipaa/for-professionals/faq/3026/under-hipaa-may-](https://www.hhs.gov/hipaa/for-professionals/faq/3026/under-hipaa-may)

[an-individual-request-that-a-covered-entity-restrict-how-it-uses-or-discloses-that-individuals-protect-health-information/index.html](#)

⁶LA County Department of Public Health, Understanding Confidentiality and Minor Consent in California: An Adolescent Provider Toolkit. <http://www.publichealth.lacounty.gov/dhsp/Providers/toolkit2.pdf>

⁷CAP Risk Management (12/2019), Patient Record Requests: What Is Proper Release Protocol? <https://www.caphysicians.com/articles/patient-record-requests-what-proper-release-protocol>

⁸California Health & Safety Code Sect 123110, et. seq.

CAP continually creates and publishes instructional guides—available in print and digital formats—that address timely practice-related issues, such as:

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