

Protecting your client's privacy

Why narrowing the scope of a subpoena for medical records may not be enough

By Jessica L. Curiale

Plaintiffs' attorneys are often faced with overbroad subpoenas for their clients' medical records, which risk serious infringement of their clients' privacy rights. Because California law generally prohibits a defendant from delving into more of a plaintiff's medical history than has been put at issue, attorneys will usually succeed on a motion to quash and narrow the scope of such subpoenas. But is simply narrowing the scope of a subpoena for medical records enough to protect your clients' privacy interests?

Permissible scope of discovery

Article 1 of the California Constitution provides that "all people are by nature free and independent and have inalienable rights, among which is pursuing and obtaining privacy." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1013.) Medical records fall within the zone of privacy protected by the California Constitution. (See *Id.*; *Britt v. Superior Court* (1978) 20 Cal.3d 844; *Hallendorf v. Superior Court* (1978) 85 Cal.App.3d 553; *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1397, 1387.)

The mere filing of a personal injury lawsuit does not automatically strip a plaintiff of the right to privacy with respect to her medical records. Although by bringing suit there may be an implicit partial waiver of the right to privacy, "the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities." (*Davis, supra*, 7 Cal.App.4th at 1014.) The California Supreme Court has made clear that such waiver extends "only to information relating to the medical conditions in question, and does not automatically open all of a plaintiff's past medical history to scrutiny." (*Britt, supra*, 20 Cal.3d at 849.) Furthermore, "[e]ven when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy." (*Davis, supra*, 7 Cal.App.4th at 1014.) "The scope of discovery must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner." (*Ibid.* (emphasis added).) The party seeking the constitutionally protected information has the burden of establishing that the information sought is directly relevant to the claims." (*Tylo, supra*, 55 Cal.App.4th at 1387.)

What this law means in practice is that a defendant is not entitled to a plaintiff's entire medical history just because a plaintiff has filed a lawsuit alleging injury to one part of her body. (See, e.g., *Hallendorf v. Superior Court* (1978) 85 Cal.App.3d 553, 555-57) (where plaintiff claimed that injuries to his arm and shoulder forced him to take an early retirement, court held that defendant was not entitled to all medical records in plaintiff's physician's possession, despite defendant's argument that such records were discoverable because information concerning prior physical and emotional conditions which affected the plaintiff's ability to work were necessary so that the defendant could "ascertain whether there were other medical and/or emotional reasons why the plaintiff took an early retirement").

Despite this settled law, defense attorneys often serve overbroad subpoenas for a plaintiff's medical records, hoping to drag up embarrassing or damaging details from a plaintiff's unrelated medical history. Any plaintiff's attorney practicing personal injury litigation has likely experienced some variation of the *Hallendorf* scenario: You file a case alleging that the plaintiff suffered a broken arm and pain and suffering related thereto, and before long, the defendant serves a subpoena on the plaintiff's medical provider seeking "Any and all documents and records pertaining to the care, treatment, and examination of plaintiff, including but not limited to all office, emergency room, inpatient and outpatient charts and records." You then meet and confer with opposing counsel, pointing out that the subpoena as written would encompass your client's entire medical history, and infringes on your client's privacy interests. You either get opposing counsel to agree to modify the subpoena to request only records relating to plaintiff's arm or file a motion to quash and eventually get the same result. Theoretically, this should be enough to protect your client's privacy interests, as the defendant's subpoena now seeks only records to which it is undoubtedly entitled. In practice, however, this is often not enough to protect your client.

The problem

In a perfect world, when a doctor's office received a subpoena for records relating to a plaintiff's arm, it would carefully review all of the plaintiff's records and produce only those records relating to the plaintiff's arm. In reality, however, even if a subpoena is perfectly tailored, no treatment provider is going to carefully cull through potentially thousands of pages of

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records to ensure that only those records responsive to the request are produced. Treatment providers do not have the time nor the means to produce documents in this way. Instead, they will copy all documents relating to the individual whose records have been subpoenaed, and then produce them all. Anyone who has spent time reviewing medical records in a personal-injury case knows that a medical file may contain all kinds of sensitive and private information, such as information relating to gynecological visits, fertility treatments, or venereal disease. While you can move to exclude any irrelevant records if the case proceeds to trial, that still does not change the fact that highly sensitive, private information has been disseminated to defense counsel. Thus, even a subpoena that has been narrowed so that it is perfectly tailored to only seek what the defendant is entitled to will place your client's privacy in jeopardy.

The solution

The law clearly protects a plaintiff's interest in the confidentiality of sensitive medical data not put at issue, so how do you protect your client from disclosure of sensitive information? The answer is a first-look procedure whereby subpoenaed records are produced by the deposition officer directly to the plaintiff's attorney's office. The plaintiff's attorney then has an agreed-upon number of days to review the records and produce them to defense counsel, along with a log of anything removed or redacted. If defense counsel wants to dispute anything on your privilege log, she can do so as she would with any privilege-dispute meet and confer, move to compel, and, if need be, have an in camera review. The first-look procedure can be implemented either by agreement of counsel or by order of the court pursuant to California Code of Civil Procedure section 1987.1(a), which provides that after a motion to quash has been made, the court may make an order "modifying" the subpoena, or *"directing compliance with it upon those terms or conditions as the court shall declare."* (emphasis added).

Thus, when you get an overbroad subpoena for medical records, the first thing you should do is get on the phone with opposing counsel and see if she will agree to a first-look procedure such as the one described above.

Explain that while this may seem like it will cause delay, agreeing to it now will actually be much quicker than the delay that will result if she does not agree and you have to file your motion to quash. If opposing counsel agrees, make sure she immediately notifies the deposition officer and the health-care provider in writing, to stop any records that may already be in transit. If opposing counsel will not agree, file a motion to quash and seek a protective order pursuant to Code of Civil Procedure section 1987.1(a), requesting that the court require the subpoenaed records to come directly to you for an initial review period. Make sure you provide a copy of the motion to quash to the deposition officer and the health-care provider, in order to stop any records that may already be in transit, along with a cover letter stating that pursuant to Code of Civil Procedure section 1985.3, they are not to obtain or produce any documents without a court order or written agreement of the parties. This practice will ensure that sensitive medical records are not improperly disclosed to the defendant.

Conclusion

California law safeguards a plaintiff's privacy and prohibits a defendant from engaging in a fishing expedition with respect to a plaintiff's medical history. Yet even a properly tailored subpoena for medical records presents a threat to a plaintiff's privacy, as the reality is that no one at any hospital or doctor's office is going to carefully cull through the records to ensure that only relevant records are produced; more likely than not, the provider will simply produce all records in its possession relating to the particular individual. These records may contain sensitive and highly personal information. To safeguard your client's privacy, while still providing the defendant with the discovery it is entitled to, the best practice is to try and institute a "first look" policy allowing the plaintiff's counsel to have a "first look" at a plaintiff's medical records, and then produce them to the defendant within an agreed- upon amount of time, along with a log of anything that has been withheld. This will result in minimal delay to the defendant, while protecting the plaintiff from disclosure of sensitive and confidential information, and is the best way to ensure that everyone's interests are adequately safeguarded.


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