

MEDICAL RECORDS GUIDE

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I.
**RESPONDING TO SUBPOENAS, COURT ORDERS, AND
OTHER REQUESTS FOR MEDICAL RECORDS FOR USE IN
JUDICIAL OR ADMINISTRATIVE PROCEEDINGS**

Requests for medical records for use in judicial or administrative proceedings can take one of three forms: (1) a personal request from the patient; (2) an order from the court or administrative agency; or (3) a subpoena from one of the parties to the proceeding. The following rules should be the health care provider's guide to responding to such requests. These rules take into account HIPAA's privacy rules to the extent HIPAA preempts state law. Please note that we have a special section dealing with mental health, substance abuse treatment, sexually transmitted disease and HIV/AIDS medical records.

A. Patient Request for Access or Copies.

1. **Nebraska.** Patients have a right to review, and make copies of, their medical records unless the health care provider determines access would be reasonably likely to endanger the life or physical safety of the patient or another person. In addition, it should be noted that certain laboratory records are prohibited by law from being disclosed.

All requests by the patient for access to, or copies of, the patient's medical record must be in writing.

Copies. If the request is for copies of the patient's medical records, the health care provider must provide copies within thirty (30) days of the request.

Access. If the request is for access to the patient's medical records, the health care provider has ten (10) days to make the patient's medical records available for review during regular business hours. If the patient's medical records no longer exist or another health care provider has the patient's medical records, the health care provider must inform the patient of such within said 10-day period. If the 10-day period is not sufficient time to gather the patient's medical records for review, the health care provider has an additional eleven (11) days to provide the patient with access to the patient's medical records, but must inform the patient, in writing, during the original 10-day period, of the reasons for the delay.

2. **Iowa.** Patients have a right to review, and make copies of, their medical records unless the health care provider determines access would be reasonably likely to endanger the life or physical safety of the patient or another person. In addition, it should be noted that certain laboratory records are prohibited by law from being disclosed.

A request for access to, or copies of, the patient's medical records must be in writing only if the health care provider has previously informed the patient of such requirement. Regardless of whether such a request is written or oral, the health care provider must provide the requested access or copies within thirty (30) days of receipt of the request unless the requested information is not accessible or maintained onsite, in which event the health care provider has a maximum of sixty (60) days to comply with the request.

B. Patient Request to Provide Medical Records to Third Parties.

1. **Nebraska.** If the patient requests that the patient's medical records be turned over to a third party, such as the patient's attorney, and the health care provider determines that disclosure is not likely to endanger the life or physical safety of the patient or another person, the health care provider must get the patient's written authorization. Any disclosure pursuant to an authorization must be limited to the medical information specifically identified in the authorization. A HIPAA compliant authorization must be used in lieu of other forms of consents or releases concerning medical needs. A sample HIPAA compliant authorization form is attached as Appendix A.

2. **Iowa.** Same as Nebraska.

C. Court Order.

1. **Nebraska.** If the health care provider receives a request for a patient's medical records in the form of an order from a court or administrative agency, the health care provider must comply with the order. No authorization from the patient is necessary. Only that part of the patient's medical record actually requested should be disclosed, i.e. do not over-disclose. A health care provider should, but is not required to, notify the patient prior to releasing the patient's medical records pursuant to the order.

2. **Iowa.** Same as Nebraska.

3. **Federal Court.** Same as Nebraska.

D. Criminal Subpoena, Search Warrant or Grand Jury Subpoena.

1. **Nebraska.** Criminal subpoenas, search warrants, and grand jury subpoenas are often treated as court orders; however, because of the legal significance and the numerous legal issues involved, if the health care provider receives a criminal subpoena, search warrant or a grand jury subpoena, the health care provider should immediately contact legal counsel.

2. **Iowa.** Same as Nebraska.

3. **Federal Court.** Same as Nebraska.

E. Civil Subpoena.

1. **Nebraska.** A party to a civil action may request a patient's medical records through the use of a subpoena without having the subpoena signed by the court. The most common subpoena a health care provider will receive is one issued by a party's attorney. The document will generally be captioned "Subpoena" or at least have the term "Subpoena" somewhere in the caption. The caption will also include the names of two non-governmental opposing parties which means it is a civil action. A subpoena should include a copy of Nebraska Rule 34A which will specifically set forth the health care provider's obligations under the subpoena and provide detailed instructions on how to comply with the subpoena. The subpoena should also identify the court presiding over the action, which should be a court of competent jurisdiction, and must be signed by one of the party's attorneys or a notary public.

Upon receipt of a subpoena requesting a patient's medical records, the health care provider should immediately send a letter to the patient informing the patient of the subpoena, and giving the patient an opportunity to object to the release of the patient's medical records. See Appendix B for an example of such a letter to the patient. Prior to providing any medical records, the health care provider must ensure that it has received, along with the subpoena, one of the following three types of documentation:

- (a) A written, HIPAA compliant, authorization from the patient;
- (b) An order from a court or administrative agency; or
- (c) A written statement from the requesting party, along with copies of all relevant documentation, establishing that either:
 - (ii) Written notice of the request for the patient's medical records was given to the patient, the notice included sufficient information about the litigation to permit the patient to raise an objection to the proper authority regarding the disclosure, and the time to raise such objections has elapsed and either no objections were filed or the objection was resolved in the requesting party's favor; or
 - (iii) The party seeking the medical records has received a qualified protective order from the court or the parties have agreed to a "qualified protective order" that will require the parties to only use the medical records for the purpose of the litigation and then have the records destroyed.

If the subpoena satisfies one of the above requirements, or the party requesting the medical records by subpoena subsequently satisfies one of the above requirements, the health care provider must provide the medical records, but only to the extent specifically identified in the subpoena.

If, however, the subpoena is not accompanied by any of the supporting documentation, the health care provider should not disclose the medical records but rather should immediately send a letter to the requesting third party informing them of the health care provider's policy regarding the release of medical records. See Appendix C for an example of a letter to the third party who is requesting the medical records.

2. Iowa. A health care provider cannot disclose medical records of any kind, or for any reason, without the patient's written authorization or a court order.

3. Federal Court. If the action is in a federal court or before a federal administrative agency, the health care provider should respond to a civil subpoena for medical records in the same manner as required in a Nebraska state court action, as described above.

NOTE: All court orders, subpoenas, and warrants discussed in Sections I.C., I.D., and I.E. above should be issued from a court of competent jurisdiction. This means the court has

jurisdiction over the health care provider and/or the health care provider's medical practice. For example, a Texas court does not have jurisdiction over a Nebraska medical practice. A Texas court, therefore, cannot order or subpoena documents from a Nebraska medical practice and the proper method to address such an order or subpoena may get complicated. In the event a health care provider receives a subpoena or court order from a jurisdiction in which the health care provider does not practice medicine, the health care provider should immediately contact legal counsel.

F. Requests from the Workers' Compensation Court, Carrier, Employers or Employees.

1. **Nebraska.** Medical records "relevant" to workers' compensation cases are to be made available upon request, without the employee's authorization, to the employer, workers' compensation insurance carrier, third-party administrator of workers' compensation benefits, and the Workers' Compensation Court. Often, there will be a disagreement over what portion of the employee's medical record is "relevant" to the workers' compensation proceeding. In such a situation, the health care provider may want to use the same approach as discussed above for handling civil subpoenas.

2. **Iowa.** Same as Nebraska.

3. **Federal Court.** Same as Nebraska.

G. Mental Health, Substance Abuse, Communicable Diseases, Sexually Transmitted Diseases ("STDs") and HIV/AIDS Medical Records.

1. **Nebraska.**

(a) **Mental Health.** Generally, "mental health records" may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative. Mental health records may also be disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative. However, in either case, if the treating psychiatrist, psychologist, or mental health practitioner determines that release of the mental health records would not be in the best interests of the patient or that disclosure is reasonably likely to endanger the life or physical safety of the patient or another person, the mental health records may be withheld. Absent a HIPAA compliant authorization for release that is approved by the treating psychiatrist, psychologist, or mental health practitioner, mental health records may only be released to a third party pursuant to a court order. The term "mental health records" is defined as those records created by, or under the direction or supervision of, a licensed psychiatrist, a licensed psychologist, or a licensed or certified mental health practitioner.

(b) **Substance Abuse.** Substance abuse treatment records may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative. Substance abuse treatment records may also be

disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative. However, in either case, disclosure is subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person. Absent a HIPAA compliant authorization for release, substance abuse treatment records may only be released to a third party pursuant to a court order.

- (c) **Communicable Diseases, STDs and HIV/AIDS.** The reports of communicable diseases, including but not limited to STDs and HIV/AIDS, which are required by law to be made to the Nebraska Department of Health and Human Services or other governmental agencies are confidential, not subject to a subpoena, and not admissible in any court action. Such information, however, may be disclosed to other governmental agencies, pursuant to applicable law, for the protection of public health after having the identifying information removed. In addition, such information may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person. Patient information and test results concerning communicable diseases, STDs and HIV/AIDS is confidential and is not subject to a subpoena, search warrant, or discovery process; nevertheless, such information and test results may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative, or may be disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative; however, in either case, disclosure is subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person.

2. **Iowa.**

- (a) **Mental Health.** Mental health records may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative. Mental health records may also be disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative. However, in either case, disclosure is subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person. Psychological test material is confidential, is not subject to a subpoena, search warrant, or discovery process, and cannot be disclosed to the patient or any other party; but such information may be released to a psychologist upon written authorization from the patient or the

patient's representative. Hospital or facility records concerning mental health may only be released pursuant to written authorization from the patient or the patient's representative subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person, or by court order.

- (b) **Substance Abuse.** Substance abuse treatment records may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative. Substance abuse treatment records may also be disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative. However, in either case, disclosure is subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person. The identity of the person seeking substance abuse treatment is confidential, cannot be disclosed to law enforcement, and is not admissible in a legal proceeding unless authorized by the patient. If the patient is a minor, the health care provider cannot disclose the minor patient's identity to the parent without the minor patient's consent. Substance abuse treatment facility records and/or involuntary commitment records are confidential unless there is an emergency or the patient provides written authorization. Absent an emergency or patient authorization, substance abuse treatment facility records and/or involuntary commitment records are not subject to a subpoena, search warrant, or discovery process.
- (c) **HIV Testing.** Any information, including reports and records, obtained, submitted, and maintained concerning HIV/AIDS testing and counseling is confidential and not subject to a subpoena, search warrant or discovery process, except such information may be disclosed upon a written release from the patient, subject to the health care provider's determination that disclosure will not likely endanger the life or physical safety of the patient or another person. Absent such an authorization, such information may only be disclosed pursuant to a special court order, which, among other things, shows a compelling need and protects the information from re-disclosure. If a sexual offender is tested, the results may be disclosed to the victim, a counselor designated by the victim, the victim's physician if requested by the victim, the parent, guardian, or custodian of the victim if the victim is a minor, or to a specified third party designated in a written, informed consent signed by the offender.
- (d) **Communicable Diseases, STDs and HIV/AIDS.** Reports of communicable diseases, STDs and HIV/AIDS, which are required to be given to the Iowa Department of Human Services are confidential, unless the information is de-identified, and if not de-

identified are not subject to a subpoena, search warrant, or discovery process.

3. Federally Funded Substance Abuse Programs. Substance abuse records of persons treated in federally funded programs may be disclosed to the patient or the patient's authorized representative upon written request by the patient or the patient's authorized representative. Substance abuse treatment records of persons treated in federally funded programs may also be disclosed to a third party pursuant to a written authorization signed by the patient or the patient's authorized representative, which contains the following special no re-disclosure clause:

This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

Absent such an authorization, substance abuse records of persons treated in federally funded programs may only be disclosed pursuant to court order. However, other than pursuant to court order, disclosure is subject to the health care provider's determination that disclosure is not likely to endanger the life or physical safety of the patient or another person.

II. PERMISSIBLE CHARGES FOR COPYING AND REPRODUCTION OF MEDICAL RECORDS.

A. Nebraska.

1. Patient Request - General. A health care provider cannot charge a patient for access to the patient's medical records and is limited to the amount it can charge a patient or the patient's authorized representative for a copy of the patient's medical records. The health care provider may charge a "reasonable cost-based fee" for copying. A reasonable cost-based fee includes the cost of supplies for, and labor of, copying, and postage but excludes "handling" ** charges or the costs of retrieving the record, and, in addition, can not exceed:

- (a) 50 cents per page for copies of regular medical records that can be copied on a standard photocopier machine;
- (b) Reasonable copy charges for those medical records that cannot be copied on a standard photocopier machine; and
- (c) The cost of labor and materials involved in furnishing copies of X-rays and similar special medical records.

**Note: Prior to HIPAA, a health care provider could also charge a \$20 handling fee. This fee can no longer be charged.

Nevertheless, if the health care provider and patient agree that the health care provider will provide the patient with a summary or explanation of the patient's medical record, the health care provider can charge fees for preparing the summary, so long as the parties agree to the preparatory fees up front.

2. Patient Request – Disability Benefits/Assistance. The health care provider cannot charge a patient for copies of the patient's medical records if the patient is going to use the medical records to support an application for disability benefits or assistance or an appeal due to a denial of such benefits or assistance relating to the following federal and state programs: Nebraska Aid to Dependent Children; Nebraska Medicaid Program; Federal Old-Age, Survivors, and Disability Insurance Benefits; Supplemental Security Income; and Medicare.

The patient must provide the health care provider with a written document from the respective state or federal agency confirming the filing of the application or appeal. The health care provider should note that the inability to charge a patient for copies of the patient's medical records described above is if the patient is making the request. If the state or federal agency makes the request for the patient's medical records in connection with the patient's application or appeal of a denial for disability benefits or assistance, the health care provider can charge the state or federal agency what it could have charged a patient under the general rules described above unless there is a state or federal law allowing such agency free copies.

3. Workers' Compensation. If the request for a patient's medical record is from the patient's employer, workers' compensation carrier or Nebraska Workers' Compensation Court, the health care provider can charge such parties for copies based on the fee schedule published by the Nebraska Workers' Compensation Court. Currently, the fee schedule provides for the same rates as set forth above under the heading "Patient Request – General."

4. Other Third Party Requests. When a request for a patient's medical records is from a third party not otherwise described above, the health care provider may charge a reasonable fee for providing copies.

B. Iowa.

1. Patient Request. A health care provider cannot charge a patient for access to the patient's medical records and is limited to the amount it can charge a patient or the patient's authorized representative for a copy of the patient's medical records. The health care provider may charge a reasonable cost-based fee for copying. An allowable fee includes the cost of supplies for, and labor of, copying, and postage, but excludes "handling" charges or costs of retrieving the record.

If the health care provider and patient agree that the health care provider will provide the patient with a summary or explanation of the patient's medical record, the health care provider can charge fees for preparing the summary, so long as the parties agree to the preparatory fees up front.

2. Workers' Compensation. If the request for a patient medical record is for use in a workers' compensation proceeding, the initial and final assessments shall be provided free of charge when requested for the purpose of determining payment and

liability. However, if copies of additional records or reports are requested, the health care provider can charge the actual costs of providing such copies. Such actual costs include the cost of supplies, labor, and postage, and cannot exceed:

- (a) \$20 for 1 to 20 pages; plus
- (b) \$1 for each additional page over 20 up to 30; plus
- (c) 50 cents for each additional page over 30 up to 100; plus
- (d) 25 cents for each additional page over 100 up to 200; plus
- (e) 10 cents for each additional page over 200.

3. Other Third Party Requests. Same as Nebraska.

NOTE: Although this Section II has focused on the allowable fees for the production of documents, to the extent a health care provider is asked to provide expert testimony, deposition, or a narrative report on a specific subject, the health care provider may set his/her/its fees for services in advance pursuant to a contract or fee schedule.

Appendix A – Authorization Form

AUTHORIZATION TO USE AND/OR DISCLOSE HEALTH INFORMATION

Authorization. The undersigned hereby authorizes _____
and its employees to use and/or disclose to _____ for the
following purpose(s) (may state “per my request”) _____

the following health information (may state “entire medical record”):

including, if applicable, the following health information related to testing, diagnosis, and/or treatment for (please initial applicable line): _____ HIV (AIDS virus), _____ sexually transmitted diseases, _____ mental health, or _____ drug and/or alcohol abuse.

Conditions. We may not condition your right to receive health care services from us upon your signing this authorization. However, if the treatment to be provided is for research purposes, your failure to sign this authorization will prevent us from providing such treatment.

Further Uses and Disclosures. When we use or disclose your health information to other parties as you have instructed in this authorization, we will not have the ability to monitor whether your health information may be further used or disclosed by such parties. In such a situation, your disclosed health information may no longer be protected by federal and state privacy laws.

Expiration. This authorization shall expire upon the earliest of (expiration date or event) or one hundred eighty (180) days from the date of this authorization. After the expiration date, we will need to obtain a new authorization from you if required by law.

Revocation. You have the right to revoke this authorization at any time in accordance with our Notice of Privacy Practices. When we receive your revocation, we will immediately stop using or disclosing the health information you authorized us to use and disclose in this authorization form. Your revocation shall not apply to those uses and disclosures we made on your behalf pursuant to this authorization prior to the time we received your written revocation.

By signing below, you acknowledge receipt of a signed copy of this authorization.

Printed Name

Date

Signature

Note: If signed by someone other than the patient, we need written proof of your authority.

Appendix B – Letter to Third Party

Sample Letter to a Third Party Who is Requesting Disclosure of Protected Health Care Information for Use in a Judicial or Administrative Proceeding

Dear [**Requesting Third Party**],

We have received your [**subpoena, discovery request, etc.**] requesting that this office disclose to you certain health care records relating to [**patient's name**]. Pursuant to the administrative simplification requirements of the Health Insurance Portability and Accountability Act of 1996 and other applicable state and federal laws, this office may not disclose the patient's medical records for use in a judicial or administrative proceeding unless specified conditions have been met.

Following a review of your request, we have determined that you have not provided sufficient documentation. It is the policy of this office to require the receipt of documentation satisfying at least one of the following three conditions prior to making any disclosures of individually identifiable health care information.

- (1) A written **authorization** from the patient that meets the requirements of 45 C.F.R. § 164.508(c);
- (2) An **order** from a court or administrative tribunal directing that this office disclose the requested materials; or
- (3) A written statement along with copies of all related documentation from you, the requesting party, that establishes:
 - (a) The party requesting the information has made a good faith opportunity to provide written notice to the patient;
 - (b) The notice included sufficient information about the litigation to permit the patient to raise an objection to the court or agency; and
 - (c) The time for the Patient to raise objections to the court/tribunal has elapsed and either no objections were filed or the objection has been resolved in the requesting party's favor.

Or

A written statement along with copies of all related documentation from you, the requesting party, that establishes:

- (a) The parties to the litigation have agreed to a "qualified protective order," as defined by 45 C.F.R. § 164.512(e)(v), that has been presented to the court/administrative tribunal; or
- (b) The party seeking the disclosure has requested a qualified protective order, as defined above, from the court/administrative tribunal.

If you have questions about this office's disclosure policy with regard to health information, please feel free to contact **[Name of Appropriate Contact at Your Office]** for further clarification.

Sincerely,

Appendix C – Letter to Patient

Dear [Patient's Name],

We value our relationship with you and want you to know that a high priority is the confidentiality of your medical record. We want to let you know that we have received a subpoena from [requesting third party] requesting this office to provide a copy of your medical records. For your convenience, we have attached a copy of the request to this letter.

This office will be, absent your written objection, required to disclose the requested medical records if certain conditions are met. You may already be aware of this request and have determined that such disclosure is not objectionable; nevertheless, the purpose of this letter is to give you an additional opportunity to object to all or a portion of the requested disclosure to [requesting third party]. If this office does not receive a written objection from you within ten (10) days of the date of this letter and [requesting third party] has satisfied the conditions necessary to allow disclosure under the applicable federal and state laws, this office will proceed with the disclosure as requested.

If you have any questions about this office's disclosure policy with regard to your health care records, please feel free to contact [name and phone number of appropriate contact at your office].

Very truly yours,