The New Normal: GAO 21-3 Mandates New HIPAA QPO In All Cook County Law Division Cases

Amundsen Davis Health Care Alert
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On November 5, 2021, Presiding Judge Hon. James P. Flannery, entered General Administrative Order 21-3, which mandates use of a new Standard HIPAA Qualified Protective Order (QPO) in the Cook County Law Division pursuant to the Illinois Supreme Court case of *Haage v. Zavala*, 2021 IL 125918.

Several provisions in the new QPO are significant changes from current practice, and of particular interest and concern to defendants. These include time and subject matter limitations on the scope of subpoenas for medical records or other PHI, as well as new requirements for the handling of records following receipt of subpoenaed materials and at the close of litigation. Pursuant to GAO 21-3:

- Subpoenas for "any and all" medical records or other records containing personal health information (PHI) may no longer be issued;
- Subpoenas for materials containing PHI must specifically be restricted to five (5) years prior to the incident and relate to the condition(s) and portion(s) of the plaintiff's body complained of;
- Defendants must give the plaintiff 14 days' notice prior to issuing any subpoena for PHI-containing records;
- Defendants are required to provide a copy of all records received in response to any subpoena to all parties within 7 days of receipt of the records;
- Within 60 days after the conclusion of litigation, the plaintiff's PHI must be returned to the producing covered entities and/or destroyed (including electronically stored copies);
- Proof of the destruction of all PHI may be made by affidavit of counsel.

While these requirements impact the defendants' ability to obtain a complete picture of a plaintiff's medical history and challenge claimed damages, there are few options for overturning or reversing the new Standard HIPAA QPO. The new provisions in the order purportedly are to bring the Standard HIPAA QPO in line with the holdings in *Haage*, which focused on the requirement for PHI destruction at the conclusion of litigation. The defendant insurance company in

PROFESSIONALS

Jennifer K. Stuart
Partner

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Haage claimed that retention of some PHI was essential for compliance with insurance laws and regulations.

The plaintiffs in *Haage* in two consolidated cases tendered to the Court a draft HIPAA QPO; the *Haage* defendants tendered a copy of Cook County's then-standard QPO, which specifically excluded insurance carriers from requirements for the return and/or destruction of all PHI at the end of litigation. The two Lake County Judges approved the HIPAA QPO and the Illinois Appellate Court, Second Judicial Districted, affirmed. The Illinois Supreme Court ultimately approved the plaintiffs' HIPAA QPO and specifically rejected Cook County's then-Standard QPO as violating HIPAA.

The plaintiffs' QPO in *Haage*, however, also contained time and subject matter limitations, as well as notice and production requirements, not directly at issue. Although the Illinois Supreme Court did not specifically address the propriety of the other provisions, by approving the plaintiffs' QPO, it implicitly approved all of the provisions as a whole for use in place of the Cook County then-standard order. GAO 21-3 therefore adopts the HIPAA QPO utilized by the plaintiff in *Haage* and approved by the Illinois Supreme Court.

What can defendants do now? Although some have argued that defendants should refuse to sign the new Standard HIPAA QPO and seek a contempt finding for the purpose of bringing the new provisions up for appeal, it is unclear whether this strategy would be successful. Contempt findings are entered where a party refuses to comply with a court's order to do something. Defendants have not been ordered to agree to the revised QPO; defendants only have to sign it if they wish to subpoena records containing PHI.

Given the limited options for challenging GAO 21-3 and the QPO as a whole, Defendants' best strategy will likely be to challenge individual provisions of the QPO on a case-by-case basis, based on the particular facts of that case. Upon a showing of relevance, it is likely that trial courts would allow modification of the QPO to permit, *inter alia*, subpoenas for records covering a longer period of time or medical issues beyond the precise injury claimed by the plaintiff. For example, even the Illinois Pattern Jury Instructions recognize that life expectancy is a relevant factor for consideration in all wrongful death claims.

A larger unresolved question is how the new QPO will affect covered entities and their production of records. It is unclear how health care providers will be expected to parse a plaintiff's medical records to only include certain diagnoses or parts of the body. A number of defense-oriented organizations are currently looking at the issue, and Amundsen Davis will provide updates as additional information is available.