Doctor Arrested for Not Producing Subpoenaed Records

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Two police officers and four marshals arrest Dr. Philip Micalizzi at the doctor's home in front of his wife and children.[1] The crime? There isn't one. Why, then? A judge authorized a "capias," a form of arrest warrant sometimes called a "bench warrant." The reason? A lawyer previously subpoenaed the doctor to appear at a deposition and produce the records of an independent medical examination performed by the doctor. The deposition did not occur. The doctor did not provide the records. The lawyer, Robert E. Henry, went to court and obtained the capias from the judge. The doctor spent several hours at a Bridgeport, CT, level-four high security facility for pretrial and sentenced offenders before his release in the early morning. Attorney Henry received the medical records the next day. The Connecticut Statewide Grievance Committee would later impose a reprimand. The reprimand related to his having wrongfully obtained the capias. Dr. Micalizzi should not have had to spend a night in jail. What lessons can others learn from Dr. Micalizzi's response to the subpoena?

A doctor or healthcare provider who hears these would likely recognize and not find unusual Dr. Micalizzi and his office's handling of the subpoena. The subpoena to Dr. Micalizzi required the doctor to attend a deposition at the doctor's office and produce records at the deposition. Henry later notified the doctor by letter that although the subpoena "calls for your attendance at a deposition . . . it will not be necessary for anyone to appear if you provide . . . copies of the requested records" before the date of the deposition.

Henry did not receive any of the subpoenaed records prior to the date of the deposition. He did receive correspondence from a Medical Consultants Network advising him that he needed to contact the Office of Workers Compensation Program for the records because they were the custodian of the records. The attorney did not come to Dr. Micalizzi's office on the day of the deposition. The doctor spent the day in his office preparing to be deposed. Henry maintains that a representative of Dr. Micalizzi's called before the deposition to say the records would be supplied voluntarily.

When the records were not supplied, Henry sent the doctor a fax that read: "You neither appeared for the deposition nor produced the requested records . . . . If you fail to respond a capias for Dr. Micalizzi will be issued by the Court. Please call upon receipt to discuss this." Dr. Micalizzi asked his staff to determine whether he could properly disclose the records to the lawyer. When Henry did not receive the records, he went to court and told a judge that

the doctor failed to attend the scheduled deposition. Dr. Micalizzi's arrest followed.

Physicians and other healthcare providers often have subpoenas served upon them. Their offices may attend to the subpoenas with a less-than-full appreciation for the liabilities and consequences of non-compliance. Physicians and all healthcare providers who receive subpoenas for testimony or records may need to be reminded to attend to the subpoenas carefully. They too can find themselves subject to similar subpoena enforcement mechanisms. An attorney's involvement may be necessary to avoid missteps in responding.

Healthcare providers do not necessarily know that statutes can authorize warrants for non-compliance with subpoenas. Courts will sometimes exercise "an inherent common law power" to enforce subpoenas by ordering the arrest of those who disobey or fail to obey court process. Under some circumstances, court clerks may issue warrants. An arrest can even occur without probable cause.[2] Recipients of subpoenas act at their own risk when they fail to appreciate a subpoena's significance. Sometimes the informality of the subpoena process encourages less-than-full attention to a subpoena's requirements. The letter that says one does not need to attend a deposition if records are provided can prove trouble for the provider who supplies records without proper authorization.

"It is the duty of every witness, lay or expert, to respond to a subpoena and, unless privileged, to testify to factual matters relevant to a controversy."[3] How a healthcare provider responds to a subpoena should depend on the provider's obligations under state and federal law to maintain the confidentiality of the records in the provider's possession. The recipient of a subpoena needs to have a sufficient understanding of those obligations to know whether to seek a lawyer's help.

Lawyers and judges may have a passing familiarity with the Health Insurance Portability and Accountability Act (HIPAA), but it will fall to the healthcare provider in the first instance to determine whether and how the rules regarding use of subpoenas in litigation apply, and whether HIPAA obligations require that steps be taken to protect the confidentiality of the subpoenaed records. The HIPAA Privacy Rules at 45 C.F.R. § 164.512(e) are a basic starting point for the provider subject to HIPAA to analyze those obligations. Certain providers have heightened obligations relative to subpoenas. Programs subject to the confidentiality requirements for federal drug and alcohol programs must give special considerations to the steps they may take in response to a subpoena under the rules at 42 C.F.R. Part 2. The federal drug and alcohol records rules specify that a person may not disclose records in response to a subpoena, unless a court of competent jurisdiction enters an authorizing order under the regulations.

Clients need to know that a motion to quash a subpoena will sometimes be necessary to protect against the prospect of an arrest warrant or an order of contempt for failure to attend to a subpoena. Many circumstances that might call for a motion to quash can be addressed by agreements as to how a subpoena will be handled. Documented agreements are one vehicle to avoid misunderstandings and worse.

We operate under a system of laws that dictates that the public has a right to every person's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege. Disputes over the collection of evidence by subpoena can have significant consequences for those involved. The Micalizzi/Henry dispute resulted in an arrest, a lawsuit against Henry and Henry's employer, and the reprimand imposed on Henry.

Had Dr. Micalizzi and Attorney Henry mutually understood how to handle the subpoena response, the subpoena served upon Dr. Micalizzi likely would not have led to his arrest and the subsequent proceedings. Although Dr. Micalizzi should not have been arrested, no provider wants to find himself or herself facing a similar set of circumstances—when avoidable.

1 This article is based upon court documents and decisions in the litigation following the arrest. Those cases include the matter in the United States District Court for the District of Connecticut, *Micalizzi v. Nationwide Mut. Ins. Co.*, No. 3:06-cv-00059(VLB), and the case of *Henry v. Statewide Grievance Committee*, 111 Conn. App. 12 (2008). The author and his firm have not participated in the cases described.

2 *See* Conn. Gen. Stat. 54-2a and *Milner v. Duncklee*, No. 3:02CV1929 (SRU), at 28 (D. Conn. 2006).

3 *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

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