

New Interprofessional Guidelines for Lawyers and Healthcare Professionals

by Kari M. Hershey, Francis V. Cristiano, Nicholas Ghiselli, Thomas J. Wolf, and Richard P. Holme

For as long as attorneys have had to rely on healthcare professionals in legal matters, there have been disagreements regarding the scope of records and testimony such professionals must provide. These disagreements frequently concern the scope, timing, and costs associated with legal requests. For example, an attorney who needs medical records and testimony to prove elements of his or her client's case or defense often issues subpoenas to treating healthcare providers to produce medical information and to testify. However, healthcare providers are prohibited by federal and state law from disclosing confidential health information without authorization, may be booked far in advance to provide needed care to patients, and want to be compensated for their time. The needs of a patient-litigant who requires medical testimony for his or her case and who may not have the ability to pay the requested compensation can conflict with the needs of a treating provider, whose time is valuable, who has care obligations to other patients, and who may not be comfortable testifying about matters beyond the specific care provided to the patient.

Colorado Interprofessional Guidelines

Accordingly, Colorado's medical and legal communities have collaborated on guidelines to provide standards and suggestions to facilitate interaction between healthcare professionals and attorneys. The Colorado Interprofessional Guidelines (Guidelines) were approved in 2012 and set forth expectations and courtesies appropriate for legal and healthcare professionals, particularly in the course of litigation. The Guidelines have been endorsed by the Colorado Bar Association, Denver Bar Association, Colorado Medical Society, Denver Medical Society, Boulder County Medical Society, and El Paso County Medical Society. They are included at the end of this article and are available electronically at www.cobar.org/index.cfm/ID/20100/subID/28380/CITP.

The purpose of the Guidelines is to encourage cooperation and respect between attorneys and healthcare professionals, and to foster an understanding of the responsibilities of both professions.¹ A predecessor Interprofessional Code was first enacted in 1986 to assist with interprofessional disputes, and was updated in 1997; however, the Denver Medical Society and Colorado Medical Soci-

ety withdrew their endorsement of the Code in 2011. The Guidelines urge healthcare professionals to understand the necessity of medical testimony in court proceedings and to "engage in the legal process in a professional and responsible manner that demonstrates respect for an attorney's duties, role, and circumstances, as well as the needs and rights of their patients."²

At the same time, attorneys are reminded of their corresponding duty to engage healthcare professionals in a manner that demonstrates respect for that professional's duties, roles, and circumstances. Because a healthcare professional's primary duty is to provide patient care, attorneys should try to minimize disruption to the healthcare professional, patients, and healthcare practices.³ With regard to charges by healthcare professionals, the Guidelines provide that "a health care provider should charge for medical/legal services what he or she would have likely earned during the time required for the healthcare provider to render the testimony or other services being requested."⁴

The Guidelines establish a Medical/Legal Dispute Resolution Subcommittee of the Interprofessional Committee as a mechanism for solving disagreements between healthcare professionals and attorneys. The Subcommittee comprises members of the plaintiff and defense bars, as well as members or staff of the Colorado Medical Society.⁵ The Subcommittee will assist in resolving fee disagreements, scheduling issues, and other interprofessional matters between healthcare professionals, attorneys, and patients.

The Guidelines and CRCP 45

A common area of contention involves the timing of subpoenas. The Guidelines aim to resolve problems between the legal and healthcare-related professions caused by subpoenas, particularly in light of recent amendments to Rule 45 of the Colorado Rules of Civil Procedure (CRCP 45).

At the outset, the Guidelines provide that when serving a health professional with a subpoena, attorneys should schedule service of the subpoena so as to minimize inconvenience to the health professional and limit disruption to patients and to the practice.⁶ As a matter of courtesy, attorneys are urged to explain, to the extent possible, the nature and subject of the subpoena.

About the Authors

Kari Hershey is a member of the CBA Health Law Section. Frank Cristiano and Nick Ghiselli are co-chairs of the CBA/DBA Interprofessional Committee, and Tom Wolf is a former Chair of the Committee. Dick Holme, an honored contributor to the Committee and *The Colorado Lawyer*, is very active in the Colorado Supreme Court Rules Committee. This article is a collaborative effort by the authors, intended to enlighten readers to avenues and guidelines available to them with regard to interprofessional disputes. Readers are encouraged to refer inquiries or disputes concerning interprofessional disputes to the CBA/DBA Interprofessional Committee for its assistance in mediating or, by agreement, arbitrating, a resolution—www.cobar.org/index.cfm/ID/20100/CITP/Interprofessional.

At the suggestion of the Colorado Supreme Court, CRCP 45 was amended to address issues that frequently arose in connection with subpoenas *duces tecum* for privileged documents. One particularly troublesome problem was issuance of subpoenas to health providers for privileged medical records. Healthcare institutions that produce records in response to a subpoena without the knowledge or consent of a patient may violate patient privilege.⁷ Amendments to CRCP 45 that aimed to solve this problem became effective January 1, 2013. CRCP 45 now protects the subject of a subpoena by requiring any subpoena for privileged records to include either a signed authorization from the privilege holder or a court order permitting production of the documents.⁸

The Guidelines harmonize the policy objectives of the amended CRCP 45 with the obligations of the legal and medical professions. For example, the Guidelines provide that “[a] health care professional or institution should not release medical records without a patient authorization or a court order, unless there is some statutory exception that allows the release of the records.”⁹ This language tracks closely with the new language in CRCP 45(c)(2)(B)(i) and highlights for health providers the importance of maintaining patient privilege and confidentiality in the litigation process.

Similarly, the Guidelines and CRCP 45 complement each other in advising those issuing subpoenas to healthcare professionals and institutions to take reasonable steps to avoid imposing undue burden or expense. Specifically, the Guidelines state that “[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”¹⁰

Conclusion

By outlining the goals of interaction between legal and healthcare professionals, the Guidelines offer a workable standard for professional courtesies and responsibilities. The recommended approach to common areas of contention allows both attorneys and healthcare professionals to plan their relationships in a way that minimizes the potential for future disagreements. Further, by adopting language that conforms with amendments to CRCP 45, the Guidelines give additional protection to patients and litigants who otherwise may be caught in the middle of professional disputes.

Healthcare professionals and attorneys are encouraged to bring any disputes to the attention of the Interprofessional Committee. Contact the Committee at: CBA/DBA Interprofessional Committee, 1900 Grant St., Ste. 900, Denver, CO 80203-4309; or Interprofessional Committee, Colorado Medical Society, 7351 Lowry Blvd., Denver, CO 80230.

Notes

1. Guidelines § 1.1.
2. Guidelines § 1.2.
3. Guidelines § 1.3.
4. Guidelines § 5.2.
5. Guidelines § 2.
6. Guidelines § 4.2.
7. *See, generally*, Holme, “New CRCP 45 Impacts Medical Records Subpoenas and Tracks Federal Rule,” 42 *The Colorado Lawyer* 23 (Jan. 2013), www.cobar.org/tcl/tcl_articles.cfm?articleid=7904.
8. CRCP 45(c)(2)(B)(i).
9. Guidelines § 3.1.
10. CRCP 45(c)(1).

Colorado Interprofessional Guidelines

1. Purpose

1.1. The Colorado Interprofessional Code is designed to guide relations between attorneys and health care professionals in client/patient matters. Such interactions are best facilitated when the two professions understand the responsibilities of the other and work together with cooperation and mutual respect.

1.2. Health care professionals must understand that medical testimony is often necessary in court proceedings. Hence, health care professionals should engage in the legal process in a professional and responsible manner that demonstrates respect for an attorney’s duties, role, and circumstances, as well as the needs and rights of their patients.

1.3. Legal professionals have a corresponding duty to engage a health care professional in a professional and responsible manner that demonstrates respect for the health care professional’s duties, role, and circumstances. Recognizing that a health care professional’s primary obligation is to provide patient care, efforts should be made to minimize disruption to the professional, patients, and the practice.

2. Medical/Legal Dispute Resolution Subcommittee

The Committee will be comprised of members of the plaintiff’s bar, members of the defense bar (who are members of the Bar Associations’ Interprofessional Committee), and members/staff of the medical society. The subcommittee will be co-chaired

by one member of the Bar Association and one member of the Medical Society.

3. Release of Medical Records

3.1. A health care professional or institution should not release medical records without a patient’s authorization or a court order, unless there is some statutory exception that allows the release of the records (*i.e.*, child abuse, coroner investigation, etc.). A subpoena for records must contain a valid authorization. A health care provider who is unsure about the proper lawful authority should contact his or her attorney or medical malpractice provider.

3.2. A party or attorney issuing a subpoena on a health care professional/institution or custodian will take reasonable steps to avoid imposing undue burden or expense.

4. Scheduling

4.1. Attorneys should schedule the services of a health care professional far enough in advance and in such a manner as to minimize inconvenience and disruption to the professional, patients, and the practice. Attorneys should advise health care professionals of trial or hearing dates at the time the trial or hearing is set, and promptly inform health care professionals of any schedule modifications.

4.2. Attorneys should communicate, to the extent possible, the nature and subject of the subpoena. Service of a subpoena should

be scheduled to minimize the inconvenience to the health care professional and limit disruption to patients and the practice.

5. Fees for Services

5.1. Health care professionals may charge a reasonable fee for services, whether the professional is providing services as a treating witness or as a specially retained witness. The attorney and health care professional should have a formal written agreement before services are provided.

5.2. In general, a health care provider should charge for medical/legal services what he or she would have likely earned during the time required for the health care provider to render the testimony or other services being requested. Workers' compensation, governmental, or agency guidelines or regulations may set fee schedules with legal limits.

5.3. If scheduled medical testimony is canceled or postponed, the health care professional may be entitled to compensation depending on the timeliness of notice and amount of disruption to the professional's practice. Health care professionals are encouraged to use time made available after reasonable notice of cancellation. Cancellation fees should be addressed in advance as part of the written agreement between the attorney and the health care professional.

5.4. Whenever document review, medical reports, conferences, or medical testimony are requested by an attorney, it will be conclusively presumed that the attorney has made definitive arrangements with the client for payment of all reasonable charges and that the attorney will be responsible for payment to the health care professional. The health care professional should be aware that the client/patient, not the attorney, is ultimately responsible for reimbursement to the attorney.

5.5. A health care professional should submit an itemized bill to the attorney for services. The attorney is accountable for promptly compensating the health care professional for the services provided. Medical rules of ethics prohibit fees for medical testimony from being contingent upon the outcome of litigation.

6. Scope of Services

6.1. Although health care professionals are "expert witnesses" because of their experience and training, a distinction is made

between health care professionals who testify based upon and about facts gained from personal observation of a patient (treating expert witness), and professionals who give opinions based upon facts furnished to them for review in the course of litigation outside their direct care and treatment of the patient (specially retained expert witnesses).

6.2. Attorneys may request a health care professional to testify as a specially retained expert witness to give opinions beyond the facts gained from personal treatment of a patient (*e.g.*, the appropriateness of another professional's care, hypothetical situations, etc.). The decision to do so is solely within the discretion of the health care professional. A treating health care provider is not obligated to render an opinion outside the scope of his care and treatment.

7. Dispute Resolution

Health care professionals and attorneys should promptly submit a summary of any dispute, along with supporting documentation, to the Interprofessional Committee at:

Interprofessional Committee Colorado
CBA/DBA
1900 Grant, Ste. 900
Denver, CO 80203-4309

or:

Interprofessional Committee
Colorado Medical Society
7351 Lowry Blvd.
Denver, CO 80230-6902

8. Notice

Once a dispute is submitted, the parties will receive a written communication from the Committee. Member(s) of the Committee will investigate the dispute and make recommendation(s) for resolution. The full committee will review the recommendation(s) and issue a final written opinion. The Committee's recommendation(s) is (are) not binding unless agreed to by the parties. ■