

## **Handling Depositions By Written Question And Subpoenas For Patient Financial Records**

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Hospital business offices always have someone appointed to bear the cross of being the Custodian of Business Records. As a health care attorney representing numerous hospitals, ambulatory surgical centers, physician groups and home health care organizations, I am frequently being asked by clients what they are supposed to do when they are served with a subpoena for business records. Let's briefly address what is being requested and why. Typically, the request is being served by a records service that is gathering the records for a law firm because there is a legal matter pending somewhere that somehow involves the patient. The most frequent instance is the personal injury case, although medical malpractice cases frequently give rise to such requests also. Normally, the records service is to perform three tasks. Task number 1 is to go to the facility, locate the Custodian and serve them with the subpoena. Task number 2 is to obtain the Custodian's answers to a set of questions referred to as a Deposition by Written Question. Task number 3 is to retrieve copies of the financial records, which will accompany the answers to the written questions by the Custodian of Business Records. The entire process is a tool for gathering the statement of a witness in such a manner as to comply with the rules of courts, so that the written responses of the witness, (i.e., the Custodian), will be admissible as evidence in court. Thus, the Custodian's responses to the questions are testimony, which may be used later as evidence. The attorney or other authority requesting the information is employing this process as a means of proving that someone was in a hospital at a certain time, received services and incurred expenses for the treatment and services received. A "clean" written deposition and set of records often alleviates the necessity of having the Custodian appear in person in court with records. Occasionally, a Custodian may be asked to simply execute an affidavit attesting to the authenticity and accuracy of copies of

patient financial records which a former patient or attorney already have in their possession. This is called “certifying” or “authenticating: documents, which means the Custodian is being asked to execute an affidavit or declaration to the effect that the records are true and correct copies of what the records purport to be, and are exact duplicates of the original. What an attorney may ask a Custodian to sign can, of course, vary greatly. If a Custodian has any doubt whatsoever about any document they are being asked to sign, he or she should contact higher authority and, if available as a resource, legal counsel. Statements of the Custodian are statements of the organization. No need to be uncooperative, however, one should always be cautious about signing documents prepared by outside sources. Now, let us turn to a quick lesson on Texas law as it pertains to this topic.

**LAW:** Section 241.151 of the Texas Health and Safety Code states that you (Custodian of Business Records) may release records related to a judicial proceeding in which the patient is a party and the disclosure is requested under a subpoena issued under the Texas Rules of Civil Procedure or Code of Criminal Procedure, or Chapter 121 of the Texas Civil Practice and Remedies Code.

**RULE:** The Custodian of Business Records is legally authorized to release business office/billing records as long as:

- \* the records are requested under subpoena, and;
- \* the patient is a party to the suit.

**NOTE:** If the patient is not a party to the suit, then an authorization for release of the records executed by the patient, or the patient’s legally authorized representative is required.

**LAW:** Section 241.154 of the Texas Health and Safety Code states that, on receipt of a written authorization, (which includes subpoenas), for records, the hospital is to provide the requested records as promptly as required, but not later than the 15<sup>th</sup> day after receipt of the request **and payment authorized by law** for providing the records. The fee schedule applicable to production of health care records under Texas law is found at Section 241.154(b) of the Texas Health and Safety Code. This schedule of charges applies to the retrieval and reproduction of the records only. The fees for giving a deposition as a witness, or certifying a document as authentic are separate and will be discussed below. The current fee schedule for the retrieval and reproduction of health care records is as follows:

- \* A hospital may charge a basic retrieval fee not to exceed \$30.00, which must include the first 10 pages of the requested copies, then;
- \* \$1.00 per page for the 11<sup>th</sup> through 60<sup>th</sup> page;
- \* 50 cents for the 61<sup>st</sup> through 400<sup>th</sup> page;
- \* 25 cents for all pages thereafter, and;
- \* Actual cost of mailing or shipping or delivering the records.

**FOR RECORDS STORED IN MICROFORM OR OTHER ELECTRONIC MEDIUM:**

- \* A hospital may charge a basic retrieval fee not to exceed \$45.00, which must include the first 10 pages of copies;
- \* \$1.00 per page thereafter, and;
- \* The actual cost of mailing or shipping or delivering the records.

**THE LAW ABOUT WITNESS FEES:** The Custodian of Records, when asked to respond to a Deposition by Written Question, is being asked to testify as a witness. This is the most frequently used means of gathering such information by attorneys and law firms. The deposition questions are directed to the “Custodian of Business Records” and the document requires the Custodian to respond to a list of a dozen or so questions,

including whether the records being provided are true and correct copies of the hospital's billing or business records, etc. The document typically requests that the billing records be produced and provided along with the written answers to the questions.

We have covered the fees that can be required by the hospital for retrieving and producing business and billing records above. Now we are talking about the fees that may be required by the witness.

For execution of an affidavit or certification of a document, a witness may charge a fee of \$1.00. That is the fee for signing an affidavit. It is NOT the fee for producing records, nor is it the fee for responding to a Deposition on Written Question.

For responding to a Deposition by Written Questions, a witness may charge a fee not to exceed \$10.00 per set of questions.

#### **WHEN A HOSPITAL MAY NOT CHARGE A FEE FOR PRODUCING RECORDS:**

A hospital (which includes Custodian of Business Records) may not charge a fee for a medical or mental health record requested by a patient or former patient, or that patient's attorney or other personal representative if the records requested are being sought for use in connection with an application for disability benefits or assistance under:

- \* Chapter 31, Texas Human Resources Code (AFDC);
- \* The state Medicaid Program, or;
  - Social Security, VA or Champus benefits.

We believe this information to be current as of August, 2000. Anyone needing legal advice on this, or any other subject should seek the assistance of a qualified attorney to make sure that they are receiving current information regarding compliance with applicable statutes and regulations.