

Health Information Compliance Alert

Privacy Exceptions: GRAND JURY SUBPOENA TRUMPS PATIENTS' PRIVACY RIGHTS

The Health Insurance Portability and Accountability Act doesn't necessarily protect a hospital's emergency department records or inpatient medical records from a grand jury investigation.

That's the conclusion Judge **T.S. Ellis, III** of the **U.S. District Court for the Eastern District of Virginia** reached recently in response to a hospital's refusal to hand over records that a federal grand jury subpoenaed. The hospital maintained that the physician-patient privilege and/or general federal rights of privacy as to medical records precluded disclosure.

Judge Ellis quickly rejected the physician-patient privilege argument in his ruling in *In re: Grand Jury Subpoena* (No. 02-151-MG). Federal Rule of Evidence 501 governs evidentiary privileges in federal criminal proceedings.

The rule provides that a witness' privilege "shall be governed by the principles of the common law." But under common law there is no physician-patient privilege, and no federal statute creates such a privilege.

As for general federal rights of privacy, Judge Ellis noted that federal case law does recognize that patients have an interest in the privacy of their medical records.

The interest is not, however, an absolute right, nor is it dispositive in all circumstances. Instead, it must be "weighed against the government's interest in obtaining the records in particular circumstances."

In this case, the government provided the court with information under seal clearly showing that the documents sought in the subpoena were relevant and material to the criminal investigation. Thus the government's interest outweighed the patients' privacy interest in their medical records.

The hospital also argued that HIPAA precludes disclosure. But the court found that argument "unpersuasive."

The HIPAA regulations "themselves make clear that any privacy interest patients have in their medical records is trumped by a grand jury subpoena that is 'relevant and material to a legitimate law enforcement inquiry,' 45 C.F.R. sec. 164.512 (f)(1)(ii)," Ellis noted.