COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

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Docket No. RM-17-1004

BOARD OF REGISTRATION IN MEDICINE, Petitioner

v.

JORG WINTERER, M.D., Respondent

DECISION AND ORDER ALLOWING SERVICE OF RECORDS-ONLY SUBPOENA

At Boston this 29th day of December, 2017.

Summary

In confirming my oral order at the prehearing conference allowing the Board of Registration in Medicine to subpoena records of care given by the respondent physician to three patients at urgent care clinics operated by a third party, I include, as conditions to the subpoena, the procedural safeguards that amended Rule 45 of the Massachusetts Rules of Civil Procedure applies to "records-only" subpoenas issued by a party to a non-party. I do so to assure that the subpoena may be issued under 801 C.M.R. § 1.01(7)(a)1 as "not inconsistent with law."

Background

This proceeding arises out of the Board of Registration in Medicine's November 22, 2017

suspension of Dr. Jorg Winterer's license to practice medicine in the Commonwealth, and its Statement of Allegations against him that included conduct placing into question the physician's competence to practice medicine. This conduct allegedly occurred at Partners Urgent Care, LLC's clinics in Newton and Watertown, Massachusetts in late December 2015, and in January and February 2016 and included (a) failure to maintain a sterile surgical field during the suturing of a lacerated finger, resulting in an infection; (b) taking a chest x-ray of a patient without covering the lower portion of her body with a protective shield, and misdiagnosing her with pneumonia; and (c) using Dermabond on a child's face too close to one of his eyes, resulting in the eye being glued shut and requiring eye repair by an opthamalogist. *See Statement of Allegations* (Nov. 22, 2017, at paras. 13-15.) Dr. Winterer denied these allegations in an answer he filed on December 20, 2017.

The Board referred this matter to DALA on November 22, 2017 for making recommended findings of fact and necessary conclusions of law. Among the facts to be found in the recommended decision to be issued here would be whether the physician's alleged conduct at the urgent care clinics occurred.

Prior to the prehearing conference, the Board moved, pursuant to 801 C.M.R. § 1.01(7)(a)1, for leave to serve a subpoena upon Partners Urgent Care, LLC (Partners), which is not a party to this proceeding. The subpoena would request records regarding Dr. Winterer's treatment of three patients at Partners clinics in Newton and Watertown (Patient CW, for a lacerated finger, on December 25, 2015; Patient LS, for complaints of chills, shaking and weakness on February 11, 2016; and Patient No. 578085 in January 2016 for an injury to his face). The Board stated in its motion that the records were relevant and necessary to prove the allegations set forth in paragraphs 13-15 of the Statement of Allegations against Dr. Winterer. The subpoena sought records only; it

would not require that a witness appear on behalf of Partners to produce the records or give testimony.

The Board served a copy of its motion for leave to serve the subpoena upon Dr. Winterer's counsel by electronic mail on December 21, 2017. I began the prehearing conference in this proceeding on December 26, 2017. Both parties appeared by counsel. Dr. Winterer did not object to the proposed subpoena, and I granted the motion orally, with written confirmation to follow.

It was my intention initially to simply so-order the motion. I have found, however, no DALA decision regarding the grounds for allowing a party to issue a "records-only" subpoena to a non-party under the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.00 *et seq*., (the Standard Rules) which govern proceedings such as this one. Rather than simply so-order the Board's motion for leave to serve one, I have decided to address records-only subpoenas under the Standard Rules, particularly in view of the 2015 amendment of Mass. R. Civ. P. Rule 45 that (for the first time) formally recognizes the records-only subpoena as a part of Massachusetts practice, subject to procedural safeguards. How a records-only subpoena should be treated under the Standard Rules, and why amended Rule 45 should be considered in doing so, are matters that are likely to arise in other DALA appeals; explaining why I have allowed one to be issued in this proceeding may prove helpful if the issue presents again.

In adding this additional analysis, I do not alter my oral order allowing the Board's motion. However, to assure that the records-only subpoena the Board intends to serve is "not inconsistent with law," as 801 C.M.R. § 1.01(7)(a)1 requires for any relief granted under that rule, I apply the procedural safeguards that amended Mass. R. Civ. P. Rule 45 provides with respect to records-only subpoenas issued by a party to a non-party.

Discussion

1. Records Subpoenas in Massachusetts Civil Practice, Generally

The Board moved for leave to serve the subpoena it proposes pursuant to 801 C.M.R. § 1.01(7), the standard adjudicatory practice and procedure rule entitled "Motions," rather than pursuant to 801 C.M.R. § 1.01(10)(g), entitled "Subpoenas," which addresses subpoenas issued by the "agency or presiding officer." Rule 10(g) provides that "[t]he Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12. Chapter 30A section 12 addresses subpoenas issued to witnesses, even if only for the production of books, records, correspondence and documents (a subpoena duces tecum). The subpoena that the Board proposes to issue here would require no appearance by a record-keeper or other person to give testimony or produce the medical records in question. It would require, instead, that Partners simply produce the requested records. The Board seeks leave to serve its own subpoena, rather than the issuance of a subpoena by a DALA Administrative Magistrate.

What the Board seeks leave to serve is, in other words, a "records-only" subpoena. This type of subpoena has been known to Massachusetts civil practice for many years, although it was not recognized formally by civil practice rules. Because neither the Federal nor the Massachusetts Rules of Civil Procedure addressed this type of subpoena specifically, the ground rules governing them were unclear, as was whether the courts could enforce them. A related issue was whether defiance of a records-only subpoena was defiance of the court and exposed the third party from whom discovery was sought to sanctions. Another was whether out-of-state courts having jurisdiction

where the subpoenaed third party resided would enforce such subpoenas. Still another was what protection (if any) the record-producing party had against burdensome production, including excessive costs associated with producing the requested records. Perhaps to avoid these uncertainties and sideshow litigation involving records-only subpoenas, the more common practice in civil litigation was to serve a third party with a subpoena duces tecum requiring that a witness produce the requested records. Both Fed. R. Civ. P. Rule 45 and Mass. R. Civ. P. Rule 45 have long recognized subpoenas duces tecum and prescribed conditions for their use. The use of a subpoena duces tecum to obtain documents rather than a records-only subpoena may have circumvented procedural uncertainties, but it was often a choice with financial and logistical consequences. Because a subpoena duces tecum required a witness to appear, the formalities of depositions under the Federal and Massachusetts rules applied, including witness fee payment and paying a reporter to transcribe the witness's deposition. Subpoenas duces tecum generated, consequently, a fair share of litigation over issues that included when and where to depose a witness bearing the subpoenaed documents but having little (if any) knowledge of material facts, and whether the witness needed to bring the original documents to the deposition rather than copies. *F*or a general overview of this history, *see Reporters' Notes*, Fed. R. Civ. P. Rule 45: 1970, 1980, 1985, 1991 and 2005 amendments, *and Reporters' Notes*, Mass R. Civ. P. Rule 45, 1973 amendments.

These quandaries were addressed by the Supreme Judicial Court's 2015 amendment of Mass. R. Civ. P. Rule 45; an amendment of Fed. R. Civ. P. Rule 45 did so earlier, in 1991. Amended Massachusetts Rule 45(b) provides for this type of subpoena specifically, and overall, amended Rule 45 "formally adopts the concept of a documents only subpoena for Massachusetts civil practice."

Reporters' Notes, *Mass. R. Civ. P. Rule 45: 2015 Amendments; Rule 45(a)*;[1] *see also* Carlos A. Maycotte, *Heads Up: The New "Documents Only" Subpoena Under Recently Amended Mass. R. Civ. P. 45*, 59 BOSTON BAR J. (Summer 2015), *available at https://*bostonbarjournal.com/2015/07/08/the-new-documents-only-subpoena-under-recently-amended-mass-r-civ-p-45/ . In addition to recognizing records-only subpoenas formally, the 2015 amendment of Mass. R. Civ. P. Rule 45 also clarified critical aspects of records-only subpoena practice that civil practice rules had left unresolved previously, among them the notice and compliance requirements that applied to records-only subpoenas, and whether courts could enforce them or protect subpoena recipients against abuse. Among these clarifications were the following:

(1) *Notice of a records-only subpoena must be given to the parties*. Amended Rule 45 requires that a party issuing a records-only subpoena must give advance notice of the subpoena to the other party or parties. *See* Mass. R. Civ. P. Rule 45(d)(1)(2015 rev.) The purpose of this requirement is to "provide sufficient notice to allow other parties to monitor discovery and to raise any objection to the subpoena." *Reporters' Notes*, Mass. R. Civ. P. Rule 45 (2015): 2015 Amendments; Rule 45(d).

(2) *The parties must also be given notice of objections to the subpoena*. Amended Rule 45(d) requires that the party serving the records-only subpoena "must also serve on all parties to the case a copy of any objection received to the subpoena as well as a notice of any production made or alternatively, a copy of the production." Per the *Reporters' Notes* to amended Rule 45(d), this provision was added "so that parties to the case, other than the party who served the subpoena, are

[1]/ Amended Rule 45 clarifies that "documents" subject to a records-only subpoena includes "documents, electronically stored information, or things." Amended Mass. R. Civ. P. Rule 45(d)(1).

aware of the scope of production and are aware of any objection to production made by the non-party who has been served with the subpoena." *Id*. It "also gives the option to the party who receives the documents to provide copies of the documents to the other parties, as often was the prior practice." *Id*.

(3) *A records-only subpoena requires no witness appearance or fees*. Per amended Rule 45(c), witness fees otherwise required by amended Rule 45 (for example, if a subpoena duces tecum is issued) do not apply if the subpoena requires the production of documents only, and does not command the appearance of a witness. The last sentence of amended Rule 45(b) "makes clear that a command to produce documents, etc. does not require the person upon whom it is served to "appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." *Reporters' Notes*, *Mass. R. Civ. P. Rule 45 (2015): 2015 Amendments; Rule 45(b)*.

(4) *A reasonable subpoena response time is required*. The person to whom the records-only subpoena is directed has 30 days from being served with the subpoena to comply with it, although the court may shorten or extend this time. Amended Mass. R. Civ. P. Rule 45(d)1.

(5) *Producing copies of the requested documents complies with the subpoena*. Amended Mass. R. Civ. P. Rule 45(f)(1)(A) provides that documents provided in response to a documents-only subpoena may be copies, unless the subpoena requested the originals. Copies may also be furnished if the subpoena requires that the originals be produced, but if requested to do so, the non-party to whom the subpoena is addressed must provide all parties with "a fair opportunity to verify the copies by comparison with the originals." Per the Reporters' Notes, this is "intended to recognize the general practice in Massachusetts of producing copies of documents, and not the originals, other than

at a deposition, hearing, or trial . . . consistent with the procedure applicable where documents are produced in connection with a deposition and the producing party desires to retain the originals." *Reporters' Notes*, Mass. R. Civ. P. Rule 45 (2015): 2015 Amendments; Rule 45(f).

(6) *The recipient of a records-only recipient has two ways to protect its rights, one of them by court order, without risking contempt.* Amended Rule 45 clarifies that defiance of a records-only subpoena issued by a party or its counsel may indeed be defiance of the court, a matter that was unclear before the amendment. Amended Mass. R. Civ. P. Rule 45(g) provides that "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending." However, the amended Rule provides an alternative to risking contempt of court. Any person "made subject" to a records-only subpoena may file an objection within 10 days of receiving the subpoena, in which case the requested records may obtained by court order only. The person served with a records-only subpoena may also challenge it by way of a motion for a protective order filed within the time it has to respond to the subpoena, *see* amended Mass. R. Civ. P. Rule 45(f)(3), resolving yet another quandary that had attended records-only subpoenas previously. The party issuing the records-only subpoena need not resort to contempt proceedings to prompt compliance in the first instance; amended Rule 45(d) clarifies that the issuing party may move to compel production pursuant to this type of subpoena. *See* amended Mass. R. Civ. P. Rule 45(d)(1), next-to-last sentence.

(7) *The party issuing the records-only subpoena may move to compel production, but an order requiring document production must protect the party producing the documents from undue burden or expense*. Amended Rule 45 provides specifically for a motion to compel production or inspection sought by a documents-only subpoena if the subpoenaed party objects. Rule 45(d)(1), as

amended, last para. However, any such order to compel production or inspection "shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance." *Id*.; *compare* Fed. R. Civ. P. Rule 45(d)(2)(similar provision, but the party compelled to produce must be protected from "significant expense resulting from compliance"). Per the *Reporters' Notes*, the intention of amended Massachusetts Rule 45(d)(1)'s "undue burden or expense resulting from compliance" clause is "to provide judges with broad discretion on a case-by-case basis to deal with the burden on a non-party to a case, and the possible expense, involved in responding to a subpoena. Its language is sufficiently broad to allow a court to require cost-sharing in its discretion as part of an order to produce."

2. Records-Only Subpoenas Under 801 C.M.R. § 1.01(7)(a)1

The Massachusetts Rules of Civil Procedure do not govern practice and procedure in DALA proceedings before the Division of Administrative Law Appeals, although, as I discuss below, amended Mass. R. Civ. P. Rule 45 states "the law" regarding records-only subpoenas in Massachusetts and is relevant, thus, in determining whether granting leave to issue such a subpoena under 801 C.M.R. § 1.01(7)(a)1 would be "not inconsistent with law."

Neither the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, § 12, nor the Standard Rules of Adjudicatory Practice and Procedure addresses records-only subpoenas specifically. Rule 10(g) of the Standard Adjudicatory Rules, 801 C.M.R. § 1.01(10)(g), addresses subpoenas to witnesses issued by agencies or presiding officers (and, thus, DALA Administrative Magistrates). Neither the statute nor Rule 10(g) provides that a records-only subpoena to a third party may be served only if a presiding officer, such as a DALA Administrative Magistrate, issues

it, or that a party or its counsel cannot issue the subpoena to the third party itself. Standing alone, this might suggest that records-only subpoenas do not exist in proceedings governed by the Standard Rules, and therefore cannot be allowed or enforced in a proceeding such as this one.

The Standard Rules provide, however, that "[a]n Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 CMR 1.00." 801 C.M.R. § 1.01(7)(a)1. Although this still provides no support for a subpoena issued by a party or its counsel without leave to do so granted by a DALA Administrative Magistrate, it furnishes a means for obtaining leave to do so subject to the "not inconsistent with law or 801 CMR 1.00" standard that Rule 7(a)1 recites.

Granting a motion for leave to serve a records-only subpoena under 801 C.M.R. § 1.01(7)(a)1 is not automatic. The Administrative Magistrate must determine, first, that both legs of the "not-inconsistent with" standard are satisfied. As a result, it is not enough that a proposed records-only subpoena is neither precluded by the Standard Rules nor inconsistent with them. It must also be "not inconsistent with law," which includes applicable Massachusetts law beyond the Standard Rules.

A pragmatic approach to this seemingly boundless search for conformity with law is to examine amended Massachusetts Rule 45, which recognized the records-only subpoena formally for the first time as a matter of Massachusetts practice, and, also for the first time, prescribed procedural safeguards governing the use of this type of subpoena. These include notice of the subpoena to the other parties, an opportunity for any party or the subpoenaed third party to contest the subpoena or its enforcement and, in enforcing the records-only subpoena, consideration (and, as appropriate, limitation) of expenses for third parties complying with the requested records production. Harmonizing a proposed records-only subpoena sought under 801 C.M.R. § 1.01(7)(a)1 with the

requirements of amended Mass. R. Civ. P. Rule 45 assures, at least, that the subpoena would conform with current Massachusetts law regarding the use of this type of subpoena in civil proceedings to obtain information from a non-party, and would provide the procedural protections that Massachusetts civil practice currently expects, and requires.

3. Conforming the Board's Records-Only Subpoena to 801 C.M.R. § 1.01(7)(a)1

The Board moves appropriately under Rule 7(a)1 for the records-only subpoena it seeks to issue to Partners Urgent Care, LLC. The subpoena may be granted under this Rule as not inconsistent with the Standard Rules or law.

First, a records-only subpoena is not "inconsistent with 801 C.M.R. § 1.00." As I noted above, neither the Standard Rules generally, nor 801 C.M.R. § 1.01(10)(g) specifically, proscribes, or even addresses, records-only subpoenas issued to a non-party by a party to a proceeding or its counsel. There is no apparent inconsistency, therefore, between the records-only subpoena the Board proposes and the Standard Rules. There is also an apparent consistency with the Rules's overall purpose. The Board's proposed records-only subpoena would spare Partners and the parties the time and expense of document production via a witness, as would be required if the Board served a subpoena duces tecum for the records in question. Granting leave to the Board to serve the proposed subpoena under Rule 7(a)1 would be consistent with the directive of 801 C.M.R. § 1.01(2)(b) that the Standard Rules be "construed to secure a just and speedy determination of every proceeding."

Second, a records-only subpoena is also not "inconsistent with law." Massachusetts civil practice now recognizes the records-only subpoena, and revised Mass. R. Civ. P. Rule 45 governs the use of this type of subpoena specifically. To be fully consistent with Massachusetts law

governing records-only subpoenas, however, a records-only subpoena allowed under 801 C.M.R. § 1.01(7)(a)1 must include at least the procedural safeguards that amended Mass. R. Civ. P. Rule 45 builds into this type of subpoena: (1) advance notice of the subpoena to the parties; (2) notice to the parties of any objections to the subpoena; (3) a reasonable time to produce records in response to the subpoena (30 days unless shortened or lengthened by order issued upon a motion seeking this relief); (4) the availability of a protective order, or an order compelling a response, relative to the records-only subpoena; and (5) if production of the requested documents is ordered, the protection of the third party required to produce documents against undue burden or expense in producing them.

Order

The Board's motion for leave to subpoena medical records from Partners Urgent Care, LLC is allowed. With adaptations to fit the circumstances presented here, I apply the procedural safeguards recited by Mass. R. Civ. P., Rule 45 (2015 amendment) to the records-only subpoena that I am allowing the Board to issue. The subpoena may recite them verbatim, or it may simply refer to this decision and include a copy of the decision with the served subpoena. These safeguards are conditions to the subpoena. They are italicized below; the non-italic material is explanatory:

(1) *A copy of the subpoena shall be mailed to counsel for Dr. Winterer when it is mailed or delivered to Parnters Urgent Care, LLC.* This is, of course, contemporaneous notice of the subpoena, not the advance notice of the subpoena that Mass. R. Civ. P. Rule 45 requires. Advance notice was given, and confirmed, when the Board sent Dr. Winterer's counsel a copy of its motion for leave to serve the subpoena before the prehearing conference, and counsel did not object to the motion during the December 26, 2017 prehearing conference.

(2) *Partners may provide copies of the documents requested by the subpoena, unless the subpoena requires the originals, in which case Partners must, if requested, provide the Board and Dr. Winterer with a fair opportunity to verify the copies by comparison with the originals.*

(3) *The Board shall serve on Dr. Winterer's counsel any objection it receives to the subpoena, as well as notification of any record production the Board receives from Partners or alternatively, a copy of the records produced*. As a practical matter, this notice may be given in the status reports that the Board will be filing, beginning with the report due by January 26, 2018. As The subject matter of this, and subsequent, status reports would include any objections to record production or failure to produce any of the subpoenaed records, and any related explanation received from Partners, including the records' nonexistence, if that is the case.

(4) *Partners has 30 days to respond to the subpoena after receiving it, unless the Administrative Magistrate shortens or lengthens this time upon motion by the Board or by Partners*. The Standard Rules provide that a party or agency served with a document request "shall respond within 30 days." 801 C.M.R. § 1.01(8)(b). That time period does not apply specifically to records-only subpoenas allowed under 801 C.M.R. § 1.01(7)(a)1, but there is no reason apparent from the Standard Rules why it should not apply here. The 30-day response time is also consistent with the response time to records-only subpoenas that amended Mass. R. Civ. P. Rule 45 provides. I apply that response time to the subpoena I allow here, but I also apply amended Rule 45's provision that the 30-day response time can be shortened or lengthened (by the court upon motion, under the amended Rule, and here, by a DALA Adminsitrative Magistrate). The parties mayalso agree to a shorter response time, or may agree to extend the time to respond to the records-only subpoena; there is no provision in the Standard Rules, or in amended Mass. R. Civ. P. Rule 45, precluding such

agreement.

(5) *If any of the records subpoenaed are not produced, the Board may move for an order compelling their production pursuant to 801 C.M.R. § 1.01(7)(a)1. Any such motion must be served by mail upon Partners and upon Dr. Winterer's counsel. Both Partners and Dr. Winterer may file an opposition or other response to the motion within seven business days of receiving it. Partners's opposition or response must include any assertion that compliance with the subpoena would impose undue burden or expense upon it, together with the grounds for the assertion. Any party requesting to be heard on the motion shall request a motion hearing in its opposition or response to the motion.*

(6) *If the DALA Administrative Magistrate issues an order compelling Partners to produce any of the subpoenaed records, the order shall not require, and nor shall it be read as requiring, that Partners must assume an undue burden or expense in producing the records in question.*

It is the responsibility of the Board and Partners to assure that the full names of patients to whom records produced pursuant to the subpoena refer are redacted, whether in the records themselves or in related motion papers or correspondence or anything else that is filed in the record of this proceeding, with initials or numbers used in place of the names (as they were in the Board's motion for leave to subpoena medical records), and that social security numbers on the records are obscured effectively.

Mark L. Silverstein
Administrative Magistrate

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