Pre-Litigation Procedures To Obtain Medical & Employment Records

by Thomas M. Diachenko, Column Editor

Obtaining information quickly is key to early case evaluation. Patients and employees have a statutory right to their records. Such documents form the basis of many claims we handle as plaintiff attorneys in injury and employment actions. They generally have an aura of reliability which far exceeds that of faulty memories and bias-prone testimony. However, such evidence generally remains in the exclusive custody and control of the potential defendant. After listening to the potential client's story, it behooves us as objective evaluators to verify and investigate the documentary evidence to determine if it corroborates, contradicts or adds to the information supplied by the potential plaintiff. There are a number of statutes available to us which can help us obtain documentary evidence in the pre-litigation case evaluation stage.

Filing a claim without reviewing the key records can end up being a costly mistake for plaintiff's attorney while failing to produce them can be a costly mistake for the defense. However, without the discovery statutes (under the California Code of Civil Procedure) available, it can prove difficult to obtain the written information you need to properly evaluate a case. Utilizing statutes outside of the Code of Civil Procedure which allow for pre-filing document production can make that task much easier. When the potential defendant resists efforts to supply or make available the requested information, it not only frustrates our efforts but can sometimes raise a red flag that there may be something to hide. On the other hand, it may simply be a matter of oversight. Whatever the reason for the non-compliance, there are remedies which provide teeth to some of these statutes. Penalties, attorney fees and costs can be recovered from the non-compliant provider and employer.

Obtaining Medical Records Pre-Litigation

As I am sure many of us have found, it is not uncommon to confront resistance and cost prohibitive charges from health care providers and/or their copy service. This frustrates our efforts to obtain medical records on injury claims even when the request asserts Evidence Code §1158 and encloses a signed authorization. In those instances when a large institution is involved, the reason for resistance tends to do be due to uninformed medical records department staff. The problem with the larger institutions tends to relate to high charges a copy service tries to impose. When it comes to small offices, resistance to record production can raise the suspicion index especially when the care of the provider is in question and there may be motive to alter the records. In those instances, you can have your client obtain the records (pursuant to Health & Safety Code §123110, see *infra)* without disclosing your involvement or see if a subsequent provider has a copy of the prior target provider's records. Thereafter, you can make an Evidence Code §1158 request and then compare the two sets of records to determine if there have been any alterations.

Evidence Code §1158 allows us the ability to obtain medical records pre-filing directly from the provider. This statute specifically provides that upon presentation of a written authorization, "prior to the filing of any action" by an attorney or agent, the health care provider shall make the records available within five days and charge no more for copying than the amounts specified or "sub-

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ject the person or entity having custody or control of the records to liability for all reasonable expenses including attorney's fees, incurred in any proceeding to enforce this section."

Without these pre-litigation enforcement statutes, the right of patients to access to their own medical records would be easily frustrated. Our own Fourth District Court of Appeal acknowledged this basic right in two related appellate cases brought by one patient (Patience Thornburg) against a hospital and a copy service company. The court recognized "the legislative goals of allowing a patient to evaluate and seek advice concerning their medical treatment before deciding whether to file a lawsuit against a medical provider." *Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 203.

In *Thornburg v. Bactes Imaging Solutions, Inc.* (2006) 138 Cal.App.4th 43, the court reversed a superior court ruling sustaining a demurrer brought by the defendant copy service company (Bactes) against a patient who was charged 20 times more the amount per page copied than was allowed by statute. (Two dollars per page instead of 10 cents a page.) The court rejected Bactes' argument that it could not be held liable because it was not a health care provider. Because Bactes assumed the duty of responding to the Evidence Code §1158 request and was acting for their own advantage and benefit as well as that of the hospital, Thornburg was allowed to allege liability against Bactes under the statute. *Id.* at 53.

Several months after the *Thornburg* decision against *Bactes*, the same court held that Thornburg did, indeed, have a private right of action against the hospital for its failure to comply Evidence Code §1158 including the cost limitations noting that "the Legislature plainly recognized [the] purpose [of Evidence Code §1158] could easily be frustrated by the unreasonable copying charges." *Id.* at 205.

In addition, Health & Safety Code §123110 provides that a patient can make a direct request and is entitled to inspect and copy their own medical records upon presentation of a written request if they pay "reasonable clerical costs". The records must be furnished within 15 days of that request. The federal Health Insurance Portability and Accountability Act (42 U.S.C. §1320 *et seq.*) has a similarly vague provision regarding what can be charged simply stating that it should be a "reasonable, cost based fee."

Obtaining Employment Records Pre-Litigation

After a three-week long jury trial and two days of deliberations this past October, Carl Lewis and I obtained a favorable plaintiffs' verdict in San Diego Superior Court for various wage and reimbursement claims on behalf of seven tow truck

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drivers who worked for a San Diego tow truck company. In addition, and particularly germane to this article, the jury also found that the defendant failed to produce records pursuant to Labor Code §226. Associated penalties were awarded for all seven plaintiffs with recoverable statutory attorney fees and costs on the back end. The requested pay and time records were not produced by the defendant employer until about six months after the complaint was filed and only after a request for production of documents was made under the discovery statutes. After nearly a year had passed from the first request for pay and time records, they were finally produced. Multiple efforts were undertaken by the defense to prevent the issue from going to the jury including a motion *in limine* and motion for non-suit, both of which were denied. The defendant employer testified that they did not produce the records and resisted inquiry as to the reason why by asserting the attorney-client privilege and claiming that they "turned the matter over to counsel." Whatever the excuse, it wasn't enough to defend against the claim. The defense of impossibility was unsuccessful. In the end, the defendant failed to produce the records at their peril and were found liable (by the jury requested solely by the defendant) for resisting efforts by these seven employees, through their attorney, to have access to their pay and time records so we could determine if and how much they were owed in wages and reimbursement.

In the above-referenced trial, the applicable subsections of Labor Code §226 were given verbatim as a special jury instruction and the verdict form included the essential elements derived from the statute to conclude a lengthy verdict form. The key provisions of Labor Code §226 include subsections (a)(c)(f) and (g) which essentially require an employer to comply with a request for an employee's pay and time records, as delineated in subsection (a), within 21 days of the request; otherwise the employer must pay a penalty of $750 plus associated costs and reasonable attorney fees. The defendant was finally held accountable for its decision not to abide by the law requiring that employees be given access to their payroll records.

The California Industrial Welfare Commission Wage Orders, as codified in the California Code of Regulations, title 8, provide additional authority for an employee's right to payroll records including piece rate, incentives and commissions and an explanation of the formula to determine the same. These provisions can be found in subsection 6 (of Wage Order 16; CCR, title 8, §11160) and subsection 7 (of Wage Orders 1 - 15; CCR title 8, §§11010 - 11150).

In addition, Labor Code §1198.5 codifies an employee's "right to inspect the personnel records that the employer maintains relating to the employee's performance or any grievance concerning the employee" and "shall make the contents of those personnel records available to the employee at reasonable intervals and at reasonable times" with some exceptions as articulated in the statute. Labor Code §432 further provides that the employer must hand over actual copies of anything which the employee signed. It is this later provision which employers use as an implied exclusionary clause to justify not making and giving copies of certain personnel files to the requesting employee which were not signed by the employee.

Labor Code §6408(d) also provides that an employer must provide employees or their representatives access to records pertaining to any employee exposure to potentially toxic materials or harmful physical agents.

Accentuating the seriousness of non-compliance, Labor Code §1199 provides that the failureZ of employer to provide such records can be punishable as a misdemeanor.

Our Professional Responsibilities

Although not found in the California Code of Civil Procedure, utilization of these pre-filing statutes and enforcement provisions can provide valuable early insight and benefit to us and the people we are trying to help. If we are serious about taking on a case, we owe it to our potential clients, the profession and ourselves to obtain the key records as soon as possible to properly evaluate the viability and scope of the claim. It would be unfortunate if we did not take advantage of these statutes to obtain information to which the aggrieved individual has a legal right and to hold the entity accountable for non-compliance. The statutes are there to help us and the people we may represent. They have emerged from the sound public policy of providing early and prompt access to information founded in fundamental individual rights. **TBN**