



IN THE THIRTEENTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF COLORADO

PROCEDURE FOR SEARCH WARRANTS SEEKING MEDICAL RECORDS

2024-2

The Court is receiving an increasing number of requests by law enforcement to obtain medical records or records containing protected health information. However, such information may be privileged under section 13-90-107(1)(d), C.R.S. Under that section, certain medical professionals are not to “be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient.” *Id.* This privilege recognizes the importance of privacy between patients and their medical providers by protecting that information. *People v. Kelley*, 2023 CO 32 ¶ 24.

Because applications for search warrants are reviewed *ex parte*, there is no opportunity for the holder of the potentially privileged information to object to its release. Thus, the responsibility to ensure that privileged information is safeguarded falls to the court. *See Stauffer v. Karabin*, 492 P.2d 862, 864–65 (Colo. App. 1971) (“Where a patient is not a party to the action and is not present ..., the mandate of the statute directs the court to enforce the privilege unless a proper waiver is obtained, or a party to the proceedings protects the privilege...”). It is inadequate to rely on future procedures to determine whether the information was properly obtained because once privileged communication is revealed to law enforcement, the privilege “for all practical purposes has been lost.” *People v. Hearty*, 244 P.2d 302, 313 (Colo. 1982).

Accordingly, to protect such information, any application seeking to obtain medical records that may fall under the physician-patient privilege must contain information demonstrating that (1) the privilege does not exist, (2) that an exception to the privilege applies, or that (3) the privilege has been waived. Failure to make such a showing will result in the request being denied.

If sufficient information is provided to satisfy the court that the physician-patient privilege does not exist, the court may order that the information be turned over directly to law enforcement. Alternatively, the court may order that the information be handled in the same manner as when there is merely a showing of an exception or waiver.

If a prima facie showing of an exception or waiver is made, the court will order the custodian of the records to comply with the warrant within 14 days by producing the records under seal and delivering them to the court issuing the warrant. The provider shall lodge the information, along

with a cover sheet listing the last known contact information for the patient, with the court, which will keep the information in a separate, sealed file. The court will provide a copy of the cover sheet to the District Attorney's Office. The District Attorney's Office must then notify the patient that such records were produced and that they have 14 days to object to their disclosure. A return of service of the notice must be sent to the Court. Upon objection, an adversarial hearing will be set to determine whether the information is privileged.

Any application must also be certified by a District Attorney, Assistant District Attorney, or Deputy District Attorney. The signature of one of those individuals constitutes a certificate by them that he or she has read the affidavit; that to the best of his or her knowledge, information, or belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and that such information is not sought for any improper purpose.

Accordingly, all proposed search warrants must include the following language and selection boxes that can be used by the judicial officer reviewing the warrant.

- The records custodian must comply with this warrant within 14 days by producing the records under seal and delivering them, along with a cover sheet listing the patient's last known contact information, to the Court that issued the warrant. **The record's custodian is not to turn over this information directly to law enforcement.**
- The Court finds that no hearing is necessary because a sufficient showing has been made that the records sought are not subject to the physician-patient privilege. The record's custodian shall release the records directly to law enforcement.

DONE and SIGNED this 10th day of June, 2024, EFFECTIVE IMMEDIATELY.



STEPHANIE M.G. GAGLIANO
Acting Chief Judge
Thirteenth Judicial District