



Subpoenaing of Reproductive Health Medical Records

Federal Attempts to Subpoena Women's Medical Records

In 2003, President Bush signed into law the "Partial-Birth Abortion Ban Act," which prohibited a method of late-term abortion known medically as intact dilation and extraction, without exception for the health of the woman. Three federal cases challenged the law's constitutionality.¹

- Seeking to determine whether the abortion procedure prohibited by the act was ever medically necessary – a key component in determining the act's constitutionality - U.S. Attorney General John Ashcroft issued subpoenas to medical facilities and doctors involved in the cases for the medical records of hundreds of women.² He justified the request by arguing that "individuals no longer possess a reasonable expectation that their histories will remain completely confidential."³
- Many of the medical facilities involved challenged the subpoenas claiming that turning over the records would violate the patients' privacy rights, even with identifying information blocked out.⁴
- In March 2004, a federal judge from the Northern District of California denied the DOJ's request that Planned Parenthood submit records of over 2,700 patients.⁵ The judge ruled the documents could not be used in the Planned Parenthood case challenging the federal abortion ban, and the DOJ dropped its demand for the records.⁶ At the same time, in New York, a DOJ subpoena of hospital medical records was denied, while another hospital won a stay on appeal after an initial unsuccessful challenge to the subpoena, causing the DOJ to drop the request. But a third New York hospital, along with University of Michigan Hospital, lost its challenge and was ordered to deliver the records.⁷
- In an appeal of a successful quash of the DOJ's subpoena for Northwestern University Hospital's records, the 7th Circuit upheld the ruling, stating that anonymity and privacy are not identical, and thus turning over anonymous patient records would violate patients' privacy rights.
- The opinion from Judge Posner noted that "even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy...revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound."⁸
- But, the court went on, had the states shown that the government's interest in the records would yield highly probative evidence, their interest would override the patients' privacy rights.⁹

¹ See *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957 (N.D. Cal. 2004); *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (SDNY 2004); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (Neb. 2004).

² CNN.com, Ashcroft addresses abortion records request, <http://www.cnn.com/2004/LAW/02/13/abortion.records.ap/>.

³ *Id.*

⁴ Eric Lichtblau, *Defending '03 Law, Justice Dep't. Seeks Abortion Records*, N.Y. Times, Feb. 12, 2004.

⁵ Eric Lichtblau, *Justice Dept. Backs Off Its Demand for Abortion Records*, N.Y. Times, Mar. 10, 2004.

⁶ *Id.*

⁷ CNN.com, *US drops fight to get abortion records*, <http://www.cnn.com/2004/LAW/04/27/abortion.records/index.html>.

⁸ *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (2004).

⁹ *Supra* note 4.



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Proposed Federal Legislative Responses

- As a response to Attorney General Ashcroft's attempts to review the medical records of women who have had abortions, Senator Hillary Clinton (D-NY) and Representative Jerry Nadler (D-NY) introduced in 2004 the Patient Privacy Protection Act.¹⁰ The Act sought to clarify that under the Federal Rules of Evidence, doctor-patient privilege protects a patient's confidential medical information in court. Medical records would only be released in cases in which the court determines that the public interest significantly outweighs the patient's right to privacy.¹¹
- In 2007, Senators Patrick Leahy and Edward Kennedy introduced the Health Information Privacy and Security Act, which, if passed, would prohibit the disclosure or use of personal health information without authorization from the patient in most cases.¹²

State Attempts to Subpoena Women's Medical Records

Kansas

- In February 2008, a Kansas judge pushed attorneys for Planned Parenthood of Kansas and Missouri to turn over medical records subpoenaed by a grand jury investigating the reproductive health clinic. The jury had subpoenaed the medical records of 16 women who had abortions at the clinic in 2003, claiming that they needed to investigate whether the clinic is adhering to parental notification and 24 hour waiting laws.¹³
- The jury was convened in December 2007 following a citizen's petition circulated by anti-abortion extremist groups. Kansas is one of six states that allow citizens to petition to empanel a grand jury.¹⁴
- A citizen-generated petition was successful in initiating a grand jury against Dr. George Tiller, one of the few remaining late-term abortion providers for women with complicated health issues.¹⁵ The Kansas Supreme Court ruled in May 2008 that he cannot immediately access patients' records as part of an investigation without undertaking certain steps to determine what information in the records could be shown to the jury.¹⁶

Indiana

- In March 2005, the Indiana Attorney General demanded the medical information of over 70 low-income patients at 19 statewide Planned Parenthood-affiliated clinics, claiming that the records were needed to determine whether the clinics were complying with a state law compelling anyone suspecting child abuse (defined as any sexual activity with a person under 14, regardless of the age of the partner) to notify authorities.¹⁷

¹⁰ S. 2827/H.R. 5126 (2004).

¹¹ Mary Ellen Schneider, Patient privacy protection act, BNET news (Nov. 1, 2004), available at http://findarticles.com/p/articles/mi_m0CYD/is_21_39/ai_n7180160.

¹² Nancy Ferris, Senators introduce stringent health records privacy bill, <http://www.govhealthit.com/online/news/103259-1.html>.

¹³ Emily Bazelon, Slate.com, Record Shopping: The Antiquated Kansas Law That Abortion Opponents Are Using To Pry Into Women's Medical Histories, <http://www.slate.com/id/2187961/>.

¹⁴ MS. Magazine, Planned Parenthood Faces Medical Records Subpoena, <http://www.msmagazine.com/news/uswirestory.asp?ID=10834>.

¹⁵ Center for Reproductive Rights Argues Before Kansas Supreme Court to Stop Grand Jury from Obtaining Patient Medical Records in Abortion Case, http://www.reproductiverights.org/pr_08_0408KansasPrivacy.html.

¹⁶ RH Reality Check, Kansas Supreme Court Protects Medical Records, <http://www.rhrealitycheck.org/blog/2008/05/07/kansas-supreme-court-protects-medical-records>.

¹⁷ Chinué Turner Richardson & Cynthia Dailard, Politicizing Statutory Rape Reporting Requirements: A Mounting Campaign? Guttmacher Institute Public Policy Report, Vol. 8 No. 3, August 2005, available at <http://www.guttmacher.org/pubs/tgr/08/3/gr080301.html>.



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- A settlement was reached in December 2006 after a Court of Appeals ruling that a minor's right to privacy supercedes the state's interest in investigating the proper reporting of sexual abuse cases. The court held that granting the demand for medical records was "neither the only, nor the most effective, nor the least intrusive means of serving those interests."¹⁸

Iowa

- During the investigation of the death of a newborn in June 2002, Buena Vista county attorney Phil Havens issued a subpoena to a Planned Parenthood clinic, demanding the names of hundreds of women who had had pregnancy tests at the clinic. Despite Planned Parenthood's refusal to release the information, a month later the number of patients seeking pregnancy tests at the clinic – which does not perform abortions – had dropped by 70%.¹⁹
- The clinic challenged the subpoena, claiming the indiscriminate nature of the subpoena violated the privacy rights of the clinic's patients. They lost the case, and appealed to the Iowa Supreme court, where the lower court's order was temporarily blocked. However, following widespread outrage at such a gross violation of patient's privacy rights – including opposition from anti-choice groups – Havens dropped the request in October 2002.²⁰

¹⁸Indiana AG Carter, Planned Parenthood Representatives Sign Settlement Denying Access To Medical Records Of Patients Under Age 14, <http://www.medicalnewstoday.com/medicalnews.php?newsid=58130>.

¹⁹ Adam Clymer, Privacy Furor As Baby Death Goes Unsolved, N.Y. Times, Aug. 24, 2002.

²⁰ Iowa D.A. Seeks Data On 100s Of Prenatal Patients, <http://www.womensenews.org/article.cfm/dyn/aid/965/context/archive>; see also George Sanchez, Planned Parenthood's Iowa Predicament, Mother Jones, Aug. 7, 2002, available at http://www.motherjones.com/news/feature/2002/08/iowa_pphood.html.