

You Can't Always Get What You Want (In Physician Medical Records Custody Disputes)

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When a physician leaves an existing medical practice but continues to practice in the same service area (whether through another group, hospital, or health system, or even as a sole practitioner), perhaps no issue has more potential to create controversy and ill will than the question of who will maintain the medical records for the physician's patients, and how the physician, his or her patients, and other parties will be given access to those records. Patient records and patient relationships constitute the heart of a physician's practice, much more so than the "bricks and mortar" that make up the physical practice work environment.

Misconceptions about the legal rights of physicians, hospitals, and patients in this area are prevalent, a situation that frequently adds fuel to the fire. In the typical scenario, both the departing physician and the former practice will want to retain possession of the medical records of patients who have been treated by the physician; and since it is impossible for both parties to retain possession, neither the departing physician nor the former practice will be completely satisfied with the medical records arrangements. However, to paraphrase the classic Rolling Stones song, "if they try sometimes, they might find they get what they need."

OWNERSHIP AND CUSTODY OF MEDICAL RECORDS: LEGAL PERSPECTIVE

State laws vary on the issue of who actually "owns" a patient's medical record. Some states, such as Florida, Louisiana, and Virginia, have enacted statutes that specifically grant ownership of a medical record to the healthcare practitioner who generates the record, while also ensuring that patients have the right to access and obtain copies of their records upon request. In other states, such as Massachusetts, Michigan, and Pennsylvania, there is no

clear statutory authority regarding "ownership" of a patient's medical records. However, in these latter states, the law typically requires a healthcare provider to maintain custody of its patients' records and to provide patients with access to their records, often specifying a standard or maximum photocopying fee that may be charged to the patient.

In many, if not most, situations involving the transition of a physician from one practice to another, legal ownership of patient medical records is not a hotly contested issue. Instead, physical custody of the records is critical, as the physician or practice that possesses the medical records can control the degree to which patients and other physicians can access the records (within the confines of state law). For example, if a practice is legally obligated to allow a patient the right to access and copy his medical record "as promptly as required under the circumstances," but not later than 30 days after receiving the request (as required by Michigan's records access law), it may be perfectly reasonable from the practice's vantage point to provide a copy of the record three days after the request is received. For the patient who may be trying to schedule an appointment with his physician's new practice (or, worse yet, may have already scheduled an appointment during the three-day period), "as promptly as required" could mean on the day on which the request is made. Any delay in receiving a copy of the record could force the cancellation of a scheduled visit and the postponement of required medical care.

Furthermore, the inconvenience to a patient of being forced to wait longer than a day or two to receive access to her medical record could result in the imposition of a *de facto* "non-solicitation covenant" on the departing physician, as the frustrated patient may give up attempting to shift her care to her physician's new office and instead remain with the physician's former practice, rather than deal with the administrative hassle of arranging for the record transfer. While such a *de facto* non-solicitation covenant would obviously benefit the practice by preventing patients from continuing their care with the departed physician, it could run afoul of state law and

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thereby create legal exposure for the practice. Indeed in some jurisdictions (Alabama, California, Colorado, Delaware, Massachusetts, and North Carolina, to name a few), it has been found to be against public policy to unduly restrict the public's right of access to the medical provider of their choice.

GUIDANCE FROM THE AMERICAN MEDICAL ASSOCIATION

The American Medical Association (AMA) has voiced its views on these matters in several formal opinions that provide guidance to medical practices and to physicians who are transitioning from one practice to another. The patient's basic right to continuity of care is emphasized in AMA Opinion 10.01, which holds that a physician "has an obligation to cooperate in the coordination of medically indicated care with other health care providers treating the patient."¹ AMA Opinion 7.01, which is addressed specifically to patient records, states the premise that "[t]he interest of the patient is paramount in the practice of medicine, and everything that can reasonably and lawfully be done to serve that interest must be done by all physicians who have served or are serving the patient."² This includes making a patient's medical records "promptly available on request to another physician presently treating the patient,"² once the patient has provided the necessary authorization.

In Opinion 7.03, the AMA deals directly with the practice transition scenario. It explains that a physician's patients should be notified when the physician leaves a group practice, and that the notice should provide the physician's new address and should offer patients "the opportunity to have their medical records forwarded to the departing physician at his or her new practice location."³ The Opinion goes so far as to find it unethical to withhold from a patient information about his or her physician's new practice. Responsibility for providing notice may fall either on the practice or the departing physician, but if the physician is responsible, the group should not interfere with the provision of notice "by withholding patient lists or other necessary information."³

RECENT NOTABLE CASE

A recent case in Massachusetts Superior Court, which received significant press coverage, demonstrates the tension and gamesmanship that are often involved in physician practice transitions, and the pitfalls that can arise if the parties have not clearly delineated their rights and obligations in writing in advance. In that case, the hospital and a group of employed physicians had entered into employment agreements that attempted to lay the ground rules for any future departure of the physicians. The employment agreements contained specific non-solicitation

provisions running in favor of the hospital, but also provided that if the physicians ceased to be employed by the hospital, the hospital would honor patient choice by, among other things, sending out a timely notice to affected patients of the physicians' new contact information:

"[A]ny . . . patient shall retain the right to choose Physician as his or her physician after the Physician's employment with [Hospital] terminates. [Hospital] shall, consistent with recommended practices of the American Medical Association, and as required by the Massachusetts Board of Registration in Medicine, notify patients of the Physician's termination from [Hospital], and shall provide contact information for the Physician."

When two of the employed physicians left the hospital to become affiliated with a competitor, a dispute arose when the hospital failed to send an appropriate notice to the affected patients. Instead, on the virtual eve of the physicians' departure, the hospital sent a mass mailing notice to the practice's patients, advising them that the physicians had left the practice and that in the future, patients should call the hospital for appointments. At no time did the hospital advise the patients of the physicians' new contact information. The hospital then scheduled a time and date for a moving company to move all patient records from the physicians' office to an undisclosed location. The physicians sought court intervention in the form of a restraining order to delay the scheduled move until appropriate notices could be sent to their patients, who could then make an informed choice with respect to their future treatment options and the location of their medical records.

Notwithstanding that the employment agreements specifically stated that the medical records were the property of the hospital, the court gave the physicians a say in where the records would be stored, at least temporarily. The court entered an order aimed at remedying the harm caused by the hospital's conduct; specifically, the hospital's failure to send timely, appropriate notice. The order required the hospital to send a second letter to the involved patients stating that any patient who wanted to continue care with either of the plaintiff physicians should contact those physicians directly at the applicable address and phone number; to notify the physicians when the notice had been mailed; and to provide the physicians with a list of patients to whom the notice was sent. For medical records that were in electronic form, the court ordered the hospital to maintain the physicians' computer access codes. The records that were to be removed from the physicians' office were to be moved to an agreed-upon neutral location to which both sides had reasonable access. Finally, any patients who called the physicians' former office number asking for either physician were to be given their new telephone number.

The court's order sought to protect the patients and prevent chaos for affected patients who were attempting to obtain their medical records so that they could continue to

be treated by their physicians. Ultimately, however, the lack of a cooperative, concerted effort to transition the physicians and ensure continuity of care, in spite of the parties' attempt to set forth their obligations in written employment agreements, resulted in undue angst and anger among patients. The dispute proved to be an expensive, unnecessary detour from what should have been the goal: the best interests of the patients, which necessarily include consideration of the risks of alienating patients and engaging in patient abandonment.

TIPS FOR ENSURING SUCCESSFUL PRACTICE TRANSITIONS

Because of the potential for physician practice transitions to be contentious, it is highly advisable to plan ahead and delineate the specific rights and responsibilities of both practice and physician well in advance of a physician's possible departure. While some physicians may resist implementing such advance planning, preferring to "hope for the best" rather than "planning for the worst," the days in which most practitioners spent their entire careers, or even long stretches of time, with a single medical practice are in the past. Inevitably, almost every practice will at some time need to grapple with the competing needs of the practice and one of its former, or soon-to-be-former, physicians. Some steps that can make that process less stressful are:

- Be sure that physician employment agreements contain clear and explicit provisions that set forth the rights and duties of practice and physician upon termination of employment, with regard to notification of patients and access to medical records. Avoid vague phrases such as "in accordance with standard practice procedure" and "in compliance with applicable AMA guidelines."
- Understand your particular state's laws on the ownership of medical records, and draft physician employment and independent contractor agreements accordingly. (For example, under Florida law, patient medical records belong to a physician's employer only if an agreement between the employer and the physician designates the employer as the records owner; otherwise, they belong to the physician.)

- Attach an agreed-upon form of post-termination notice to patients as an exhibit to each physician employment agreement. The notice should comply with AMA Opinion 7.03 and any particular state law requirements.
- Agree in advance in writing on the manner in which the notice to patients will be sent (by the practice, by the physician using a patient list provided by the practice, etc.), and who will pay for the mailing. Medical practices should also provide forwarding contact information to patients who call the office for appointments with the departing physician while at the same time offering continuing medical care through the practice, where appropriate.
- Include agreed-upon timeframes for provision of medical records following a request by a patient or practitioner (e.g., on the same day if the request is received before 10:00 a.m.; on the next business day if received after 10:00 a.m.; within three business days if the records must be retrieved from off-site storage).
- Be prepared to work cooperatively through the departure period in spite of any animosity or hard feelings that may exist. For example, medical practices and physicians should work together to provide access to medical records for emergent care, in addition to any previously agreed-to methods for routine records access.

By establishing in advance a plan to provide patients with a seamless transition from one office to the next, and following the best practices outlined above, both practice and physician can be assured that they can "get what they need" while placing the interest of the patient before their own and honoring the AMA's directive to do everything that is reasonable and lawful to serve that interest. ■

REFERENCES

1. American Medical Association. Opinion 10.01—Fundamental Elements of the Patient-Physician Relationship. June 1990.
2. American Medical Association. Opinion 7.01—Records of Physicians: Availability of Information to Other Physicians.
3. American Medical Association. Opinion 7.03—Records of Physician upon Retirement or Departure from a Group.