MEDICAL RECORDS, ACCESS TO

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Introduction

The bedrock of the physician–patient relationship has always been mutual trust. Healthcare professionals must trust that their patients are being honest and forthright when they provide information, so that the proper medical judgment can be exercised. At the same time, patients must trust that their healthcare professionals will have the patient's interests at heart and will use professional judgment and skill on their behalf. In order for this trust to be present, all patients must know that whatever they tell their healthcare professionals, as well as the other information about them in the healthcare professional's records, will be held in strict confidence. Any distrust in this regard could lead to patients not fully cooperating in their medical care. If patients provide incomplete or inadequate information, it could result in misdiagnosis, mistreatment, and harm.

The fundamental duty of healthcare professionals to maintain patient confidentiality is reflected in various professional codes of ethics and in the law. As early as the fifth century BC, the Hippocratic oath required that "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."

The importance of this commitment remains undiminished to this day, although the practice of medicine has changed dramatically since Hippocrates' time. No longer do patients have a single physician who makes house calls, knows the entire family history, and can address all their medical needs. Modern healthcare by its nature involves the participation of a number of healthcare professionals and specialists in a variety of healthcare settings. This fragmentation of the modern healthcare delivery and payment systems requires the widespread sharing of patient information among healthcare professionals and third parties. Inherent in this is the risk of inadvertent or unauthorized disclosures.

As if these challenges to patient confidentiality were not enough, the expansion of modern technology and electronic communications into healthcare services also provides additional threats. Our increasing reliance upon telecommunication devices and computers offers unprecedented access, both authorized and unauthorized, to information of all sorts. Increasingly we use the internet for personalized healthcare information services and products. The expansion of "telemedicine," relating to the practice of medicine "at a distance," and the proliferation of "telehealth," which encompasses all of the other dimensions of healthcare services and activities, suggest that these risks will increase. Modern healthcare delivery and payment systems routinely utilize this growing technology to convey, use, and store confidential, sensitive, or potentially embarrassing medical information.

Accordingly, it is helpful to understand the rights, responsibilities, and limitations imposed on those who create or hold medical information, and on those others who seek to access, or use, this special category of information.

Medical Records – General

As discussed above, disclosure made by a patient to a healthcare professional within the framework of a physician–patient relationship is considered confidential. When those disclosures are memorialized in

written form, these written records, as well as other information generated during the relationship, are also considered confidential.

Purpose of Medical Records

Patient medical records serve a number of important purposes. First and foremost, the medical record is an orderly collection of information about the patient and the care rendered to the patient. Medical records have become all the more important in our decentralized modern healthcare system with its heavy reliance on a primary care physician, specialists, diagnostic testing by third parties, and multiple providers. Complete and accurate medical records are essential to the decision-making by these participants and providers who may not know the patient or actually even see the patient.

Another important function of a patient medical record is to document the medical necessity for the care provided and the extent of the services rendered. For example, insurance companies and third-party payers generally require such written evidence before payment can be authorized. In the case of managed care, such documentation may be required even before the treatment is authorized. Patient medical records also serve as a basis for performing medical professional peer review, for quality improvement initiatives, and for verifying whether a healthcare provider's local, regional or national licensure requirements or accreditation standards have been met. Medical records are also an important source of information to governmental entities responsible for maintaining vital statistics, preventing or managing communicable diseases, and generally protecting the public health.

Content of Medical Records

Generally, patient medical records include three types of information. They are patient identification information, clinical information, and financial information. The patient identification information typically includes the patient's name, address, birth date, family or contact persons, and social security or other identification numbers. The clinical information may include a patient's medical and social history, the results of physical examinations, diagnostic tests, X-rays and other radiology reports, and any orders for medications. If hospitalization is involved, the medical records may also include admission notes, surgical reports, nursing notes, pharmacy records, laboratory test results, discharge planning, and a discharge summary. Medical records will typically also include information about advance directives and healthcare decision-making proxies or surrogates. Also included in the medical record is financial information such as health insurance coverage, assignments of benefits, and the names of co-signing parties or guarantors for purpose of arranging payment.

Form and Content of Medical Records

Some important legal and practical distinctions must be noted on the form in which the medical records and their contents are kept. Historically medical records were only kept in paper form but increasingly they are now being maintained in an electronic form or a combination of paper and electronic form. Generally, the originator, creator, or holder of the medical record is considered its owner. At the same time, however, the person about whom the information pertains usually controls how the holder may make use of the information and therefore controls the disclosure of the medical information to third parties. As a result, when a patient changes physician, or seeks a second opinion, the patient is usually entitled to a copy of the medical record but not to the original medical records themselves.

Medical Records Access and Use

As a general rule, patient medical information may only be provided to those having a legal right to access it or to use it. Usually the patient is the primary recipient of the information and it is the patient who gives specific written consent to its use or to dissemination to third parties. However, it is important to note that there are times when public policy considerations and other important societal benefits may outweigh the patient's individual need for confidentiality. These may include investigations of communicable diseases or allegations regarding possible child or sexual abuse. In such cases access to what would otherwise be confidential information is permitted without patient knowledge or consent, or even over the patient's vehement objection. State or national laws and professional codes of conduct usually articulate these rights and the exceptions. For the most part, however, without the patient's specific consent or the presence of other compelling state interests that provide a justification, both access to and use of confidential patient medical information is improper and illegal. Specific instances that commonly arise are discussed below.

Patient/Authorized Representative Access

The patient or person about whom the medical information is collected is generally entitled to access to his/her information. The patient is also permitted to

approve or restrict the further uses or dissemination of this medical information. Disclosures to third parties are usually accomplished by the use of a written medical record authorization form or release that the patient signs. In some cases, particularly if the form is signed elsewhere and merely presented to the holder of the records, it is appropriate to require that the patient's signature be notarized in order to authenticate that it is in fact the patient who has signed the form. At times the patient may wish to delegate to others this right to approve access or authority to approve disclosures. Patients may ordinarily do so through the use of legal documents such as power of attorney or perhaps pursuant to an advance directive naming a surrogate. The applicable law may also allow disclosure to legal guardians, surrogates, or proxies in cases where the patient is not mentally or physically competent.

Spouse/Immediate Family Members

As a general rule, even those persons who are closest to the patient are not permitted to have access to a patient's medical information unless the patient consents to the disclosure. This consent may be in writing or implied from the circumstances. Their legal status as a relative by blood or marriage, or close personal relationship, does not automatically grant status that permits access to medical record information. This can present difficulty when the healthcare provider is in need of medical treatment consent or in other situations where the provider is in possession of information about the patient's genetic condition that can be inherited, or perhaps about communicable diseases that may affect others but the patient may not wish to disclose.

Healthcare Providers – For Treatment

Generally, a physician may disclose a patient's confidential information to office personnel, other physicians, hospital personnel, and medical consultants in connection with the patient's care. This may be done even without specific approval or written consent by the patient. This is because the patient's approval for such disclosures is implied from the physician–patient relationship and from the fact that the patient has submitted to the physician's care. It is reasonable to assume that the patient's desire for treatment encompasses approval to make all disclosures reasonably necessary to obtain the appropriate medical care. Obviously, these other persons are in need of access to all relevant information necessary for them to fulfill their duties in connection with their shared undertaking.

In a similar vein, the office personnel and administrative staff of healthcare providers are also generally permitted to have access to confidential medical information. This is the case so long as the access is in connection with performance of their patient-related duties such as scheduling appointments, reporting results to patients, telephone orders, billing and collection, and communication with legal advisors in defense of malpractice claims.

Unless the patient directs otherwise, on the same basis, disclosure is also generally permitted to third parties providing related healthcare services such as those involved in discharge planning, pharmacies, durable medical equipment entities or short-term rehabilitation, or long-term custodial nursing care. However, abundance of caution suggests that written authorization be obtained.

Healthcare Providers – For Quality and Peer Review

Another important use of patient medical information is to evaluate the professional services of healthcare providers. Recent studies have focused attention on the prevention of medical mishaps and improved patient safety. Government entities that license healthcare providers, hospitals, and managed care entities have traditionally engaged in professional credentialing and peer review activities that require consideration of their patient care activities as gleaned from patient medical records.

Third-Party Payers

As modern healthcare has become more costly, reliance upon health insurance and government health benefit programs has also become increasingly important. Disclosure of patient medical information is frequently necessary in order to obtain payment by, or reimbursement from, these third-party payers. Generally patients will sign consents or give authorization at the outset of treatment or care to allow their providers to release medical information. Otherwise the patient risks denial of payment and will be personally responsible for payment.

Legal Obligations

There are times when patient medical information that is otherwise confidential must be disclosed without patient consent, or even over the patient's objection. There are a number of situations in which healthcare professionals or providers may have an affirmative duty to report such information, or a duty to respond when asked. In these situations the healthcare provider will not be liable to the patient for improper disclosure as immunity is usually provided under the following applicable laws.

Reporting mandated by law Many jurisdictions impose a requirement on healthcare providers to report suspected instances of child abuse, sexual abuse, elder abuse, or occasions where a patient may be a danger to him/herself or others. In these circumstances healthcare professionals may have virtually no discretion and must report even when aware of mitigating circumstances. In fact, these healthcare professionals can face possible civil liability, criminal prosecution, or professional licensure discipline if they fail to report so. As a result, patient medical information that may otherwise be confidential must be disclosed without the patient's consent or even over the patient's objection.

Public health Another instance when disclosure is frequently mandated involves the preservation of public health. Healthcare professionals are frequently under legal obligations to report cases of sexually transmissible diseases, as well as other contagious diseases such as hepatitis, tuberculosis, and human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS). The worldwide threat of biological and chemical weapons of mass destruction may also impose duties on healthcare professionals to report under public health as well as national security requirements.

Discovery in legal proceedings Patient medical records are regularly the subject of discovery and used as evidence in connection with legal proceedings. Frequently, the health condition of the patient has been placed in issue by the patient as part of a civil lawsuit claiming personal injuries or professional negligence, or perhaps in cases seeking disability benefits. A person's mental or physical condition may also be an issue in child custody proceedings or guardianship proceedings. Medical information can also be relevant in criminal cases and administrative matters.

Generally, disclosure of patient medical information as part of pretrial discovery or as evidence in a judicial proceeding is compelled through use of a subpoena for production of records at a deposition or judicial proceeding or a subpoena seeking personal testimony. Sometimes specific court orders compelling production or testimony are also issued. With the exception of investigatory matters, the person about whom the records are sought usually has an opportunity to interpose an objection before disclosure occurs. In many jurisdictions, subpoenas for production of records in lieu of deposition may be issued in civil cases in which the opposing party is given a certain time within which to object. Failure to object timely constitutes an authorization for disclosure. Refusal to honor a proper request for medical records can be punished by the court's contempt powers.

Disclosure in connection with searches and seizures There are times when law enforcement agencies or government entities may seek patient medical information in connection with investigations of the patient or of the healthcare providers. In the USA, the Fourth Amendment of the Constitution provides protection against unreasonable searches and seizures and provides an assurance that a basis exists for making this inquiry. Unless authorized by law or legal process, routine inquiries by law enforcement may be refused unless the patient's consent has been provided. Under these circumstances the healthcare professional is typically instructed not to alert the patient as to the receipt of the inquiry.

Employers

Another area where problems can sometimes arise is when access to patient medical records is sought by the patient's employer or even prospective employer. This situation may occur, for example, in the cases of preemployment health screenings and when employees seek compensation for work-related injuries, or other employer-provided benefits such as medical leave or disability. This can also become problematic in those places where employees receive their healthcare or benefits from their employers. In reaction to the rising costs of healthcare, many larger businesses operate self-funded plans under Employee Retirement Income Security Act (ERISA) and similar laws, which may give employers access to healthcare and claim data on their employees.

The concern is that the employer may use the medical information in connection with decisions about hiring, firing, promotion, and benefits coverage. Generally, unless the applicable law permits disclosure to employers without the patient's consent, the patient's authorization is required.

Scientific Research

Another instance where confidential medical information may be requested is in connection with clinical research. The evaluation of new medications, implantable devices, and treatments frequently involves testing on human subjects. The measurement of success over the long term also relies upon collection and evaluation of patient data. Ordinarily, if medical records are being reviewed for purposes of data collection and the information is aggregated and reported in a way that will not identify the patient to which the data pertain, then no specific patient authorization is required. However, if a person is participating in a clinical trial and his/her patient

information is to be reported to the study sponsor in a way that is identifiable, then a consent for this will generally be included in the initial enrollment documentation presented to the patient.

Limitations and Liabilities

Limitations on Access

As expansive as the protections may already be to preserve confidentiality of patient medical records, there are a number of instances where additional limitations have been imposed, or special exceptions to the general rules are created in order to further various public policy considerations. Typically, these safeguards have been established to protect the needs of persons who are seen as the more vulnerable among us. Some examples are as follows.

Emancipated minors Generally the law provides that only persons who are considered adults are permitted to make decisions regarding access to their medical information or their medical care. Adult status is usually conferred when the person reaches the "age of majority," as defined in local law. However, in many jurisdictions the law allows those who are under the legal age of majority to be treated as adults if they have achieved emancipated status. Minors can demonstrate emancipation by serving in the military, upon becoming married, or by otherwise living independently and providing for their own support.

The law continues to struggle with the degree of respect to be shown to "mature minors" who do not meet the above criteria for adulthood, but who, by virtue of experience, education, acceptance of responsibility, and other circumstances, have demonstrated their ability to act as reasonably and appropriately as someone over the age of majority. In addition, in some jurisdictions unwed pregnant minors may also be granted legal status to make medical treatment decisions that may include decisions with respect to access to medical information.

"Superconfidential" medical information Special limitations on access are also provided to certain categories of medical information that are deemed "superconfidential." These special categories generally include medical records pertaining to sexually transmissible diseases or HIV/AIDs, drug or alcohol abuse, or mental health conditions. In these cases, the public policy benefits that result from encouraging early diagnosis and treatment, or the ability of the public health authorities to control spread of dangerous diseases, are seen as justifying a higher level of authorization to obtain such information or to compel disclosures without consent. Another public policy consideration favoring the imposition of these additional burdens is the desire to spare these patients from exposure to perceived or real discrimination that may result from disclosures that might occur in the usual course.

As a result, in the case of "superconfidential" medical records, a very specific form of consent from the patient is usually required to authorize disclosure. A general medical record release is not sufficient. In many instances subpoenas for medical records that are routinely issued in the course of litigation are also insufficient to reach these special types of medical records. Rather, in some jurisdictions an additional and very specific court order will be required to permit the disclosure and to delimit the circumstances under which any further dissemination or uses will be allowed.

Public figures In recent years the health conditions of celebrities, sports figures, political candidates, and government officials have become the subject of great public attention. More troublesome for these people and their family members is media interest in toxicology reports and autopsy photographs in cases of injury or death of the famous or celebrated. In order to avoid sensationalism or to ally unwarranted speculation, it is now commonplace for such figures to disclose health information voluntarily. As a rule, however, the status of the individual as a public figure does not change the character of the information or the rules governing access to it. Such medical or hospitalization information is confidential and may not be released to the media without the patient's family consent, court order, or as permitted by governing law.

Legal Duties and Causes of Action

In the event of a disclosure of confidential medical information where there is an obligation not to do so, the law provides several legal theories for legal redress.

Breach of confidentiality While patient medical information is generally considered "confidential" and the communications between a healthcare professional and patient are considered "privileged," it is helpful to understand the differences between them. This is the case because these differences can affect the legal duties, rights, and remedies in the event of an improper disclosure.

The special protection is based upon the concept that certain information, when shared with third parties under certain circumstances, should be kept

private and confidential and that the obligation should be enforceable. Sometimes this duty is created by a special relationship of trust that exists between the parties such as physician and patient. Other times the duty is imposed by virtue of specific laws that apply to the relationship in question.

Generally, a physician who violates the confidentiality of the physician–patient relationship may be liable to the patient for damages. Likewise, any other holder of information that is by law considered confidential will be liable to the patient for any improper disclosures. Damages may include nominal damages for vindication of the legal right associated with the mere fact that the breach of duty happened and may also include compensatory damages for actual harm caused. If the breach is especially egregious, the law may also permit punitive or exemplary damages to be awarded. It is also likely that discipline by the applicable licensing authority will be imposed as well.

Privilege against disclosure Another limitation on disclosure of medical information is associated with a privilege that attaches to the physician–patient relationship. Privileges are created by law and serve a special purpose. Privileges are used in legal proceedings to control the scope of information that can be discovered or introduced as evidence. Privilege may be seen as a right to withhold information. It is an affirmation by society about the value and importance assigned to the ability to speak and write freely about certain things in the knowledge that it will not be used later. Because privileges are legal in nature they are not absolute. There are instances, for example, in the case of a mentally incompetent patient, child custody, suspected abuse cases, or other compelling circumstances where the privilege may be overcome. But, for the most part, the privilege frequently does work to protect communication by a patient, or information about a patient, from being brought to light.

Among the privileges recognized by law, perhaps the most commonly recognized is the physician–patient privilege. It protects the patient's privacy, and therefore may be waived by the patient. The provider does not have an independent basis to refuse to disclose patient information if the patient has waived the privilege. Unless the patient waives the privilege, the provider is bound to maintain the confidentiality.

Invasion of privacy A concept that is closely related to the above is privacy. This concept is not limited to the healthcare information and relationships. Some jurisdictions recognize a common law, statutory or even constitutional right to be "let alone." An invasion of an individual's right of privacy is considered a civil wrong. It involves an unwarranted making use of that individual's personality where the public has no legitimate interest, or a wrongful intrusion into his or her private activities. Under common law a claim for invasion of privacy could be made when there was an unjustified intrusion upon physical solitude or seclusion, the taking and use of a person's name or likeness for financial gain, for unreasonable disclosures of private facts, and for publicity that unreasonably placed the person in a false light before the public.

In the healthcare setting this issue has surfaced in connection with media demand for access to autopsy photographs or medical records of public figures, politicians, laboratory results of rock stars, and politicians. Healthcare professionals and providers must take care to take reasonable steps to protect the safety and confidentiality of patients and their records. In the USA the Health Insurance Portability and Accountability Act (HIPAA) privacy standards are applicable to protect broad categories of protected health information.

Other causes of action Other possible causes of action for improper disclosures exist. For example, in the USA a cause of action may be made for violation of constitutional rights in those states that have enacted constitutional provisions that guarantee a right to privacy that may encompass health or medical information.

Alternatively, a claim could be made for breach of an implied contract to keep such things confidential based upon the circumstances, even though there is no agreement to do so. Another legal theory could be negligence for violation of a duty that is imposed by society or law. Still another possible claim could be for infliction of emotional distress stemming from the nature of the harm that might be suffered by a patient, if embarrassing or sensitive medical information were improperly shared.

Emerging Trends in Medical Records

There are several emerging trends that are reshaping the future of patient medical records, their retention, and their disclosure. The first is the ongoing effort internationally to encourage electronic medical records. The second is a direct result of the first. There are now widespread initiatives by patient advocates, industry, and government to provide enhanced protection against unwarranted disclosures of electronic records and to impose greater accountability by the holders of such confidential information.

Electronic Medical Records

Modern telecommunication and computer technology is contributing to rapid expansion of electronic medical informatics systems that will result in elimination of paper or handwritten medical records, which can be incomplete, illegible, or misplaced. The great promise of electronic health data is that it will permit creation of a comprehensive medical record that can overcome the difficulties of fragmented medical care, lack of ready access, and the frailties of paper records. Such electronic records will be readily accessible from even remote locations to meet emergent or ordinary medical needs. Electronic medical records will improve patient medical care by more efficiently coordinating the professional and support services required over the continuum of care, resulting in shortened hospitalizations and overall reduction of medical errors and costs.

Electronic medical records are vulnerable to the same threats that are already being faced by other sectors of business and government that rely heavily on telecommunications and computer support.

Additional Protections and Accountability

It is in response to the threats created by electronic medical records that many countries are imposing additional legal safeguards and requiring systemic accountability. For example, in the UK the Data Protection Act 1998 became effective on March 1, 2000. Among other things, this law requires that personal data shall be adequate, relevant, and not excessive in relation to the purpose(s) for which they are processed. Further, the law requires that appropriate technical and organizational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. In a requirement that perhaps reflects the increasing mobility of its populations and the reduction of geographic and political barriers, the Act also provides that personal data shall not be transferred to a country outside the EEA, unless that country or territory ensures an adequate level of protection for the rights and freedoms of the data subject in relation to the processing of personal data.

Similarly, in the USA privacy regulations became effective in April 2003, and have been adopted in connection with the 1996 HIPAA. Additional regulations imposing technical requirements on the holders or transmitters of electronic protected health information will be effective in 2005. These regulations require that healthcare providers give their patients written notices that describe their privacy practices and procedures. The regulations also require certain health providers to maintain logs about inquires made concerning their patients' personal health information (sometimes called PHI). The content of this log is available to patients for review. In addition, when responding to inquiries for PHI, the health provider must review the records and provide only the minimum PHI that is necessary to respond to the inquiry. A broad range of stringent penalties may be imposed for violation.

Caveat and Conclusion

It should be noted that this article reflects primarily on the law and principles found in North America and to some extent in the UK. Readers are cautioned that, although these broad principles apply globally, there will be local, regional, or national differences.

For example, a patient's right to access their own medical information may be more restricted in some nations such as Japan where cultural paternalism was historically present, or where religious traditions run deep. Similarly, while the European Council Convention on Human Rights and Biomedicine in 1997 embraced the principle of access to medical information, there remain great differences on what that truly means in a particular country. Even among the nations with shared English common-law traditions, no uniformity is necessarily present on the question of a patient's access to his or her own records. For instance, the Canadian Supreme Court has recognized a far-ranging right of access to medical information, but the Australian High Court has taken a narrower view.

Other disparities can be seen in the nature and extent of the privilege against disclosure. In France the privilege against disclosure is considered "general and absolute" such that even the patient may not relieve the physician of the obligation. In contrast, in Germany, under certain circumstances, the patient's consent to the disclosure automatically voids the physician's right to avoid making disclosure.

As illustrated above, every factual setting is unique and important differences and distinctions may be present when considering the legal implications. Consequently, this article is intended to provide general information and should not be construed as providing legal advice and it is not intended to be relied upon for that purpose.

See Also

Clinical Trials: Legal Aspects and Consent; **Consent:** Confidentiality and Disclosure; **Human Rights, Controls and Principles**; **Professional Bodies:** United Kingdom

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