Medical Records– Their Medico-Legal Significance

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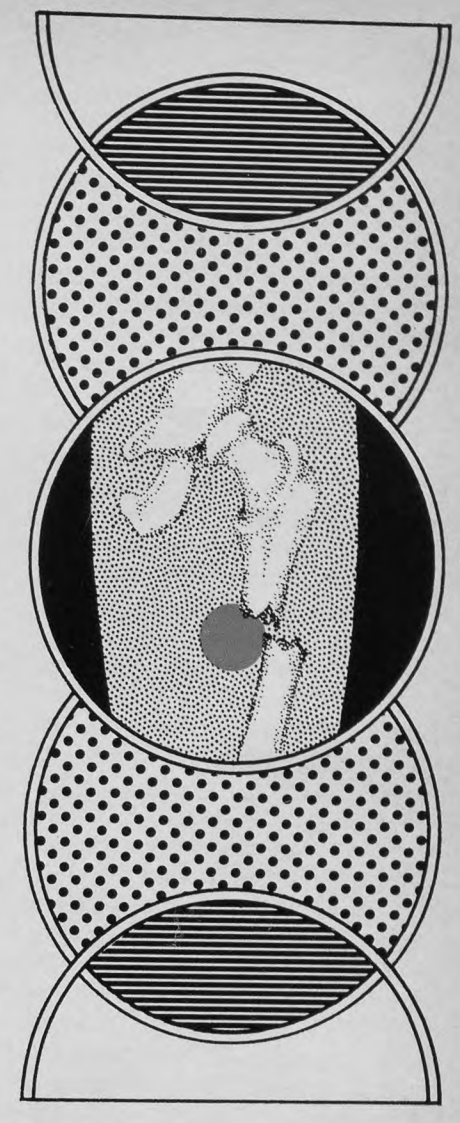

This article discusses the physician's obligations in record-keeping and current judicial attitude towards the patient's medical record. Physicians are required, both medically and legally, to maintain a current, adequate record for each patient. This establishes the physician's continuity of care, but it also requires his vigilance and diligence through constant review and surveillance. In the past, the record was exclusively the property of the health care provider. Of late, jurisdictions are decreeing that the health care provider has an absolute right to possession and ownership of the original record only, and the right to the information in the record belongs absolutely to the patient. The physician is liable for the proper maintenance, custody, and storage of the record for the required statutory period. Although the patient can customarily obtain his record by court order, the courts have also recognized the concept of professional discretion under which a physician may deny the patient access to his medical record if in the physician's judgment he believes it would be to the patient's detriment.

Any discussion of medical records mandates the recognition that a medical record has the potential of becoming a legal document as well. In recent years, the medical record of the patient in a hospital, clinic, or physician's office has become essential to the resolution of issues in nearly every branch of the law – malpractice, personal injury, workmen's compensation, and others. It has been estimated that medical evidence plays a part in about three quarters of all civil cases and in about one quarter of criminal cases brought to suit.[1]

With that in mind, the physician is best advised to remember that a properly kept medical record may serve as his best friend and witness. If not properly maintained, the record may turn out to be his worst enemy.[2-5] This is particularly true if the record has not been appropriately and adequately developed, accurately maintained, and reviewed so that it is always up-to-date. Corrections, additions, and deletions should be properly recorded. Once the record has been made, there should not be any removal, tampering, or substitutions attempted. There should never be any attempt to improve legibility of the original entry. All record changes are best made in chronological sequence with an adequate explanation regarding the change and without any alteration of the original entry.[6] Poorly kept or inadequate records may be considered a breach of the accepted standard of medical care. They certainly would be a factor in any malpractice case.[1]

Human Elements in Medical Record-Keeping

The physician has always believed that he has absolute and complete ownership of the patient's record. Regardless of whether or not one agrees with this point of view, there are explanations for this philosophy. These involve the human aspects of record-keeping. As an outgrowth of the moral and ethical aspects of the physician's professional responsibility to the patient, many physicians have developed a paternalistic attitude toward their

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patients and consider the record of the patient their personal diary.

This is frequently reflected in the notes that the physician writes on the patient's chart. It is not unusual for the physician to record his purely personal views, thoughts, and ideas regarding the patient. These remarks are not always relevant or pertinent to the medical diagnosis and treatment. Obviously, this type of note does not represent scientific, objective, and descriptive observations of the patient. The physician usually does not even want the patient to be aware of these personal comments, and they may later prove embarrassing, at the very least. However, this type of note is made in the belief that it will remain the secret of the physician and he never contemplates that it will be revealed. In the past, it has been possible for the physician to protect this type of remark from becoming available to the patient by interposing the legal doctrine of ownership of the record.

Another human element involved in record-keeping is that many physicians resent the requirement to keep detailed records. They consider it a chore and an imposition on their time. This feeling is often reflected, undoubtedly unconsciously, in the type of note that the physician writes on his patients' charts. It reflects his annoyance, resentment, and hostility to the imposed requirement of record-keeping. The physician does this despite the fact that he recognizes the need for medical records. Since the physician considers the records inviolate, he believes he may make such notes with impunity.

Still another problem with medical records in the hospital is the frustration of the attending physician in his dealings with the house staff. Similarly, the house staff sometimes finds itself at odds with the attending physicians. These feelings, unfortunately, find themselves expressed in the notes written by the attending physician and/or the house staff. These notes later come back to haunt one or both of the parties when the records see the light of day, particularly in a legal proceeding.

The physician obviously does not want the patient to know or be aware of his personal thoughts and intimate observations. In order to keep these remarks private and secret, the physician claims the disclosure may be detrimental or incomprehensible to the patient. Furthermore, the physician asserts that if the information is made available to the patient without his supervision, it may prove irreparably harmful. In truth, the physician should never record his personal feelings about the patient or about the house staff. If only the necessary medical facts are recorded, this problem will not arise and hollow excuses will not be necessary.

Physicians are also concerned with the legal hazards inherent in their daily recording of impressions, and differential and changing diagnoses. They are concerned with the legal perils should the contents of the record become known to the patient at a later date. They believe this may give the patient ammunition for a malpractice action. Therefore, even disregarding the question of ownership, they believe they should not be required to expose themselves to potential legal hazards inherent in the nature of medical record-keeping. Since records must be kept, the physician believes the only way to avoid this problem is to deny the patient access to the records. Some courts have upheld this contention in denying the patient access to his records.[7-13]

The physician frequently objects to making the record available to the patient because he believes that patients are not adequately informed medically and will not understand, or may even misunderstand, the contents of the record. Present day realities are that many patients are capable of understanding their medical problems, particularly with proper, adequate, and appropriate explanation. This is the result of greater educational opportunities, mass communications (television, radio, newspapers, magazines and books), and urbanization of our society. This is the rationale for the legal doctrine of "informed consent" which the courts are insisting exists between physician and patient. People today are knowledgeable, sophisticated, and capable of understanding medical matters.

In those rare instances where the knowledge of the medical facts may be detrimental to the patient, the courts generally have recognized the doctrine of "professional discretion or privilege" and will not hold the physician liable for failing to record the specific information which he believes may be detrimental to the patient, providing he records this judgment as to his professional discretion appropriately on the chart.

Legal Status of the Medical Record

In recent years, the legal status of medical records has changed, as evidenced by court decisions and legislative enactment of statutes making records available to the patient.[14]

In the past, patients' medical records made by physicians in their offices, hospitals, or other health care facilities during the course of examination and treatment were considered the property of the health care provider – physician, hospital or clinic.[7-13] An analysis of the cases and decisions involving ownership of patients' medical records reveals that, in the past, almost all were decided on the basis of strict and narrow interpretations of the rules of personal property. Consequently, the ownership of the patients' records had been adjudicated to reside in the health care provider who was the owner of the personal property that included the paper, x-ray film, ECG paper, etc.[12-16]

Undoubtedly the courts were principally concerned with the protection of the record and the interests of the physician. Copying a record in former days was a chore and a burden, as well as a possible source of errors. The development of photocopying techniques has changed this. Photocopying has eliminated the administrative and mechanical impediments which have made it difficult for the patient or the attorney to obtain medical records.

Until recently there had been no attempt to differentiate between the physician's ownership and possession of the record, based on his ownership of the personal property, and the patient's ownership of the information therein. There was no consideration of the patient's property interests in the contents of the records. Therefore, the courts ruled that the patient had no right to his records. He could not even legally compel the transfer of the records to the patient's succeeding physicians.[8,9] The courts even noted that it was important to the physician that he retain possession of the patient's records as part of his medical management and as a possible defense in the event of a malpractice suit.[7]

In the earlier decisions, the courts decreed that the payment of fees to the health care provider by the patient

represented payment only for the professional services rendered. The payment of these fees did not include any rights of ownership or possession of the original records.[7,9] They ruled that the patient had paid only for the professional services and not the physical materials. Actually, it appears that there may have been a continuing misinterpretation or misunderstanding of the court decisions. A closer examination and an analysis of these decisions reveals that no mention was made of the ownership of the information on the records, merely the physical possession of the personal property belonging to the physician.[17]

As to hospital records, the hospital almost always required the attending physician's approval and consent before they would release the records to the patient, based on the belief that the records were the physician's property and the hospital was merely the custodian. Although patients have succeeded in preventing the destruction of their medical records,[8] they were not permitted to have physical possession of the records, nor even to inspect or copy them. The patient could not compel their being made available to him except under limited circumstances involving litigation in which the records were necessary. This was merely the extension of the rule that hospital records were always available by means of subpoena by either litigant, whether the attending physician consented or not. Actually the patient could acquire a copy of his records by subpoena.[14]

The underlying problem was that a suit had to be filed before the subpoena could be obtained. From a practical point of view, therefore, the filing of the suit for the purpose of obtaining the medical records by subpoena could be avoided if the records were voluntarily offered to the patient's attorney for review. This, in fact, often obviated continuation of the action when the records were made available. In other situations, it led to a continuation of the lawsuit because it was already started.[17]

In more recent decisions the courts have departed from the earlier philosophy vesting absolute ownership of the patient's record in the physician.[17-31] They have decreed that although the health care provider has an absolute right to possession of the original record, at the same time, the patient has an absolute right to the information and is therefore entitled to a copy of his hospital record.[17] This privilege is even extended to the next of kin in the event of the death of the patient. This right to examine the record extends to the patient's succeeding physician or attorney or other representative.[18,19] Furthermore, the refusal of the physician to make the records available to the persons entitled to access to them constitutes fraudulent concealment and suspends the running of the statute of limitations regarding the viability of the claim and cause of action.[19] No longer is the consent of the attending physician required for the release of the medical records to the patient or his representative by the hospital. As a matter of law, any direction by the physician that the record not be released should not be honored by the hospital.

The rationale of the courts in rendering these recent decisions and establishing these new precedents regarding the patient's access to his records has been that hospitals and other health care providers maintain records for the benefit of the patient as well as for the hospital and the physician. They are an essential and fundamental part of the contractual relationship between the hospital and the patient. The patient's interest in and right to his hospital record is declared to be superior to that of either the hospital or the physician. The courts have held that the keeper of hospital records is only the custodian and not the owner of the information constituting the patient's medical record. Further, the patient has a property right in the information appearing or portrayed in the records.[13]

The rule is the same when it involves the record of a patient and a private physician. The fiduciary relationship and the right of the patient to a full and frank disclosure of all the facts relating to his physical condition vests the patient with exclusive control over the information in his records. This includes the review of his medical records by third parties, such as other health care providers, attorneys, other representatives, and insurance companies.[23]

When a physician acts as the employee of another, such as a hospital or clinic, his examination or treatment records usually become the property of the employer in the absence of an agreement to the contrary.[32] This is predicated on the employer-employee relationship. Any request for the records must be directed to the employer and not the physician.

Furthermore, even under the earlier decisions when the patient had very limited access to his records, he could acquire ownership, possession, and control by a contractual agreement with the health care provider.[33] The courts would enforce an agreement whereby the physician had entered into a contract agreeing that the contents of the record, the record itself, or other materials or data such as an x-ray film, ECG or EEG would become the property of the patient.

X-rays are usually held to belong to the radiologist, not to the referring physician, who may receive the radiologist's report, or the patient. However, if the films are delivered to the patient who takes them to his physician for interpretation, and the radiologist tells the patient that he does not expect them to be returned, the patient becomes the owner of the x-rays.

Those courts that insist that the patient's records be complete and available on demand, regardless of the consequences, recognize that this benefit to the patient may be achieved at some risk to the patient. The physician can be assured, however, that his appropriate remarks on the chart are privileged, regardless of their nature, and will not subject him to liability, provided they are made in "good faith," in the performance of his professional responsibilities, and with adequate protection of the patient's right to privacy and confidentiality.

Health care providers are charged with keeping the medical record confidential. Breach of this sacred, moral, ethical, and professional duty of confidentiality by unauthorized release of the record without the consent of the patient or his legal representative could result in the physician being held liable for negligence or invasion of privacy.[34]

Under present judicial interpretation, the physician may still be able to withhold the purely medical remarks under the doctrine of "professional discretion" because of their potentially harmful effects on the patient.[17] He cannot, under present judicial philosophy, prevent disclosure of the gratuitous personal remarks which have no bearing on the professional care of

the patient. In fact, these may prove at least embarrassing or, at worst, the basis for litigation. The physician may protect himself from a charge of defamation through rules of evidence and the doctrine of privilege which are an overall protection granted to physicians by the law in order that they carry on their medical functions without having to be concerned about legally offending the patient. However, this may prove to be a shallow protection when the records are discovered as part of a malpractice lawsuit and the remarks are used to impugn or impeach the physician's professional concern about the patient.

Actually, an evaluation of the latest decisions reveals that the right of ownership of the patient's original medical records by the health care provider has not been disturbed by recent court decisions.[23] The physician or the hospital still has the right to possession and custody with the concurrent duty to maintain and store the records according to prescribed statutes of limitation. What the courts have done is to recognize *two types of ownership.* They have separated the traditional ownership *of the physical materials,* composing the actual record from the ownership *of the information therein.* The former still resides in the health care provider, while the latter is designated to be property of the patient. To that end, the health care provider must make the information available to the patient upon reasonable request. The patient must pay the expenses involved in making this information available. Nonpayment of a bill cannot be used as a reason by the physician for not reproducing the record.

It appears that the courts have based their decision on the legal principles recognizing and establishing the right of the patient to control his body, the right to give "informed consent" to medical management, and the right to complete medical information.[35] They have carried these principles to their ultimate conclusion, the patient's right to access to his record. At the same time, the courts have recognized the problems of the physician in regard to medical records and have established the *doctrine of professional discretion* in the preparation and dissemination of records. Professional discretion in withholding part or all of records must, however, be based on a medical judgment made in good faith and appropriately recorded; it must not be an arbitrary, capricious, or pernicious act.

Not only have the courts recognized the interests of the patient and the health care provider, physician, and hospital, but also the interests of others involved in the medical care of the patient. Nurses, technicians, and orderlies (whose work may be part of the record), or their representatives, have a right to review records when they become an interested party legally.[36-38] They may have access to the records under properly legally established circumstances and conditions. Similarly, third-party insurance carriers and intermediaries have a right to inspect and review the patient's records as a prerequisite to settling a claim.

Medical records are not only changing in form but in their legal status and significance.[39] (and RE Rouchard, et al, written communication, March, 1974) One solution that has been suggested is that patients carry their own records.[40] Health care providers, in general, and physicians, in particular, are best advised to keep in mind the changing legal concepts regarding records during the course of their handling patients' records.[41]

A physician should remember that the rules of professional conduct of the American Medical Association's Judicial Council decree that a physician is ethically obligated to cooperate with and transfer records to the physician who succeeds him in caring for a patient.[42] Whenever the physician transmits information regarding a patient, he must protect the patient's right to privacy and confidentiality.

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