ILLINOIS STATE MEDICAL SOCIETY

Resolution 11.2022-22
(A-23)

Introduced by: Jerrold B. Leikin, MD, ISMS Member

Subject: Attorneys' Retention of Confidential Medical Records and Controlled Medical Expert's Tax Returns After Case Adjudication

Referred to: Medical Legal Council

Whereas, medical records are extremely confidential records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and can only be disclosed under certain circumstances; and

Whereas, HIPAA states that for all covered entities and business associates, it is recommended any documentation that may be required in a personal injury or breach of contract dispute is retained for as long as necessary. "As long as necessary" will depend on the relevant statute of limitations in force in the state in which the entity operates. In many cases, statutes of limitation are longer than any HIPAA record retention periods; and

Whereas, the filing of a civil lawsuit provides the mechanism for the issuance of subpoenas for witnesses and subpoenas duces tecum to produce documents that often involve medical records; and

Whereas, the Circuit Court of Cook County amended its Health Insurance Portability and Accountability Act (HIPAA) Protective Order following the Illinois Supreme Court's recent determination of an insurer's obligations with a plaintiff's protected health information (PHI). In short, PHI obtained by insurance companies during litigation cannot be used outside the litigation context, and it must be returned/destroyed at its conclusion. (*See Haage v. Zavala*, 2021 IL 125918); and

Whereas, the above order requires return or destruction of all records within 60 days of the close of the case. This prohibits parties, counsel, *and the parties' insurers* from using PHI for any purpose other than the litigation in which the order was entered; and

Whereas, the American Bar Association is generally silent regarding attorney's retention of medical records after the case is adjudicated; and

Whereas, courts have required controlled expert witnesses to produce personal financial records, including federal 1099 tax forms related to legal work as well as personal income tax returns, even when they include information concerning the expert's spouse: and

Whereas, in *Grant v. Rancour*, 2020 IL App (2d) 190802 (June 12, 2020), the court stated that: "Opposing parties may cross-examine an expert witness about the amount and percentage of his or her income generated as an expert witness, the frequency with which he or she testifies, and the frequency with which he or she testifies for a particular side."; and

Whereas, personal tax returns of medical experts obtained by attorneys should be afforded similar HIPPA type protections after the close of the case; and

Whereas, attorney's prolonged retention of these confidential and private documents can only be utilized in an adversarial intent; therefore, be it further

RESOLVED, that attorney requests for controlled medical expert personal tax returns should be limited to 1099-MISC forms (miscellaneous income) and that entire personal tax returns (including spouse's) should not be forced by the court to be disclosed; and be it further

RESOLVED, that the Illinois State Medical Society (ISMS) advocate through legislative or other relevant means the proper destruction by attorneys of medical records (as suggested by *Haage v. Zavala*, 2021 IL 125918) and medical expert's personal tax returns within sixty days of the close of the case; and be it further

RESOLVED, that the Illinois Delegation to the AMA draft a resolution to create a policy to the same.

References:

1) https://www.hhs.gov/hipaa/index.html
2) https://www.cdc.gov/phlp/publications/topic/hipaa.html
3) https://www.hipaajournal.com/hipaa-retention-requirements/
4) *Haage v. Zavala*, 2021 IL 125918.
5) https://www.americanbar.org/
6) https://www.clausen.com/cook-county-uses-hipaa-to-further-limit-discovery-and-use-of-litigants-medical-records/
7) *Grant v. Rancour*, 2020 IL App (2d) 190802 (June 12, 2020)

Fiscal Note:

None

Existing ISMS policy related to this issue:

An expert witness is defined as a physician licensed to practice medicine in all its branches, having a basic educational and professional knowledge as a general foundation for testimony and, in addition, having special expertise, relevant personal experience, practical familiarity and technical knowledge of the problems that are being considered, as well as knowledge of alternative forms of treatment, and who was active in the practice of the medical subject under discussion at the time the incident occurred. (HOD 1987; Last BOT Review 2011)

The Illinois State Medical Society supports the concept that: (1) As a matter of public interest, members of the Illinois State Medical Society have an obligation to serve and to be impartial expert witnesses; (2) A physician who testifies as a medical expert should be in active practice of medicine and any testimony shall be further considered as the practice of medicine; (3) Opinions expressed by a physician expert witness should be based upon a thorough knowledge and understanding of the pertinent facts and should be based on science, truth, honesty, personal and professional experience; (4) A physician shall never be compelled to provide expert testimony in a medical liability lawsuit; and (5) A physician shall never act as an expert witness on a contingency basis. (HOD 1992; BOT 2004 Amended; Last BOT Review 2011)

Patient care records contain privileged information of confidential nature. Such records are the property of the hospital, clinic or physician. Information contained therein is held in trust by the holder. In the case of hospital records, patients, patients' attorneys or patients' succeeding physician, upon written patient authorization, have the right of access to hospital records, the ability to review and the right to copy or receive copies. Hospitalized patients may be afforded access to their records upon discharge but not during hospitalization. This access is not afforded in case of psychiatric illness. In the case of nonhospital records, patients' attorney or succeeding physician, but not patients themselves, upon presentation of written patient authorization, have the right of access to said records, with the ability to review and the right to copy and receive copies. Upon receipt of proper, written authorization from the patient, a copy, abstract or summary shall be provided, as required, to legally authorized recipients of such record. Patient records are utilized by official committees of organized medical staffs to accomplish scientific review, peer review or other patient care improvement. Reports and proceedings of such committees are confidential and shall not be disclosed to any person outside the purview of such committees. ISMS will take all appropriate action to preserve the confidentiality of records and activities of medical staff committees.

Pursuant to a subpoena for records, a physician must respond in some acceptable way. If the document called for violates the physician-patient privilege, e.g., psychiatric medical record requests, then the physician must file written objections with the court or request that the patient or the patient's counsel do so. It is recommended that the physician obtain a consent form from a patient prior to turning over medical information. Usually, when a patient puts his/her physical condition at issue by filing suit, his/her medical records, which are otherwise confidential, become subject to discovery, pursuant to the patient's own consent. When a physician receives a subpoena for original records, as long as a document or record can be authenticated by testimony or a notarized statement attesting to the authenticity of the copies, it is acceptable to submit photocopies of medical records, as opposed to originals. When a physician receives a court order, copies of the medical record may generally be released. However, there may be circumstances where original records are mandated. In such a case the physician should keep a copy of the medical record and number the pages of the original record before release so that they may be counted when the original is returned. A reasonable charge for record copying service may be made. (HOD 1994; Last BOT Review 2010)

Existing AMA policy related to this issue:

Expert Witness Testimony H-265.994
(1) Regarding expert witnesses in clinical matters, as a matter of public interest the AMA encourages its members to serve as impartial expert witnesses.

(2) Our AMA is on record that it will not tolerate false testimony by physicians and will assist state, county and specialty medical societies to discipline physicians who testify falsely by reporting its findings to the appropriate licensing authority.

(3) Existing policy regarding the competency of expert witnesses and their fee arrangements (BOT Rep. SS, A-89) is reaffirmed, as follows:

(a) The AMA believes that the minimum statutory requirements for qualification as an expert witness in medical liability issues should reflect the following: (i) that the witness be required to have comparable education, training, and occupational experience in the same field as the defendant or specialty expertise in the disease process or procedure performed in the case; (ii) that the occupational experience include active medical practice or teaching experience in the same field as the defendant; (iii) that the active medical practice or teaching experience must have been within five years of the date of the occurrence giving rise to the claim; and (iv) that the witness be certified by a board recognized by the American Board of Medical Specialties or the American Osteopathic Association or by a board with equivalent standards.

(b) The AMA opposes payment of contingent fees for all types of medicolegal consultations, including management services provided by firms engaged in locating physician consultants. Where necessary, the AMA supports state legislation making it illegal for medicolegal consulting firms to take a contingent fee in personal injury litigation. Such arrangements threaten the integrity and the compensation goals of the civil justice system. Like the individual expert witness, the role of the medicolegal consulting firm which locates and supplies experts should be one of limited service to the judicial process. Contingent fee arrangements are plainly inconsistent with the scope of this responsibility.

(c) The AMA supports the right to cross examine physician expert witnesses on the following issues: (i) the amount of compensation received for the expert's consultation and testimony; (ii) the frequency of the physician's expert witness activities; (iii) the proportion of the physician's professional time devoted to and income derived from such activities; and (iv) the frequency with which he or she testified for either plaintiffs or defendants. The AMA supports laws consistent with its model legislation on expert witness testimony.