

Record Keeping: Friend or Foe? Part II - Records Management

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“It was his story against mine, but of course, I told my story better.”

— Humphrey Bogart as Dixon Steel – In a Lonely Place (1950)

These words still hold true today and your records provide the basis for your story. Here, we will address the management of four areas in which your records may be requested.

1. Patient Records Release
2. Colorado Dental Board (CDB) “30-day” Demand Letter
3. Litigation Disclosure
4. Subpoena and Litigation “Hold” Letters

Other than a routine patient records release, it is a good idea to contact your professional liability carrier for assistance.

Overview

When any of these four situations arise, you should not destroy, alter or amend any portion of the patient’s record. Your records must now stand on their own merit. The destruction of records can lead to a claim in litigation that you have “spoliated” (destroyed or failed to retain) important information. This can result in the court precluding evidence, creating adverse presumptions about what the record might have said or, in extreme cases, instructing the jury against you about a particular point.

If you believe an amendment or addition is warranted, always consult your legal counsel as to whether an

amendment is advisable and how to do it properly.

Generally, no note or amendment should be added to a patient chart in response to a CDB request for records. Comments or explanations can be provided in your response to the board’s inquiry.

Keep an exact duplicate of what you send to others.

You must keep separate files for confidential communications with your counsel or professional liability carrier. Such communication may include a request to draft a “narrative” or statement of what you believed happened if litigation is likely. Confidential communications are not patient records and must not be sent inadvertently to others.

Patient Records Release

You may receive a records release from a patient for many reasons. It is important to read the release carefully and produce only what is requested.



The Code of Colorado Regulations requires that you must produce a copy or make the record available for inspection within seven (7) calendar days of the request. 3 CCR 709-1 1.9(B) As previously discussed, keep a record of exactly what was sent or shown (i.e., number of pages, date range, record type, etc.) If you believe litigation may occur, get counsel involved immediately through your professional liability carrier.

If you send records to a patient, you should confirm that they may be emailed if that is how the patient wants them sent. Email may not be entirely secure. Records can be merged into a single pdf that can be password protected. The password should be emailed separately.

Note: Patient records must be kept for seven (7) years from the date of last treatment; seven (7) years from the date of majority (18 years of age) for care provided to a minor. 3 CCR 709-1 (E)

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Colorado Dental Board "30-day" Demand Letters

The number of complaints filed by patients with CDB is rising. The CDB emails the "30-day" letter demanding that you respond to the complaint and provide records. The "30-day" letter is sent to your email address on file with DORA. Thus, it is essential that you keep your contact information up to date. The CDB does not mail complaints to a physical address.

You should seek assistance without delay when you receive a 30-day letter. The Dentists' Professional Liability Trust provides administrative coverage to its members for board matters and will engage counsel for you to help with the response.

It is helpful to your counsel if you assemble the chart and related materials as soon as you get the 30-day letter. The CDB typically requests the complete chart which includes communications, billing, radiographs, images, etc. It often requests casts. Counsel frequently "Bates numbers" the file pages to eliminate questions about what was produced and for reference in your response. Bates numbering is easiest if records are provided to counsel in electronic format. Until you know if casts are necessary, take images of them. The casts may be made available when necessary. The sooner the chart is ready, the more helpful it is to your counsel.

Communications, drafts, record production and any other work with your counsel for a board response is **CONFIDENTIAL**. Do **NOT** put board work in the patient chart.

Litigation Disclosure/ Suit Involving You

If you receive a letter from an attorney suggesting you may be sued, contact your carrier immediately. Counsel will be provided for you if you are involved in litigation. If a suit is filed against you (by serving you with a summons and complaint), the Colorado Rules of Civil Procedure require mandatory disclo-

sure of your chart and other documents relevant to a claim or defense in a case. Your counsel will guide you in preparing the chart (and all other patient materials). It is critical that you share everything with your counsel. Do not let your attorney be surprised. The file will be organized for production in the lawsuit, and it is likely the materials will be "Bates numbered" resulting in each page of your chart having a separate, identifying page number. Never send anything to the opposing counsel yourself. Your attorney will handle all document production.


Subpoena and Litigation "Hold" Letters from an Attorney

If you receive a subpoena to produce records, read it carefully. Contact your carrier immediately to see if it will be helpful to get counsel involved on your behalf. Work with your counsel and provide only what is requested, keeping a record of exactly what was produced. It is likely the materials will be Bates labeled for page number, date range, and type of document. Keep a copy of the subpoena and a duplicate file of what was produced.

Lastly, you may receive a letter from an attorney demanding that your records and other information be preserved, but not (yet) requesting them. Such a letter is sometimes referred to as a litigation "hold" letter. This letter or notice means that you should preserve and not destroy pertinent records. The failure to do so, even if inadvertent, can give rise to

a claim that you have spoliated information, which, as noted above, can lead to adverse evidentiary consequences if a lawsuit is later filed. It is prudent to call your professional liability carrier if you receive such a letter.

Conclusion

Producing records is an important event that must be done carefully and correctly. Ask for help if you are uncertain or have questions. Your staff may not be as attentive to the requirements and consequences as you are, so it is wise to be directly, personally involved in the process. 

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