Confidentiality and privacy issues during the investigation and litigation of a medical malpractice incident, claim, or lawsuit

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PURPOSE OF RISK MANAGEMENT RECOMMENDATIONS
OMIC regularly analyzes its claims experience to determine loss prevention measures that our insured ophthalmologists can take to reduce the likelihood of professional liability lawsuits. OMIC policyholders are not required to implement these risk management recommendations. Rather, physicians should use their professional judgment in determining the applicability of a given recommendation to their particular patients and practice situation. These loss prevention documents may refer to clinical care guidelines such as the American Academy of Ophthalmology’s Preferred Practice Patterns, peer-reviewed articles, or to federal or state laws and regulations. However, our risk management recommendations do not constitute the standard of care nor do they provide legal advice. If legal advice is desired or needed, an attorney should be consulted. Information contained here is not intended to be a modification of the terms and conditions of the OMIC professional and limited office premises liability insurance policy. Please refer to the OMIC policy for these terms and conditions.

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Physicians often have questions about sharing protected health information (PHI) with their professional liability carrier or an attorney during the investigation and litigation of a medical malpractice incident, claim, or lawsuit. The following discussion provides general information; please call your liability carrier or your personal attorney if you need more assistance.

• GENERAL CONFIDENTIALITY OBLIGATIONS OF TREATING PHYSICIAN
  o Patient’s right to confidentiality, and your duty to protect it, are due to:
    ▪ Physician-patient privilege
    ▪ Patient’s constitutional right to privacy
    ▪ Patient’s right to privacy of medical information (state law and HIPAA)
    ▪ Professional obligation to maintain secrecy of patient confidences
  o The physical records belong to the physician or facility, but the patient at times controls use and disclosure of the information contained in the records.
Some disclosures are mandatory (e.g., reporting obligations for communicable diseases).
Some are permitted without patient notification or authorization (e.g., for treatment, payment, healthcare operations under HIPAA; these are called “permissive disclosures”).
Some are permitted only with the patient’s written authorization (e.g., disclosure to employer or other third parties).

• SCENARIO #1: POOR OUTCOME, PRECAUTIONARY DISCLOSURE “My patient experienced a poor outcome, and I’m concerned I might be sued. Can I disclose PHI to my professional liability carrier or my attorney?”
  o Who has the duty to protect confidentiality? You do.
  o Who needs to obtain authorization from the patient? Probably no one.
  o State law: disclosure to professional liability carrier or attorney usually allowed without authorization in anticipation of litigation in order to prepare defense
    ▪ Contact your professional liability carrier or personal attorney.
  o HIPAA: disclosure to professional liability carrier or attorney allowed without authorization as healthcare operation
    ▪ Enter into business associate agreement with carrier or attorney to ensure that they will protect the confidentiality of PHI.
    ▪ Minimum necessary rule applies, but usually need entire medical record, including billing, to review care
    ▪ No accounting or disclosure to the patient required since part of healthcare operations
  o Disclosure to your carrier or attorney: no authorization needed; little to no risk of breach of confidentiality.

• SCENARIO #2: INFORMAL INTERVIEW OR DISCUSSION WITH THE ATTORNEY OF A PATIENT WHO IS SUING ANOTHER DOCTOR “An attorney contacted me to discuss a current (or former) patient of mine who is suing (or considering suing) another physician. Can I talk to my patient’s attorney?"
  o Who has the duty to protect confidentiality? You do.
  o Who needs to obtain authorization from the patient for me to discuss my care: You do, but the patient’s attorney usually obtains it for you.
  o With the patient’s authorization, you can release your records and discuss your care if you want to.
  o There is no duty to discuss your care unless there is a court order or valid subpoena.
  o Some physicians who have discussed their care with the plaintiff attorney have ended up as a defendant.
  o Contact your professional liability carrier before agreeing to talk to the patient’s attorney. In some cases, you will be assigned an attorney to protect your interests.
Informal discussion with patient’s attorney: patient authorization needed; no risk of breach of confidentiality with authorization; risk of being named as defendant, so contact your carrier first.

• SCENARIO #3: INFORMAL INTERVIEW OR DISCUSSION WITH THE LIABILITY CARRIER OR DEFENSE ATTORNEY OF ANOTHER PHYSICIAN
  “A professional liability carrier or attorney called me to discuss a current (or former) patient of mine. The carrier or attorney represents another physician. Can I talk to the other physician’s attorney or carrier about my care of the patient?”
  o Who has the duty to protect confidentiality? You do.
  o Who needs to obtain authorization from the patient for me to discuss my care: You do, since discussing your care with the attorney or carrier of another physician is NOT a healthcare operation for you. The carrier or defense attorney can obtain it for you.
  o With the patient’s authorization, you can release your records and discuss your care if you want to.
  o There is no duty to discuss your care unless there is a court order or valid subpoena.
  o If the defense attorney or carrier has not obtained an authorization (perhaps because they are reviewing the incident on a precautionary basis), disclosure may not be lawful.
    ▪ Either do not discuss your care or contact the patient first to obtain authorization. Contact your own carrier or attorney for advice.
  o Informal discussion with another physician’s carrier or attorney: patient authorization needed; no risk of breach of confidentiality with authorization; may be unlawful without authorization.

• SCENARIO #4: TESTIFYING ABOUT CARE RENDERED TO A CURRENT OR FORMER PATIENT WHO IS SUING ANOTHER DOCTOR
  “A patient of mine is suing another physician, and one of the attorneys wants to take my deposition and/or have me testify in court.”
  o Who has the duty to protect confidentiality? You do.
  o However, when the patient brings a lawsuit based on medical care, the doctor-patient privilege and constitutional privacy rights are generally waived as to the care at issue. State laws vary, so consult your liability carrier or attorney.
  o These situations can be volatile, so consult with your own liability carrier or attorney.
  o The requesting attorney obtains the patient’s authorization, or subpoenas the records if the matter is in litigation, which enables you to release your records and testify about your care.
  o If sent records other than your own to review, destroy by burning or shredding once notified that case is over, unless advised otherwise by the attorney who sent you the records.
Testifying about care rendered to current or former patient: authorization provided; no risk of breach of confidentiality with authorization.

- SCENARIO #5: HIRED AS EXPERT BY THE PLAINTIFF (PATIENT’S) ATTORNEY
  “A plaintiff attorney wants to hire me as an expert.”
  o Who has the duty to protect the confidentiality?
    - You do, if you have treated the patient.
    - If you have never treated the patient, the patient or patient’s representative do.
    - Once the defendant physician or other health care provider has released the PHI to the patient or patient representative, the patient can share information with whomever he/she wishes.
    - Once you receive the PHI, you should protect confidentiality by using the PHI only for purposes of your review and testimony.
  o Who obtains the authorization that allows you to review records and discuss the patient’s care? The plaintiff attorney.
  o At the end of the case, destroy records by shredding or burning, unless advised otherwise by the attorney who sent you the records.
  o Hired as plaintiff expert: no risk of breach of confidentiality with authorization if use limited to purpose of review and testimony; destroy records at end of case.

- SCENARIO #6: HIRED AS EXPERT BY THE DEFENSE ATTORNEY OR CARRIER
  o Who has the duty to protect the confidentiality?
    - You do, if you have treated the patient.
    - If you have never treated the patient, the defense attorney or liability carrier that retained you as an expert.
    - Under HIPAA, the defendant physician’s liability carrier and defense attorney are performing healthcare operations on his/her behalf. They sign a “business associate agreement” with the defendant physician, and must then protect the confidentiality of PHI.
    - Under HIPAA, once you receive the PHI from the business associate, you are considered a “downstream user” of the PHI.
      • You will be asked by the carrier or defense attorney to sign a “Reasonable Assurances” letter, and must then protect the PHI by using it only for purposes of your review and testimony.
  o Who obtains the patient’s authorization?
    - Under HIPAA, if your review of the care is performed as part of healthcare operations on behalf of the defendant physician, no authorization is needed.
    - If there is no patient authorization, verify that state law allows the defendant physician’s carrier or defense attorney to share PHI with you, since state law can be stricter than HIPAA.
- If there is a claim or lawsuit, the defense attorney or liability carrier will obtain the patient’s authorization for you.
  - Once notified that the case is over, destroy records by burning or shredding, unless otherwise advised by the defense attorney or insurance carrier.
  - Hired as defense expert: authorization not needed under HIPAA but may be needed under state law; no risk of breach of confidentiality with authorization if use limited to purpose of review and testimony; destroy records once case is over.

OMIC policyholders who have additional questions or concerns about practice changes are invited to call OMIC’s confidential Risk Management Hotline at (800) 562-6642, extension 641.