Handling requests from attorneys

RUSSELL G. THORNTON, JD

The most frequent non–lawsuit-related questions that we receive from physicians relate to contact by an attorney about a current or former patient. Most frequently, this contact is in the form of a records request or a notice of claim letter. These 2 situations are relatively uncomplicated. The proper response is clear and straightforward. The situations that require more thought involve requests to (a) interview or meet to discuss the patient's care and condition, (b) provide a report or narrative about the patient's care or condition, (c) review the patient's care or condition in the capacity of an expert witness, (d) provide deposition testimony about the patient's care or condition, and (e) testify about these matters at trial. This article discusses considerations for each of these circumstances.

GENERAL CONSIDERATIONS

Physician-patient privilege

Preservation of the physician-patient privilege should be the primary concern in each of these situations. Communications between a patient and physician for the purposes of evaluation, diagnosis, and treatment are privileged (1). The improper disclosure of privileged information exposes the physician to a claim by the patient for damages (2). This privilege, however, may be waived. The waiver may come from the patient or an authorized representative. This waiver can be express, by execution of an authorization (3), or implied, by filing a legal claim that is based, at least in part, on the patient's medical condition (4). This implied waiver of the privilege is limited to matters that are relevant to the claim and is discussed in further detail below.

Liability exposure

The second consideration is that these contacts can expose you to some form of a liability claim. The most obvious exposure is to a health care liability claim based on negligence in providing care and treatment to the patient in question. As mentioned above, these situations can also expose you to a claim based on the improper disclosure of privileged physician-patient information (2).

Responsible expression of opinions

This last consideration applies primarily when an attorney seeks an opinion about the propriety of the patient's care and treatment, the cause of the patient's medical conditions or problems, or the patient's future needs and prognosis. Make sure that your opinions are based on the proper standard and on thorough, accurate, and complete information. There is nothing improper about expressing opinions on these issues. Problems arise for everyone involved, including the patient, when strong opinions are provided based on personal standards of care, assumptions, and/or incomplete and inaccurate information. In the context of a medical negligence claim, the relevant inquiry about the propriety of a physician's care is not what you personally would do in treating that patient (5). The standard is what a reasonable and prudent physician would do under the same or similar circumstances (6). When expressing an opinion about the cause of a condition or injury, that opinion must be based on reasonable medical probability (more likely than not) (7). When expressing an opinion about the cause of a patient's death, the patient must have had a >50% chance of survival absent the care or conduct at issue (8). Further, unless you have had the opportunity to review all of the available and relevant information on a patient, you cannot be in a position to responsibly express opinions about the patient's care, the cause of a particular injury or condition, or the likelihood that the patient would have otherwise survived.

Opinions that are not based on the proper legal standard and on complete and accurate information are misleading to counsel and can cause significant problems later. The simple rule is to keep in mind the proper standard and to make sure that you obtain all of the relevant information that is available before expressing a final opinion on these types of issues.

REQUESTS FOR MEDICAL RECORDS

A physician's office receives requests for medical records in many forms. The records may be sought through a personal request. In this situation, the patient may request the records personally, a nonattorney representative of the patient may request the records on the patient's behalf, or an attorney representative of the patient may request the records. Records may also be requested by the parties to a case as part of a legal proceeding. Records obtained as part of a legal proceeding are most commonly requested in the form of a "subpoena." Records subpoenas are almost always in the form of depositions on written questions. The purpose of any form of a records request is to

From Stinnett, Thiebaud & Remington, LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett, Thiebaud & Remington, LLP, 4800 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

obtain a complete and unaltered copy of your medical records on the patient. Additionally, the requesting individual may also want the records provided in a form that makes them authentic and admissible as legal evidence (9).

Keep in mind that these requests do not seek, nor do they have the ability to seek, attorney-client or other privileged information, such as materials provided or received in the context of a quality assurance or peer review proceeding (10). Accordingly, if materials from your liability insurance carrier, attorneys, peer review proceedings, and/or Board of Medical Examiners proceedings exist on a patient, they must be kept secure and separate from the patient's medical, billing, and other treatment records. Failure to keep these privileged materials separate from patient records may result in the inadvertent production of them in response to a records request. While you might be able to retrieve privileged documents after they have been inadvertently produced, the privileged information contained in these materials has already been disclosed. In reality, it is too little, too late. Keep these materials secure and separate. Do not take this chance.

Personal requests

While the original medical records are your property, a patient is entitled to a copy of his or her records (11). Under the Medical Practice Act, when requested, copies of a patient's records must be provided within 15 days of the request, unless the physician feels patient access to this information would be harmful to the patient (11). When providing records based on a personal request, do not produce the records without a valid authorization that becomes part of the patient's medical chart.

Complications and concerns usually arise when the request and authorization come from someone other than the patient. If the patient is a minor, the patient's parent or legal guardian has the authority to request records (12). If the patient is deceased, the personal representative of the deceased has the authority to obtain records (13). The probate court determines the personal representative of the deceased (14). If this determination has been made, letters testamentary or letters of administration should be available to confirm the representative's authority (14). If the request for records comes from legal counsel for the patient, make sure that counsel has authorization from the patient or the proper representative before providing a copy of the records.

The important factor here is that you obtain, and retain in the patient's medical chart, documentation that establishes that you were authorized to provide a copy of the records. This way, you have evidence to support your maintenance of the physician-patient privilege and determination that the proper authority existed to release your patient's records.

Subpoenas

Depositions on written questions, more commonly called records subpoenas, are the most common manner in which defendants obtain records in the course of a legal proceeding. The records are sought in this manner so that they are authentic and admissible under the applicable legal rules of evidence and procedure (9). Additionally, when records are obtained in this manner, it is not necessary to have the physician who maintains the records, or a "records custodian" from his office, testify in person at trial to legally establish that the records are authentic and admissible evidence. Production of a patient's records in response to a subpoena constitutes a proper disclosure of patient records (15).

NOTICE OF CLAIM LETTERS

Most physicians discover that they will likely be a defendant in a health care liability claim through a notice of claim letter. Such notices almost always come from counsel retained by or on behalf of the patient. Occasionally, a notice will come directly from the patient, but this is very rare. Under statute, this notice must be sent by certified mail and be provided at least 60 days before suit is filed (16).

Regardless of who sends the notice letter, your response is the same. Immediately call your professional liability insurance carrier and fax the representative a copy of the letter. Immediate action is required not only so that the carrier can begin to take steps to protect your interests but also to fulfill the duties of notice and cooperation that you owe to your carrier under your insurance contract. A failure to provide prompt notification to your carrier may deprive you of legal and contractual rights that are absolutely necessary to protect your interests in litigation.

REQUESTS FOR MEETINGS/INTERVIEWS

Requests from claimant's counsel

Occasionally, counsel for a claimant will request a meeting or interview to discuss your treatment of a patient. Before discussing the case or even scheduling a meeting with counsel, you need to determine some key facts and then call personal counsel or your professional liability insurance carrier to discuss the request.

The first key fact is the last date that you treated the patient. The aim here is to determine whether or not the statute of limitations has run on any claim that the patient might have against you. Under Texas law, the statute of limitations on a health care liability claim is 2 years (17). When this 2-year period begins can be subject to some interpretation. It can start from the time of the patient's death, the last date of treatment, or the date of a particular treatment (17). Additionally, the statute of limitations is extended for 75 days if the claimant has provided a notice of claim letter to any health care provider (18). This extra 75-day period of limitations is not dependent on your being sent or receiving notice (19).

To be safe, consider the statute of limitations to be a 2-year and 75-day period that starts from the last day that you or your office had any contact with the patient or the date of the patient's death (if the patient died), whichever is later. If you cannot readily determine this information, or after calculation of these dates find that the statute of limitations has not run, do not take any further steps to meet with counsel or discuss the patient's care until you have spoken with your personal lawyer or your professional liability insurance carrier. Your insurance carrier will likely want to retain counsel to protect your interests in any such interview or meeting. If the statute of limitations has run, you are probably safe, but it is still prudent to contact your counsel or carrier about the situation.

The second key fact is the information sought or desired and whether there is a pending legal claim. Never take counsel's word

that the claimant has no interest in pursuing a claim against you. Representations of this nature do nothing to protect you from being sued in the future. Determination of any facts that surround a pending claim can provide insight about whether you may have some liability exposure to the claimant and can also provide your carrier or counsel with sources to tap for further information about the situation. Investigation into these matters is important, since it may provide further detail about the claims at issue and/or give insight into counsel's true motivation in seeking your opinions.

The best course of action is to always notify your personal counsel or liability insurance carrier any time a claimant's counsel wants to discuss matters relating to your treatment of a patient. With your premium payments, you have purchased expertise in these matters and protection from liability exposure. If you do not have personal counsel knowledgeable about these matters, let the carrier determine how to respond or whether to retain counsel. The carrier has more experience in these situations than you and may also know the attorney who requested the interview. There is no good reason not to utilize legal and insurance resources to ensure your protection to the best extent possible.

Requests from defense counsel

Defense attorneys who represent health care providers in health care liability claims frequently contact physicians involved in a claimant's treatment as part of their investigation of the claim. The purpose behind these requests is most often to determine if there are any criticisms of the care their client provided and to get information about the cause or causes of the claimant's injuries and prognosis. Unfortunately, some attorneys defend their clients by trying to shift blame for bad results to another health care provider. Thus, if you are not familiar with the attorneys who wish to speak with you or with their firm, contact your insurance carrier for direction. It should have knowledge of the attorneys and their reputation.

Maintaining the physician-patient privilege is still the primary concern in these situations. As briefly mentioned above, the provisions that establish the privileged nature of physician-patient information also detail situations in which the privilege is waived (3, 4). One situation in which the privilege is waived occurs when the patient places his medical condition at issue in a legal proceeding (4). It is important to understand, however, that this is not a blanket waiver of the privilege but a waiver of the privilege only to the extent that it may apply to information that is relevant to the claims at issue in the lawsuit (4, 20).

While claimant's counsel may posture that such "ex parte" communications between defense counsel and a patient's health care providers are improper, Texas appellate courts have been steadfast in holding that this conduct is not improper or illegal so long as both professionals (the attorney and the physician) act in an ethical manner (20). Other courts, however, have ruled that these contacts are not proper (21). Acting in an ethical manner means that the attorney does not try to delve into irrelevant privileged matters and the physician does not disclose or discuss such matters (22).

Defense attorneys should advise the physician up front about the claims against their clients and the injuries or conduct at issue. They should then advise the physician that they are interested only in information that pertains to those issues and do not want to discuss any unrelated information because of its privileged nature. With these steps, the proper areas of inquiry and ground rules have been established. If you ever have a concern that counsel seeks information that is not relevant to the issues at hand, advise him or her that you will not discuss that matter for professional reasons. An ethical defense lawyer will respect your judgment and move to a different area of inquiry. If counsel tries to reason you out of your concerns, simply state that the issue is not open to discussion. If counsel persists despite your stated concerns, simply end the interview in a polite manner.

REQUESTS FOR SUMMARIES/NARRATIVES

The same concerns discussed above with respect to requests for meetings and interviews apply to requests for summaries and narratives. You should obtain some type of professional advice before any communication with claimant's counsel simply to ensure that your own interests are protected. Keep in mind that you are not under any obligation to create a summary or narrative. While the Medical Practice Act allows you to provide a summary or narrative instead of copies of your records (11), generally it is easier and better to simply provide copies of the records when they are requested. This shows that you have nothing to hide and will not raise any "red flags" with whoever is requesting the records. If a summary or narrative is requested in addition to copies of the records, you can request compensation from the requesting attorney for the time spent creating the summary or narrative.

REQUESTS FOR EXPERT REVIEW

You may also be asked to provide opinions on matters other than the specifics about your care and treatment of a patient. A previous article discusses that situation (23). Keep in mind the cautions discussed above about your own possible exposure to a claim. Ensure that your interests are protected and that any opinions you express are based on the proper standards and on complete and accurate information.

REQUESTS FOR DEPOSITIONS AND TRIAL TESTIMONY

Since depositions and trial testimony are sworn testimony that becomes a matter of record, it is even more important that you seek professional advice and that your counsel prepares you. The presence of counsel can provide valuable assistance. If nothing else, it can deter the lawyers from attempts to take advantage of you or to stray too far from the actual facts of the case.

CONCLUSION

Requests for information involving your treatment of a patient are not to be taken lightly. Most attorneys are ethical and are just doing their jobs by thoroughly investigating the claim. Counsel is entitled to discover the facts that surround a claim. A cooperative attitude is important and can go a long way in preventing you from being named as a party to a lawsuit or being deposed to get your opinions. Nevertheless, pitfalls such as the physician-patient privilege and your own liability exposure must be considered beforehand. If you remember to preserve the physician-patient privilege on nonrelevant matters and utilize the available resources for professional advice and assistance, you

may not be able to prevent a bad situation, but you have at least taken prudent steps to minimize, avoid, or prevent any further legal entanglements that can arise from these contacts with counsel.

---

1. See Rules 509(a), 510(b), *Texas Rules of Evidence* (West 2003); Section 159.002, *Texas Occupations Code* (West 2003); Section 611.002(a), *Texas Health & Safety Code* (West 2000).
2. Section 159.009(b), *Texas Occupations Code* (West 2003); Section 611.005(b), *Texas Health & Safety Code* (West 2000).
3. Rule 509(e)(2), (f), 510(d)(2), *Texas Rules of Evidence* (West 2003); Sections 159.003(a)(2), 159.005(a), *Texas Occupations Code* (West 2003).
4. Rule 509(e)(1), Rule 510(d)(1), *Texas Rules of Evidence* (West 2003); Section 159.003(a)(1), *Texas Occupations Code* (West 2003).
5. See *Hersh v. Hendley,* 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ).
6. Texas Pattern Jury Charge, Section 50.1 (2000).
7. See *Park Place Hosp. v. Estate of Milo,* 909 S.W.2d 508 (Tex. 1995).
8. *Kramer v. Lewisville Memorial Hosp.,* 858 S.W.2d 397 (Tex. 1993).
9. See Rules 803(4), (6), 902(10), *Texas Rules of Evidence* (West 2003).
10. See Rule 503(b), *Texas Rules of Evidence* (West 2003); Section 160.007(a), *Texas Occupations Code* (West 2003); Section 161.032(a), *Texas Health & Safety Code* (Vernon's Supp. 2003).
11. Section 159.006(a), *Texas Occupations Code* (West 2003). But see Section 4.01(d), Article 4590i, *Texas Revised Civil Statutes Annotated* (Vernon's Supp. 2003). (Patient was entitled to records within 10 days from the date of a request for records under article 4590i.)
12. Rules 509(f), 510(a)(3)(B), *Texas Rules of Evidence* (West 2003); Section 159.005(a)(2), *Texas Occupations Code* (West 2003); Section 611.004(a)(4), *Texas Health & Safety Code* (West 2000).
13. Rules 509(f), 510(a)(3)(D), *Texas Rules of Evidence* (West 2003); Section 159.005(a)(5), *Texas Occupations Code* (West 2003); Section 611.004(a)(5), *Texas Health & Safety Code* (West 2000).
14. See Sections 178, 181, 183, 186, *Texas Probate Code* (West 2003).
15. See Section 159.003(a)(12), *Texas Occupations Code* (West 2003); Rule 176, *Texas Rules of Civil Procedure* (West 2003).
16. Section 4.01(a), Article 4590i, *Texas Revised Civil Statutes Annotated* (Vernon's Supp. 2003).
17. See Section 10.01, Article 4590i, *Texas Revised Civil Statutes Annotated* (Vernon's Supp. 2003).
18. Section 4.01(c), Article 4590i, *Texas Revised Civil Statutes Annotated* (Vernon's Supp. 2003).
19. See *De Checa v. Diagnostic Center Hosp.,* 995 F.2d 74 (5th Cir. 1993); *Thompson v. Community Health Inv. Corp.,* 923 S.W.2d 569 (Tex. 1996).
20. See *Durst v. Hill Country Memorial Hosp.,* 70 S.W.3d 233, 238 (Tex. App.—San Antonio 2001, n.w.h.); *Rios v. Texas Dep't of Mental Health & Mental Retardation,* 58 S.W.3d 167 (Tex. App.—San Antonio 2001, n.w.h.); *Hogue v. Kroger Store No. 107,* 875 S.W.2d 477, 481 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
21. See *Stewart v. Women in Community Service, Inc.,* 1998 WL 777997 at *3 (D. Nev. October 7, 1998); *Perkins v. United States,* 877 F. Supp. 330 (E.D. Tex. 1995); *Horner v. Rowan Companies,* 153 F.R.D. 597 (S.D. Tex. 1994).
22. See *Durst,* 70 S.W.2d at 238.
23. Thornton RG. Considerations for an expert witness. *BUMC Proceedings* 1998;11:227–230. Available from http://www.baylorhealth.com/proceedings/11_4/11_4_thornton.xhtml; accessed February 14, 2003.