6.5 - MEDICAL RECORDS IN OFFICE PRACTICE

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It goes without saying that physicians have a professional duty to maintain adequate records on each patient. As the maker and custodian of such records, however, there is also myriad of considerations with respect to access. Medical records are now widely shared with insurance companies, state welfare and law enforcement agencies, researchers and employers. It is important for the physician to appreciate in what circumstances physicians are legally obliged to provide access and, occasionally, to allow corrections to their records.

Patients' Right of Access

At common law, which is the traditional judge-made law in all provinces except Québec, the law is that patients should have access to their medical records in all but a small number of cases. The records themselves are the property of the maker of them, but the patient is entitled to photocopies at a reasonable cost. The exception to this general right of access is the occasion where, in the opinion of the physician, the patient's medical care or welfare may be jeopardized by access to the information. Mr. Justce La Forest's judgment in the leading case, *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, is a complete code of the common-law rules. The full text is available on the Supreme Court of Canada's website under "judgments."

Even where, in the physician's opinion, right of access should be refused, this discretion is subject to curial review and the court may order access. If the refusal is made in good faith in the performance of his or her professional duties, there will likely be no cost consequence resulting from the refusal. If, on the other hand, the court is not satisfied that the physician acted in good faith, such as the cover-up of evidence suggesting medical error, the court may order the physician to pay the patient's legal costs of seeking the court order. This would be a rare occurrence, but the sanction should not be ignored. Nor should it be forgotten that, if a physician's conduct comes into question in civil, criminal or disciplinary proceedings, the refusal to deliver up the records for inspection can and probably will be used against the physician in cross-examination.

Access by Persons other than Patients

An authorization and direction by a patient to allow another person, such as an insurer or a solicitor, access to medical records, is generally subject to the same legal considerations as the right of the patient as if the request had been made by the patient himself or herself, or by court order.

Special considerations arise when the access is sought against the patient's will or ability to consent. The categories of occasions when such problems may arise are not closed. However, the following are some examples.

Proceedings Relating to Capacity to Consent to Treatment

In proceedings *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A, relating to the capacity of a patient to give or refuse consent to treatment, the parties are entitled to examine and copy any documentary evidence that will be produced and any report whose contents will be given in evidence. Moreover, they or their counsel or agent are entitled to examine and to copy, at their own expense, any medical or other health record prepared in respect of the party, subject to subsections 35 (6) and (7) of the Mental Health Act (withholding clinical record), subsections 33 (2), (3) and (4) of the Long-Term Care Act, 1994 (withholding personal record) and subsections 183 (2) to (6) of the Child and Family Services Act (withholding record of mental disorder).

Public Hospital and Psychiatric Patients

Records kept by public hospitals are governed by the *Public Hospitals Act*, R.S.O. 1990, c. P.40. Records kept by psychiatric facilities are similarly governed by the *Mental Health Act*, R.S.O. 1990, Chap. M.7. Especially in the case of the latter subject, the role of the custodian of records in public health institutions is subject to statutory and regulatory considerations which require specialist training and knowledge. Often a patient will not only apply to see the records but also to make corrections on issues related to his or her employment or professional standing. These subjects are beyond the scope of this paper and this division of CLEO. Physicians should be aware of the existence of this separate régime, however, in their dealings with patients in institutional settings.

Private Long-Term Care Service Providers

Under the *Long-Term Care Act, 1994*, S.O. 1994, c. 26, private corporations and their officers, directors and employees, are subject to the duties of confidentiality similar to those of physicians. Subject to certain exceptions, a service provider is required to disclose a health record as required by a summons, order, direction, notice or similar requirement, in connection with a matter that is in issue or that may be in issue in a court or under a statutory administrative body.

If, in the opinion of the service provider, disclosure of the personal record or a part of the personal record is likely to result in serious physical or serious emotional harm to the person to whom the record relates or to another person, it shall make a statement in writing to that effect. Once that statement is made, the service provider shall not disclose the record, or the part of the record, unless the service provider is ordered to do so by the court or the administrative body before which the matter is or may be in issue, after a hearing from which the public is excluded and that is held on notice to the service provider.

The specific procedures are beyond the scope of the this paper and this division of CLEO, but the physician should be aware of the existence of a separate statutory procedure in the long-term care context.

Child Protection

The rights and responsibilities of the physician in the child protection context are governed by the *Child and Family Services Act*, R.S.O. 1990, c. C-11. This is both a fascinating and controversial area of law and ethics which imports not only the passive role of the physician as passive custodian of information and records, but also active ethical duties of reporting abuse.

In instances of known or suspected child abuse, the physician should not rely on self-help or delegate the issue to office staff. This area of law is emergent and is a hot topic of debate among legal experts. Although, at common law, the physician's dealings with a child or parent are protected by a qualified privilege against defamation suits, one must be careful that informing or failing to inform state authorities may attract legal consequences and may cause harm to occur or be perpetuated. Physicians should, without exception, seek the advice and direction of their professional colleges.

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