

MEDICAL-LEGAL GUIDELINES FOR COOPERATION BY THE NEW MEXICO MEDICAL SOCIETY AND STATE BAR OF NEW MEXICO

INDEX

1. GENERAL ROLES OF PHYSICIAN AND ATTORNEYS
 - A. Introduction
 - B. General Role of Physician and Nature of Physician Testimony
 - C. General Role of Attorney
2. DISCLOSURE OF MEDICAL INFORMATION
 - A. Psychotherapist-Patient Privilege
 - B. Non-Psychotherapist Medical Information
 - C. Nature of Medical Information
 - D. Form and Date for Medical Authorizations
3. MEDICAL RECORDS AND REPORTS
 - A. The Attorney's Role
 - B. The Physician
 1. Medical Records
 2. X-ray and Test Results
 3. Promptness
 4. Supplying Information Requested
4. PHYSICIAN-ATTORNEY CONFERENCES
5. THE PHYSICIAN AS A WITNESS
 - A. General
 - B. Deposition Testimony
 - C. Testimony at Trial
6. ARRANGEMENTS FOR COMPENSATION OF A PHYSICIAN
 - A. Compensation Must Not Be Contingent Upon Outcome
 - B. Responsibility for Payment of Physician's Charges
 - C. Arrangements for Payment
7. CHARGES FOR MEDICAL TESTIMONY
8. RESOLUTION OF DISPUTES
- APPENDIX.....Procedures for Hearing Complaints

1. GENERAL ROLES OF PHYSICIANS AND ATTORNEYS

A. Introduction. These standards contemplate the development of a clearer understanding between physicians, attorneys, patients and clients of their related problems in the establishment of their respective rights and the discharge of their respective duties regarding legal claims or litigation involving patients/clients. Inasmuch as the confidence which an individual has in his physician and in his attorney contributes much to the successful functioning of the professional relationship, care should be taken to protect the relationship.

B. General Role of Physician and Nature of Physician Testimony. Because of the physician's special knowledge of his patient he has a duty to assist his patient by furnishing information and by preparing and testifying about his patient. The specific language a physician uses to relate the nature, course, cause and prognosis of a patient's illness and other facts observed about a patient, and to express his opinions, may have significant legal consequences which may not be fully appreciated or intended by a physician.

The joint participation of the attorney and the physician in preparing for the physician to testify should ordinarily lead to appropriate testimony. A physician should not provide legal advice to his patient or advise on the value of the case. A physician is not expected to know the substantive law, the rules of procedure or the rules of evidence. A physician should not be biased nor an advocate.

C. General Role of Attorney. The Attorney should not give medical advice to his client. It is for the attorney to determine how and under what circumstances facts about the patient/client's medical condition are to be appropriately presented during the course of litigation.

2. DISCLOSURE OF MEDICAL INFORMATION

A. Psychotherapist-Patient Privilege. The New Mexico Supreme Court has established a psychotherapist-patient privilege which precludes disclosure by a psychotherapist of information obtained in the examination or treatment of the psychotherapist's patient without appropriate consent. (SCRA 1986, 11-504, New Mexico Rules of Evidence) A psychotherapist should not provide information about a patient unless this privilege has been waived by a written authorization signed by the patient or the patient's appropriate representative or disclosure of the information has been required by court order. If the privilege is waived by an appropriate written authorization or by court order the psychotherapist should provide all available information to the attorney or attorneys entitled to receive it pursuant to the written authorization or the court order.

B. Non-Psychotherapist Medical Information and Medical Records. Although the New Mexico Rules of Evidence do not recognize a general physician-patient privilege, information known by the physician may be confidential. Therefore a physician may refuse to discuss or disclose information which he or she deems to be confidential and not related to the injury or illness being claimed by the patient absent a written authorization from the patient or a court order. Notes made in treating a patient are primarily for the physician's own use and constitute his personal property. However, on request of the patient a physician should provide a copy or a summary of the record to the patient or to another physician, and attorney, or other person designated by the patient.

The doctor's office record is a confidential document involving the patient-physician relationship and should not be communicated to a third party without the patient's prior consent, unless required by law or to protect the welfare of the individual or the community. Medical records should not be withheld because of an unpaid bill for medical services.

C. Nature of Medical Information. The medical information provided by a physician should be full and complete and should include all records made by the physician as well as all other records obtained and preserved by the physician, and other pertinent medical information requested, if any, that does not appear in the records.

D. Form and Date for Medical Authorizations. A written authorization that is required or requested should identify to whom medical information is to be disclosed, should be signed by the patient or the patient's appropriate representative and should be dated. A physician should supply the requested medical information in response to an original or photocopy of an appropriate authorization properly signed and dated. A physician is not required to provide medical information in response to a medical authorization dated more than a year prior to the date of the request for the information.

3. MEDICAL RECORDS AND REPORTS

A. The Attorney's Role. An attorney who requests copies of medical records or reports or who requests an evaluation of a patient's condition should make the request in writing. The attorney should specify the nature of the information that is desired such as copies of the physician's records, or specific parts thereof, or a report or evaluation prepared by the physician from the records. If an examination of a patient has been ordered by the court, the attorney should supply the examining physician with a copy of the court order before the examination takes place. Most requests for medical information about a patient are made without a court order.

B. The Physician.

1. **Medical Records.** A treating or examining physician should keep records adequate to provide pertinent information regarding the patient/client.

2. **X-rays and Other Test Results.** The physician should retain control of his x-rays and other test results made in connection with his treatment of the patient. This does not preclude their delivery to another physician with the permission of the patient provided arrangements are made for their return. Ordinarily, original x-rays and the originals of other test results should not be left in the custody of an attorney, but copies should be made and provided, if requested.

3. **Promptness.** Appropriate requests by attorneys for medical records and information should be honored promptly by the physician. If a physician is unable to prepare a requested report or evaluation within the time specified in the attorney's request, the physician should notify the attorney upon receipt of the request.

4. **Supplying Information Requested.** In order to avoid unnecessary expense, the physician should make certain that he knows what is being requested. For instance, if only medical records have been requested, there is no reason for the physician to incur the extra time or expense for preparation of a separate evaluation of the patient's condition or a narrative of the patient's treatment. If a separate report has been requested it should cover the patient's history, the physician's findings, diagnosis and prognosis. If any of those items cannot be addressed at the time of preparation of the report, the physician should explain their absence as a part of the report.

4. PHYSICIAN-ATTORNEY CONFERENCES

It is frequently necessary and desirable for physicians and attorneys to confer about a patient. For example, an attorney may need to confer with a physician as a part of the investigation of the patient/client's possible legal claim even though the physician may never become a witness; a physician and attorney may confer about the medical aspects of a person's claim in lieu of a deposition or other more formal exchange of medical information; a physician and attorney may confer in preparation for the physician's testimony regarding his patient.

Conferences should be arranged at times and places that are mutually convenient for the physician and attending attorneys. The attorney or attorneys requesting a conference should schedule it at a time reasonably in advance of court or other deadlines.

The amount of the physician's charges for the conference and the party responsible for payment of the physician's charges should be agreed upon in advance of the conference. A physician may require payment, in advance of, or at the time of the conference, for the amount agreed to from the party responsible for payment. (Under the Rules of Professional Conduct which govern the conduct of the New Mexico attorneys, an attorney may advance or guarantee expenses such as physician's charges for conferences or expert witness fees, provided the patient/client remains ultimately liable for such expenses. Rule 16-108E.(1).)

5. THE PHYSICIAN AS A WITNESS

A. **General.** A lawsuit or other legally related medical matter may require the testimony of a physician. This testimony may be required in the pretrial phase of the lawsuit, called the discovery phase, and it may also be required at the trial itself.

B. **Deposition Testimony.** The testimony during the pretrial (discovery) phase of a lawsuit is ordinarily given pursuant to a deposition. In such a proceeding, the attorney for any party to the lawsuit can require that a physician be deposed.

Ordinarily, the attorney taking the deposition will arrange that it be held at a time and place convenient for the physician and attorneys. Usually a subpoena will not have to be necessary. However, a subpoena may be necessary for a variety of legal reasons. In the event that the attorneys and the physician can not agree on the time or the place of the deposition, the attorney setting the deposition may subpoena the physician.

At the deposition, the parties to the lawsuit ordinarily will be represented by their attorneys. The physician will be asked questions under oath by the attorney setting the deposition and may be questioned by the other attorneys present. The testimony will be taken down verbatim by a court reporter, who will then prepare a transcript if requested to do so.

Since the testimony given at a deposition may be read at trial, it is important that the physician be prepared before being deposed. This may include attorney-physician conferences before a deposition.

Ordinarily, a deposition cannot substitute for the live testimony of a physician at trial. In certain circumstances, a deposition may be used at trial in lieu of live testimony by the physician. A physician's deposition testimony may be used to contradict any inconsistent testimony of the physician at trial.

C. **Testimony at Trial.** Because a deposition may not suffice for use at trial, or because it may be important to have a physician testify in person, a physician may be required to testify at a trial. Usually this is best accomplished by a voluntary agreement with the attorney. The attorney should provide adequate advance notice of the day for the trial testimony. Unfortunately, particularly with trailing dockets, an attorney may not know the precise day when a physician may have to testify at a trial and the physician and the attorney should cooperate with each other to minimize inconveniences.

Before the trial, the attorney should notify each physician whom he intends to call as a witness of the trial date. During the trial, the attorney should, on a daily basis, inform the physician of the anticipated time for his testimony.

An attorney may subpoena a physician to testify at trial for a variety of reasons, including:

1. It may be desirable in a particular case for the physician to be able to testify, if asked, that he is appearing in court pursuant to a subpoena; or

2. It may be essential in order to secure a continuance if for any reason, the physician fails to appear as required; or

3. It may be statutorily required in order to obtain reimbursement for the physician's fee.

When possible, the attorney should give the physician advance notice of the service of a subpoena. The physician should make himself available for such service.

6. ARRANGEMENTS FOR COMPENSATION OF A PHYSICIAN

A. **Compensation Must Not be Contingent Upon Outcome of the Suit.** Under no circumstances may a physician charge a fee for an examination or testimony which is contingent upon the outcome of the lawsuit.

B. Responsibility for Payment of Physician's Charges.

(1) **Patient is liable for and primarily responsible for payment of a physician's charges.** The patient is liable for and primarily responsible for payment of a physician's charges for medical services and for medical-legal services. An attorney is ethically forbidden to pay for debts incurred by a client. This includes costs incurred on behalf of the client during a lawsuit. Although a patient/client remains liable for and primarily responsible for payment of medical-legal services rendered by a physician, the attorney may advance payment of such services on behalf of the client, in certain circumstances, in the same manner that the attorney might advance payment of other costs of litigation. Both the physician and the attorney should make certain that the patient/client understands that the patient/client is liable for and primarily responsible for payment of the physician's fees, regardless of the outcome of the patient/client's legal claim. The client is encouraged to participate in all discussions with the attorney and physician during negotiations, concerning physician charges, realizing that the client is responsible for such charges and payments.

(2) **Charges by treating physician for medical services.** The treating physician should bill the patient directly for medical services rendered to the patient, whether before or after a legal claim arises. If not previously paid by the patient, the physician's bill for medical services may be paid out of the proceeds of the patient/client's case on which the attorney is representing the patient/client, if the payment is authorized by the patient/client.

(3) **Charges by physician for Medical-Legal services.** A physician should bill the client and the attorney, jointly, for the physician's medical-legal services. This includes services in the nature of examinations requested by the attorney, reports, consultations, depositions, and other services of a medical-legal nature. The attorney should try to have the charges for medical-legal services paid as they are billed by the physician, rather than waiting for the outcome of the case, unless the physician agrees to defer payment until the case is concluded. Before an attorney retains a physician as a consultant or as an expert witness for the client, the attorney should make sure that his client has been told of the need for the consultant or expert witness and that arrangements have been made for payment of the physician's fee.

C. **Arrangements for Payment.** An attorney requesting medical information should make arrangements for compensation for the physician prior to the physician's providing the medical information. The basis of the physician's charges and who will be responsible for payment should be agreed to in advance. An itemized billing by the physician is recommended to assist expediting payment.

7. CHARGES FOR MEDICAL TESTIMONY

A. **General.** As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim, requests assistance from his/her physician to act in the capacity of a material witness, the physician should consent in order to secure the patient's legal rights.

The medical witness must not become an advocate or partisan in the legal proceedings. It is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

The physician serving as an expert witness or medical consultant is entitled to reasonable compensation for time spent in conferences, in the preparation of medical reports and for court or other appearances. These are proper and necessary items of expense in litigation involving medical questions.

8. RESOLUTION OF DISPUTES

Disputes between physicians and attorneys relating to matters covered by these Guidelines and Cooperation should be resolved under the rules and procedures of the Medical-Legal Grievance Committee of the New Mexico Medical Society and the New Mexico State Bar. (A copy of the procedures for hearing complaints by the Medical-Legal Grievance Committee follows.)

Procedures for Hearing Complaints

1. All complaints must be submitted in writing to the committee at the office of the New Mexico Medical Society.
2. The individual against whom the complaint is filed will receive a copy of the complaint and be given a reasonable time to respond. A copy of the committee procedures for hearing complaints will be forwarded to both parties.
3. The committee may strongly urge that both parties involved make a sincere effort to resolve the dispute without the necessity of appearing before the committee and to notify the committee of the results.
4. If efforts have been unsuccessful, the committee will hold an "informal" hearing. The chairman will select five members of the ten member committee to hear each case with not more than three members from either profession. Three members will constitute a quorum for the hearing and not more than two members from either profession.
5. It is expected that the chairman of the committee will perform the necessary investigation pursuant to consideration of the case before the committee.
6. Either or both parties may attend the committee hearing at which the complaint will be considered.
7. Attorneys for the parties involved will not be permitted to accompany them at this "informal" hearing of the committee. (see paragraph 14)
8. Deliberations of the committee will be held in executive session with a vote being taken by written ballot.
9. Decisions of the committee will be reported in writing to both parties involved.
10. Minutes and records will be retained.
11. Proceedings of the committee will be confidential. However flagrant or repetitive complaints may be submitted to the disciplinary committee of the respective organization by a majority vote of the committee.
12. If either or both parties do not accept the opinion of the committee, then the committee may offer a binding arbitration agreement to both parties.
13. Should both parties sign a binding arbitration agreement, the chairman of the committee will appoint three members from the five members of the committee who were not selected to consider the complaint at the informal hearing. The chairman will select no more than two members from each profession to hear the case under the arbitration agreement.
14. Attorneys for the parties involved may be present at this "formal" hearing.
15. Either or both parties may employ a court reporter for the evidentiary hearing at their own expense. However, the committee must be supplied, at no expense to the committee, a copy of any transcription made of a court reporter's verbatim records.
16. Under arbitration agreement, all records are to be maintained.
17. Deliberations of the Arbitration Committee will be in executive session.
18. Only complaints of interprofessional relations will be considered by the committee.

MEMORANDUM

To: Richard C. Civerolo

From: William Carpenter
Michael Rueckhaus
Stephen Durkovich

Re: Dissenting opinion regarding 2(B) proposed guidelines,

Dated: February 13, 1989

We respectfully submit the following as the opinion of the dissenters to the approval of Paragraph 2(B) of **Medical-Legal Guidelines for Cooperation by the New Mexico Medical Society and State Bar of New Mexico** entitled "Non-Psychotherapist Medical Information and Medical Records". The provision was approved by a vote of 4-2 of the 12 member Medical-Legal/Medical-Bar Liaison Committee at meeting held December 14, 1988.

1. *Smith v. Ashby*, (N.M. Bar Bull. Vol. 26, No. 43, October 29, 1987). Any
(continued next column)

fair reading of that case requires a conclusion that, absent patient consent or court order, our Supreme Court does not countenance *ex parte* communications between the patient's health care provider and anyone else:

... we find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient. [citing *Petrillo v. Syntex Laboratories, Inc.*, 499 NE2d at 962]

The case clearly acknowledges that a confidential relationship exists between health care provider and patient.

2. American Medical Association. Opinions of the Council on Ethical and Judicial Affairs No. 505 (1986) flatly states that it is not ethical for a health care provider to reveal confidential patient information without the patient's consent or a court order.

3. The Provision. With the above in mind, kindly examine the guideline in question which reads as follows:

B. Non-Psychotherapist Medical Information and Medical Records. Although the New Mexico Rules of Evidence do not recognize a general physician-patient privilege, information known by the physician may be confidential. Therefore a physician may refuse to discuss or disclose information which he or she deems to be confidential and not related to the injury or illness being claimed by the patient absent a written authorization from the patient or a court order. Notes made in treating a patient are primarily for the physician's own use and constitute his personal property. However, on request of the patient, a physician should provide a copy or a summary of the record to the patient or to another physician, an attorney, or other person designated by the patient.

The record is a confidential document involving the patient-physician relationship and should not be communicated to a third party without the patient's prior consent, unless required by law or to protect the welfare of the individual or the community. Medical records should not be withheld because of an unpaid bill for medical services. [Emphasis added]

(a) By stating that the health care provider may refuse to disclose information, the "guideline" really says that it is permissive for a physician to discuss with third parties those matters which the physician deems are non-confidential (the physician is the sole judge of such determination).

(b) It is further permissive for a physician to discuss matters which the physician (again as sole judge) determines are not related to the injury or illness that is the subject of the patient's claim (in a typical injury case, most physicians are not even moderately aware of the nature of the patient's claim in the first place).

(c) The guideline then says that the record (i.e. the chart) is a confidential document. Therefore, the physician can talk about physician-patient matters all he/she wants; but, showing the chart to someone is not ethical.

(d) It appears that the patient may request that a summary, and not the chart, be disclosed. It appears further that the health care provider may, at his or her option, choose to supply a summary instead of the chart. No standards are established regarding the composition of such summary.

(e) The guideline emphasizes the health care provider's property ownership rights in the medical chart; but it fails to consider the rights of the patient to have access to his or her medical records.

4. Conclusion. Not even a plurality of this Committee has endorsed a guideline addressed to health care providers and their patients which:

a. is contrary to prevailing case law and professional ethical standards. In propounding a guideline, the responsible position of the Committee, at the very least, is to assert the correct standards.

b. attempts to establish a mechanism by which a health care provider can betray a confidential relationship (and expose that health care provider to concomitant claims by his/her patient for such disclosures). The guideline would grant discretion to the health care provider (and to the patient, in the case of the "summary") in choosing what is or is not, appropriate for disclosure to third parties. The true purpose of a guideline is to set forth a standard of practice, not to approve the use of unbridled discretion.

c. gives both patient and health care provider an opportunity to edit or withhold medical information under the guise of providing a "summary." At the very least, the recipient should be advised that he/she is receiving a summary and not the original record.

d. erodes, rather than confirms, the right of the patient to have access to his/her own medical records.

e. propounds a standard which invites further litigation, rather than a standard which works toward preventing controversy. The only purpose that is accomplished by this provision is to give the blessing of our Committee to some health care provider who is willing to be "woodshedded" by the lawyer for his patient's party opponent.

We therefore respectfully dissent to the Committee's approval of the guideline.

William H. Carpenter
Michael M. Rueckhaus
Stephen Durkovich