

Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015¹

1. Introduction

- 1.1 Trust is a vital component of the doctor-patient relationship. Patients trust doctors to keep their personal information confidential including their medical records. Because of this relationship, patients should feel confident in fully disclosing their personal information to their doctor and undergoing intimate examinations and investigations that are necessary for their appropriate medical management.²
- 1.2 Doctors base their professional judgment regarding a patient's medical management on the full and frank disclosure of the patient's personal information. It is imperative that patients remain confident that this information is protected by their doctor to the extent permitted by law. There is the very real and serious risk that patients may either not attend a doctor or may limit or falsify the personal information they provide to their doctor because of fears that their privacy may be breached, potentially resulting in serious consequences for the patient's health care. This is especially relevant for patients who may already perceive or experience barriers to appropriate medical care.
- 1.3 Doctors have an ethical, professional and legal duty to protect their patients' personal information, including their medical records. Maintaining confidentiality of the patient medical record to the extent allowed at law is essential to the therapeutic relationship and secures the necessary trust and openness that characterises the ongoing communication between doctors and their patients to optimise patient care.
- 1.4 Under privacy legislation, patients have a right to know what information is held about them, a right to access their medical records (including by requesting copies) and the right to have some control over its use and disclosure to others. Doctors may have legal rights in relation to copyright of their own work. Doctors are encouraged to work with their patients and align expectations as to how patients' personal information, including information held in their medical records, will be handled.
- 1.5 The right to confidentiality of medical records is not absolute, however, and the wider community generally agrees that certain exceptions to confidentiality are in the public interest. In circumstances where exceptions apply, disclosure of the patient's medical record without the consent of the patient may be permitted such as in a medical emergency or where required by law. Where relevant and practical, doctors may need to ensure patients are made aware of such limits to confidentiality at the outset of any consultation. At all times, such disclosure should be to the minimum extent necessary to achieve the objective.
- 1.6 The AMA believes that any action by third parties, including Government, to compel doctors to disclose patients' medical records must overwhelmingly be proven to serve the public interest. The public benefit of such disclosure must outweigh the risk that patients may not seek medical attention or may modify the personal information they disclose to their doctor because of fears their privacy will be breached.
- 1.7 Doctors are encouraged to familiarise themselves with relevant Commonwealth, State and Territory legislation; in particular, legislation relevant to privacy and to medical records. If unsure about disclosing a patient's personal information including their medical record to a third party, doctors are encouraged to consult the AMA or their medical indemnity provider.

¹ If disclosure of information to members of the patients' treating team is undertaken in accordance with privacy legislation, further consent is not required.

² Personal information includes health information.

- 1.8 The following guidelines may assist doctors when responding to third party requests for a patient's medical record. For the purpose of these guidelines, a third party consists of any individual or entity outside the therapeutic doctor-patient relationship. The 'medical record' refers to any information held in the medical record and may include the full medical record, an extract of the medical record, or a summary of the medical record including digital images and electronic correspondence. The full medical record includes correspondence from third parties (eg., colleagues) if they form part of the management of the patient.

2. Consent for disclosure of medical records

- 2.1 Other than exceptions permitted by law or as required by law (see below), medical records should not, without the patient's express up-to-date consent, be disclosed to persons other than the patient unless the patient would reasonably expect such disclosure to take place, in accordance with relevant privacy legislation. For example, it is likely a patient who has consented to the collection of their personal information may reasonably expect the doctor to share the patient's medical record amongst the treating health care team.
- 2.2 The AMA is increasingly concerned that some third party requests for a patient's complete medical record may be inappropriate and unnecessary. In order to assist the patient in making an informed decision whether or not to consent to disclosure of their medical record to a third party, the doctor and patient should consider the following:
- the nature of the third party's request for the patient's medical record (eg., why the third party has requested the medical record in the first place);
 - the content and details of the medical record;
 - the implications for the patient of disclosing (or not disclosing) the record to the third party;
 - the scope and format in which the medical record should be provided; for example, the full medical record, an extract of the medical record, or a summary of the medical record;
 - to whom the medical record will be disclosed (eg., the details of the third party) and for what particular purpose; and
 - the timeframe in which the medical record should be disclosed to the third party. In most cases, once the patient has consented to the disclosure of their medical record, the doctor should undertake this within a reasonable timeframe, generally no more than 30 days after the patient has provided consent.
- 2.3 The doctor should document any consent discussion in the patient's medical record including whether or not the patient consented to the disclosure. The patient's signed written consent from parties such as insurers or solicitors should be included in the patient's record.
- 2.4 To ensure appropriate ongoing care, when a patient transfers to another medical practitioner, the doctor should, when asked by a patient, make available either a copy of the original medical record or a summary. It is appropriate that the reasonable cost for this service should be borne by the patient.

3. Patients who are minors

- 3.1 Some minors are capable of consenting to medical treatment. The law recognises that these minors, who have sufficient intelligence and understanding, are capable of consenting to medical treatment. The confidentiality of these minors should be respected; therefore, parents may not have automatic access to their medical records without the consent of those minors.
- 3.2 If a minor is not capable of consenting to their own treatment, generally, either parent can access the medical record and provide authority for disclosure to a third party. If a parent asserts a sole right to authorise disclosure, the doctor should seek a written explanation of that assertion. This may be in the form of a parenting order (see below).
- 3.3 In the situation where a child's parents are separated or divorced, there may be parenting orders made by the Family Court indicating how parental responsibility is to be exercised. The doctor ought to clarify that the parent seeking release of the child's records has the authority to do so. It is reasonable for a doctor in those circumstances to ask to see the most recent

parenting orders. The orders may not be specific as to medical care and responsibility or there may be no written orders in place. Shared parental responsibility is presumed under Family Law so if parents are separated they will generally both have parental responsibility. However, if a doctor has dealt with one parent exclusively for a number of years and it is clear that the other parent has had no involvement in the child's medical care for that time, it is prudent for the doctor to check before releasing a child's record to the absent parent to ascertain if any exception to disclosure exists.

4. Patients with impaired decision-making capacity

- 4.1 The confidentiality of patients with impaired decision-making capacity must also be respected. Immediate family or loved ones may not have automatic access to the medical records of patients with impaired decision-making capacity. For many patients, the loss of decision-making capacity is progressive rather than immediate and may fluctuate over time. Such patients should be encouraged to participate in decisions involving the disclosure of their medical records to third parties consistent with their level of capacity at the time a decision needs to be made. Some patients will have sufficient capacity to make a supported decision, where the patient makes the decision themselves with the assistance of a support person, while others with insufficient capacity will require a substitute decision, where a decision is made on behalf of the patient by a substitute decision-maker authorised by law.
- 4.2 The medical records of patients who are unable to provide consent due to impaired decision-making capacity should not be disclosed to third parties unless the substitute decision-maker would reasonably expect such disclosure to take place.

5. Patients who are deceased

- 5.1 Doctors' ethical, professional and legal duty to protect the confidentiality of medical records continues even after the patient has died.
- 5.2 Information from the medical records of deceased persons cannot be released other than according to statutory requirement, under legal compulsion, or with the consent of the executor or appointed administrator of the deceased person's estate. Doctors should seek advice from their medical indemnity provider about releasing the records of deceased persons to third parties (including family members).

6. Where disclosure of medical records to third parties is authorised

- 6.1 There may be circumstances where the law authorises, but does not require, a doctor to disclose information from a patient's medical record, regardless of whether or not the patient has provided consent. This may include:
- certain types of medical research;
 - certain health service management, funding or monitoring activities (eg, audit and quality assurance, accreditation, incident monitoring);
 - to lessen or prevent a serious threat to the life, health or safety of any individual or to public health or safety;
 - taking appropriate action in relation to suspected unlawful activity or serious misconduct;
 - reasonably necessary for establishing, exercising or defending a legal claim or complaint.
- 6.2 If patients' medical records are to be used for clinical or epidemiological research without specific patient consent, it is incumbent on the treating medical practitioner to ensure that the patient's identity is safeguarded and that any legislation or statutory guidelines are complied with. Information should be disclosed only for medical research relevant to public health or public safety conducted according to a written protocol approved by a recognised ethics committee and in accordance with any statutory guidelines. The disclosure should be restricted to the minimum necessary for the research. The protocol should explicitly provide for the maintenance of confidentiality of any individually identified or identifiable data. The treating doctor should reserve

the right not to disclose information from the medical record when, in his or her opinion, disclosure would be contrary to the patient's interests.

- 6.3 In a medical emergency where the patient cannot provide consent, a doctor may disclose information from a patient's medical record to the extent necessary to protect the patient's life or health or to prevent a serious threat to the life, health or safety of any individual, or to public health or safety.

7. Where disclosure of medical records is required

- 7.1 There may be circumstances where the law compels a doctor to disclose a patient's medical record, regardless of whether or not the patient has consented, such as by statute, warrant, subpoena or court order.
- 7.2 Doctors may be required by statute to disclose information from a patient's medical record in cases of mandatory disease notification or mandatory notification of child abuse.
- 7.3 In cases where there is a warrant, subpoena or court order requiring the doctor to produce a patient's medical record, some doctors and/or patients may wish to oppose disclosure of clinically sensitive or potentially harmful information. The records should still be supplied but under seal, asking that the court not release the records to the parties until it has heard argument against disclosure.
- 7.4 If disclosure of information from a patient's medical record is permitted or required by law, where appropriate the patient should be informed of that having occurred and this information should be documented in the medical record.

8. Fees for providing copies of medical records

- 8.1 Doctors are entitled to recover from the patient or from any other legally authorised person or authority requesting the information, the reasonable cost of providing access to the information contained in a medical record. In some jurisdictions, legislation determines the maximum amount a doctor can charge.
- 8.2 Within the limits of any relevant legislation, doctors should establish their own reasonable fees for providing copies of medical records. This would include an assessment of the time taken for administrative staff to copy the records and the cost of each photocopy or the cost of printing the records. Members are encouraged to contact the AMA office in their State or Territory for information about any legislation that might apply in that jurisdiction that sets fees for the copying of medical records. In States and Territories that do not regulate the fees for copying medical records, doctors might find the information provided by law societies on the cost of photocopying in the legal sector a useful reference.

For further information:

Office of the Australian Information Commissioner. www.oaic.gov.au
AMA Privacy and Health Record Resource Handbook for Medical Practitioners in the Private Sector.
Canberra, 2014.