



the Reporter

TEXAS MEDICAL INSURANCE COMPANY
risk management news for Texas dentists — 2008

Risk management for the EDR avoiding common documentation pitfalls

by Laura Brockway, ELS

The promise of electronic dental records (EDR) is a more accurate, legible, and comprehensive patient record, available to dentists at the touch of a button. As more dentists begin using EDRs, it's important to note that the basic rules of documentation still apply and that EDRs come with their own risk management considerations. This article will cover the documentation pitfalls specifically related to EDRs and how to avoid them.

Implement a strict policy regarding passwords and security. Authorized users of an EDR system are given passwords. The system associates the person who enters that password as the author of the entry in the patient's record. It is imperative that passwords only be used by the individuals to whom they are assigned.

Ideally, staff members should not have access to the dentist level of security because that would allow them to add or alter information as if they were the dentist. Staff members should have their own passwords and level of security clearance based on their job functions. Again, avoid sharing passwords simply to make the entry of information easier.

Not all employees need access to the EDR. Some practices limit access to those in direct patient care. Others may allow non-clinical staff to view (and not enter or edit) information in the EDR. When an employee who had access leaves the practice, delete his or her password immediately.

Ensure patient encounter records are locked. The information entered into the EDR is likely to be more accurate if done immediately after the visit. The date of dictation or date of transcription should be included. The author of each entry must take specific action to verify that the entry is his or hers and that it is accurate. It is advisable that once a patient encounter entry is completed, the author should sign it and it should be locked in the system. Not all EDRs are set up to perform this task.

If information needs to be added or comments made after the entry has been locked, the new entry should be clearly identified as an addendum with current date, reference to the date being amended, the reason for the late entry, and electronic signature. Anyone who makes addendums should ensure that they are clearly marked as such. Unclear, after-the-fact entries may be viewed as alterations to the record, which can compromise the defense of litigation.

Be aware that templates can import old or inaccurate information. Most EDRs have been designed with templates for patient encounters. While these drop-down menus save time, dentists may not be aware that some EDRs re-populate the same data in the templates for each subsequent visit. If information from a previous visit is picked up from the templates, it can give the impression that the treatment plan is not working or that the dentist is not editing the record. Conversely, some programs may be set up so that specific complaints default to "resolved" if the dentist or the patient

does not renew that complaint on the next visit. Notes should be individualized for each patient encounter, and relevant sections reviewed to avoid importing incorrect, redundant, and irrelevant information.

Make sure the dentist's sign off is clear. Another potential weakness identified in some systems — it is not clear to an outside reviewer that the dentist signed the record at the end of the visit. While the dentist's signature could most likely be verified somewhere in the system, the note itself needs to be signed. When possible, initiate an electronic signature when documenting patient encounters. Additionally, some programs do not allow each clinical staff member making entries to authenticate the entry with a signature or initial. It is recommended that each staff member sign or initial all entries in the dental record or that the EDR "audit trail" be adapted to trace staff entries.

Review orders or emails before signing off with electronic signatures. In conjunction with the previous recommendation, signing an order is an affirmation that the order is correct. Auto-authentication techniques that do not require the author to review the entry should be avoided. Do not "universally" click off on a series of orders or emails without reading them.

Enable tracking mechanisms. Most software programs include a tracking system to help ensure that patients

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Asset protection for

by Laura Brockway, ELS

Editor's note: The information provided in this article is not to be construed as legal advice and should not be relied upon without specific consultation with a professional.

It's an unpleasant fact to face — any dentist at any time could be sued. And with any lawsuit comes risk to a dentist's personal assets. If a judgment exceeds your professional liability insurance policy limits or if a cause of action falls under the policy exclusions, a dentist's personal assets or a practice's accounts receivables may be exposed. Without advanced planning, these hard-earned assets could be lost. The solution — asset protection.

"Just as you encourage patients to take preventive measures to ward off health problems, it is prudent to organize your financial affairs and assets to guard against risks in advance," says Austin attorney Ken Vanway.

For Fort Worth attorney Marvin Blum, asset protection is one part of the overall financial and estate planning process. "You build a structure to protect assets from being taken by future creditors, especially if there is a substantial judgment against the dentist that exceeds his or her insurance limits," he says.

Why dentists need asset protection

According to Mr. Blum, professional liability is just one risk dentists face. "Dentists can be sued for other reasons — if a patient is injured in the office or parking lot, slip-and-fall claims," Mr. Blum says. "Dentists have a reputation as having deep pockets. If one party is perceived as having deep pockets, they are more likely to be sued even if it's an automobile accident."

Many dentists believe the threat of an excess judgment or jury verdict was mitigated by the health care liability reforms of 2003. According to Mr. Blum and Mr. Vanway, dentists should still be concerned about asset protection for several reasons.

The 2003 reforms placed caps on non-economic damages only. Economic damages — which can include past and future medical expenses and lost wages — were not capped. "If the plaintiff was a high wage earner, the judgment could be substantial," says Mr. Vanway.

Additionally, the reforms only affected health-care related liability claims. Other types of liability claims are not subject to the caps on non-economic damages. Mr. Blum also points out that the protection afforded by the caps could be short-lived. "There is no guarantee these reforms will stick. They continue to be controversial, and it is very likely the legislature will be pressured to either raise the cap or repeal the law," Mr. Blum says. "It's important for dentists to have asset protection strategies in place before that happens."

Vulnerable areas

"When deciding on an asset protection plan, we look at a client's financial statement to first determine what is protected by statute. What cannot be taken away from you," says Vanway. These "protected assets" can include:

- The dentist's home, if he or she has lived there longer than 40 months. The Texas Property Code provides that a "homestead" is exempt from the claims of the owner's creditors, other than valid encumbrances properly fixed on the property. In Texas, this homestead protection was unlimited, with no dol-

lar limit on the value of the property. However, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 placed limits on the Texas homestead exemption. The unlimited Texas exemption only applies if the home has been owned for more than 40 months. If the home has been owned for a shorter period, the homestead exemption is limited to \$125,000.

- \$30,000 in personal property for a single adult and \$60,000 in personal property for a family. The personal property eligible for this exemption includes home furnishings, family heirlooms, vehicles, personal property used in a trade or business, and jewelry (not to exceed 25% of the applicable dollar limitation).

- Qualified retirement plan benefits and IRAs are generally exempt from creditors. The 2005 Bankruptcy Reform Act limited this exemption to \$1 million per individual (\$2 million for a husband and wife.) IRAs are only exempt to the extent that the contributions were tax deductible when made.

- Annuities and life insurance — Texas has an unlimited exemption for insurance benefits, employer-provided annuities, and annuity contracts purchased by individuals.

- "All other assets — other real estate, brokerage accounts, interest in a practice, bank accounts, notes, are subject to creditors," says Mr. Vanway.

One particularly vulnerable area for dentists — their accounts receivables, which may represent their largest business asset. "A large accounts receivable balance presents an attractive target to a creditor. It is relatively easy for a creditor to collect a judgment because the court can appoint a receiver to open the mail and take the payments made on the accounts receivable balance until the judgment is satisfied," says Mr. Blum.

"In a group practice, if any one dentist has a judgment against him or her, all of the practice's accounts receivables are exposed because they are an asset of the practice," says Mr. Vanway. This applies even for a judgment against a dentist who is no longer with the group.

Accounts receivables are susceptible even if the dentist operates with an entity that limits liability. "If the dentist is the sole owner of the entity, the creditor can get a judgment against the entity too, which gives the creditor access to the accounts receivable," says Mr. Blum. "Also, if the dentist operates as a sole proprietor and owns the accounts receivable personally, then a creditor who has a judgment against the dentist can take the dentist's accounts receivable."

Physicians who are married and hold their assets as community property should be aware that 100 percent of community property is vulnerable in a claim against either spouse. "Many dentists believe that only their half of the community property can be taken. But a creditor can take 100 percent of the property, wiping out both the physician and the spouse," says Mr. Blum. (Texas is one of 10 states that follow the community property system, meaning that property acquired by spouses during a marriage is viewed as one total "community" of property.)

Strategies

Fortunately, a number of strategies can be employed to protect a dentist's vulnerable assets. "The process can go from simple to very complex. I usually lay out the continuum to clients, and they pick how far we go by what it takes for them to sleep well at night," says Mr. Blum.

dentists



An example of one simple strategy is partition planning which can be used to protect community property. “With partition planning, the husband and wife agree to partition community property into separate halves. This is a simple document that protects the separate property of the innocent spouse from exposure to claims against the other spouse,” says Mr. Blum.

Dentists can also take advantage of state law exemptions and pay off their home mortgage, if they have owned the home longer than 40 months. Another option is to put money in qualified retirement plans, though the protection is limited to \$1 million per individual. Dentists can also purchase life insurance or annuity products, which are exempt from creditors’ claims. Another option is to set up trusts for children or grandchildren.

One strategy along the middle of the complexity spectrum includes creating a Family Limited Partnership. “One way to protect personal assets is to create a Family Limited Partnership [FLP] and transfer title of those assets to that entity. If there is a judgment against the dentist, the assets in this entity cannot be touched,” says Mr. Vanway.

Under an FLP, a creditor holding a claim against a dentist has limited rights to satisfy that claim with respect to the partnership interest held by that person. “Creditors can end up waiting and waiting for years. This tends to make creditors frustrated and inclined to settle for less than the judgment amount,” says Mr. Blum. “It also makes the personal injury attorney less likely to take the case because it is more difficult for them to recover their fees and expenses.”

To protect accounts receivables, Mr. Blum implements a strategic medical accounts receivable transfer or SMART plan. “For this, you borrow funds from a bank and then use the proceeds to purchase an asset that is exempt from creditor claims, such as an annuity. The receivables are pledged as collateral for the loan and cannot be reached by creditors,” Mr. Blum says.

Successful asset protection

According to both Mr. Blum and Mr. Vanway, the key to successful asset protection is to do it early. It is very difficult to protect assets against existing claims, but it is relatively easy to protect assets against future claims. “Procrastination closes the door on all these strategies,” says Mr. Vanway. “Once you have knowledge that a lawsuit or judgment is pending, it is considered fraud to transfer the assets after a suit has been filed.”

Additionally, dentists should understand that the process is very individualized and how complex a plan will be depends on the dentist’s circumstances. However, when asked if dentists could implement only one asset protection strategy, what should it be, both Mr. Blum and Mr. Vanway said creating a Family Limited Partnership.

Dentists may be hesitant to begin an asset protection plan for a number of reasons including a lack of understanding of the process or a lack of time. “I think there is always a mentality that it will never happen to me. But statistics show that over a dentist’s career, the odds are very high that he or she will lose sleep over a potential claim,” says Mr. Blum. “When a claim arises and you have this in place, you know it will not wipe you out.”

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Asset protection tips

How to find an attorney

Both Mr. Vanway and Mr. Blum recommend that dentists employ an attorney who is Board Certified in Estate Planning and Probate Law and who has extensive experience in this area of law. “Dentists should look for a board certified attorney with good references and 10 or more years of experience in asset protection,” says Mr. Vanway.

Time involved

According to Mr. Blum, the time involved in setting up a plan depends on the complexity of that plan. For the simplest plans, it is a 3-meeting process with the attorney. At the first meeting, which would last about two hours, the dentist and attorney discuss the dentist’s assets and financial situation. The attorney would then analyze this information and make recommendations. These recommendations would be reviewed at a second meeting, which would take about one hour. The attorney then

begins to implement the recommendations, and there is a third meeting to review and sign documents. This meeting may take about two hours. For more complicated plans, it could take several meetings.

Cost

How much an asset protection plan will cost also varies with the complexity of the plan. Mr. Blum estimates the cost for partition planning and using state law exemptions to be \$2,000. The cost to create trusts could be \$3,000. The cost to create an FLP and implement a complex plan could range from \$5,000 to \$10,000. According to Mr. Vanway, the investment in an asset protection plan is generally a one-time expenditure and will be fully or partially income tax deductible.

“The cost is very individualized and clearly this is a situation where you get what you pay for,” says Mr. Blum.

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have completed referrals. However, some practices may not be using these systems or have not discovered them. These tracking systems can minimize exposure to allegations of failure to diagnose and can lead to better patient care. Specifically, they can provide ways to:

- verify that the patient keeps the appointment;
- confirm receipt of a consultant's report;
- prompt a call to the consultant if a report is not received;
- make sure the dentist reviews the report;
- communicate the results to the patient;
- arrange for follow up; and
- document all these steps with dates and electronic signatures.

It is strongly recommended that dentists employ these tracking systems. Additionally, if you are planning to purchase an EDR, avoid those without a tracking system.

Establish a system to appropriately capture paper and other external clinical documents. Optimally, all paper documents should be scanned into the electronic record for easy accessibility. These documents could include paper records used before implementing an

EDR, consultant reports, or records from other dentists. Additionally, a process should be implemented to ensure that, once scanned, the paper documents are properly stored or destroyed.

Prescriptions are not always captured in the EDR. E-prescribing can be very helpful if it saves the information as part of the patient's record. If dentists who use EDRs are not e-prescribing, prescriptions should be captured by scanning the paper prescription into the EDR or fully documenting the name, dose, quantity, instructions, and refill amount. Documenting only the name of the medication does not meet the documentation guidelines set by the Texas State Board of Dental Examiners. The same is true when dispensing sample medications to a patient.

Ensure records are backed up reliably. The HIPAA security rule requires that patient data be backed up to ensure it can be retrieved if a hardware failure or other event occurs. Back-ups can and do fail and this could result in the loss of all your patients' records.

Creating a back-up data set is only the first step. The back-up record must be tested regularly to ensure that all appropriate data are being copied, and that data restoration is possible. Testing should occur for all back-up

types, including in-house creation on a removable hard drive or for processes that send the information over the Internet for offsite storage. Even if an EDR vendor is providing offsite back up, confirm that the data is saved appropriately.

Make sure the records are complete when providing printed copies. Many dentists using an EDR do not regularly print a patient record, and they may be unaware that clicking the print button on an EDR does not always provide a complete record. A patient or subsequent treating dentist could receive an incomplete record as the result of the EDR printing protocols. If the records request came from an attorney, and that attorney received an incomplete record, this could cause the attorney to accept and file a malpractice claim based on incomplete information. Confirming that a complete record is sent is a prudent risk management practice.

Conclusion

Whether you are purchasing your first EDR system, have just begun to implement one, or have used one for years, following the recommendations in this article may help you reduce risk and enhance patient safety.

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