

“Tips for Doctors Post Katrina”

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1. What are the legal consequences to me if my patient’s medical records were destroyed?

Under Louisiana law, physicians are required to retain their patients’ records for a minimum of six years. Not only does this support continuity of care, but from a legal perspective, your medical records often contain information that is critical to your defense if your patient files a medical malpractice complaint against you. If your practice was located in an area that had significant rain, flood or mold issues, your patients’ medical records and/or radiologic films may have been destroyed.

While the law requires you to retain your patients’ records for at least six years, it does not appear that our courts have ever addressed how a doctor should be penalized if the records are destroyed. Given the extraordinary devastation of Hurricane Katrina, it is highly doubtful that an affected physician would be penalized.

As a practical matter, you should be mindful of the patients’ privacy rights under state and federal law when you discard the destroyed records. For example, you would probably not wish to put them on the curb where third parties can view your patients’ names or other protected information.

2. What do I do if one of my patients alleges medical malpractice and I don’t have his medical records post-Katrina?

Medical malpractice cases are often won or lost based on the contents of medical records that were prepared contemporaneously with the medical care rendered. Medical records are objective evidence of your care of the patient. They can provide powerful proof in your defense. The patient will also be disadvantaged without access to his records, but he may have definite (but not necessarily accurate) memories of discussions with you and he will have strong ideas about why he believes you committed malpractice (again, not necessarily accurate.) If you had a busy practice, had seen the patient multiple times or only once or twice, or if the care at issue occurred months or years ago, without your records, you will likely have difficulty remembering the specifics of your interactions with the patient and your treatment of him.

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If possible, you will want to recreate your patient's medical record through other means. If the malpractice claim was filed at least a few weeks before the storm, perhaps your attorney or the attorneys for other parties already have a copy of your office chart. Perhaps another physician has important excerpts of your chart in their records. It is also possible that copies of hospital, outside lab or radiologic tests are available.

As a side note: You should know that under Louisiana law, patients can claim “spoliation” of missing records. They have to prove that the records were intentionally destroyed for the purpose of depriving the patient of their use. Generally, a physician's failure to produce evidence that is available to him raises a presumption that the evidence would have been detrimental to his case. However, this adverse presumption is not applicable when the failure to produce the evidence is adequately explained. If the records were destroyed by the affects of the storm, this should certainly constitute an “adequate explanation.”

3. What do I do about medical records that were damaged but not destroyed ?

If your patients' records were damaged, but salvageable, you are probably required to make reasonable efforts to preserve them under your obligation to retain them for at least six years. The law would probably impose a duty on you to “act reasonably under the circumstances.” There are companies that specialize in document remediation. Under HIPAA, make sure you make the company you retain a “business associate.”

4. What are my responsibilities to my patients if I am ending my practice in Louisiana?

The standard of care requires you do what is reasonable to ensure your patients' continuity of care. If you are leaving Louisiana, notify your Louisiana patients that you are terminating your relationships with them. Within the notice, you might wish to recommend that the patients secure a new physician, particularly if they have chronic conditions that require on-going attention or an acute condition that requires timely attention. Also, inform your patients of who will have custody of their office charts and how they can get access to them. If your patients' records were destroyed or damaged, you may want to notify your patients of that fact. Some of your patients may have undergone testing before the storm, and you had not had an opportunity to report the results to them. Advise your patients that if that occurred, they should contact a new physician immediately for follow-up.

From a medical malpractice perspective, notice of termination of your relationship serves two purposes. One, it evidences your professionalism and shows that you care about your patients' future well-being. Also, under circumstances, it might help “start the clock” on the time your patient has to file a malpractice complaint against you.

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There are several ways you can try to communicate with your patients. If your office records are intact, you might want to mail the notice to your patients at their last known address. If you cannot do that (or even if you can), also post your notice on one of several web sites designed to connect doctors and patients. Some of those are: FindLaDocs.com; kathrinahealth.org; lhaonline.org (the Louisiana Hospital Association website); Inha.org (the Louisiana Nursing home website); nola.com (see the missing persons database.)

6. Did I commit medical malpractice if I was not able to timely treat my patients after the storm?

Of course, each case is unique, and we are not able to provide a blanket answer to this question. However, Louisiana law does recognize the “Act of God” concept or defense. It has been defined as “a providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care or by the use of those means which the situation renders reasonable to employ . . . An injury by an Act of God is an injury due directly and exclusively to natural causes which could not have been prevented by the exercise of reasonable care and foresight.”

No doubt, Louisiana courts will be dealing with the Act of God defense in various contexts post-Katrina.

7. How do I get a reliable medical history on my new patients whose previous records were destroyed?

You will be challenged to obtain reliable medical histories from some patients who come to you for the first time as a “post-Katrina” patient. Many people had physicians whose offices were destroyed, or who are no longer in Louisiana. Make sure your records clearly reflect that this new patient’s history is uncertain due to the inability to obtain information post-Katrina. Ideally, your chart will also reflect the reasonable efforts you undertook under the circumstances to obtain a reliable history.

For thousands of citizens affected by the hurricane, obtaining correct medications is a huge issue. Fortunately, physicians may log on to Katrinahealth.org for help. Prescription histories for over 860,000 people from the affected areas are on-line. The information comes from chain pharmacies, Medicaid, the Department of Veterans Affairs, and major health insurance plans. The information may not be comprehensive, but it is helpful. To access the site, you will need to contact the American Medical Association at 800-262-3211 to obtain an ID and password.