

PREPARING THIRD PARTY MEDICAL REPORTS, RECORDS AND CERTIFICATES

WHAT TO INCLUDE, WHICH PROCEDURES TO FOLLOW AND WHO CAN SEE WHAT

Deirdre Malone,
Coryn Kelleher Tobin



As a doctor, sometimes you'll be asked to prepare reports on your patients (or any patient) for third parties including employers, solicitors and insurance companies. Examples of these situations include:

- When acting on behalf of an employer: pre-employment assessments or fitness to return to work following any extended absence
- When acting on behalf of an Insurance Company: E.g. to produce a PMA or assess a patient for the defence of litigation
- Reviewing patients for the purpose of a report to an Insurer: E.g. a travel insurance claim made by the patient

A patient may seek a copy of the records, report or certificate you have provided and the question of whether the patient is entitled to a copy is often asked.

CONFIDENTIALITY

A patient is generally entitled to expect that the information they give to you during a consultation will be kept confidential, but there are limited circumstances when you are permitted to breach your duty of confidentiality to a patient. When a patient attends for assessment on the instructions or direction of a third party, such as an employer, solicitor or insurer, the patient must understand that the confidential information provided by them during the consultation will be given to that third party and may well include past medical history.

CONSENT

While a patient may understand that by carrying out the assessment you will be reporting to a third party, you should also have a written consent from the patient, generally provided by the instructing party when the assessment is requested. You should also outline the reason for reviewing the patient, which will be relevant in the event of a request for a copy of the records or report at a later stage by the patient. It can be as simple as reviewing the written form of consent with the patient, for example, saying:

"Company X has asked me to review you today to see if you are fit to return to your role as XX within the Company. I will send a report of my findings to the HR Manager/Director of the Company at the end of this consultation. I will only include information that is relevant to this assessment. I will discuss my findings with you, so that you know what I will say in the report and you can ask me any questions that you may have about my diagnosis."

And you should seek clarification that the patient understands your role before starting the formal assessment.

ASSESSMENT

The assessment should be specific to the incident or illness for which you have been asked to report but there are occasions when, acting on the instructions of a third party, you may find yourself in a situation where the patient presents with a more sinister possible diagnosis. As a GP, you are responsible for the overall management of your patients, but not necessarily for patients for whom you have been asked to carry out a particular assessment, after which there will be no ongoing relationship. Care for any such possible diagnosis should be transferred back to the patient's primary GP and this information should be transmitted promptly.

In these situations you should notify the patient of any potential concerns and possible adverse findings in a sensitive manner. You should advise the patient that if they consent, you may contact their own doctor for follow-up, and you should also advise the patient to make contact with their doctor too.

TO WHOM IS THE DUTY OF CARE OWED?

Any information you provide in a report or certificate must be factually accurate. You must make sure you are not influenced by any inducements or pressures you may receive from those instructing you.

Fundamentally, you owe a duty of care to the person instructing you, such as the company/employer. However, you must also afford the patient the same standard of professionalism as applies to the care and treatment of any other patient.

CASE STUDY

A doctor is asked to review a patient and certify the patient as fit for a particular role to a prospective employer. The role involves heavy lifting and manual handling. The patient has a history of significant back pain. The doctor certifies the patient as fit for the new job. The patient subsequently sustained an injury in the new job.

1. The doctor here has a duty of care to their patient. To refer to a relevant court decision, *Hedley Byrne & Co Ltd -v- Heller & Partners* [1964] AC 465:

'[I]f a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy.'

2. The doctor owes a duty of care to the prospective employer (even though there is no contractual relationship between the employer and the doctor).

It is a generally accepted principle that a medical doctor owes a duty of care to the person to whom the statement is made and who relies upon it (*Kapfunde -v- Abbey National plc* [1998] IRLR 583). In this case study, the doctor was fully aware that the certificate would be provided to the employer for the purpose of certifying that the patient was fit for the specific role.

EXCEPTIONS - THE DATA PROTECTION ACTS

The Data Protection Acts 1988-2003 (and Freedom of Information Act 1997-2014) permit a patient to take up copies of their medical records, which will include medical reports and certificates held about that patient upon the patient's written request.

There are exceptions set out in the legislation permitting a doctor to refuse to release the medical information sought to the patient. These include:

1. The Data Protection (Access Modification) (Health) Regulations, 1989. It states that 'health data' shall not be provided to a patient 'in response to a request for access, if that would cause serious harm to his or her physical or mental health.'
2. If the report was prepared specifically on behalf of the opposing side in relation to existing (and not simply contemplated) litigation, the report and the correspondence with the instructing solicitor will be privileged and does not have to be disclosed to the patient.

In recognising that doctors are regularly presented with requests for reports from third parties, you should also remain cognisant of the fact that the patient is likely (save as outlined above) to be entitled to take up a copy of that report. Only in the event of the two limited exceptions outlined above, can you refuse to release the records/notes/report and/or certificate to the patient.

At all times you should be mindful not to release reports or notes that mention a third party.

For example, if the letter of instruction requests a Certificate of Fitness to return to work following an extended absence of an employee, it is likely that the employee will be entitled to take up a copy of the notes taken at the time of assessment, together with the report/certificate furnished to the employer.

In contrast, if you're asked to prepare a report by the employer's solicitors in relation to the condition and prognosis of a patient in respect of a Personal Injury action, such records and reports will attract litigation privilege and the patient will have no entitlement to receive a copy.

The advice for all doctors is to proceed with caution and if in any doubt, contact Medisec for assistance.

