

Spoliation of Evidence
Presentation 6

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Spoliation of Evidence

- > Destruction of evidence so that evidence is permanently unavailable to the court and opposing party
- > Destroyed evidence may be:
 - Medical records (written or EHR)
 - Billing records
 - Email correspondence
 - Medical device documentation
- > May involve:
 - Physical destruction (e.g., shredding)
 - Concealment of medical records
 - Relocation of evidence to a permanently inaccessible location
 - Alteration of medical records (most common)

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Spoliation of Evidence - 2

- > Alterations may include:
 - Adding to the record after the initial entry
 - Deleting entries from the record
 - Obliterating items in the record
 - Substituting a fabricated record
 - Destroying the record
 - "Losing" the record
- > May be intentional (willful) or unintentional (negligent)
- > Includes attempts to prevent or alter testimony of witnesses
- > Requirements to prove spoliation varies across states


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Spoilation of Evidence - 3

- > Effects of spoliation
 - Destroys fairness and justice
 - Increases risk of erroneous decisions
 - Increases litigation costs
 - Offends notion of fair play
 - Undermines adversarial system


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Reasons Not to Alter Medical Records

- > Medical records are relied on by:
 - Other health care providers
 - Health insurance providers
 - Attorneys
 - Claims representatives
 - Judges and juries
- > Unaltered records are your best defense
 - Medical record notes are often exculpatory
 - Falsified medical records virtually assure plaintiff victory
- > Electronic Medical Records
 - Easy to falsify but all changes are recorded


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Example - Electronic Medical Records

- > Day One
 - Surgeon performs gallbladder resection
 - Writes operative report using "cut and paste"
 - Patient is discharged home with dull ache
- > Day Two
 - Patient readmitted with severe jaundice
 - Bile duct has been transected
 - Surgeon logs onto EMR and changes operative report
- > Medical Malpractice litigation
 - Plaintiff's attorney deposes surgeon
 - Plaintiff's attorney subpoenas electronic medical records including meta data


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As Judge Learned Hand wrote in 1939,

"[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt."




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Elements of Spoliation

Five elements of spoliation are:

- 1) The intentional
- 2) Destruction of evidence
- 3) Carried out by a party to the litigation or its agent
- 4) That is relevant to the dispute and
- 5) Was destroyed at a time when legal proceedings are pending or reasonably foreseeable




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Federal & State Laws

- > No federal laws address spoliation of evidence
- > State laws generally rely on case law (common law)
- > California Law
 - No separate tort for either intentional spoliation of evidence or negligent spoliation of evidence by a party to the underlying action
 - There are non-tort remedies but only for intentional spoliation of evidence



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Remedies for Intentional Spoliation of Evidence-1

- > If the court has concrete evidence of willful suppression of evidence:
 - 1) Evidentiary Inference
 - Courts are permitted to instruct juries under Evidence Code § 413
 - California Civil Jury Instruction reads:

“You [the jury] may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.”


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Remedies for Intentional Spoliation of Evidence-2

- 2) Discovery Sanctions
 - Court can decide proper sanctions for destruction or suppression of relevant evidence on a case-by-case basis, depending on:
 - > Degree of fault of party altering or destroying evidence;
 - > Degree of prejudice suffered by opposing party; and
 - > Whether sanction will deter such conduct by others in the future
 - May include:
 - > Monetary sanctions
 - > Contempt sanctions
 - > Issues sanctions
 - > Evidence sanctions
 - > Termination sanctions


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Remedies for Intentional Spoliation of Evidence-3


- 3) Disciplinary Action against Attorneys
 - See Cal. Rules Prof. Conduct, rule 5-220
 - See Cal. Bus. & Prof. Code § 6077, 6106
- 4) Penalties for Destruction of Evidence
 - California Penal Code § 135
 - > Criminalizes spoliation of evidence to deter such conduct
 - California Penal Code § 471.5
 - > “[a]ny person who alters or modifies the medical record of any person, with fraudulent intent ... is guilty of a misdemeanor.”
 - Cal. Bus. Prof. Code § 2262
 - > “Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct.”

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Other Consequences of Spoliation of Medical Records

- > State medical licensing board discipline
 - Range: reprimand, fine, license suspension, loss of license
- > Professional liability insurance coverage cancellation
 - Legal bills won't be covered in medical malpractice case




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Publications Physicians Must Distribute to Patients

Presentation 7




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Publications Physicians Must Distribute

- > **A Patient's Guide to Blood Transfusions** [Health and Safety Code § 1645 (the Paul Gann Blood Safety Act)]
 - Must provide a standardized summary of the positive and negative aspects of receiving blood
- > **A Woman's Guide to Breast Cancer Diagnosis & Treatment** [Health and Safety Code § 109275]
 - Must provide summary discussing alternative breast cancer treatments for women who are being biopsied or treated for breast cancer




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Publications Physicians Must Distribute

- > **Gynecologic Cancers..What Women Need to Know**
[Health and Safety Code § 109278]
 - Must be distributed by physician responsible for annual gynecologic exam
 - Describes symptoms and diagnosis of gynecological cancers
- > **Professional Therapy Never Includes Sex**
[Business and Professions Code § 728]
 - Psychiatrist must distribute to patients who have previously been involved sexually with their psychotherapist during prior treatment
 - Summarizes their legal rights and remedies


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Publications Physicians Must Distribute


- > **Things to Consider Before Your Silicone Implant Surgery**
[Business and Professions Code § 2259] (Cosmetic Implant Act of 1992)
 - Must provide to patients considering implant surgery
- > **What You Need to Know About Prostate Cancer**
[Business and Professions Code § 2248 and Health and Safety Code § 109280] (Grant H. Kenyon Prostate Cancer Detection Act)
 - Must be provided when examining a patient's prostate gland
 - Summarizes availability of appropriate diagnostic procedures

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Mandatory Reporting Conditions
Presentation 8

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Reportable Conditions

- > Physicians must report certain diseases and conditions to their Local Health Officer [Health & Safety Code § 120250]
 - Failure to report a reportable condition constitutes gross negligence and incompetence
- > Syphilis
 - All cases of suspected or confirmed syphilis should be reported within one working day
 - Report to local health office of jurisdiction where patient resides
 - Can be by phone, fax, or electronically
 - Should inform patient at time of testing that, if positive, a confidential report is required and the health department may contact patient to follow up




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Reportable Conditions

- > Tuberculosis
 - Must report to the local health officer within one working day
 - The LHO has duty to report case to California Department of Public Health
 - Must also report to LHO when patients stop TB treatment as well as all household contacts of the TB case
- > Lapses in Consciousness
 - Must report immediately in writing to LHO
 - > Name, date of birth, address of every patient older than 14
 - Report will be sent on to DMV to enforce Vehicle Code
 - Will be kept confidential and used solely to determine eligibility to operate a motor vehicle




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Reportable Conditions

- > Drugs – Duty to Warn
 - Pharmacists must give warnings of harmful effects of prescribed drugs combined with alcohol or if drug impairs ability to drive
 - Physicians who dispense sample pills in their clinic have same duty to warn
- > Injuries by Deadly Weapon or Criminal Act
 - Must report known or suspected injuries by a firearm
 - Must report injuries resulting from assaultive or abusive behavior
 - Must make oral report by telephone immediately
 - Must make written report to law enforcement agency within two working days




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Reportable Conditions

- > **Pesticide Poisoning**
 - Must report pesticide-related illness to LHO by telephone within 24 hours and in writing within 5 days
 - Must also file a report with the Division of Labor Statistics and Research within 24 hours of the initial examination
- > **Child Abuse**
 - Must report known or suspected child abuse to a child protective agency as soon as possible by telephone and in writing within 36 hours
 - Failure to report is punishable by imprisonment for up to six months and a fine of up to \$1,000
 - Considered unprofessional conduct and is grounds for disciplinary action and administrative citation by the MBC
 - Failure to report is also grounds for suit for civil damages for any subsequent injury to the child




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Reportable Conditions

- > **Consensual Sex Involving a Minor**
 - Must report female child under 16 years old who is impregnated by a man who is 21 years or older
 - Must report children 14 years or older when reasonable suspicion sexual contact was non-consensual
 - Children under 14 years are presumed to be unable to consent to sexual activity so all sexual contact violates the law and must be reported
 - > where there is a reasonable suspicion of sexual activity
 - > presence of sexually transmitted disease




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Reportable Conditions

- > **Elder Abuse**
 - Must report all actual or suspected abuse of dependent adults and elderly dependent adults
 - > Includes: physical abuse, mental abuse, sexual abuse, exploitation, neglect, self-neglect, intimidation, deprivation of nutrition, and financial abuse
 - Confidential report must be made immediately by telephone and a written report sent within two working days to an adult protective service agency or law enforcement agency




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Reportable Conditions

- › Injuries from Neglect or Abuse
 - Must report patients transferred from a health or community care facility who shows signs of physical injury, neglect, abuse, or battery
 - Must be made by telephone and in writing within 36 hours
 - Person making report is immune from liability
 - Failure to comply with requirements is a misdemeanor punishable by up to six months in county jail and/or a fine of up to \$1,000
 - Failure to comply is considered unprofessional conduct by the MBC




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Patients' Access to Own Medical Records

Presentation 9




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Patients' Rights to Access their Medical Records

- › Patients have the right to inspect and obtain copies of their medical records [Health and Safety Code §§ 123100-123149.5]
- › Must permit patients to inspect their medical records within 5 working days after receiving a written request.




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Patients' Rights to Access their Medical Records

- > Patient are entitled to copies of their records.
 - Must provide copies of medical records within 15 days after receiving a written request
 - Provider is entitled to charge a fee of up to 25 cents per page or 50 cents per page for records copied from microfilm plus reasonable clerical costs


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Patients' Rights to Access their Medical Records

- > Patient are entitled to copies of their records.
 - In lieu of making copies, provider may draft a comprehensive summary for the patient
 - > Summary must be made available to patient within 10 working days from the date of request (and up to 30 days if record is of extraordinary length or patient has been discharged from a facility within the last 10 days)
 - > Provider may charge a reasonable fee based on actual time and cost for preparation [Health and Safety Code § 123130]
 - Copies of x-rays, EKGs, EEGs need not be provided if originals are transmitted to another healthcare provider within 15 days after receipt of written request


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Patients' Rights to Access their Medical Records

- > Parents of minor patients
 - Should balance right to obtain records with need to protect physician-patient relationship with minor patients [Health & Safety Code § 123115]
- > Physician may deny patient's request if
 - Substantial risk of detrimental consequences to patient having access to psychiatric or mental health records
- > Patients have right to add addendum to medical record
 - May provide a written addendum about any item in medical record patient believe to be incomplete or incorrect
 - Healthcare provider must attach the addendum to the patient's medical record and must include addendum whenever the records are provided to a third party [Health & Safety Code § 123111].


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Patients' Rights to Access their Medical Records


- > Physician may not withhold patient medical records because of unpaid healthcare bills.
 - To do so subjects physicians to sanctions by the MBC [Health & Safety Code § 123110(i)].
- > Physician's willful violation of the "Patient Access to Health Records Act" constitutes unprofessional conduct
 - MBC will consider violation as grounds for disciplinary action
 - May include license suspension or revocation [Health & Safety Code § 123110(i)].




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Terminating Patient Relationships
Presentation 10




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Terminating Patient Relationships – Example 1

A patient has been in your practice for about 10 years, has faithfully made regular visits, but has not been compliant with your medical regime for taking hypertension medications. You have repeatedly explained the risk of nonadherence, and you have rescued the patient on many occasions with emergent medications, usually in the local emergency department over a weekend. You are convinced that the patient understands but stubbornly refuses to comply. You decide to terminate this patient from your practice. Can you?



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Terminating Patient Relationships

- > Reasonable to end patient relationships
 - Cannot be discriminatory
 - Cannot be abandonment
- > Acceptable reasons
 - Treatment nonadherence
 - Follow-up noncompliance
 - Office policy nonadherence
 - Verbal abuse
 - Display of firearms or weapons
 - Nonpayment of bills




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Terminating Patient Relationships

- > Exceptions
 - Patient in acute phase of treatment
 - Physician is only source of medical care within reasonable distance
 - Physician is only source of specialized medical care
 - Patient is a member of a prepaid health plan
- > Other situations
 - Patient cannot be dismissed or discriminated against based on limited English proficiency or is in a protected class by state or federal law
 - > Americans with Disabilities Act (ADA)
 - > Civil Rights Act
 - > Emergency Medical Treatment and Labor Act (EMTALA)




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Terminating Patient Relationships

- > Other situations (cont)
 - For pregnant patients,
 - > Can end relationship in 1st trimester if pregnancy is uncomplicated
 - > Can end in 2nd trimester if pregnancy is uncomplicated and the patient is transferred to another practice prior to cessation of services
 - > Can end in 3rd trimester only under extreme circumstances (e.g., illness of physician)
 - Presence of a disability cannot be a reason for terminating relationship unless patient requires care for disability outside expertise of physician




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Terminating Patient Relationships

- > Give patient written notice of termination
 - Send by both regular mail and certified mail, return receipt requested
 - Keep copies of all materials in the patient's medical record
- > Elements of written notice
 - Reason for termination ("inability to achieve or maintain rapport")
 - Effective date (30 days is adequate)
 - Provisions for interim care
 - Offer referral suggestion for continued care
 - Offer to provide copy of medical records (attach authorization form)
 - Offer to speak with new provider to ensure smooth transition
 - Remind patient of their responsibility to follow-up and continue medical care
 - Explain that medications will be provided only up to the effective date of termination




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Closing Your Medical Practice

Presentation 11




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Closing a Medical Practice

- > Physician is terminating the physician-patient relationship
 - Should notify patients sufficiently in advance
 - Need to ensure smooth transition to new treating physician
 - Need to minimize liability of "patient abandonment"
- > Patient has ultimate decision from whom to receive care
 - Send letter to patient explaining closure including final date of practice
 - Advise patients where their medical records will be stored and how to access them
 - Include authorization form with letter to facilitate transfer of medical records to new treating physician
 - If practice is being taken over by another physician, patients can be referred to that physician.



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