

RISK MANAGEMENT



The question often arises about a physician's liability exposure in the event that their patient records are destroyed as a result of a catastrophic event such as fire, flood, or, in the case of electronic records, a major computer malfunction.

The loss of patient medical records would surely disrupt your practice and potentially cause significant problems for some patients. However, beyond the business and follow-up issues associated with trying to take care of patients without their medical records, it's unlikely that you'd be held liable for the loss of these files. To make a legitimate claim, a patient would have to establish that you or someone on your staff negligently caused the event that led to the records destruction, e.g., if an employee's cigarette accidentally started a fire in the records room.

There's no established protocol regarding steps that should be taken to protect your paper records. And certainly you're not expected to maintain duplicate copies of all medical records at some off-site location to protect against a catastrophic loss. However, if you have an electronic medical records system, back up your medical records at least daily. Your failure to do so could result in some liability exposure if the records are lost, and a patient suffers as adverse event because they're unavailable.

Probably the greatest risk you face from losing patient records is the trouble that might be encountered in defending against a malpractice claim, or even a reimbursement challenge, without the records to show exactly what you did and why.

A legal principle known as the "missing evidence rule" stipulates that judges can instruct juries that if a party to a lawsuit fails to produce necessary evidence and can't adequately explain why it can't be found, the jury can presume that the absent evidence would be damaging to the party's claim. However if records are lost due to some

catastrophic event-especially a weather-related occurrence, such as a hurricane or a wildfire- it's unlikely that the missing evidence rule would be applied.

Your best course of action to protect yourself against a missing records nightmare is to duplicate the charts of any patient who expresses dissatisfaction with your care or who has a significant adverse outcome. Keep those copies someplace other than your office-in your home, or possibly in your attorney's office- so that they'll be available if the original records are accidentally lost or destroyed. When necessary, remember to update those duplicated records. Take this precaution even if you're not concerned about a catastrophe. You will avoid the possibility of records important to the defense of a malpractice claim being lost- or inappropriately altered- in the ordinary course of business. **Remember, accurate and thorough records are often your best defense in any medical liability case.**

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