

Attesting to a patient or candidate's health? Sure, but don't fudge the truth

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Ask Part B News

Question: A local candidate for political office wants his medical records from my office and states that he plans to release them to the public and wants his physician to make a statement about his health. Obviously, under HIPAA he has a right to the records, but is it appropriate for the physician to make such a statement?

Answer: It's understandable that a candidate today may want proof that he's fit for service. Democratic presidential contender Bernie Sanders, who had a heart attack in Oct. 2019, released letters from three doctors with notes on his health in December. These letters mention conditions Sanders has or has had apart from his heart attack, including gout and high cholesterol, but there has nonetheless been a flurry of calls for him to release what are variously called in the press "full," "complete," or "comprehensive" medical records.

First of all, says Rich Cahill, vice president and associate general counsel for The Doctors Company in Napa, Calif., the candidate can have or do whatever he wants with his own records, including selectively releasing parts of them. "Anyone can personally decide to make a limited disclosure, redacting whatever he or she chooses, despite media and public demand for more," Cahill says.

But if as their provider you are asked to sign off on the candidate's health, you are bound by HIPAA to refer only to as much as your patient stipulates. "A physician who voluntarily chooses to make a certification of a candidate's physical condition can only disclose what the patient authorizes," Cahill explains. That applies even if the patient misrepresents their own condition to the press, and the press calls you for a statement, says Claire Marblestone, senior counsel with Foley & Lardner LLP in Los Angeles. "Even in that circumstance, the doctors would not be permitted to disclose information to the public without the patient's consent, as doing so would violate federal and state patient confidentiality laws."

On the other hand, you can't misrepresent the patient's condition at the patient's behest. That means, for example, you can't say the candidate is, in your opinion, up to the rigors of governance if you believe he or she is not "because state medical acts require ethical behaviors by licensees," Cahill says.

Jennifer Searfoss, JD, a Virginia-based health care consultant, refers to the infamous letter Harold Bornstein, M.D., released for then-candidate Donald Trump in 2016, stating that if elected Trump would "be the healthiest individual ever elected to the presidency."

"The Bornstein letter was not appropriate," Searfoss says, "and complaints against his license could have been made."

Eric Fader, partner in the Rivkin Radler firm in New York, thinks you should just stay out of the business of publicly certifying candidates' health. He cautions that a physician could get stuck in an awkward place "if he or she provides the complete medical record to the patient who then releases only portions of it or lies outright about its contents."

Searfoss is more sanguine; physicians can attest that the records that have been released "are complete to their knowledge," she says. "They do this on other applications such as life insurance exams." But owing to the nature of the release, she recommends you vet your statement with a lawyer.

And if the patient wants you to disseminate the records yourself as evidence of their completeness and authenticity, that's great. But "the provider should obtain the patient's written authorization to disclose his or her medical records, and the authorization should comply with federal and state law," advises Marblestone. — Roy Edroso

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