



# MEDICAL RECORD CONSIDERATIONS DURING BANKRUPTCY

By William L. Jansen, President and CEO  
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Congratulations! You've been assigned a health care provider bankruptcy. Nothing too difficult, right? What about the medical records? What are the responsibilities of the trustee for those records?

For the purposes of this article, the definition of what constitutes a medical record that should be maintained during a bankruptcy will be discussed. In addition to the medical record, there are two other health records patients consider vitally important: pathology specimens and medical images/x-rays (specifically mammograms) stored in the pathology and x-ray departments.

### First Things First, What is a Medical Record?

Medical records are known by many different names, including the Patient Record, Health Record, Clinical Record, Patient/Health Information Record, Patient File, Medical Information File, Patient/Medical Chart, etc. and are typically defined as a patient's medical history, care and treatment. In the United States, maintaining a complete, accurate and adequately protected medical record is a requirement of healthcare providers. These same requirements become the responsibility of the trustee handling a bankrupt healthcare provider. When it comes to safeguarding the medical chart, failure to protect it invites scrutiny by the authorities. In particular, the Department of Health and Human Services has the authority to issue financial penalties.

For most of us, a medical record conjures an image of a folder stuffed full of both a doctor's handwritten notes and printed documents detailing a patient's diagnosis, care and treatment. As a result of the passage of the Health Information Technology for Economic and Clinical Health Act (HITECH Act), (a part of the American Recovery and Reinvestment Act of 2009 (ARRA)), a medical record is no longer just a paper file. The medical record now straddles the paper and digital world and in many cases the medical record is fully electronic.

### Why Keep a Medical Record?

There are three primary reasons healthcare organizations maintain medical records:

(1) To provide the flow of information needed for ongoing care to the patient, to document patient care and treatment, for the patient's continuity of care, i.e. future healthcare needs., and to support patient billing operations. (While many of us give little thought to our own medical record, imagine for a moment...a loved one is seriously ill and their medical record isn't available.);

(2) To be used for research purposes, as a source of data to evaluate new and existing treatment protocols. These records are coded to collect all types of statistical information for public health purposes, and for legal defense, to name but a few;

(3) To be maintained to satisfy retention requirements under federal and state laws. Maintenance of medical records is especially significant if the organization is defined as a Covered Entity<sup>1</sup> under HIPAA. Failure to maintain and protect medical records can lead to significant fines and penalties even during organization closings and bankruptcy proceedings.<sup>2</sup>

As mentioned in the previous paragraph, medical record documentation supports the patient billing operations. The chart is needed to substantiate the treatment provided to a patient when billing an insurance carrier or a governmental body, in particular the federal government. Without the medical record, new or rejected bills cannot be properly substantiated and submitted or resubmitted for payment. A failure to maintain medical records results in reduced revenue to the estate.

The length of time medical records are required to be kept varies from state to state. Generally speaking, when determining how long to keep and protect medical records the more exacting of the state or federal regulations usually prevail. After it has been determined if any existing records can be destroyed/disposed of, it is critical that the trustee plans for the long term storage of all remaining records with legally authorized access to the information. A properly prepared destruction schedule should be developed to assure timely destruction of records once they are no longer required to be maintained.

### Medical Images/X-Rays and Mammograms

Medical images/x-rays are interpreted by a radiologist, transcribed, and the transcribed report made part of the medical record. However, because the interpretation is subjective, other providers may need to review the original image. This is particularly true for mammogram images of the breast. Mammograms are regulated separately by the Food and Drug Administration Mammography Quality Standards Act (MQSA). The act allows the patient to request the *original* image. This means the report contained in the medical record will not suffice. It is critical that the original film or digital image is available to the patient.

### Pathology Specimens

As with a medical image/x-ray, a pathology specimen interpretation is subjective. In the cases of recurring cancer or other chronic diseases, having the specimen available to a future health provider may be essential for the proper treatment of a patient. Pathology specimens must also be properly preserved. For example, paraffin tissue block specimens, require an environmentally controlled storage space. If the storage space is too hot the paraffin can melt releasing the tissue sample.

### Who Can Help

In order to maintain and protect a medical record, it is important to initially enlist the help of knowledgeable staff from the debtor healthcare provider. The key individuals who can usually provide immediate information about most of the health data across the enterprise are the Health Information Management Director, Medical Imaging/Radiology Director, Laboratory/Pathology Director, Facilities Manager and the Information Technology Director. Additionally, outside vendors, (aka Business Associates<sup>3</sup>) who maintain health information on behalf of the



#### About the Author

William L. Jansen is the President and CEO of MetalQuest. Mr. Jansen is a record trustee and custodian for closed and bankrupt health providers. Prior to 2009, he provided information services to the health care, defense, finance, and manufacturing industries. He has held clearances for the US Defense, Energy and Treasury departments.

**Generally speaking, most of a patient’s medical information is collected and stored as a paper, electronic or hybrid record. In the case of paper files, the medical record is usually stored in areas controlled by the Health Information Management Department. Older medical records may be stored off-site under the organization’s control or with a record storage company. The electronic portion of the record may be stored in a computer system, which may or may not be under the control of the organization, stored in the cloud, or offline on tapes, discs and other electronic formats.**

organization should be able to provide you with inventories of archived records and data in their possession.

### Where to Find Records and Record Types

Generally speaking, most of a patient’s medical information is collected and stored as a paper, electronic or hybrid record. In the case of paper files, the medical record is usually stored in areas controlled by the Health Information Management Department. Older medical records may be stored off-site under the organization’s control or with a record storage company. The electronic portion of the record may be stored in a computer system, which may or may not be under the control of the organization, stored in the cloud, or offline on tapes, discs and other electronic formats.

In larger organizations, the medical record primarily contains health information. In smaller organizations, (such as a medical private practice, dentist office or even a durable medical equipment supplier), the medical record is often combined with patient financial data and usually exists in paper form. However, solo practitioners and other small health providers are rapidly moving to electronic health record systems.

The following chart describes potential locations of large medical records caches. It is important to note that medical information can be found in a single location or in hundreds of locations, especially within in a large institution. Often overlooked areas include medical devices, old hard drives and other storage media such as a USB flash drive, or hard drives in copiers and fax machines. Because every closing and bankruptcy is different, a diligent search for all possible storage locations is critical.

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Figure 1. Record Storage Locations

Record Type	On-Site At Facility	Off-Site Storage Controlled by Facility	Off-Site Vendor Storage
Paper Medical Record	Yes	Yes	Yes
Electronic Medical Record	Yes	Yes Typically, older mothballed systems	Yes—Cloud Storage and/or Off-Line Formats
Medical Record and/or X-Ray Microfilm	Yes	Yes	Yes
Medical Record and/or X-Ray Microfiche	Yes	Yes	Yes
Hardcopy X-Ray	Yes	Yes	Yes
Digital X-Ray	Yes	Yes Typically, older mothballed systems	Yes—Cloud Storage and/or Off-Line Formats
Pathology Specimens	Yes	Yes	Yes

### Record Formats and Storage Media

The chart below describes possible storage media for medical records, medical images/x-ray images and pathology specimens.

Figure 2. Record Types

Analog	Digital	Other
Paper Files	Computer IT Systems	Pathology Glass Slides
X-Ray Film	USB Flash Drives	Pathology Paraffin Tissue Blocks
Microfilm	Computer Backup Tapes	
Microfiche	Hard Drives	
	CDs	
	DVDs	
	Optical Disks	
	Video Tapes	
	SD Cards	

## General Steps to Take as A Trustee in a Health Care Provider Case

When dealing with medical and/or other records during a bankruptcy proceeding or facility closing, there are several basic steps to take when providing for appropriate long term storage, access and final disposal/destruction. They include the following:

1. Secure records including electronic records.
2. If record requests must be fulfilled, then determine who and how to process and fulfill each request.
3. Determine if the organization is a Covered Entity or Business Associate under HIPAA.
4. Determine what state and federal records retention and privacy and security regulations will apply to the organization.
5. Determine if 11 U.S. Code §351--Disposal of patient records will be used.
6. Develop a comprehensive records inventory for the organization if one does not exist. If a records inventory is available ensure the document is up to date and add additional information as necessary. At a minimum include:
  - (a) Record Type and Description
  - (b) Format

(c) Storage Location and Control

(d) Time Span of Records

(e) Retention Requirements for Each Record Type

7. Develop long term plan for the storage, access and final destruction/disposal of records with dates/timeline.
8. Properly destroy/dispose of all records that are no longer required by law.
9. If using a records management vendor, ensure a comprehensive Business Associate Agreement is in place.
10. Transfer records to records management vendor.
11. Notify patients of the records transfer to records management vendor.

## Conclusion

For many trustees, dealing with medical records adds another unexpected level of detail. However, with proper planning and due diligence, the estate can avoid penalties for not protecting medical information, increase the collectable revenue, and provide critical information to patients for their healthcare and legal needs. 🏠

*(see "Helpful Organizations and Reference Material" next page)*

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## Helpful Organizations and Reference Material

Department of Health and Human Services HIPAA for Professionals <a href="https://www.hhs.gov/hipaa/for-professionals/index.html">https://www.hhs.gov/hipaa/for-professionals/index.html</a>
American Health Information Management Association <a href="http://www.ahima.org/">http://www.ahima.org/</a>
Association of Medical Imaging Management <a href="https://www.ahra.org/">https://www.ahra.org/</a>
Clinical Laboratory Improvement Amendments of 1988 <a href="https://www.cdc.gov/clia/index.html">https://www.cdc.gov/clia/index.html</a>
American Clinical Laboratory Association <a href="https://www.acla.com/">https://www.acla.com/</a>
American Society for Clinical Laboratory Science <a href="https://www.ascls.org/">https://www.ascls.org/</a>
ARMA International <a href="https://www.arma.org/">https://www.arma.org/</a>
FDA Mammography Quality Standards Act <a href="https://www.fda.gov/radiation-emitting-products/mammography-quality-standards-act-and-program">https://www.fda.gov/radiation-emitting-products/mammography-quality-standards-act-and-program</a>
i-Sigma <a href="https://isigmaonline.org/">https://isigmaonline.org/</a>

### ENDNOTES:

- <sup>1</sup> Covered Entity General Information. <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>
- <sup>2</sup> HHS Press release “Consequences for HIPAA violations don’t stop when a business closes”. <https://www.hhs.gov/about/news/2018/02/13/consequences-hipaa-violations-dont-stop-when-business-closes.html>
- <sup>3</sup> Business Associate General Information. <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html>

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##### 1. OUR MEMBERS

By becoming a member of NABT, the largest organization of chapter 7 trustees in the U.S., you'll join nearly 1000 of this country's approximately 1200 active panel trustees and many others, including attorneys, auctioneers, and service providers.

##### 2. LISTSERV

If you need to find a realtor in another state or would like input on an interpretation of the Code, you can ask for assistance from your fellow NABT members (including trustees, attorneys, suppliers, auctioneers, and others) throughout the country using the Listserv.

##### 3. A PLACE TO SELL ASSETS

For those unusual items, or assets that are desirable to buyers outside your district, list the asset on the NABT website and set your own terms of sale.

##### 4. HELPLINE

If you have a question of a sensitive nature, or one you'd just prefer to discuss with an experienced trustee from outside your district, give the NABT Helpline a call and a trustee will contact you within 24 hours to offer assistance.

##### 5. AMERICAN BANKRUPTCY TRUSTEE JOURNAL

Four times a year you'll receive a complimentary issue of our magazine, highlighting issues particular to trustees and those who work in the chapter 7 bankruptcy field. Some say this alone is worth the price of membership!

##### 6. CREDITOR WIKILIST

Search for creditors, add new creditors, and collaborate with other trustees to edit existing contacts. Need a creditor to file a claim? Search the WikiList. Looking for your defendant? Consider the WikiList.

##### 7. OPPORTUNITY FOR INFLUENCE

For the past 25 years, NABT has worked with the U.S. Trustee, legislators and others to improve the bankruptcy system for trustees and others.

##### 8. DISCOUNTED CONFERENCE FEE

NABT members are offered reduced rates for our Spring Seminar and Annual Convention. Each year you'll have two opportunities to gain continuing education for trustees and to meet with other trustees, their staff, and related professionals.

##### 9. ONLINE LIBRARY

On our website, you'll find Seminar Materials, Trustee Tips, Disaster Plans, Helpful Links, ABTJ Articles and much more.

##### 10. REFERRALS

Many of our members elect to use other NABT members when necessary to locate professionals in other areas, whether for trustee matters, other legal and accounting issues or even personal concerns.