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Health Care Confidentiality: Current Virginia Law and a Proposal for Legislation

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Health Care Confidentiality: Current Virginia Law and a Proposal for Legislation

By Paul Lombardo

What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.¹

This is Hippocrates' ancient prescription for medical confidentiality. Once presumed only for physicians, the rule of confidentiality is now a universal ethical requirement for those who work in health care settings, including psychologists, social workers and others who provide mental health services. The ethical norm for practitioners is matched by an expectation on the part of patients who yield the secrets not only of their bodies, but of their minds, in an effort to achieve health.

Some have argued that developing practice trends give too many people access to a patient's records. As a result, the foundation of trust characteristic of the doctor/patient relationship has eroded, they say, and the ethic of shared secrets is threatened.² Additionally, the new technologies that require computerized medical records and convenient electronic data transmission have made the protection of clinical information difficult. Legal practice has also evolved, and demands for medical evidence in all types of litigation—from personal injury, to employment actions to child custody—have become commonplace.

Certain kinds of medical innovations have led to proposals for new laws. For example, the availability of previously unknowable genetic information set the stage for the devel-

Also in this issue:

| | |
|------------------------------------|-----------|
| <i>In the Federal Courts.....</i> | <i>28</i> |
| <i>In the Virginia Courts.....</i> | <i>32</i> |
| <i>In Other State Courts.....</i> | <i>39</i> |
| <i>Case Index.....</i> | <i>44</i> |

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opment of a model genetic privacy act,³ and general concerns over the possibilities for abuse of electronic medical records have yielded calls for a comprehensive national law to regulate medical confidentiality. A bill that would accomplish that goal has recently been introduced in Congress.⁴ In the judicial arena, the importance of mental health confidentiality is coming into focus as the United States Supreme Court reviews the application of the psychotherapeutic privilege to actions in federal courts.⁵

Meanwhile, though some federal statutes provide extraordinary protection for certain kinds of records,⁶ and occasional exceptions that supersede state prohibitions on disclosure,⁷ medical confidentiality is generally a creature of state law.

Virginia Confidentiality Law

Virginia's law relating to confidential medical or mental health information is contained in a patchwork of statutes that are difficult to find and more difficult to understand and apply. Taken together, those laws neither instruct the subject of sensitive information when his or her expectation of confidentiality will be respected, nor clearly alert the professional when a disclosure of confidential information is appropriate. Ironically, while there are as many as fifteen different statutes that allow or require doctors and psychotherapists to breach patient confidentiality, there is no statute in Virginia that specifically requires confidentiality to be maintained in both public and private therapeutic contexts. (See Table 1.)

There are, however, several statutes that protect some features of medical and mental health confidentiality. A statute on the "Rights of Patients and Residents" of facilities operated, funded or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services promises "legal rights and care consistent with basic human dignity." A specific provision of

Table 1: Virginia Law Allowing or Requiring the Disclosure of Patient Information

| | |
|------------------|--|
| § 32.1-36..... | <i>physician must report HIV+ patients, children with STDs</i> |
| § 32.1-37..... | <i>medical care facility directors and others must report certain diseases</i> |
| § 37.1-226..... | <i>patient "deemed" to consent to disclosure for purpose of insurance reimbursement</i> |
| § 46.2-401..... | <i>medical directors of state facilities must report discharged mental patients unable to operate motor vehicles to Department of Motor Vehicles</i> |
| § 54.1-2400.1... | <i>health professional immunity for making reports to police and others concerning patient threats</i> |
| § 54.1-2906..... | <i>hospital's duty to report disciplined or impaired health professionals</i> |
| § 54.1-2907..... | <i>practitioner's duty to report impaired health practitioners</i> |
| § 54.1-2908..... | <i>health professional organization's duty to report disciplined members</i> |
| § 54.1-2909..... | <i>organizational duty to report malpractice, discipline in other states, professional incompetence, etc.</i> |
| § 54.1-2966..... | <i>physician to report the disability or infirmity of a person licensed to operate aircraft</i> |
| § 54.1-2966.1... | <i>physician to report the disability of a person licensed to operate a motor vehicle</i> |
| § 54.1-2967..... | <i>physician to report wound inflicted by certain weapons</i> |
| § 54.1-2968..... | <i>physician immunized for identifying any person under the age of 22 who has physical or mental handicapping condition</i> |
| § 63.1-55.3..... | <i>physician and others must report evidence of adult abuse</i> |
| § 63.1-0248.11 | <i>physician and others must report evidence of child abuse</i> |
| § 65.2-607..... | <i>workers' compensation exam by physician designated by employer not privileged</i> |

the statute allows a facility resident to “[h]ave access to his medical and mental records and be assured of their confidentiality”⁸

Another statute settles the ownership of medical records in health care providers while simultaneously mandating that “providers shall keep medical records confidential and only authorized personnel shall have access to such records.”⁹

The only other broad legal protection of confidential information is provided by a privilege against compelled disclosure in the litigation context.

The Privilege Statutes:

Virginia Code §§ 8.01-399; 8.01-400.2

Two statutes protect against compelled court disclosure of confidential information communicated during a health encounter. Section 8.01-399 covers communications made to physicians and other “duly licensed practitioners of the healing arts,” specifically including clinical psychologists. The privilege insulates “any information. . . acquired in attending, examining or treating the patient in a professional capacity.” It is operative in civil (but not criminal) litigation except when the patient’s physical or mental condition has been put at issue, or in the court’s judgment when “necessary to the proper administration of justice.” Though courts have broad discretion under this statute to compel disclosures concerning otherwise confidential communications, the practices of trial judges are quite variable. At times confidentiality is honored even in criminal trials—though the statute does not protect it.¹⁰ At other times, though confidential medical information has seemed particularly relevant to fair adjudication, the judge’s discretion in excluding it from a civil trial has been upheld.¹¹

—continued on page 41—

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Health Care Confidentiality...

—continued from page 27—

A similar statute (§ 8.01-400.2) applies to communications between licensed professional counselors, licensed clinical social workers and licensed psychologists, and their clients. The privilege it establishes is also limited to civil actions and contains most of the same exceptions of the companion statute (§ 8.01-399), as well as a specific cross reference to the statutory requirement of reporting child abuse.

Though these laws can provide a harbor against compelled revelations of confidential matter in court, they provide inadequate barriers to other improper disclosures of personal information. This inadequacy was highlighted in a recent Virginia Supreme Court opinion involving a medical malpractice claim for breach of confidentiality.

Pierce v. Caday

A woman consulted her physician for advice and a prescription sedative, asking that the “highly confidential” nature of their discussion be respected. She later found that details of her conversation with the doctor had been repeated by his employee to her coworkers. A suit followed, alleging that the doctor’s failure to control his employees amounted to breach of an explicit contract of confidentiality.¹² The trial court dismissed the suit, questioning both the form (a contract action) and the substance (an allegation of wrongful disclosure of information) of the woman’s legal claim.

On appeal, the Supreme Court upheld the trial court’s decision because the plaintiff had not complied with provisions of the malpractice act. It agreed that the claim was properly characterized as an action in tort, not a contract. The analysis of doctor/patient confidentiality that followed was instructive:

While the General Assembly implicitly has recognized the existence of a qualified physician-patient privilege in Virginia, the only explicit statutory pronouncement of the privilege is an evidentiary rule restricted to testimony in a civil action. . . . In the present case, the plaintiff seeks to fashion a cause of action for recovery in damages out of what has thus far been recognized in Virginia as merely a rule of evidence.

Some states, the Court noted, had recognized wrongful disclosure of medical information as a valid tort claim; others had not. Because the plaintiff and defendant presumed that the claim was valid, the issue was not put to the Court, thus a decision on whether to judicially recognize such a cause of action was un-

necessary. The Court could “assume without deciding” that such an action would be available.

The *Pierce* case dramatized the absence of clear statutory protection in the Code of Virginia for medical and mental health confidentiality in contexts other than the courtroom.

The Virginia Supreme Court has characterized the legal privilege for confidentiality as “merely a rule of evidence.”

Proposed Confidentiality Law

For the past two years, the Committee on the Needs of the Mentally Disabled of the Virginia Bar Association has studied the problem of medical and mental health confidentiality. Following a review of laws in other states and consultation with lawyers and representatives of health professional associations, the Committee drafted a comprehensive bill that has been introduced to the Virginia General Assembly.

House Bill 750 is an attempt to formulate a comprehensive legislative statement and to set a general standard on the subject of medical and mental health confidentiality in Virginia law. It addresses current deficiencies in the law, while providing clear legislative guidance to both patients and practitioners concerning appropriate legal duties, responsibilities and expectations.

The bill is an attempt to formulate a comprehensive legislative statement on the subject of medical and mental health confidentiality.

The draft legislation is divided into six sections. Section I provides definitions of common terms used throughout, and clarifies the scope and coverage in the act. For example, the definition of “provider” affected by the proposed law mirrors the use of that term in Section 8.01-581.1 (listing all health care practitioners affected by the Medical Malpractice Act) but unlike that section of the Code, also includes state facilities, as well as anyone licensed by the boards within the Department of Health Professions. “Records” protected by the law include all material maintained in any form, along with the substance of any communication made by a patient to a provider in the course of receiving health services.

Section II recognizes a right of privacy in a patient’s medical records. It establishes the general principle that disclosure of records is prohibited without patient consent or unless it is otherwise permitted under conditions set forth in the law.

Section III describes the scope of coverage of the law, noting that release of information under provisions of the workers compensation statute is not affected, nor are the records of minor patients, in most cases. It also authorizes limited disclosures to caretakers of mental health patients.

Section IV lists twenty-five specific situations in which disclosure of patient information is permitted. This section cross-references most current law that mandates or authorizes disclosure, such as child and adult abuse reports or reports on impaired practitioners. It also incorporates existing provisions of Section 8.01-413 regarding medical records.

Section V enumerates the requirements for responding to requests for records from patients or anyone else, and it includes a suggested form for providing consent to release of confidential health care information. It also incorporates procedures contained in current Section 32.1-127.1:02 for the copying of medical records.

Section VI outlines in detail the procedure to be followed for issuing subpoenas to health care providers. It includes strict requirements of notice to the patient and the patient’s attorney, and the time line that must be met before records may be released by a provider. A new provision of this section would require lawyers seeking records to notify patients of their right to object to a subpoena. The section supplies the legal standard the court should apply when challenges to subpoenas are filed.

Taken as a whole, the proposed legislation would have several beneficial effects. By cross-referencing existing statutes concerning confidentiality, it establishes a single reference point on

that topic in the Code for patients, providers and lawyers. It gives those who create and maintain patient records clear guidance concerning prohibited and permitted disclosures. It requires lawyers to notify patients before disclosures of private information contained in their records are made in response to a subpoena, and it alerts patients of their right to object to the disclosures. It clarifies how providers can comply with subpoenas without violating the law and gives patients an explicit right to their records. Finally, it announces a strong legislative policy in favor of confidentiality, long an expectation of patients and an ethical mandate for practitioners, though never before so clearly protected by Virginia law.

Direction for both the legal and health care communities on the extent and limit to patient confidentiality is long overdue. Whether the law will finally reflect both patient expectations and the ethical norms of the health care professions is a matter to be addressed in the current session of the General Assembly.

[The full text of the Virginia Health Care Confidentiality Act may be viewed on the Internet at <http://www.ilppp.virginia.edu/ilppp/medconf.html>].

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Notes

1. Ludwig Edelstein, "The Hippocratic Oath: Text, Translation and Interpretation." *Bulletin of the History of Medicine*. (Supplement 1, 1943).
2. Mark Seigler, "Confidentiality in Medicine—A Decrepit Concept." *New England Journal of Medicine* (December 9, 1982, p. 1582).
3. Annas et al., *The Genetic Privacy Act, 1995*.
4. U.S. Senate Bill 1360, *Medical Records Confidentiality Act of 1995*.
5. *Jaffee v. Redmond* 51 F. 3d 1346 (CA 7, 1994) cert granted, 64 USLW 3281 (existence of psychotherapist/patient privilege under Federal Rules of Evidence).
6. *Federal Confidentiality of Drug and Alcohol Abuse Patient Records*, 42 USC § 290dd-3; 42 CFR Part 2.
7. *Developmental Disabilities Act* (access to Program Records by Advocacy Program authorized to investigate abuse) 42 USC § 6042 (a) (1); similar provisions under the *Protection and Advocacy for Mentally Ill Individuals Act* (PAMI) 42 USC § 10801-501.
8. Va. Code § 37.1-84.1; accompanying *Rules and Regulations to Assure the Rights of Residents of Facilities* contain lengthy provisions concerning permitted and prohibited disclosures of patient information and records, VR 470-03-01 (July, 1983).
9. Va. Code § 32.1-127.1:02 Medical records; ownership; provision of copies; § 54.1-2403.3 contains substantially the same language concerning provider ownership of records.
10. For example, *Wilson v. Commonwealth* 1995 WL 293050 (Va. App.) (unreported decision), (appeal followed exclusion of records of a mentally retarded complaining witness in a sexual battery prosecution).
11. See, for example, *Peoples Security Life v. Arrington* 243 Va. 89, 412 S.E.2d 705 (1992), holding that the exclusion of medical records of a woman whose husband died of stabbing and gunshot wounds incurred while sitting next to her in their auto and who later claimed the proceeds of his life insurance policy was nonetheless within the discretion of the court.
12. *Pierce v. Caday* 244 Va.285, 422 S.E. 2d 371 (1992); see 13 *Developments in Mental Health Law* 5 (1993) for details of the case.