

Spring 3-1-1998

# Virginia Supreme Court Endorses Medical Confidentiality Claim

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## Recommended Citation

Paul A. Lombardo, Virginia Supreme Court Endorses Medical Confidentiality Claim, *Dev. Mental Health L.*, Spring 1998, at 21.

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proceedings and the availability of short-term sanctions justify a lower level of competence. However, the court disagreed, holding that fundamental fairness required the same protection offered to adults.

However, the court did not reverse the finding. The court held that a review of the record indicated that the trial court properly inferred the juvenile was competent, despite

narrow areas of difficulty, principally communication. In their decision, the court discussed the testimony of two clinical psychologists, one of whom testified that D.D.N. could participate in his defense, while the other expressed some doubts, but acknowledged that D.D.N. had the cognitive capability to participate.

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## *Virginia Supreme Court Endorses Medical Confidentiality Claim*

By Paul A. Lombardo, PhD, JD

Virginia's law of medical confidentiality has seen major changes in the past two years. In 1997, a new statute declaring a right to privacy in medical information went into effect. The Patient Records Privacy Act provided long overdue clarification concerning the boundaries around confidential communications that take place in the clinical context. Less than a full year after the Privacy Act was adopted by the General Assembly, the legal significance of medical confidentiality was again highlighted. In the case of *Curtis v. Fairfax Hospital*, the Virginia Supreme Court for the first time recognized the right of a patient to sue when medical records were wrongfully disclosed

### *The Malpractice Case*

The Curtis case was triggered by the tragic death of Jessica Curtis. Jessica was born in 1989; her mother suffered from diabetes. Though the birth was "uneventful," concerns about the potential for hypoglycemia related to maternal diabetes led doctors to place Jessica in a neonatal intensive care unit to monitor her progress. On the day she was scheduled for discharge, Jessica was found lying face down in full cardiopulmonary arrest. She was found "with her nose flattened, her face pushed in, and blue in color."

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A neonatologist who treated Jessica said she was in cardiopulmonary arrest for at least ten and perhaps as many as forty minutes before she was found; a second doctor said she had suffocated in her blanket. Though she was resuscitated, Jessica suffered extensive brain damage, dying four months later.

Patricia Curtis, Jessica's mother, eventually filed a malpractice claim, charging that Jessica's death was the result of medical negligence. The hospital responded that Jessica's death resulted from a near Sudden Infant Death Syndrome event related to maternal risk factors. Jessica's mother suffered seizures, had difficulty controlling her diabetes and smoked during pregnancy. This strategy did not convince the trial jury, which eventually awarded Ms. Curtis \$500,000 for the wrongful death of her daughter Jessica.

### *The Wrongful Disclosure Lawsuit*

In the midst of the malpractice case, Ms. Curtis' medical records describing treatment just prior to Jessica's birth and years earlier were retrieved from Fairfax and other hospitals. According to her lawyer, when Ms. Curtis' deposition was taken "very abusive questions" about "highly personal matters" were asked and it was apparent that lawyers for the hospital and other defendants had been privy to those records.

The events surrounding the Curtis deposition led to a second lawsuit, filed even as the first was awaiting trial. In that case, Ms. Curtis claimed that the hospital had conspired to commit medical malpractice by wrongfully disclosing her confidential medical records to the director of legal affairs for the hospital's parent corporation and to a nurse who was also a defendant in the first malpractice suit. The allegations made by Curtis included the charge that the hospital had intended to use confidential information "to gain an advantage in the underlying malpractice action, [concerning the death of Jessica Curtis] and to otherwise harass and disturb Curtis."

The hospital responded, arguing that a legal claim against a health care provider for unauthorized disclosure of confidential medical information has never been recognized in Virginia. Additionally, the hospital claimed that as owner of the records it could not be guilty of wrongfully mishandling its own property. A trial court judge turned those assertions aside, noting that the hospital was "merely a repository" for patient records, and that a legal claim for wrongful disclosure was valid.

Attorneys for Ms. Curtis and Fairfax Hospital disagreed over whether a suit could be properly sustained in Virginia for breach of medical confidentiality, but there was no dispute over how Ms. Curtis's records had been disclosed. The case was eventually submitted to a judge for resolution of the legal question alone. Did Virginia's privilege law (Virginia Code section 8.01-399) allow a health care

provider to unilaterally disclose medical records to people other than the patients to whom the records pertain?

The privilege statute protects physician-patient communications from compelled disclosure in a civil case. However, patients who put their physical or mental condition "at issue" by filing a malpractice suit are considered to have waived the privilege, and their records may be subject to court ordered disclosure. The trial court judge concluded that the Curtis malpractice lawsuit was

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brought on behalf of Jessica Curtis, and the circumstances surrounding her death were at issue. In contrast, the condition of Patricia Curtis was "not inherently at issue" and thus there was no justification to release records "simply to hunt for a grounds of defense." Finding that there is a "potential for abuse" when court oversight of record disclosure is absent, the judge concluded that Fairfax Hospital was liable for damages of \$100,000.

*Curtis in the Virginia Supreme Court*

Fairfax Hospital appealed the decision to the Virginia Supreme Court. In its opinion, that Court noted the hospital's concession that it "unilaterally disseminated the plaintiffs medical records to an attorney and a nurse" without permission from the patient or a judge's order. The Court analyzed that event within the context of traditional state law on the duties of doctors to patients.

In our jurisprudence, a health care provider owes a duty of reasonable care to the patient. Included within that duty is the health care provider's obligation to preserve the confidentiality of information about the patient. . . . Indeed, confidentiality is an integral aspect of the relationship between a health care provider and a patient and, often, to give the health care provider the necessary information to provide proper treatment, the patient must reveal the most intimate aspects of his or her life to the health care provider during the course of treatment.

The Court concluded that the duty of maintaining patient confidences had been breached and announced a clear rule of liability for the hospital and others who fail to protect patient records:

[A] health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, . . . violation of this duty gives rise to an action in tort.

Emphasizing that this decision is consistent with decisions of most other states that have faced the question, the Court underlined the need for judicial approval for such disclosures. The hospital's defense had included the assertion that this disclosure was made within the judicial context, that is, as part of a lawsuit. But the Court nevertheless found the fault in this case to be that "an independent judicial officer, not the Hospital or the director of legal affairs for the Hospital's parent company" should have reviewed the relevance of patient records to the lawsuit before any such records were released. The Court repeated its finding that "if the patient did not manifestly place his or her medical condition at issue, . . . then the statute required a determination by a judicial officer" to make that determination.

#### *Conclusion*

The version of the privilege statute applied to the facts in *Curtis* has been amended several times in the intervening years since the events leading to that lawsuit. The statute now specifically allows for disclosure of records when necessary to the protection of the physician's legal rights, for example, in preparation for malpractice lawsuits. But the language of the privilege statute and its relation to other parts of the law is far from clear; many questions surrounding the proper handling of medical records remain.

Nevertheless, several issues are clarified by the *Curtis* decision. The idea that medical records exist as the property of health care providers to be released at their convenience has been explicitly rejected by Virginia's highest court. Providers have no absolute right to patient information; they hold medical secrets as trustees or fiduciaries. Providers also face significant liability when a breach of confidentiality occurs. Successful lawsuits can and will be brought in the future when inappropriate disclosures of medical information occur. Records of mental health treatment are considered a part of the medical record.

The *Curtis* case makes it all the more important to understand and observe boundaries of patient confidentiality as well as the range of disclosures permitted by law during litigation and at other times. It also finally clarifies the importance of medical confidentiality in Virginia, not merely as a rhetorical aspiration, but as both an ethical imperative and a legal mandate.