

# Privacy's Day in Court

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*by Brian D. Gradle, Esq.*

While HIM professionals work to implement HIPAA, courts across the nation continue to hear cases that could affect this work. Namely, these are cases related to state privacy laws.

HIPAA's "preemption" framework provides that state laws that are not contrary to HIPAA or that provide for greater privacy for individuals than the federal rule are not preempted. In other words, such state laws are valid and enforceable privacy laws within those respective states.

This article will explore a few recent cases that highlight the critical need to monitor and understand such privacy cases as they emerge. HIPAA's definition of state law goes beyond statutes and regulations to include, among other things, court cases such as these from Ohio, Virginia, and New York.

## Ohio: Hospital Disclosures to Outside Parties

The state of Ohio recognized a new cause of action--that is, a new basis upon which a party may sue--in its 1999 decision *Biddle v. Warren General Hospital*. In this case, the plaintiffs were former patients of the hospital who had discovered that the hospital had released patient registration forms to a law firm without their consent. The patient registration forms included information such as address, birth date, employment information, and admitting diagnosis.

The law firm had used the information to determine if the patients' respective accounts could be paid by the Social Security Administration. The law firm then contacted the potential claimants and "offered unsolicited advice that they should take legal action" to obtain their supplemental security income.

The Ohio Supreme Court recognized that hospitals may disclose medical information without prior authorization in certain cases in accordance with statutory or common law mandates, or when disclosure is necessary to protect an interest that outweighs patient confidentiality. However, the court determined that was not the case here.

The court was also not persuaded by the defendants' argument that concerns about privacy breaches were mitigated by the fact that the disclosure was to a law firm, which had a duty of confidentiality to its hospital client. The court ruled that the patients' general consent form was not sufficient to permit the subsequent disclosure of the medical information to the law firm.

In establishing the standards for a claim of a breach of confidentiality, the court concluded that a plaintiff must demonstrate that the defendant has made unprivileged disclosure of nonpublic information without consent to a third party and that the defendant obtained the information as a result of a confidential relationship.

## Virginia: Disclosures in Preparation for Trial

In 1997, the Supreme Court of Virginia recognized a cause of action for breach of privacy. After a patient sued a hospital in a wrongful death action involving the patient's daughter, the hospital provided the patient's medical records to the hospital's defense counsel and to her daughter's neonatal nurse in preparation for the nurse's deposition. The plaintiff, who had communicated her medical history to the hospital as part of her prenatal care, sought damages for emotional distress caused by the unauthorized release of her medical information.

In the case, *Fairfax Hospital v. Curtis*, the Virginia Supreme Court held that "...in the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a healthcare 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."

Importantly, the court also ruled that the patient had not waived her right to the confidentiality of her medical records by filing an action against the hospital in her capacity as an administrator for her deceased daughter. In the view of the court, the plaintiff had not placed her medical history at issue; under Virginia law, this would have permitted dissemination of her medical history to appropriate parties. Consequently, only the determination by a judge or magistrate that the plaintiff's condition was at issue would have permitted the dissemination of her medical records.

The court found that the plaintiff would be eligible to recover damages for "emotional distress" caused by the hospital's actions.

## New York: Fiduciary Obligations of Providers

In New York, a recent case has focused attention on the nature of the relationship between certain providers and patients. In *Anonymous v. CVS*, the plaintiff, an HIV-positive individual, claims that pharmacists have a fiduciary duty of confidentiality to their customers and that this confidence was violated when the local pharmacy sold and transferred his prescription and medical information to CVS without his consent.

While considering the defendants' motion to dismiss the case last year, the New York trial court found that while a pharmacist's role does not equal that of a physician who is treating a patient, the transaction between a pharmacist and a customer does involve the principal characteristics of a fiduciary relationship: dependency and influence. This case is currently in litigation.

There is no question that a thorough working knowledge of the federal HIPAA rules is critical to those involved in the use and disclosure of health information. However, mere compliance with the federal standards is not enough. Continual monitoring and understanding of developments at the state level--particularly in the courtrooms--must also be included as part of an overall HIPAA compliance strategy.

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