

LEGAL EAGLE EYE NEWSLETTER

December 1998

For the Nursing Profession

Volume 6 Number 12

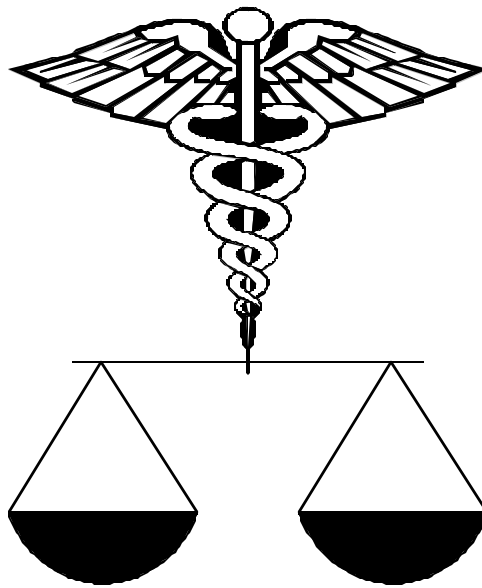
Patients' Charts: Court Defines Patient's, Provider's Rights And Responsibilities.

The Supreme Court of Connecticut recently took the opportunity to review in detail the legal principles which govern a patient's or patient's representative's rights *vis a vis* the records and other materials contained in a patient's medical chart and the healthcare provider's corresponding responsibilities.

The patient in this case was diagnosed at a major university teaching hospital with stage IB endocervical adenocarcinoma in 1995. Her earlier Pap smear slides obtained at a community hospital from 1993 to 1995 were requested and sent to the university hospital pathology department, and then returned to the community hospital.

The earlier slides contained highly atypical endocervical cells, which may have meant the adenocarcinoma diagnosis should have been made at the community hospital as early as 1993.

The patient retained an attorney to investigate the possibility of suing the community hospital for malpractice, for failing to read the Pap smear slides correctly and catch the carcinoma earlier. The attorney demanded possession of the original earlier Pap smear slides. The community hospital agreed to let the attorney see the slides and to let the attorney's forensic pathologist come in and



A patient or a patient's physician or attorney can examine original notes, films, slides, reports, etc., and can demand copies of materials from the chart that can be copied.

A healthcare provider can and must retain physical custody of original notes, films, slides, etc., in the patient's chart.

SUPREME COURT OF CONNECTICUT, 1998.

examine the slides in the community hospital's pathology lab. The hospital also agreed to provide copies of all written materials in the chart.

Without first filing a malpractice suit, the patient sued the community hospital for possession of the original earlier Pap smear slides. The court ruled the community hospital had already done all it had to. It was proper to refuse the patient's demand for possession of the original Pap smear slides.

According to the court, the law allows a patient, a patient's physician or a patient's legal representative to examine any and all materials contained in a patient's medical chart. This includes original pathology specimens, pathology slides, xray films, lab specimens, physician's notes, reports, correspondence, bills, insurance forms, etc.

The patient does not have to first file a malpractice suit against the healthcare provider to be entitled to access to the materials contained in the patient's medical chart.

Before a malpractice suit can be filed many states now require a certification along with the suit papers that there has been a diligent pre-suit investigation to ascertain that valid grounds exist for a lawsuit. In some states it is re-

(Continued on page 2)

Inside this month's issue ...

December 1998

New Subscriptions: Page 4

**Patients' Charts/Rights And Responsibilities
Freedom Of Speech/Retaliation - Reporting Violations/Retaliation
Whistle-Blower/Retaliation - False Imprisonment/Alcohol Rehab
Abuse Of Vulnerable Adult/Psychiatrist/Nurse's Duty To Report
Post-Operative Staph Infection - Patient's Fall**

1998 Subject Index

Patients' Charts: Patient's, Provider's Rights And Responsibilities. (Continued)

(Continued from page 1)

quired that the claim be submitted for out-of-court arbitration before suit can be filed in court.

States whose laws impose pre-filing prerequisites for healthcare malpractice suits impose penalties against patients and their lawyers for failing to follow those prerequisites. Most commonly, the healthcare provider has the right to have the suit dismissed if the pre-filing prerequisites were not followed. This is true also if a certification as to the validity of the claim has been filed as required, but the certification, by the attorney or an expert witness, has no factual basis.

The court insisted that a healthcare provider must allow a patient or the patient's representative the opportunity to investigate a possible malpractice claim.

There may not be grounds for a suit. But if the healthcare provider has not allowed the patient or the patient's representative access to the patient's chart before suit is filed, and it turns out there were no grounds for a suit, it is possible a court will not penalize the patient or the patient's attorney for filing the groundless suit if the healthcare provider forced the patient to file a suit just to be able to subpoena the chart to see if there are grounds for a suit.

The downside is that there may be grounds for a lawsuit, as it appeared in this case.

If a patient has filed a malpractice suit, the patient's attorneys can subpoena the records or other materials they desire. When a subpoena is presented to a healthcare provider, the provider must comply with the subpoena or send the provider's own attorneys to the court under whose authority the subpoena was issued to contest the validity of the subpoena. There are no safe grounds for lay persons untrained in the law to second-guess a court subpoena without guidance from legal counsel.

A patient or patient's representative seeking access to a patient's healthcare chart does not need to file a lawsuit, have a

subpoena or even state a reason for desiring access to the chart. It is not for a healthcare provider to demand a reason why access to the chart is being sought, or to judge the appropriateness of the patient's or patient's representative's motivation for seeking access to the chart.

A patient, a patient's physician or a patient's legal representative is entitled to copies of materials that can be copied, including x-rays and scans. Copy expenses are the patient's or patient's representative's responsibility. In general, providers can charge reasonable clerical fees and per-copy duplication fees. Each state has its own specific rules setting out how much providers can charge.

It was not an issue in this case, but the court's opinion cautions healthcare providers about patients who are making disability and industrial insurance claims.

Patients may have the right to copies of the medical records they need to pursue disability or industrial insurance claims at a reduced cost or at no cost. Providers must consult their own legal counsel to make themselves aware of how their state laws cover this special circumstance.

Although the issue did not come up in this case, other courts have decided that using an outside photocopy vendor, rather than making copies of patient's charts in-house, is not a violation of a patient's right to medical confidentiality.

Certain materials cannot be copied. That was the core issue before the court in this case. The court ruled, however, that the fact that original pathology slides cannot be copied does not change the rules. A patient or patient's representative is still entitled to access to examine them, but the originals are to stay in the custody of the healthcare provider.

The court expressly rejected the argument that Pap smear slides or other pathology specimens that were once part of the patient's body are the patient's personal property. The court ruled that once obtained by the healthcare provider these materials are no longer the patient's property,

but belong to the healthcare provider.

The court noted that healthcare providers are required by law to keep original records and pathology materials, for various reasons. Even though the requirement for providers to retain records was set up to protect patients whose future care providers may need access to their records, it is not up to a patient to dispense with the provider's obligation to retain the patient's records just because the patient asks for them.

It is important to note that a patient or patient's representative has the right to access the original chart materials, and the right to copies of materials that can be copied. These are two independent rights.

A patient has the right to copies of what can be copied. However, it is not permissible for a healthcare provider to substitute copies for the originals. A patient or patient's representative cannot be brushed off simply with a copy of the chart. There is a right to come into the healthcare facility and look at the original materials. It is possible that the person making copies has left out a page inadvertently, or misunderstood his or her instructions and not felt it important to copy lab reports or pharmacy order slips, or whatever, under a mistaken belief that only certain things are important enough to be copied.

It is also possible there have been erasures or other changes in the chart which have been done with a more sinister motivation, and, if so, that is something the patient has the right to know about.

When a patient or patient's representative comes to view the chart, the person can be seated in a designated area and closely supervised while in possession of the chart. As a matter of courtesy, a representative may be given access to an x-ray viewing box. In this case the patient's attorney's medical expert was given permission to use the hospital's microscope to examine the Pap smear slides, which the court indicated was appropriate and was all that was required of the hospital with respect to the slides. **Cornelio v. Stamford Hospital**, 717 A. 2d 140 (Conn., 1998).