

# Labor & Delivery: Critical Evidence Missing From The Chart, Court Validates Patient's Right To Sue.

The child now suffers from medical disorders which are recognized as being associated with trauma from substandard care during labor and delivery.

One of the first steps in the parents' lawsuit was for the parents' attorneys to demand copies from the hospital of all of the mother's and child's medical records from the mother's labor and the child's delivery by emergency cesarean.

The hospital responded to the lawyers' demand by stating that certain of the records were missing from the chart and could not be accounted for.

Specifically, the hospital was unable to produce the following:

Nursing progress notes from 7:45 p.m. the evening before through 2:00 p.m. the day of delivery;

Labor flow sheets from 6:00 a.m. through 2:00 p.m. the day of delivery;

Fetal heart monitor strips from 2:50 a.m. through 2:00 p.m. the day of delivery;

Perioperative nursing notes from the cesarean section.

(The emergency cesarean was started at 2:30 p.m. on the day in question.)

The physician hired by the parents' lawyers as an expert witness stated in his report that he could not render an opinion due to the fact that he was not able to review records that were critical to the case.

***A hospital owes a legal duty to each of its patients to maintain the patient's medical records. In Indiana the period is seven years post-treatment.***

***When a hospital fails to fulfill this duty the hospital commits a breach of a professional responsibility which can lead to consequences from state licensing authorities.***

***As with other breaches of a healthcare provider's professional duties, the patient also has the right to sue over the fact his or her records have suspiciously come up missing.***

***The focus is not the negative impact on the patient's care. The focus is the negative impact the records being missing has on the ability to pursue a malpractice case effectively against those responsible for the records being missing.***

COURT OF APPEALS OF INDIANA  
April 16, 2010

With the parents' malpractice case against the hospital sitting dead in the water the judge allowed the parents' attorneys to amend the allegations they were making in the case.

They were permitted to shift the thrust of the case away from medical malpractice, which they could not prove without the missing records, and sue instead for the fact the hospital was unable to furnish the critical medical records they needed.

The Court of Appeals of Indiana ruled the parents and child still had the right to sue, clearing up any confusion whether a right of action separate and distinct from medical malpractice exists in Indiana just as does in many other US state jurisdictions.

## **Spoilation of the Evidence Gives the Patient the Right to Sue**

Spoilation of the evidence is the legal term for a patient's lawsuit against an individual healthcare provider or institution for negligent alteration, loss or destruction of medical evidence which deprives the patient of the effective ability to bring legal action against the provider or institution for malpractice.

The concept applies not only to paper medical records, monitor strips and computer files, but also to films, slides, pathology samples and defective medical devices and equipment which have been altered or have disappeared under a cloud of reasonable suspicion of intent to cover up the basis for a patient's lawsuit. ***Howard Regional Health v. Gordon*, \_\_\_ N.E. 2d \_\_\_, 2010 WL 1524870 (Ind. App., April 16, 2010).**