

## Medical Records: Court Looks At Recent Amendments To US HIPAA Regulations.

The US Court of Appeals for the Eleventh Circuit (Florida) recently had to resolve a conflict between the Florida Public Health Statutes and the US Health Insurance Portability and Accountability Act (HIPAA), two laws which say conflicting things about release of deceased nursing home residents' confidential medical charts to their family members.

### HIPAA Prevails Over State Law

The Court applied the established legal principle, known as preemption, that Federal law prevails in the face of a direct conflict between state laws and Federal laws on the same subject.

According to Florida state law, certain persons including spouses and persons named in durable powers of attorney are entitled to copies of a deceased nursing home resident's confidential medical records, just for the asking.

However, the nursing home refused to honor numerous requests for release of deceased residents' records to the spouses and persons named as attorneys-in-fact for deceased residents, who presumably wanted to see the records to investigate possible grounds for filing medical negligence lawsuits.

According to the HIPAA regulations prior to the March 2013 amendments, only the personal representative of a deceased resident's probate estate was entitled to copies of the deceased's confidential medical records.

After the recent amendments, in addition to the personal representative of the probate estate, family members or other close persons or persons named by the deceased before death are allowed copies of the chart, just for the asking, but only if they were involved in the resident's care or involved in paying for the resident's care.

None of the persons who made the medical-records requests in question in this case were probate personal representatives or fit within the limited expansion of the rules which became effective in March 2013.

Looking beyond these narrow technicalities, the Eleventh Circuit Court of Appeals seems to have announced a broad policy decision that healthcare professionals must look to the HIPAA and applicable Federal regulations for guidance on issues of medical confidentiality rather than local state laws and regulations. **OPIS Mgt. v. Fla. Agency for Health Care**, \_\_\_ F. 3d \_\_\_, 2013 WL 1405035 (11th Cir., April 9, 2013).

## Patient's Fall: Family Failed To Come Forward With Evidence Of Negligence, Lawsuit Dismissed.

An elderly Alzheimer's patient resided in a nursing home.

Two CNAs took her to the shower, removed her underwear and sat her down on a shower chair. One of the CNAs momentarily turned away to put the resident's underwear in a plastic bag, then turned back around and found her on the floor.

The patient was badly injured. She had surgery the next day and was then transferred to a hospice where she died a week later.

The family's nursing experts' reports contained only generic allegations that the nursing home failed to assess the patient's fall risk, failed to implement fall protocols, failed to supervise the patient, failed to obtain physicians' orders for the patient's safety and failed to obtain an adequate shower chair.

***A healthcare provider who becomes a defendant in a negligence lawsuit does not have to have expert testimony, or any testimony, to prevail in the lawsuit.***

***The defendant need only demonstrate to the court's satisfaction that the patient or patient's family has failed to present evidence of negligence.***

***Evidence of professional negligence must come from a qualified expert witness.***

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However, the Court of Appeals of Georgia ruled that the family's nursing experts failed to specify in detail what exactly the CNA did wrong or neglected to do right under the circumstances.

The Court pointed out that a facility that is a defendant in a civil negligence lawsuit has no obligation to prove that its employees were not negligent. The defendant will prevail if the plaintiff fails to prove negligence.

The quality of the care a patient receives or should receive but does not is a subject area that is not within the common understanding of lay persons who might sit on a civil jury. The patient or the family must look to qualified experts in medicine or nursing for their expert opinions. **Padgett v. Baxley**, \_\_\_ S.E. 2d \_\_\_, 2013 WL 1277729 (Ga. App., March 29, 2013).