

YOUR PATIENT AND CONFIDENTIALITY: A PRACTICAL APPROACH

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'What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about' (Hippocrates).¹

'I will respect the secrets confided in me even after the patient has died' (International Code of Medical Ethics).²

The principle of confidentiality is as old as the Hippocratic Oath and is common to the three oldest professions (law, medicine and theology). Ever since Hippocrates failed to stipulate what information ought not to be 'spread abroad', issues of confidentiality have posed problems for doctors. Questions relate to what constitutes confidential information and under what conditions confidential information should or may be divulged. With the advent of the HIV epidemic and the attendant human rights concerns there have been a plethora of legal rules and rulings focused on protecting patient confidentiality.

THE SOUTH AFRICAN POSITION

Principles of privacy have been entrenched in the Bill of Rights of the South African Constitution:

'Every person shall have the right to privacy, which includes the right not to have –

- (a) their home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.³

This fundamental right to privacy has been taken up in a rule of conduct of the Health Professions Council of South Africa (HPCSA). Persons registered in terms of the Health Professions Act, Act No. 56 of 1974, are legally bound to comply with rules issued by the HPCSA. Failure to comply with these rules of conduct may lead to a disciplinary hearing.

The rule relating to professional confidentiality states:

'A practitioner shall only divulge verbally or in writing any information regarding a patient which he or she ought to divulge in terms of statutory provision or at the instruction of a court of law or where justified in the public interest: Provided that any other information shall only be divulged with express consent of the patient or, in the case of a minor under the age of 14 years, with the written consent of his or her parent or guardian or, in the case of a deceased patient, with the written consent of his or her

next-of-kin or the executor of his or her estate.⁴

Where consent has been obtained there is usually little problem in releasing information but, as with the Hippocratic Oath, the rule provides little guidance on what is actually confidential information and what constitutes the public interest.

INFORMATION THAT SHOULD BE REGARDED AS CONFIDENTIAL

- Information obtained during a consultation, either as a result of a personal communication or as a result of a medical examination. This includes the results of any pathology or other tests that are performed or requested.
- All patient records.
- Details of any treatment, counselling or referral.
- Information about the patient obtained from another medical professional.
- The actual diagnosis/illness on a sick certificate.
- The second part of the death certificate which relates to medical and health information.

STATUTORY OBLIGATIONS

Certain written laws place a legal obligation on the medical practitioner to provide information. There are five main sets of legislation a medical practitioner is likely to be

confronted with in terms of which he or she is obliged to provide information about a patient that would otherwise be regarded as confidential:

- The notification of notifiable medical conditions in terms of regulations issued under the Health Act, Act No. 63 of 1977. Any person legally competent to diagnose and treat a patient is obliged to provide the following information to the local authority in the case of a disease that has been declared a notifiable medical condition: name, age, sex, population group, identity number (if available), date of birth, address, place of work or school, the date of commencement of the condition and any information relating to the probable place or source of the infection. HIV and AIDS are *not* notifiable medical conditions in terms of South African law.⁵
- The Child Care Act, Act No. 74 of 1983, requires a health care practitioner who examines a child or deals with any child in circumstances giving rise to the suspicion that that child is being ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency, to notify the case to the Department of Social Development.⁶
- In terms of the Occupational Health and Safety Act, Act No. 85 of 1993, any medical practitioner who examines or treats a person for a disease which is listed in the Third Schedule to the Compensation for Occupational Injuries and Disease Act (Act No. 130 of 1993) or any other disease which he believes arose out of that person's employment is obliged to report the case to the person's employer and the Chief Inspector of Labour and inform the patient accordingly.⁷
- The Occupational Diseases in Mines and Works Act, Act No. 78 of 1973, requires a medical practitioner who considers or suspects any person medically examined or treated by him, who he knows or believes on reasonable grounds to have worked at a mine or works, to be suffering from compensable disease in terms of the Act to report the case to the Medical Bureau for Occupational Diseases.⁸
- The Registration of Births and Deaths Act, Act No. 51 of 1992, requires health professionals to complete death certificates honestly and fully.

COURT ORDERS

A health care professional is obliged to disclose confidential information if ordered to do so by a judge or presiding officer of a court. This should be done after stating that the information is confidential and is being supplied under protest. Objection should be made if the information requested appears to relate to persons that are not parties to the proceedings, e.g. relatives.

There is no obligation on the practitioner to report suspected crimes (other than child abuse) such as gunshot wounds, nor do the police, lawyers or insurance companies have an inherent right to confidential medical information without patient consent.

DISCLOSURE IN THE PUBLIC INTEREST

Disclosing information, in the public interest, is arguably the situation that creates the most anxiety among health care professionals and it is also the most difficult for which to provide practical guidelines. Disclosure of confidential information without consent may be justified where failure to do so may expose the patient or others to risk of death or serious harm, i.e. where third parties are exposed to risks so serious that they outweigh the patient's right to privacy.

A notable example of this sort of situation occurred in the English case of *W v. Egdeell*. W was in Broadmoor for murdering five people and was a paranoid schizophrenic. Dr Egdeell had written a report for W's parole application which disclosed serious concerns about releasing W into society. W refused permission for the report to be released to the hospital authorities. The doctor then released the report to the Home Office since he believed he had an overriding duty to safeguard the public. W sued for breach of confidentiality. The Court ruled that the public interest in the disclosure of this report over-rode any duty to confidentiality. Without disclosure the hospital authorities would not be in a position to make an informed judgement about the risks of W killing again.⁹ A similar situation arises where a patient continues to drive after being informed by the practitioner that he or she is not fit to do so and constitutes a danger to himself and others.

In a recent case in Australia a woman successfully sued two doctors for failing to tell her that her African fiancé was HIV-positive after the couple attended surgery together for blood tests.

Another instance that could be considered to be in the public interest is the supply of information in connection with an inquest or fatal incident enquiry.

In all cases such as these the possible harm to the patient must be weighed against the benefits that are likely to arise out of release of the confidential information. Ultimately, the 'public interest' can only be determined by the courts.

SHARING INFORMATION WITH OTHERS PROVIDING CARE

Patients should be made aware that their personal information will be shared with other people in the health care team in order to facilitate their diagnosis, treatment and care, unless they object. It is particularly important



that patients understand what will be disclosed if they are referred to other agencies for health or social care. The patient's wishes must be respected if they object to particular information being shared with others providing care, except where this would put others at risk of serious harm or death. It goes without saying that it is essential to ensure that persons you disclose information to are aware that this information is given to them in confidence and this confidence needs to be respected. Where a patient objects to information being shared, it is imperative that the patient be informed how this may affect his or her future health care. The patient is then in a position to make an informed decision.

KEY POINTERS IN DEALING WITH PATIENT CONFIDENTIALITY

- Disclose patient information only with legal consent, when obliged to do so by law or when it is necessary and justified to protect the public interest.
- When commissioned to write a report for a third party, such as an employer, you have a duty to both the patient and the person who commissioned the report. This should be made clear to the patient as part of the consent process. All appropriate and relevant information must be disclosed in the report. Never put yourself in the position where you have or appear to have misled the commissioning party. If the patient is

not happy with what is going to be disclosed, decline to go further with the process.

- Disclose only the information that is asked for. Do not elaborate unless this is required for understanding the information supplied.
- Maintain patient anonymity where possible.
- Where obliged to provide information by law or in the public interest, inform the patient, where possible, that this is going to be done.
- Ensure that there are adequate arrangements for the security of personal information when it is stored, sent or received by fax, computer, e-mail or other electronic means.
- If at all uncertain about releasing information, do not hesitate to consult a colleague or your professional association for advice.

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