Bioethics for clinicians: 8. Confidentiality

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Abstract

PHYSICIANS ARE OBLIGED TO KEEP INFORMATION about their patients secret. The understanding that the physician will not disclose private information about the patient provides a foundation for trust in the therapeutic relationship. Respect for confidentiality is firmly established in codes of ethics and in law. It is sometimes necessary, however, for physicians to breach confidentiality. Physicians should familiarize themselves with legislation in their own province governing the disclosure of certain kinds of information without the patient's authorization. Even when no specific legislation applies, the duty to warn sometimes overrides the duty to respect confidentiality. The physician should disclose only that information necessary to prevent harm, and should reveal this information only to those who need to know it in order to avert harm. Whenever possible any breach of confidentiality should be discussed with the patient beforehand.

Résumé

LES MÉDECINS DOIVENT GARDER SECRETS les renseignements sur leurs patients. Dans la relation thérapeutique, la confiance passe par le fait de savoir que le médecin ne divulguera pas de renseignements confidentiels sur le patient. Les codes d'éthique et la loi établissent fermement le respect de la confidentialité. Parfois, les médecins doivent toutefois divulguer des renseignements confidentiels. Les médecins devraient se familiariser avec les lois de leur province qui régissent la divulgation de certains types de renseignements sans l'autorisation du patient. Même lorsqu'aucune mesure législative en particulier ne s'applique, l'obligation de prévenir l'emporte parfois sur celle de respecter la confidentialité. Les médecins ne devraient dévoiler que les renseignements nécessaires pour prévenir tout préjudice et les communiquer seulement à ceux qui ont besoin de les connaître pour éviter le préjudice en question. Il faut dans la mesure du possible discuter d'avance avec le patient de toute divulgation de renseignements confidentiels.

Mr. T is 35 years old and is married. He has had unprotected sex with prostitutes on 2 occasions. Although he is asymptomatic, he becomes anxious about the possibility of having contracted a venereal disease and consults his physician. After conducting a thorough physical examination and providing appropriate counselling, Mr. T's physician orders a number of tests. The only positive result is for the HIV blood test. The physician offers to meet with Mr. T and his wife to assist with the disclosure of this information, but Mr. T states that he does not want his wife to know about his condition.

Mr. U is a 42-year-old professional who is living with his 14-year-old son and is involved in an acrimonious divorce. He is receiving drug therapy and weekly psychotherapy sessions for depression. Mr. U tells his psychiatrist that his wife makes him so crazy that at times he wants to kill her. He is concerned that in the heat of a confrontation he might act on this impulse. However, he recognizes that killing his wife would be devastating to his son, for whom he feels a great deal of affection and devotion.

Ms. V is 29 years old and has epilepsy. Her driver's licence was revoked when the ministry of transportation was notified of her history of seizures. Ms. V men-

Education

Éducation

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← For prescribing information see page 594

tions in passing to her physician that she sometimes drives short distances to get groceries with her 3-year-old daughter in the car. When the physician challenges her about this, Ms. V emphasizes that her seizures are very infrequent. Finally, the physician states that he might be obliged to notify the authorities. Ms. V asks what more the authorities could do, now that they have revoked her licence. Would they put a police cruiser outside her house to make sure she doesn't drive?

What is confidentiality?

Physicians are obliged to keep information about their patients confidential. Confidentiality provides a foundation for trust in the therapeutic relationship.

Why is confidentiality important?

Ethics

Without an understanding that their disclosures will be kept secret, patients may withhold personal information. This can hinder physicians in their efforts to provide effective interventions or to pursue certain public health goals. For example, some patients may not feel secure in confiding a drug or alchohol dependence and thus may not have the benefit of treatment. Others may refrain from disclosing information that could alert the physician to the potential for harm or violence to others.

Respect for the confidentiality of patient information is not based solely on therapeutic considerations or social utility, however. Of equal, if not greater, importance is the physician's duty to respect patient autonomy in medical decision-making. Competent patients have the right to control the use of information pertaining to themselves. They have the right to determine the time and manner in which sensitive information is revealed to family members, friends and others.

In our strongly individualistic society the principle of autonomy is taken very seriously. This principle, however, is not absolute. As John Stuart Mill observed in the 19th century, personal freedom may legitimately be constrained when the exercise of such freedom places others at risk:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[1]

Applied to the question of confidentiality, this suggests that although patients have the right to control how information about themselves is shared, this right is limited by the obligation not to harm others. When harm is threatened, the principle of autonomy (and hence the duty to preserve confidentiality) no longer takes precedence, and disclosure without the patient's authorization may be permissible or required.

Law

The confidentiality of patient information is prescribed in law. For example, physicians in Ontario are prohibited from providing information to third parties regarding a patient's condition or any professional service performed for a patient without the consent of the patient or his or her authorized agent unless such disclosure is required by law.[2] A breach of confidentiality that is not required by law may prompt disciplinary action by the College of Physicians and Surgeons of Ontario. Similar provisions concerning confidentiality exist in other provinces. Moreover, a breach of confidentiality may result in a civil suit.

Legal requirements to reveal certain kinds of information without the patient's consent are defined in both statutory and common law. The most notable legislated requirement involves the mandatory reporting of patients who suffer from designated diseases, those deemed not fit to drive and those suspected of child abuse.[3]

The case of *Tarasoff* v. *Regents of the University of California*[4,5] involved a psychologist who had reason to believe that his patient would kill a woman named Ms. Tarasoff. At the psychologist's request the campus police arrested the patient, but he was released when he assured the police that he would stay away from Tarasoff. No further action was taken, and the patient killed Tarasoff 2 months later.[4] Two decisions resulted from this case. The first established the duty to warn.[4] The American Psychiatric Association lobbied for the case to be reheard by the California Supreme Court.[6] As a result, a duty to protect was established that may or may not include a warning to the potential victim or the police.[5] The decision also implied that committing a dangerous patient to institutional care would obviate the need to warn.

Although the Tarasoff decision does not impose a legal duty upon Canadian physicians it could reasonably be expected that Canadian courts would apply similar reasoning in a comparable case. In *Tanner* v. *Norys* the Alberta Court of Appeal stated that if it were presented with a case involving a psychiatrist who failed to warn another of the risk of harm, then it would follow the reasoning used in the Tarasoff case.[7] In the report of the Commission of Inquiry into the Confidentiality of Health Information, Justice Horace Krever wrote that "it cannot be said with certainty that an Ontario court would decide a case involving identical circumstances [to those in *Tarasoff*] in a different way."[8]

Most recently, the College of Physicians and Surgeons

of Ontario accepted recommendations formulated by an expert panel representing provincial and national medical organizations. The panel determined that physicians have a duty to warn when a patient reveals that he or she intends to do serious harm to someone else and it is more likely than not that this intention will be carried out.[9] The college has recommended that a standard of practice be established such that failure to warn would become a basis for a disciplinary finding of professional misconduct.[10] This recommendation, although accepted, has yet to be implemented and has not yet been adopted in law.

Policy

The Hippocratic Oath[11] explicitly demands confidentiality in physicians' dealings with patients:

> 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.[11]

The Hippocratic Oath and subsequent codes of ethics[12] admitted no exceptions to the duty of confidentiality. However, more recent codes allow that breaches of confidentiality may be justified or required in certain circumstances. For example, the CMA Code of Ethics states:

> Respect the patient's right to confidentiality except when this right conflicts with your responsibility to the law, or when the maintenance of confidentiality would result in a significant risk of substantial harm to others or to the patient if the patient is incompetent; in such cases, take all reasonable steps to inform the patient that confidentiality will be breached.[13]

Thus, according to the CMA Code of Ethics, physicians may disclose confidential information not only when they are required to do so by law but also when there is significant risk of substantial harm to others (which is, in effect, the reasoning underlying any legal duty to warn). The CMA position statement on AIDS advises physicians that

> disclosure to a spouse or current sexual partner may not be unethical and, indeed, may be indicated when physicians are confronted with an HIV-infected patient who is unwilling to inform the person at risk. Such disclosure may be justified when all of the following conditions are met: the partner is at risk of infection with HIV and has no other reasonable means of knowing the risk; the patient has refused to inform his or her sexual partner; the patient has refused an offer of assistance by the physician to do so on the patient's behalf; and the physician has informed the patient of his or her intention to disclose the information to the partner.[14]

The CMA has affirmed that medical records are confidential documents and that patient authorization is necessary for the disclosure of information contained in such records to a third party, unless such disclosure is required by law. Although medical records are the property of the physician or health care institution that compiled them, patients have the right to examine their records and to copy the information they contain.[15]

The Canadian Psychiatric Association[16] recommends that patients whom a physician believes at any point during treatment to be dangerous or potentially dangerous should be informed that confidentiality may be breached for his or her own protection and that of any potential victim. The association also recommends that any breach of confidentiality should be discussed beforehand and that the patient's cooperation should be enlisted if possible.

Empirical studies

Farber and associates[17] found that internal medicine residents based their decisions to breach confidentiality on factors other than the patient's intention to commit specific acts of violence. Reports of past violence, a criminal record and a history of high-cost crime increased the likelihood that confidential information would be disclosed. Cheng and collaborators[18] found that most adolescents who responded to their survey had problems that they wished to be kept secret and would not seek the help of health care professionals because of concerns about confidentiality. Ubel and colleagues[19] reported that inappropriate comments were made by hospital staff on 14% of elevator rides in the 5 institutions studied. Most frequently, these remarks constituted a breach of patient confidentiality.

How should I approach confidentiality in practice?

Physicans must respect their patient's confidences. Private information should be revealed to a third party only with the consent of the patient or his or her authorized representatives or when required by law.

Physicians should familiarize themselves with the legal requirements in their own province for the disclosure of patient information. When possible, it is important to discuss with the patient the necessity of any disclosure before it occurs and to enlist his or her cooperation. For example, it is helpful to persuade a patient suspected of child abuse to call the Children's Aid Society in the physician's presence to self-report, or to obtain his or her consent before the authorities are notified. This approach will prepare the way for subsequent interventions.

When harm is threatened and there is no specific legal requirement for disclosure the duty to warn may still override the duty to respect confidentiality. This is the case when the anticipated harm is believed to be immi-

nent, serious (and irreversible), unavoidable except by unauthorized disclosure, and proportionate to the harm likely to result from disclosure. In determining the proportionality of these respective harms, the physician must assess and compare the seriousness of the harms and the likelihood of their occurrence. In all instances, but particularly when the harms appear equal, the physician must exercise his or her judgement. In cases of doubt, it would be prudent for the physician to seek expert advice, such as from the Canadian Medical Protective Association, before breaching confidentiality.

When a physician has determined that the duty to warn justifies an unauthorized disclosure, two further decisions must be made. Whom should the physician tell? How much should be told? Generally speaking, the disclosure should contain only that information necessary to prevent the anticipated harm and should be directed only to those who need the information in order to avert the harm. Reasonable steps should be taken to mitigate the harm and offense to the patient that may arise from the disclosure.

The cases

Mr. T's physician warns him that steps will have to be taken to ensure that his wife is made aware of his condition. These steps might include a direct warning to his wife and notification of the public health department. The physician subsequently decides to enlist the help of the department, which she believes to be experienced in dealing with this kind of issue. The public health authorities contact Mr. T and tell him that he must inform his wife. Mr. T responds to their authority and brings his wife to see his physician to be told about his condition.

Mr. U's psychiatrist carefully assesses the homicidal potential of his patient and concludes that Mr. U's wife is in no imminent danger. Mr. U does not really want to kill her and has never had violent outbursts in the past. More important, he does not want his son to suffer the negative consequences of such an action. Given the hostility he feels, Mr. U resolves to avoid contact with his wife. Psychotherapy continues, addressing a number of issues. A settlement with the wife is reached and Mr. U becomes involved in another relationship.

Ms. V's physician seeks legal advice to determine his obligations. He receives conflicting opinions. One opinion states that a duty to inform under these circumstances exists under the province's highway traffic act. A written opinion from the ministry of transportation states that once medical evidence has been received and action has been taken to suspend the driver's licence, further notification is not necessary. The relevant health care legislation permits confidentiality to be breached only when this is required by law.

This raises the question of whether the reasoning used in the Tarasoff case would apply, such that the physician has a duty to warn. The patient has had only 1 or 2 seizures during the past year and feels that she can tell when they are coming on. At most, she drives for 5 minutes 2 to 3 times per week. The probability of an accident resulting in serious irreversible harm is therefore very low. Furthermore, it is not clear that anyone is in a position to intervene even if notification were made.

Ms. V's physician feels that his patient is denying the reality of her illness and does not appreciate the risks involved. Over the next 2 weeks he continues to counsel her, explaining the risks to her daughter, to other people and to herself, given that she probably would not be insured in the event of an accident. This proves effective in penetrating Ms. V's denial of her illness. She tells the physician that she has decided not to drive again while her licence is revoked. Ms. V continues to work with her physician, addressing other areas of her life. This case highlights the importance of continuing to work therapeutically with patients while considering ethical and legal concerns.

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For prescribing information see page 581 →