CONFIDENTIALITY IN MEDICINE

Sharon Kling, *MB ChB, DCH(SA), FCPaed(SA), MMed(Paed), MPhil*

Department of Paediatrics and Child Health, Tygerberg Children's Hospital and Stellenbosch University, Tygerberg, South Africa

ABSTRACT

Confidentiality in medicine ensures respect for the patient's privacy and improves health care by enabling the patient to trust the health professional with very personal information. Confidentiality may be breached if required in terms of the law, such as in the case of gunshot wounds, child or other abuse and communicable diseases. Other justifiable exceptions to the confidentiality rule are in an emergency situation, where the patient is incompetent or incapacitated, and in the case of psychiatrically ill patients who need to be committed to hospital. The final reason to breach confidentiality is to protect third parties, whether this is concern for the safety of a specific person or in the public interest. Two examples of the latter are the Tarasoff case and HIV/AIDS.

INTRODUCTION

'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.' The doctor-patient relationship is built on trust and necessitates that the doctor maintains confidentiality regarding personal information, as stated in the Hippocratic Oath.[1]

The Hippocratic Oath

Doctors no longer take the original Hippocratic Oath, but variations of it are still pledged today. The Declaration of Geneva of the World Medical Association includes the statement, 'I will respect the secrets which are confided in me, even after the patient has died.'[2] Most modern oaths and codes of ethics include some statement about respecting patient confidentiality. The Health Professions Council of South Africa (HPCSA) Ethical Rules of Conduct regarding confidentiality are detailed in Figure 1.[3]

However, according to Beauchamp and Childress, 'Some commentators ridicule such official rules as little more than a ritualistic formula or convenient fiction, publicly acknowledged by professionals but widely ignored and violated in practice.'[4]

We have added a new section on ethics to the journal, and are hoping that we can get it accredited for ethics CPD points. Kindly send submissions or suggestions for topics to the section editor, Sharon Kling, at sk@sun.ac.za

CONFIDENTIALITY IN MEDICINE

Confidentiality is 'the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds.'[5] It differs from privacy in that it always entails a relationship. Confidentiality in medicine serves two purposes.[6] Firstly, it ensures respect for the patient's privacy and acknowledges the patient's feeling of vulnerability. Secondly, it improves the level of health care by permitting the patient to trust the health professional with very personal information.

The essential reasons to support the maintenance of medical confidentiality are: (i) respect for patient autonomy; (ii) fidelity, i.e. acting in good faith to keep implied promises; and (iii) consequentialist, i.e. if doctors maintain confidentiality, then patients will be more likely to trust them and tell the truth, thus promoting the best consequences.[4,7]

Siegler,[6] writing in 1982, argued that 'Medical confidentiality, as it has traditionally been understood by patients and doctors, no longer exists. This ancient medical principle, which has been included in every physician's oath and code of ethics since Hippocratic times, has become old, worn-out, and useless; it is a decrepit concept'.[6] He discovered that his patient's medical records might have been legitimately accessed by between 25 and 100 persons at the university hospital, and pointed out that improved hospital medicine and expanded health care teams all contribute to a changing view of medical confidentiality.

Confidentiality in South African hospitals is no different. Famously, medical information about the late Minister

Professional confidentiality

13. (1) A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only –
    - (a) in terms of a statutory provision;
    - (b) at the instruction of a court of law; or
    - (c) where justified in the public interest.

(2) Any information other than the information referred to in subrule (1) shall be divulged by a practitioner only –
    - (a) with the express consent of the patient;
    - (b) in the case of a minor under the age of 12 years, with the written consent of his or her parent or guardian; or
    - (c) in the case of a deceased patient, with the written consent of his or her next-of-kin or the executor of such deceased patient's estate.

Fig. 1. HPCSA Ethical Rules regarding confidentiality.

Correspondence: Dr Sharon Kling, Department of Paediatrics and Child Health, Faculty of Health Sciences, Stellenbosch University, PO Box 19063, Tygerberg 7505. Tel +27-21-938-9506, fax +27-21-938-9138, e-mail sk@sun.ac.za

of Health, Dr Manto Tshabalala-Msimang, was leaked to the press. The perception is that public figures are not entitled to the same confidentiality and privacy rights that accrue to others. In academic teaching hospitals, the hospital folder is generally available to numerous staff and students, and discussions on ward rounds may inadvertently disclose confidential information in the presence of patients other than those being discussed.

Computerisation of laboratory and radiological investigations makes confidential information easily available, even to healthcare professionals not directly involved with the particular patient's care. In private hospitals I have personally witnessed patient confidentiality being violated by both nursing and medical staff.

Siegler adds an 'afterthought' to his discussion on confidentiality: the disclosure of confidential information in informal situations such as lifts, offices and passages in hospitals. He believes that these breaches of confidentiality are probably of greater concern to patients than the availability of medical records to officials doing their duty, and says that the principles of medical confidentiality in codes of ethics were probably designed to prevent these indiscretions rather than to maintain absolute doctor-patient confidentiality.[6]

When confidentiality may be breached

If the patient authorises the doctor to disclose confidential information, then no breach of confidentiality has occurred. Sometimes the law requires the doctor to breach confidentiality, e.g. reporting of gunshot wounds, child or other abuse and communicable diseases. Other justifiable exceptions to the confidentiality rule are in an emergency situation, where the patient is incompetent or incapacitated, and in the case of psychiatrically ill patients who need to be committed to hospital. The final exception is where the aim is to protect third parties, whether this is concern for the safety of a specific person or in the public interest. Examples of these follow in the paragraphs below.[4,5]

Legislation governing confidentiality in medical practice in South Africa is contained in the National Health Act No 61 of 2003.[8] Sections 14, 15 and 16 deal with issues of confidentiality. Section 14 states that all information concerning a patient, including information relating to his or her health status, treatment or stay in a health establishment, is confidential. The types of health information that is protected and confidential are detailed in this section, and include diagnostic, health status and treatment information, and also the fact that a person has been to or stayed in a health facility. According to section 14 confidentiality may only be breached if:

- the patient consents to that disclosure in writing;
- a court order or any law requires that disclosure; or
- non-disclosure of the information represents a serious threat to public health.

When confidentiality may be breached: the Tarasoff case[4]

Prosenjit Poddar was a student from India who enrolled at the University of California, Berkeley. In 1968 he met a fellow student, Tatiana Tarasoff, and began seeing her regularly. However, she told him there was no hope of a serious relationship, and he was shattered by this news. He was very upset and began to follow her around. He sought professional help and saw a psychologist, Dr Lawrence Moore, at the university. In August 1969 he confided to the psychologist that he intended to kill Tatiana. The psychologist informed the campus security who detained Poddar, but then released him as they thought he appeared to be rational. Moore failed to inform Tatiana or her parents that she was in danger. In October 1969 Tatiana returned to the university after a holiday in Brazil, and Poddar killed her. Initially he was convicted of second degree murder, but this ruling was subsequently overturned and he returned to India. Tatiana's parents sued Dr Moore and the university. The majority judicial opinion at the subsequent court case was, 'when a therapist determines ... that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.' The judges believed that the therapists could not be exonerated on the grounds that Tatiana was not their patient. The rule of medical confidentiality in this case should be broken in the 'public interest in safety from violent assault.' A dissenting judge believed that violation of confidentiality would negatively impact psychiatric treatment of patients.

When confidentiality may be breached: the case of HIV/AIDS

Mr X, a 30-year-old man, has just tested positive for HIV. He asks his doctor not to tell his wife, and says he is not ready to disclose to her as yet. What should the doctor do? Should the doctor respect Mr X's autonomy and confidentiality and not tell his wife, or does he have an obligation to tell her to protect her (beneficence)? Of course, there are a number of permutations of this scenario, and we do not know whether Mrs X is HIV infected or not. The most important consideration is whether the doctor believes that Mrs X is in danger of becoming infected if she does not know Mr X's result.

In a case in New South Wales, Australia, in 1999, the court ruled that a medical practitioner owed a duty of care to the sexual partner/s of a patient. A subsequent case occurred in 2003, and involved PD and her future husband, FH, who underwent HIV testing prior to getting married. PD tested negative and was told that FH's test results were confidential. She was not informed that her own results were not definitive as she might have been in the window period when she was tested. FH was found to be HIV positive, but he did not return to the doctor for follow-up, nor did he disclose his status to PD. They subsequently married and engaged in unprotected sex. Two months after the marriage, PD was admitted to hospital with a fever and a rash, and she was diagnosed with HIV shortly before the birth of her child the following year. She was commenced on antiretrovirals and underwent a caesarean section; the baby was HIV negative. PD sued the doctors of the medical centre where she and FH had been tested. The judge in the case ruled that the doctors have a statutory obligation to refrain from breaching confidentiality and may not reveal information about one person to another without that person's consent. However, he also ruled that the doctors in this case owed PD a duty of care, without defining the extent of that duty. He found that the doctors were 'in breach of the duty of care that they owed PD which resulted in her becoming infected with HIV' and awarded her damages in the amount of $727 437.[9]

What advice do current South African guidelines have for Mr X's doctor? The guidelines of the South African Medical Association (SAMA) recommend that the doctor may disclose the patient's HIV status to the sexual partner/s **only** if all the following conditions are met and the patient is still reluctant to disclose after counselling:[10]

(a) The sexual partner/s should be known and clearly identifiable;

(b) The sexual partner should be at real risk of being infected. In other words, the doctor believes the patient is posing a risk to the sexual partner;

(c) The patient should be told that the doctor is going to breach his/her duty to maintain confidentiality. SAMA recommends that the patient be permitted a specified period of time to tell the partner him/herself;

(d) Once these steps have been followed the doctor may disclose the HIV status to the partner. Pre-test counselling and/or referral of the person to a counselling, support and/or treatment facility should be offered.

The HPCSA HIV guideline recommends that the doctor use his or her discretion in deciding whether or not to disclose information to the sexual partner, taking into account the risks involved.[11] The first step is to 'counsel the patient on the importance of disclosing to his or her sexual partner(s) and to take other measures to prevent HIV transmission.' The doctor must offer support to the patient in disclosing. If the patient still refuses to disclose his or her HIV status, the doctor should counsel the patient on the healthcare practitioner's ethical obligation to disclose such information and request consent to do so. If the patient still refuses, the doctor should disclose the information and ensure access to voluntary counselling, testing and treatment where necessary. However, the healthcare professional must be aware that this situation constitutes a major ethical dilemma, and manage it very carefully.

In the only case in South African law that examined the issue of disclosure by a doctor of a patient's HIV status without his consent, Jansen van Vuuren and another vs Kruger, 1993, the Appellate Division of the Supreme Court ruled that a doctor may not disclose his patient's HIV status to other doctors without consent unless there is a clear legal duty to do so. The case revolved around Dr Kruger disclosing his patient's HIV status to colleagues during a game of golf.[12] None of the professionals to whom he disclosed the information was treating the patient at the time.

Confidentiality in allergy practice

Allergy practice is no different from other medical practice, and the guidelines regarding confidentiality would be as discussed above. On performing an Internet search I came across two interesting items regarding confidentiality and allergy. The first involved a ban on children bringing bananas to school as one of the teachers has 'a life-threatening allergy to the fruit' but the identity of the staff member could not be revealed 'due to medical confidentiality.'[13]

The other was a response to an article on peanut allergy published in the *BMJ*.[14] As part of the disclaimer one of the authors stated that he 'has a child with a food allergy.' The correspondents felt that this statement could possibly lead to identification of the child involved and therefore breaches the medical confidentiality of the author's child. According to them a better way of indicating a potential conflict would be 'Dr X has a personal interest in food allergy', but the question is whether it is really necessary to disclose authors' families' illnesses at all![15]

CONCLUSION

The responsibility of the healthcare professional involves both patient confidentiality and good communication with members of the healthcare team.[16] It is important that patient confidentiality be respected and discretion exercised as to what information should be disclosed. All members of the healthcare team need to realise that this information should be used only for promoting patient care, and that confidentiality should be breached only under exceptional circumstances.

Declaration of conflict of interest

The author declares no conflict of interest in respect of the content of this article.

REFERENCES

1. http://www.pbs.org/nova/doctors/oath_classical.html. Accessed 30 September 2010.
2. http://www.wma.net/en/30publications/10policies/g1/index.html. Accessed 30 September 2010.
3. HPCSA Ethical rules of conduct for practitioners registered under the Health Professions Act, 1974. *Government Gazette* 4 August 2006. http://www.hpcsa.co.za/downloads/rules_reg_constitution/thical_rules_rules_of_conduct_generic_2006_08_04_amended_2009_03_30.pdf. Accessed 1 October 2010.
4. Beauchamp TL, Childress JF. *Principles of Biomedical Ethics*. 5th ed. Oxford, New York: Oxford University Press, 2001.
5. Purtilo R. *Ethical Dimensions in the Health Professions*. 3rd ed. Philadelphia: WB Saunders, 1999.
6. Siegler M. Confidentiality in medicine – a decrepit concept? *New Engl J Me*d 1982; 307: 1518-21. Reprinted in: Kuhse H, Singer P. *Bioethics: An Anthology*. Oxford: Blackwell, 2004: 490-492.
7. Hope T. *Medical Ethics – a very short introduction*. Oxford: Oxford University Press, 2004.
8. National Health Act No 61 of 2003. http://www.info.gov.za/view/DownloadFileAction?id=68039. Accessed 15 March 2007.
9. Mair J. Duty of confidentiality and HIV/AIDS: PD v Harvey. *Health Information Management Journal* 2009; 38(2): 49-54.
10. SAMA. Ethical and Human Rights guidelines on HIV and AIDS 2006. http://www.samedical.org. Accessed 30 September 2010.
11. HPCSA: Ethical Rules; Management of Patients with HIV Infection or Aids (updated 2005): http://www.hpcsa.co.za. Accessed 30 September 2010.
12. Jansen van Vuuren and Another NNO v Kruger (675/91) [1993] ZASCA 145; 1993 (4) SA 842 (AD); [1993] 2 All SA 619 (A) (28 September 1993). http://www.saflii.org/za/cases/ZASCA/1993/145.html. Accessed 5 October 2010.
13. *The Telegraph*. School bans bananas over teacher allergy. 15 June 2009. http://www.telegraph.co.uk/news/uknews/5540615/School-bans-bananas-over-teacher. Accessed 4 October 2010.
14. McLean S, Sheikh A. Does avoidance of peanuts in early life reduce the risk of peanut allergy? *BMJ* 2010; 340: c424.
15. Tuthill DP, Brown JDM, Davies CCA, Pomeroy M. Potential breach of patient confidentiality – how much do we need to declare? *BMJ* 2010; 340/bmj.c424.short/reply.
16. Macara AW. Confidentiality – a decrepit concept? Discussion paper. *J Roy Soc Med* 1984; 77: 577-584.