The Duty to Maintain Confidences

A physician-patient relationship creates a bond of trust between the physician and patient. Within this relationship, the physician is obligated to respect the patient's privacy and maintain confidentiality. This bond of trust promotes an atmosphere of openness and honesty that is essential to the diagnostic and therapeutic process. A patient who lacks trust in his physician's ability to keep his medical information confidential is less likely to be honest about his symptoms and more likely to avoid medical care.

The duty to maintain patient confidentiality arises under ethical principals and legal rules. Common law in Tennessee (law created by judges) recognizes an implied “covenant of confidentiality” between a physician and a patient. Also by statute, the Patient’s Privacy Protection Act acknowledges a patient’s expectation of and right to privacy in licensed health care facilities. Violation of these rules gives a patient the right to sue a physician or other health care providers for breach of duty.

The Health Information Portability and Accountability Act (HIPAA) is a federal law that is designed to protect the confidentiality of protected health information whether it is oral, written, or electronic. A violation of HIPAA may have serious consequences, including disciplinary action, fines, and imprisonment.

However, the duty of confidentiality is not absolute, and there are times when the physician is required by law to reveal a patient’s confidential medical information.

Exceptions to the Rule

Under Tennessee law, the covenant of confidentiality is not enforced if it offends public policy. The courts and legislature have carved out exceptions to the rule whereby a health care provider must reveal a patient’s confidential information even though the patient has not consented.

Subpoena or Court Order.

Tennessee does not recognize a testimonial privilege for communications between a physician and his or her patient. A physician can be required by court order to testify about confidential medical information. If a physician is served with a subpoena or other court order requesting patient medical records, the physician cannot refuse to produce them based upon the patient's privacy rights. Before producing the records, the physician should contact the patient to give the patient’s attorney time to decide whether to challenge the request.

There are exceptions to the exception. A mental health
privilege prevents a psychiatrist (or any member of his or her staff) from revealing or testifying about confidential information obtained during the course of or in connection with a therapeutic counseling relationship, including individual, joint, or group counseling. For purposes of testimonial privilege, a psychiatrist is defined under Tennessee law as a “licensed physician when practicing as a psychiatrist.” Tennessee also recognizes a psychologist-patient privilege.

Many states recognize the mental health privilege because of the stigma that has been attached historically to people seeking help for mental health problems. For a psychiatrist or psychologist to render effective treatment, a patient must be completely honest and open, and the mental health privilege helps assure a patient that his or her confidences cannot be easily revealed even in the face of a court order.

**Note:** There are exceptions to the mental health privilege where a psychiatrist or psychologist is required by law to disclose confidential information. These exceptions are discussed in the factsheet: Legal Issues of Mental Health, Tutorial # 8.

**Injuries Inflicted by Violence.** Any person who gives aid to someone suffering from a wound or other injury inflicted by means of knife, gun, pistol, or other deadly weapon or other means of violence must report it to law enforcement authorities.

The same is true for any injury resulting from exposure to a methamphetamine laboratory. Physicians must make this report even though it means revealing confidential medical information about a patient.

In many states, including Tennessee, patient injuries resulting from domestic violence are reported by health care providers under this type of statute. Through June 30, 2009, Tennessee requires health care providers to file a monthly report documenting their domestic abuse cases. The report is for study purposes only and is submitted without patient identification information.

**Child Abuse.** Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition must report the harm immediately if there is reason to believe that the harm has been caused by brutality, abuse, or neglect. Health care providers, including psychiatrists and psychologists, must do so even if it means disclosing patient confidences. A “child” is defined as anyone who is under 18 years of age, or who is reasonably assumed to be under 18 years of age.

The identify of the person making the report is confidential, unless his or her testimony is needed for an indictment or conviction. Persons making the report in good faith are immune from civil and criminal liability. Any person who knowingly fails to make a report commits a misdemeanor, and health care providers who fail to make a required report also may be liable in civil court for breach of duty.

**Elder Abuse.** Under the Tennessee Adult Protection Act, any person who has a reasonable belief that a disabled or elderly adult has been the victim of abuse, neglect, or exploitation must report this suspicion to the proper authorities. The Act protects adults of advanced years (60 years or older) and disabled adults (18 years old or older) who need help from others to manage their own resources, carry out the activities of daily living, or to protect themselves from neglect, hazardous or abusive situations.

Anyone making a report in good faith is immune from civil or criminal liability. Any person who knowingly fails to make a required report commits a misdemeanor.

**Professional Oversight Proceedings.** The duty of confidentiality protects the patient — not the physician. If a patient makes a complaint against a physician to the Board of Medical Examiners, the Board has investigatory powers that include obtaining copies of patient records that may be relevant to the investigation, including records of patients who did not make the
complaint. A physician cannot refuse to produce patient records based upon patient privacy rights. A physician who refuses to produce patient records made pursuant to a request that complies with the law may be subject to disciplinary action.

*Reporting Communicable Diseases.*
By law, health care providers are required to report diseases and conditions that are either communicable or dangerous to the public. Reports are made to the local health department. Some diseases or conditions, such as encephalitis, measles, plague, and tuberculosis require immediate telephonic reporting followed by a written report. Others, such as chancroid, cholera, influenza, lyme disease, and malaria require only a written report. Reports of HIV and AIDS require special confidential reporting to designated health department personnel.

Patient identifying information must be included in the report so that the health department can take appropriate action to contain the disease or condition and protect the public. Health care providers do not breach the covenant of confidentiality nor violate HIPAA by providing the required information if done in accordance with the law.

*Foreseeable Harm to Third Parties.*
If a patient’s illness presents a foreseeable risk to identifiable third parties, Tennessee law may require the physician to warn the third parties, even though the patient has not consented to the disclosure. For example, the Tennessee Supreme Court has held that a jury may find a physician liable for not telling a patient’s wife that he died of Rocky Mountain Spotted Fever and warning her of the risks and symptoms of the disease. Within a week, she also died of the disease. In a lawsuit brought by the wife’s son, the court found an affirmative duty to warn identifiable third persons in the patient’s immediate family against foreseeable risks emanating from a patient’s illness.

This case is not unique, and similar cases have been brought that involve exposure to other diseases, such as HIV or tuberculosis. This issue often arises in the mental health context when a patient discloses an intent to harm a third party. Jurisdictions may follow different rules, and the results often depend upon the specific facts of each case. Because this problem can arise in different contexts, with different diseases and issues, health care providers should proceed cautiously in balancing their patient’s right to privacy with a third party’s right to know. Seeking legal advice in these situations is advisable.

**Conclusion**
Other exceptions to the covenant of confidentiality may exist under the law, and this paper is not meant to give an exhaustive list. The danger in focusing on the exceptions is that the reader may lose sight of the importance of a patient’s right to confidentiality. Health care providers must rigorously train themselves and their staffs to hold a patient’s private health information confidential while being mindful of the infrequent instances where public policy overrides the patient’s right to privacy.

**Helpful Web sites**
- TN Adult Protective Services
  http://www.tennessee.gov/humanserv/adfam/afs_aps.htm
- Communicable and Environmental Disease Services — TN
  http://health.state.tn.us/CEDS/index.htm
- TN HIV/AIDS/STD Section
  http://health.state.tn.us/STD/forms.htm
- TN Dept. of Children’s Services
  http://www.tennessee.gov/youth/
- TN Dept. of Health
  http://health.state.tn.us/

**Disclaimer:** The information contained in this factsheet is educational in nature and provided as a public service. It is not intended as legal advice nor should it be relied upon as such. The information is based upon federal and Tennessee law, and the law in other states may be different. Laws may change without notice, rendering the information contained in this factsheet inaccurate. If you have specific legal questions, please consult an attorney.

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