

Medical confidentiality in the work of a urologist, andrologist and sexologist — special situations

Krzysztof Kowalik¹ , Paulina Janik², Andrzej Modrzejewski¹

¹Clinical Department of General Surgery, Pomeranian Medical University in Szczecin, Poland

²Department of Philosophy of Law, the John Paul II Catholic University of Lublin, Poland

Abstract

The authors of this paper discuss the scope of medical confidentiality in terms of the urologist, andrologist and sexologist. They draw attention to special situations such as the problem of male infertility or other sexual problems in a relationship and the obligation of medical confidentiality. The paper also addresses the issue of how to deal with a patient under the age of 18 with intimate problems. The paper reviews the legislation addressing the aspect of medical confidentiality in everyday situations in the practice of urologists, andrologists and sexologists, taking into account special situations.

The issues discussed include medical confidentiality in the use of data related to the patient and his/her procedure, the use of medical records for educational and scientific activities and the presence of bystanders during the medical examination, issues related to photo and video documentation of the procedure. The article covers topics related to medical confidentiality that will also be useful for doctors of other specialties.

Keywords: medical confidentiality; urologist; andrologist; sexologist; special situations

Journal of Sexual and Mental Health 2023; 21: 28–33

Introduction

In order for a doctor to accurately diagnose and treat, they must obtain a lot of information from the patient, which is often of intimate nature. A patient is willing to share this information if they are assured it will be kept confidential. Therefore, medical confidentiality shapes the partnership between the doctor and the patient based on trust. Urologists and sexologists are a unique group of doctors who are expected to be particularly confidential. For example, the problem of male infertility is a particularly difficult and intimate issue for many couples. These couples do not want to discuss problems related to having children with members of their immediate family, and they expect tactfulness, confidentiality, and empathy from the attending physician.

doctor-patient confidentiality. In colloquial language, confidentiality means information (a matter, a fact) that should not be disseminated, should not be revealed, and should be kept a secret. Medical confidentiality means an obligation not to disclose a patient's medical history to outsiders in the course of practicing medicine. The penultimate paragraph of the Hippocratic Oath states: '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' [1]. The fourth point of the Code of Medical Ethics also states [2]: 'do not abuse the trust of patients and maintain confidentiality even after their death'. It must be therefore assumed that despite the absence of a legal definition, medical confidentiality is an integral part of the medical profession.

How to understand the scope of medical confidentiality?

The Polish legal system does not have a legal definition of profession confidentiality, which also includes

Medical confidentiality as a legal obligation

The obligation of confidentiality is justified by the right to privacy, from which the so-called autonomy privacy is derived. In Poland, the right to privacy is a constitutional right set out in Article 47 of the Constitution of the Republic of Poland [3]. The legal norm derived from the above-mentioned Article states that

Address for correspondence: Krzysztof Kowalik
 Clinical Department of General Surgery, Pomeranian Medical University in Szczecin, ul. Piotra Skargi 9–11, 70–965 Szczecin, Poland
 e-mail: krzysztof.kowalik.uro@gmail.com

Received: 01.12.2022 Accepted: 19.04.2023 Published: 6.11.2023

'Everyone shall have the right to legal protection of their private and family life, of their honor and good reputation and to make decisions about their personal life'. By regulating this issue, legislators ensure legal protection of every aspect of an individual's life. For the purpose of this article, the concept of 'privacy' is an important element of that legal provision. The Constitutional Tribunal rightly pointed out in its decision from 11 October 2011 in the case no. act K 16/10 [4]: 'Privacy understood as the right to live one's own life, arranged according to one's own will with all external interferences limited to the absolute minimum, refers, *inter alia*, to personal life (as well as the health of an individual)'. In health care, this right is safeguarded by doctor-patient confidentiality.

In view of the above, it is necessary to refer to Article 51, section 1 of the Polish Constitution [5], which states that: 'No one may be obliged, except on the basis of statute, to disclose information concerning his/her person'. By establishing this legal norm, the scope of professional confidentiality is defined for all professions, not only for medicine. This legal norm is fully illustrated by Article 40 of the 5 December 1996 Act on the professions of medical doctors and dentists [6], which states that a doctor is obliged to maintain doctor-patient confidentiality in the course of their work. Section 2 of this Act enumerates the exemptions to medical confidentiality, which include situations stated in the Act; the medical examination was conducted at the request of authorized persons (who are authorized under separate laws, authorities, or institutions), in which case the doctor is obliged to inform only these authorities or institutions about the patient's health; when confidentiality may pose a danger to the life or health of a patient or third parties; the patient or their legal representative consent to a disclosure, however, only after prior notification of the patient of the adverse consequences of the disclosure; there is a need to provide necessary information about the patient to the medical examiner; there is a need to provide the necessary information about the patient related to the provision of health services to another doctor or authorized persons participating in the provision of such services.

Medical doctors are required to follow the Code of Medical Ethics [7], which defines the scope of medical confidentiality quite precisely, in accordance with their own conscience. The following articles from the Code can be quoted:

Article 23. [7] A physician is required to maintain doctor-patient confidentiality. Information about the patient and their environment, obtained by the doctor in connection with their professional activities, is

confidential. The death of a patient does not release a physician from the duty of medical confidentiality.

Article 24. [7] It is not a violation of medical confidentiality to provide information about the patient's health to another doctor if it is necessary for further treatment or issuing a certificate about the patient's health condition.

Article 25. [7] Exemption from medical confidentiality may take place: if the patient consents to it, if maintaining confidentiality significantly threatens the health or life of the patient or other persons, and if it is required by law.

Article 26. [7] It is not a breach of medical confidentiality if, after a medical examination is carried out at the request of persons authorized by law, the result of the examination is transferred to the authorities who requested it. However, it is essential that the patient is informed of that before the doctor begins the examination. Any information that is not necessary for the results of the examination should remain confidential.

Article 27. [7] A physician has the right to disclose any observed threats to human life or health that result from human rights violations.

Article 29. [7] A physician should ensure that the persons assisting them also maintain professional confidentiality. A physician should only disclose information that is necessary for the proper performance of their professional duties. A physician must ensure that medical records are properly maintained and protected from disclosure. Medical records should only include information necessary for medical treatment.

Article 29. [7] A physician and those working with them are obliged to safeguard the confidentiality of the information contained in the genetic material of patients and their families.

It should be noted here that compliance with the Code of Medical Ethics [7] is not a legal requirement. In its decision on 7 October 1992, the Constitutional Tribunal stated that the establishment of deontological standards (for example, the Code of Medical Ethics) did not fall within the competences of state authorities. Deontological standards are not legal norms, as they are included in a set of ethical norms independent of the law. The reference to deontological standards is merely a statutory confirmation of the generally recognized right of the medical corporation, as well as other professional corporations, to determine deontological principles. It is worth noting that the postulates contained in the Code are identical to the common law. The Code of Medical Ethics is a collection of all generally applied legal norms, in order for various professional groups to have easy access to them — in this case physicians.

Material and methods

Material scope of medical confidentiality

Medical data is not the only information considered to be confidential, it also includes information not directly related to a patient's treatment (Article 13 of Patient Rights Act) [8].

The following are therefore subject to confidentiality:

— Information about the place of residence, finances, personal relations. This obligation arises regardless of how the information is given. A physician is obliged to maintain medical confidentiality only if they have received the above-mentioned information in the course of their professional work. However, there is a dispute in Polish literature about the nature and limits of professional confidentiality, and in particular, whether this confidentiality is conditional or unconditional.

Medical confidentiality is conditional since there are exemptions. These exemptions from medical confidentiality are set out in, among others: Article 240 § 1 of the Criminal Code [9], which lists 22 crimes included in the obligation to inform the relevant authorities of their occurrence. Here are some of them:

- an attempt on the life of or health of prisoners of war and other persons — Article 123 of the Criminal Code,
- murder — Article 148 of the Criminal Code,
- serious damage to health — Article 156 of the Criminal Code,
- rape — Article 197 § 3 or 4 of the Criminal Code,
- taking advantage of helplessness, impairment — Article 198 of the Criminal Code,
- sexual intercourse with a minor — Article 200 of the Criminal Code

Therefore, if a physician has received information from a patient (while providing health services) that a prohibited act has been committed, the physician should first consider whether the prohibited act is included in Article 240 of the Criminal Code [9]. If it is, they have a legal obligation to inform the authorities (under the threat of criminal sanctions). If it is not, the physician is required to keep it confidential and is exempt from Article 304 § 1 of the Code of Criminal Procedure [10], which is about the 'social' and not 'legal' duty to report a given act to law enforcement authorities.

The general obligation of medical confidentiality is provided for in Article 40 of the Medical Professions Act. It shall not apply when another statutory provision states as such. Article 240 of the Criminal Code is such a provision. On the other hand, Article 304 § 1 of the Code of Criminal Procedure is about a 'social' obligation, not a 'legal' one. This is a provision of procedural law, not substantive law, and cannot be the basis for

criminal liability (because the provisions of substantive law provide such a basis). It should be noted, however, that the interpretative view of the legal provisions defining the hierarchy of Article 240 of the Criminal Code and its reference to Article 40 of the Medical Professions Act is only one line of interpretation in the Polish legal system. Therefore, when determining the hierarchy of these provisions, Article 240 of the Criminal Code should be regarded as the primary provision when compared to Article 40 of the Medical Professions Act, with Article 340 § 1 of the Code of Criminal Procedure placed next to them as it is addressed to everyone and everything else (persons and acts). Article 304 § 1 of the Code of Criminal Procedure is therefore not addressed directly to physicians.

It is worth noting and perhaps changing one's view of professional confidentiality in the context of Article 178 and 180 of the Code of Criminal Procedure [11, 12], i.e., inadmissibility in evidence, which result in an exemption from professional confidentiality. Without entering a major discussion on the subject, it is worth noting that unconditional inadmissibility in evidence refers to the seal of confession and facts which the defense counsel or lawyer or legal advisor learnt about while providing legal advice or conducting a case. Article 178 of the Code of Criminal Procedure equates medical confidentiality with notarial, advocate, legal counsel, tax advisor, and statistical confidentiality. In order for these persons to be exempt from professional confidentiality, it must be a necessity in the administration of justice and these circumstances cannot be established on the basis of other evidence. Legal doctrine indicates the need for the court to carefully consider and examine whether these two conditions are present. Similarly, in case-law it is noted that in light of the social importance of maintaining professional confidentiality, it is unacceptable to treat an exemption from it as simply a formality. It should be remembered that an exemption from professional confidentiality applies only to specific proceedings before specific authorities — it does not affect other cases and does not authorize the beneficiary to disclose confidential details in any way. According to the Code of Criminal Procedure, if a physician has been exempt from confidentiality, it is mandatory to exclude the public from the hearing and to treat the testimony as a confidential document [13].

Communicating patient information to another physician

This issue is defined in Article 26 of the Code of Medical Ethics [7], which states that 'it is not a violation of medical confidentiality to provide information about the patient's health to another physician if it is

necessary for further treatment or issuing a certificate about the patient's health condition'. This is a kind of safeguard for the physician who must provide the necessary information about a patient during referrals to other departments or medical facilities, including confidential information.

When is a physician not required to notify law enforcement authorities?

Article 240 of the Criminal Code does not impose a legal obligation on a doctor to notify law enforcement authorities in the following situations:

- exposure to HIV infection, venereal or infectious disease, incurable or life-threatening disease (Article 161 § 1 and 2, Criminal Code) [14]. This is where the conflict appears. According to Article 14 (2, 2) of the Patient Rights Act [8] and Article 40 (2, 3) of the Medical Professions Act [15], disclosure is permissible if maintaining confidentiality would threaten the life and health of other persons. The basis of this is the assumption that the right to privacy and confidentiality must give way if it is necessary to protect other, superior values such as life and health. The literature indicates that exception applies when the patient suffers from an infectious disease or is HIV-positive.

Therefore, the question arises — should a physician (most commonly an infectious disease specialist in this case) inform the patient's sexual partner about the possibility of an infection?

International acts and the Jurisprudence of the European Court of Human Rights recommend great caution and restraint in providing such information. In Poland, the provisions of the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans refer to this issue. For the physician, Article 26 (2) of the aforementioned Act is key as it states that in the case of sexually transmitted diseases, the doctor is required to inform the infected patient that their sexual partner(s) needs to arrange a medical appointment.

This is because the patient themselves should inform their partner(s) of the need for a medical appointment.

If a patient does not know their sexual partner or it is clear from their attitude that they will not cease activities that risk infection, the physician may notify the appropriate sanitary services that may initiate an epidemiological investigation. However, it should be noted that a physician can undertake these steps only if there is a real threat of infecting third parties, i.e., sexual partners.

It should also be noted that the disclosure of professional confidentiality is a crime (abuse of trust) defined in Article 266 of the Criminal Code. At the same time, it

is stipulated that the disclosure of confidentiality may take place only to the extent necessary, and a physician is required to maintain it even after a patient's death [Article 40 (2α, 3) of the Medical Professions Act] [14]. On the other hand, Article 40 (4) of the Medical Professions Act [14] indicates that a physician cannot disclose any information that would enable a patient to be identified without their consent.

Special situations

Imprisoned patient during a visit to the urologist in the presence of prison guards

Imprisoned patients are a very special case. The general principle of maintaining medical confidentiality arises from Article 40 (1) of the Medical Professions Act [14]. According to this provision, a physician is required to maintain doctor-patient confidentiality in the course of their work. Exemptions from this obligation are stated in Article 40 (2) of the Medical Professions Act [14], which indicates that the obligation to keep this information confidential does not apply to situations stated in the Act, i.e., when the medical examination was conducted at the request of persons authorized on the basis of separate laws, authorities, and institutions. In such cases, the physician is required to inform only those authorities and institutions about the patient's health.

One might consider whether an imprisoned patient brought in for a medical examination could ask for the prison guard to leave the doctor's office if the examination violates his/her intimacy.

In accordance with Article 115 § 7a, 7b of the Criminal Code, for prisoners, specified in Article 88 §3 and §6 (2) on semi-open and closed prisons, health services are provided in the presence of a nonmedical officer [17]. At the request of the person providing the health services (the physician), the services can be provided without the presence of a non-medical officer. Provision §7a is used when a convict, who is imprisoned in a closed prison, requires health services outside the premises of the prison. This is a safeguard for the physician in case of dangerous prisoners, where the doctor may be in danger, and also in case the convict reports the physician has committed illegal acts, such as harassment. According to the aforementioned provisions, a medical examination may be carried out without the presence of an officer only at the request of a doctor. The prisoner may request the physician to ask the officer to leave, but the final decision is up to the doctor.

The presence of auxiliary (nursing) medical personnel during an examination of a patient with private problems

Another issue that can be raised here is the presence of support staff during a medical examination. It is

often argued in public health care that support staff also work in hospitals, so they can also be present in the doctor's office during a medical examination. However, according to current law, a patient has the right to request that the support staff (nurse) leave during an examination that may violate their privacy, unless the presence of the staff is necessary for the examination. This is due to the fundamental patient rights and the right to privacy [18]. The decision to have an additional person present during an examination should be a joint decision of the patient and the doctor. Despite the absence of an additional person, a physician must present the scope of the examination and then discuss the performed examination. In some situations, a physician may request the presence of another person during the examination itself. For example, a patient showing signs of a mental illness, a mentally handicapped patient, the patient shows symptoms of anxiety and tension, or is reluctant to be examined.

However, it should also be noted that the patient may be insincere in the presence of third parties, which may result in poorer medical history and have a negative impact on the diagnostic process. Therefore, a physician should concentrate primarily on the well-being of the patient in this situation.

Sexual issues in a relationship

Medical confidentiality and the problem of sexual issues in patient relationships deserve special attention in the daily work of a urologist or a sexologist. It should be clarified here that if a physician becomes aware of a patient's sexual issues (including infertility), but which also affect their sexual partner, the disclosure of such information can only be done with the partner's consent [19].

Attention should also be paid to patients who are minors. It should be noted here that if a physician is convinced that providing confidential information about the child could be unfavorable, and especially if the child objects to it (confidential information meaning the child's sexuality or relationships), then the physician may keep this information confidential without informing their parents or legal guardians. Statutory representatives do not have the legal tools to force a physician to violate this confidentiality [20]. After the child turns 16, their consent is required [21].

The concept of medical records (including electronic records, video recording, or photographic records)

The concept of medical records is an essential element for subsequent considerations. According to the Act of 6 November 2008 on patients' rights and the Ombudsman for Patients' Rights [22], all medical data and information related to the patient's state

of health and all provided treatments and services should be considered medical records. The Supreme Court in its decision on 9 February 2011, ref. act V CSK 256/1, adopted a broad interpretation of this concept, indicating that: 'a broad approach allows to include medical information obtained in the form of prepared tissue fragment and organs taken during an autopsy in order to determine the cause of death of the patient in the category of medical records'. Therefore, medical records consist of not only the medical history (examinations, medications, etc.) but also all recordings from surgeries or autopsies.

It should be emphasized, however, that in the case of video recordings or photographic records, the patient should be informed that they will be recorded and consent to it. The legislation does not specify how the consent should be communicated, so it may be expressed orally, in writing, or non-verbally.

The use of medical records in scientific research

Medical records play an essential role in the education of a future physician. Many scientific and medical articles also rely on case studies. Therefore, it is no wonder that the question of medical confidentiality and the use of patient medical records for scientific and educational purposes is of great importance in this article.

Article 26 of the Act of 6 November 2008 on patients' rights and the Ombudsman for Patients' Rights [22] is particularly important here. Pursuant to paragraph 1 of the aforementioned Act, medical records can be made available not only to the patient but also to their legal representative or a person authorized by the patient. The following paragraphs state who is able to access patient's medical records after their death, and which factors are examined by the court. Paragraph 3 of the Act provides an exhaustive list of entities, authorities, etc., which may obtain access to medical records.

Particular attention should be paid to paragraph 3a, which came into effect on 5 June 2009, which states that medical records are made available to persons preparing for the medical profession and for training medical professionals to the extent necessary to achieve educational goals. Paragraph 3b states that these persons are required to maintain medical confidentiality about these records, even after a patient's death.

At this point, it should be noted that there is currently no legal provision that directly addresses the issue of consent or objection of the patient to the participation of students in the process of providing health care services. Nevertheless, the patient should be informed that students will be present during an examination or surgery. The patient should also have the right to refuse to consent to their presence, but this should be well-justified. However, the physician ultimately decides whether

the students may participate in the treatment process [23].

Paragraph 4 is significant for this article, as it states that medical records may also be made available to a university or research institute for scientific purposes, without revealing the name or other personal data that would enable the identification of the patient. The difference between paragraph 3a and paragraph 4 of the Act is that the former relates to teaching and the latter relates to scientific purposes.

Therefore, anonymization is an essential part of sharing medical records. This is also emphasized in Article 2 (1) and (2c), Article 4 (1) and (8), Articles 12, 15, 24, 28, 40 and 57 (1)(d) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data repealing Directive 95/46/EC (General Data Protection Regulation) [24], Anonymization means that medical data are no longer considered personal data and are not protected.

Conclusions

Medical confidentiality and its exemptions should be interpreted in the context of many regulations, various branches of the law, including criminal law in particular. It should be remembered that for a physician, especially a urologist or sexologist, maintaining medical confidentiality is especially important. Situations where medical confidentiality may be waived should also be taken into account. The issue of medical records and access to them are an incredibly important element of this article. Moreover, the issue of patient anonymization in cases of sharing medical records for educational and scientific purposes was highlighted. The lack of regulation of certain legal issues and their interpretations by, among others, the Supreme Court, were also discussed.

Article information

Acknowledgements

The authors of this article would like to thank to legal counsel Mateusz Nafalski for his valuable input and feedback.

Conflict of interest

The authors declare that there is no conflict of interest.

References

1. Source. <https://portal.bioslone.pl/obalanie-mitow/hipokrates/przysiega-hipokratesa> (1.11.2022).
2. Declaration of Geneva. <https://nil.org.pl/dzialalnosc/osrodk/osrodek-bioetyki/etyka-medyczna/491-deklaracja-genewska-swiatowego-stowarzyszenia-lekarzy-wma> (1.11.2022).
3. The Constitution of the Republic of Poland. Art. 48. <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (1.11.2022).
4. Dz.U. 2011 nr 240 poz. 1436. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20112401436> (1.11.2022).
5. The Constitution of the Republic of Poland. Art. 51. <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (1.11.2022).
6. Dz.U. 2022 poz. 1731 t.j. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220001731> (1.11.2022).
7. Code of Medical Ethics (in polish). https://nil.org.pl/uploaded_images/1574857770_kodeks-etyki-lekarskiej.pdf (1.11.2022).
8. Dz.U. 2022 poz. 1876. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220001876> (1.11.2022).
9. art 204. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001138/T/D20221138L.pdf> (1.11.2022).
10. Art. 304. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001375/T/D20221375L.pdf>.
11. Art. 178. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001375/T/D20221375L.pdf> (1.11.2022).
12. Bereza A. Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania. OBSiL, Warszawa 2015.
13. Art. 180. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001375/T/D20221375L.pdf> (1.11.2022).
14. Art. 161. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001138/T/D20221138L.pdf> (1.11.2022).
15. The Penal Code. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220001138> (1.11.2022).
16. Art. 40. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20230001516/T/D20231516L.pdf> (1.11.2022).
17. Art. 115. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001138/T/D20221138L.pdf> (1.11.2022).
18. Dz. U. 2021 poz. 53. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210000053/T/D20210053L.pdf> (1.11.2022).
19. Art. 20. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001876/T/D20221876L.pdf> (1.11.2022).
20. Kordasiewicz B. Cywilnoprawna ochrona prawa do prywatności KPP. KPP. 2000; 1(1): 41–42.
21. Kubiak R. Aspekty prawne w pracy lekarza androloga. In: Kubiak R. ed. Andrologia. Zdrowie mężczyzny od fizjologii do patologii. Wydawnictwo Lekarskie PZWL, Warszawa 2020: 1227–1258.
22. Art. 32. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20230001516/T/D20231516L.pdf> (8.07.2023).
23. Dz.U. 2009 nr 52 poz. 417. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20090520417>.
24. Czy pacjent ma prawo sprzeciwić się obecności studentów przy badaniu? <https://polisa.med.pl/czy-pacjent-ma-prawo-sprzeciwic-sie-obecnosci-studentow-przy-badaniu-,300.html> (18.03.2023).
25. Art. 2 ust. 1 i 2 lit. c, art. 4 pkt 1 i 8, art. 12, 15, 24, 28, 40 i 57 ust. 1 lit. d [in]: Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE.