

PROVIDED AS INFORMATION ONLY
NO RECOMMENDATION OR ENDORSEMENT
ALWAYS CONSULT LEGAL ADVICE

Exceptions to the general rule of confidentiality

In spite of the general presumption that medical information is confidential, courts have found a number of exceptions to the standard protections against disclosure of confidential information. Regardless of the legal theory protecting medical information, courts do not treat privacy or confidentiality interests as absolute, particularly when "supervening interests of society or the private interests of the patient intervene" (*Horne vs. Patton*, 287 So.2d 824 (Ma. 1973)). Courts have concluded that physicians may disclose medical information without liability under a number of different circumstances.

- **When information is already available to others.** For example, medical information in an employee's records has been exempted from confidentiality protection with respect to the patient's employer (*Valencia vs. Duval Corp.*, 645 P.2d 1262 Ariz. Ct. App. 1982)).
- **To protect patients' interests.** The state's interest in obtaining medical records to determine whether a patient needs to be committed may outweigh the physician-patient privilege (*State vs. Kupchun*, 373 A.2d 1325 (N.H. 1977)). Similarly, disclosure alleging that someone is mentally ill and in need of supervision, care or treatment may not lead to liability (*Schwartz vs. Thiele*, 51 Cal. Rptr. 767 (Cal. Ct. App. 1966)).
- **When the patient waives the physician-patient privilege.** Patients who place their medical conditions at issue in litigation or by filing worker's compensation claims are deemed to have waived the physician-patient privilege or to "forfeit" claims for violation of the right of privacy (*Heller vs. Norcal Mutual Ins. Co.*, 876 P.2d 999 (Cal. 1994); *Kaplowitz vs. Borden, Inc.*, 594 N.Y.S.2d 744 (N.Y. App. Div. 1993); *Home Insurance Co. vs. Aetna Life & Casualty Co.*, 644 A.2d 933 (Conn. App. Ct. 1994)). Courts usually consider the privilege waived only to the extent that the medical records concern an element of the claim or defense; it is not waived with respect to unrelated medical information (*Vredevelde vs. Clark*, 504 N.W.2d 292 (Neb. 1993)).
- **In the interest of justice.** Some statutes deem defendants' hospital records to be admissible in criminal trials (see *State vs. O'Brien*, 232 So.2d 484 (La. 1970)). In several cases, courts allow disclosure of confidential medical information that is relevant to a criminal prosecution (*State vs. McAbee*, 463 S.E.2d 281 (N.C. Ct. App. 1995), review denied, 467 S.E.2d 730 (1996)) or a grand jury investigation for Medicaid or IRS fraud (in re: *Grand Jury Investigation*, 441 A.2d 525 (R.I. 1982) (Medicaid fraud); *United States vs. MHC Surgical Ctrs. Assocs.*, 911 F. Supp. 358 (N.D. Ind. 1995) (IRS fraud)). Similarly, a patient's statutory right to medical privacy may be subordinate to the right of the state in alleged cases of patient abuse or criminal treatment (in re: *Application to Quash Subpoena Duces Tecum in Grand Jury Proceedings*, 455 N.Y.S.2d 945 (N.Y. 1982)).
- **To ensure quality medical treatment.** Courts will allow disclosure of medical information in the interest of ensuring that medical care is adequate, particularly in the context of investigations of matters affecting patient health, such as a physician's alleged addiction to drugs and alleged administration of anesthesia while under the influence of addictive drugs (*Arnen vs. Dal Cielo*, 42 Cal. Rptr. 2d 712 (Cal. Ct. App. 1995)); allegations of improper experimentation on patients, (*Hyman vs. Jewish Chronic Disease Hospital*, 258 N.Y.S.2d 397 (N.Y. 1965)); or a hospital staff committee's examination of the qualifications of a staff physician (*Klinge vs. Lutheran Medical Center*, 518 S.W.2d 157 Mo. Ct. App. 1974)). Courts have ruled differently with respect to the permissibility of hospital disclosure of a physician's HIV-positive status to colleagues or patients. Some allow such disclosures (in re: *Milton S. Hershey Medical Ctr.*, 595 A.2d 159 (Pa. Super. 1991), aff'd 634 A.2d 159 (Pa. 1993)),

whereas others believe that a hospital must take "reasonable measures" to maintain the confidentiality of a physician's HIV-positive status, (*Estate of Behringer vs. Medical Center*, 592 A.2d 1251 (N.J. Super. 1991)).

- **To protect the best interests of the child.** Several courts find that in parental termination, custody or child-abuse cases, the best interests of children outweigh the parents' protected confidentiality interests in their medical records and communications (*Jane Doe vs. Davies County Division of Children and Family Services*, 669 N.E.2d 192 (Ind. Ct. App. 1996), transfer den (1996)). Physician-patient privilege statutes often do not protect matters relating to child abuse and some courts deem the privilege abrogated with respect to child abuse (*State ex re. Udall vs. Superior Court*, 904 P.2d 1286 (Ariz. Ct. App. 1995)). Finally, statutory requirements for health care professionals to report child abuse and neglect usually preclude actions for breach of confidentiality (*Hope vs. Landau*, 486 N.E.2d 89 (Mass. Ct. App. 1985)).

In child custody disputes, however, some courts continue to uphold the physician-patient privilege, while noting that the state's interest in correctly determining who is the proper caretaker is weighty enough to allow the court and other interested parties to examine the parents' records privately (*D. vs. D.*, 260 A.2d 255 (N.J. Super. Ct. 1969)). In contrast, however, a number of courts find that the medical records of parents are protected from disclosure by the physician-patient privilege, period (*Best Koshman vs. Superior Court of Sacramento County*, 168 Cal Rptr. 558 (Cal. Ct. App. 1980); *Wing vs. Wing*, 393 So. 2d 285 (La. Ct. App. 1980); *Bond vs. Pecaut*, 561 F. Supp. 1037 (N.D. Ill. 1983)).

- **To protect third parties.** Courts often will find that the public interest in protecting others from disease or threatened violence overcomes the confidentiality of medical information. Thus, if a patient presents a risk of transmitting a disease to others, several courts have found that the physician may disclose as much information and to such persons as is reasonable and necessary to prevent the spread of disease (*Simonsen vs. Swenson*, 177 N.W. 831 (Neb. 1920)). In addition, privacy interests may not be violated when a healthcare professional informs authorities that the patient threatened another's life (*Viviano vs. Moan*, 645 So.2d 1301 (La. Ct. App. 1994), cert. denied, 650 So.2d 254) (psychologist informed law enforcement officials that a patient was threatening a judge's life), or when physicians reveal information related to investigations of rape suspects (*Bryson vs. Tillinghast*, 749 P.2d 110 (Okla. 1988) (no cause of action when a physician disclosed information concerning a patient with injuries similar to those of a rape suspect)).
- **To serve a "substantial and valid interest" of the employer.** Some courts have reasoned that an employer "may have a substantial and valid interest in aspects of an employee's health that could affect the employee's ability effectively to perform job duties." Thus, when a court considers the interest "substantial and valid, it is not an invasion of privacy ... to disclose information to the employer" (*Bratt vs. International Business Machines Corp.*, 467 N.E.2d 126 (Mass. 1984)).

A few of these cases have involved the military's need for information regarding employees' use of drugs or alcohol. In those cases, the courts usually find that the military's security needs may require knowledge of the employee's health status. For example, courts have found no cause of action when physicians informed the military of a patient's alcoholism when the patient was a military employee (*Clark vs. Geraci*, 208 N.Y.S.2d 564 (N.Y. 1960)), or of a patient's husband's use of alcohol and illegal drugs because the husband held a high-level security clearance position (*Howes vs. United States*, 887 F.2d 729 (6th Cir. 1989)).

- **To provide insurers with information.** Most of the cases dealing with exceptions to the confidentiality of medical information do not involve disclosure to insurers. One notable case, however, held that, in applying for insurance, plaintiffs lost the rights to nondisclosure that they otherwise had (*Hague vs. Williams*, 181 A.2d 345 N.J. 1962)).
- **When medical information is shared by two parties.** Prenatal records present complications when an infant-plaintiff raises issues regarding her delivery. In most cases, courts consider the records open to disclosure, even though they reveal information about the mother, because the child's suit acts as a waiver to the physician-patient privilege and because the records are shared, belonging to both infant and mother (the doctrine of inseparability) (*Palay vs. Superior Court*, 22 Cal. Rptr. 2d 839 (Cal. Ct. App. 1993)).
- **Disclosure of medical information to spouses.** Some courts reason that the physician-patient privilege or right of privacy does not protect against disclosure of a patient's medical records to the other spouse. Courts have allowed disclosure of a wife's medical records to her husband during their separation based on the theory that the husband had an absolute right to those records and to authorize their disclosure to others (*Pennison vs. Provident Life & Accident Insurance Co.*, 154 So. 2d 617 (La. Ct. App. 1963), cert. denied 156 So. 2d 266). Similarly, another court found no invasion of privacy when a physician discussed his patient's condition with the patient's wife, even though the couple was involved in divorce proceedings (*Mikel vs. Abrams*, 541 F. Supp. 591 (W.D. Mo. 1982)). Finally, a physician was not liable for revealing medical information to a patient's husband, even though the husband intended to use the information in divorce proceedings, on the theory that each spouse has the right to know of any disease that has a bearing on the marital relationship (*Curry vs. Corn*, 277 N.Y.S.2d 470 (N.Y. Misc. 1977)).

A number of courts do, however, consider medical information privileged or protected by privacy rights even with respect to the other spouse (*Khairzdah vs. Khairzdah*, 464 So. 2d 1311 (La. Dist. Ct. App. 1985)). Indeed, one court reasoned that a more stringent standard should apply with regard to psychiatric information, since a spouse often seeks counseling for problems that could affect the spousal relationship (*MacDonald vs. Clinger*, 446 N.Y.S.2d 801 (N.Y. App. Div. 1982)).

- **Disclosure to siblings.** Courts are more likely to be reluctant to disclose medical information to siblings than to a spouse, even in cases where the information would be relevant to elements of a tort suit. For example, in a suit alleging malpractice in the birth of a child, the statutory privilege precluded disclosure of medical records concerning the child's healthy siblings, even though the records were relevant to the defense theory that the defect was genetic (*Diderikx vs. Cottage Hospital Corp.* 393 N.W.2d 564 (Mich. Ct. App. 1986)).
- **To protect a criminal defendant's constitutional rights.** In a few cases, courts have held that medical records otherwise protected by the physician-patient privilege should be disclosed if they are essential to vindicate a criminal defendant's constitutional right of confrontation (*Shartzler vs. Isaraiels*, 1997 Cal. App. 487 (Cal. Ct. App. 1997)) or right to have access to exculpatory evidence (*People vs. Presto*, 176 N.Y.S.2d 542 (N.Y. App. Div. 1958)).

- **Absence of malice or intent to do harm.** In a few jurisdictions, the absence of malice or intent to do harm has been recognized as a defense for unauthorized disclosure of medical information (*Collins vs. Howard*, 156 F. Supp. 322 (D.C. Ga. 1957) (no liability without maliciousness or lack of justifiable cause for disclosure); *Clark vs. Geraci*, 208 N.Y.S.2d 564 (N.Y. 1960)(no recovery for unauthorized disclosure without showing intent to do harm)).

The vast number of exceptions to the general rule against disclosure of medical information demonstrates the great leeway one has in arguing for or against a cause of action for unauthorized disclosure of medical information. A few common themes emerge, however. First, information communicated or obtained in the course of treatment is presumed to be protected against unauthorized disclosure unless the interest in disclosing the information is weightier than the patient's interest in avoiding disclosure. The competing interests most likely to supersede the patient's interest in confidentiality or privacy are the interests in 1) protecting parties, 2) justice and prosecuting crimes, and 3) protecting the integrity of the medical profession.

A point of key importance in the area of genetics is that, even when statutes prohibit unauthorized disclosure of medical information, employers and insurers might nevertheless have legitimate access to genetic information in some circumstances. Thus, in the often - cited hypothetical case of an airline pilot who tests positive for Huntington's, a court might reason that it is in both the employer's and the public's interest to disclose the information to the employer so that it can monitor the pilot for neurological decline. The legality of such disclosure is even more likely if the employer is the United States military because of national security interests.

The willingness of many courts to disclose confidential information to spouses might influence the legality of genetic counselors' disclosing genetic information to spouses. Courts might conclude that disclosure would not be actionable because this information affects reproductive decision making and therefore could benefit the spouse, especially if they rely on cases presuming that medical information should be shared between spouses.

Courts might be more reluctant to allow disclosure to siblings, since one presumes less intimacy exists among siblings. The sibling cases, however, usually involve disclosure only for the benefit of litigation, which might be deemed a less pressing interest than disclosure for the benefit of making reproductive decisions. Thus, even in those instances, a court might theoretically decide that a sibling's interests are sufficiently weighty to overcome the patient's interest in nondisclosure.

Duty to Warn

The second aspect regarding the disclosure of medical information concerns whether physicians or health care professionals have an obligation to disclose otherwise confidential medical information or to warn of risks that patients present to third parties. The courts have found a number of instances in which physicians are legally obligated to protect a third party from a patient's medical or psychological condition. In some of the early cases, the information a physician was obligated to share did not concern confidential information. For example, the family might already have known that the patient was sick but not that the illness was infectious. More recently, the issue of confidentiality is avoided when physicians fulfill the duty to protect third parties by informing the patient of the infectiousness of the disease. For example, physicians may fulfill the duty to their patients' sexual partners by informing the patients of the sexually transmissible nature of their disease (*Reisner vs. Regents of University of California*, 37 Cal. Rptr. 2d 518 (1995) (HIV); *DiMarco vs. Lynch Homes-Chester County*, 525 A.2d 422 (Pa. 1990) (hepatitis B)).

Courts often will impose the duty to protect or disclose information to third parties on the person who actually poses the risk. Several jurisdictions require those who know they are infected with a venereal disease to protect their partners by refraining from sexual intercourse or by informing their partners of their infection (see *Meany vs. Meany*, 639 So.2d 229 (La. 1994)). Some courts have found that a person infected with a venereal disease may be liable not only to his sexual partner for failing to warn of the disease, but also to foreseeable partners, such as the spouse of his sexual partner (*Mussivand vs. David*, 544 N.E.2d 265 (Ohio 1989)). In addition to duties imposed by tort law, some states make it a crime to intentionally infect another with HIV (Idaho Code, § 39-608 (1995); Mo. Ann. Stat. § 191.677.1(2) (Vernon 1995)).

The duty to warn is particularly interesting when it requires health professionals to disclose medical information that otherwise would be confidential. In the famous case of *Tarasoff vs. Regents of University of California*, 551 P.2d 334 (Cal. 1976), the California Supreme Court held that psychotherapists may have a duty to warn third parties of the danger of the psychotherapist's patient, even though it would require disclosure of confidential information. Most courts restrict this duty to cases in which the victim is known or identifiable, although a few jurisdictions apply the duty even when there is no specifically identifiable victim. Not all jurisdictions, however, follow the *Tarasoff* approach. (see, for example, *Nasser vs. Parker*, 455 S.E.2d 502 (Va. 1995)). A number of courts also have imposed a duty on physicians to warn third parties or take steps to protect them from patients who take medications that might result in dangerous side effects, such as impaired driving abilities (*Welke vs. Kuzilla*, 375 N.W.2d 403 (Mich. Ct. App. 1985)).