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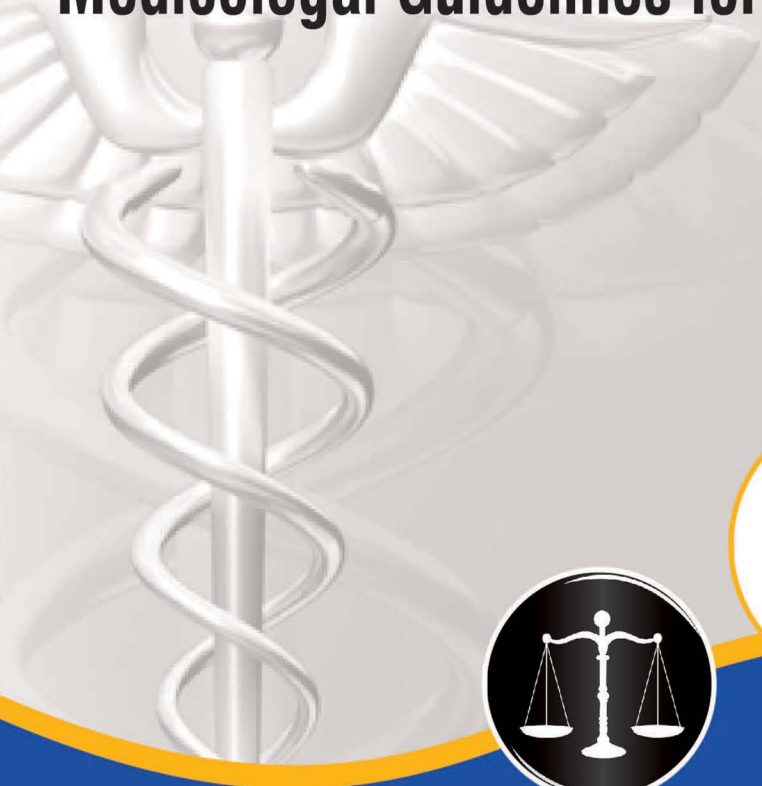
LEGAL ISSUES in Medical Practice

Medicolegal Guidelines for Safe Practice







Editor
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Foreword
SM Kantikar

2nd Edition

JAYPEE

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CHAPTER 2

Confidentiality and Disclosure in Medical Practice

VP Singh, Akashdeep Aggarwal

"What I may see or hear in the course of treatment or even outside of treatment in regard to the life of men, I will keep to myself."

—Hippocrates[1]

INTRODUCTION

Confidentiality is essential to the trusting relationship between patient and the physician. All the information related to the patient, received by a physician during the course of treatment are considered as professional secret. Such information has to be kept confidential and must not be divulged without patient's consent. It is a physician's duty to refrain from disclosing voluntarily to any third party, the information which he has learned directly or indirectly in his professional relationship with the patient. The purpose of medical confidentiality is to enable the patient to make full revelation of the information with assurance that the physician will guard the confidential nature of the information disclosed. Full revelation of the information facilitates the physician to treat the patient appropriately.

Medical privacy involves informational privacy (e.g., confidentiality, anonymity, secrecy and data security); physical privacy (e.g., modesty and bodily integrity); associational privacy (e.g., intimate sharing of death, illness and recovery); proprietary privacy (e.g., self-ownership and control over personal identifiers, genetic data, and body tissues); and decisional privacy (e.g., autonomy and choice in medical decision-making).[2] Patient has a right to privacy which is protected by code of medical ethics. If the healthcare provider breaches the confidentiality of patient, he may face professional and legal sanctions.

However during the course of treatment, information related to patient is to be shared with other clinicians and healthcare workers involved in the treatment. As such, it is justifiable so long as precautions are taken to restrict the access of confidential information to persons not involved in the treatment process. In addition, patient must be informed the ways in which the confidential information will be shared for the purpose of treatment only.

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■ WHEN CONFIDENTIALITY MAY BE BREACHED?

The obligation of medical confidentiality is not absolute as there are certain exceptions to the rule of confidentiality, where disclosure of personal health information is permissible.

Legal Requirement/Administration of Justice

A doctor has to disclose the professional secrets when required by law to do so. He may be compelled to divulge the confidential information by a Court order, while giving evidence in a Court of law. In such situations, patient's consent is not required and the doctor can easily justify the breach in confidentiality. A doctor has to disclose the health information for the purpose of administration of justice (e.g., malpractice cases, consumer protection cases, workman's compensation cases, demanded by the police on a written requisition, etc.).

Patient's Interest

A doctor may disclose the patient's confidential information, if he believes it to be in patient's best interests. Such situations may arise when patients are incapable of making their own decisions. The information regarding a patient's health is given to a relative or other appropriate person in circumstances where the doctor believes it undesirable on medical grounds, to reveal the information to the patient. While referring a patient to another doctor, confidential health information may be shared with healthcare professionals involved in patient care during the transit and also to the doctor to whom the patient is being referred.

Medical Research

Confidential information of the patient may be disclosed for the purpose of research or experiment strictly as per the guidelines issued by some authoritative body like Indian Council of Medical Research (ICMR). Identity and records of the human participants of the research or experiments are as far as possible kept confidential. No details about identity of said human participants are disclosed without valid scientific and legal reasons which may be essential for the purpose of therapeutics or other interventions, without the specific consent in writing of the human participant concerned, or someone authorized on their behalf. It must also be ensured that the said human participant does not suffer from any hardship, discrimination or stigmatization due to the research or experiment.[3]

Health Insurance Purpose

Medical practitioners may disclose the health information of his patient, when demanded by insurance companies as provided by the Insurance Act, when the patient has relinquished his rights on taking the insurance.

Public Safety

Physician has to disclose confidential health information related to communicable/notifiable diseases as a statutory requirement. A physician can divulge confidential information of his patient, without consent, if he believes it to be in favor of public interest. Before disclosing the confidential information of his patient, physician has to balance the public interest against his

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patient's interest. If the public interest is at significant risk due to non-disclosure of patient's health information, and at the same time, public interest outweighs the patient's interest, then physician may be justified in disclosing the information.

■ GUIDELINES ON MEDICAL CONFIDENTIALITY

Medical Council of India Regulations

In exercise of the powers conferred under Sec 20A read with Sec 33(m) of the Indian Medical Council Act, 1956, the Medical Council of India with the previous approval of the Central Government, made the regulations namely *Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations*. These regulations have addressed the important issue of medical confidentiality.

Regulation 1.3.2

If any request is made for medical records either by the patients/authorized attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours. Thus it is clear that no doctor can refuse to handover the patient's medical record to the authorized person under the garb of *breach of confidentiality*.

Regulation 2.2: Patience, Delicacy and Secrecy

Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of patients observed during medical attendance should never be revealed unless their revelation is required by the laws of the State. Sometimes, however, a physician must determine whether his duty to society requires him to employ knowledge, obtained through confidence as a physician, to protect a healthy person against a communicable disease to which he is about to be exposed. In such instance, the physician should act as he would wish another to act toward one of his own family in like circumstances.

Regulation 5.2: Public and Community Health

At all times, the physician should notify the constituted public health authorities, of every case of communicable disease under his care, in accordance with the laws, rules and regulations of the health authorities.

Regulation 7.6: Sex Determination Tests

On no account, sex determination test shall be undertaken with the intent to terminate the life of a female fetus developing in her mother's womb, unless there are other absolute indications for termination of pregnancy as specified in the Medical Termination of Pregnancy Act, 1971. Any act of termination of pregnancy of normal female fetus amounting to female feticide shall be regarded as professional misconduct on the part of the physician leading to penal erasure besides rendering him liable to criminal proceedings as per the provisions of this Act.

Regulation 7.14

The registered medical practitioner shall not disclose the secrets of a patient that have been learnt in the exercise of his/her profession except:

- In a court of law under orders of the Presiding Judge.

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- In circumstances where there is a serious and identified risk to a specific person and/or community, and notifiable diseases.
- In case of communicable/notifiable diseases, concerned public health authorities should be informed immediately.

Regulation 7.17

A registered medical practitioner shall not publish photographs or case reports of his/her patients without their permission, in any medical or other journal in a manner by which their identity could be made out. If the identity is not to be disclosed, the consent is not needed.

Right to Information Act and Medical Confidentiality

The Right to Information Act (RTI), 2005 entitles the citizens to access information that is publicly available and related to public interest. The demands for information in medical records are increasing. All the information requested through RTI need not be disclosed. The request for information from the third party about a patient does not come under the definition of information provided under Sec 2 (f) of the RTI Act.

Sec 8 of the Act provides certain exemptions from disclosure of information:

- *Information which would impede the process of investigation or apprehension or prosecution of offenders.* [*Sec 8(1)(h) RTI Act, 2005*]
  This provision is especially relevant to the medicolegal cases. In such cases, the Public Information Officer would be entitled to have clearance from the police or other investigating agency before releasing the information.
- *Information available to a person in his fiduciary relationship* need not be disclosed unless, the competent authority is satisfied that the larger public interest warrants the disclosure of such information.* [*Sec 8(1)(e) RTI Act, 2005*]
  **Fiduciary* is a person who occupies a position of trust in relation to someone else, therefore requiring him to act for the latter's benefit within the scope of that relationship. In business or law, it generally means someone who has specific duties, such as those that attend a particular profession or role, e.g., doctor, lawyer, financial analyst or trustee.
- *Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual need not be disclosed unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information. [Sec 8(1)(j) RTI Act, 2005]*
  In a physician-patient relationship, it is the most important duty of a physician to maintain professional secrecy. Physicians cannot disclose to any other person, the information regarding his patient, which he has gathered during the course of treatment. The medical practitioners and administrators must be well versed with the provisions of RTI Act so as to decide, whether to provide or not, the information requested under RTI Act.

The confidentiality required to be maintained of the medical records of a patient, considering the regulations framed by the Medical Council of India cannot override the provisions of the Right to Information Act. If there be inconsistency between the regulations and the RTI Act, the provisions of the Act will prevail and the information will have to be made available under the Act.

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Decision regarding disclosure of personal information of an individual may vary from case to case depending upon the circumstances of the case. In *Secretary General, Supreme Court of India* vs. *Subhash Chandra Agarwal,*[4] Delhi High Court held that personal information including tax returns, medical records, etc., cannot be disclosed in view of Sec 8(1)(j) of the RTI Act. The court, however, further stated that, *if it can be shown that sufficient public interest is involved in disclosure, the bar (preventing disclosure) would be lifted and after duly notifying the third party (i.e., the individual concerned with the information or whose records are sought) and after considering his views, the authority can disclose it.*

Maharashtra State Information Commission permitted disclosure of medical records of former Minister Mr Surupsinh Naik, who had been imprisoned and it was alleged that he used his political influence to falsify medical symptoms to stay in a hospital rather than a prison during his 1 month sentence. The RTI Act request was filed in the public interest to expose this political corruption. The Commission held:

Public Information Officer can disclose personal information, since there is a feeling in the minds of people that highly placed people and people with money power can spend their jail term not in the prison but in the hospital, public interest will be better served, if this information about hospitalization is disclosed even though this information is of a 3rd person and of a personal nature. The information about hospitalization, medication and discharge report of a patient in the government hospital, if required by the legislature cannot be denied to them.[5]

RTI and Medicolegal Cases[6]

Large number of requests are received by health authorities under the RTI Act to provide information related to medicolegal cases such as copies of postmortem reports, medicolegal reports, etc. Public Information Officers (PIOs) should be well versed with the provisions of RTI Act so that they are able to decide whether the information requested is to be provided or not.

If an FIR has been registered in a case and investigation is in progress, the PIO can claim exemption under clause (h) of Sec 8(1) on the ground that providing copy of PMR or MLR would impede the investigation and/or apprehension or prosecution of offenders. Similarly, in cases where the disclosure of information may endanger the life and safety of any person (potential witnesses, victim, etc), exemption can be claimed under Sec 8(1)(g). In case of doubt whether an FIR has been registered in a case, the PIO may officially write to the Police and ascertain the status. Time limit of 30 days for providing information under the RTI Act is sufficient for this purpose.

Issuing Copy of MLR/PMR to Other Persons (Other than the Patient and the Police Officer Investigating the Case)[6]

Delhi High Court in State vs. Gian Singh held that, a medicolegal report or postmortem report is a confidential document and not a public document.[7] As per the medicolegal manual prepared by Health Department Haryana, copy of PMR/MLR may be provided, subject to fulfilment of the following three conditions:

1. Applicant shall submit a written application addressed to the concerned Medical Officer clearly stating his/her relationship with the patient/deceased person.
2. Applicant shall pay the fee prescribed by the State Government with the Health department and enclose the receipt for the same along with the application, and
3. The Applicant shall furnish NOC from concerned Police Station (investigating the matter) clearly stating that the issuance of copies of MLR/PMR will not hinder the investigation.

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Alternatively, the applicant shall produce order of the Court directing the Medical Officer concerned to provide him/her copy of the PMR/MLR.

Medical Confidentiality and HIV Status

Confidentiality in HIV-positive patients is a sensitive issue in medical practice due to its interrelated ethical and legal repercussions. In India, most public health policies dealing with HIV infection encourage individuals to come forward voluntarily for testing, counseling and treatment. Many public health authorities have argued that failure to maintain confidentiality could threaten the cooperation of HIV-positive individuals.

The right of HIV-positive individual to confidentiality comes in conflict with the right of the partner to be informed about the risk of infection, known as partner notification. Persons unknowingly placed at risk of HIV infection, have a moral right to information so as to protect them, seek testing and commence treatment, if necessary. The dilemma between individual rights of HIV-positive patients and social control over them has led to controversies all over the globe.

In medical practice, physicians may face clinical situations when they know the identity of the person deemed to be at risk. The ethical and legal issues related to breach in confidentiality due to partner notification were examined in detail in *Tarasoff case*. In this case, Prosenjit Poddar, a student of the University of California, told his psychiatrist about his intention to kill a girl named Tatiana Tarasoff. Realizing the seriousness of his intention, the therapist concluded that Poddar should be detained for observation. Concerned about the breach of confidentiality, the therapist's supervisor rejected the recommendation and ordered that all records relating to Poddar's treatment be destroyed. The police released Poddar on his assurance that he would *stay away from the girl*. Two months later, he killed Tatiana. The girl's parents sued the University for negligence. The court held that the physician could be held liable for failing to take adequate steps to protect a known intended victim of his patient. It was considered ethically permissible for the physician to notify the person whom the physician believed was endangered. Many States in the USA legislated that physicians are legally obliged to notify subjects who are at risk of infecting third parties. However, civil liberty groups demanded proper guidelines for the physicians in relation to disclosure decisions. This resulted in formulation of the *policy on privilege to disclose* which included the criteria for disclosure:

- The physician reasonably believes that notification is medically appropriate and that there is a significant risk of infection.
- The patient has been counseled regarding the need to notify partners.
- The physician has reason to believe that the patient will not notify his/her partners.
- The patient has been informed of the physician's intent to notify partners and has been given the opportunity to express a preference as to whether the partners should be notified by the physician directly or by a public health officer.[8]

NACO Guidelines on Confidentiality in HIV-positive Individuals Operational Guidelines for ICTCs: (July 2007)

Operational guidelines for Integrated Counseling and Testing Centres (ICTCs) by National AIDS Control Organization (NACO)[9] aim to ensure uniformity in counseling and testing services across the country. These guidelines suggest that, *information gathered during counselling must not be shared with others. The HIV test result must be reported only to the client*

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unless the client states the desire to share the test result with a family member, partner or close friend. HIV testing is to be done after obtaining the informed consent from the client. This permission is entirely the choice of the person submitting for the test and can never be implied or presumed. Except in circumstances when disclosure to another person is required by law or ethical considerations, the HIV-positive person has the right to privacy, and also the right to exercise informed consent in all decisions about disclosure in respect of his/her status. The operational guidelines for ICICs also suggest about partner notification that an HIV-positive person should be encouraged to share the positive test result with his/her spouse, sexual or needle sharing partner(s). This process of encouraging the client to share the test result might take multiple visits. If after multiple visits the counselor feels that the client* is not ready to share his/her status and the regular sexual partner of the HIV-positive individual is deemed to be at risk, the partner can be notified of the person's positive status.

*Client is a person seeking healthcare services, including in an ICTC, is a client and not a patient. Patients are considered passive recipients of treatment/care/hospitalization, whereas clients are consumers who make a choice whether or not to avail of a certain service.

Guidelines on HIV Testing (March 2007)

The NACO published *Guidelines for HIV testing*[10] in March 2007. The manual provides comprehensive document that guides on all the aspects related to HIV testing as well as training. NACO discussed issues related to confidentiality and informed consent for HIV testing under the chapter titled *Legal and ethical issues of HIV/AIDS* as follows:

Confidentiality and HIV/AIDS

The patient has the right to confidentiality. The physician should not reveal confidential communications or information, without the consent of the patient, unless provided for by law or the need to protect the welfare of the individual or public interest. Civil and criminal penalties may ensue for unlawful disclosure of HIV-positive status. However, the principle of confidentiality is never absolute and has always been subject to limits in the interest of society, public welfare and the rights of the other individuals.

Exceptions to confidentially are appropriate when necessary to protect public health or when necessary to protect individuals, including healthcare workers, who are endangered by persons infected with HIV. If a physician knows that a seropositive individual is endangering a third party, the physician should within the constraints of the local law: (i) Attempt to persuade the infected patient to cease endangering the third party; (ii) If persuasion fails, notify authorities, and (iii) If the authorities take no action, notify the endangered third party.

Informed Consent for HIV Testing

Informed consent applies to HIV testing and it is real informed consent and not implied consent. Full disclosure of the nature of HIV disease, nature of the proposed test, implications of a positive and a negative test result and the consequences of treatment must be made prior to taking consent. The consent must be voluntary and patient must be able to understand and competent to refuse. Testing should always be accompanied with counselling. Informed consent for testing and disclosure must be in writing.

Human immunodeficiency viruses testing in a minor and an incompetent patient can be undertaken with a guardian's consent. HIV testing should not be undertaken without written informed consent because of the issues of confidentiality, discrimination, victimization and psychological harms and burdens raised by an HIV-positive result.

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Judicial Decisions on Medical Confidentiality and HIV Status

In India, till date, there is no legislation exclusively dealing with issues of medical confidentiality and partner notification in HIV-positive individuals. However, law on confidentiality in *people living with HIV/AIDS* (PLHA) may be construed from the Court decisions on the issue.

In Mr X vs. Hospital Z,[11] the Supreme Court of India allowed for disclosure of a person's HIV status to their partner. Mr X donated blood for his uncle's surgery at Hospital Z. After few months, Hospital Z informed the uncle that Mr X's blood had tested positive for HIV. Meanwhile, Mr X was to be married to Ms Y, but he himself called off the wedding when he heard about his HIV status. Several people including members of Mr X's family had been made aware of his HIV-positive status. He was completely ostracized by the community. Mr X approached the Supreme Court for damages against Hospital Z, on the grounds that they disclosed confidential information. The Supreme Court held that:

> *An HIV-positive patient who may transmit the disease to his or her prospective spouse is not entitled to the maintenance of confidentiality, since the life of the spouse has to be saved. Therefore, a hospital can disclose a patient's HIV status to the prospective spouse (partner), and in fact, since acts that are likely to spread communcable diseases are a crime under the Indian Penal Code, the failure of the hospital to inform the spouse of the disease would make them participant criminals.*

The court also ruled that since being infected with a venereal disease (read HIV/AIDS) is ground for divorce under Indian matrimonial laws, a person suffering from such a disease has no right to get married until they are cured. An appeal was filed, seeking clarification, and challenging the judgment of the Supreme Court decision to suspend the right of PLHA to marry when that was not even an issue before it. In the appeal, Mr X vs. Hospital Z (AIR 2003 SC 664), while the Supreme Court rescinded its earlier observations regarding marriage, and restored the right to marry for PLHA, it upheld its previous decision about partner notification maintaining that this disclosure was permissible.

Mandatory HIV Screening

The UNAIDS/WHO support mandatory HIV testing of the blood to be used for transfusion or for manufacture of blood products. Mandatory screening of donors is required prior to all procedures involving transfer of bodily fluids or body parts, such as artificial insemination, corneal grafts and organ transplant. The UNAIDS/WHO do not support mandatory testing of individuals on public health grounds. Many countries require mandatory HIV testing for immigration purposes and for pre-recruitment and periodic medical assessment of military personnel. The UNAIDS/WHO recommend that such testing should be done only when accompanied by proper counselling of the individuals and referral to medical and psychosocial services for those who are tested HIV positive.[12]

The NACO has also opposed mandatory HIV testing for public health purposes. It further said that such mandatory testing on public health grounds could be counterproductive as it may scare away a large number of suspected cases from getting detected and treated.[13]

HIV Testing of Patients Prior to Surgery

The practice of insisting the patients for HIV testing before surgery or routine compulsory pre-surgical HIV testing without informed consent is widespread both in private and government institutions in India. The practice is not legitimized, often secretive and discretionary. A multicenter study on 2200 healthcare providers indicated 67% of respon-

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dents reported that they screened patients for HIV before elective surgery, and 92% felt that universal pre-surgical HIV screening was a desirable policy.[14] A survey explored the views of medical practitioners working in 9 hospitals on mandatory *HIV testing of patients prior to surgery*. The survey indicated that the predominant reason for surgeons favoring mandatory tests was their fear of acquiring HIV infection from a patient. This fear appeared to lead them to focus on risk avoidance and self protection, for which they favored mandatory testing rather than the nationally recommended practice of adopting universal precautions.[15] However, the arguments in favor of mandatory HIV tests on the basis of risk of transmission of HIV infection from patients to surgeon are not sustainable on scientific grounds. The documented risk of transmission of HIV infection is reported to be very low, and from scientific perspective, surgeon's apprehensions are overstated.[16] Moreover, if a patient is in 'window period', the pre-surgical test results will be rather misleading and result in false assurance that the test is negative.[17] In spite of scientific evidence indicating the pre-surgical HIV testing as no-essential, the surgeon's insistence on compulsory testing is stringent. To conclude the whole discussion, there is no substitute for universal or standard precaution, and compulsory pre-surgical HIV testing is an unconscionable practice that has no legitimate and scientific basis. Voluntary HIV testing that requires the patient's consent is an appropriate and legally accepted approach.

CONCLUSION

Medical confidentiality remains important both to patients as well as healthcare professionals. Effective treatment requires accurate information. Patients are most likely to provide this information when they are not worried about public exposure. In addition to analyzing medical confidentiality from the physician's perspective as a professional responsibility, it is extremely important to understand that patient interests are at the core of medical confidentiality policy. The obligation of medical confidentiality is not absolute as there are certain exceptions to the rule of confidentiality, where disclosure of personal health information is permissible. In the absence of specific legislation on medical confidentiality, physicians have to maintain a fine balance between maintaining confidentiality and disclosing the health information, on the basis of various ethical guidelines and court decisions available.

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