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Doctor-patient confidentiality - right and duty of a doctor in law regulations

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Summary:

Physician's professional secrecy is one of the most important duties of a doctor and should be provided with confidentiality regarding his or her health. Generally speaking, there is no legal definition of "physician's professional secrecy" in Poland, although this concept already appears in the oath of Hippocrates: *'I will keep secret anything I see or hear professionally, which ought not to be told'*. The issue of medical confidentiality (physician's professional secrecy) has been regulated in several legal acts such as: The Patient Rights and Patients Ombudsman Act, The Constitution of the Republic of Poland, The Medical Profession Act, The Civil Code Act, The Criminal Code Act and Code of Medical Ethics which is not considered as a legal act. The patient has the right to require confidentiality of the information concerning him and the obligation to keep medical confidentiality will apply to every representative of the medical profession, who obtained certain information by various professional activities.

Key words: patient, physician, medical law, physician's professional secrecy

The idea of attorney-client refers to, inter alia, professions such as journalist, notary, solicitor or lawyer. However, it plays special role in legal transactions, especially medical regulations – doctor-patient confidentiality, which is one of the most important duties of a doctor related to his/her occupation and means providing full confidentiality for a patient on data regarding his/her health, and by this means doctor's duty to patient over this matter. Generally there is lack of a legal definition for "doctor-patient confidentiality", even though this idea already appears in Hippocratic Oath: *"and about whatever I may see or hear in treatment, or even without treatment, in the life of human beings, I will remain silent, holding such things to be unutterable"[1]*. What then the doctor-patient confidentiality is and what is its application? We will try to answer these and other questions in following considerations.

The issues of doctor-patient confidentiality has been regulated in several pieces of legislation. The first example should be the Article 13 of the Act of 6-th November 2008 year about patient rights and Patient Ombudsman [2], according to which the patient has right to demand from people occupying medical profession, including people providing health services, to keep confidential all the information about him/her collected for the purpose of performing medical profession. Therefore, the obligation to keep doctor-patient confidentiality will apply to any representative of the medical profession, who in connection with performance of professional activities, has obtained certain information. This means, that not only doctors, but also representatives of other professions and professional healthcare groups, who obtained confidential information in connection with performed professional activities are obliged to follow doctor-patient confidentiality. The quality of the secret is its confidentiality. It is described as a limitation of access to information, which means that we can talk about a secret only when certain information is not available to the public, but only for restricted group of people [3]. Therefore, the commonly known message that has been deprived of confidentiality is not a secret. We can say about confidentiality of a certain information, even if it became well-known for most of the public, only if the group of insiders remains restricted [4]. In the same time it is impossible to specify the number of insiders which, if exceeded, means that the information is no longer confidential. It should be noted, that it is primarily the way in which pieces of information about patient are obtained that determines whether these are confidential. It is about determining whether these were obtained in connection with professional activities. Therefore, there is no catalogue of circumstances and facts within the scope of secrecy.

The 2005/36/WF directive of European Parliament and Council of 7-th September, 2005 year pays attention to confidentiality in relations between doctor/dentist/nurse/midwife/pharmacist and client in recognition of professional qualifications [5]. The patient has right to demand from people

occupying medical profession to keep all information about him/her confidential. The obligation is not limited in time, concerns actual and former patients and lasts after the death of a patient [6].

Therefore the subject scope of patient's right for confidentiality is quiet broad and includes all the information about him/her, obtained by the doctor for the purpose of performing professional activities. It is not only about strictly medical data, but also about data that refers to patient's personal, family, property and professional situation. Every fact and piece of information obtained by subjects providing healthcare services, regardless of their form or method of consolidation, are confidential. These can include both oral information and also information recorded in medical documentation (individual and collective), i.e. in febrile card [7]. Patient has right to demand confidentiality of information on conducted medical examination, diagnosis based on it, disease history and therapeutic procedures, methods and advances in treatment, earlier and concomitant illness, hospitalization, rehabilitation and nursing care and medication.

In turn, subjective scope of doctor-patient confidentiality includes people who are obliged to keep it in connection with provision of healthcare services. Therefore, it includes a doctor, nurse, midwife, surgeon, laboratory diagnostician, pharmacist and psychologist and also these people, whose obligation to keep attorney-client confidentiality does not result from distinct regulations, because these have not been prepared.

It should be noted, that every piece of information referring to health condition are strictly connected to private sphere of a human. Disclosure of this information might cause feeling of shame and even became the reason for discrimination, and therefore these are protected by the law. It is worth noting, that the patient's right to have doctor keep information confidential results directly from Constitution of Republic of Poland [8]. The Article 47 of Constitution of RP gives its citizen right to protect private life, honor and name. The protection of communication secrecy is a regulation of Article 49, while the protection from disclosure of information about citizen is the Article 51 of Resolution 1. These guarantees are generally defining the scope of individual's freedom towards the state and its institutions and also towards other institutions [9].

The obligation to keep attorney-client confidentiality also includes members of pharmacy self-government. The profession of pharmacist also belongs to the category of public trust professions, that is why people who occupy them have to remember to do not disclose any sensitive information, having in mind building good relations with patient. It is reflected in the Act on Pharmaceutical Chambers, which states: *"Members of the pharmacy self-government are obliged to: 1) follow the*

principles of professional ethics and deontology, behave dutifully and conscientiously perform their professional duties; 2) keep in secret messages regarding health condition of patient obtained in connection with performed professional activities"[10]. The Pharmacist Code of Ethics says similarly: *"Pharmacist keeps confidential everything he/she learned during or in connection with the performance of professional activities. Exemption from attorney-client confidentiality may only take place in circumstances specified by law" [11]*.

Similar solutions in the field of the right to doctor-patient confidentiality are included in the Medical Code of Ethics. Confidential is information about the patient and his environment that has been obtained in connection with performed professional activities [12]. Providing information about the patient's health condition to another doctor, if necessary for further treatment or issuing a decision on the patient's health condition, does not constitute breach of doctor-patient confidentiality [12]. This regulation is also reflected in regulations of Patient's Rights and Patient's Ombudsman Act of Article 14, point 2, which additionally allows for disclosure of doctor-patient confidentiality when following it might be dangerous for life or health of the patient or other people as well as when patient or his/her statutory representative allow to disclose the doctor-patient confidentiality or regulations of other legislations do so. Some regulations included in Articles 23-29 of Medical Code of Ethics regulate discussed matter in different way to the common law. In the event of a collision, it is necessary to first rely on the provisions of the Act, because the Medical Code of Ethics is not a source of universally binding law.

That is why the Act of 5-th December 1996 year on doctor and dentist professions [13] is a basic Act regulating that matter of keeping doctor-patient confidentiality. In accordance with Article 40 of the Act, the doctor is obliged to keep in secret information connected with the patient and obtained in conjunction with performance of professional activities. It applies both doctor and dentist, irrespective of the form of profession or business relationship, as this obligation has been shaped in an absolutely binding manner [14].

If it comes to subjective scope of confidentiality included in the Act, similar to previously given regulations, it has been broadly specified and includes all the information connected with the patient, that were obtained by the doctor in conjunction with performance of professional activities [1]. Therefore it is all about the data, that the doctor has obtained during his/her work. The most often it is the patient, who provides this information during the interview. The source of this information might be also medical documentation, test results prepared by medical staff or information from third parties (patient's family).

So when do we exactly encounter confidentiality violation and what is its form? These are following situations:
a) patient discloses himself/herself certain data in presence of third parties
b) information is provided to third parties (personally or by phone) by people occupying medical professions,
c) Topics related to patients are discussed in private conversations of medical staff

Therefore we will deal with confidentiality violation both in writing and oral, as well as in case of action (i.e. providing the data to journalists) and omission (i.e. leaving the documentation in public place). The fact whether complete data or only part of it will be disclosed does not matter.

However, the Act of doctor and dentist professions in Article 40 provides for certain situations when the secret may be disclosed. In accordance with Article 40, paragraph 2 of doctor profession Act (...) - the doctor is not obliged to keep confidential the information connected with the patient and obtained in conjunction with performance of professional actions when:
1) if so are the regulations – i.e. Act of 1-st July 2005 year on collection, storage and transplantation of cells, tissues and organs [15] in Article 19, paragraph 2 says, it is allowed to mutually disclose the personal data of the donor and recipient when the organ is to be collected from a living person;
2) a medical examination was carried out at the request of authorized bodies and institutions on the basis of separate Acts; then the doctor is obliged to inform about the patient's state of health only to those organs and institutions. The catalog of these entities is quite wide and includes, among others, police, prosecutors, courts, ZUS and KRUS or employers. After the examination, the doctor provides the above mentioned only with information obtained by the authorities as a result and only to the extent indicated by the applicant. In addition, the doctor cannot share this data with other entities. Before starting the examination, the physician is obliged (pursuant to Article 26 of the Medical Code of Ethics) to inform the patient that it is carried out at the request of the institution and its result as well as the information related to it will be transferred to that entity;
3) keeping the secret may pose a danger to the life or health of the patient and other people. Danger to the health or life of the patient should be understood as a threat that is not a direct consequence and a medical consequence of the dynamics of the disease [16]. As for the danger to persons other than the patient, the justification for repealing the secret must be real, not hypothetical, which should be based on objective medical findings. At the same time there must be a reasonable belief, that the patient on his/her own will not warn a third party, that is exposed to more than a minimal risk [17]. As an example, the application of this provision to patients suffering from AIDS or HIV positive can be given [18]. In a situation where the patient himself/herself does not want to inform the spouse or

sexual partner of the danger, it seems that the doctor can and even should do it [18], especially with reasonable suspicion, that the patient is not going to abstain from high risk sexual relations or take care of the partner's safety otherwise [19]. This is confirmed by Poznań Court of Appeal, stating that there is no doubt that the doctor's responsibilities include providing detailed notification of the consequences of carrying infectious disease not only to the patient but also members of his/her family who are exposed to infections due to daily direct contact with the carrier. The opinion of the expert appointed in the court clearly stated, that one of the basic ways of spreading the jaundice virus are marital contacts (including sexual relations in particular) and running a household with the carrier, what imposed on the healthcare workers a special duty to inform the plaintiff – the patient's wife – about the carrier identification in her husband and the identification if appropriate preventive measures that were necessary to avoid infecting other family members. In the circumstances of the case it was all the more obvious that the plaintiff was a person authorized to obtain all the information regarding her husband's health condition [20];

4) the patient or his legal representative agrees to revealing the secret after informing him/her about the adverse effects of its disclosure – no restrictions on the scope of entities and the purpose of providing information. However, in order to legally disclose the data the patient has to be fully aware when making decisions and indicate persons, who he/she authorized to learn the data concerning him/her. The legislator assumes that the doctor, thanks to his knowledge, is able to see the unfavorable consequences of confidential data disclosure – i.e. the use of the genetic tests results by insurance companies;

5) there is a need to pass the necessary information about the patient to the forensic doctor – the forensic doctor is a doctor who meets the criteria set out in the Act of 15-th June 2007 on the forensic doctor [21], in Article 5, according to which the president of the regional court concluded a contract for the performance of the court doctor's duties. These activities consist in issuing certificates confirming the ability or inability to appear at the request or notification of the authorized body, i.e. the court or body conducting criminal proceedings [21], i.e. parties and their statutory representatives, proxies, witnesses, defenders and other participants [21]. The provisions of the Act on a forensic doctor do not apply to persons deprived of their liberty, who absence is justified by other bodies [21];

6) there is a need to provide necessary information about the patient related to providing healthcare services to another physician or authorized persons participating in the provision of these services – as a rule, doctor-patient confidentiality does not allow the transfer of information obtained in connection with performance of professional medical activities to other employees of the medical entity, i.e. medical and technical-administrative staff if they do not participate in the treatment process [6]. If there is a legitimate need, the information should be provided, but only to the extent that it is necessary for further treatment or a decision on the patient's state of health.

It should be remembered that the concept of medical confidentiality is regulated in individual legal Acts, not only in relation to civil proceedings, but also criminal and professional proceedings. So, as far as criminal law is concerned, the Criminal Code of Procedure in Article 180 § 2 [22] distinguishes two characteristics that must exist in order for a professional such as a doctor to be released from professional secrecy (by a court or in a preparatory proceedings by a prosecutor). It happens when:
→ it is necessary for the good of justice
→ and when circumstances cannot be set based on another proof.

It should be added that based on Katowice Appealing Court's thesis of the judgement from 21-st of December 2016 r. it was decided, that patient's approval for disclosure of information that are a doctor-patient confidentiality (in this case in criminal proceeding) is enough, and the court's decision in this regard would be pointless. At the same time it should be underlined, that the patient's statement should precisely and personally indicate the persons and circumstances which are to be disclosed [23].

In the case of disciplinary proceedings, the Act on Medical Chambers [24] contains two provisions that directly relate to the maintenance of doctor-patient confidentiality. So, giving testimony or explanations regarding the circumstances covered by the proceedings in relation to the professional responsibility of doctors (Article 59, point 4 of the Act) will not be a violation of the above principle. However, Article 79 point 2 of mentioned Act, imposes on the medical court the obligation to exclude disclosure of the trial, if the doctor-patient confidentiality would be disclosed during the course of it.

Summarizing, the physician's duty to keep confidential the information obtained in connection with the performance of medical activities is also the right of the patient to require this confidentiality.
In connection with occupied profession, the doctor has access to often extremely intimate details on the patient's life regarding not only his health but also of his relatives. In the regulations of Polish Law, the question of the possibility of limiting this right has been specified due to the nature of the proceedings pending in the subject case, i.e. criminal, civil or professional standards. Administrative courts – especially in the case of medical records, also often refer in their judgments to the use of information which are a medical secret. The issue of doctor-patient confidentiality has been regulated in such Acts as the Constitution of the Republic of Poland, the Act on the profession of doctor and dentist, the Code of Civil Procedure and the Medical Code of Ethics (which in fact is not an Act of universally binding law, because it concerns deontological standards within the medical self-government). The patient has the right to demand confidentiality not only from the doctor, but also from every healthcare professional who treated him/her during the treatment process or who had

indirect access to the information related to his/her health.

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