

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 4-I-06

Subject: Opinion E-5.05, “Confidentiality,” *Amendment*

Presented by: Robert M. Sade, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws
(Francis X. Van Houten, MD, Chair)

1 INTRODUCTION

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3 The ethical requirement to maintain the confidentiality of patient information sometimes clashes
4 with legal requirements to disclose such information, such as statutory reporting requirements and
5 subpoenas for medical records. This tension is acknowledged in the AMA’s *Principles of Medical*
6 *Ethics, Principle IV*, which states “A physician... shall safeguard patient confidences and privacy
7 within the constraints of the law.” However, *Principle III* makes clear that laws may at times
8 conflict with medical ethics, requiring physicians to advocate for changes in the law: “A physician
9 shall respect the law and also recognize a responsibility to seek changes in those requirements
10 which are contrary to the best interests of the patient.”

11
12 The tension between ethical and legal conduct is also examined in Opinion E-1.02, “The Relation
13 of Law and Ethics.” It notes that ethical obligations often exceed legal duties, and that, in the
14 exceptional case of an unjust law, physicians’ ethical responsibilities should supersede legal
15 obligations.

16
17 INFORMATION DISCLOSED BY PATIENTS

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19 One of the responsibilities of patients in the patient-physician relationship is to disclose to
20 physicians information that is medically relevant. Opinion E-10.02, “Patient Responsibilities,”
21 asserts that patients have “a responsibility to be truthful and to express their concerns clearly to
22 their physicians.” In certain circumstances, patients divulge information that is socially
23 stigmatizing or that may in some way compromise a third party. Additionally, physical
24 examination of a patient often leads a physician to ask questions that elicit information of a very
25 personal nature.

26
27 Information divulged to physicians may be important to other parties for various reasons. Law
28 enforcement personnel may want certain information that indicates a crime has occurred or may
29 occur. For example, physicians are often legally required to disclose evidence of child abuse,
30 which might be obtained from a physical examination or conversation with the patient.

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32 Public health authorities also have an interest in health information when the well-being of the
33 public is at stake, especially information concerning communicable diseases. At times, this
34 information can be disclosed without identifying the patient, but at other times disclosure of the
35 patient’s identity may be necessary.

* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

1 The importance of trust in the patient-physician relationship and a legal requirement to disclose
2 information identifying individual patients can lead to an ethical dilemma for a physician.
3 Historically, information obtained from a patient was sacrosanct, and any disclosure was ethically
4 impermissible. The modern legal system has placed burdens on the doctrine of confidentiality that
5 make this obligation more complex.

6 7 LEGAL REQUIREMENTS TO DISCLOSE

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9 The relation between the law and the ethics of confidentiality has been significantly shaped by the
10 decision in *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334 (1976), in
11 which the court concluded that a psychologist had acted negligently by failing to protect a third
12 party at risk of being harmed by a patient. Today, the Tarasoff doctrine often is interpreted broadly
13 to justify the disclosure of confidential information when it can avert harm to a third party.

14
15 From a medical ethics standpoint, the Tarasoff doctrine can be understood as the broad obligation
16 to protect a third party overriding the obligation to respect patient autonomy by honoring
17 confidentiality. The disclosure of confidential information is justified because the physical harm it
18 avoids is greater than the harm caused by the breach itself.

19
20 Moreover, the Health Insurance Portability and Accountability Act (HIPAA) permits or requires
21 disclosure of patient information to a variety of governmental and private entities or individuals.
22 Physicians should be aware of the requirements of this Act and the manner in which information
23 may be protected, as well as the justifications for such disclosures.

24
25 The Tarasoff doctrine, various state and federal laws requiring disclosure of confidential
26 information, and the judicial power to order such disclosures by subpoenas, discovery, and trial
27 testimony have compelled physicians to divulge information that traditionally was held in
28 confidence. A number of considerations should impact physicians' decisions on whether and how
29 much confidential information to disclose.

30 31 BALANCING OBLIGATIONS

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33 When determining what information to disclose, a physician should consider the benefits of
34 disclosing the information, how much information to disclose, and whether to inform or obtain the
35 consent of the patient.

36
37 Disclosure can benefit the patient, the public, or a limited number of persons. The patient's benefit
38 should be the first consideration of any disclosure, but consideration of benefits to others is also
39 appropriate in determining whether and how much to disclose, when required to do so.

40
41 Whenever possible, physicians should avoid disclosing information that could identify the patient.
42 In some contexts, such as law enforcement, identifying information may be necessary to
43 accomplish the purpose of disclosure. In other situations, identifying information should be
44 withheld unless a statute specifically requires such information or a court orders the disclosure. If
45 there is no statute or court order compelling disclosure, the confidentiality of patient information
46 should be maintained. In all situations, physicians should provide no more information than is
47 required.

48
49 While consent of a patient to reveal confidential information is generally not required by statutes
50 mandating disclosure, respect for the patient suggests that he or she should be notified.

1 Circumstances do not always allow for the patient to be notified, however, and in some cases
2 notifying about the disclosure is not advisable.

3
4 CONCLUSION

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6 The current opinion on confidentiality relies primarily on *Principle IV*, which subordinates
7 confidential health information to legal mandates. It fails to remind physicians, however, to
8 determine whether the requirements are contrary to the patient's interests, as required under
9 *Principle III*, and to uphold the ethical responsibility of maintaining confidentiality as much as
10 practicable when legal requirements to disclose are not ethically justifiable, as described in Opinion
11 E-1.02.

12
13 A physician who chooses to divulge information without questioning the extent to which it is
14 necessary risks disclosing too much information and breaching the trust that arises from the
15 confidential relationship with the patient. Alternatively, a physician who refuses to disclose
16 regardless of the legal mandate risks legal penalties.

17
18 Physicians should balance ethical obligations of confidentiality with legal requirements to disclose.
19 The benefits of providing the required information and the question of how much information to
20 disclose are key considerations. Additionally, patients should be informed of the disclosure and
21 their consent should be obtained whenever reasonable.

22
23 The Council concludes that amendments to Opinion E-5.05, "Confidentiality," are required to
24 clarify the distinction between ethical obligations and legal requirements, and the possibility that
25 legal requirements for disclosure may not take ethical considerations into account. Often, legal
26 justifications for disclosure are based on protection of the public, while physicians' obligations are
27 to individual patients primarily, though not exclusively. Therefore, physicians should always
28 consider their ethical obligations to maintain confidentiality when facing a legal requirement to
29 disclose, and should provide the minimum information that is required by law.

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31 RECOMMENDATION

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33 The Council recommends that Opinion E-5.05, "Confidentiality," be amended as follows and the
34 remainder of the Report be filed.

35
36 E-5.05 Confidentiality

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38 The information disclosed to a physician ~~during the course of the relationship between~~
39 ~~physician and by a patient is confidential to the greatest possible degree~~ should be held in
40 confidence. The patient should feel free to make a full disclosure of information to the
41 physician in order that the physician may most effectively provide needed services. The
42 patient should be able to make this disclosure with the knowledge that the physician will
43 respect the confidential nature of the communication. The physician should not reveal
44 confidential ~~communications or~~ information without the express consent of the patient,
45 ~~subject to unless required to do so by law. The obligation to safeguard patient confidences~~
46 ~~is subject to~~ certain exceptions which are ethically ~~and legally~~ justified because of
47 overriding ~~social~~ considerations.

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49 When ~~Where~~ a patient threatens to inflict serious physical ~~bodily~~ harm to another person or
50 to him or herself and there is a reasonable probability that the patient may carry out the

1 threat, the physician should take reasonable precautions for the protection of the intended
2 victim, which may include ~~including~~ notification of law enforcement authorities.

3
4 When the disclosure of confidential information is required by law or court order,
5 physicians generally should notify the patient. ~~When the disclosure is likely to harm the~~
6 ~~patient disproportionately or when the required disclosure is unnecessary or excessive, the~~
7 ~~physician~~ Physicians should disclose the minimal information required by law, and
8 advocate for the protection of confidential information and, if appropriate, seek a change in
9 the law.

10
11 ~~Also, communicable diseases and gun shot and knife wounds should be reported as~~
12 ~~required by applicable statutes or ordinances. (III, IV, VII, VIII)~~

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14 Issued December 1983; Updated June 1994 and November 2006.

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16 (Modify HOD/CEJA Policy)

Fiscal Note: Staff cost estimated at less than \$500 to implement.