

Medical confidentiality and the human right to privacy: a legal approach

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Abstract

This paper presents a critical analysis of medical confidentiality. It attempts to understand it in a wide way, from its inception and ethics base that can be found in the Hippocratic Oath. It goes through criminal and disciplinary norms in order to reach the concept of the human right to privacy. The aim is to find the different legal approaches of medical confidentiality and to demonstrate the various aspects it consists of, currently making it as a part of the right to privacy.

Key words: Medical secret. Legal approaches. Right to privacy.

Resumo

Segredo médico e o direito humano à privacidade: uma abordagem jurídica

Este artigo apresenta uma análise crítica do segredo médico. Busca compreendê-lo de maneira ampla, desde sua origem e respaldo ético no Juramento de Hipócrates. Passa pela normatização disciplinar e penal para chegar à concepção de que direito humano à privacidade. O objetivo é localizar as diferentes abordagens jurídicas do segredo médico e demonstrar os diversos aspectos de que se reveste e que culminam atualmente com sua colocação como parte do direito à privacidade.

Palavras-chave: Comunicação sigilosa. Direito à privacidade. Normas jurídicas.

Resumen

Secreto médico y el derecho humano a la privacidad: un abordaje jurídico

Este artículo presenta un análisis crítico del secreto médico. Trata de entender de una manera amplia, desde sus inicios y la ética de apoyo en el juramento hipocrático. Por medio de las normas penales y disciplinarias para llegar a la idea de que el derecho humano a la privacidad. Su objetivo es encontrar los diferentes enfoques legales del secreto médico y demostrar los diferentes aspectos que contiene y que culminó con su ubicación actual como parte del derecho a la privacidad.

Palabras-clave: Lo secreto médico. Enfoques jurídicos. Derecho a la privacidad.

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Social relationships take place through many types of activities and in multiple ways. They include diverse situations, which comprise those established between the client-user and the person performing functions, ministries, occupations, or professions. All of them, especially the aforementioned, are surrounded by ethical and disciplinary elements, many of them criminal or civil, whose importance goes beyond personal relationships – which marks them as a public issue and calls for its own standardization.

Among such elements that are typical of relationships established through the performance of functions, ministries, occupations, or professions is the confidentiality. It is traditionally configured as the constitution of insurance in favor of professional relationships. Such insurance was established in the interests of the professional and his/her client, and shows repercussions in many liability spheres. Its scope is effective and affects, among others, medical professionals. In their case, it is covered by nuances that are very specific, determined due to the nature and performance of the profession, which gets more and more complex due to new aspects of science development and social relations.

On that topic, the words of minister Ruy Rosado, of the Superior Court of Justice (STJ), should be highlighted when he said, based on theoretical knowledge, that *the circumstances today are changed. Social relationships are massified*¹. In this context, as emphasized by Fachin, bioethical law, even if extensive and complex, is filled with deficiencies against the need for certainty for its researchers².

We can observe in his statement the tone of the difficulty referred to as *reasoning for individual freedom* against the utilitarianism, competition, and even economic interests surrounding medical advances. Then, Law appears as a simple (but not always strong) agent for facilitating the coexistence between science progress and the dignity of men, establishing *vague frontiers for the free growth of human ingenuity*².

The set of doubts and questions arising from the relation between Law, especially Public Law, and Medicine is aggravated by the hard ethical injunctions surrounding it. It is permanently affected by *the deep and fast modifications that personal relationships currently suffer*³. The question regarding the direct relationship with its universality, limited by the search for clarification on many approaches to the violation of medical confidentiality, can be applied to the theme. Such search shows the opportunity of verifying the violation of medical confi-

dentiality and also the violation of the constitutional right to privacy.

A verification of such importance allows the transition of the *medical confidentiality* concept from the ethical, disciplinary, and criminal areas to the constitutional right to privacy area. At the same time, that requires a great concern with the constant delimitation. An intended limitation of important verifications is imposed if they are especially considered as peculiar to history, ethics, and the right of privacy.

Medical confidentiality

Confidentiality is everything related to privacy and that should be kept under reservation, which should or must not be disclosed, made public, or simply informed to people who are not authorized by the interested parties. Confidentiality also means not only the restriction in disclosing or acknowledging, but also the simple denial of confirming information, even if it is of public domain. It is fit to say that the confidentiality regarding a third party and his/her privacy is given by the confidence established through personal relationships. On the other hand, secrecy is holding back one's own conduct.

Medical confidentiality under an ethical point of view

Medical confidentiality, typically the concealment owned by other professions, is originated back in Medicine history and is ethically expressed in the Hippocratic Oath. On it, Vergara⁴ offers extensive clarifications. On its ethical aspect, confidentiality is based on complete reservation and its violation through the simple act of telling, transmitting, or confirming knowledge over the patient or third parties obtained through the performance of the activity.

Reached by positive standards, the theme has a new setting, which at first was only disciplinary. The addition of the institution of medical confidentiality in the set of professional confidentiality and the criminal classification of its violation, its conflicts with procedural standards, the jurisprudence of the issue, certain subsequent relations and the paths currently taken by medicine are the cause for new opportunities for study – which culminate with the analysis under the light of the human right to privacy.

The changes in the social relations between doctor and patient, determined through the evident and recorded massification process, are consistent with the new reflections on the obligation or the duty to keep professional confidentiality. The first ethical fundament assumes the commitment with discretion. As a precept of social ethics to be adopted by the doctor, related to all things learned through social and professional acquaintanceship, it admits the violation due to necessity. Developed as a cause of the confidence from the intimacy between doctor and patient, arising from the eventual possibility of conflict of interests, it finds its new necessities associated to the denial of permission. The growing distance between both parties allows the negative repercussion on the right to preserve privacy.

It can be said that this study of the theme allows the verification of medical confidentiality under the ethics point of view, while still referring to the Law point of view. Therefore, it is not limited to the violation of medical confidentiality as an ethically wrong act anymore, but is a disciplinary and criminal misdoing. When such limits are crossed, the violation to the right of privacy can be identified, constitutionally standardized. This is the aspect that is currently relevant and can be characterized by its universality.

Disciplinary misdoing of violating medical confidentiality

The conduct of certain professional categories can be subject to behavioral codes specific for the activity and, mainly, social relationships established by it. Its violation is classified as an administrative infraction⁵, of disciplinary nature, subject to its own sanctions and coercions. It is what is known as disciplinary liability, almost always generically referred to as ethical duty. The Medical Code of Ethics (CEM)⁶ in force is undeniably needed⁷ and it lists the standards for professional behavior, prohibitions and obligations, as well as the prerogatives of the category.

However, even considering the pertinence of the new CEM when exemplifying the ethical standards for professional behavior, it cannot be denied that the professional activity is once again connected to a new capitalist ethic, *very similar to the simple absence of any ethics*. Especially in regard to medical ethics, Nalini makes an observation on the subject, implicating a growing doubt:

It has been affirmed that morality as an economical system seems to be a contradiction, a 'con-

tradictio in adiecto'. Economy as a system for providing material assets should comply with economical standards, not moral ones. Economy, aiming for the efficient production and distribution, should be kept close to a well intentioned, but perhaps stupefying, moral rationality. It is clear that a sensible and well formed conscience does not give a right satisfaction to it⁸.

Against statements such as this, it should be considered that the administrative standardization of the disciplinary conduct of the medical secrecy maintenance is the one closer to ethical conduct, even if it does not absolutely supports shortcuts and exceptions. The disciplinary procedures established for medical conduct have been conducted with significant reservation. Its decisions do not assume general and active publicity, since it is hard to evaluate its results and establish conclusions with some value.

Criminal offence of violating professional confidentiality

Madeira Pinto, quoted by Mirabete, due to the recent recollection of the provisions of a Article 5, section X of the Federal Constitution⁹, expressly mentions the secrecy of *certain professions and the decorum that should cover the defense of private and public interests*¹⁰. The criminal precept protects the personal freedom of keeping secrets whose disclosure could cause some type of harm to others. The protection is given due to the criminalization of contrary behavior, grounded by the violation: *The purpose of the criminal type is to punish those who, due to the activity they perform, know of a secret and, instead of keeping it, tell it to third parties, enabling damages to a third party*¹¹.

The typical conduct is to reveal the secret. The action is revealing. It is characterized by transmission of knowledge. Here, a relevant aspect appears, acquiring a conceptual content. Its revelation can possibly cause some material or moral harm, public or private, to any person or group, regardless of whom the revealing person or the third party are. Evangelista de Jesus¹² mentions the typical fact expressed in human behavior resulting, as a rule, as provided by the criminal law. In this aspect, criminal provisions are a little distanced from the medical confidentiality violation of ethical violation, becoming more than a disciplinary violation.

The nucleus of the type allows an analysis on the sense of the verb to reveal, which *means unveil*,

to tell a third party or to denounce¹¹. It could also be said that: it means to let a third party know of a secret professionally obtained, with the possibility of causing harm to others.

Relative aspect of the professional confidentiality

The protection of confidentiality is not absolute, but relative. It is not about only protecting it without discrimination, but while its revelation has no legal support¹³. The medical professional is not obliged to reveal a secrecy that exposes his/her client to a criminal procedure –Article 66, section II of the Criminal Contravention Law¹⁴ – and is not exempt from it when answering to a lawsuit that has no relation to the treatment given¹⁵.

The professional's behavior is considered as illicit when it does not comply with the legal request for clinical files and medical reports in order to inform a police inquest¹⁶. But there are also rulings that understand such no compliance as a just cause¹⁷. Both understandings occur due to the fact that when the Law becomes aware of the wrongful act there is no more need for confidentiality¹⁸.

Medical confidentiality and social interest

In this set of restrictions to the violation of professional confidentiality, the consent from the passive subject, which means all of those who can suffer any harm, can make the action illicit since what is prohibited is the illegal revelation¹⁹. The fraud in the type configuration is the matter relevant to the desired study. It is the free and conscientious will of revealing a secret, aware of the possibility of harming someone. The law does not deem malicious the cases of, for example, negligence – when the medical professional leaves a medical file or report of a patient in sight of a third party. Also, one cannot speak of a specific subjective element or type.

The provisions of Article 154 of the Criminal Code²⁰ supports that the preservation of the confidentiality by the medical professional in the name of social interest is secured by the relationship between doctor and patient – important for the professional practice in favor of public health. That is because one cannot consider as certain the search for health services that also interest society, other than individual interest, if liable to disclosures or publications. The

relations are usually contrary to the patient's expectations since they can cause damages to property or pain and suffering.

The observations are plausible when it is verified the extent of the intimacy that was exposed during the performance of the medical act, not only the intimacy restricted to the actual patient, but also extensible to third parties. The higher the exposure of intimacy, directly or indirectly, the higher the chances of damage and the need for its preservation. The first understanding that the preservation of medical confidentiality against penalties occurs in favor of the professional practice and public health has a reason for existing. However, added to that is the obligation of recovery by the same practice as a criminal offence.

Civil offence of violating medical confidentiality under the constitutional standpoint

The occurrence of offence shows the new and outstanding phenomenon of Civil Law constitutionalization and the passage of liberal individualism and patrimonialism to the social interest sphere, with a clear guarantee of privacy. The matter of professional confidentiality transcends the right of keeping it in the private sphere as ensured by ethics and by the Criminal Law. For such areas, the maintenance of confidentiality constitutes the guarantee given to the professional in favor of the relationships established by him/her and in the interest of his/her client. It becomes the guarantee of social interest in preserving privacy and its relation with the dignity of human life through the insurance of something that constitutes the large complex of intimacy.

Medical confidentiality and privacy

Regarding the complex legal relationship between doctor and patient, Stancioli approaches confidentiality under the aspect of privacy, confirmed by the provisions of Article 5, section X of the Constitution – in which the inviolability of private life is generically ensured²², supported by Article XII of the Universal Declaration of Human Rights proposed by the United Nations (UN) in 1948²³. The ethical issue, with its own repercussions, which are ethical, disciplinary, criminal, and civil, assumes, therefore, a strong constitutional content.

Next, the author will demonstrate how much the information control is currently referring to the

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need for admission of opposition between the public and the private life. From such opposition results the protection of all that is typical of the private sphere against the actions of the public power, but also against the actions of other private entities. In the context of individuality, not only based on old concepts going back to the historical roots of medicine, a new vision of medical confidentiality and the need for its preservation can be presented as a logic result of privacy²⁴.

It is possible to conclude by the reception of medical confidentiality in the new constitutional order with infra-constitutional repercussions. In it, human dignity is the basis^{25,26} for the standards of the imposition of professional confidentiality and the liability for its violation, peculiar to the established inviolability of private life, including its feelings, thoughts, and behaviors that are not publically shared. The privacy that is integral to the personality rights²⁷ to be respected is independent from the manifestation of the interested party in this sense. It is the assurance of inviolability as assumed. A considered manifestation is that when the interested party publically announces his/her intimacy or expressly authorizes its divulgation.

Medical confidentiality against the right to privacy

The current aspect of significant constitutional-ity discusses medical confidentiality beyond ethical issue, disciplinary management, and penalties specific to the professional relations that restrict it. Within the field of assuring the inviolability of privacy, it broadens the limits of what is theoretically undeterminable, the subject being passive to the illicit practice of its disclosure. It is necessary to understand that the damage to others is not restricted to the confidences from a patient to a doctor, but reaches all of those subject to the damages of the violation of data from his/her private life.

It is possible to compare diverse and opportune standards and say that the affirmation that CEM administrative-disciplinary provisions on the duty of confidentiality are extremely extensive on the classification and restricted on the legal scope. The penalty provisions of Article 154 of the Criminal Code are limited by the demand of an objective element, the damage, as well as of a subjective element, fraud, and extended on the legal scope. Finally, after the duty of medical confidentiality is confirmed according to the provisions of Article 5, section X of the Federal Constitution as illicit tort, it assumes a large scope encom-

passing fraud and guilt and expanding the universe of passive subjects.

Exceptions to medical confidentiality

Keeping the confidentiality ends the circumstanced interests that the hypothesis of legitimate violation transcends based on a larger interest. Keeping the confidentiality obeys the social interest based on personal interest, which loses importance when compared to the admittance of its violation in favor of another social interest different from that of the patient that is even higher and hierarchically superior. The evidence that the admitted revelations should be limited to special time and place has weight.

Concerning the subjectivity of confidentiality, the insurance and the penalties for its violation create significant questions, whose approach complies with current aspects, not only ethical and legal, but also medical and scientific. The significance and the extension of just cause, legal duty and consent, as permissive exceptions of the act of violating medical confidentiality, are important for the analysis of conduct. This item is where the evaluation subjectivity for legal incidence assumes an important shape and is able to show the relativism of legal solutions.

In the cases characterized by just cause or by legal duty, confidentiality gives place to the higher interest of avoiding the dissemination of diseases, illicit behavior, or of ensuring the evaluation and repression in the interest of Justice. The obligation of confidentiality is not contrary to the interests of society, as Hungria points out, quoted by Leao, when he says that *confidentiality is owned by the doctor to its client, not its executioner*²⁸.

The breach of confidentiality due to the express consent from the person trusting the doctor, directly or indirectly, comes before the possibility of causing harm to someone. However, the large of universe of "someone" of possible harmed parties does not necessarily correspond to the former one. That leaves us with the question of the harm of the consented revelation. After the consent, the revelation becomes only optional, never obligatory, the final decision being the doctor's. It can be said that the consent for revelation results in the option of volitive deliberation. For the performance of this option, it is necessary to consider what harm is caused to others due to the breach of confidentiality.

Within the provisions of Procedural Law, the doctor might be present in different procedures in dif-

ferent locations or procedural positions. It should always come before the duty of keeping a secret shared due to professional performance, under penalty of administrative coercion and criminal or civil liability. Jurandir Sebastiao²⁹ broadens the understanding regarding just cause for the violation of medical confidentiality when appearing in court as a witness or in compliance with the request for medical charts and other notes. However, it is a clear case of legal, despite obligatory, duty to collaborate with the legal system to find the truth³⁰.

It is important to point out the principle of real truth³¹, source of justice, able to allow decisions that are less arbitrary and more compatible with the fair composition of litigation, minimizing any escape from court appearance and the collaboration with its goal and in reaching social peace. It is easy to notice the role of testimony, including that of the medical professional, on the matter of insured confidentiality.

Confidentiality does not have an absolute assurance of conservation, much less belongs to the doctor – he/she is only a trustee. It is not to the professional to use it to defend his/her own property, since it belongs to the patient, to third parties interested in it, and so only in the limits of collective interests. A clarifying summary of a ruling by the 2nd Class of the Federal Supreme Court (STF) recognizes the non-absolute character of medical confidentiality obligation against the law case surrounding the appreciation for concrete situation in courtrooms³².

Modernity has created a lot of other situations that still leave questions. Some of them are not limited to questions, but indicate disciplinary, criminal, and civil consequences. An example is the new ethical circumstances dictated by the presence of HIV in humans, by assisted fertilization, by the use of sperms and eggs from spouses or third parties, surrogacy, and other matters related to health, sexuality, paternity, and maternity. The relations between doctor and patient are varied and, many times, can be autonomous, without the common knowledge of the interested parties. Once again, the legal understanding of the evaluation of law case is relevant when it demands that the medical professional should have a renewed care for his/her evaluations and decisions regarding keeping the confidentiality and its violation.

Medical confidentiality: between legal violation and privacy

The technical-scientific development of the medical activity, the recently occurred changes or

the ones that are still happening in social relations, as well as the growing formation of a technical and sociological society of communication is bringing new data to the specific relation between doctor and patient. Its surroundings are different, without being possible to say so far that they were substantially modified. The growing complexity surrounding it has not demanded a review of deontological concepts, but of new practical matters demanding legal answers.

That is clear against the issue of professional confidentiality that tends to be fragile and before the higher possibilities of violation without penalties against social interests, influenced by the strong assurance of privacy. A culture has been developed where everyone has the right to know everything and, confronted with the contemporary subsistence of medical confidentiality as a relevant principle, the question orbits around the specificities of its exceptional breach. Kept as an exception of the convenience of confidentiality and the worry with the assurance of privacy, it is also a consistent exception against the powers of the State, social interest, and right to information.

Medical confidentiality shows a great paradox between its ethical maintenance, founded by convenience and the aforementioned assurances, and the new surroundings related to its breach, in an ambivalence of positions reflecting on the jurisprudential application of the law. It is visible the strength of law cases and the prevalence of circumstances in cases that reach courtrooms, emphasizing the divergences between applied solutions and doctrine doubts, without pointing out a definitive path.

The theme has enough standards, both in the administrative-disciplinary and in the criminal and civil spheres, and is coherent with the legislation on medical techniques and activities. The doctrine has evolved in the sense that changes respond to social demands, but, concerning the application, where jurisprudence should set solid marks, there are still doubts and uncertainties imposed by law cases of circumstantial decisions. There is still a lot missing from studies to reach a level of certainty and safety.

The old ethical precept has its importance kept and strengthened by exceptional current questions that keep i ensuring its maintenance even if, in many cases, they point out the hypothesis of its breach. The exceptions are not contrary to its preservation, but i ensure flexibility for the adjustments demanded by new circumstances involving medical activity. The duty of confidentiality keeps its preva-

lence as a true obligation to comply with, keeping it as a right of the patient and a conquest of society. Its scope by the 1988 constitutional text, under the form of assurance of privacy, constitutes an undeniable strength.

As stated said by Leão²¹, criminal suits against doctors for violation of confidentiality are rare. On civil indemnification lawsuits for criminal offence or illicit due to violation of medical confidentiality, they cannot be found. The application of penalties and acceptance in distinctive and imprecise concrete situations are verified in the Legal Power realm, added to the undeniable limitations that characterize it, creating doubts and uncertainties. Essential elements of the ethical conduct of Public Law, as the effectively good and the effectively bad, true and false, legal and illegal, and, graver still, passive and not passive of effective criminal or civil liability, are left to study.

The relation between disciplinary, criminal, and civil provisions, under the constitutional standpoint, constitutes a valuable and current content. It allows the study from the critical view of the Law's systemic standpoint, in which doctrine and jurisprudence are supporting elements. The current control of information points out the need for admitting the opposition between public and private life. From such opposition results the protection of all that is typical of the private sphere against the actions of the public power, but also against the actions of other private entities.

It is possible to conclude by the reception of medical confidentiality in the new constitutional order. In it, human dignity is the basis for the standards of the imposition of professional confidentiality and the liability for its violation, peculiar to the established inviolability of private life, including its feelings, thoughts, and behaviors that are not publicly shared. The privacy that is integral to the personality rights to be respected is independent from the manifestation of the interested party in this sense. The inviolability is insured as assumed. A considered manifestation is that when the interested party publicly announces his/her intimacy or expressly authorizes its divulgence.

The study of medical professional confidentiality against the constitutional concept of privacy constitutes innovation in itself, in which are located the new aspects involving the activity of the medical professional and that point out practical cases arising from the evolution of science. Eventual data referring to the relationship between client and patient can also be added.

Privacy and confidentiality

The conception of medical confidentiality under the law standpoint of constitutionalized privacy results in the opportunity of consideration on the confidentiality surrounding it while its publication is not authorized.

The relation between medical confidentiality and human rights, among which is the right to privacy, grants to it an even more limited concept, with contacts that are arguable regarding disciplinary, criminal, and legal exceptions, typical of the social interest, even if disposed as a way of also protecting the interests of the patient. However, a large part of confidentiality is under the criteria of the patient regarding its revelation. These relations between facts, interests, and legal provisions are still complex and bear permanent analysis, even if they are not properly discussed in this study.

While there is no authorization for revealing that which is ensured by confidentiality, the information, kept out of the knowledge of others, is the object regarded as confidentiality. As such, the authorization for publicizing a medical secrecy is the exception to confidentiality – which is, *per se*, a rule.

Interaction between different spheres of liability

It is undeniable that the interaction between the three types of liability – disciplinary, criminal, and civil – can be confusing. The respective independencies are kept in compliance with the principle of unit of jurisdiction.

Regarding the relation between civil and criminal actions, without its repercussions over the disciplinary matter, the Civil Process Code reserves Articles 63 to 68³³. The provision that the criminal sentence provides a civil ruling when it recognizes the practice of an act of necessity, self defense, strict compliance with legal duty or regular exercise of the law deserves a special highlight. It is admissible the proposition of the civil lawsuit, *actio civilis ex delicto*, regarding a criminal procedure that has not categorically recognized the material inexistence of the fact. The provisions of such articles are in complete harmony with Article 61, section I of the Criminal Code³⁴.

Fiúza³⁵ makes an observation that clearly mentions all three spheres of liability: *when the criminal judge affirms the existence of the fact and says who*

committed it, and such decision is ruled, it makes it right the obligation of indemnifying the damage resulting from the crime³⁶. The words of Jurandir Sebastiao mean that the *breach of professional confidentiality, apart from the lack of ethics, can also be classified, at the same time, as a crime provided by Article 154 of the Criminal Code. That is why a doctor who commits a breach of secrecy can be doubly punished (by the organization of the class and by common justice)*³⁷. It can also be said that it is liable to civil liability with compulsory compensation for property or pain and suffering.

The relations and implications between the three types of liability, emphasizing the need for compensation for patrimony as a consequence of criminal penalties, are discussed by Nalini³⁸. During its evolution, the deontological limitation assumed a disciplinary and criminal character at first – the last one with civil repercussions that are typical of the liability for damages arising from criminal illicit acts. Nowadays, it has a different setting, very clear for cases of liability for damaged arising from illicit for violating the right to privacy.

Final remarks

The concept of medical confidentiality at first surrounded by the ethical field has historically reached the disciplinary and criminal field, even if under the influence of procedural determinations. Currently, it assumes an even larger extension when it goes to the field of constitutionalized right to privacy.

The conclusion that medical confidentiality, when violated, does not cause only a breach of disciplinary and criminal liability, is also significantly relevant. It is supported by the autonomous civil liability, arising from the practice of generic illicit of the violation of the right to privacy.

This conclusion on the extension of the concept of medical confidentiality unveils the legal approach of its violation in a bigger sense, even if it accentuates its subjective aspects. As such, civil liability is no longer dependent of criminal procedures and its conclusions, and is not limited to determine the administrative liability, but is possible as an autonomous theory, without the constitution of the aforementioned.

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