MDA National
Support Protect Promote

Confidentiality and Consent

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Confidentiality

Confidentiality is a fundamental basis of the doctor–patient relationship as patients have a right to expect that their personal information will be held in confidence by their doctor. The importance of confidentiality in the doctor–patient relationship dates back to antiquity.

The Hippocratic Oath states:

What I see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.

Doctors have an ethical, professional and legal duty to protect the confidentiality of the information acquired as a result of the management of patients. This duty forms the basis of trust and honesty in the doctor–patient relationship. It encourages patients to disclose personal information truthfully, without fear of embarrassment, harm or discrimination that may arise from widespread dissemination of the information.

Your duty of confidentiality extends to all information that arises out of your professional relationship with patients. A patient's right to confidentiality survives the doctor–patient relationship, and even the patient's death.

However, in some circumstances disclosure of confidential information by practitioners is permissible by law. These circumstances are examined later in this booklet.

The vast majority of cases of breach of confidentiality occur inadvertently (see case history 1). A doctor may become the subject of a complaint and/or disciplinary proceeding for a breach of confidentiality, and there is the potential for a claim.

The use of social media has increased the risk of breaches of confidentiality and privacy (see case history 2).

Confidentiality and Consent:

Case history 1

The doctor in training (DIT) was asked to attend the morgue to certify a patient as deceased. On arrival, the DIT was given the patient's medical records. The DIT noted that the patient was a well-known politician. The morgue attendant told the DIT that the patient's body had a few "unusual features". The DIT removed the sheet from the patient's body. He was rather shocked to see some unusual body piercings and tattoos on the politician's genitalia. He quickly performed an assessment and completed the death certification.

On returning to the wards, the DIT joined in a discussion with some of the nurses and other hospital staff about the politician. The DIT disclosed the fact that he had just examined the patient's body and outlined in graphic detail the nature of the tattoos and body piercing. At a party later that evening, the DIT became involved in a further discussion about the politician.

The next day, the DIT was paged to attend the Medical Director's office. A journalist had just contacted the superintendent to ask for confirmation of rumours of "certain irregular features" of the politician's body. The DIT was horrified that the information had been provided to the press.

The Medical Director said the patient's family had already been contacted by the journalist and they were extremely angry about the breach of confidentiality.

Medical practitioners owe a duty of confidentiality to all of their patients and this duty continues even after the death of a patient. DITs should take care to avoid any "gossip" or disclosure of information they obtain about patients during the course of their work.

Confidentiality and Consent: Case history 2

An elderly patient was undergoing cardiac surgery. At the conclusion of the operation, the patient had a cardiac arrest and CPR was commenced - including internal cardiac compressions.

An intern filmed part of the resuscitation process on her iPhone and posted the footage on her Facebook page. The patient was not identifiable in the footage but when posting the film, the intern named the hospital at which she worked under her tag line "Guess what happened at work today?" A colleague, who was a Facebook friend of the intern, saw the footage online and reported the matter to the hospital.

Breach of confidentiality may arise out of the sum of information posted online by you or others, even if the original information was de-identified. Additionally, hospitals usually have strict policies regarding the use of social media, including not identifying the hospital and/or patients without consent.

Are there situations where I can breach patient confidentiality?

Yes. DITs can provide information to a third party without it constituting a breach of confidentiality in any of the following situations:

- the patient consents to the release of the information
- disclosure to another health professional to ensure the appropriate medical care of the patient
- mandatory disclosure of information is required under law, e.g. a subpoena or search warrant, or statutory requirements in relation to child abuse (see case history 3)
- there is an overriding duty in the "public interest" to disclose information, such as when there is a "serious" threat of harm to an individual or individuals and it is reasonable and/or impracticable to obtain the patient's consent, e.g. a patient who refuses to stop driving despite medical advice to do so, or a patient who threatens harm against another person. These are often difficult and complex cases and you are encouraged to seek advice from your registrar or consultant and/or MDA National if faced with this type of situation.

Confidentiality and Consent:

Case history 3

The DIT was working in ED when she saw a three-year-old boy with a wound on the back of his hand. The patient's mother reported that her son had accidentally burnt his hand when he was playing with matches.

The DIT was concerned about the nature of the wound which resembled a cigarette burn. She cleaned and dressed the wound. She also noticed that the child had some small round bruises on his upper arm. The DIT thought the injuries were non-accidental. She was not sure what to do and sought advice from the ED registrar. The registrar reviewed the patient and advised the DIT to contact the child protection authority.

In all states and territories, medical practitioners are required by law to report cases of child abuse. Reports can be made with or without the knowledge of the parents, and do not constitute a breach of confidentiality.

Summary of important points – confidentiality

- A DIT has an ethical, professional and legal duty of confidentiality.
- Confidentiality is central to establishing and maintaining trust between doctors and patients.
- Exceptions to the duty of confidentiality include:
  - patient consent to the release of information
  - disclosure to another health professional on a 'need to know' basis
  - mandatory disclosure required by law
  - an overriding duty in the 'public interest' to disclose information.

Consent

When do I need to obtain consent?

A patient needs to give consent before undergoing any examination, investigation, procedure or treatment. In many situations consent is implied, such as when a patient lifts his/her clothing to allow an abdominal examination, or holds out an arm to have a blood pressure check.

Why do I need to obtain consent?

Obtaining consent is good medical practice and a legal necessity. Patients are entitled to make their own decisions about undergoing medical treatments or procedures, and should be given adequate information on which to base those decisions. The aim of obtaining consent should be to enable the patient to determine whether or not to undergo the proposed intervention.

When should I obtain written consent?

There is no general requirement for consent to be given in writing. However, health departments and/or hospitals have policies on when consent should be obtained in writing. For example, NSW Department of Health requires a standard consent form to be used for major procedures, including:

- all operations or procedures requiring general, spinal, epidural or regional anaesthesia, or intravenous sedation
- any invasive procedure or treatment (including drugs) where there are known significant risks or complications
- administration of blood transfusions or products
- experimental treatments.

Who is responsible for obtaining consent?

The legal responsibility for obtaining consent lies with the medical practitioner recommending and/or performing the intervention. However, the medical practitioner may delegate this responsibility to another health professional in certain circumstances.

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How do I obtain consent for an intervention and/or surgical procedure?

Obtaining consent is a process of communication involving a discussion between doctor and patient. The NHMRC's *General Guidelines for Medical Practitioners on Providing Information to Patients* provides useful guidance on obtaining patient consent for interventions. In part, the Guidelines state:

Doctors should normally discuss the following information with their patients:

- *the possible or likely nature of the illness or disease;*
- *the proposed approach to investigation, diagnosis and treatment:*
  - *what the proposed approach entails;*
  - *the expected benefits;*
  - *common side effects and material risks of any intervention (see below);*
  - *whether the intervention is conventional or experimental; and*
  - *who will undertake the intervention;*
- *other options for investigation, diagnosis and treatment;*
- *the degree of uncertainty of any diagnosis arrived at;*
- *the degree of uncertainty about the therapeutic outcome;*
- *the likely consequence of not choosing the proposed diagnostic procedure or treatment, or of not having any procedure or treatment at all;*
- *any significant long-term physical, emotional, mental, social, sexual, or other outcome which may be associated with a proposed intervention;*
- *the time involved; and*
- *the costs involved, including out-of-pocket costs.*[1]

Informing patients of risks

Doctors should give information about the risks of any intervention, especially those that are likely to influence the patient's decisions. Known risks should be disclosed when an adverse outcome is common even though the detriment is slight, or when an adverse outcome is severe even though its occurrence is rare. A doctor's judgement about how to convey risks will be influenced by:

- *the seriousness of the patient's condition; for example, the manner of giving information might need to be modified if the patient were too ill or badly injured to digest a detailed explanation;*
- *the nature of the intervention; for example, whether it is complex or straightforward, or whether it is necessary or purely discretionary. Complex interventions require more information, as do interventions where the patient has no illness;*
- *the likelihood of harm and the degree of possible harm. The more information required, the greater the risk of harm and the more serious it is likely to be;*
- *the questions the patient asks. When giving information, doctors should encourage the patient to ask questions and should answer them as fully as possible. Such questions will help the doctor to find out what is important to the patient;*
- *the patient's temperament, attitude and level of understanding. Every patient is entitled to information, but these characteristics may provide guidance to the form it takes; and*
- *current accepted medical practice.*[1]

What are the common medico-legal issues involving consent that MDA National deals with?

There are two main medico-legal problems pertaining to consent that DITs should be aware of:

1. Failure to obtain consent for a physical examination

Every year, MDA National assists at least one DIT who is the subject of an allegation of indecent assault. This type of case can be avoided by appropriate communication with patients, including providing a full explanation of the nature and purpose of an examination and obtaining consent for any physical examination that you perform (see case history 4).

2. Failure to inform a patient about the potential risks of a surgical procedure

A patient needs to be informed of the benefits and the 'material risks' associated with an intervention (see case history 5). This will enable the patient to decide whether or not to undergo the intervention. Information should be provided in a form and manner that helps the patient understand the condition and treatment options available. This information needs to be appropriate to the patient's circumstances, personality, expectations, fears, beliefs, values and cultural background.

Medical negligence claims for 'failure to warn' of the risks of a surgical procedure are a relatively frequent source of claims against Surgeons and other proceduralists (see case history 5).

DITs can fulfill an important role in ensuring that a patient has fully understood the discussion about the benefits and risks of the procedure that has been recommended by their doctor.

Can a patient withdraw their consent?

Yes. A competent adult patient has a right to give or withhold consent to a medical examination, investigation, procedure or treatment. A patient can withdraw their consent to a medical intervention at any time.

Can information be withheld from a patient?

Yes, on very rare occasions information may be withheld from patients. This is referred to as 'therapeutic privilege'. Therapeutic privilege may be used if the medical practitioner believes, on reasonable grounds, that the patient's physical or mental health may be seriously harmed by disclosure. In practice, this situation is extremely uncommon.

What about incompetent adult patients?

In circumstances in which an adult patient does not have the capacity to consent, there is specific guardianship legislation enacted in each state and territory which provides for valid substitute consent.

The legislation outlines a hierarchy of decision-makers. This may include an enduring guardian who was appointed by the patient when they still had the capacity; or a spouse, other family member or unpaid carer. Where there is no available substitute decision maker, an application can be made to the relevant Guardianship Tribunal for the appointment of a guardian.

Can children and adolescents consent to their own treatment?

Consent for medical treatment given to patients under 18 years of age is generally provided by parents. In many cases, it is preferable to obtain the consent of both the child and the parent for medical treatment. However, there are circumstances in which children under the age of 18 years can consent to their own treatment and without their parents' knowledge. This common law position is based on a 1985 English House of Lords judgment, *Gillick v Wisbech Area Health Authority*. In this case, the issue to be determined was whether a medical practitioner could provide contraceptive advice and prescribe contraceptives to a child under the age of 16 years, without the prior knowledge or consent of her parents. The Court determined that there were circumstances in which a child could consent to their own medical treatment. In order to do so, the child must have a sufficient understanding and intelligence to enable him or her to understand fully what is being proposed, including an understanding of the nature and effects of any procedures. This is often referred to as 'Gillick competence'. The level of maturity required to provide consent will vary with the nature and complexity of the medical treatment.

There is also specific legislation in NSW and SA that relates to the medical treatment of children. In NSW, the *Minors (Property and Contracts) Act 1970* provides some guidance regarding the medical and dental treatment of children and adolescents. Section 49 of this Act states that a medical practitioner who provides treatment with the consent of a child 14 years or over will have a defence to any action for assault or battery. This Act does not assist a medical practitioner in a situation where there is a conflict between a child and their parent, and a parent can still potentially override a child's consent to treatment.

In SA, the *Consent to Medical Treatment and Palliative Care Act 1995* outlines the legal requirements for obtaining consent by medical practitioners. Section 6 of this Act states that a child 16 years and over can consent to their own medical treatment as validly as if an adult. Additionally, Section 12 of this Act states a child under the age of 16 years can consent to medical procedures if:

- the medical practitioner is of the opinion that the patient is capable of understanding the nature, consequences and risks of the treatment and the treatment is in the best interests of the health and wellbeing of the child; and
- that opinion is corroborated in writing by at least one other medical practitioner who has personally examined the child before the treatment was commenced.

What should I do in an emergency?

It is important to be aware that no consent is required in emergency situations if it is impractical to do so. In the case of a medical emergency (where treatment is immediately necessary to save the life of a patient or to prevent serious injury to their health), and the patient is not able to consent to the required treatment at the time, a medical practitioner may perform emergency treatment.

Confidentiality and Consent:

Case history 4

The DIT was asked to review a 21-year-old woman who had undergone an emergency appendicectomy two days earlier. The patient was complaining of mild shortness of breath. The DIT drew the curtains around the patient's bed and proceeded to take a full medical history. He then performed a routine cardiovascular and respiratory examination.

The following day, the DIT received a phone call from the hospital advising him that the patient had made an allegation of indecent assault against him. The hospital asked the DIT to attend an interview. Unfortunately, the DIT attended the meeting unaccompanied, without first seeking advice from MDA National or a solicitor. At the meeting, the DIT was suspended from duty, pending an investigation into the patient's allegations. At this point, the DIT contacted MDA National for advice and a solicitor was appointed to protect his interests.

The following day, MDA National's solicitor and medico-legal adviser met with the DIT. The DIT categorically denied the patient's allegations that he had indecently assaulted her by fondling her breasts. The DIT said that he had performed a full cardiovascular and respiratory examination, including palpation of the apex beat and auscultation of the heart and lung fields. After submissions from MDA National's solicitor, the DIT was reinstated.

Confidentiality and Consent:

Case history 5

Rogers v Whitaker [2] **was a medical negligence claim involving the failure of an Ophthalmologist, Dr Rogers, to disclose to his patient that as a result of surgery in her blind right eye she may develop sympathetic ophthalmia in her 'good' left eye.**

The patient, Mrs Whitaker, had for many years been almost totally blind in her right eye. Dr Rogers had advised the patient that an operation on her blind right eye would not only improve its appearance but would probably restore significant sight to it. The surgical procedure was performed on 1 August 1984. After the operation there was no improvement to the right eye, and the patient lost vision in her left eye, rendering her completely blind.

In 1992, the High Court of Australia found that Dr Rogers was liable in that he had failed to warn the patient that, as a result of surgery, she might develop sympathetic ophthalmia. Evidence was led that the risk of this complication was extremely remote, perhaps as low as 1:14,000. The High Court found that the risk of sympathetic ophthalmia was a material risk, and thus required a warning. Mrs Whitaker was awarded damages in the amount $808,564.38.

What are 'material risks'?

A risk is material if:

- a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or
- the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

References

1 *General Guidelines for Medical Practitioners on Providing Information to Patients*. NHMRC 2004. Available at: nhmrc.gov.au.

2 *Rogers v Whitaker* [1992] HCA 58.

Further reading

Medical Board of Australia. *Good Medical Practice: A Code of Conduct for Doctors in Australia.*

Find out more

For more information visit **mdanational.com.au** or contact **1800 011 255**.

MDA National's experienced medico-legal advisers provide accurate, empathetic and timely medico-legal advice, with access to our 24/7 service for urgent matters.

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