

General Counsel Note

Physicians have always had a duty to safeguard patient information revealed to the physician during the patient/physician relationship. Principle IV of the AMA Principles of Medical Ethics states that: "A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law."¹ This Principle has been interpreted to require that information revealed to the physician during the course of the patient/physician relationship be kept confidential to the "greatest possible degree."² Although courts have relied on the AMA's ethical guidelines as the basis for imposing legal obligations, these ethical guidelines in and of themselves are not binding by law. Maintaining patient confidentiality is, however, also a legal duty established by federal and state laws and regulations.

There are, of course, a few exceptions to this duty to keep patient information confidential. Physicians who practice in Tennessee need to know about recent legal developments that make clear that one of those exceptions no longer exists.

¹ AMA Principles of Medical Ethics, www.ama-assn.org/ama/pub/category/2512.html

² AMA Opinion E-5.05 Confidentiality, www.ama-assn.org/ama/pub/category/2498.html

Prior to recent rulings by the Tennessee courts, it was possible for defense counsel and a physician to engage in court-approved *ex parte* conversations (legal jargon meaning that the conversation is "on behalf of or involving only one party to a legal matter and in the absence of and usually without notice to the other party). Trial courts would grant a defendant's "Motion to Allow Access to Treating Physicians," with restrictions such as the following:

1. The case must involve alleged medical malpractice,
2. The information sought must relate only to the diagnosis and treatment of the condition for which the Plaintiff originally sought treatment and any time relevant treatment for any injury claimed to have arisen from the alleged malpractice, where the Defendant physician was still involved in treatment of the Plaintiff,
3. No Defendant physician shall be present during the contact between Defense Counsel and a treating physician, and
4. The Court in which the action is pending must authorize the contact pursuant to a Motion filed by Defendant with Notice to the Plaintiff.

With the issuance of a court order under the circumstances above, the patient's authorization for informal conversations between the attorneys and the patient's treating physicians was not required. The courts granted this type of motion to avoid the expense of formal discovery, and because formal discovery is time consuming. Also, the courts reasoned that the defendant should have equal access to medical information relevant to the lawsuit, "bearing in mind that the object of any lawsuit is the ascertainment of truth."³ Thus, in the past, Tennessee recognized a public interest exception to the physician's duty to keep patient confidences in which the interest in maintaining the confidentiality of patient information was outweighed by the public interest in facilitating our justice system. **However, this exception was clearly struck down** by the Tennessee Supreme Court in June, 2006 when the Court confirmed the decision by the Court of Appeals there are no exceptions to a physician's duty of confidentiality that permits disclosure of medical information in private conversations without the patient's consent.⁴

In *Alsip et al v. Johnson City Medical Center et al.*, the plaintiffs (two daughters and the mother of the deceased patient) filed a malpractice action against a physician who had treated the patient in the emergency

³ Alsip, et al. vs. Johnson City Medical Center, et al. (discussion of Mary Killian vs. Medical Education Assistance Corporation), 2005 WL 1536192 (Tenn. Ct. App.) at p. 3

⁴ Alsip, et al. vs. Johnson City Medical Center, et al., No. E 2004-00831-SC-509-CV, 2006 WL 1765900 (Tenn. June 29, 2006)

department shortly before the patient died. The defendant physician, and various other entities named as defendants in this case, filed a motion requesting that legal counsel for the defendants be allowed to meet with and have *ex parte* conversations with non-party treating physicians who provided care and treatment for the deceased prior to his death. In a unanimous decision, the Tennessee Supreme Court ruled that a patient's medical information is only available to legal counsel via authorization from the patient or through use of formal discovery tools set forth in the Tennessee Rules of Civil Procedure.

The Court held that:

1. There is an implied covenant of confidentiality between a physician and his or her patient unless, of course, there is a contrary understanding between them.
2. A plaintiff does not waive the covenant of confidentiality by filing a lawsuit that requires disclosure of medical information. The Health Insurance Portability and Accountability Act (HIPAA) preempts Tennessee law that allows a waiver by filing a lawsuit because HIPAA preempts any state law that provides less stringent protections of identifiable patient health information.
3. The covenant of confidentiality is not absolute and can be voided when its enforcement would compromise the needs of society, such as when a patient's illness

presents a foreseeable risk to other individuals, and when reporting is required by law.

4. **There is no public policy exception to a physician's statutory duty of confidentiality that permits disclosure of medical information in private conversations without the patient's consent.**

Ex parte conversations between legal counsel and treating physicians are not allowed in Tennessee without patient or patient's legal representative's authorization. This rule applies to all parties in litigation, so it applies both to the patient's legal counsel and to opposing counsel.

This does not mean that physicians employed by Vanderbilt cannot discuss Vanderbilt patient issues with a Vanderbilt attorney or Risk Management. If you need assistance

with a request from outside legal counsel regarding information about a patient, contact Risk Management at 936-0660 or the Office of General Counsel at 936-0323. Routine requests for copies of medical records with the patient's authorization are handled by Medical Information Systems (322-2824).

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