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When Doctors Pick up the Pen—Patient-Doctor Confidentiality Breaches in Publishing

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“I hold back nothing,” the famous confessional poet Anne Sexton once wrote, before a posthumous biography of her sparked a major debate about the limits of patient confidentiality in publishing [1].

Martin T. Orne, MD, Sexton’s psychiatrist of 8 years, released more than 300 audiotapes of private therapy sessions to Sexton’s biographer, in addition to writing an introduction to the book [2]. The audiotapes chronicled significant personal details of Sexton’s life, including her sexual abuse of her daughter, extramarital affairs, and psychotic behavior [2]. While Sexton left no instructions about what should be done with these tapes when she committed suicide in 1974, Dr. Orne and Sexton’s family felt that she would want the tapes released. Some physicians and ethicists disagreed, however, arguing that doing so violated patient confidentiality, a professional commitment that physicians make to protect patient information so that patients will be comfortable disclosing all details (even private or embarrassing details) that may be pertinent to their diagnosis and treatment [3].

Though Dr. Orne was never sued, similar court cases suggest that physicians must tread carefully when publishing patient information, even that which they have tried to de-identify [4]. This article will look at various claims patients might bring against physicians publishing confidential information and possible physician defenses.

Claims

Breach of Confidentiality. A first type of claim is breach of patient confidentiality. Contract law theory holds that a contractual relationship is established when a physician accepts and begins a patient-physician relationship. The contract encompasses an obligation on the part of the physician to keep the patient’s disclosures in confidence, and, when this confidence is broken, patients can sue for, in essence, not getting what they paid for [5, 6].

In a New York case, *Doe vs. Roe*, “Mrs. Doe” sued her former psychiatrist, “Dr. Roe,” over a book that chronicled the treatment of herself and her late husband [7]. Although the patients’ names were not included in the book and Dr. Roe had changed a number of facts, Doe argued that the inclusion of certain details—such as her son’s having published a number of operas in his youth and the remarriage of her former husband, a Harvard law graduate turned speechwriter, to a disabled lawyer—revealed her identity to acquaintances [8]. The New York Supreme Court held that

Dr. Roe had entered into a contract with her patients to keep matters in confidence and had violated patient confidentiality with the publishing of her book [9]. The court issued a permanent injunction against any distribution of the book (even to other professionals) and awarded Mrs. Doe \$20,000 in compensatory damages [10].

Plaintiffs may also sue for breach of confidentiality under tort claims. The basis for tort claims is professional malpractice—claims arise when a professional fails to uphold a standard of behavior specific to his or her profession. To succeed in a breach of confidentiality claim under tort law, a plaintiff must prove four items: (1) that a patient-physician relationship existed, (2) that the physician's conduct fell below the standard of care, (3) that there is a causal link between the physician's action and the injury to the plaintiff, and (4) that the patient suffered actual injury [11]. In defining the standard of care, courts have looked to professional ethics codes that provide guidance on patient confidentiality, like the Hippocratic Oath and the American Medical Association's *Code of Medical Ethics* [12-14]. Courts also sometimes consider medical licensing statutes here [14].

Invasion of Privacy. Patients may also bring a claim of invasion of privacy without consent. This tort also has four requirements: intrusion into patient privacy, appropriation of patient information, publicity that falsely represents the plaintiff in the public eye, and public disclosure of private facts [15, 16]. Courts sometimes consider both the nature and the content of such a disclosure in making a determination. Some instances in which physicians have been found justified in revealing patient information include disclosures to family members and to employers, where these parties have a legitimate interest in knowing something about a patient's condition [16].

Physician Violation of Statute. Physicians may be sued if they indirectly violate a state or federal law.

The federal Health Insurance Portability and Accountability Act (HIPAA) requires health care providers and health plans that conduct business electronically to comply with certain privacy rules [17]. State laws that protect patient confidentiality vary widely. Rules that govern patient confidentiality may be spread across a variety of different statutes, ranging from those that concern public health to medical licensure or credentialing, or legal privilege regulations, and they may address a wide variety of topics, from specific diseases to autopsy [18]. Some states have codified statutes pertaining to these matters, while others rely on common law (or court cases) to provide such protections [19].

In states that have mandates against the disclosure of patient information, physicians may be sued for violating state law. States and jurisdictions that have dealt with cases under this category include New York, Washington, the District of Columbia, Nebraska, New Jersey, and Tennessee [16].

Defenses

Physicians who are accused of wrongly revealing private patient information may have a number of defenses available to them. If the patient consented in writing to having his or her information released, for example, the right to patient-physician privilege has been waived [16].

Physicians may also claim that disclosure of the information was in the private or public interest. Private interest includes preventing harm to either the patient or others. (Relevant here is the famous case *Tarasoff v. Regents of the University of California*, in which a therapist was held to have a duty to disclose private patient information to a third party in danger after his patient informed him of intention to murder a girl and then acted on it [20].) Public interest includes information that is relevant to public health or that is newsworthy and part of the public record [21, 22].

Physicians have also claimed a right to disclose when the interest of science was at stake. In *Doe*, the physician claimed that her book was a useful resource for physicians on providing treatment to certain types of patients. The court, though hesitant to comment on the validity of her book as a medical resource, held that it did not rise to a level that trumped the patient's right to privacy [23].

Lastly, some physicians have argued that their right to free speech under the First Amendment permits them to disclose private patient information to the public. In one Massachusetts case, *Commonwealth v. Wiseman*, a filmmaker was sued for violating certain conditions he had agreed to in the filming of a state hospital. The court found that the First Amendment interest in having specialists in the fields of psychiatry and public health view the film was strong enough to outweigh patient privacy interest [24]. By way of contrast, the *Doe* court found that, because a contractual agreement to respect patient privacy was in place (given the established patient-doctor relationship), a First Amendment right to free speech did not outweigh that right to privacy [25]. One commentator has suggested that a key distinction may be whether the publication or product was intended for public benefit or not [26].

The laws concerning patient confidentiality are still being carved out by legislatures and courts, but precedent dictates that physicians must be careful in publishing information about their patients. While patients' stories may be instructive for both professional and general audiences, this interest must be balanced against society's interests in making patients comfortable sharing private information with their doctors. As legal cases have shown, physicians who reveal private details about their patients to the public may be sued for damages related to invasions of privacy, breach of contract, and the breaking of state law and may even find their books enjoined from publication. As courts continue to define the balance between a First Amendment right of free speech, the public's right to know, and protection of private information, physicians must take care to protect patient privacy in any publishing endeavor.

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