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Doctor's Duty to Speak

T. Raber Taylor, A.B., LL.B.

Mr. Taylor, a frequent contributor to the ROCKY MOUNTAIN MEDICAL JOURNAL, was invited to address the Medical Staff of St. Joseph's Hospital, Denver, Colorado, at their annual meeting in January. We believe his remarks will interest all of our LINACRE QUARTERLY readers.

IT WOULD not be expected that a practicing attorney discuss medical questions. There are, however, legal concepts governing the relations of physician and patient that can be enumerated with profit.

Let us recall a few basic legal principles affecting the practice of medicine related to an ever timely problem — when does the word of the doctor or his silence help or injure his patient? We are not considering here the frequently and extensively treated question of medical secrecy — the doctor's ethical and legal obligation to his patient not to disclose to others information confided to him. Let us focus our attention on the problems arising from the practice of his profession with the help of speech or keeping silent.

Before the birth of Christ, the artful use of speech or its opposite — silence — and the proper amount of each challenged the physician. Publius Syrus, a Roman Advocate, when counseling physicians and others, set forth these maxims: "I have often regretted my speech; never my silence. Keep the golden mean between saying too much and too little." Conscious of such good counsel, most

of our doctors strive to keep the golden mean. They strive to observe their professional ethics to "neither exaggerate nor minimize the gravity of a patient's condition." They seek to assure themselves that their patients have such knowledge of their condition as will serve the best interests of the patient and his family. (Chapt. 2, Sec. 3 — Prognosis, *Principles of Medical Ethics*, 1955 Edition)

Other doctors, however, have treated their patients behind the dark shield — "what they don't know won't hurt them" or "ignorance is bliss." This dark shield has been examined by the American Medical Association in an opinion - sampling survey and by others in several popular and professional articles. The A.M.A. survey reported that many people, 46 per cent of the laymen and 47 per cent of the medical profession, complained that most physicians are not frank enough with their patients. Last summer the *U. S. News and World Report* article asked, "Should Doctors Tell All?"¹ The *Saturday Evening Post* article answered, "Doctors Should Tell

¹ *U. S. News and World Report*, July 13, 1956, p. 104.

the Truth."² In his inaugural address, Dr. Dwight H. Murray, President of the A.M.A., met the charge that doctors do not tell the truth to their patients. He urged them to take a new approach. "The patient," he said, "has a right to know."

A few physicians continue their accustomed non-disclosure. They believe that frankness with patients is dangerous. They point out the danger to the patient who, if he knows all, may lose his will to live when he hears he is seriously ill. Another mentioned danger is telling too much to the patient who lacks the emotional stability to take bad news. Some doctors say that distraught individuals, on learning the blunt truth, have committed suicide.

Long before the A.M.A. opinion survey doctors, moralists, and lawyers have been thinking and writing about the duty to speak. To mention a few, Dr. Charles C. Lund of the Harvard Medical School has an excellent article entitled "The Doctor, the Patient and the Truth."³ Father Gerald Kelly, S.J., known to many of you as the author of the booklets *Medico-Moral Problems*, includes in this series an excellent chapter, "Should the Cancer Patient Be Told?"⁴ The most extensive legal study has been made by Hubert Winston Smith, M.D., LL.B., and professor of legal medicine, first at Harvard Medical School, and later at the University of Illinois. His work is entitled, "Therapeutic Privilege to Withhold Specific Diagnosis from Patient, Sick with Serious or Fatal Illness."⁵

The question is asked, "Is there a legal duty to be frank with patients?" The legal answer, like most medical answers, is not an unqualified one. Doctors seek from lawyers an automatic rule-of-thumb legal prescription. At the same time, the doctor is conscious that a specific prescription to serve the patient's best interests is usually required in medicine.

The legal prescription or answer depends upon the facts in each case. The cases, however, divide into two groups. In the first group are the patients with a curable or controllable ailment. In the second group are the patients whose illness is fatal.

How does the doctor usually decide when the law requires him to speak and when to be silent? A review of our fundamental law will give a general guide and answer. Such a review can properly begin with our Declaration of Independence. It expresses the first and fundamental principles of our law. It is the beginning and source of medical law. The principles are found in these familiar words:

We hold these Truths to be self-evident, that all Men are created equal: that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just powers from the Consent of the Governed; . . ."

² *Saturday Evening Post*, June 16, 1956, p. 23.

³ 19 *Tenn. L. Rev.*, 344, April 1946.

⁴ Gerald Kelly, S.J., *Medico-Moral Problems*, II, 7, The Catholic Hospital Association, St. Louis 4, Mo.

⁵ 19 *Tenn. L. Rev.*, 349, April 1946.

We see here the three key philosophical and ideological concepts—

First, All men are created and endowed by their Creator with inalienable rights.

Second, Man's right to life is Creator endowed.

Third, Consent is given to Government to secure this right to life.

These concepts indicate that physicians, like government, are to make secure man's right to life. And, like government, physicians derive their authority from man's consent. The doctor receives his authority, if any, from the patient's consent and desire to secure his inalienable rights. These rights are: to have life, to have necessary care, and to ask others to see to his welfare. These rights the patient receives directly from the Creator, not from another man, or a staff of men, nor from the State, nor from any political authority.

The right of the physician to treat requires the prior consent of the patient. Consent means *with knowledge*. The law imposes an obligation on the patient, *once he has chosen his doctor*, to give full information and a full opportunity to the doctor to treat the case. On the other hand, the law imposes on the physician a two-fold personal duty: (1) to explain to his patient the general purpose, extent, and risks, if any, of the prescribed treatment or operation, and (2) to be reasonably certain the patient understands and then freely consents. The law will find the physician breaching his duty if he obtains the patient's consent to

treatment or operation by concealment or half-truths.

For the treatment of a curable or controllable ailment, however, not only is the patient's consent needed, but the patient's intelligent cooperation is, for his best interests, necessary for successful therapy. The physician knows best how true this is in the case of the cardiac, the diabetic, the epileptic. The doctor has an obligation to instruct the patient in some detail as to the nature of the ailment and the precautions and the regimen which must be followed. The law finds that a doctor breaches his duty when he fails to give the patient proper instructions as to the care and attention calculated to effect a cure. (*Beck v. Klinck*, 78 Iowa 696.)

This rule of law does not mean that the doctor must explain all the details of his diagnosis and share them with the patient. The guiding rule of law, as well as medicine, is to use speech and silence just so far as they help the patient. Frequently there are details of a diagnosis or a prognosis that need not be disclosed, either because they would be of no particular benefit, or because through misunderstanding or exaggerated anxiety on his part, the words would injure more than do good. A doctor's anxious face and evasive silence can also injure. In every case the physician has the responsibility of prescribing the measure of speech and silence that will be for the best interests of the patient and his family.

The law imposes on the physician the duty of acting with the

utmost good faith toward the patient. If the doctor knows he cannot accomplish a cure or that treatment adopted will probably be of no benefit or of little help, he must so advise the patient. (Logan v. Field, 75 Mo. app. 594.) In a recent case a doctor has been held liable to a patient for costly deception by holding out false hopes of recovery which induced the patient to undergo expensive treatments he should have known were useless.

The second group of cases involves speech and silence with the patient fatally ill. In abiding by medical staff constitutions and bylaws, the physician is bound to give his moribund patient every benefit possible. This obligation is summarized in the *Ethical and Religious Directives for Catholic Hospitals*.⁶ Directive 7 reads:

Everyone has the right and the duty to prepare for the solemn moment of death. Unless it is clear, therefore, that a dying patient is already well-prepared for death, as regards both temporal and spiritual affairs, it is the physician's duty to inform, or to have some responsible person impart this information.

Different words have been used by lawyers when they express what is summarized in this directive. Louis J. Regan, legal adviser to the California State Medical Society and frequent contributor to the *American Medical Association Journal*, in his booklet *Malpractice and the Physician*,⁷ says:

It is extremely doubtful that a physician has a therapeutic privilege to withhold a specific diagnosis from a patient who is sick with serious or fatal illness. To the contrary, the confidential rela-

tionship requires in ordinary circumstances that the physician make a frank and full disclosure of all the pertinent facts to any adult and mentally competent patient.

Hubert Winston Smith, M.D., LL.B., in his work on "Therapeutic Privilege to Withhold Specific Diagnosis" tells us:

There is another principle to be borne in mind from a legal point of view: in all such cases, the physician should make it a practice, wherever possible, to communicate the true facts immediately to near relatives. This will enable special arrangements to be made in respect to financial affairs, property matters or family dispositions, almost as effectually as if the individual himself knew the truth. Finally, it would seem that the attending physician, in late stages of such a malady, should do what he can to assure the patient of a chance to make a last will and testament and to have the solace and comfort of religious ministrations.

Again we are confronted with the practical question, how much speech and silence must be prescribed for a patient suffering from a fatal illness? The patient has a right to know the truth. All lawyers will agree that a doctor may not breach his duty to his patient through deceit or a lie. The doctor's duty to tell the patient of his critical condition so he can put his worldly and spiritual affairs in order does not require the doctor to disclose all of the diagnostic data in detail, nor to tell him the precise nature of his illness. A doctor may reasonably presume that a patient does not desire knowledge which would injure rather than help, but the doctor may not rely upon this presumption contrary to the patient's known desire for full knowledge.

Dr. Dwight Murray and many other physicians and surgeons believe that the vast majority of

people have the emotional stability to take the shock of bad news. In their professional experience they have found that withholding information may cause the patient greater worry than knowledge of the truth. Dr. Lund tells us, "Almost always it does more good than harm to tell the patient who is in a hopeless situation the truth about his prospects. This must always be done gently, and perhaps indirectly." He further tells us that a question to the patient as to whether he would like to see his clergyman or to make his will is usually sufficient. Following such a suggestion, the patient often asks

a direct question and is entitled to a direct answer.

A patient's knowledge of a fatal illness may depress him to a point of attempted suicide. However, Dr. Walter Alvarez of the Mayo Clinic reports, "In forty-odd years of practice I cannot remember anyone's committing suicide because I told him the hopeless truth. Instead, hundred of persons thanked me from their hearts and told me I have relieved their minds."

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⁶ Second Edition, Catholic Hospital Association, St. Louis 4, Mo.

⁷ J. A. M. A., 147, 54-59, Sept. 1, 1951.