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Medical confidentiality as one of the key duties of doctors

Tajemnica lekarska jako jedna z kluczowych powinności lekarza

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Należy cytować wersję pierwotną

Abstract

The medical secret is one of the most important duties related to the profession. It guarantees confidentiality of patient's most sensitive data, allows him to build with the doctor a real relationship, based on trust, allows unhampered contacts, excludes third persons from the circle of the interested parties. Medical confidentiality is a significant right of patients, which is protected by law, for breach of which the court can grant a compensation. The disclosure of medical confidentiality may result in a civil liability for a physician who violates protected rights of a patient. Due to the obvious violation of deontological or criminal obligations, the legislator provides ethical liability in the event of an unlawful violation of the obligation of medical confidentiality. All the exceptions to this principle are of high importance as well as the circumstances of the release from medical confidentiality.

Key words: patient confidentiality, release from medical confidentiality, doctor as a witness in court

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Introduction

The issues of medical confidentiality are regulated in the Medical Profession Act [1–5], while in the deontological dimension it is provided in the Code of Ethics of the Professional Self-Government [6]. This second regulation provides that the death of a sick person does not exempt them from the obligation of confidentiality. The doctor must ensure that individuals assisting or helping him in his work respect professional confidentiality. Exemption from medical confidentiality may be granted only if the patient consents to it or if the confidentiality significantly endangers the health and life of a patient or other individuals. On the other hand, the legislator provides that the doctor is obliged to keep confidential information related to the patient and information which was obtained when practicing his profession, while also allowing exceptions to this rule.

The obligation of confidentiality shall not apply in cases when stated by the act; the medical examination was carried out at the request of authorized bodies and institutions; confidentiality may endanger the life or health of the patient or other persons; the patient or his or her legal representative consents to the disclosure of confidentiality; there is a need to provide the necessary information about the patient to a forensic doctor, another doctor or authorized individuals participating in providing health services.

Exemptions to the rule

Under the Medical Profession Act, physician-patient privilege is treated as an obligation of keeping confidential information related to the patient and information which was obtained when practicing his profession [7]. The secret covers all data, facts and circumstances established by

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the doctor or obtained by him, both in the course of examination and diagnostics, as well as by disclosure by the patient or other individuals. Medical confidentiality covers all elements of medical records, previous therapeutic treatment, and progress in treatment [8]. Since medical confidentiality is the rule to be followed, any exceptions to it must be interpreted narrowly so that a broad interpretation does not lead to a distortion of the purpose of the regulation on confidentiality for the patient [9]. These guidelines are particularly important in situations of conflict of interest or goods, some of which require confidentiality and others require disclosure in order to meet certain legal requirements. An example in this respect may be tax proceedings under which the tax authorities carry out activities aimed at establishing the facts of a doctor's tax misconduct. As the court judicature resolved against the background of disputed cases, a taxpayer may not be punished for failure to comply with the summons of an authority if he could not objectively, for reasons beyond his control, satisfy the authority's request [10]. Only an authorization resulting from a statutory provision could constitute a basis for the tax (control) authority to demand data resulting from medical records. Patient data including name and address are not covered by medical confidentiality and are not medical data [11]. It seems obvious that a doctor's right of access to professional medical data and the possibility, sometimes even an obligation to consult another doctor, as well as applicable to all professional confidentiality, constitute an obvious basis for making the data from medical records available to another doctor. Meanwhile, in one of the cases of so-called medical error, a hospital defending himself against the patient's claims, sought so-called private expert's opinion, forwarding the medical documentation of the claimant to him for assessment.

Importantly, personal data that enables the identification of the patient in the transferred documentation was pre-identified, which made it impossible to identify the person personally. The documentation was therefore made available in order for the hospital to consult a medical case with a medical authority in the relevant medical field, in order to prove that there are no signs of responsibility to compensate towards the suing person. The hospital was sued for infringement of protected goods on the basis of professional confidentiality, however, the court held that objectively making medical records available to another doctor — a professor of medical sciences—for consultation purposes, even in violation of the 2008 Act on Patient's Rights and the Patient's Ombudsman, it is not connected with the violation of medical confidentiality in a way detrimental to personal rights [12–14]. In another judgment, the court assessed the public interest in the context of the obligation to keep medical confidentiality. The public interest is bounded by the protection of the individual's personal interests, which only to a limited extent justifies depriving the individual of protection for the public good. Determination of the reason why pregnancy endangers the life or health of a pregnant woman, as well as the results of prenatal examinations or the description of medical reasons indicating a high probability of severe and irreversible impairment of the foetus or an incurable life-threatening disease requires checking medical records which are covered by medical confidentiality. Therefore, it is justified to assume that questions regarding diagnoses of individual medical cases or their verification are not public information. Medical diagnosis does not in any way refer to general issues that serve the general public and is by its very nature not accessible to everyone.

It is therefore difficult to give it the characteristics of a "Public matter". [15]. Undoubtedly, the duty of medical confidentiality does not apply if its confidentiality could endanger the patient or other persons. This exception is particularly important in the context of the threat that society may face as a result of the non-disclosure of data covered by this secret, but which are also of major importance for the security of others. An example, taken from the doctrine, may be the need to inform competent authorities of the incapability to drive of a person who is a driver, even if he is a non-professional driver [16]. Such medical data is relevant to all road users who may be at risk due to patient activity. A classic example would also appear to be so-called "legal highs", the use of which may pose a threat to the life or health of the patient, the use of which is notified to law enforcement authorities in order to enable them to identify the source of substances that may pose a threat to other people [17].

In court proceedings there are different rules depending on whether we are dealing with criminal or civil proceedings.

Individuals obliged to maintain medical confidentiality may be questioned about facts covered by that confidentiality only if it is necessary for the sake of justice and the circumstances cannot be established on the basis of any other evidence. In pre-trial proceedings, the court decides, at a meeting without the participation of the parties, not later than 7 days from the date of delivery of the prosecutor's motion [18], on the question of hearing or permission for hearing. The decision of the court may be appealed against.

The procedure for exemption from professional confidentiality provided in Article 180, paragraph 2 of the Code of Criminal Procedure will apply if the doctor refuses to disclose the confidentiality or the patient does not give such consent or there will be no exceptions other than those specified in the Act [19, 20]. The exemption from confidentiality may not apply when the patient is the accused individual and the information has been disclosed to the doctor in connection with the alleged act. The relevant provision of the Code of Criminal Procedure prohibits taking as evidence of any statements made by an accused person to a doctor providing medical assistance in relation to the alleged act, thus regardless of their content. In this respect, the doctor cannot be released from medical confidentiality pursuant

to Article 180, paragraph 2 of the Code of Criminal Procedure, as the appointed Article 199 of the Code of Criminal Procedure is a *lex specialis*, *i.e.* a special general rule [21–23]. Importantly, the Code of Civil Procedure does not contain a separate legal regulation relating to the exemption from medical confidentiality. It seems that if a patient files a lawsuit, his or her consent to disclosure of data covered by medical confidentiality by doctors who are appointed as witnesses in order to prove the legitimacy of their claims should be implicitly accepted. However, this is not self-evident in relation to those who, in order to defend themselves, are called upon to act as witnesses, and the patient clearly does not release them from confidentiality. They may then hide behind so called kind of obligation, justifying their refusal to give evidence. Article 261 § 2 of the Code of Civil Procedure provides that a witness may refuse to answer a question asked, if the testimony could expose him or his relatives to criminal liability, or severe and direct damage to property, or if the testimony was to be combined with a violation of a relevant professional confidentiality. In the second case, there is a doctor and a medical confidentiality. Professional confidentiality covers information obtained in connection to pursuing occupation, and thus also as a doctor [24, 25].

Confidentiality after a patient's death

As a rule, the doctor is bound by a secret even after the patient's death. Since 2016, a doctor, subject to a few situations, being bound by confidentiality even after the patient's death, may be released from it, if the consent to disclosure of confidentiality is given by a close relative within the meaning of the Act on Patient's Rights and the Patient's Ombudsman. A close relative means a spouse, relative or affinity up to the second degree in a straight line, a statutory representative, a person in cohabitation or a person indicated by the patient. A close relative who consents to the disclosure of a secret may determine the scope of its disclosure. Such exemption from medical confidentiality shall not apply if another close relative opposes disclosure. This provision does not oblige the medical practitioner to determine whether another close person objects to the disclosure of information related to a deceased patient. The consent of a close relative to the disclosure of confidentiality does not apply to the possibility of making medical records of the deceased patient available to such a person. The right to medical records after the patient's death is still held by a person authorized by the patient during his or her lifetime. Therefore, a distinction should be made between the category of "health information"; and the category of "data written in medical records". The scope of the two categories can be either convergent or different, and the legal basis and disclosure rules are also different. The body providing health services makes the medical documentation available to a person authorized by the patient. After the patient's death, the medical records are made available to a person authorized by the patient during his or her lifetime or who was his or her legal representative at the time of the patient's death. As far as health information is concerned, there is another legal provision which first defines this category of data. A patient, including a minor who is over 16 years of age, or his or her legal representative, shall have the right to obtain from a doctor accessible information about the patient's state of health, diagnosis, proposed and possible diagnostic and therapeutic methods, the foreseeable consequences of their use or omission, treatment results and prognosis.

The patient or his or her legal representative shall then have the right to consent to the provision of the information in question to other persons. The use of a plural number in the provision determines the possibility of authorizing more than one person to obtain information about the patient's health.

Amendments to the provisions on medical confidentiality

The Act of December 6, 2018 amending the Act on the Professions of Physician and Dentist and some other acts was published under item 150 in the Journal of Laws of the Republic of Poland on January 25, 2019. Until now, the doctor was, as a rule, bound by a secret also after the death of the patient, unless the consent to disclosure of confidentiality was given by a close relative. A close relative who had consented to the disclosure of a secret, could determine the scope of its disclosure. When amending the above-mentioned Act, a provision was introduced that exemptions from the medical confidentiality referred to in this Act shall not apply if disclosing a secret is opposed by another close relative or was opposed by the patient him- or herself during his or her lifetime. Such an objection is included in the patient's medical records. In the event of a dispute between close relatives over disclosure of a secret or the scope of its disclosure, consent to the disclosure of confidentiality is given by the court at the request of a relative or a doctor. The doctor may also apply to the court in case of reasonable doubt as to whether the person requesting or opposing disclosure of a secret is a close relative. The court, when agreeing to the disclosure of the secret, may determine the scope of disclosure of data covered by medical confidentiality. In the event that the patient opposed the disclosure of a medical secret during his or her lifetime, the court may, at the request of a close relative, agree to disclose a secret and determine the scope of its disclosure, if it is needed for:

1) claiming punitive or compensatory damages for patient's death;
2) protection of life or health of a close relative.

If a court application is made, the court will consider the following factors:

1) the interest of the participants in the proceedings;
2) the real nature of the relationship between a close relative and the deceased patient;

3) the will of the deceased patient;
4) the circumstances of expressing objection.

Summary

Medical confidentiality is not absolute. The legislator provides for cases where disclosure is not only authorized, but sometimes mandatory. Not all legal provisions concerning exemption from medical confidentiality are sufficiently precise. There is a clear normative distinction between the categories of data covered by medical confidentiality, medical records, health information and data covered by the doctor's own knowledge. Disclosure of each of these categories of information is subject to separate rules and does not contribute to regulatory consistency on such an important issue related to the pursuit of the occupation of a doctor.

Conflict(s) of interest

The author declare no conflict of interest

Streszczenie

Tajemnica lekarska jest jedną z najbardziej istotnych powinności związanych z wykonywaniem zawodu. Gwarantuje pacjentowi poufność najbardziej wrażliwych danych, pozwala na zbudowanie z lekarzem prawdziwej więzi, opartej na zaufaniu, umożliwia nieskrępowane kontakty, wykluczające z kręgu zainteresowanych osoby postronne. Tajemnica zawodowa stanowi istotne prawo pacjenta, które podlega ochronie prawnej, za jego naruszenie sąd może przyznać pacjentowi zadośćuczynienie. Ujawnienie tajemnicy lekarskiej może skutkować dla lekarza odpowiedzialnością cywilną w związku z naruszeniem dóbr prawem chronionych, etyczną ze względu na oczywiste naruszenie powinności deontologicznych lub karną, albowiem ustawodawca przewiduje także przepisy karne na wypadek niezgodnego z prawem naruszenia obowiązku zachowania tajemnicy lekarskiej. Szczególnie istotne znaczenie mają wyjątki od tej zasady oraz przesłanki i okoliczności zwolnienia lekarza z tajemnicy.

Słowa kluczowe: tajemnica lekarska, zwolnienie z tajemnicy medycznej, lekarz jako świadek przed sądem

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