

Medical Privacy Norms, Common Law and Statute

<http://wendy.seltzer.org/brooklaw/07privacy/>

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- Patchwork of law and custom
- Increasing amounts of information and ability to correlate it
 - Better epidemiology
 - Better privacy invasion
 - Better economics

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Hippocratic Oath

- Whatever in connection with my professional service, or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.

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Ethical duties and tort law

- When is there a duty of confidentiality?
- When is there a duty to disclose?
- What's the cost-benefit analysis?

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- Duties of confidentiality
 - Hippocratic oath
 - Evidentiary privilege: Therapist-patient
 - Patient holds. Patient can waive (not DR)
 - Stops access to relevant truthful evidence
 - But that evidence wouldn't have been created in the first place but-for
 - Preserves confidence in treating physicians, so preserves general public health and welfare
 - No dangerous patient exception

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Jaffee v. Redmond

- General duty to give testimony
 - Exception where there is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."
 - Rooted in need for confidence and trust.
- Dissent.
 - Cost is too high
 - individual prevented from proving valid claim/defense
 - Who needs psychotherapists, we have bartenders?
 - Officer should have to live with her guilt

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McCormick v. England

- Tort liability for breach of confidence.
 - Lack of evidentiary privilege in S.Carolina not dispositive
- How does breach of confidence differ from privacy torts?
 - Focuses on the source, not the substance of the disclosure
 - Need **not** be highly offensive, published, cause serious mental distress
- “Such disclosures [to physician] are not totally voluntary; therefore in order to obtain cooperation, it is expected that the physician will keep such information confidential.”
- Majority rule: tort for breach of phys confidence
- Fiduciary duty.

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McCormick v. England

- Tort liability for breach of confidence.
 - Lack of evidentiary privilege in S.Carolina not dispositive
- How does breach of confidence differ from privacy torts?
 - Which is better here? In general?
- “Such disclosures [to physician] are not totally voluntary; therefore in order to obtain cooperation, it is expected that the physician will keep such information confidential.”

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Hammonds v. Aetna

- Insurer persuades physician to disclose confidential info.
- Contract for health benefits
- Fiduciary trust for confidentiality, implied condition
 - Not merely ethical but legal duty
- Inducing breach of confidence also breaches duty.
- Note: exception for compelled disclosure, public danger

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Tarasoff v. Regents

- Duty to disclose/warn?
 - How does it arise?
 - To whom is it owed?
- If custom is important, why isn't the APA amicus against persuasive?
 - “Psychiatrists can't reliably predict danger”
- What if patient makes non-specific threat: “I'm going to kill someone,” and pulls out a loaded gun to show.

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McIntosh v. Milano

- What's the impact on therapists?

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- Imagine you're a therapist greeting a patient for his first session. You give the standard HIPAA privacy form.
- Can you assure the patient that statements made in therapy are confidential?
- Do you warn that specific threats of violence will not be confidential?

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Northwestern Memorial Hospital v. Ashcroft

- What's the disclosure harm?
- What's the benefit?

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How does HIPAA stack up?

- FTC Fair Information Practices
 - Notice
 - Choice
 - Access
 - Security
 - Redress

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- Duty of non-disclosure
 - Ethical duty (Hippocratic oath)
 - Implied contract
 - Improves care

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