



# Medical Confidentiality and Professional Secrecy in Nigeria

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## Abstract

Confidentiality is the basis of law suits demanding compensation for an injury caused by health care providers. Poor awareness and illiteracy in the society today have made most people reluctant to pursue their legal claims arising from medical confidentiality. This research examined the medical confidentiality and professional secrecy in Nigeria. It was discovered that there are no or very few medical confidentiality suits today due to misinformation, beliefs, financial constrain and the fear of the unknown. Many Nigerians are not aware of their right over medical confidentiality issues. When they are aware it is difficult to pursue their rights due to several factors amongst which are poverty, fear of the unknown and resolve in their hearts that litigations will not right the wrong and let the will of God be. We recommend that the Nigerian Medical Council in collaboration with the government take strict measures in enlightening the populace on their rights to medical confidentiality. The court should discourage the act by penalizing the offenders which will in turn serve as deterrence to others. Hospital managements should organize training courses on the confidentiality or on law and medicine to educate medical practitioners on their legal responsibility towards their patients. The punishment for offenders should be more stringent and graver enough to warrant striking out the name of the practitioner off the register. Hospital management should also ensure that facilities needed for effective performance of duty should be procured from time to time.

**Keywords:** Medical Confidentiality; Professional Securities

**Abbreviations:** NAFDAC: National Agency for Food, Drug Administration and Control; ILO: International Labour Organization.

## Introduction

Health care providers have a duty to respect their patient's confidentiality [1]. This is sometimes called the duty of professional secrecy. This duty covers all the information patients tell their doctors and any facts doctors discover about their patients as part of the doctor-patient relationship. Professional secrecy belongs to the patient, not the health care provider. Health care providers cannot reveal what their patients tell them, unless their patients waive the confidentiality of the information or if the law allows it.

## The Scope of Confidentiality and Professional Secrecy

The constitutional and ethical obligation of privacy and confidentiality imposes a duty on health care providers to ensure that the information about the patient's case is not disclosed without permission. Generally, confidentiality refers to the ethical, professional, and/or legal duty of the healthcare professional and other professionals, such as lawyers and social service providers, not to disclose to anyone else without authorisation, information that was given to or obtained by the professional in the context of his/her professional relationship with the client [2]. More specifically, medical confidentiality is defined as the right of a subject to control disposition of information disclosed during

the course of professional relationship and the reciprocal obligation of the professional to ensure that no harm befalls the subject as a result of the disclosure of such information [3]. In the light of the above definitions, the level of privacy and medical confidentiality in Nigeria is on the down turn because of these factors; Intrusive premarital screening by religious bodies, employers and employees mandatory medical screening, lack of proper punishment for breach of privacy and medical confidentiality.

### **Lack of patients' Awareness on their Rights of Privacy and Medical Confidentiality**

The provision of Rules of professional conduct in rule 44 [4]. While stating the steps for disclosure mandates the patients consent to be taken before any disclosure can be made, even if the patient's identity is anonymous [5]. This is to prevent professionals using the information obtained from their clients in disguise of claiming that it has been blinded with anonymous.

The general principle is that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, held to have agreed, that the information is confidential with effect that it would be just in all circumstances that he should be precluded from disclosing information to others [6]. It is the duty of the medical practitioner to show compassion to his/her patients, while at the same time being aware of the limits of his/her curative powers [7]. A physician shall respect the rights of patients, of colleagues and other health professionals, and shall safeguard patient confidence within the constraints of the law. The duty of confidentiality as couched in the right of privacy has its root in the Hippocratic Oath which reads in part "...whatever I shall see or hear in the course of my profession as well as outside my profession in my intercourse with men if it be not what should be published abroad I will never divulge, holding such things to holy secrets [8].

The patient's fundamental rights of medical confidentiality as couched in the Nigeria Constitution [9] and other sundry legislation [10] should be practiced in the best way. In consideration of the meaning of privacy and the concept of medical confidentiality, the rights of a patient, the role of medical practitioners in executing those rights in the best interest of the patients while protecting the fundamental rights of other citizens. The legal instruments for the role of medical practitioners shall be examined with Rules of professional conduct in medical and dental practitioners Act and other sundry legislations.

The need to protect and promote the right of patients, is predicated on the standards contained in the Universal

Declaration on Human Rights [11]. The African Charter on Human and Peoples Right [12] and International Covenant on Economics, Social and Cultural Rights [13] as well as other international human rights instruments, such as the International Labour Organization (ILO) and Instruments concerning discrimination in employment, protection of workers privacy, safety and health at work [14]. Many of these rights are contained in chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

A breach of confidentiality is a disclosure of private information that a medical doctor has given to a third party without the patient's consent or a court order. Such disclosure can be oral or written, by telephone or any electronic means of communication. Confidentiality in some hospital settings is not practicable to some extent. There may be a large number of people who may have access to information contained in a patient's file, all of whom will have valid reasons for requiring that access. In most teaching hospitals, the records of patients are exposed to medical students who are still under training and not yet bound by any oath. It is expected that they must keep this information confidential, but this is not easily enforceable.

### **Exception to the Right of Privacy and Medical Confidentiality**

The principle of confidentiality however, is not absolute in nature, as case law and legislation admits limitations and exceptions. There may be instances where a doctor receives information about a dangerous illness that can endanger the lives of others. He would be required to use his professional judgment to disclose such information to appropriate authority to prevent others from the risk of been infected even if that would amount to a breach of confidentiality. The effect of patient's disclosure of his or her medical conditions may be catastrophic; however, strict adherence to non-disclosure may result in a third party contracting the illness. Thus, the medical practitioner's decision truly has life-or-death consequences; these raised salient questions for contemplation, thus: What can be done to ensure a patient's privacy and confidentiality where there are inadequate health facilities?, What is the test for measuring what is in the best interest of the public as a condition for disclosing a patient's confidences as contemplated by law?, Is the concept of confidentiality still relevant in Nigeria? These are some of the challenges to address. This underscores the need to ensure a balance between protecting a patient's right to confidentiality and securing the health of others who are likely to be put at risk due to non-disclosure, and to also underscore the need for adequate facilities to keep to the best practices.

The law protecting a patient's privacy and the confidentiality

of their medical information is well defined in both the constitution [15] and other sundry legislation in Nigeria [16]. It is further bolstered by Code of Medical Ethics in Nigeria [17] though, in most cases, a patient's privacy is paramount in some circumstances, including where maintaining a patient's privacy could put the public at risk, health care professionals will not be bound by these restriction and may in fact, be obliged by statute to disclose information regarding a patient's health status [18].

Medical confidentiality is not absolute in the practice of medicine in Nigeria. The legitimate exceptions are specified by the statutes [19], disclosures with consent, disclosure required by law and disclosures in the public interest. Consequently, the laws generally prohibit medical practitioners from disclosing patient's medical status unless an exception applies. If they do disclose such information, they have committed an offence under the law. The utilitarian argument of public health stems from the fact that when there is constant fear of breaching confidentiality, people will not be encouraged to visit healthcare professionals to receive treatment when they consider themselves as infected. This is not a limit, but what can be said to be one of the biggest threats to medical confidentiality stems from what is obtainable in modern day medical practices.

### Overriding Concern for Safety of Other Persons

Irrespective of the important nature of the moral and legal duty of confidentiality, our teaming patients have to bear in mind that physicians have a duty to protect others from harm. This shows that physicians have a legal duty under the Nigeria legal system to persons whom they do not even know, just as towards their families. The physician's role of protecting others from harm is mainly based on what is known as the 'principle of beneficence'. According to Beauchamp and Childress [20], beneficence refers to a moral obligation to act for the benefit of others. They argue that there are many act of beneficence which is not obligatory, but a principle of beneficence in this sense establishes an obligation to help others further their important and legitimate interests. For a physician, the duty to save others from harm is obligatory, because their moral duty is to save humanity by caring for the sick ones. Physicians' moral obligation of beneficence could be traced to the Hippocratic Oath, which reads in parts "...I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice..."

Thus, the protection of a sick person from harm and injustice also extends to the members of the person's family. The rules of beneficence demand that physicians should protect and defend the rights to others, prevent harm from occurring to others, remove conditions that will cause harm to others,

help person with disabilities, rescue persons in danger [21]. This age long principle is in pair material with the relevant provisions of the Constitution of the Federal Republic of Nigeria [22] which provides on derogation from the right of confidentiality for the purpose of protecting the right and freedom of other persons. There are two forms of beneficence which includes; specific beneficence that applies to specific persons (such as relations, families and friends), and the general beneficence which goes beyond specific relations to all persons. The specific principles of beneficence could be applied to proffer a solution in cases where HIV/AIDS infected persons have refused to disclose their status, and equally refuse to engage in safer sex practices. In such situation, the physician has a moral obligation to warn spouses or lovers of such persons. The committee of the American Psychiatric Association held thus:

If a physician has convincing clinical information that a patient is infected with HIV/AIDS and also has good reason to believe that the patient's actions will place others at ongoing risk of exposure, then it is ethically permissible for the physician to notify an identifiable person who the physician believes is in danger of contracting the virus [23].

In Nigeria Legal System, the law governing the protection of HIV/AIDS patient's right to privacy and confidentiality is in line with the position in the American jurisdiction. The Act clearly imposes an obligation on the physician to disclose where HIV infected person refused to disclose their status to a partner in marriage or co-habiting relationship when such refusal placed others at a risk of being infected by a partner [24]. Such notification will help the ignorant third party to take precautions when it comes to having body contact which might involve body fluid. This idea of physician's duty to protect/warn is often framed in terms of a landmark decision of a Californian court case in US, *Tarasoff v Regents of the University of California* [25]. The man Prosenjir Poddar had told his psychologist of his intention to kill his ex-girlfriend, Tatiana Tarasoff, and later carried out his mission. The court eventually held the psychologist liable for damages for failing to warn Miss Tarasoff of the impending threat to her life, which eventually led to her death. The original decision in this case stated that "when a doctor or psychotherapist, in the exercise of his professional skill and knowledge, determines or should determine that a warning is essential to avert danger...he incurs a legal obligation to give a warning [26]"

### Overriding Legal Requirement to Divulge Certain Crucial Information in Public Interest

Physicians have a duty of beneficence not only to the infected person's relatives but also to anyone in need of their help and in the public interest. Narrowing down the definition of public interest, Lord Wilberforce gave a gentle reminder

that “there is a wide difference between what is interesting to the public and what is in the public interest to know” [27]. The idea of whether the public in the disclosure of a person’s medical status is important than is the public’s interest of keeping medical confidentiality has been an issue of ethical discussion. However, there are occasions where the interest of a patient comes in conflict with that of the general good which might demand the disclosure of confidential information. Examples are cases of infectious diseases, like Lassa fever, Ebola virus which have been noted in Nigeria and other African countries. In Nigeria and other jurisdictions, the laws require the report of certain communicable and infectious diseases to the public health authorities [28].

Consequently, the National Health Act which is a principal legislation regulating the Nigerian health care sector, set out parameters under which health or medical information of a patient can be divulge in certain crucial circumstances. The Act requires a physician to treat all information concerning a user of health facility, including information relating to his or her health status, treatment or stay in a health establishment with utmost confidentiality. However, the Act further derogates this crucial right of patients in circumstances where non-disclosure of the information represents serious threat to public health [29]. Similarly, the Constitution of the Federal Republic of Nigeria in its chapter IV provides for the protection of fundamental rights of its citizens. These rights include right to private and family life under which medical confidentiality can be infer. However, maintaining patient’s confidentiality is not absolute, since the constitution required physicians to breach this right in the interest or defence of public safety, public order, public morality or public health [30]. In such situations, the law compels physicians to disclose the information to public health authorities, just as the Tarasoff’s case implies that the protective privilege of confidentiality ends where the public peril begins. Public interest and safety in this case is of paramount importance and cannot be compromised when compared to the personal interest of the patient. Breach of medical confidentiality is legally justified under these conditions: if the patient presents a serious danger to other’s health, there is a possibility of potential harm to others, and the risk must be serious as to threaten human health or lead to loss of lives.

### Legal Implication of the Breach of the Duty of Privacy and Medical Confidentiality

The law established that physicians owe a duty of confidentiality to their client. This is recognized at both statutes and the principles of common law. The Supreme Court of Canada in *McInerney v Mac Donalt* [31] categorised the physician-patient relationship as fiduciary duty. Also, in *Hay v University of Alberta Hospital* [32], the status of

the right of confidentiality was described by Picard as the cornerstone of the doctor-patient relationship and this is recognized in a number of international ethical codes such as the Hippocratic Oath. A physician may disclose patient information with the consent of the patient or where legislation specifically requires that confidentiality can be breached to protect a third party or the public health. However, an unjustifiable breach of confidentiality is taken seriously by various legislations. In Nigeria, unjustified breach of medical confidentiality attracts legal consequence; the index patient may seek redress either before an administrative tribunal or a competent court, depending on the fact and circumstances of each case.

The National Health Act provides a procedure for a person to lay a complaint about the manner he or she is treated at a health facility for investigation [33]. The Act mandates the minister or commissioner or any appropriate authority to establish a procedure for the laying of complaint within the areas of the national health system for which the Federal or State Ministry is responsible. Consequently, any physician found guilty of breaching patient’s right to confidentiality commits an offence and is liable on conviction to imprisonment for a period not exceeding two years or to a fine of N250,000 or both [34]. Similarly, HIV and AIDS (Anti-Discrimination) Act serves as a source of regenerated hope for the protection of HIV/AIDS patients. While protecting AIDS patient’s confidential information, the Act imposed a legal duty on the minister to monitor the legal enforcement of patient confidentiality [35].

The Minister of Justice is to among other things, conduct an investigation into any alleged breach of patient’s confidentiality and make necessary recommendations to an institution or individual pursuant to an inquiry and to commence criminal proceeding against the infringer in a court of competent jurisdiction [36]. This suggests that, where there is an allegation of a breach of confidentiality and the minister refused to act, the affected patient can seek an order of mandamus against the minister to ensure compliance because it is a public duty. The strict position or stand of Nigeria on the issue of medical confidentiality has also been legalized under the National Health Insurance Scheme Act. Essentially, once a breach of patient’s confidentiality is established against any officer acting under the guise of the Act, it may amount to a conviction or aggregated damages of not less than Twenty Thousand Naira (N20,000) only against the infringer [37]. It is apparent from the foregoing that legal implication of the breach of medical confidentiality is not exclusively a matter for the professional tribunals, jurisdictional competence also resides in the court of law, and patient’s confidentiality is a fundamental right guaranteed under the relevant provisions of the constitution [38]. It is a matter for the court to deal with, and once the

court has found a practitioner guilty of the breach, it comes within the type of cases referred to the professional tribunals to take disciplinary actions against the erring practitioner under the Act [39].

### Best Practices Principle

'Best Practice', is a method or technique that has been generally accepted as superior to any alternative, it produces results that are superior to those achieved by other means or because it has become a standard way of doing things [40]. Confidentiality is usually thought of as an ethical issue, but it is also a legal obligation which healthcare providers are usually bound to respect in their contracts with patients. There is a common law duty to preserve professional confidence, the Constitution of the Federal Republic of Nigeria [41] also guarantees citizens' right to privacy which is the father of medical confidentiality in Nigeria. Both the constitution and the National Health Act which is the principal legislation regulating the Nigerian healthcare sector and other sundry legislation makes it an offence to divulge information about health service user without the user's consent unless permitted by law.

The law in some occasions warrants that a physician's duty to the public outweighs the principle of confidentiality. One of such occasion is the duty to warn people about potentially violent action against their lives. This practice is framed in the ground breaking decision in the case of *Tara off v Regents of University of California* [42]. Following an appeal to this ruling, the decision was rephrased and led to the formation of what is known as the *Tarasoff* principle, which for this purpose qualifies it as the "Best Principle". In the appeal, the Californian court stated that; 'When a physician determines, or pursuant to the standard of his profession should determine, that his patient represents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger'[43] (sic). From this famous case, it is crystal clear that the duty to protect can at least supersede the patient's right to confidentiality. In this principle (Best Practice principle) it is apparent that public policies favoured the protection of confidentiality in instances which disclosure is essential to avert danger to others, example, and the sexual partner of the infected person. Deducing from the above case, disclosure to protect others or the public require certain circumstances. First, there must be foreseeability of potential harm. There must be a reasonably high degree of risk to other persons before a physician can disclose.

Under the Nigeria legal system, the law is settled over this principle, in cases of a HIV/AIDS infected persons. It provide for a partner in marriage or co-habiting relationship for a right to be informed of his partner's HIV status should he/

she stand a chance of being infected [44]. Practicing this provision in the best form will suggest that, an infected person must refuse to disclose his/her status to his lover or spouse with a very high, foreseeability of engaging in unprotected sex with his lover before a physician may warn the ignorant lover or spouse. Second, there must be a serious risk. The risk posed to the third party must be genuine and not speculative. The serious harm that could warrant an infringement on confidentiality has to do with loss of health or life. Third, the victim must be identifiable. Even though warning the third party is the only option left for the physician, when his patient is adamant on disclosing his status to his sex partner, such warning should only be given with the full knowledge of the patient after a substantial effort to motivate the patient to give the warning. We are of the opinion that married couple whose spouse has been diagnosed with an infectious transmittable disease is entitled to know since they are physically attracted to each other.

We have established that the constitution of the Federal Republic of Nigeria also imposed a legal duty on the physician to invade patient's confidentiality when it is reasonably justifiable in the interest of defence, public safety, public order, public morality or public health [45]. It is pertinent to state that there are instances where the interest of a patient comes in conflict with that of the general public which might demand disclosure, for example life threatening infections. The main idea of disclosing such delicate information for the good of the public is to prevent others from being infected. However, the law did not define the best interest test for measuring public interest. The implication is that, the disclosure of patient's confidential information for the interest of the public in Nigeria does not currently have the required level of clarity or consistency.

### Challenges Faced by Medical Practitioners in Safeguarding Patient's Confidentiality in Nigeria

The management of patient's confidentiality by healthcare practitioners is without its attendant challenges. Some of the challenges seen as impediments to safeguarding patient's confidentiality includes: healthcare practitioner's inability to manage patient's confidentiality, inadequate health facilities and staff shortages, open record keeping system, poor salary structure of health workers, corruption and counterfeit drugs amongst others.

#### Healthcare Practitioners Inability to Manage Patient's Confidentiality

It is observed that healthcare practitioner runs the risk of disclosing their client's medical status that they know personally by gossiping about the patient with co-workers.

Other instances involve where co-workers making effort to find out the status of patients whom they know personally thereby persuading the physician in charge to erode patient's dignity.

### **Inadequate Facilities and Staff Shortages**

Inadequate facilities and resources constrained in healthcare institutions is another challenge, coupled with staff shortage. In some healthcare institutions there are no enough consulting or counseling rooms as well as places where physicians and counselors could not be overheard by other patients, staff or relatives, does not guarantee confidentiality. Practitioners faced with this limitation find it difficult to ensure patient's confidentiality. In some private hospitals, pharmacy stores are maintained under the medical director's watch in their consulting rooms, consequently, frequent entering by others looking for supplies further erode patient's confidentiality. Similarly, lack of proper ventilation and Air conditioner's forced practitioners to throw their consulting rooms open where they could be over-heard by staff or relatives from outside because the high temperature made it uncomfortable to close the door.

Lack of visual privacy is another challenge especially when a patient receives a test result and reacts by crying, people in the ward infer from the patient's disposition that such patient is likely infected by a harmful disease. Similarly, experiences have shown that confidentiality may be compromised when negative results are given in public wards while positive results are delivered in separate rooms.

### **Open Record Keeping System**

A record keeping system that is very porous inhibits the prospect of maintaining patient's confidentiality. Patient files that carry 'Inscription' may arouse the curiosity of partners or other health workers not involved in the treatment of such a patient. This challenge is very worrisome as health institutions cannot do without documentation. Without documentation, patients are likely not to receive the care they require.

### **Poor Salary Structure of Health Workers**

Poor salaries received by health workers in public hospitals have led to the proliferation of private practice. Some private health centres are ill equipped, while some are operating without license. Consequently, facilities which are ordinarily used separately are jointly used in private centres which further erode patient's dignity.

### **Corruption**

In Nigeria, corruption has eaten deep into the health sector, despite concerted efforts by various administrations and

the huge investments by the international donor agencies to improve the healthcare delivery system, sufficient facilities that can guarantee patient's confidentiality are not always consistently available. Funds intended to improve on the facilities flow quickly into the accounts of corrupt officials beyond the reach of official seizure and the random effect is the breach of patient's confidentiality due to inadequate medical facilities.

### **Counterfeit Drugs**

Confidentiality is further eroded when fake drugs or counterfeit drugs are procured. The National Agency for Food, Drug Administration and Control (NAFDAC) estimated that in 2002, about 41 percent of the drugs were counterfeit, while in the same year [46], the World Health Organization (WHO) puts the figure at 70 percent for fake or substandard drugs [47]. What this means is that the patient may have to start treatment afresh when his health condition does not improve due to incidence of fake drugs. Because of this, confidentiality in certain patients may have been eroded due to ineffective treatment.

Our social infrastructures are undoubtedly in short and epileptic supply. The disclosure of medical confidentiality is not only committed by doctors, but other paramedics do commit same. Confidentiality is the basis of law suit demanding compensation for an injury caused by health care providers. Poor awareness and illiteracy in the society today have made most people reluctant to pursue their legal claims arising from medical confidentiality. It is very important that the issue is addressed timeously. There are no or very few medical confidentiality suit today due to misinformation, beliefs, financial constrain and the fear of the unknown. Many Nigerians are not aware of their right over medical confidentiality issues.

### **Conclusion**

It is our considered opinion and we recommend that the Nigerian Medical Council in collaboration with the government should take strict measure in enlightening the populace on their rights to medical confidentiality. The court should discourage the act by penalizing the offenders which will in turn serve as deterrence to others. Hospital managements should organize training courses on the confidentiality or on law and medicine to educate medical practitioners on their legal responsibility towards their patients. The section of the Medical and Dental Practitioners Act that provides for suspension of a medical or dental practitioner from practice for six (6) months should be amended to carry more time as there are cases that may require a punishment of more than six months but are not grave enough to warrant striking out the name of the practitioner off the register. Hospital

management should also ensure that facilities needed for effective performance of duty should be procured from time to time.

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