

MEDICINE AND THE LAW

COVID-19 and patient-doctor confidentiality

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Given the increasing numbers of ethical and legal issues arising from the COVID-19 epidemic, particularly in respect of patient-doctor confidentiality, doctors must explain to patients how the measures taken to combat the spread of the virus impact on their confidentiality. Patients must be reassured that doctors are ethically bound to continue to respect such confidentiality, but it should be made clear to them that doctors must also comply with the demands of the law. While the Constitution, statutory law and the common law all recognise a person's right to privacy, during extraordinary times such as the COVID-19 pandemic, confidentiality must be breached to a degree to halt the spread of the virus.

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The COVID-19 pandemic has given rise to a number of ethical and legal issues affecting the doctor-patient relationship, particularly in respect of doctor-patient confidentiality, as there is anecdotal evidence of stigmatisation of infected persons. Doctors must therefore reassure their patients about the confidentiality of their consultations, and also explain the ethical and legal situation.

Ethical rules regarding breaching of doctor-patient confidentiality

Patients expect that their doctors will preserve the confidence of their consultations as required by the ethical rules of the medical profession (Health Professions Council of South Africa (HPCSA) Guidelines for Good Clinical Practice in the Health Care Professions,^[1] paragraph 4(1)). The HPCSA's Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act^[2] state that medical practitioners may only divulge information regarding a patient that they ought to divulge: (i) in terms of a statutory provision; (ii) at the instruction of a court of law; or (iii) where it is justified in the public interest. Any other information may be divulged by a practitioner only: (i) with the express consent of the patient; (ii) in the case of a minor aged <12 years, with the written consent of his or her parent or guardian; or (iii) in the case of a deceased patient, with the written consent of his or her next of kin or the executor of such deceased patient's estate (rule 13(2)).

Doctors should inform their patients that ethically they will not breach their confidence unless they or their surrogates consent to the information being disclosed, or the law requires the doctor to disclose such information.

The law regarding breaching of doctor-patient confidentiality

The Constitution^[3] and several Acts^[4-8] and court orders^[9-12] provide for the confidentiality of information concerning healthcare users and when disclosure is required in the public interest.

At common law doctor-patient confidentiality is protected,^[13] but it may be breached as above. It may also be breached where: (i) there is a threat to an endangered third party, e.g. where a university psychologist did not warn a girl and her family that her university boyfriend was threatening to kill her;^[14] (ii) there is a moral, social or legal obligation to make a disclosure to a person or agency that

has a reciprocal moral, social or legal obligation to receive the information;^[15] and (iii) where a patient complains to the doctor's regulatory body about the practitioner's conduct regarding their treatment, and the doctor is obliged to make certain disclosures about such treatment as part of his or her defence.^[15]

Doctors should inform their patients that certain statutes and the common law require them to breach the confidentiality rule – particularly if it is necessary to protect third parties and is in the public interest. COVID-19 is an example of a statutory duty to report notifiable diseases to the designated health authority where the disease poses a risk to the broader community. COVID-19 has been declared a notifiable disease (regulation 12 of the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions^[6]) and subjected to extensive regulations under the Disaster Management Act^[16] to prevent its spread in South Africa.

The effect of the COVID-19 regulations on doctor-patient confidentiality

The COVID-19 regulations^[16] provide that any person who has been clinically (or by a laboratory) confirmed as having COVID-19, who is suspected of having contracted it, or who has been in contact with a person who is a carrier of COVID-19, may not refuse: (i) a medical examination, including taking bodily samples; (ii) admission to a health establishment or a quarantine or isolation site; or (iii) submission to mandatory prophylaxis, treatment, isolation or quarantine or isolation to prevent transmission.

If a doctor (or a laboratory) takes a sample from a patient for testing for COVID-19, the clinician (or the laboratory) must record the patient's name, identity or passport number, residential address and cellphone number and obtain a copy or photograph of their passport, driver's licence, identity card or identity book, and promptly submit this information, along with any information regarding the likely contacts of the person tested, to the Director-General of Health for inclusion in the COVID-19 Tracing Database established in terms of the regulations.^[16] The regulations further state that information contained in the COVID-19 Tracing Database and any information obtained through the regulations is confidential, and that no person may disclose any information contained in the COVID-19 Tracing Database, or any such personal or other information obtained

through the regulations, unless authorised to do so and unless the disclosure is necessary to address, prevent or combat spread of COVID-19. This covers the situation where such information is also sent weekly by the Director-General of Health to the 'designated judge' who monitors the information and its use to address, prevent and combat the spread of the disease.

The regulations^[16] state that persons may not refuse to go into quarantine or isolation to protect others from COVID-19, and also provide that 'Any person who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted murder or murder.'

Doctors who send patients for testing and/or test patients for COVID-19 must inform them that although they have to send personal information about their patients and copies of their patients' documents to the Director-General of Health for inclusion in the COVID-19 Tracing Database, such information will be kept confidential. The information will be captured on the database and sent to the designated judge, who will ensure that it is used for the purposes of the COVID-19 regulations. Furthermore, the information may not be disclosed by persons not authorised to do so or unless it is necessary to prevent the spread of the epidemic. Doctors should also tell their patients that any other information from their consultations that is not relevant to the COVID-19 preventive measures, or necessary to be disclosed in terms of any other law, will be kept confidential.

Doctors should advise their patients that it is a criminal offence: (i) to refuse to submit to a medical examination; (ii) to refuse to go into isolation or quarantine to prevent endangering others; or (iii) to intentionally fail to get tested if they suspect that they might have COVID-19 and subsequently infect others with the virus. A person's refusal or failure to subject themselves to the necessary medical examination, isolation, quarantine or test may be regarded as recklessness, which could be interpreted to mean that they have the 'eventual intention' to infect others, and they could therefore be prosecuted for intentionally exposing others to the risk of COVID-19 infection.

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11. S v Webb 1971 2 340 (T).
12. Cf. Minister of Health, Western Cape v Goliath 2009 (2) SA 248 (C).
13. Jansen van Vuuren v Kruger 1993 (4) SA 842 (A).
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