1-17. INTENTIONAL NONDISCLOSURE

The courts have recognized situations in which there is justification for less complete disclosure, although consent must still be obtained. These exceptions to disclosure include: therapeutic privilege, emergencies, patient incompetence, patient waiver, and prior patient knowledge.

1-18. THERAPEUTIC PRIVILEGE

a. Introduction. Therapeutic privilege, the most controversial exception to the disclosure requirement, allows that the physician may intentionally and validly withhold relevant information. The decision to withhold such information must be based on a "sound medical judgment" that to divulge the information would be potentially harmful to a depressed, emotionally drained, or unstable patient.

therapeutic privilege: the physician's prerogative to withhold information if he or she reasonably believes that the patient's mental or physical well-being would suffer as a result of learning the information.

b. Protecting the Patient from Harm. If the physician determines that the patient's anxiety level is such that a normal disclosure could be detrimental to the effectiveness of the required treatment, therapeutic privilege may be exercised. Therapeutic privilege, however, cannot be invoked solely out of a concern that disclosure might cause the patient to refuse treatment. Depending on state law, the physician may have to provide the omitted information to the next of kin, and obtain concurrence from the relative on the patient's consent form. Although the physician may have decided to withhold information about risks, he or she still must disclose other information (for example, benefits) to the patient. Thus consent must still be obtained from the patient. But, it is based on a limited disclosure of the relevant facts. Thus, the patient ends up giving express consent based on limited disclosure. Although patient autonomy is the goal of consent, there are circumstances in which patients may have a deep need for a health care professional who assumes authority and with reassuring confidence issues orders that can aid the patient's recovery. Human needs for such authority are common in a medical context and complicate the process of reaching decisions with patients. (Refer back to anecdote in para 1-13g: "Does the Patient Want Autonomy or Beneficence or Both?")
Situations in which the physician might opt to exercise therapeutic privilege:

A confused, frightened cardiac patient.
A hope-exhausted, chronically depressed, kidney-dialysis patient.
A patient with metastatic cancer who faces treatment alternatives with terrifying risks.

Figure 1-14. Therapeutic privilege.

c. Avoiding Risk of Any Counter Therapeutic Harm Whatsoever. The way that therapeutic privilege is applied varies across legal jurisdictions. Some courts permit physicians to withhold information if disclosure would cause any counter therapeutic deterioration whatsoever (be it physical, psychological, or emotional). For example, if the physician has a patient with a weak heart, should the physician risk a possible heart attack by telling the patient about a suspected cancer? The physician may decide to withhold this information, or may opt to announce it with carefully chosen words: "I see a growth that I'm concerned about. We need to do a biopsy to check it out."

MISUSE OF THERAPEUTIC PRIVILEGE (A HYPOTHETICAL CASE)

You have been referred to the orthopedics department for a knee injury (a very common complaint in the Army). The physician, CPT Rosemary Smythe, recommends knee surgery. She explains the risks and benefits and provides other relevant information. But, she fails to mention that a knee brace would probably be just as effective in correcting your condition as an operation.

You assume that you are getting the advice of an experienced physician. But in fact, you are being treated by a physician who is just out of medical school and completing her residency in the Army. CPT Smythe has a hidden agenda. Before this young resident can take the orthopedic boards, she needs to have performed ten knee reconstructions. The surgery she is proposing for you would be her tenth knee reconstruction.

In this example, CPT Smythe has withheld relevant information for her own purposes, not to your benefit. The failure to disclose this information would constitute a misuse of the therapeutic privilege. (There are, in fact, built-in safeguards against such an occurrence. In the military, you can automatically get a second opinion if your primary physician is a resident. If the second physician confirmed the need for a knee surgery, your consent would be expected. For the most part, you cannot refuse treatment required to make you fit for service. However, if you refused knee surgery, but could still do your job to include the two-mile run for physical training, you would not be discharged from service)
d. **Risk of Jeopardizing Success of Treatment or Impairing Decision-Making Abilities.** In some jurisdictions, the physician can withhold information if, and only if, the patient's knowledge of the information would have serious health-related consequences, for example, jeopardizing the success of treatment or critically impairing relevant decision-making processes through psychological harm. In the example cited above, if the physician thought that revealing the suspected cancer would result in a heart attack, he or she might exercise therapeutic privilege. If there will be pain associated with the proposed procedure, the physician must still disclose that information to the patient, even though it might complicate or hinder treatment. The patient can demand to know more about the pain and discomfort before giving consent. In such a situation, some physicians, who simply wish to avoid the nuisance of an emotional scene with the patient, may choose to exercise therapeutic privilege and discuss the proposed procedure with the spouse or close relative of the patient instead. This is not entirely fair to the patient because it deprives the patient, in some measure, of the right to autonomous decision-making.

e. **Risk of Rendering the Patient Incompetent.** In the strictest interpretation, the therapeutic privilege can be validly invoked only if the physician reasonably believes that disclosure would render the patient incompetent to consent to or refuse treatment. It might appear that protecting a patient from harm could conflict with the overall aim of informed consent (respecting a patient's right to autonomous decision making). To invoke therapeutic privilege under this last condition would not, in principle, conflict with respect for autonomy because the patient would be in no condition to make an autonomous decision if he or she were to become incompetent.

f. **Limitations on Therapeutic Privilege.** Courts have carefully limited therapeutic privilege to avoid abuses. As stated earlier, it is not applicable when the sole basis is physician concern that the information might lead the patient to avoid needed therapy.

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**LEVELS OF THERAPEUTIC PRIVILEGE**

Depending on the jurisdiction, therapeutic privilege may be exercised when there is a risk of:

- Any counter therapeutic harm (physical, psychological, or emotional) from disclosure. 
  (Most liberal interpretation.)

- Jeopardizing success of treatment or impairing decision-making abilities.

- Rendering the patient incompetent to consent or refuse. 
  (Strictest application.)

**NOTE:** Therapeutic privilege cannot be exercised solely for fear that the patient will refuse the therapy.

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Figure 1-15. Levels of therapeutic privilege.
g. **Disclosing Withheld Information to a Relative.** Physicians can only rely on therapeutic privilege when they can document that a patient's anxiety is significantly above the norm. If information is kept from the patient, the information must still be disclosed to a relative. Before the procedure can be performed, the informed relative must concur with the patient's consent to the procedure.

### TELLING THE NEXT OF KIN

A pregnant woman with an inordinate fear of surgery and a history of heart problems goes into labor. As the labor progresses, it becomes increasingly apparent that the baby, who in the breech position, will have to be delivered by Caesarean section. In view of the woman's weak heart and expressed fear of being operated on, the physician decides to exercise therapeutic privilege, withholding the fact that the baby will have to be delivered by C-section. The husband is informed that delivery will be by C-section and his consent is duly obtained. This possibility had been discussed by the physician and the woman’s spouse prior to delivery. Risks and benefits of a Caesarean delivery had been covered with the spouse earlier and his permission had been obtained at that time.

### UNDER THERAPEUTIC PRIVILEGE

At a minimum, the physician obtains from the patient:

- Express consent based on limited disclosure.

The physician may also have to obtain from the next of kin:

- Express consent based on the knowledge of all relevant facts.

Figure 1-16. Disclosure/consent requirements under therapeutic privilege.

### 1-19. EMERGENCIES

a. **General.** In emergencies, when consent is presumed to exist, there is a parallel modification of the disclosure requirement. When there is no time to secure consent, there is clearly no time to make disclosures. In *Crouch vs. Most* (N.M., 1967), the court recognized that even when there is time to secure consent, emergency situations may still leave time for only an abbreviated disclosure.
b. **The Extension Doctrine.** The traditional rule has been that the physician cannot exceed the scope of permission he or she was given, that is, only those procedures specifically authorized by the patient can be performed. More recently, the courts have begun to recognize the medical reality that it is usually more sensible to perform any necessary additional procedure as part of the originally authorized procedure. If a *life-threatening* situation arises *during surgery*, which was not covered by the consent form because it was unknown, then consent of a family member may be sought. But, if the situation is so emergent as to prevent that, then the extension doctrine may be applied and no consent is necessary in order to save the patient's life.

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**EXTENSION OF CONSENT**

In *Kennedy vs. Parrott* (N.C., 1956), the surgeon punctured some cysts that he found on the patient's ovaries during an appendectomy (for sound medical reasons), although he had no express authorization to do so. The court found an implied extension of consent, even though the extended procedure resulted in phlebitis, which necessitated additional surgery. The court recognized the surgeon's autonomy to react to unexpected conditions that could not be known beforehand, especially since the cysts were within the realm of eyesight of the original incision.

**EXTENSION OF CONSENT NOT FOUND**

In *Wells vs. Van Nort* (Ohio, 1919), a surgeon was held liable for removing a patient's ovaries and fallopian tubes when express consent had only been given for an appendectomy. The doctor's defense that the organs were diseased was rejected on several grounds. There is an implied prohibition against any procedure not expressly consented to. In addition, implied consent to removal of a body part or reproductive capacity is usually not found.

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**1-20. PATIENT WAIVER AND PRIOR PATIENT KNOWLEDGE**

a. **Patient Waiver.** There is no legal obligation to disclose information that the patient does not wish to hear. But, physicians must be careful with this doctrine, as it can only be relied upon when the patient has clearly expressed his or her wish not to receive that information. The physician should find out why the patient does not want to know any of the particulars, and should see if there is any way in which it would be acceptable to the patient to receive said information. A waiver is very risky because if there is subsequent discontent or a bad result, it may be difficult to establish that the waiver was not physician-initiated.

b. **Prior Patient Knowledge.** There is no liability for nondisclosure of risks that are common knowledge or that the patient has previously experienced.
1-21. CONSENT IS NOT REQUIRED IN SOME EMERGENCIES

   a. Emergency Treatment. Two conditions must be met in order to be able to
treat an emergency patient without consent: 1) it must be a real emergency, and 2) it
must be an emergency in which consent cannot be obtained.

   b. Real Emergency. The patient's condition must be such that it requires
immediate treatment, either to preserve life or prevent serious impairment.

   c. Consent Unobtainable. It must be a situation in which it is impossible to
obtain consent of any kind, either the patient's or someone else's. This means that the
patient is mentally or physically unable to provide consent and there is no one available
to provide authorized consent on the patient's behalf, such as a parent for a child.

   d. Both Conditions Met. If both of these conditions are met, then treatment
may be provided, without consent and without risk of liability for battery. But, if one of
the two conditions is not met (it is possible to obtain consent or it is not a real
emergency), then the health care providers are limited in what they can legally do for
the patient. If, for example, the patient has a wound, all that can be done is to clean it
until consent is obtained.

1-22. CONSENT NOT REQUIRED FOR TESTS UNDER POLICE ORDER

   Tests carried out under police direction for use as evidence in prosecuting
suspected criminals do not require patient consent. Tests that the police might request
include: breath analysis, urine analysis, blood samples, stomach pumping, and
occasionally x-rays to detect swallowed contraband, such as diamonds or drugs. (The
authority for tests used in ongoing investigations is based on constitutionally protected
Fourth Amendment rights of probable-cause search.)

Continue with Exercises, Section III
EXERCISES, LESSON 1, SECTION III

It is recommended that you work the following exercises (1 through 11) before beginning the next section of the lesson. After you have completed the exercises, check your answers against the solutions following the exercises. For any answer missed, reread the material referenced in the solution.

MULTIPLE-CHOICE. Select the ONE response (a, b, c, or d) that BEST completes the statement or BEST answers the question.

1. The strictest interpretation of therapeutic privilege allows the physician to withhold information only if he or she believes that disclosure would cause the patient to:
   b. Respond poorly to treatment.
   c. Become incompetent to consent to or refuse treatment.
   d. Incur physical, psychological, or emotional harm.

2. Under therapeutic privilege, the physician obtains:
   a. Blanket consent from the patient.
   b. Express consent from the patient based on limited disclosure of the relevant facts.
   c. Consent from the patient based on full disclosure.
   d. Freedom from the obligation to disclose any relevant information or to get patient consent.

3. When therapeutic privilege is exercised, most courts require that ___________ who has been informed of all the relevant facts of treatment, concur with the patient’s consent to the procedure.
   a. A relative.
   b. A chaplain.
   c. The court.
   d. Another physician.
4. An emergency patient can be given treatment without consent if immediate action is required to preserve life or prevent serious impairment and:
   a. Patient consent cannot be obtained.
   b. The next of kin is not available.
   c. The patient is unwilling to give consent.
   d. Consent of any kind is unobtainable.

5. An unconscious young man is brought to the emergency room with a deep cut in his foot. If an orthopedic surgeon does not perform surgery without delay, there will be permanent damage. The health care team can ________________ without the risk of a malpractice suit.
   a. Only examine and clean the wound.
   b. Only examine and clean the wound, and prepare the patient for surgery.
   c. Perform the surgery.

6. The disclosure requirement may be waived for ________________ or when the physician must legitimately perform additional necessary procedures, without consent under the extension doctrine.
   a. An emergency.
   b. Minor surgery.
   c. A CAT scan.
   d. A biopsy.

7. If a patient does not wish to hear certain information relevant to treatment, the doctor should:
   a. Initiate a duly witnessed physician's waiver.
   b. Try to find an acceptable alternative method of getting the information to the patient.
   c. Feel free from any responsibility to disclose the information in question.
8. The police order stomach x-rays on a suspected thief who may have swallowed a stash of diamonds. In this situation, the radiologist:

   a. Must obtain consent from the patient unless he or she is competent.
   b. Must seek consent from a police official.
   c. Needs to obtain clearance from the patient's lawyer.
   d. Can proceed without obtaining consent.

9. The unconscious victim of a train wreck is brought into the emergency room. Her arm is irreparably mangled, and she will die unless it is amputated without delay. Consent cannot be obtained (the patient is not competent to give consent and there is no next of kin on hand). If the doctor operates, he or she:

   a. Will be liable for battery.
   b. Will have been acting within the law.
   c. May face administrative sanctions.
   d. Could be sued for negligence.

10. Therapeutic privilege **CANNOT** be exercised if the sole basis is a concern that the patient will:

    a. Respond poorly to treatment because of the information revealed.
    b. Incur physical, psychological, or emotional harm.
    c. Become incompetent to consent or refuse.
    d. Refuse treatment as a result of the disclosure.

11. Which of the following situations **DOES NOT** represent a legitimate basis for an exception to disclosure?

    a. The patient has already experienced the risk or knows about it.
    b. A resident recommends knee surgery without mentioning that a knee brace would be a viable alternative to surgery.
    c. Disclosure of all the pertinent information will jeopardize the success of a treatment.
    d. The patient was admitted under emergency conditions, and there was no time to disclose information or secure consent.

   **Check Your Answers on Next Page**
SOLUTIONS TO EXERCISES, LESSON 1, SECTION III

1.  c  (para 1-18e & figure 1-15)
2.  b  (para 1-18b)
3.  a  (para 1-18g)
4.  d  (para 1-21)
5.  c  (para 1-21)
6.  a  (para 1-19b & anecdote "Extension of Consent")
7.  b  (para 1-20a)
8.  d  (para 1-22)
9.  b  (para 1-21a)
10. d  (para 1-18b)
11. b  (para 1-18d, bottom and anecdote "Misuse of Therapeutic Privilege")

Go to Section IV