7. **Professional secrecy in medical practice.**

Medical confidentiality

- Professional secrecy is the obligation to keep secret any confidential information that has been acquired in the course of one's occupation.
- All employees are under an obligation, both during the contract of employment and after its termination, not to divulge professional secrets of a personal or individual nature which they have learned in the course of their work.
- http://www.eurofound.europa.eu/emire/BELGIUM/PROFESSIONALSECRECY-BE.htm

- Protecting confidentiality in medical practice the doctor promote protection of professional secrets.

- Confidentiality oblige the doctor to secrecy and in legal as much as in deontological terms this action become professional, therefore breaking confidentiality a measure of unprofessional behaviour.

- Confidentiality is the moral bound. Professional secrecy is the legal bond.

fidelity**

Trust > confidences > loyalty*> reconfirmation of the initial trust of the patient > secure doctor-patient relationship

- Legislation:
  - *Laws*
    - *National laws*
      - *Penal legislation* : breaking the professional secrecy
      - *Organic laws:* law regarding the patient's rights
    - *International laws*
      - The Universal **Declaration** of **Human Rights** **1948,** art.12
      - **European** Convention on Human **Rights** art. 8
  - *Ethics regulations*
    - *National*
      - National ethics/deontological codes
    - *International*
      - Hippocrates Oath, Geneve Declaration, International Code of Medical Ethics, Declaration of patient's rights, WMA

*Loyalty = Def. faithfulness or a devotion

**Fidelity = Def. the quality of being faithful or loyal

- The Universal **Declaration** of **Human Rights**, **Article 12.** "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks".

- **The European Convention on Human Rights, 1950, ARTICLE 8**
- "Everyone has the right to respect for his private and family life, his home and his correspondence.
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Ethics regulations

Hippocratic Oath, 400 bC

"What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about."

Geneve Declaration, 1948, WMA

I will respect the secrets that are confided in me, even after the patient has died;

International Code of Medical Ethics, 1949, WMA

A doctor owes to his patient complete loyalty and all the resources of his science. Whenever an examination or treatment is beyond his capacity he should summon another doctor who has the necessary ability.

A doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him

- **DECLARATION OF LISBON ON THE RIGHTS OF THE PATIENT, World Medical Association**, 1981, 1995
- **Right to confidentiality**

a) All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death. Exceptionally, descendants may have a right of access to information that would inform them of their health risks.

b) Confidential information can only be disclosed if the patient gives explicit consent or if expressly provided for in the law. Information can be disclosed to other health care providers only on a strictly "need to know" basis unless the patient has given explicit consent.

c) All identifiable patient data must be protected. The protection of the data must be appropriate to the manner of its storage. Human substances from which identifiable data can be derived must be likewise protected.

Romanian Code of Medical Ethics

ART 17 Professional secret
The doctor will respect the professional secret and will act according to the legal right of any person with respect to his private life concerning the information's provided

ART 18 Concerning the length of the obligation to keep the professional secrecy
(1) The obligation to keep the professional secrecy is opposable also to keen of law members.
(2) Obligation to keep the secret persists even after the death of the patient

ART 19 Transmitting data concerning the health of a person
The doctor, if asked, will inform the patient or the person entitled regarding any data related to the health of that person.

ART 20 Conditions when the secrecy may be waved
Conditions when the entitled right of a person to the privacy of his life regarding health information's may be waved are explicitly required by the law.

Tarasoff v. Regents case, Univ. California (17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976)

- Prosenjit Poddar was a student from Bengal, India.[1] He entered the University of California, Berkeley as a graduate student in September 1967 and resided at International House. In the fall of 1968, he attended folk dancing classes at the International House, and it was there he met Tatiana Tarasoff. They saw each other weekly and on New Year's Eve she kissed Poddar. He interpreted the act to be a recognition of a serious relationship. This view was not shared by Tarasoff.
- After this rebuff, Poddar underwent a severe emotional crisis. He became depressed and neglected his appearance, his studies, and his health.

- Prosenjit Poddar was a patient of a psychologist at UC Berkeley's Cowell Memorial Hospital in 1969. Poddar confided his intent to kill Tarasoff. The psychologist requested that the campus police detain Poddar, writing that, in his opinion, Poddar was suffering from paranoid schizophrenia, and recommended that the defendant be civilly committed as a dangerous person.
- Poddar was detained but shortly thereafter released, as he appeared rational. The senior dr. supervisor, ordered that Poddar not be subject to further detention.
- Several months later, on October 27, 1969, Poddar carried out the plan he had confided to his psychologist, stabbing and killing Tarasoff. Tarasoff's parents then sued the psychologist and various other employees of the University.

- "The public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins (Mathew O. Tobriner)" [17 Cal. 3d 425, 442 (1976)]. This quote had become later on the general jurisprudence for confidentiality worldwide.

- At trial court, case is dismissed (not heard), judge rules that there is no cause of action, because of confidentiality between doctor and patient: "Doctor has a duty only to patient, not to third parties".

- Tarasoff appeals but California appeals court supports the decision of the trial court. Appeal is taken to the California Supreme Court.

- **Tarasoff I (at the Supreme Court):**
- California Supreme Court reverses the trial court's decision, stating that the trial court must hear the case. Reasoning: "therapist bears a duty to use reasonable care to ***give threatened persons warnings*** as are essential to avert foreseeable danger."
- This causes uproar in community of MDs and policemen, causing the California Supreme Court to rehear the case again, in 1976
- **Tarasoff II (at the Supreme Court):**
- California Supreme Court: "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use *reasonable care* ***to protect*** the intended victim against such danger."
- After a first Appeal at the Court of Justice defendants lose the case and so, the student obliged to go home and leave forever the American soil.

- **<u>Legal and moral aspects rised by the Tarassof case:</u>**
  - **Duties**
    - “Duty to Protect, Not a Duty to Warn?
    - How is a psychiatrist supposed to protect a victim, rather than just warning a victim?
  - California Supreme Court: “The discharge of this duty may require the therapist to take one or more of various steps. This, it may call for him to warn the intended victim, to notify the police, or to take whatever steps are reasonably necessary under the circumstances.”

  - **Problems that arise With a Duty to Protect:**

1.“Disruption of the therapeutic alliance

2.Possible precipitation of violence (by victim or by the patient if he subsequently does not seek treatment)

3.Stigmatization of the patient

4.Fear of Liability by the psychiatrist, resulting in change of practice or defensive practice”

[http://www.stanford.edu/group/psylawseminar/Tarasoff.Greene.htm].

- **“How Courts Have Recently Interpreted Tarasoff:**
- A duty is present by the therapist to take some action to prevent foreseeable harm to a third party injured by the client.
- Most states that have dealt with a Tarasoff interpretation now require the third party be defined as an *“identifiable victim,”* before the therapist can be said to have a duty to this victim. This is commonly now defined as a person the client has actually defined as a potential victim, and therefore the therapist has a knowledge of this specific need to protect.”

[http://www.stanford.edu/group/psylawseminar/Tarasoff.Greene.htm].

Lipari v. Sears, Roebuck and Company, US District Court, Nebraska, 1980:
Mr. Cribbs, history of involuntary treatment buys gun at Sears. One month later, he leaves the hospital and the program. Thirty days later, he fires shotgun in Omaha club, kills Mr. Lipari, wounds Mrs. Lipari. Lipari sues Sears, Sears sues the hospital, Mrs. Lipari sues the hospital. District Court rules that the therapist has a duty to detain dangerous people if they are a threat to the public (based on Tarasoff).

Jablonski by Pahls v. United States, United States Court of Appeals, Ninth Circuit, 1983:
Ms. Kimball and Mr. Jablonski are dating. She loves him, but is afraid of his past threats, attempts to kill her mother (Ms. Pahls), and her. She takes him to the Loma Linda hospital when he has threatened her mother, on 7/10/78. Doctor says that she should leave him, but feels that he is not dangerous, as Mr. Jablonski has not threatened her currently. He's released, then he kills Ms. Kimball 7/16/78. Kimball's daughter (with help of Kimball's mother Ms. Pahls) sues the hospital, alleges that there was a duty of the psychiatrist to protect Ms. Kimball. Court rules that Ms. Kimball was a foreseeable victim of Jablonski's violence, and necessary steps were not taken in protecting her.

Naidu v. Laird, Supreme Court of Delaware, 1988:
Mr. Putney is released from the Delaware State Hospital, after being treated for the seventh admission, for paranoid psychosis symptoms. Leaves voluntary admission March 1977. Five months later, he drives over Mr. Laird, while in a psychotic state, and kills him. Ms. Laird sues, Supreme Court of Delaware holds that Mr. Laird was a foreseeable victim to Mr. Putney's dangerousness, and did not discharge duty to warn properly.

STEPS TO BE TAKEN BY A PSYCHIATRIST IN A TARASOFF-like CASE (TARASOFF ASSESSMENT CASE)

Assessment of Violence:

1) Investigation of any threat of violence by the patient
2) Establish four important parameters of possible harm
    1. **t**ype of harm
    2. **i**mminence of harm
    3. **l**ikelihood of harm
    4. **s**eriousness of harm
3) Determine which threats are likely to be real, based on details about the threat:
    1) **p**ast history of violence (the most important risk factor for future violence)
    2) **i**mpulsiveness
    3) **a**bility to resist violent impulses
    4) **r**eaction to violence
    5) **motivation** to maintain self-control
    6) **use** of alcohol and drugs (another major risk factor of violence). Try to obtain data from other family members about history

Discharge the Duty:

- "The discharge of this duty may require the therapist to take **one or more of various steps**. This, it may call for him to warn the intended victim, to notify the police, or to take whatever steps are reasonably necessary under the circumstances."
  1. Changing the treatment program for the patient
  2. Requesting the patient be voluntarily committed
  3. Civil commitment
  4. Warning the potential victim
  5. Warning others who would be likely to notify the victim.
  6. Contacting the police in the area of the victim or the patient
- **Minimize Liability:**
- Follow the above steps
- Consult with colleagues

[Psychiatrist Duties: Tarasoff, John M. Greene, M.D., Adjunct Clinical Faculty, Stanford University Department of Psychiatry, August 3, 2000], http://www.stanford.edu/group/psylawseminar/Tarasoff.Greene.htm].

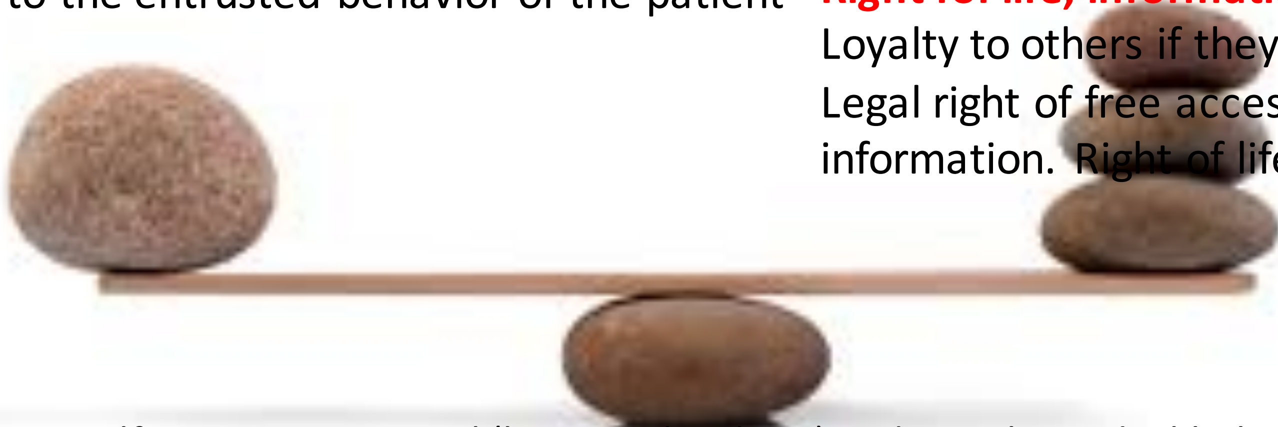
- Anytime when the doctor breaks confidentiality (professional secrecy) he brakes the penal law. The penal law has no exception in itself. Other laws and rules (not the penal law) introduce other general obligations that generates double loyalty in order to ascertain the duty of the patient to protect the public good or a third party. Thus the doctor must have a solid motivation for discharging his duty to the patient and sustaining his duty to a third party and he therefore must accept possibility of liability.

Ethical values. Moral conflicts. Double loyalty

There is a possible ethical **and legal** conflict between:

Patient's interest (individual good, loyalty, duty)
Right of intimacy, medical care, autonomy
Ask for retaining the secret due to loyalty, intimacy as a measure to the entrusted behavior of the patient

Public interest /a third party interest (public good, beneficence, non-maleficence, duty)
Right for life, information, liberty
Loyalty to others if they are in danger.
Legal right of free access to public information. Right of life.



Double loyalty in itself is not controversial (however loyalty is). A doctor has a double bond loyalty to the child as much as for his parent, to the unborn child as much as for the mother, etc. Whenever is possible the doctor will act solving all interests within this double loyalty and without controversy.
Sometimes Loyalty to the patient become controversial toward loyalty to a third party or public (public obligations) in as much as autonomy or justice may face beneficence or non-maleficence.
The solution come always from protecting the most vulnerable person/persons which does not have the knowledge of the peril that one face and protecting the health of the patient above all considerations.

Professional secrecy. Confidentiality

Right to the free information, right to life, etc. vs.

Right to intimacy, etc.

Beneficence vs. fidelity

Right to health care
Right for life
Right for information,
Right for liberty

Right of intimacy
Right to liberty
Right to property
Right to self determination
Right to medical care
Autonomy
Justice

Legal values

Good of a third party
Social good
Beneficence
Non-maleficence
Duty
Justice

Fidelity
Loyalty,
Duty
Justice

Moral values

Moral chain of duty and bond:

TRUST> INFORMATION>SECRECY>LOYALTY>CONFIDENTIALITY

- The doctor has a duty to keep the medical secret of his patient and to secure his relationship with the patient: however whenever he become aware of a malicious information that put in peril that person or another person he must be aware of his second duty to protect the innocent (double loyalty) and not to secure the malicious information: the doctor must not become a mere means of the patient (an immoral act) and therefore he may not to secure the chain of legal and moral bonds whenever another person is in peril.
- Confidentiality is a moral response of the doctor solving the morality of the relationship because of the trust's patient commitment.
- However the patient cannot ask the doctor to become immoral in order to maintain an immorality bound unbroken.
- Therefore the doctor has a positive duty first not to create the bond of duty toward a maleficent value and after that again a positive duty to inform.
- If so, the medical secrecy is not broken (it becomes not a felony) because first of all it does not exists in itself in this particular case when malicious information subsists.

- “Medical information cannot be passed to anyone without the direct consent of the patient. Confidentiality also includes keeping a patient's medical information private even from his friends and family unless the patient expressly says it is okay to release the information.”

  [USMLE''"' MEDICAL ETHICS: THE IOO CASES, p.19, Kaplan publishing 2006]

- The doctor and the hospital does not has the property of the patient’s data but these data belong to the patient who has the property of the medical health and own body (habeas corpus). Therefore the doctor and the hospital detain the administration of the data which as a property belong to the patient himself.

- However in a public institute of hospital the information's are provided publicly only by the spokesmen.

- Physicians have a strong professional mandate to maintain the confidentiality of patients.

- **Communications set between patient and physician are highly privileged and this confidentiality may only be violated when :**
  1. **there is potential harm to the patient itself or a third party**
  2. **when there is a court order demanding the information**
  3. **when in the best medical interest of the patient (i.e. medical specialties consults)**
  4. **when the patients gives an expressed consent to broke the duty and when he makes clear indications in that**
  5. **There is a court order**
  6. **There is a felony on the way or to prevent the felony consequences.**