

Sorin Hostiuc, National Institute of Legal Medicine Bucharest, Dept. of Legal Medicine, University of Medicine and Pharmacy "Carol Davila", Dept of Legal Medicine and Bioethics, Bucharest, Romania*

Buda Octavian, University of Medicine and Pharmacy "Carol Davila", Dept History of Medicine, Bucharest, Romania

Crystallization of the concept of the medical secret in 19th century France

ABSTRACT

Background. Until recent years medical secret was considered one of the most important applied practical concepts in European medical ethics/deontology, being only surpassed by informed consent in the last half of the century. Little is known about the way this concept evolved in continental Europe, as only a small number of scientific articles in this area are available in the literature written in English. The purpose of this article is to summarize the evolution and crystallization of this concept in France from which it spread to numerous countries in Continental Europe in the 19th century.

Materials and methods. A bibliographic search of relevant books, articles, and documents regarding 19th century medical secret in France.

Results. The crystallization of medical secret in France started early compared to other European countries; both legal and moral aspects regarding medical secret disseminated widely from France to other countries in Continental Europe, influencing significantly the way this concept was structured at a national level.

Conclusions. Many famous cases or debates in the areas of medical ethics and deontology from the countries in Continental Europe are forgotten. However, knowing and discussing them in relation to modern bioethics concepts might help decrease the resistance to these newer concepts, and elaborate a more practical model for the morality of the medical act, which will also include regional particularities.

Keywords: medical secret; confidentiality; history of medical ethics.

* Contact address: Sorin Hostiuc, National Institute of Legal Medicine, Sos. Vitan Barzesti 9, 042122, Bucharest, Romania, phone no +40723791072, email: sorin.hostiuc@umf.ro, soraer@gmail.com

Introduction

Physicians and other healthcare providers have a moral and legal obligation to keep confidential all information obtained during their professional relationship with a patient¹. There are many reasons for imposing this obligation, including a natural desire for privacy, the fact that it increases the trust in the healthcare provider², it favors getting a correct and complete medical history, it decreases the fear of stigmatization and discrimination, it protects the patient against possible abuses³ and so on. Until recently medical secret was one of the most important applied, practical concept in European medical ethics/deontology⁴, being surpassed by informed consent only in the last half a century. The purpose of this article is to summarize the evolution and crystallization of this concept in France, from which it spread in numerous Continental Europe countries in the 19th century.

A brief history of medical secret in Europe before 19th century

Many authors associate the origin of medical secret with the Hippocratic Oath, suggesting that from here it was taken over in modern medicine or even other professions⁵. There are several reasons why this approach seems to be incorrect. The Oath, at least the oldest known version, only considered to be secret the information that shouldn't be disseminated, and not to all the information physicians obtained from their patients. The Oath, translated by von Staden says: "*And about whatever I may see or hear in treatment, or even without treatment, in the life of human beings - **things that should not ever be blurted out outside** - I will remain silent, holding such things to be unutterable*"⁶. Miles believes that, in combination with the previous phrase from the Oath, stating that physicians should be reluctant to make any form of voluntary and destructive injustice, it suggests that physicians shouldn't disclose only the information that could dishonor the patient⁷. Nicolae Minovici, president

¹ Anita L. Allen, "Confidentiality: An Expectation in Health Care," in *The Pen Center Guide to Bioethics*, ed. Arthur; Caplan, Vardit; Raviski, and Autumn. Fiester (New York: Springer, 2009), 127-128

² Peter; Singer and AAM. Viens, *The Cambridge Textbook of Bioethics* (UK: Cambridge University Press, 2008).

³ Tom; Beauchamp, "The Principle of Beneficence in Applied Ethics," in *The Stanford Encyclopedia of Philosophy, Fall 2008 Edition*, ed. Edward N. Zalta (2008).

⁴ See for example Paul Camille Hippolyte Brouardel, *Le Secret Médical* (Paris 1887).

⁵ Robert M. Veatch, *Hippocratic, Religious, and Secular Medical Ethics: The Points of Conflict* (Georgetown University Press, 2012); O. Temkin, *Hippocrates in a World of Pagans and Christians* (Johns Hopkins University Press, 1991); Steven. Miles, *The Hippocratic Oath and the Ethics of Medicine* (Oxford: Oxford University Press, 2005); Henry. von Staden, "In a Pure and Holy Way": Personal and Professional Conduct in the Hippocratic Oath?," *Journal of the history of medicine and allied sciences* 51, no. 4 (1996).

⁶ "In a Pure and Holy Way": Personal and Professional Conduct in the Hippocratic Oath?."

⁷ Miles, *The Hippocratic Oath and the Ethics of Medicine.*, 151

of the Romanian College Board just before the Second World War, said that the exact phrase from the Oath, as written in Latin, contains in its embryo form the need of breaching the secret. The Latin version said: “*Quae autem inter curandum visu, aut auditu no-tavero, et extra medendi arenam in communi hominum vita per-cepero quae non decet enuntiare, silentio involvam*”. Therefore the physician must not be silent about everything he sees, hears, or understands, but only about things that would damage the best interests of his patient, and bring a prejudice to the collectivity⁸. Riddell, in an article written for *Lancet* in 1927 considered that this pledge from the Oath can be seen as “little more than a general declaration against gossiping”⁹. Moreover, in the Greek islands, in the time of Hippocrates, most treatments were done in public¹⁰, in front of everyone, as an advertising method for the physicians. Men were entitled to obtain medical information about the women, slaves and children in their care. Medical treatises written during that time detailed things like name, address and physical afflictions of patients. Thus, for example, in *The Epidemics*, we were informed that: “*In Larissa, the menses of Gorgia’s wife have ceased*”¹¹ or “*Nicippus had a wet dream during fever that did not make him feel worse. The same thing happened several times without doing him no harm. It was predicted they would cease when the fever reaches climax, which happened. Critias was angry on the dreams that caused him erections*”¹². In Western Europe the Hippocratic Oath was rediscovered and used ever more frequently since the Middle Age¹³. Before that, Roman and Canon law, containing specific regulations regarding professional secret were better known, and heavily influenced Western culture.

Other studies suggest that the origin of medical secret is identifiable in the professional secret developed within the framework of other occupations. Shuman, for example, considered the origin of modern professional secret to be identifiable in Roman law, in the refusal of a lawyer to testify against his client. This refusal led to two concepts, known today as the relational privilege (refusal to divulge confidential information, generated by a privileged relationship between attorney and client) and incompetence rule (attorneys cannot testify in cases in which they represent their clients).¹⁴ The reason for this interdiction was ethical - it was wrong for the society to compel a citizen to disclose secret information, because allowing

⁸ Nicolae; Minovici and Ion. Stanescu, *Secretul Profesional* (Bucuresti: SOCEC, 1939).

⁹ Lord Riddell, “An Address on the Law and Ethics of Medical Confidences,” *The Lancet* 210, no. 5418 (1927).

¹⁰ Jacques. Jouanna, *Hippocrates*, Trans. Mb Debevoise (Baltimore: Johns Hopkins Press, , 1999),75

¹¹ Hippocrate, “Of Epidemics.”, 5:11

¹² *Ibid.*, 5:11

¹³ Veatch, *Hippocratic, Religious, and Secular Medical Ethics: The Points of Conflict*.

¹⁴ Daniel. Shuman, “The Origins of the Physician-Patient Privilege and Professional Secret,” *Southwestern law journal* 39, no. 2 (1985).

this would require for that citizen to breach a moral duty¹⁵. Another profession in which professional secret developed earlier is religion. Again Shuman established that the confessional secret is identifiable as a distinct concept since the fifth century AD. Before that confessions were public, being done in front of the entire congregation. By the fifth century church canons forbade priests to disclose information given to them during the confession, prohibition later identified in canons of both Orthodox and Catholic Church.

The origin of the French notion of professional secret seems to be an article from the Digests¹⁶. Although the article only forbade the disclosure of testamentary dispositions, it said, in general, that the disclosure of private information could generate legal liability. In France, the need for a legal regulation of the medical secret appeared after a series of events, which started in 1477 when King Louis XI issued an edict forcing physicians to denounce crimes against state authorities, even if the information were obtained while practicing medicine¹⁷. Around 1600, the Faculty of Medicine from Paris made professional secret mandatory for all physicians: “*Aegrorum arcana, visa, audita, intellecta, eliminat nemo*” [The secret of the sick, that the physician will obtain from their mouths, see with the eyes or only guess, will be sacred for him]¹⁸. Therefore, the obligation of medical secret was absolute for physicians. Influenced by the Faculty of Medicine of Paris, most French medical faculties required an absolute medical secret from their physicians. Although confidentiality was not a legal obligation per se, as it was known to be a mandatory condition imposed by the medical profession to its members, its breach generated liability. For example Brouardel presents the case of a surgeon who breached the medical secret in a request for obtaining the fees due for one of his consults. During the court proceedings the physician divulged the disease of his patient (scurvy). The Rouen Court fined the surgeon with 10 pounds and forbade him to practice his art for six years¹⁹. In 1666 a Royal Edict required surgeons to notify the local police officer whenever they were requested to treat open lesions, as a mean of reducing the number of duels, extremely high in that time. Although the requirement only applied to surgeons (who at that time were not considered physicians per se), it had significant consequences for the evolution of the idea of medical confidentiality in France. The contradiction between the obligation to keep

¹⁵ Ibid.

¹⁶ Henry Duque, “(Life Insurance Law)-Interpretation of Statutes Making Communications between Physician and Patient Privileged,” *ABA Sec. Ins. Negl. & Comp. L. Proc.* (1952).

¹⁷ Ion Manu, “O Obligație Profesională: Secretul Medical” (Facultatea de Medicină, 1938), 14

¹⁸ Brouardel, *Le Secret Médical.*, 163

¹⁹ Ibid., 148

the medical secret, that gradually included surgical activities (see the example above) and this Edict had caused many public debates and trials (for details see Brouardel or Hallays)²⁰. One of the most famous fixes for this contradiction was given by Dupuytren in 1832 who, questioned about such a case replied: “*Je n’ai pas vu d’insurgés dans mes salles d’hôpital, je n’ai vu que des blessés*”²¹. In 1788 the Edict of 1666 was formally extended to include physicians from hospices and nursing homes.

Medical secret in 19th century France

In 1810, the Napoleonic Criminal Code incriminated the disclosure of medical secret. The rapporteur for this article in the French parliament stated in the explanatory memorandum that:

*Shouldn’t be considered as an extremely severe crime the revelation of secrets done by the treating physicians, revelation that tends almost always to compromise the reputation of the trust the patient has in his physician? By not being sure that the secrecy of his disease is not made public, wouldn’t many patients prefer to be the victim of their untidiness than of a fatal indiscretion? Wouldn’t it be a misfortune for the entire humanity to consider vulgar traitors those who, on the contrary, should be considered as noble hearted men, benefactors, and comforters? We are sure that nobody of us thinks this way, and this measure of general and public order will constitute a warranty for the life and honor of every citizen.*²²

This Criminal Code had a major influence over the development of Criminal Codes all over continental Europe. Most countries took the article regarding professional secret and included it in their own national legislatures. For example the German Penal Code from 1872 stated, in Art. 300 that: “*Lawyers, legal workers, notaries, lawyers in criminal law, doctors, surgeons, midwives, pharmacists and their assistants, for violating private secrets entrusted to them by virtue of position, status or profession, shall be punished by a fine of up to 500 tael or imprisonment for up to 3 months. The initiation of the criminal investigation is done only on request*”²³. Belgian Criminal Code from 1867, in Art. 458 stated that: “*Doctors, surgeons, health officers, pharmacists, midwives or any other persons who, by virtue of their function or profession,*

²⁰ Ibid.; A. Hallays, “Le Secret Professionnel” (1890).

²¹ Brouardel, *Le Secret Médical.*, 148

²² Ibid, 23-24

²³ “Strafgesetzbuch Für Das Deutsche Reich Vom 15. Mai 1871, [Http://Lexetius.Com/Stgb/300/](http://Lexetius.Com/Stgb/300/),” (1871).

reveal secrets entrusted to them, unless they are called to testify in court (or before a parliamentary inquiry commission), or the law obliges the revelation of those secrets, will be punished with imprisonment from 6 days to 6 months and a fine from 100 to 500 francs”.²⁴ An Italian Criminal Code from 1839 (The Albertine Criminal Code) stated in Art. 634: “Doctors, surgeons, pharmacists, midwives and any other person who, by virtue of their profession, position or status will become keeper of obtained secrets, unless the law forces them to give some to the public authority, will disclose the secrets, shall be punished with at least a 6 month prison bed and will be suspended from doing their profession or duties, if applicable²⁵. A subsequent Italian Criminal Code will generate a fundamental change, by specifically stating that the disclosure of professional secret can only be made if there is a just cause. This just cause must be clearly stated by the law, and is not to be left at the discretion of the physician²⁶. The Hungarian Penal Code is also similar, having additionally a condition of severity: if the breach of the professional secret was not considered to generate social danger, it wasn’t considered a crime²⁷. From these examples we see that most of the 19th century continental law regarding the professional secret was similar to the one from the Napoleonic Penal Code. Moreover, in many countries even the punishment for breaching the professional secret is very close to the ones found in the Napoleonic Criminal Code (see e.g. Belgium or Romania). We must also take into consideration that French medicine and jurisprudence were highly influential in that time in Europe. We often find judicial cases from France used as precedents in courts from other parts of Europe (especially Italy, Romania, Belgium), and the French medical journals were considered to be the most influential in a wide area of subjects all over Europe. Therefore debates originating from France had the habit of spreading rapidly all over the continent, and their main ideas were often taken as such and included in local medical practice or jurisprudence. For example medical confidentiality in Romania evolved as a concept based almost entirely on French jurisprudence, as only a couple of cases were identifiable in Romania in this area until the beginning of the Second World War²⁸.

²⁴ “Code Penal Belgique,” (1867).

²⁵ Carol de Savoia Alberto, “Codice Penale Per Gli Stati Di S.M Il Re Di Sardegna,” (Torino: Stamperia Reale, 1839).

²⁶ Manu, “O Obligație Profesională: Secretul Medical.”. 23

²⁷ George. Bogdan, *Curs De Medicină Legală. Vol Iii. Avortul, Pruncuciderea Și Deontologie Medicală*. [Course on Legal Medicine. Vol III. Abortion, Infanticide, and Medical Deontology], vol. III (Iasi: Tipografia Goldner, 1924)., Vol. III, 415

²⁸ Minovici and Stanescu, *Secretul Profesional*; Eugen. Uscatu, “Secretul Profesional. Studiu Critic De Deontologie Medicală” (1901).

The Watelet case

Watelet case stemmed from a letter from Dr. Watelet, to the journal *Le Matin* on December 1884, in which he tried to counteract a number of charges related to the way he treated a patient, a family friend, who eventually died due to an oncological disease. The letter did not show any intent to harm. Dr. Watelet tried to explain a situation for which he was publicly accused. However he was convicted by the first court to a fine of 10 francs, conviction confirmed by the Supreme Court in 1885. The decision stated:

in the case it is brought to us, Mr. Watelet has done the revelation he was accused for, without the intention to harm, true, but in a personal interest, or personal defense if you will, and to answer to charges of negligence, which he supposed to be accused of. Regardless, he made this revelation with his own will, ie freely, this being the first element of criminal liability. He had the conscience of the act as is specified by law, meaning he knew he was revealing an information that was confidential by its nature as it was obtained in the exercise of his profession; this is the second element of criminality - intentional element. If, by giving in principle a less extensive basis to this item, we would like to take into account in part the prejudicial nature of the act, we would not find it here. If truly Dr. W has worked for his personal interest or as a defense, and his intention was not to do harm, he still had the consciousness that his act could do harm and this consciousness of personal or public prejudice of an action is put under the criminal law, being enough in this case to prove a guilty intent²⁹.

This case caused a paradigm shift in the analysis of breaches of medical confidentiality. Before the Watelet case, disclosure didn't trigger criminal liability unless it was done with the intent to harm someone (*"l'intention of nuire"*). Therefore, in order for a person to be accused of breaching the medical secret, his victim should have been harmed in a certain way by the disclosure. Without proving it, the breach wasn't considered a criminal offense. After the decision of the Court of Cassation, this intent to harm was no longer needed in order to establish criminal liability: *"le délit existe des que la révélation a été faite avec connaissance, indépendamment de toute intention de nuire"*.³⁰

²⁹ George; Bogdan and Mina. Minovici, *Principii Generale De Deontologie Medicală* (București 1901); Brouardel, *Le Secret Médical*; Manu, "O Obligație Profesională: Secretul Medical."; Minovici and Stanescu, *Secretul Profesional*; Uscatu, "Secretul Profesional. Studiu Critic De Deontologie Medicală."

³⁰ Bogdan and Minovici, *Principii Generale De Deontologie Medicală*; Brouardel, *Le Secret Médical*; Manu, "O Obligație Profesională: Secretul Medical."; Minovici and Stanescu, *Secretul Profesional*; Uscatu, "Secretul Profesional. Studiu Critic De Deontologie Medicală."

The case had a very important practical significance because he brought to the public attention other problems regarding the analysis of professional secret. The first element is represented by the fact that physicians can share public information about their patients; however, private information from a public case could not be disclosed. On the appeal Watelet said that the facts he disclosed were already public and therefore he did not breach a secret. The rapporteur in this case (Tanon), trying to counter this defense, stated that it is virtually impossible to legally objectify what information should be kept as secret and what could be made public in such cases. Because of this impossibility, it is better for all private information to remain undisclosed by the physician³¹. The second element is that medical data presented in a scientific journal is not considered public information. One of the arguments Watelet used in the trial was the case of the physicians of Leon Gambetta, who published medical data about the case in a scientific journal and were not prosecuted. He was told that the reason for not prosecuting those physicians (Charcot, Cornii, Siredey, Brouardel, Vernueil, Trela and Lannelongue) was that they published the case in a medical journal, removing all non-medical data from the presentation³². As a consequence, many journal articles, books, PhD theses from the last part of the 19th and the first part of the 20th century used to contain detailed personal information about the patients/subjects, with only scarce attempts to anonymization. The third element is that any personal information, obtained during the physician-patient relationship was considered secret, regardless of the personal relationship between physician and patient. A slightly different decision was given by the Court of Appeal of Toulouse, which in a relatively similar case stated that, as the physician is in a relationship of friendship with his patient, he can give some further explanation about what is known regarding the disease, but only about information that was already publicly available³³.

This case stemmed many controversial issues in the last part of the 19th century and the first part of the 20th century in areas like reproductive medicine, insurance medicine, expert medicine, infectious disease between spouses, writing death and birth certificates or even divulging information about patients that wasn't obtained during a medical consult. A famous case, published initially in 1898 is the following: a physician was called by a family whose physician he was. Because he was informed to be an emergency he went to the patients' home. Here he found the married couple in a violent fight. The physician retreated from this domestic violence scenario without giving any medical consult. Soon after, the physician was

³¹ Brouardel, *Le Secret Médical*.

³² Minovici and Stanescu, *Secretul Profesional*.

³³ Bogdan, *Curs De Medicină Legală. Vol Iii. Avortul, Pruncuciderea Și Deontologie Medicală.*, III., 368

subpoenaed by one of parties in a divorce trial. Before the judge, the physician refused to divulge any information about the above-mentioned fight, as he considered this information to be secret. The physician was fined by the with 10 francs; however, the Physician's Association from Rhone decided that his action was correct, as the professional secret is absolute³⁴.

Even if this approach to medical confidentiality was seen as too restrictive by some authors, this absolutist view can be still traced today not only in France, but also in many continental Europe countries. Medical secret is seen as absolute, with only clearly regulated instances in which it can be divulged, and the disclosure is still seen as a criminal offence, irrespective of the intention to do harm. This approach can be also on identified in laws/directives regulating the security of personal information (see e.g. Directive 95/46/EC), that requires from the signatory States not only very strict rules about how is personal data handled, but also the implementation of appropriate technical and organizational measures to protect it from unauthorized disclosure or access, even for the transmission of data over a network³⁵.

Some exceptions to the rule of absolute secrecy of the medical information shared by the patient began to appear since the end of the 19th century, as it was obvious that, by not regulating the exceptions, many public functions of the physicians were blocked. Some important exceptions included insurance medicine, death and birth certification, mandatory declaration of contagious diseases, child abuse, poisoning, and so on³⁶. Many of the exclusions were associated with expertal medicine (especially insurance medicine) – the expert physician had a duty to report his findings to the third party payer; if the expert physician was also the treating physician of that patient, he had to recuse himself from the expertal position, and never from the treating position, as otherwise it might reveal secret information, found during his relation with the patient, to the employer³⁷. An interesting example in this regard is the way medical secret is analyzed in the context of physician – servant – employer relationship. If the employer paid for the consult, and the disease of the servant did not cause a severe and immediate risk for the employer, the confidentiality of the physician-patient (servant) relationship was absolute. If the employers paid, and the disease of the servant posed a certain and immediate risk for the employer, the physician-patient relationship could be

³⁴ Ibid.

³⁵ European Parliament, "Directive 95/46/Ec of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data" *Official Journal* L 281 , 23/11/1995 P. 0031 - 0050 (1995).

³⁶ Bogdan and Minovici, *Principii Generale De Deontologie Medicală*; Minovici and Stanescu, *Secretul Profesional*.

³⁷ *Secretul Profesional*.

breached, as the relationship between physician and employer was contractual (he hired the physician as an expert). For example, if a nanny had syphilis, the physician had the duty to inform the employer and by that to avoid sickening the child. If the servant paid, the medical secret was absolute, as the contractual relationship was established between physician and servant³⁸. Another interesting debate, showing how reticent were physicians in breaching the medical confidentiality, is seen in the resistance to the public health reform from 1892. This law initially required that patients suffering various diseases to be reported. However, after intense debates, at the recommendation of the Academy of Medicine, the communicable diseases were separated in two lists – one with mandatory reporting and one with suggested reporting. In the first group were included diseases like typhoid fever, typhus, smallpox, diphtheria, while in the second group were included some “shameful” diseases like tuberculosis, even if it represented, at the time, one the biggest threat to public health. Moreover, venereal diseases like syphilis were omitted completely³⁹.

Many famous cases or debates in the areas of medical ethics and deontology from countries in Continental Europe are forgotten. Before World War 2 this disciplines were highly evolved in this geographical areas, and they still have practical repercussions on the way the morality of the medical act is understood by physicians (at least the older ones). Knowing them, discussing them in relation with modern bioethics concepts, could help decrease the resistance to these newer concepts and elaborate a more practical model for the morality of the medical act, which will also include regional particularities of medical ethics, besides the almost universally recognized today fundamental norms of bioethics.

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³⁸ Victor Balthazard, *Precis De Medecine Legale* (Paris: Bailliere, 1921); Bogdan and Minovici, *Principii Generale De Deontologie Medicală*; Minovici and Stanescu, *Secretul Profesional*; Uscatu, “Secretul Profesional. Studiu Critic De Deontologie Medicală.”

³⁹ Dorothy Porter, *The History of Public Health and the Modern State*, vol. 26 (Rodopi, 1994)., 82-84

Sorin Hostiuc, Buda Octavian

Kristalizacija pojma medicinske tajne u Francuskoj 19. stoljeća

SAŽETAK

Pozadina. Sve donedavno medicinska tajna bila je možda najvažniji primjenjivi, praktični pojam u europskoj medicinskoj etici/deontologiji, nadmašen jedino konceptom obaviještenog pristanka u posljednjoj polovici stoljeća. Malo je poznato o načinu na koji se ovaj koncept razvio u kontinentalnoj Europi, pri čemu je vrlo mali broj znanstvenih članaka o toj temi dostupan na engleskome jeziku. Cilj je ovog članka sažeti evoluciju i kristalizaciju ovog pojma u Francuskoj, iz koje se širio drugim zemljama kontinentalne Europe u 19. stoljeću.

Materijali i metode. Bibliografska pretraga relevantnih knjiga, članaka i dokumenata koji se odnose na medicinsku tajnu u Francuskoj u 19. stoljeću.

Rezultati. Kristalizacija pojma medicinske tajne započela je u Francuskoj rano, usporedimo li je s drugim europskim zemljama; štoviše, i legalni i moralni aspekt u pogledu francuske medicinske tajne naširoko se proširio u kontinentalnoj Europi, gdje je značajno utjecao na lokalna formiranja tog pojma.

Zaključci. Mnogi su slavni slučajevi i debate iz zemalja kontinentalne Europe u područjima medicinske etike i deontologije zaboravljeni, bivajući nadomješteni recentnijom povijesti bioetike. Kako bilo, njihovo poznavanje i diskusija o njima u relaciji s modernim bioetičkim konceptima moglo bi pomoći umanjiti otpor prema tim novijim konceptima i omogućiti razradu praktičnijih modela za etičnost medicinskog čina, koji će uvijek uključivati regionalne posebnosti medicinske etike, pored danas gotovo univerzalno prepoznatih temeljnih bioetičkih normi.

Ključne riječi: medicinska tajna; povjerljivost; povijest medicinske etike

