

# Between confidentiality and criminal prosecution – medical confidentiality in criminal proceedings and the disclosure of medical secrets relevant to prosecution

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## Abstract

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Maintaining medical confidentiality in criminal proceedings holds potential for conflict. On the one hand, the physician must maintain confidentiality about secrets that have become known to him in the relationship with the patient. On the other hand, the state has a duty to enforce criminal prosecution and thus an interest in clarifying the facts as comprehensively as possible, which may require recourse to patient information. In addition, individual participants in the proceedings can have an interest in the disclosure of medical secrets relevant to criminal prosecution. These conflicts are subject of this work. The aim is to develop a coherent system specifically for conflict situations in criminal proceedings.

The first part of this work concentrates on the fundamentals of medical confidentiality: the criminal offense of Section 203 of the German Criminal Code (StGB) and its procedural protection, in particular through the right to refuse to give evidence under Section 53 of the German Code of Criminal Procedure (StPO). According to Section 203 of the German Criminal Code, physicians are liable to prosecution if they unauthorizedly disclose medical secrets that has – in their professional capacity – been entrusted to them or otherwise become known to them.

In a second part, this work examines the extent to which norms of authority exist for the disclosure of secrets relevant to criminal prosecution – in particular for the purpose of public, sole repressive criminal prosecution interests. In conjunction with criminal offenses different statutory rules exist that permit the disclosure of confidentiality. One focus is on the analysis of Section 32 of the German Code of Federal Registration (BMG). Particular importance is also placed on Section 34 of the German Criminal Code, which links the justification of action to avert danger to a weighing of conflicting interests. It is shown that a justified disclosure of confidentiality for law enforcement purposes is not apodictically excluded, but – contrary to the prevailing view – is possible within narrow limits.

In the third part, using the example of the main trial, it is discussed to what extent a disclosure of confidentiality can be justified for the purpose of the procedural defense of a third party, the



patient or the physician himself. In these cases, it is no longer only the general interest in criminal prosecution or the clarification of the crime that is affected. In addition, the legal interests of the accused that are endangered by the impending conviction must be considered.

The last part of this work is devoted to the question of the procedural usability of an unauthorized disclosure of confidentiality in criminal proceedings. The interaction of the substantive duty of confidentiality and the procedural right to remain silent is still controversial until today. In the end, the thesis argues for a general exclusion of evidence, based on a teleological interpretation of the right to refuse to give evidence.

The study concludes that a breach of medical confidentiality to protect the public interest in criminal prosecution is justified in rare cases, and for the purpose of procedural defense as a rule. However, if there is no permission to disclose medical secrets, these secrets may not be used as evidence in criminal proceedings.