

May 9, 2005

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Dear Dr. Finucane:

You have asked for clarification of an issue about physician reporting of certain disorders to the Motor Vehicle Administration (MVA). Your question arises from a discussion of the matter in our office's *Policy Study on Alzheimer's Disease Care* (January 2004). In a chapter discussing driving and other transportation issues affecting people with progressive dementia, we commented that, under the MVA's law, "physicians and other diagnosticians are authorized (although not mandated) to report certain disorders, including those 'characterized by lapses of consciousness.'" *Policy Study* p. 107.¹ We noted, however, that the pertinent provision, § 16-119 of the Transportation Article, Maryland Code, in addition to authorizing reporting of these conditions to the MVA's Medical Advisory Board, also directs a physician not to report (without patient consent) "information derived from the diagnosis or treatment of any individual on whom a confidential or privileged relationship is conferred by law." § 16-119(b)(2). You now ask us to clarify the scope of this prohibition.

When Maryland's first physician reporting law was enacted in 1973, it mandated reporting and contained no exception. Chapter 548, Laws of Maryland 1973. This heavy-handed approach was quickly seen as unsatisfactory, and the law was amended the next year. Chapter 871, Laws of Maryland 1974. As amended, the reporting law became permissive instead of mandatory ("may report" instead of "shall report"). In addition, the 1974 amendment prohibited the reporting of "information derived from the diagnosis or treatment

¹ These disorders are identified in the MVA's regulations. COMAR 11.17.03.02.

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of any individual on whom a confidential or privileged relationship is conferred by law,” and this language was retained after the Vehicle Law was revised in 1977 into its current form.

Thus, determining the scope of the prohibition depends on the answer to two questions: (1) When is “a confidential or privileged relationship is conferred by law”? (2) If such a relationship exists, when is “information derived from the diagnosis or treatment” of the patient?

1. *Nature of relationship*

A “confidential or privileged relationship” is *not* “conferred by law” on every physician-patient relationship. As the Court of Special Appeals not long ago summarized, “there is no physician-patient privilege in Maryland. Communications made to a physician in his professional capacity by a patient are neither privileged under the common law of Maryland, nor have they been made so by statute. This has been the law in Maryland, and, except for a narrow exception ... in the mental health area, that remains the law of Maryland today.” *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 135-36 (2001). *See also, e.g., Robinson v. State*, 249 Md. 200, 221 (1968).

The “narrow exception” to which the Court referred is the privilege in § 9-109 of the Courts Article for “communications relating to diagnosis or treatment of the patient” *of a psychiatrist*.² Consequently, the prohibition in § 16-119 (b)(2) of the Transportation Article only affects reporting by these specialists. 71 *Opinions of the Attorney General* 407, 411 (1986). It simply does not apply to reporting by geriatricians, internists, neurologists, or other physicians. Except for a psychiatrist, a physician who reports the existence of a specified disorder does not violate the prohibition and, indeed, has immunity for the report. § 16-119 (e) and (f).

2. *Nature of information*

The prohibition manifestly applies to the following sources of information: physical or psychological characteristics discerned in an examination; diagnostic test results; and anything that a patient communicates in the course of therapy. Even if a psychiatrist were to

² This statutory privilege also applies to psychologists, and other provisions extend a comparable privilege to psychiatric-mental health nursing specialists and licensed social workers. §§ 9-109.1 and 9-121 of the Courts Article.

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learn some information about a patient outside the context of diagnosis or treatment, it seems highly unlikely that this limited information would be sufficient to establish a reportable disorder. As a practical matter, therefore, reports by psychiatrists are largely prohibited.

I hope that this letter of advice, although not to be cited as an Opinion of the Attorney General, is fully responsive to your inquiry. Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development