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## Reflections on Breach of Confidence from the U.S. Experience

By Brian C. Murchison\*

Breach of confidence, termed an “emerging tort” in the pages of the *Columbia Law Review* more than twenty years ago,<sup>1</sup> has emerged but is still taking shape.<sup>2</sup> As commentators already have explored its potential conflict with First Amendment freedoms of speech and press,<sup>3</sup> the following comment addresses that problem only briefly. Most of my concern centers on breach of confidence in another setting: its clash with fundamental components of the U.S. civil litigation system, specifically the attorney-client privilege, the structure of the adversarial process, and rules of discovery. In a line of decisions, the Supreme Court of Ohio (whose tort and other common-law decisions are frequently consulted by other jurisdictions) has protected confidentiality of medical records against strong arguments advancing the purpose and importance of these basic components of legal process. Viewing confidentiality as an element of autonomy, the Ohio decisions suggest that even fundamentals of legal process cannot override it in the typical case. Those fundamentals, it seems, presuppose protections for core freedoms of ordinary life, including the freedom to engage with and rely upon others for information and support, all within a mutually agreed-upon zone of confidence.

### 1. Confidentiality and Legal Process.

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<sup>1</sup> Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 *Colum. L. Rev.* 1426 (1982).

<sup>2</sup> David A. Elder, *Privacy Torts* 5:2 (2006) (noting recognition of confidentiality tort by U.S. courts).

<sup>3</sup> E.g., Eric Barendt, *Privacy and Freedom of Speech*, in *New Dimensions in Privacy Law: International and Comparative Perspectives* (Andrew T. Kenyon & Megan Richardson, eds.) 24-26 (2006); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 *Geo. L. J.* 123 (2007).

In *Biddle v. Warren General Hospital*,<sup>4</sup> a law firm working for a hospital proposed a plan for obtaining payment of unpaid medical bills. The hospital would give the firm all patient registration forms (numbering about 12,000) on which patients had put name, telephone number, age, and medical condition. The law would review the forms and screen for medical conditions that might qualify for benefits under the Social Security Supplemental Income program of the U.S. government. The firm then would telephone any patient whose condition looked promising, inform the patient that the call was made on the hospital's behalf (but apparently not disclose that it was a law firm actually calling), file the disability application, and if successful take a fee from the hospital. After the plan was implemented, one of the firm's secretaries decided to bring the scheme to the attention of the media. A newspaper quickly saw that the situation involved a possible breach of patient confidentiality. Ultimately a class action seeking compensatory and punitive damages was filed against the hospital and the firm.

The Ohio Supreme Court used the case to recognize what it called "an independent common-law tort of breach of confidence in the physician-patient setting,"<sup>5</sup> defined as "the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship."<sup>6</sup> The court recognized that the duty was not absolute – that some disclosures without consent are statutorily privileged, others are required by common-law duties, and still others are privileged at common law "to protect or further a countervailing interest which outweighs the patient's interest in confidentiality."<sup>7</sup> The issues in *Biddle* were whether the hospital could be found liable for

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<sup>4</sup> 715 N.E.2d 518 (Ohio 1999).

<sup>5</sup> *Id.* at 522.

<sup>6</sup> *Id.* at 523.

<sup>7</sup> *Id.* at 524.

releasing the records to its attorneys, and if so, whether the firm was liable as well for inducing the breach.

On the first question, the hospital argued that no breach of confidence had occurred in the first place – that the firm was the hospital’s alter ego, not a “third party,” and therefore that the hospital’s disclosure was a disclosure to itself.<sup>8</sup> Even if a breach did take place, the firm maintained, the functioning of the attorney-client relationship was an important interest outweighing the patient’s interest in confidentiality.<sup>9</sup> The dispute thus reduced to dueling relationships, and the Court’s task was to decide which relationship took priority -- the physician-patient relationship of confidentiality which encourages individuals to seek out a source of medical care and advice, or the attorney-client relationship which contemplates an unimpeded flow of information from principal to agent.

The Court resisted the effort to resolve the case with a notion of attorney-client indivisibility. Instead the Court took the less metaphysical approach of looking at the details of the peculiar plan, particularly at the release of a large amount of intimate information leading to unsolicited, perhaps misleading calls to patients.<sup>10</sup> In the Court’s view, no “interest public or private” could justify immunity on these facts.<sup>11</sup> The Court included a long footnote stating that the scheme went “far beyond” anything necessary for debt collection.<sup>12</sup> In addition, the Court openly worried that recognizing a privilege in *Biddle* would pave the way for doctors to “release

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<sup>8</sup> Id. at 525.

<sup>9</sup> Id. at 526-27.

<sup>10</sup> Id.

<sup>11</sup> Id. at 527.

<sup>12</sup> Id. at 527n.1.

the bulk of their office files without authorization so that a lawyer [could] search through them for potential workers' compensation or personal injury claimants.”<sup>13</sup>

In tort terms, the sense was that the burden of obtaining the patients' consent was far less than the magnitude of the harm to the confidential relationship. In contract terms, the releases originally signed by the patients contained no language that could be stretched to support the hospital's disclosures to the law firm. In moral terms, the Court endorsed a strict concept of confidentiality, in which parties agree to forego any self-interested use of shared confidential information absent a reasonable opportunity for the other party to register opposition. The Court thus protected the reasonable expectation of autonomy within a medical relationship, and recognized a clear violation of that autonomy in the hospital's wholesale “informational release”<sup>14</sup> for financial rather than medical purposes.

The Court also recognized an action for tortious inducement, which would be available if the relevant party (here the law firm) knew or should have known of the confidential relationship, intended to induce disclosure, and lacked any reasonable belief that the disclosure would not violate the duty owed to the patient.<sup>15</sup> After declaring that both actions were part of Ohio law, the Court boldly applied the newly announced elements to the facts, ruling that reasonable minds could find violations of the duties.<sup>16</sup>

*Biddle* invites speculation about its fundamental rationale. On both sides of the case, information was shared within a relationship of trust. Patients shared intimate facts with the hospital, and the hospital shared the same facts with its attorneys, who had their own duty of

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<sup>13</sup> Id. at 525.

<sup>14</sup> Id. at 527.

<sup>15</sup> Id. at 528.

<sup>16</sup> Id. at 528-29.

confidentiality. On both sides, the trust relationship facilitated freedom: the patients confided in the hospital in order to receive sound medical help and thus enhance their freedom to live as they chose, and the hospital shared the records with their advisors in order to expand their commercial and professional options. The hospital's point might even have been that a free flow of information from client to attorney about all aspects of hospital services was necessary for, and conceptually "prior to," the hospital's ability to provide confidential services in the first place. The Court, however, staunchly rejected any such suggestion, asserting that the firm was simply not "an acceptable legal repository for the unauthorized disclosure of confidential information that the principal learned within another confidential relationship."<sup>17</sup> But why was the firm not "acceptable"? It may be that the conduct of the "attorney" and "client" on these facts was so clumsily and needlessly intrusive that the "relationship" seemed a cover for exploitative conduct. Or perhaps the Court believed that, although both relationships were social goods, the medical relationship's benefits for the individual were more socially useful than the attorney-client relationship's benefits for the hospital's welfare. Whatever the rationale, the Court showed no hesitation in protecting patient autonomy and brushing aside formalisms about attorneys and clients.

In a second case, the same state supreme court confronted another clash between medical confidentiality and a supposed bulwark of legal process – here, the conventional practice of adversarial litigation. In *Hageman v. Southwest General Health Center*,<sup>18</sup> an attorney represented a wife in a divorce and child custody case. The husband counterclaimed for custody, effectively waiving the privilege to keep confidential his medical records, including those relating to mental health. The wife's attorney then lawfully obtained the husband's

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<sup>17</sup> Id. at 526.

<sup>18</sup> 893 N.E.2d 153 (Ohio 2008).

psychiatric records. Meanwhile, the husband allegedly assaulted the wife, and a criminal investigation began. It was then that a key step was taken: the wife's attorney turned over the husband's psychiatric records to the prosecutor in the assault case.

The husband sued the wife's attorney for breach of confidence, alleging wrongful release of the medical records to the prosecutor. The defendant-attorney argued that the husband had waived the privilege in the civil divorce case and that the waiver carried over to the criminal case, especially since the husband had made no effort to seek a protective order.<sup>19</sup> The Ohio Supreme Court disagreed, finding "no legal justification" for, or "practical benefit" in, the notion that a patient's "waiver for a specific, limited purpose is a waiver for another purpose."<sup>20</sup> The Court's concern was that a contrary ruling could undermine individuals' willingness to seek medical (specifically psychiatric) care.<sup>21</sup> The Court worried too about the potential for abuse of waiver -- that a lawyer who, as in this case, had obtained records in a civil matter could "intensify legal pressure" on the other party if the law permitted the lawyer to disclose the records in other matters.<sup>22</sup> Recognizing an "independent tort,"<sup>23</sup> the Court held that the attorney was subject to liability.

In *Hageman*, the confidentiality interest came into nearly open conflict with an interest at the heart of the U.S. legal process – its reliance on the adversarial structure of adjudication, in which opposing sides must press their own interests through legal moves and counter-moves. Here the defendant attorney insisted that it was up to the plaintiff to protect his own psychiatric records – in effect, that the very nature of the adversarial process put the burden on the plaintiff

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<sup>19</sup> Id. at 158.

<sup>20</sup> Id. at 157.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id. at 158.

to guard against further spread of the records by obtaining a protective order.<sup>24</sup> The Court declined to answer the charge directly, coolly dodging it by concluding that the plaintiff had had “no opportunity” to seek a protective order.<sup>25</sup> The Court nevertheless acknowledged the argument’s importance, conceding that “it may be appropriate to discuss the failure to take protective measures” in a later case.<sup>26</sup> At the same time, the dynamics of the adversarial process played a key role in the outcome, but working against, rather than for, the defendant. As noted, the Court ruled that the defendant’s claimed right to release the medical records in other matters would enable parties in future cases to gain an unfair advantage. The Court’s concern was therefore not that the *plaintiff* had stumbled by neglecting to seek a protective order, but that the *defendant* was insisting on a right to disclose that would give future defendants too great a chance to make the adversarial process sharper than it usually is. Just as the Court in *Biddle* had been uneasy about the exploitative potential of the attorney-client relationship, the Court in *Hageman* showed discomfort with a potentially abusive use of medical information as a bargaining chip in the context of divorce. In both cases, then, when confidentiality interests competed with basic features of the legal process, the Court demonstrated awareness of how good things can be used for ill – here, how elements of legal process that generally support the pursuit of justice can push against limits and threaten abuse.

In a third Ohio case, *Roe v. Planned Parenthood*,<sup>27</sup> a thirteen-year-old girl became pregnant by her 21-year-old soccer coach, who urged her to have an abortion at Planned Parenthood. Since Ohio requires parental notification and consent, the coach posed as the girl’s father when Planned Parenthood called on the telephone for consent. The coach posed as the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 912 N.E.2d 61 (Ohio 2009).



girl's brother on the day of the procedure. Afterwards, the parents discovered that their daughter had had an abortion, and the coach was convicted of seven counts of sexual battery. The parents brought a civil action against Planned Parenthood, alleging failure to notify them and to obtain their consent, failure to obtain the girl's consent, and failure to report to state authorities suspected sexual abuse of a minor who was receiving medical services from the defendant. In discovery, the parents sought ten years' worth of nonparty records from Planned Parenthood, specifically any abuse reports filed with state authorities and medical records of minors who had been the defendant's patients. The parents sought this information in order to bolster their claim for punitive damages by establishing a "systematic and intentional breach of the duty to report suspected abuse" under state law.<sup>28</sup> When Planned Parenthood declined to turn over the requested records, the parents moved to compel production of the materials with identifying information redacted. The trial court ordered production, but the Ohio Supreme Court reversed. The Court noted that *Biddle* and *Hageman* had been confined to recognizing actions for improper release of medical records and associated defenses.<sup>29</sup> The Court emphasized that those decisions had not involved discovery and could not be invoked to compel production of nonparties' confidential records. Unwilling to create a new rule for the discovery context, the Court announced, "Any exception to the physician-patient privilege is a matter for the General Assembly..."<sup>30</sup> Of particular note, the Court found redaction "merely a tool" to safeguard personal information within confidential records that become subject to disclosure.<sup>31</sup>

The *Roe* plaintiffs, like the defendants in *Biddle* and *Hageman*, argued against confidentiality by insisting that disclosure was justified by a core component of legal process.

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<sup>28</sup> Id. at 68.

<sup>29</sup> Id. at 70-71.

<sup>30</sup> Id. at 71.

<sup>31</sup> Id.

That component was nothing less than “the public’s interest in justice,”<sup>32</sup> which supported obtaining the proof necessary to establish a recognized claim. As the dissenting judge variously restated this interest, the plaintiffs were invoking a fundamental “right to seek redress,” a “right to litigate their claims,” a “right to examine every possible legal argument” against the defendant.<sup>33</sup> The requested discovery, the plaintiffs maintained, was essential to vindicating the rights of abused children as well as parents’ rights “to protect their minor children and to guide their medical treatment.”<sup>34</sup> And so the lofty goal of legal process -- that “[t]he truth be known as far as possible to enable the law to provide justice in each case”<sup>35</sup> -- was set against the interest of medical confidentiality.

Again, the latter prevailed, the Court disagreeing sharply with a number of lower court decisions that had extrapolated a discovery interest from *Biddle*’s recognition of a common-law “defense.” The Court also rejected the plaintiffs’ invocation of “public policy,” explaining that the case was not a class action, had no “criminal implications,” and thus involved only the parties to the case.<sup>36</sup> On this point, the Court was not persuasive; tort cases can implicate public policy without being class actions and without the involvement of criminal law. The Court was on firmer ground in suggesting that the requested discovery was simply not essential -- that the plaintiffs could proceed with their case without it<sup>37</sup> -- although the Court declined to fashion a rule that turned on essentiality. Instead, the Court left all rulemaking concerning discovery of nonparty confidential medical records to the elected branches, as if to say that the requested holding was too substantial and too controversial for common-law decision-making. As in

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<sup>32</sup> Id. at 81 (Donovan, J., dissenting) (reviewing plaintiffs’ arguments in previous cases).

<sup>33</sup> Id. at 76-77.

<sup>34</sup> Id. at 85.

<sup>35</sup> Id. at 76.

<sup>36</sup> Id. at 71 (majority opinion).

<sup>37</sup> Id. at 72.

*Biddle* and *Hageman*, there was palpable skepticism about countervailing values of legal process, even about so familiar a tool as redaction. The interest in medical confidentiality was too important and at the same time too fragile, and the general goal of facilitating informational flow for the achievement of justice too amorphous and too overbearing, to produce any other outcome.

## 2. Confidentiality and the Marketplace of Ideas.

When we turn from the flow of information in the litigation system, and confront the flow of information in the “marketplace of ideas,” has the confidentiality interest enjoyed similar success? Despite recent scholarship calling for a reinvigorated action for breach of confidence, the cases involving a clash between a plaintiff’s confidentiality interest and a speaker’s exercise of First Amendment freedoms have been few. Certainly the U.S. Supreme Court has yet to take up the question.

The Supreme Court *has* taken up the action for public disclosure of private facts. In three well-known decisions -- *Cox Broadcasting Corp. v. Cohn*,<sup>38</sup> *Smith v. Daily Mail Pub. Co.*,<sup>39</sup> and *The Florida Star v. B.J.F.*<sup>40</sup> -- the Court invoking freedoms of speech and press has all but pre-empted a damages action for invasion of privacy. Does this mean that an action for breach of confidentiality would meet the same fate? Not necessarily. In each of the three privacy cases, the Court found that the challenged speech involved “a matter of public concern.” While these cases certainly would be relevant to a test of the confidentiality action, the Court could find in

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<sup>38</sup> 420 U.S. 469 (1975).

<sup>39</sup> 443 U.S. 97(1979).

<sup>40</sup> 491 U.S. 524 (1989).

another decision – the 2001 case of *Bartnicki v. Vopper*<sup>41</sup> – a plausible roadmap for accommodating the confidentiality tort with the strictness of First Amendment analysis.

In *Bartnicki*, the Court recognized the interest of “privacy of communication”<sup>42</sup> in a cell phone conversation between two union members discussing a contentious labor negotiation. This “private speech”<sup>43</sup> was intercepted, taped, delivered to a radio station, and ultimately broadcast, prompting suit against the radio station by the original parties to the call. The plaintiffs sued for damages under federal and state wiretapping laws and survived a motion for summary judgment. The High Court reversed, holding that the First Amendment protected the station’s right to disseminate “a matter of public concern,”<sup>44</sup> and that the statutes were therefore unconstitutional as applied. At the same time, the Court acknowledged that the value of private speech was part of the “constitutional calculus.”<sup>45</sup> In an important concurrence, Justice Stephen Breyer called for a nuanced framework. Noting that the cell phone conversation at issue concerned possibly violent union activity, Justice Breyer observed that the plaintiffs had “unusually low privacy expectations” in the conversation, in contrast to an “unusually high” public interest in the subject matter.<sup>46</sup> This approach may suggest a way to examine the confidentiality interest in an eventual case, taking account of the importance of private speech for self-governance and self-realization, and the possible chilling of valuable dialogue if private speech is under-protected.<sup>47</sup>

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<sup>41</sup> 532 U.S. 514 (2001).

<sup>42</sup> *Id.* at 532-33.

<sup>43</sup> *Id.* at 518.

<sup>44</sup> *Id.* at 535.

<sup>45</sup> *Id.* at 533.

<sup>46</sup> *Id.* at 540 (Breyer, J., concurring).

<sup>47</sup> Accord, Barendt, *supra* note 2.

Suppose, then, that a case reaches the Court involving broadcast of an intercepted cell phone conversation between the same two union members, A & B, embroiled in the same negotiation, but this time discussing A's health problems rather than the labor issue. It is unlikely that any matter of "public concern" would be directly or indirectly implicated. Because A's expectation of privacy would be "unusually high," a suit sounding in breach of confidence or based on the wiretapping statutes would likely survive First Amendment challenge. Now suppose a different conversation: A confiding to B that A has been struggling with serious doubts about the merits of their public position in the labor negotiation. If, as before, a third party intercepts the conversation and a radio station sends it over the air, the Court would likely find it related to a matter of public concern – the ongoing negotiation. However, it is far from clear that the "public interest" in A's private struggles would be "unusually high," as was the violence-tinged conversation in *Bartnicki*, nor is it clear that A's expectation of privacy would be considered "unusually low." More likely, a Court cognizant of the value of private speech would protect A's freedom to work through his doubts and develop his thoughts on an important issue in dialogue with a trusted associate. Private speech of this kind surely deserves substantial weight in a "constitutional calculus," and could prevail over the interest in public dissemination of the intercepted dialogue – at least, if a Breyer-like analysis finds favor among a majority of Justices.

### 3. Concluding Thoughts

Finally, it is worth noting that, despite increasing recognition of the action for breach of confidence in the United States, and despite predictions that it might withstand the heat of the First Amendment, it is not yet always available. Yet even where it is not invoked by name, its arrival in the broader legal culture seems to be having an effect. Thus, in a 2009 case in

Minnesota, *Yath v. Fairview Clinics*,<sup>48</sup> a plaintiff sued a medical clinic when the plaintiff's medical condition turned up on an unrestricted webpage on Myspace.com. The suit, however, was not for breach of confidence but for public disclosure of private facts, and the case risked dismissal due to the "publicity element" of the public disclosure tort. The problem was that the plaintiff had been able to prove only that "a small number of people actually viewed" the webpage; moreover, the webpage had been accessible only for one or two days.<sup>49</sup> The defendants therefore argued that the "publicity" element could not be met, maintaining that "a finding of publicity depends on the matter being communicated to such a large number of people that it becomes public knowledge."<sup>50</sup> The Minnesota Court of Appeals rejected the argument, concluding that the Restatement (Second) of Torts does not require proof of large numbers but can be satisfied simply by proof that the information was posted on a publicly accessible webpage.<sup>51</sup> Did the court borrow conceptually from the action for breach of confidence in declining to mandate proof of widespread numbers of readers?<sup>52</sup> The case was ultimately dismissed on other grounds, but its flexible understanding of "publicity" suggests that courts confronting new modes of privacy invasion may refine doctrine creatively. The public disclosure tort may take on aspects of the confidentiality tort in the time-honored process of the common law.

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<sup>48</sup> 767 N.W.2d 34 (Ct. App. Minn. 2009).

<sup>49</sup> Id. at 43.

<sup>50</sup> Id. at 44.

<sup>51</sup> Id. (citing Restatement (Second) of Torts § 652D cmt. A (1977)).

<sup>52</sup> Cf. *Hill v. MCI WorldCom Communications, Inc.*, 141 F. Supp 2d 1205 (S.D. Iowa)(recognizing damage to special relationship as substitute for publicity element in public disclosure action), *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977) (same).