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## **The Right to Demand to Withhold Information as an Expression of Patient's Autonomy**

**Abstract:** The right to demand to withhold information is an expression of respect towards patient's will and his autonomy as well as denial of the paternalistic conception of a relation between an ill individual and his doctor. It is the patient who, as a disposer of the right to information, decides if and to what extent he wants to receive such information. Despite the fact that the right to information has been widely described in the medical law literature, the right to demand to withhold information, which is directly connected to it and ensuing from it, has not been thoroughly examined yet. Because of that, it seems right and reasonable to analyse the issue related to the boundaries of patient's autonomy. It should be emphasised that none of the current Laws pertaining to the obligation to inform have stated that the patient has the right to not be informed of his health condition. The institution of demanding to withhold information raises many concerns while in medical practice it very often occurs. The following paper examines the scope of the patient's right to demand to withhold information as well as the circumstances of excluding and restricting that right. Additionally, it widely describes the consequences caused by the right to resign from information. In particular, a part of the paper is devoted to the legal character of an expressed consent to treatment in accordance with the opinions expressed in the legal doctrine.

**Keywords:** patient's rights, the right to demand to withhold information, patient's autonomy

### **1. Introduction**

The right to demand to withhold information expresses respect for the patient's will and autonomy<sup>1</sup>, and contradicts the paternalistic perception of a relation between a patient and doctor<sup>2</sup>. The patient as a disposer of the right to information decides if and to what extent he wants to receive such information. Although the

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1 E. Zielińska (ed.), *Ustawa o zawodach lekarza i lekarza dentystry. Komentarz*, Warszawa 2008, p. 450.

2 J. Bujny, *Prawa pacjenta między autonomią a paternalizmem*, Warszawa 2007, p. 148.

right to information has been widely discussed in the medical law literature, the right to demand to withhold information, which is directly connected to it and ensuing from it, has not been comprehensively analysed. For this reason, it seems right and reasonable to analyse the above issue, which is particularly related to the limits of patient's autonomy. It should be emphasized that none of the current Laws pertaining to the obligation to inform have stated that the patient has the right to not be informed of his health condition<sup>3</sup>. The institution of demanding to withhold information raises many concerns while in medical practice it very often occurs. Undeniably, the very nature of this right arises problems itself, as it is an exception<sup>4</sup> from the general principle of informing the patient and informed consent to therapy embedded in the doctrine and case law. This generates doubts related to the establishment of the scope of disclaimer of information and a potential restriction of the right to demand to withhold information – the exclusion of the right to not inform – and, in consequence of the above, the fulfilment of the request to not inform and its impact on the efficiency of consent expressed by the patient as well as ensuing ethical and legal dilemmas.

The right to demand to withhold information has been regulated in Art. 9 par. 4 of the Act on the Patient's Rights and Patient Ombudsman<sup>5</sup>, which grants the patient the right to demand to withhold information about his health condition, diagnosis, proposed and possible methods of diagnosis and treatment, foreseeable consequences of their application or omission thereof, effects of treatment and forecast. A patient may resign fully or partially from the information he or she is entitled to receive by specifying clearly the scope of information he or she disclaims. Similar regulation has been contained in Art. 31 par. 3 of the Act on the Profession of a Physician and Dentist<sup>6</sup>, under which a doctor is not obliged to inform the patient upon his or her request, and in Art. 16 of the Code of Medical Ethics<sup>7,8</sup>. Both provisions correspond to one another, similar to the right of the patient to not be informed and the exception

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3 A. Górski, O obowiązku lekarza poinformowania pacjenta i zgodzie pacjenta na zabieg, "Studia Iuridica" No. 39, 2001, p. 85.

4 T. Dukiet- Nagórska, Stosowanie ustawy o zawodzie lekarza przez psychiatrów i ustawy o ochronie zdrowia psychicznego przez lekarzy innych specjalności, "Prawo i Medycyna" 2004, No. 4, p. 9.

5 Consolidated text Journal of Laws 2016, item 186 as amended [Tekst jedn. Dz.U. z 2016 r. poz. 186 ze zm.] in short u.p.p.

6 Consolidated text Journal of Laws 2017, item 125 as amended [Tekst jedn. Dz.U. z 2017 r. poz. 125 ze zm.] in short u.z.l.

7 Kodeks Etyki Lekarskiej, Announcement of the President of the Supreme Medical Council of 2 January, 2004 on the publication of a uniform text of the resolution on the Code of Medical Ethics [Obwieszczenie no 1/04/IV of Prezesa Naczelnej Rady Lekarskiej z dnia 2 stycznia 2004 r. w sprawie ogłoszenia jednolitego tekstu uchwały w sprawie Kodeksu Etyki Lekarskiej].

8 Even if the Code of Medical Ethics it is not a source of universally binding law due to art. 4 of u.z.l. is an important reference criterion for assessing the correctness of performing a medical profession.

from the obligation to inform the patient imposed on a doctor. The right to demand to withhold information has been regulated schematically. Due to this, in compliance with the statutory regulation, the doctrine also merely points out that the exemption of a doctor from the obligation to inform a patient is designated by the scope of request made the patient himself or herself<sup>9</sup>. Nevertheless, it should be underlined that such a statement is quite general and may be applied only in typical cases, which are relatively rare in the practice.

In order to systemize my article and assure its reliability, it is necessary to indicate a circle of subjects entitled to the discussed right. Even though patients themselves undeniably belong to this group, it is worth considering whether the patient's statutory representative is also entitled to the right not to inform. The doctrine has so far relied on the opinion according to which minor patients, including those who attained 16 years of age, may demand to withhold information whereas a statutory representative is denied this right<sup>10</sup>. The very form of the request itself is significant as it should be expressed directly, undoubtedly<sup>11</sup>, clearly, decisively, indicating the patient's determination (omission to inform may not be based on presumed consent<sup>12</sup>) and, for evidence reasons, it should be recorded in medical documentation<sup>13</sup>. According to the opinion that has emerged in the doctrine<sup>14</sup>, the very reading of the provision itself implies that consent may not be presumed and it must be a request verified according to severe criteria. A doctor may not cease to inform a patient based on his or her presumed behaviour, e.g. when the patient resigns from asking questions. As a disposer of the right to information, the patient may resume his willingness to be informed any time, and then he or she is informed upon general rules<sup>15</sup>. The doctrine emphasizes that the disclaimer must be active and explicitly expressed<sup>16</sup>.

The causes of wavering the right to information may vary: a patient may be not interested in his or her health condition, he or she may not want to hear such information, or may feel disgust to such information<sup>17</sup>, or the demand may be the

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9 J. Bujny, *Prawa pacjenta między...*, *op. cit.*, p. 148.

10 D. Karkowska, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz*, Warszawa 2016, p. 237.

11 E. Zielińska (ed.), *Ustawa o zawodach...*, *op. cit.*, p. 450.

12 M. Boratyńska, P. Konieczniak, *Prawa pacjenta*, Warszawa 2011, p. 248.

13 L. Kubicki, *Nowy rodzaj odpowiedzialności karnej lekarza (przestępstwo z art. 192 KK)*, 2000, No. 8, p. 31.

14 M. Świdarska, *Zgoda pacjenta na zabieg medyczny*, Toruń 2007, p. 163.

15 A. Augustynowicz, A. Budziszewska- Makulska, *Ustawa o prawach pacjenta i Rzeczniku Prawa Pacjenta. Komentarz*, Warszawa 2010, p. 70.

16 *Ibidem*, p. 70.

17 M. Boratyńska, *Autonomia a granice upoważnienia osoby bliskiej i zaufanej*, "Prawo i Medycyna" 2014, No. 1 (54 vol.16), p. 68.

effect of full trust in the doctor<sup>18</sup>. The reasons for the waiver depend on the patient<sup>19</sup> and they are not subject to doctor's evaluation. In practice, the demand most often occurs when patients are in serious condition and they themselves suspect unfavourable forecast; then they do not want to be informed about their health condition by the doctor<sup>20</sup>. The doctrine indicates the supremacy of the so-called "right to the truth", which becomes restricted due to the fact that the patient may not want to know everything, particularly unfavourable forecast which may worsen his or her psychical and physical condition<sup>21</sup>. The demand to withhold information is not the disclaimer of the right in the civil law meaning because the subject of the right to information is the patient's personal interest – information autonomy<sup>22</sup>.

## 2. The scope of the patient's right to demand to withhold information

The scope of the right to demand to withhold information is not specified in the binding legal provisions. Nevertheless, the doctrine points out that it depends on the patient because as a disposer of the right to information, he or she decides which information and to what extent thereof he or she disclaims. As a medical professional, who evaluates which information a patient may waive due to his and other persons' interest, a doctor affects the shape of information being conveyed as well. Moreover, it should be underlined that there are cases of exclusions of the application of Art. 9 par. 4 of APR and Art. 31 par. 3 of APP under the law itself.

Various ideas related to the scope of disclaimer of the right to information have emerged in the doctrine. The following opinions are the most common: the first one distinguishes a possibility of complete (full) disclaimer of information, where a doctor is exempted from the obligation to convey any information, and the second one – the concept of partial disclaimer – where medical professionals are exempted only from specific information<sup>23</sup>. A slightly different idea is presented by E. Zielińska, according to which a patient has the right to specify that he or she does not want to receive detailed information, or to be informed at all about some aspects of scheduled surgeries<sup>24</sup>. This scope of information not to be conveyed is determined more narrowly because it is limited to details and some aspects; what is more, it literally does not list a possibility of full disclaimer of the right to information. The

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18 U. Drozdowska, W. Wojtal, *Zgoda i informowanie*, Warszawa 2010, p. 59.

19 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 234.

20 M. Grego, *Podstawy i konsekwencje decyzji lekarza o ograniczeniu pacjentowi informacji o jego stanie zdrowia i rokowaniu*, (in:) J. Hebrko, R.D. Kocyłowski, B. Pawelczyk (ed.), *Lege Artis problemy prawa medycznego*, Poznań 2008, p. 55.

21 M. Nesterowicz, *Prawo medyczne*, Toruń 2016, p. 189.

22 U. Drozdowska, *Cywilnoprawna ochrona prawa pacjenta*, Warszawa 2007, p. 148.

23 A. Augustynowicz, A. Budziszewska-Makulska, *op. cit.*, p. 70; D. Karkowska, *op. cit.*, p. 234.

24 E. Zielińska (ed.), *Ustawa o zawodach...*, *op. cit.*, p. 480.

right not to be informed is presented most narrowly by K. Michałowska, according to whom the admissible scope of disclaimer within the areas designated by Art. 31 par. 1 of APR is too wide – it is a full disclaimer of the obligation to inform – and it should be made narrower<sup>25</sup>. The information may be limited only to such data which would not adversely affect the patient's psychic because a doctor is not allowed not to fulfil the obligation to inform the patient<sup>26</sup>. An opposite opinion is held by J. Bujny, who believes that a patient disposes his right to information in any way while any attempts at limiting or disrespecting his will are manifestations of a lack of respect for the patient's will and interfere in his autonomy<sup>27</sup>. Under practical interpretation of the scope of disclaimer to exercise the right to information, it should be considered whether the patient may waive all information, including those connected with a risk posed by a surgery and forecast. Assuming that a patient is a disposer of his right and decides about its shape substantively (by authorizing other persons to inform) and objectively (about the type and scope of information), it should be acknowledged that the patient may request to restrict or withhold the information at his discretion<sup>28</sup>.

### **3. Circumstances of exclusion or restriction of the right to demand to withhold information**

Considering the scope of the right to demand to withhold information, it should be emphasized that it is not an absolute and unlimited right. Nevertheless, M. Boratyńska holds an opposite opinion thereon, claiming that the right to demand to withhold information specified in Art. 31 par. 3 of APP is explicitly stipulated and unlimited<sup>29</sup>. Although the reading of Art. 9 par. 4 of APR implies its absolute nature: "a patient has the right to demand", the regulation contained in Art. 31 par. 3 of APP is of a slightly more dispositive nature: "a doctor is not obliged to inform the patient". It is apparent that the provision exempts a doctor from the obligation to inform; yet it does not impose on him an absolute obligation not to inform upon the patient's request. Therefore, a situation when a patient has been provided with unwanted information should be admissible. The above interpretation is justified by the fact that the obligation of information (informing appropriately and within the proper scope) is treated as one of the most important obligations of a doctor. Hence, obliging doctors to consider patients' requests in an absolute and unlimited way without granting medical professionals a possibility of deciding *ad casu* would evoke doubts.

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25 K. Michałowska, *Charakter prawny i znaczenie zgody pacjenta na zabieg*, Warszawa 2014, p. 160.

26 K. Michałowska, *Informowanie pacjenta w polskim prawie medycznym*, "Prawo i Medycyna" 2003, No. 13 (vol. 5) p. 115.

27 J. Bujny, *Prawa pacjenta między...*, *op. cit.*, p. 148.

28 U. Drozdowska, W. Wojtal, *Zgoda...*, *op. cit.*, p. 60.

29 M. Boratyńska, *Autonomia a granice...*, *op. cit.*, p. 68.

Despite recognition that a patient is a disposer of the right to information, a purpose of the discussed right (apart from the guarantee of the patient's substantive treatment) is also the guarantee of a due (appropriate) course of treatment, proper cooperation with the doctor, and, in some cases, the protection of the rights of third parties. There are two possibilities of excluding or restricting the right to demand to withhold information. The first one involves the restriction under the Act whereas the second one apparently results from the decision of the doctor himself who, due to the patient's good, will decide to inform the patient against his or her request taking into account the course of treatment and the importance of information for the patient's potential consent.

The statutory exclusion of the right to withhold information refers to patients suffering from infection and psychological disorders, or those undergoing medical experiments or transplantation, women deciding for abortion, female recipients of gametes (embryos) and male donors of sperm based on the Act on Infertility Treatment<sup>30</sup>. We should thoroughly consider situations when, under the law, a patient may not waive the right to be informed, which refers both to the information about "common" and higher risk (threat). It should be emphasized that there is no "compulsory information" in medicine except statutory prerequisites, which will be discussed<sup>31</sup>.

The exclusion of the right to withhold information refers to infected patients not only due to their course of treatment but also in order to assure safety to third parties. Such use of the patient's right to no information could jeopardize other people<sup>32</sup>. A person likely to be sick, ill or exposed to infection is not only informed due to the specific nature of their condition but also hospitalized against their will (pursuant to Art. 35 par. 1 of the Act of 5 December 2008 on Counteracting and Fighting Human Infections and Infectious Diseases<sup>33</sup>). Moreover, an infected patient may not disclaim information due to safety of other people; here his or her autonomy expressed in the right to withhold information succumbs to the right of other people. Pursuant to Art. 39 of ACFH, in the case of diagnosing infection which may spread through sexual intercourse, a doctor or physician is obliged to inform the infected person about the need to contact the doctor of his sexual partner or partners – this obligation deprives the patient of the right to not be informed. Due to the content of Art. 26 of ACFH, strictly specified medical personnel – a doctor, physician, nurse or midwife – are obliged to instruct the infected patient, among others, about ways or measures to counteract spread of infection to other people, and in the case of diagnosing infection

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30 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 237.

31 U. Drozdowska, W. Wojtal, *Zgoda...*, *op. cit.*, p. 59.

32 U. Drozdowska, *Cywilnoprawna...*, *op. cit.*, p. 148.

33 Consolidated text Journal of Laws 2016, item 1866, as amended [Tekst jedn. Dz.U. 2016 poz. 1866] in short u.z.z.ch.

which may spread through sexual intercourse, inform the infected person about the need to contact his sexual partner or partners' doctor. The provision does not allow the patient to resign from necessary information. The right to withhold information succumbs to the right of other people<sup>34</sup>.

Furthermore, the situation of a psychiatric hospital patient is also specially regulated in the Act of 19 August 1994 on the Protection of Mental Health<sup>35</sup>. The provisions regulate mandatory treatment of a patient admitted without his consent with regard to whom a doctor is obliged to provide information about his scheduled treatment. Persons suffering from disorders are informed about the purpose of psychiatric hospitalization, health condition, proposed diagnostic and therapeutic action and their foreseeable effects. Due to special restrictions of the psychiatric hospital patient's autonomy, he or she may not be deprived of the right to the above-mentioned information.

The right to not inform is excluded with regard to persons undergoing medical experiments. Under the regulation contained in Art. 24 of APP, patients are informed about the purpose, methods and conditions of experiments, expected therapeutic or cognitive benefits, and a risk and possibility of withdrawing from the participation in the experiment at each stage thereof. The nature of such treatment is not medical and they always require complete information – the patient may not waive it<sup>36</sup>. Research and medical experiments as well as clinical tests have a lot in common, among others, the obligation to inform a person undergoing the experiment<sup>37</sup>. It should be indicated that a medical experiment is not always a medical action – due to this, the law prohibits experiments without voluntary consent; general provisions on consent for treatment do not apply in this case<sup>38</sup>.

Individuals enjoying special information privileges are also candidates for living donors of tissue and organs as well as recipients thereof. Pursuant to Art. 12 par. 1 point 5 of the Act of 1 July 2005 on the Recovery, Preservation and Transplantation of Cells, Tissue and Organs<sup>39</sup>, before giving consent, a donor is precisely and accurately informed in writing about a type of surgery, ensuing risk and foreseeable effects thereof for his or her health in the future. Similar to this, pursuant to Art. 12 par. 1 point 9 of ARPT, a candidate for a recipient is informed about a risk related to the

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34 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 236.

35 Consolidated text Journal of Laws 2017, item 882 as amended [Tekst jedn. Dz.U. z 2017 r. poz. 882 ze zm.]

36 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 235.

37 W. Nowak, *Prawne formy zgody pacjenta na eksperyment medyczny (zagadnienie cywilnoprawne)*, "Prawo i Medycyna" 2005, No. 3 (20, vol. 7), p. 47.

38 A. Górski, *Leczyć czy nie leczyć? Dylematy podejmowania leczenia z punktu widzenia konfliktu dóbr*, [in:] *Czasopismo Prawa Karnego i Nauk Penalnych*, Year XV: 2011, p. 160.

39 Consolidated text Journal of Laws 2017, item as amended 2017 [Tekst jedn. Dz.U. 2017 poz. 1000], in short u.p.p.p.

surgery of recovery of cells, tissues or organs and possible effects of the recovery for the donor's health.

Furthermore, pregnant women who have the right to obtain information about prenatal tests enjoy special information privileges, particularly if the embryo is at a higher risk of genetic and developmental defect, or incurable disease threatening the embryo's life<sup>40</sup> (Art. 2 par. 2a of the Act on Family Planning<sup>41</sup>). The right to demand to withhold information is excluded also with regard to women who want to terminate pregnancy (Art. 4a of AFP).

The last special regulation is the obligation to inform a woman as a recipient and a man as a donor, which is contained in the Act on Infertility Treatment<sup>42</sup>. It is the obligation to inform individuals with regard to whom actions related to *in vitro* conception have been undertaken. Gametes may solely be recovered from a donor if the absolute statutory condition is satisfied, i.e. the person being prepared for donation is clearly and precisely informed about the type of a surgery, its nature, laboratory tests conducted for this purpose and the right to receive the results of these tests, a manner of storing and protecting his personal data, medical secrecy, a risk related to the surgery of recovering gametes, foreseeable affects of its application in the future, security measures, etc. Analogical requirements have to be satisfied by a female recipient.

The second possibility of excluding or restricting the right to demand to withhold information results from dispositive reading of Art. 31 par. 3 of APP, according to which a doctor is not obliged to inform a patient. This interpretation results from the fact that the obligation to not inform, i.e. a peculiar ban on informing, may not be imposed on a doctor, as well as from the specificity of relations that are subject to the analysis. It is admissible (apart from the situations ensuing from the Act) that, due to the forecast, radicalism and irreparability of a given medical treatment, e.g. limb amputation or vasectomy, a doctor will inform the patient against his or her will<sup>43</sup>. The patient's request under such exceptional circumstances cannot abate (repeal) the doctor's obligation because the patient may not be deprived of the information about the purpose of the treatment related to, e.g., irreparable amputation of his body part<sup>44</sup>. Failure to inform would evoke more traumatic effects than a response to the information. What is more, non-medical treatments require full information.

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40 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 221.

41 Consolidated text Journal of Laws of 1993, No. 17 item 78 as amended [Dz.U. 1993, Nr 17 ze zm., poz. 78], in short u.p.r.

42 Consolidated text Journal of Laws 2017, item 865 as amended [Tekst jedn. Dz.U. 2017 poz. 865].

43 D. Karkowska, *Ustawa o prawach...*, *op. cit.*, p. 235; M. Sośniak, *Cywilna odpowiedzialność lekarza*, Warszawa 1968, p. 47.

44 M. Świdorska, *Zgoda...*, *op. cit.*, p. 169.

Their nature decides about informing the patient fully and excludes the protection of autonomy of the will of a patient refusing to be informed<sup>45</sup>.

The doctrine also debates on the issue of disclaimer of the right to information related to higher risk surgeries. The doctrine relies on the opinion assuming that such a disclaimer is admissible also in this case due to referral to Art. 31 of APP contained in Art. 34 par. 2 of APP, according to which a doctor is obliged to inform the patient under Art. 31 of APP before the patient gives consent to operation or application of a therapeutic method or diagnosis posing a higher risk. Moreover, *ratio legis* of admissibility of the patient's disclaimer of information is the protection of autonomy of the patient's will<sup>46</sup>. M. Filar holds an opposite opinion believing that the reading of Art. 31 of APP supports absolute obligation of information with regard to operations and other surgeries posing a higher risk<sup>47</sup>.

We think that the opinion reported in the doctrine saying that a doctor may not refrain from fulfilling the obligation of information he is burdened with and limit the scope of information to the information that would not negatively affect the patient's psychic when the patient does not want to be informed<sup>48</sup> is too far-reaching. However, due to the dispositiveness of Art. 31 par. 3 of APP and the right to inform the patient against his or her will in exceptional situations doctors are granted with, we will prevent concerns resulting from the potential effects that may be evoked by certain information during the treatment process. Nevertheless, it is argued that recommendations about the lifestyle or pharmacotherapy should not be identified with the information conveyed before the surgery which constitutes an element of consent<sup>49</sup>. In such situations, a doctor is obliged to talk to the patient and perhaps attempt to change the patient's decision not to be informed in order to satisfy the obligation of information *lege artis*. The postulate of defining the conditions of disclaimer in such a situation should be approved of<sup>50</sup>.

#### **4. Consent to treatment in the light of the demand to withhold information**

The patient's right to demand to withhold information evokes consequences regarding the legal nature of the expressed consent to treatment while the doctrine presents various concepts thereof. The problem is extremely significant because properly expressed consent excludes a possibility of launching any therapy by medical

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45 *Ibidem*, p. 169.

46 *Ibidem*, p. 163-164.

47 M. Filar, *Lekarskie prawo karne*, Kraków 2000, p. 264-265.

48 K. Michałowska, *Informowanie...*, *op. cit.*, p. 107.

49 M. Świdarska, *Zgoda...*, *op. cit.*, p. 165.

50 M. Boratyńska, P. Konieczniak, *Prawa...*, *op. cit.*, p. 248.

personnel<sup>51</sup>. The problem results from the collision between the right to demand to withhold information disposed by the patient himself or herself on the one hand, and difficulty to assess consent expressed without informing the patient. A legal nature of consent expressed by the patient who waived the right to information results from the prerequisites of non-defectiveness of consent, pursuant to which a declaration of will may not be affected by defects of declarations of will – the fulfilment of the principle of informed consent<sup>52</sup>. However, it should be emphasized that due to statutorily admissible exception in the form of a possibility of not informing patients, on the one hand, they cannot consent to actions (acts) they do not know anything about while, on the other hand, they have the right to not be informed<sup>53</sup>.

The demand to withhold information implies the expression of not-informed consent, called blanket consent, based on which a doctor has been generally authorized to act according to his expertise<sup>54</sup>. The doctrine argues that a patient has to the right to waive information and it is the only case of blanket consent which abates invalidity (unlawfulness) while the consent itself is not defective if it was demanded by the patient. Disclosure of information is not the only condition of validity of consent but patients cannot make a rational decision about treatment not knowing certain facts medical personnel is aware of<sup>55</sup>. Disclaimer of information may be connected with authorizing a person of trust, which is of a substitute nature, when the patient is informed “above his or her head”. A person of trust is authorized due to the so-called prudence, e.g. in case of a medical error; in such situations, a person of trust is a sole recipient of information<sup>56</sup>. According to the above opinion, disclaimer of the right to information does not essentially mean disclaimer of the right to express consent to treatment as it is blanket consent. If effect of the demand to withhold information, our legal system contains only one case when consent for any treatment or consent for generally defined treatment may be applied<sup>57</sup>.

According to the opposite concept, obtaining blanket consent from the patient is legally ineffective. Expressing consent, a patient must receive information while in the situation of withholding information upon the patient’s request, doctor’s actions shall be lawful but the consent itself shall be devoid of legal importance<sup>58</sup>. A similar

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51 A. Górski, *Leczyć, czy nie leczyć?*, Dylematy... *op. cit.*, p. 153.

52 U. Drozdowska, W. Wojtal, *Ustawa...*, *op. cit.*, p. 16.

53 K. Michałowska, *Charakter prawny...*, *op. cit.*, p. 159.

54 *Ibidem*, p. 159.

55 M. Boratyńska, P. Konieczniak, *Prawa...*, *op. cit.*, p. 246.

56 M. Boratyńska, *Autonomia...*, *op. cit.*, p. 68.

57 M. Boratyńska, P. Konieczniak, *Prawa...*, *op. cit.*, p. 248.

58 *Ibidem*, p. 160.

assumption has been adopted by the doctrine; disclaimer of the right to information inhibits a possibility of expressing informed consent<sup>59</sup>.

Absolutely distinct and apparently most acceptable opinion separates the concept of blanket consent from the demand to withhold information. A demand to withhold information entails abatement of one of the elements of the structure of effective consent because through his statement on the refusal to receive information, the patient overturns "the element of information". Blanket consent essentially involves acceptance of any medical interventions expressed by the uninformed patient who has not made a request to not be informed. Blanket consent, however, does not generate legal effects<sup>60</sup>.

## **5. Doctor's conduct and the patient's right to demand to withhold information**

Although a patient has the right to demand to withhold information, since the patient delegates responsibility and the right to make a decision onto a doctor, the doctor plays a significant role in the procedure of the demand to withhold information. For the above reason, it is necessary to discuss the conditions of disclaimer to information a doctor may provide.

The doctrine points out that satisfying the requirement of due diligence, a doctor should repeat the question whether the patient certainly waives the right to information including potential serious consequences, and ask about a possibility of appointing the authorized person to obtain information on the patient's behalf. In effect of the disclaimer, a doctor should inform about necessary requirements and consequences of the treatment, e.g. the need to follow a specific diet. What is more, the information before the treatment should not be identified with recommendations after the treatment concerning the patient's lifestyle; the patient's prior disclaimer does not matter here<sup>61</sup>. It should be emphasized that medical personnel must not put pressure on the patient in order to obtain his or her disclaimer, or suggest the patient may disclaim information for the sake of a free decision made by a doctor<sup>62</sup>. Continuing the thread of abuses committed thereon, we should point out a possibility of abuses related to omitting burdensome and time-consuming procedures of collecting informed consent, particularly in large centres admitting a lot of patients where there is a risk that doctors, with the approval of administrative authorities, will

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59 T. Dukiet- Nagórska, Świadoma zgoda w ustawodawstwie polskim, "Prawo i Medycyna" 2000, No. 2, p. 80.

60 M. Świdowska, Zgoda..., *op. cit.*, p. 164-165.

61 *Ibidem*, p. 165-166.

62 D. Karkowska, Ustawa..., *op. cit.*, p. 234.

persuade patients to disclaim this right<sup>63</sup>. What is more, a doctor may not suggest the patient uses the right to disclaim due to the patient's interest or failure to understand information<sup>64</sup>.

The opinion reported in the doctrine saying that informing a patient about his or her health condition regardless of their wish not to do so, or conveying full information about their health condition even though they have not demanded it infringes the obligation of information<sup>65</sup> appears to be accurate. In consequence, we should consider whether a doctor provides a patient with excessive information when illegitimately informing him or her against their will. According to the definition proposed in the literature, excessive information is the information which may harm the patient. In the light of this definition, information conveyed against the request may constitute excessive information if it harms the patient. Nevertheless, the doctrine underlines that a doctor may not be held responsible for providing excessive information because the statutory structure of the information is defective and implies the provision of excessive information by doctors. What is more, this notion is difficult to define, which somehow excludes responsibility for its provision and entails difficulties in establishing precise limits of responsibility<sup>66</sup>. Consequently, a doctor may not be held responsible for the provision of excessive information.

Nevertheless, we should consider the situation when not respecting the demand to not inform, a doctor faces responsibility for the harm caused by this information. The patient informed against his or her will may, e.g., develop depression due to their health condition and mental state<sup>67</sup>. *Per analogiam*, we can invoke here the example of informing under the circumstances of a therapeutic privilege where, under the judgment of Higher Regional Court in Colonia, the court found the doctor liable for the harm when he straightforwardly told the patient about brain cancer and uncertainty of the future therapy. Receiving this information, the patient was shocked and had a mental breakdown to such an extent that he developed a heart disease and partial muteness. In the court's opinion, despite the doctor's right to inform, revealing the information in such a form violated this right<sup>68</sup>. The above problem is very delicate since the effects of information may appear irreparable<sup>69</sup>, and it is difficult to balance the patient's right to information and not harming him or her<sup>70</sup>.

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63 This phenomenon is already present in the west on a large scale; M. Boratyńska, P. Konieczniak, *Prawa...*, *op. cit.*, p. 247.

64 M. Świdorska, *Zgoda...*, *op. cit.*, p. 166.

65 A. Górski, *Leczyć...*, *op. cit.*, p. 90-91.

66 R. Tyimiński, *Odpowiedzialność lekarza za udzielenie informacji nadmiernej*, "Prawo i Medycyna" 2012, No. 1, p. 57.

67 A. Górski, *Leczyć...*, *op. cit.*, p. 92.

68 M. Nesterowicz, *Prawo medyczne...*, *op. cit.*, p. 190.

69 K. Michałowska, *Zgodna...*, *op. cit.*, p. 160.

70 M. Nesterowicz, *Prawo medyczne...*, *op. cit.*, p. 190.

The last problem concerns doctor's responsibility related to the abatement of unlawfulness of his or her action through the patient's informed consent – explicitly expressed patient's will exempts the doctor from responsibility<sup>71</sup>. Apart from autonomous contents, consent and information also provide security measures against depriving doctor's actions of the features of unlawfulness<sup>72</sup>. The conflict arises between the doctor's obligation to provide information, which restricts unlawfulness, and autonomy of the patient's will expressed in the demand to withhold information. The form of providing information which burdens a doctor serves, on the one hand, the patient's trust in the doctor and emphasizes the patient's autonomy and his or her right of self-determination but, on the other hand, it protects the doctor pursuant to Art. 6 of the Criminal Code<sup>73</sup>. It should be pointed out that the patient has the right to dispose of information and, trusting the doctor, he or she may waive the right to information. On the other hand, accepting this right, the doctor takes over the entire burden of not conveying information himself or herself, and in the face of not-informed consent, he or she makes a decision himself or herself. In order to secure the doctor's interest, the doctrine underlines that due to the effects evoked by the violation of the obligation of information contained in Art. 31 par. 1 of APP, the doctor should be able to prove that the patient demanded to withhold information directly and undoubtedly.

## 6. Conclusions *de lege ferenda*

Doubts discussed herein have been evoked by the quite schematically drafted regulation of the right to demand to withhold information. Due to the above, the following conclusions *de lege ferenda* may be drawn. We should approve of the determination of the scope of disclaimer and statutory prerequisite restricting or excluding the right to waive information. Moreover, we should attempt to define the conditions of the disclaimer and consequences thereof on the legal nature of consent for treatment. However, one of the most important postulates is to eradicate different readings of the provisions of the Act on the Patient's Rights and Patient Ombudsman and the Act on the Profession of a Physician and Dentist by combining them, which will effect in the patient's right to demand to withhold information and concurrently maintain certain authorization of the doctor to provide it, which results from the present reading of the latter Act.

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71 M. Świdarska, *Zgoda...*, *op. cit.*, p. 164.

72 K. Michałowska, *Zgoda...*, *op. cit.*, p. 160.

73 A. Dyszlewska-Tarnowska, (in:) L. Ogiegło (ed.), *Ustawa o zawodach lekarza i lekarza dentystry. Komentarz*, Warszawa 2015, p. 295.

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