Clinical Theory and Opinion

Privacy, Privilege and Confidentiality in Psychotherapy

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Privacy and confidentiality are two of the cornerstones of psychotherapy. All therapists agree that patients have a right to privacy and confidentiality during the therapeutic process. However, what does the therapist do when faced with a subpoena? For example, how much information should be disclosed if the patient is a danger to self or others, or when child or elder abuse is suspected? What information does the managed care company really need in order to approve of and pay for treatment?

I believe that if we start from the point of view that the patient has an *absolute* right to privacy in the therapeutic relationship and that *any* disclosure is a deviation from that right, these questions become less confusing. The courts have routinely held that the right to privacy in the therapeutic relationship is not only essential to the therapeutic process, but is constitutionally protected. In my opinion, any and all disclosures of information revealed in therapy, whether mandated or permitted under the law, must be made with the intention to protect the patient's right to privacy to the fullest extent possible. California Supreme Court Justice Broussard wrote, "The quintessential zone of privacy is the human mind..." and "Our ability to exclude others from our mental process is intrinsic to the human personality" [1]

In order to apply this standard, it is useful to understand the difference between *privilege* and *confidentiality*, and how these two concepts are related to the right to privacy. To truly understand the meaning and impact of the psychotherapist-patient privilege, the legal standard which protects the patient's right to privacy, we must understand the important distinctions between psychotherapist-patient privilege and confidentiality.

Confidentiality is both a legal and ethical requirement. Confidentiality standards require that we protect our patients' privacy by not disclosing identifiable information except where permitted or required by law. Although there are numerous circumstances where we may, or must, reveal information, we should always hold to the standard that we are to protect our patients' confidentiality to the greatest extent possible. A violation of a patient's confidentiality is potentially punishable by professional sanction, criminal prosecution and civil damages for malpractice.

Privilege is the right of individuals to refuse to allow certain information about them disclosed in the legal system. It is a legal doctrine which enforces or protects certain information. Ordinarily, most information available in society cannot be held back from the legal system. There are few privileges, and almost no absolute ones. Almost everybody has to testify when asked, and few can claim the information requested is special, and is allowed to be withheld from courts. The priest-penitent, attorney-client, spousal privilege, and psychotherapist-patient privileges are the only exceptions to the rule that information withheld form the courts interferes with the search for truth.

Parents can be forced to testify against their children, and children against their parents, neighbors against neighbors, employers against employees. Personal journals, insurance, and school records can all be subpoenaed and used in court. Although rife with exceptions, the fact that the psychotherapist-patient privilege is included on the short list of privileged relationships speaks to the importance the courts have given to this right of the patient, and to the importance of the need for privacy in the psychotherapist's office. "The patient...lays bare his entire self, his dreams, his fantasies, his sins, and his shame. It would be too much to expect them to do so if they knew what all they say – and all that the

psychiatrist learns from what they say may be revealed to the whole world from a witness stand."[2]

We must keep in mind that this right belongs to the patient, *not* to the therapist. It is the patients right to hold or waive their privilege (privacy). It is the therapist's *duty* to assert it on patients' behalf. There have been several court cases where therapists refused to turn over records and testify after their patient has requested that they do so. The landmark decision in California (in Re: Lifshutz) involved a case where the therapist refused to testify or turn over his records in a lawsuit filed against his patient. Dr. Lifschutz asserted that turning over the records and testifying would damage other patients' faith in the confidentiality of the therapeutic relationship, and interfere with his own right to practice his profession. [3] Nevertheless, the courts have consistently held that while it is the duty of the therapist to protect the patient's privacy, if the patient is competent he/she can decide when to give up his/her privacy rights.

The patient (or the patient's conservator) is always the "holder" of the privilege, even when the patient is a minor. In practice, licensed psychologists must always "assert" the privilege on behalf of the patient in the face of a request from the legal system for information. We should generally refuse requests for information until we determine that a release of privileged information is being made at the request of the patient, or that the patient has had the opportunity to assert his/her rights by appealing to the court.

Although all fifty states and the Federal Courts now recognize some form of the psychotherapist-patient privilege, as with any rule, there are exceptions. For example, therapists are *mandated* to breach this privilege is they reasonable suspect child or elder abuse, or if their patient is a serious threat to another (Tarasoff). They *may* breach their clients privilege if the client is a danger to self or others, if the therapist is sued for malpractice, if a minor under 16 has been the victim of a crime, or to collect on an outstanding bill. Additionally, if a judge determines that there is no privileged relationship, he or she may order the release of a patient's records if the patient raises his/her mental or emotional condition in a lawsuit, if a deceased client's will is contested, if the court orders the patient examined, or if the patient raises competency or insanity issues. There are numerous other exceptions.

The principles of privilege and confidentiality are entwined, and sorting out the rights of the patient from the responsibility of the therapist can be confusing and complicated. A good example of the complexity of this question, as well as an approach to dealing with it, can be found in the Child Abuse Reporting Act. This act mandates that "a mandated reporter" (all licensed psychologists are mandated reporters) who "has knowledge of or observes a child in his or her professional capacity...whom he or she knows or reasonably suspects has been the victim of child abuse, to report." The legislature's intent is to prevent child abuse, a goal the legislature holds as being of greater societal importance in this instance than the psychotherapist-patient privilege. So, how should the reporting requirement be approached by a therapist who is attempting to stay within the laws about confidentiality, privilege and the patient's right to privacy?

The judiciary has been remarkably consistent on this point. Even when we make a mandated report, we are only required to provide the information required by the law. Justice Tobriner wrote in the Tarasoff decision, "The therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary...and even then that he do so discreetly, and in a fashion that would preserve the privacy of the patient to the fullest extent compatible with the prevention of the threatened danger."[4] The legal and ethical standards are clear. The patient's right to privacy is to be respected even while it is being breached.

The Child Abuse Reporting Act specifies that a report of child abuse "shall include the name of the person making the report, the name of the child, the

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present location of the child, the nature and extent of the injury, and any other information, including information that led that person to suspect child abuse, requested by the child protective agency." The legislature has provided almost complete immunity for the therapist who reports. Except in the most egregious cases, therapists who report child abuse cannot be sued for what they say to a child protective services worker. Once the door has been opened by the mandate to report, it is safe for the therapist to tell the CPS worker anything. But is it in keeping with the spirit of the privilege, and the right to privacy enshrined in the law?

I would argue that if we hold to the principles espoused by Justice Tobriner above, then our duty is to disclose only the information that is specifically required by law, and necessary to assist the child protective agency worker in investigating and preventing child abuse. If we are asked for detailed information from a therapy session that does not appear relevant, I believe our obligation is to attempt to protect the privacy of the patient by keeping information that is not necessary for the protection of the child and the investigation of the abuse confidential.

Throughout our professional lives we will be faced with a variety of situations in which the law requires or mandates a breach of a patient's privilege, and a violation of the patient's confidentiality. Managed care companies want their treatment reports filled out. If a patient is a danger, we have to decide what to do, who to tell, and how much information to provide. Yet it sometimes seems that when the demand for confidential information comes from someone other than the patient, therapists too often give out more information than necessary. It is as if once the lid is off, anything may be revealed. For example, we fill out the forms sent by the patient's insurance company. We inform the staff of an inpatient unit about the details of a patient's therapy prior to the time they were admitted. But not all this information is necessarily germane to a patient's treatment. Every question on a form may not be relevant. How much does staff really need to know to successfully and safely manage a situation? We must resist the impulse to give too much, and thus lose sight of our duty to protect the privacy rights of the patient.

Most therapists believe in the duty of confidentiality, and the importance of their patients' privacy. Financial pressures, confusion about the law, self-protection, or a sincere desire to do the right thing can muddy the waters. But if we remember that one of our most important duties to our patients is to protect their privacy, then things become clearer. We must cling to the belief that every exception to privilege, mandated report, managed care form, or subpoena is a special case, a deviation from the rule that our patients' privacy is foremost. By carefully reading the law, consultation with peers, experts and attorneys, we can better uphold that fundamental right of our patients, and protect the ideal that the "quintessential zone of privacy is the human mind." Ψ

1. Long Beach City Employees Assn. v. City of Long Beach (1986) 41 Cal. 3d 937, 943- 944

2. Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting Guttmacher and Weihofen, Psychiatry and the Law 272 (1952).

3. *In re* Lifschutz, (1970) 2 Cal.3d 415, 467

4. Tarasoff v. Regents of University of California, (1976)17 Cal. 3d 425, 551 P.2d 334, 131

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