

Confidentiality, Informed Consent and the USA Patriot Act

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An FBI agent presented a psychologist with a subpoena. The agent informed the psychologist that he/she had to turn over all records pertaining to a patient immediately. Failure to do so is punishable “by fine or imprisonment, or both” (18 U.S.C.401).” The psychologist was then informed that it is also illegal to notify the patient who is the subject of the subpoena. The patient was a UC Berkeley foreign exchange student with strident anti-war and anti-American activist views. In her next session, the patient described her constant anxiety. She feared she was becoming paranoid, because she believed the FBI was following her. Shortly after the session ended, the agent returned, and demanded to know what the patient had discussed.¹

The above scenario, while hypothetical, is entirely plausible under existing law. Following the tragic events of September 11th, 2001, Congress passed the USA Patriot Act. The purpose of the legislation was to make it easier for law enforcement to act to prevent future acts of terrorism. Section 215 of the Patriot Act authorizes certain FBI agents to request a subpoena from a special court. These subpoenas, if approved, require access to any requested records, and the subject of the investigation may not be notified. According to a Department of Justice informational webpage, to do so could result in serious penalties.

As Congress was debating the Patriot Act, psychologists were anxiously discussing the impact of HIPAA, and the new requirements for informed consent. There were concerns about the privacy implications for patients, and whether HIPAA adequately preserved the confidentiality of psychotherapy notes. Lost amidst the abundance of articles, workshops and discussions regarding HIPAA, Section 215 of the USA Patriot Act became law.

Although most psychologists are aware that their records can be subpoenaed, professional psychology has well-established procedures for how to respond in such an event (APA, 1996, Fridhandler and Caudill, 2004). Typically, the psychologist is expected to assert the privilege on behalf of the client, and contact the patient to determine if the patient agrees to the disclosure of the record, or has the opportunity to resist the subpoena in court. Under Section 215 of the USA Patriot Act, these options would not be permitted. In fact, none of the options typically available to psychologists is legal. It may be impermissible to tell anyone that the subpoena has been received, even to get consultation (Beeman and Jaffer, 2003). It is not clear whether legal representation to assert the privilege before the court is even an option. Section 215 requires disclosure of the documents. Anything else is apparently punishable by sanctions.

¹ I am indebted to Milton Kalish, LCSW, for bringing this matter to my attention.

The Section 215 of the Patriot Act could potentially effect any psychologist treating any patient. There is a substantial body of work that discusses the impact of third party intrusions into the therapeutic relationship (Langs, 1973, Freud, 1968, Sundelson and Bollas, 1995, Garvey, 2003). I have previously discussed the collapse of the “analytic space” (Ogden, 1989) that occurs when therapists face intrusions from outside of treatment, such as subpoenas, child abuse reporting, or responding to suicidal or dangerous patients (Donner, 2003). Not all such intrusions will lead to the destruction of the treatment. When faced with intrusions into the treatment, psychologists can use the treatment itself as a means of addressing the impact of the intrusion. When a traditional subpoena is served, or a child abuse report is made, psychologists are permitted, if not encouraged, to speak to the patient about what has occurred between them. However, if a psychologist were to receive a subpoena authorized by Section 215 of the USA Patriot Act, the therapist would be gagged, unable to speak to the patient about this impact on the treatment. It is unclear as to whether it would be legal to discuss the issue in supervision.

Were the treatment to continue, the goal and purpose of the treatment would have become perverted. The therapist would have become an informant, not a psychotherapist. It is difficult to imagine that continuation of the treatment would be in the best interest of the patient, and it is easy to see how continuing would be harmful and exploitive. According to the American Psychological Association Ethical Principles Of Psychologists and Code of Conduct, 2002, Principle 3.04, psychologists are expected to “take reasonable steps to avoid harming their clients/patients...and to minimize harm where it is foreseeable and unavoidable” Although psychologists in most states are required to make child abuse reports, they are not required to become an ongoing source of information. In fact, in California, a case against an admitted child molester was overturned because a psychologist had disclosed information to a Sheriff's deputy after making an initial child abuse report (People v Stritzinger, 1983). This case clarified that when making child abuse reports, psychologists are to provide only the amount of information necessary to investigate the alleged abuse, and should not become an ongoing source of information.

It is difficult to imagine how a psychologist could minimize the harm inherent in becoming a secret conduit of information for a law enforcement investigation. Continuing to provide treatment under such circumstances would constitute a substantive conflict of interest. The treatment under such circumstances would appear to be more harmful to the patient than helpful, and psychologists are expected to “refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.” (3.06).

Section 1.02 of the Ethics Code of the American Psychological Association (APA, 2002), attempts to help psychologist in such conflicts by permitting psychologists to obey the law, without fear of violating the Ethics Code. However, the situation described above would place the psychologist in the midst of irreconcilable and untenable ethical dilemmas. While it is hard to imagine that compliance with a subpoena issued under the

authority of Section 215 would result in the psychologist being disciplined by the APA Ethics Committee, to continue the work with the patient would violate the spirit and intent of a wide range of ethical standards. “If psychologists learn of misuse or misrepresentation of their work, they take reasonable steps to correct or minimize the misuse or misrepresentation” (1.01). A psychologist who permitted the therapy to continue would be permitting the treatment to be misused, and would be misrepresenting his/her role to the patient.

It seems likely that the only resolution to the dilemmas posed by the hypothetical example would be for the psychologist to terminate the treatment. The Ethics Code requires that Psychologists terminate therapy when it becomes reasonably clear that the client/patient no longer needs the service, is not likely to benefit, or is being harmed by continued service” (10.10). While terminating the treatment may be the most appropriate step to take, the psychologist would be unable to facilitate alternative treatment as required in 10.10(c), because the psychologist would be unable to explain the reason for terminating the treatment, and would be referring the patient into a treatment knowing that the problem was simply being passed on to the next provider. Thus, the provider would be in the position of continuing with a harmful treatment, or terminating the treatment without providing adequate referrals.

Informed Consent is not a Solution

It may appear that the solution to the problems described above would be to inform the patient in advance of the potential intrusion into the therapy. Although many therapist’s now use standard informed consent documents to describe to patients the various rules, guidelines and limitations of psychotherapy, simply adding a statement about the USA Patriot Act may not be sufficient to address the myriad complications involved in responding to a Patriot Act subpoena. Section 10.01 of the Ethics Code requires that “psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality.” If we believe that termination of the therapy without explanation or referral is the appropriate response to a Patriot Act subpoena, it may also be necessary to state that the psychologist may terminate the treatment without explanation or referral in the event of the receipt of such a subpoena. The conundrum is that this course of action might indicate to the patient that they were the subject of an investigation, and thus may also be illegal.

Adapting our informed consent process to include a discussion of the limitations and risks imposed by Section 215 of the USA Patriot Act may be all that we can do at this point.. Nevertheless, this seems to be another in a long line of intrusions into the therapeutic relationship. Protecting our country and our citizens from terrorist attacks is a laudable goal. However psychologists have a long history of protecting the public from dangerous patients, and have many options available to them, including notification of the police. However Tarasoff type warnings do not require psychologists to become “confidential informants (Bollas and Sundelsen, 1995). The purpose of such disclosures are to protect the public, not provide information for an investigation. The USA Patriot Act offers no such limitations or protections to our patients.

Of great concern is that this section of the Patriot Act passed without input from our professional associations. In 1957, J. Edgar Hoover wrote an editorial in the Journal of the American Medical Association encouraging physicians to report evidence of disloyalty. At that time in American history, many of the leaders in our government believed the United States was locked in a battle with communists, intent on destroying the American way of life. Although the AMA code of ethics was changed to permit physicians to inform on their patients to protect the welfare of the community (Mosher, 2003), the medical community was included in the discussion of the importance of confidentiality, and where privacy should give way to societal concerns. Although this provision has long since given way to an increased emphasis on privacy, at least the medical community was involved. Most psychologists are unaware of the implications of this section of Patriot Act, and have not been involved in debating the legislation or considering how to implement the law into their practices.

As this article was being written, Congress was debating a renewal of the USA Patriot Act. Despite the potential for a substantial impact on the practice of psychologists, organized psychology continues to be silent on the subject. Whether or not such a rule is ultimately in the best interest of our patients or our society, psychologists must be informed so that we may be a part of the debate. We have an obligation under our Ethics Code to do more than to simply inform our patients of the limitation of our ability to protect their privacy. "If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict" (1.02). The first step in acknowledging our commitment to the Ethics Code is to enter the discussion, to stand up for our commitment to the Ethics Code, and to make known our responsibilities to all of our patients as well as to our country.

In *Jaffee v Redmond* (1996), the United States Supreme Court decided to protect the psychotherapist patient privilege in the federal courts. Justice Stevens, in the Majority Opinion, based his opinion on long established principles. He cited numerous precedents, and spoke to the importance of the need for privacy in psychotherapy. "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment."

Justice Stevens also knew something that many psychologists ignore. Confidentiality is more important than informed consent. We must strive to protect the privacy of our patients, not simply inform them that there is no privacy. As Justice Stevens wrote, "(T)he participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

This document is educational in nature and is not intended to replace the advice of an attorney. In addition, although the information in this document was accurate at the time of publication, psychologists using this information should bear in mind that laws and regulations change over time and that the

interpretation of laws and regulations by courts and the Board of Psychology may change from time to time. This information does not reflect the official position of the American Psychological Association or the California Psychological Association.

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