Psychotherapy Notes and Disclosure Threats

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The Jaffee versus Redmond Case

Fortunately, the Court of Appeals for the Seventh Circuit reversed this decision and remanded the case for a new trial. At the new trial (Jaffee vs. Redmond), the court concluded that “reason and experience” compelled recognition of the psychotherapist-patient privilege. “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.” The court concluded that the trial court had erred by refusing to afford protection to the confidential communications between Redmond and Beyer. “Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen’s death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty.” This court decision is a giant victory for the champions of patient confidentiality.

The Status of Privacy Legislation

Some months following this encouraging decision, however, Donna Shalala, Secretary of Health and Human

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Resources, sent recommendations to the Congress for privacy legislation that are far removed from the words of the Court. In her recommendations to Congress made on September 12, 1997, Secretary Shalala expressed great concern about the multiple unauthorized uses of medical information and demonstrated a wish to fight actively to protect patients' records. However, her means of protection is by policing and punishing abuses, rather than through laws restricting access or limiting the amount of information payers can require for treatment authorization. Consequently, there are no constraints on the type or quantity of information that payers can request, no plans for separating out sensitive information, and no restrictions on unauthorized disclosures for law enforcement, intelligence agencies, and research. A law enforcement officer or intelligence agent need only walk into a therapist's office and request the records, and that is sufficient—no subpoenas, no search warrants! And once information is secured, that information can flow unimpeded from place to place "as needed." These proposals are only recommendations to Congress and are not yet law. However, the Portability and Accountability Act (Kennedy- Kassebaum) requires that privacy legislation must be enacted by 1999; if not, the Secretary of Health and Human Resources will issue regulations.

The Therapist's Role in Protecting Confidentiality

What sort of protection for the private and confidential information entrusted to them by patients can psychotherapists anticipate? What do you tell patients in terms of what they can expect? What do you write down and how can you protect it? Many would say write down as little as possible. However, in many instances, it is important that significant information be available to others in case you must be absent. Many situations also require documentation in order to receive payment.

This is one of the risks that patients need to know about when you are obtaining an "informed consent" from them. Despite the fact that patients may then hesitate to request treatment or feel less free as they talk, they need to know if you are required to provide certain information to a third party payer in order to receive payment.

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Given the real potential for indiscretions and inappropriate access, you must give great care and considerable thought to what you decide to write in a patient's medical chart. Charting should clearly describe the patient's initial problems, a reasoned plan for treatment and information that a colleague would need to have on hand in order to provide quality care should the patient need to be seen in an emergency when you are not available. Medications, laboratory tests, and diagnostic procedures are, of course, significant items to have available both for others and in order to chart the patient's progress. However, patients' fantasies, hopes, dreams, and innermost secret desires and fears should remain private (i.e., they do not belong in what is, in truth, a potentially public record). Progress notes should be succinct and impersonal (e.g., "the patient discussed interpersonal problems and issues concerning assertiveness were clarified.").

But what about "working notes," the detailed notes that one keeps of psychotherapy sessions? These are notes that we take to have available for supervision or to use at a later date for reflection about the patient, his or her treatment and progress, alternative approaches, etc. Such working notes are naturally filled with intimate details of the patient's inner world—yet there are circumstances when these notes can be subpoenaed! One effort at patient protection is to destroy these notes when you are no longer using them for their original purpose. Mindfulness of their patients' vulnerability should lead clinicians to find ways to be discreet and protective of patient information. Information can be recorded in many ways that are personally useful without including specific details that could, if exposed, prove damaging.

Conclusion

The decision in the Jaffee vs. Redmond case was a great victory in the fight to preserve confidentiality. However, we all have an important fight ahead of us to convince our legislators to make laws that are consonant with it. Until then, we should write our records with the possibility in mind that they may become as available to the public as the books on the shelf of the public library.

References

2. Confidentiality of Individually-Identifiable Health Information, Recommendations of the Secretary of Health and Human Services, pursuant to section 264 of the Health Insurance Portability and Accountability Act of 1996, Submitted to: The Committee on Labor and Human Resources and the Committee on Finance of the Senate; The Committee on Commerce and the Committee on Ways and Means of the House of Representatives, September 11, 1997.