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CONFIDENTIALITY

The concept of confidentiality is essential for all medical treatment. This is stated clearly in both the Hippocratic Oath and in the American Medical Association's (AMA's) *Principles of Medical Ethics.* Confidentiality is perhaps even more vital to the practice of psychiatry, as is evidenced by reading the APA's *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (see Section 4). Patients cannot be expected to reveal their innermost selves, their fears and passions and obsessions, unless they are certain that what they say will be held in the strictest confidence.

Within the context of the physician-patient relationship, you have a duty not to disclose information you've learned from the patient. A breach of confidentiality not only has the potential to harm your patient, it can put you at risk for a malpractice suit as well.

Most states have statutes that define the privileged nature of the physician-patient relationship, and many have enacted other statutes that more specifically confer privilege on the psychotherapist-patient relationship. This concept of privilege generally prevents a physician or therapist from disclosing any confidential patient information learned in the course of treatment.

Under HIPAA (see Chapter 41A), psychotherapy notes, as differentiated from the patient's medical record, are held to a higher level of confidentiality and are not to be disclosed to insurers for claims audits and don't have to be released to the patient like the medical record does. Psychotherapy notes are treated differently from other mental health information contained in the medical record because they contain particularly sensitive information and also because they are the personal notes of the psychiatrist that are not required or useful for treatment, payment, or health care operations purposes, other than by the mental health professional who created the notes.

In order to be given this higher level of protection, the psychotherapy notes need to be maintained separate from the medical record. Note, it is important to check with your state's rules on privacy to determine if there is a higher level of protection than is provided under HIPAA. In addition, HIPAA now requires the Notice of Privacy Practices (NPP) distributed by psychiatrists (and other mental health providers) who maintain psychotherapy notes to contain a statement specifying that most uses and disclosures of psychotherapy notes will be made only with patient permission. Psychiatrists who do not keep psychotherapy notes are not required to include this statement regarding uses and disclosures of psychotherapy notes in their NPPs. In addition, the NPPS must contain a

statement informing the patient that they may revoke a prior authorization. It is important that all staff working in a psychiatric office understand the importance of strict confidentiality and that efforts are made to safeguard the privacy of patient records. A physician will be held responsible for any breach of confidentiality committed by a member of his or her staff.

EXCEPTIONS TO STRICT CONFIDENTIALITY

On occasion a psychiatrist will have reason to breach the concept of strict confidentiality and disclose information a patient has relayed during the course of therapy. This can only be done with the express authorization of the patient or if the psychiatrist is legally compelled to do so, as when a patient is considered to be a danger to himself or others.

Consent

If a patient has given informed consent for information to be released, the psychiatrist is permitted to reveal information learned in the course of therapy. It should be noted that to be *informed* the consent must be voluntary and intentional (see Chapter 21).

Overriding Interest of the Public

Depending upon in which jurisdiction you practice, you may have a duty to warn (see Chapter 20) if the patient poses a threat to a third party. However, whether there is a duty, is state specific. If there is a duty to warn, a psychiatrist may be held liable for any harm that occurs if a warning has not been given. Many states also have specific waivers allowing psychiatrists to reveal confidential information in the context of civil commitment proceedings (see Chapter 22). Under HIPAA, a notable exception to the protection from disclosure exists for disclosures required by other laws, such as for mandatory reporting of abuse, and mandatory "duty to warn" situations regarding threats of harm made by the patient (state laws vary as to whether such a warning is mandatory or permissible or if there is a duty).

Patient's Interests

Disclosures can sometimes be justified on the grounds that they are necessary to protect the patient. For instance, it may be indicated for a psychiatrist to warn a patient's family or roommate when the patient is very depressed and has voiced suicidal thoughts. Should you have questions on whether disclosure may be justified, contact your attorney or risk management professional.

Reporting Statutes

Almost all states have statutes requiring that certain conditions—infectious diseases, incidents of child abuse, diseases characterized by loss of consciousness, et al—be reported to government authorities. These statutes differ tremendously from state to state as to what conditions must be reported and what events trigger the duty to report. You'll need to familiarize yourself with your state laws.

MENTAL HEALTH CONFIDENTIALITY STATUTES

In recent years an increasing number of state and federal laws have been enacted that address confidentiality concerns. Some of these deal with disclosing HIV/AIDS information and may also address the release of substance abuse information. A number of states have enacted mental health confidentiality statutes that attempt to deal comprehensively with the issue of confidentiality and identify what a psychiatrist can and cannot safely disclose. Some of these laws establish a general rule of confidentiality and then enumerate exceptions to that rule. If you are working in a jurisdiction that has regulations in these areas, you should become familiar with the relevant provisions. A call to the state agency that oversees mental health licensure should let you know if your state has a specific mental health confidentiality statute.

CONFIDENTIALITY AND MINOR PATIENTS

When your patients are minors rather than adults, the rules of confidentiality become much less clear. Parents may argue that since they are financially responsible for the care their child receives, they have the right to make all decisions involved in that care. However, while it is clear that a psychiatrist has a duty to let parents know if there is a risk that a child will harm himself or others, it is not necessarily the case that parents should be informed of everything a child says in therapy.

States may vary on the age of consent for mental health treatment. As such, it is important to know when you need to obtain consent from parents and when the information can be discussed with them. It is important to be aware of your specific state regulation on the age of consent for mental health/substance abuse treatment. You must always be careful not to disclose information to parents that would exacerbate problems in the parent-child relationship or undermines your doctor-patient relationship.

When dealing with adolescents, the rules relating to confidentiality become even more complex. It is safe to operate under the premise that minors possess the

independent right to privacy when they are legally able to consent independently to medical care (see Chapter 21). Again, it is important to know what the age of consent is within your state.

If you suspect child abuse, most states require a report to the responsible government agency and provide the physician with immunity for breaching confidentiality when making a report.

PRACTICAL POINTERS FOR AVOIDING CONFIDENTIALTY PROBLEMS

- Follow the general principle to honor a patient's confidences unless a legal exception applies.
- Instruct staff not to release any patient information without your advance approval.
- Have a written "Authorization for Release of Medical/Mental Health Information" form that can be tailored to specific situations. (See Appendix N).
- If you have any doubt about the validity of consent-to-release information, call the patient to discuss the information and verify consent.
- Be aware of the possibility for the breach of confidentiality when communicating by cell phone, e-mail, fax, or voice mail. Be sure nothing is communicated that is of a confidential nature unless you can be certain of who will be reading or hearing it.
- When leaving messages for a patient with family or on a machine, leave only your name and phone number and the times you can be reached. Be sure to instruct staff to do this as well.
- When doing an evaluation (e.g., for worker's compensation), clarify the limits of confidentiality at the outset, explaining who will and will not receive a copy of the evaluation.
- Obtain legal advice before releasing any information after a patient's death.
- Inform group therapy participants about the parameters of confidentiality.
- If you're subpoenaed or receive a court order to testify or release records, seek advice from an attorney.
- Do not automatically assume that an insurer has the patient's consent to have information released to them. Try to discuss such an authorization with the patient at the beginning of treatment. Always get written consent.
- If you need to use a collection agency or small claims court to collect on an unpaid bill, be sure to send the patient appropriate advance notice in writing and reveal the least amount of information necessary.