Famous and Notorious Cases, Publication and Privacy

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The right to privacy and the related principle of confidentiality generally govern the behavior of psychiatrists and other physicians in presenting medical cases in the professional literature and elsewhere. The ethical obligation by physicians to maintain privacy has been embodied in the Hippocratic Oath and its modern-day successors. The right to privacy is supported by numerous other traditions; breach of privacy may result in disciplinary action by state licensing boards or in civil liability; most states provide for privileged protections to communications between physicians and patients, psychiatrists and patients, or psychotherapists and patients.

Despite these practices, privacy is not absolute. Reporting of contagious diseases, gunshot wounds, child abuse, and venereal disease may take precedence over the right to privacy. Interventions to hospitalize a person for psychiatric reasons and to prevent harm also have become exceptions to the general rule.

In this article, attention will be directed toward the issues dealing with the publication of material derived from psychiatric reviews in situations where famous or notorious persons have been examined.

Privacy and Treatment

Generally, a patient in treatment has the strongest claim to privacy. No physician may publish material about patients that will expose communications made in a doctor-patient treatment relationship. When physicians write articles about patients, personal material and identifying data are disguised or omitted. For example, a surgeon cannot prepare an article using photographs of a surgical procedure if the patient can be identified unless there is specific authorization to do so. In one widely publicized case,[1] a psychiatrist's book about the treatment of a patient was found to violate the right to privacy because the book contained material that could lead to the exposure of the identity of the party described.

The current *Principles of Medical Ethics of the American Medical Association* state that a physician shall safeguard patient confidences within the constraints of the law.

That code with annotated references has been adopted by the American Psychiatric Association.[2] Nonetheless, there are many areas where ambiguity remains. For example, when the words "confidences within the constraints of the law" are used, one may question whether this refers to a professional concept of confidence or a legal concept. If it is the latter, the ethical, professional protection required may be governed by legal princi-

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ples that may not comport with traditional professional concepts.

Wigmore has stated that to justify privilege (legal protection to a confidential relationship):

(1) the communications must originate in a confidence that it will not be disclosed.

(2) confidentiality must be essential to the satisfactory maintenance of the relationship.

(3) the relation must be one which the community believes should be fostered.

(4) the injury to the relationship from disclosure of the communication must be greater than the benefit gained for the correct disposition of the litigation.

Thus, an important point legally and perhaps generally is that the communications must originate in a confidential relationship. If there is no confidential relationship in the first place, then whether privacy should be respected in all ways or just in some becomes important.

The *APA Annotations* (Section 4, paragraph 3) state that clinical and other materials used in teaching and writing must be adequately disguised to preserve the anonymity of the individuals involved. Though this usually can be readily accomplished, it cannot be done under certain circumstances. At times the facts of a situation cannot be altered without significantly altering the meaning and interpretation of a case. One could not write about presidential assassins and would-be assassins without the identities of at least some of the participants being clear. Similarly, those who deal with mass or bizarre murderers may have difficulty in this regard. More importantly (and this is a matter to be discussed below), one must confront the issue of the doctor-examinee relationship in terms of the expectations or reality of protected communications.

Famous Patients

The conflicting principles involving people of eminence are discussed in Robitscher's article, "Public Life and Private Information."[3] This article was published in the *Journal of the American Medical Association*; the mere fact of publication indicates that controversy exists and that the ethics may not be clear. Inasmuch as "public personages often manipulate the content of information released about their health during their lifetime," Robitscher feels that physicians should have the right after their deaths to "reveal information clarifying and supplementing lifetime reports without violating the general rule of confidentiality."

A number of prominent medical cases were discussed. The extent of President John Kennedy's purported Addison's Disease is still not clear; the autopsy to this day has remained partially suppressed. Does the public have a right to know this? Did the public have the right to know of the major disability of President Wilson or the minor disability of President Eisenhower? The Constitution now has a system for replacement by the

Vice-President in situations of disability by the President; this also implies a need for communication of information.

Lord Moran, the physician of Winston Churchill, wrote about his famous patient after his death. *Lancet* felt that confidentiality owed to the living is doubly owed to the dead, and the British Medical Association strongly asserted its view that the death of the patient did not terminate the obligation to secrecy. The role of a physician-friend-counselor is a difficult one. How is history divided into watertight compartments — one forever closed to scrutiny, one acceptable for free discussion?

Keen discussed the secret operations on President Cleveland many years after the event; McIntyre wrote a book, *White House Physician*, concerning his involvements with and observations of Franklin Roosevelt. Lawyers have not been hesitant to write books about their eminent cases even though "confidentiality" is a consideration in legal practice as it is in medical practice.

Robitscher concluded his article by asserting there are justifiable exceptions to the rule that the patient's health is a private rather than a public matter. He believed that while physicians should respect the right to privacy of the eminent during their lifetimes, after death the opportunity should exist to "set the record straight." Thus there is a basis for the view that accurate history from which all can learn has its own utility.

The Eagleton matter in which the prior psychiatric history of a Vice-Presidential candidate was leaked reflects the thought that the public has a right to know. Similarly, a number of years ago, a southern state was confronted with the commitment of an allegedly psychotic governor.

Weighing the professional obligation to privacy and the need for public awareness, one cannot simply say that all treatment reactions should be forever private. Robitscher's suggestion that there be relaxed rules after death regarding the medical history of public personages deserves serious consideration.

Notorious Legal Cases and the Psychiatric Evaluation

The rules that apply to psychotherapeutic or other treatment situations need not apply to evaluative or consultative ones that do not involve a doctor-patient relationship.

This difference is implied in Section 2, paragraph 2 (*APA Annotations*) in which it is stated, "The psychiatrist should diligently guard against exploiting information furnished by the patient and should not use the unique position of power afforded him/her by the psychotherapeutic situation to influence the patient in any way not directly relevant to the treatment goals."

Psychiatrists do perform many functions other than the traditional therapeutic ones. People are screened for jobs, insurance, capacity to retain jobs, and for numerous legal purposes at the request of third parties. Such examinations do not meet the criteria of a doctor-patient relationship or

confidentiality when transmittal of information to such third parties is inherent in the procedure.

Section 4, paragraph 6 states explicitly, "Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination."

Thus, it is clear that the current code of ethics does recognize numerous circumstances where ethically the right to privacy does not apply. In particular, these would not seem to apply to court-ordered and attorney-ordered evaluations unless by local rules or specific orders there would be such protection.

Other ethical principles, however, may be applicable to such a situation. Professional work performed within the context of an attorney-requested evaluation usually fits within the attorney-client privilege in terms of preparation of the case and the work-product rule.[4] The applicability of this rule in governing the physician in publication after completion of litigation is unclear. When trials are held, the contents of the proceedings are public record and not entitled to any privacy protection.

Because of the lack of clarity regarding such cases, I offer some opinions about what I think should be appropriate, pending more definitive policy as mandated either by law or by appropriate bodies representing the medical profession.

Guidelines

There may be a prior agreement between an attorney and a psychiatrist concerning the use of evaluative material for publication purposes; if there is such an agreement as part of the contract or otherwise, then the parties should be bound by such agreement. If there is no contract, no policy within the jurisdiction, and no clear-cut professional stance, then I suggest the following guidelines.

An evaluation for litigation purposes should be kept confidential during the pendency of the litigation. Once the trial has been held and the psychiatrist has testified and/or submitted reports, the material has become a matter of public record, and any rules regarding privacy should no longer apply. If the lawyer has employed a psychiatrist and does not use the psychiatrist as a witness or publicly acknowledged source (use of the report), then the psychiatrist should not breach that obligation to the lawyer by any subsequent publication of those reports without permission of the attorney. Even this may have deleterious public consequences in that certain materials may be suppressed. For example, I was involved in an important medicolegal matter; my reports were not deemed useful by the attorney; he subsequently obtained other, more favorable evaluations that were used in the obtaining of large settlements. The case has long since been decided; discussion of the material would, in my mind, be of great interest to the professional audience (which has been exposed to just one point of view in

the literature). I have never published this material nor do I intend to because I respect the right of the attorney to his privacy in our relationship of consultant and consultee.

Where the case has passed through public channels and the work product has been used in part or in full, the psychiatrist should feel free to write about the case or cases. Where the case has been settled without a public record, then the psychiatrist should not write about the case without permission unless this can be done without specific identification of the parties.

Neither the attorney nor the examinee should be permitted to exercise a veto power. This would lessen the tendency of the psychiatrist to present a point of view favorable to either of these parties. The psychiatrist would also be free of the accusation of having coerced the parties into agreement if no agreement is required. On occasion, the preparation of a literary work, particularly for the nonprofessional market, may have economic potential for the writer. Nonetheless, in the free market of ideas, this is not a sufficient objection. Numerous others have not been reticent in analyzing public matters and nonprivacy situations, and psychiatrists should similarly feel free to enter the public arena as long as the above principles have been met. It is to be expected that individual psychiatrists will be criticized for sensationalism, bad taste, opportunism, or worse, but there is no reason why they, like others, should not be free to express their views. Carefully detailed descriptions and analyses can be productive and educational and can enhance the understanding of the individual and the process. Recent events demonstrate once again that courtroom presentations may meet the needs of legal procedure, but they are not adequate for scholarly review that ultimately contributes to a more rational and pragmatic public policy in medicolegal matters.

An open policy may be embarrassing and demeaning to the profession; the concept of free speech, however, always did carry some risk for somebody or some group. Where such expression becomes offensive or not within the realm of acceptable professional behavior for other reasons, then other criteria may be applied.

Merits of the Conservative Approach and Contrasting Viewpoints

The American Psychiatric Association devotes in its ethical code more space to confidentiality than to any other issue. Many psychiatrists believe the obligation to privacy is absolute; others feel that publication can ultimately only demean the profession by the behavior of a few and that it is not in the interests of the profession to allow the use of patient-derived information. They would act on the side of caution and the traditional professional role in "not going public." This stance, however, has in other areas been recognized as unduly restrictive. More and more, professional persons have recognized the need to be spokespersons, either as representatives of a group or as individuals, in bringing professional knowledge to public atten-

tion, particularly where issues of public policy have been involved. The courts have restricted the authority of professional groups from constraining public exposure by their members. For example, advertising is now permitted, and professional groups are limited in their power to restrain members from such activities. While often not exemplary, such behaviors have not been particularly catastrophic to professional practice.

The safeguarding of patient confidences was the issue in a complaint brought before the Ethics Committee of the American Psychiatric Association, as reported in the *Psychiatric News* of April 16, 1982.[5] The case was one in which a psychiatrist appeared on a television show and discussed a widely reported case in which the psychiatrist had acted as a court-appointed consultant for a commitment hearing. Excerpts of his testimony were read on the television show, and the psychiatrist elaborated in the program about that information. The psychiatrist was accused of violating the ethical code of the association. In particular, the psychiatrist was charged with violating the code in these regards:

> Section 4, paragraph 5. Ethically the psychiatrist should disclose only that information relevant to a given situation.
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> Section 4, paragraph 11. It is ethical to present a patient or former patient to a public gathering or to the news media only if that patient is fully informed of enduring loss of confidentiality, is competent, and consents in writing without coercion.

The psychiatrist asserted that his action was necessary to present a balanced view of the proceeding and testimony. The district branch criticized the psychiatrist for his voluntary action (as opposed to the testimony that was court directed), for his use of information not in the court record, and for giving confidential information outside the court. The psychiatrist was found to have engaged in unethical behavior and was admonished by the American Psychiatric Association.

The details of the above case are unclear from the report. One might wonder if there were indeed a confidential relationship or whether there was a doctor-patient relationship. It does bring up the matter of ambiguity. When one is seen for treatment or for evaluative purposes at the request of the individual, there clearly is a doctor-patient relationship. When one examines a person to apply professional knowledge in an evaluative determination, one is acting in a professional capacity, and ordinarily the words *doctor* and *patient* are used. However, one must consider the fact that a relationship may be a doctor-patient one for some purposes but not for others. Perhaps the issue of whether the relationship is a confidential one in the first place should be the guideline for judging that relationship for the purposes of publication or other forms of public communication.

Compounding the matter is the fact that, under certain circumstances, the psychiatrist may have multiple roles so that the fine points of differentiation may be impossible. This is particularly applicable in public medicine. In certain circumstances, such as in the military or in public psychiatric hospitals, and especially in forensic psychiatric settings to which a person has

been sent involuntarily, there may be institutional or legal restrictions on confidentiality. Second, often evaluation is not separable from a treatment function, in that the same staff persons are required to perform in both roles. Where there has been a treatment aspect, then the psychiatrist should be precluded from publication without meeting the other requirements noted in the ethical code.

An advantage of absolute adherence to the rule of privacy is that it obviates the necessity to make such decisions, and therefore it is an easier and more pure guideline. One cannot easily be criticized for conformance to such an ethical stance.

On the other hand, the reality is that numerous situations clearly reflect cases in which there is no professional relationship justifying total privacy, that the types of matters relevant to the purposes of this discussion are usually blatantly public matters, and that the public should have some right to accurate and appropriate information in public and notorious cases.

Conclusion

The issues dealing with publication of information by psychiatrists, in professional and nonprofessional media, in public and notorious cases have been presented. Clearly, much confusion exists, and the guidelines for individuals, both legally and professionally, are murky.

Since policy is unclear psychiatrists must be concerned about allegations of possible unethical behavior. The delicate nature of these issues is such that organizational review by the appropriate professional bodies of publication policies in a more detailed and comprehensive fashion would be advisable and timely. □

References

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