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ETHICAL OBLIGATIONS FOR THE PSYCHIATRIST: CONFIDENTIALITY, PRIVILEGE, AND PRIVACY IN PSYCHIATRIC TREATMENT

*Robert Sadoff**

I. INTRODUCTION

In the case at hand, Ben Jones confessed to his psychiatrist, Dr. Jennifer Palmer, that he had been the one who actually killed the police officer during an aborted bank robbery. Jones was aware that Frank Smith had been falsely accused, tried, and convicted of the offense for which Mr. Jones was responsible. He was also aware that Frank Smith was scheduled to die in three days by execution. He told his psychiatrist that he was responsible for the killing and did not believe that Frank Smith should die for this crime. He also revealed that he had consulted his attorney and his minister prior to coming to this regularly scheduled session that he had had with Dr. Palmer since his release from prison. Mr. Jones was currently facing trial on drug offenses and had a long history of various drug offenses and robberies to obtain money for his drug addiction. He was looking for some "deal" in order to avoid a lengthy sentence under the new guidelines.

What about the ethical duty of the psychiatrist in this complex situation? First, the psychiatrist has an ethical duty of confidentiality—for example, not to disclose the information learned in the course of treating a patient—unless mandated by law or in order to protect the patient or others in the community. Although section 9 of the *Principles of Medical Ethics* has been repealed, its text illustrates the strong concept of confidentiality to which psychiatrists are still held. Specifically, section 9, as applied to psychiatrists, stated the following:

A physician may not reveal the confidences entrusted to him
in the course of medical attendance, or the deficiencies he

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may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.¹

Thus, without the patient's expressed permission, the psychiatrist may not unilaterally disclose information obtained in the course of psychiatric treatment.

Second, the patient has a privilege in most states with respect to the psychotherapist-patient relationship or the physician-patient relationship.² However, very few states have a specific psychotherapist-patient privilege which prohibits the psychiatrist from testifying against his patient without the patient's permission or without the patient waiving this privilege.³

Third, the patient has a right to the privacy of the patient's medical records in the event Dr. Palmer took notes and wrote information given to her in the course of treating Mr. Jones. That is, her records on her patient may not be disclosed except under court order.

In looking at these three areas that regulate psychiatric practice, we may analyze each as regarding aspects of confidentiality, privilege, and privacy.

A. Confidentiality

Confidentiality is an ethical duty of the psychiatrist, unless it is breached whereby it becomes a legal issue. That is, if a psychiatrist breaches his or her duty of confidentiality to the patient, and the patient is damaged as a result of that inappropriate disclosure, the patient may sue the psychiatrist for malpractice in deviating from the standard of care. Most psychiatrists hold this duty to be relatively sacred—not to be violated under most conditions. However, the statement of ethics for physicians allows an escape from absolute secrecy by requiring confidentiality, “unless . . . required . . . by law or [where] necessary in order to protect the welfare of the individual or of the community.”⁴ What this means for psychiatrists is that when

1. PRINCIPLES OF MEDICAL ETHICS § 9 (Am. Med. Ass'n 1957) (repealed 1980).

2. Loral C. Alexander, *Should Alabama Adopt a Physician-Patient Privilege?*, 45 ALA. L. REV. 261, 265 (1993).

3. SCOTT N. STONE & ROBERT K. TAYLOR, 2 TESTIMONIAL PRIVILEGES § 7.09 (2d ed. 1995).

4. PRINCIPLES OF MEDICAL ETHICS, *supra* note 1, § 9.

the court mandates disclosure through court order, the psychiatrist may have little or no choice but to disclose in order to avoid a contempt of court citation. The other part of the exception is to "protect the welfare of the individual or of the community."⁵ Certainly, in cases of suicidal threat, behavior, or potential, the psychiatrist has a duty to save the life of the patient by disclosure in order to effectively protect the patient through hospitalization or other means.

For the psychiatrist to protect the welfare of the community, the psychiatrist must disclose when identifiable third parties are threatened by the patient in the course of therapy. These are the so-called "*Tarasoff* Cases" that originated in California in the mid-1970s and spread across the country in various forms,⁶ deviating from the original *Tarasoff* case in which a specific threat was made in the course of therapy against an identifiable third party.⁷ In *Tarasoff v. Regents of the University of California*, the California Supreme Court stated clearly the duty of the psychiatrist to protect that third party from the violence of the patient. However, other courts have modified *Tarasoff* to include violence to third parties that was never disclosed in the course of therapy or when general threats are made in therapy and no specific third party is identified. Most recently, in *Schuster v. Altenberg*,⁸ the Supreme Court of Wisconsin stated that "[o]nce negligence is established, the defendant is liable for unforeseeable consequences as well as . . . to unforeseeable plaintiffs."⁹ That ruling appears to put an undue burden on the practicing psychiatrist who may not be aware of the potential violence of his or her patient.

Nevertheless, courts have mandated that psychiatrists "protect" third parties who are threatened by patients in the course of therapy. The ethical duty of the psychiatrist is to protect the welfare of the community. Does Frank Smith, sentenced to die in three days, represent "the community" that Dr. Palmer needs to protect? Can

5. *Id.*

6. *See, e.g.,* *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693 (Ga. 1982); *Bardoni v. Kim*, 390 N.W.2d 218 (Mich. Ct. App. 1986); *McIntosh v. Milano*, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979); *Peck v. Counseling Serv.*, 499 A.2d 422 (Vt. 1985). "A *Tarasoff*-type duty has been adopted in 23 states, in addition to California . . ." *Bradley v. Ray*, 904 S.W.2d 302, 307 (Mo. Ct. App. 1995).

7. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

8. 424 N.W.2d 159 (Wis. 1988).

9. *Id.* at 164 (quoting *A.E. Invest. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764, 766 (Wis. 1974)).

Dr. Palmer legally and ethically disclose the information given by Mr. Jones in the course of therapy in order to save Frank Smith's life? Clearly, this would be a breach of confidentiality in the course of treatment. However, is this breach of confidentiality justified by the potential for saving the life of an innocent man?

Some psychiatrists would clearly disclose this information based on a belief that they have a higher duty to protect Frank Smith than to protect the confidentiality of Mr. Jones. They would decide, on higher moral grounds, that they must disclose under these rigorous circumstances.

Other psychiatrists would adhere strictly to the rules of confidentiality and never disclose without the patient's permission. They would not interpret Frank Smith as being part of the community in need of protection and would believe very strongly that they have no duty to disclose this information. In fact, they would believe they have a duty to withhold this information in the interest of their belief in professional confidentiality.

The latter group of psychiatrists, in order to achieve a just end, would undoubtedly attempt to get Mr. Jones to disclose on his own, thereby achieving justice without breaching confidentiality. However, Mr. Jones is not about to disclose on his own, and it is unlikely that he could be persuaded by Dr. Palmer to do so in order to protect Frank Smith. Mr. Jones is looking out for his best interest and obviously feels torn in that he has consulted his attorney, his minister, and his psychiatrist.

B. Privilege

Under the doctrine of privileged communications, it is unclear what Dr. Palmer's duty would be to Mr. Jones with respect to various jurisdictions. Different states have different privilege statutes, some being more stringent than others by prohibiting the psychiatrist from testifying about this information without the patient's consent.¹⁰ Other states have broader privilege statutes, including Pennsylvania, which states that a physician may not testify against a patient without the patient's consent if that testimony "tend[s] to blacken the character of the patient."¹¹ Clearly, Dr. Palmer's testimony would "blacken the character" of Mr. Jones. It is unknown from the data whether the

10. See STONE & TAYLOR, *supra* note 3, § 7.09.

11. 42 PA. CONS. STAT. ANN. § 5929 (1982).

authorities are aware that Dr. Palmer is treating Mr. Jones. It is unclear whether Mr. Jones was released on parole from the last time he was in prison and started therapy in the prison and then was referred to Dr. Palmer for subsequent treatment. In some cases the parole officer is aware of the existence of the therapist and the regularity of therapy as part of the conditions for parole. If the authorities are aware that Dr. Palmer is treating Mr. Jones, they may make some formal request for the records of treatment, which may include the disclosures and confession given by Mr. Jones to Dr. Palmer about his role in the killing of the police officer during the aborted bank robbery.

C. Privacy

Mr. Jones's right to privacy includes the privacy of his medical records. Those records may not be released by Dr. Palmer to anyone without Mr. Jones's consent. However, a court may order Dr. Palmer to release her records to the court if the court believes there is relevant information in the records, but the court may not go "on a fishing expedition" without a sound basis for ordering the records. In *In re Lifschutz*,¹² the California Supreme Court ordered Dr. Lifschutz to send his records to the judge to be reviewed *in camera* after Dr. Lifschutz was held in contempt for refusing to give over his records after a court order and a failure of all appeals.¹³ Dr. Lifschutz believed that these records were inviolable and could not be given to courts even in the face of a court order.¹⁴ He was protecting not only the rights of this particular patient to withhold these records, but the rights of all patients whom he felt had the right to absolute secrecy and privacy when speaking with their psychiatrists. After reviewing the record *in camera*, the judge in Dr. Lifschutz's case decided the records were not relevant or material to the case at hand.¹⁵ Dr. Lifschutz was released from prison and his records were not utilized in the case.

In *In re B*,¹⁶ the Supreme Court of Pennsylvania held that a lower court judge could not obtain the records of Dr. Roth's patient

12. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

13. *Id.* at 439, 467 P.2d at 573, 85 Cal. Rptr. at 845.

14. *Id.* at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.

15. See SAMUEL KNAPP & LEON VAN DE CREEK, PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS 67 (1987).

16. 394 A.2d 419 (Pa. 1978).

without her consent merely because the judge believed the records may be relevant in the case.¹⁷ Even a lower court judge may not go on a fishing expedition without proper cause to seek those records.¹⁸

II. DISCUSSION

What can the psychiatrist do to help her patient and protect the life of Frank Smith, if that is possible? The first thing Dr. Palmer should do upon hearing this "confession" by Mr. Jones is to determine its validity. Is Mr. Jones delusional? Is he fantasizing? Or is he deliberately lying to his psychiatrist? Presumably, Dr. Palmer knows her patient from treating him since his release from prison. She would have ruled out any question of psychosis that would result in a delusional system about Frank Smith and the killing of the police officer. She would also know whether Mr. Jones is prone to fantasy or whether he has a history of malingering. There would appear to be no valid reason for Mr. Jones to deliberately lie about killing a police officer in the course of a robbery. Thus, it would be important for Dr. Palmer initially to ascertain the validity of these statements before she proceeds. She may further validate the truthfulness of the statements through her consultation with Claire Hopewell, Mr. Jones's attorney.

If Dr. Palmer determines that Mr. Jones's confession is valid, it is recommended that Dr. Palmer seek to have Mr. Jones disclose this information to the authorities on his own. If he is unwilling to do so, Dr. Palmer should try to convince him to cooperate to the best of his ability in order to save Frank Smith's life. The psychiatrist, having been told that Mr. Jones consulted his attorney and his minister earlier that day, may request permission from Mr. Jones to consult with the minister and the attorney in order to determine Mr. Jones's legal rights and his best interest in this case. If Mr. Jones agrees, it is recommended that a meeting of the three professionals occur to determine what is the best course of action. Perhaps the three of them together could convince Mr. Jones to disclose the information that would save Frank Smith's life. If that fails, then it seems to me the psychiatrist would be left to her own decision regarding disclosure. Some psychiatrists would strictly adhere to the standard of confidentiality and would never disclose unless mandated by law. Other

17. *Id.* at 426.

18. *Id.*

psychiatrists would rationalize that Frank Smith is part of the general "community" and would disclose, under the duty to protect the welfare of the community, including Frank Smith. A third group of psychiatrists would disclose because they would feel a higher moral duty to do so in order to save Frank Smith's life, irrespective of the issue of confidentiality or "duty to protect."

How else may the psychiatrist help Mr. Jones? In consulting with Mr. Jones's attorney, Claire Hopewell, she may help in the newer concept of "three strikes and you're out" philosophy recently employed by some states.¹⁹ Dr. Palmer may be able to show that many of Mr. Jones's previous crimes were all related to his drug addiction. She may be able to show the seriousness of his mental condition that requires intensive therapy, and thereby mitigate his sentence for his current drug charges. She may also be able to help Mr. Jones in his murder case if he confesses and is tried for the killing of the police officer during the bank robbery. She may be able to show that Mr. Jones was under the influence of drugs at the time of the aborted bank robbery and that the killing was done without full mental capacity. She may be able to help Mr. Jones's lawyer negotiate with the prosecutor a guilty plea in the murder in exchange for a life sentence rather than a full trial, which may lead to the death penalty for Mr. Jones.

III. CONCLUSION

Without the information that Frank Smith is about to be executed for a crime that Mr. Jones had committed, there would be no problem for the psychiatrist. She would not disclose the information because it would violate her duty to her patient. However, the fact that another man's life is in jeopardy poses a moral dilemma for Dr. Palmer. How can she protect the rights of her patient and still protect the welfare and the life of Frank Smith? Which has priority? If she is able to effect, with the cooperation of Mr. Jones's attorney and the prosecutor, a negotiated guilty plea in exchange for a life sentence for Mr. Jones, saving the life of Frank Smith appears to be justified.

Thus, by allowing Dr. Palmer to discuss the case with his attorney, Mr. Jones may be able to effect a satisfactory conclusion to this dilemma and still save the life of Frank Smith.

19. See, e.g., CAL. PENAL CODE § 1170.12 (West Supp. 1996).

In a case of this type, the treating psychiatrist must be aware of the regulations of confidentiality, privilege, and privacy governing the practice of psychiatry. The psychiatrist should also be aware of the issues and parameters of criminal law that may permit helping the patient. In this case the psychiatrist should take a proactive position rather than a passive stance of resignation that nothing can be done because of the rules governing the practice of psychiatry. As noted in the ethics for psychiatrists, exceptions to the confidentiality rule exist that are relevant and appropriate in this case.