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Group for the Advancement of Psychiatry: Confidentiality and Privileged Communication in the Practice of Psychiatry

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CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY. Group for the Advancement of Psychiatry. New York. 1960. Pp. 24. 50 cents.

The physician-patient privilege, a product of 19th century reform, became of major significance only under 20th century socialized medicine. The 19th century doctor was a wholly private practitioner; his sole concern was for the health of his patient, and medical ethics justified keeping confidential the fact that his patient had "galloping consumption," typhoid fever or a loathsome disease.

But with the rise of preventive medicine and community health concepts, with the growth of life and accident insurance, workmen's compensation and the expansion of common carrier liability, the doctor has been shouldered with two disparate sets of duties: the ethical duty to his patient to respect his confidences, and a moral or even legal duty to disclose information important to public health and safety. These frequently conflict, and the doctor faces the dilemma of choosing between them.

Not only has the scope of the privilege been increasingly impinged upon by considerations of public protection, but leading authorities in the law of evidence have rather unanimously taken the view that the privilege serves no useful purpose and should be abolished. General practitioners of medicine also find it of no importance to them.

At the same time, however, the privilege has come to be of great importance in a specialized field of medicine that hardly existed when most of the statutes were written—the practice of psychiatry. Although the automobile accident victim may have little legitimate reason for silencing his doctor, the psychiatric patient may have very compelling reasons. The psychiatrist must insist on very personal data, and must explore the relationship of the patient's act to his basic drives which can be adequately revealed only by his deepest and most secret thoughts and feelings. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he

lays bare his entire self, his dreams, his fantasies, his sins, and his shame."[1] The relationship is closer to that of priest and penitent than to that of the ordinary general practitoner and his patient. Some of the things the psychiatric patient must tell his therapist about, such as marital infidelities and sexual perversion, obviously may lead to litigation, and the patient might hesitate to speak frankly if he knew that his psychiatrist could later be compelled to testify. Whatever objections might be made to the privilege in other kinds of medical practice, confidentiality is a sine qua non for successful psychiatric treatment.

This small pamphlet, prepared by the Group for the Advancement of Psychiatry by its committee on psychiatry and law, under the chairmanship of Dr. Andrew S. Watson of the University of Michigan, undertakes to tell the psychiatrist what he needs to know not only about the legal privilege but also the ethical professional obligation of confidentiality.

The advent of "scientific medicine," as the committee says, plus modern institutionalization and modern emphasis on records, has increased the likelihood that confidentiality may be broken. Most of the situations in which the law today requires exposure come under two headings: matters relating to public health and matters relating to crime. In the area of public health, the law in many states now imposes a positive legal duty on physicians to report cases of certain named communicable diseases and perhaps other maladies and injuries such as cancer, occupational diseases, injuries to workmen compensable under workmen's compensation laws, cerebral palsy, epilepsy, drug addiction and others.

The pamphlet also discusses problems that arise when the psychiatrist is treating the patient in a capacity that ties his allegiance to a party or agency whose interest may be adverse, as when he is acting in the capacity of prison psychiatrist. It also discusses the problem of hospital and office records and developments in the processing of records arising out of the institution of "social service exchanges" which act as clearing houses through which public and private agencies exchange information.

In matters relating to crime, the physician has the same duty as any other citizen to assist in the discovery and apprehension of criminals. The GAP pamphlet hardly touches on the problems that the psychiatrist faces when he discovers to his dismay that his patient has committed a crime or is seriously likely to commit a crime, or when a woman patient informs him that another doctor has performed an illegal abortion upon her. Problems such as these have been the subject of much discussion in England recently, but there has been very little such discussion in this country. A similar question arises when the psychiatrist has a patient who is subject to "blackout" fits due to epilepsy or some other mental disorder, yet insists on driving an automobile. Nor is there any discussion of such questions as whether the psychiatrist should talk when questioned by governmental

[1] GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952).

security agencies or congressional investigating committees about homosexual or other immoral or criminal conduct of patients who may be governmental employees, a subject that the District of Columbia Medical Society had occasion to debate not long ago.

The GAP committee proposes a statute that would put the psychiatrist-patient privilege on the same basis "as provided by law between attorney and client." This would generally make the privilege broader than the physician-patient privilege, which as already said usually contains many exceptions. (In a few states, psychologists have in recent years obtained statutory recognition of a privilege for their professional communications; these are usually specifically made to refer to the attorney-client privilege, with the result that the psychologist privilege is broader than that for communications to physicians, including psychiatrists.)

The device of defining the scope of the privilege by reference to the attorney-client privilege might be satisfactory if the scope of the latter were clear, but it is not. The delimitation of situations in which that privilege does not exist is itself a complicated area of law.[2] The American Bar Association in 1938 recommended a flexible statute, such as that of North Carolina, which contains a proviso allowing a judge to compel disclosure "if in his opinion the same is necessary to the proper administration of justice."[3] While flexibility may be desirable to allow some exceptions, it fails to serve the essential purpose of the privilege: the patient can never be sure that his confidences will be kept inviolate. Professor Slovenko has suggested a wording which would go to the other extreme, of making the communication "absolutely privileged."[4] But absolute rules are usually too rigid. Granting that communications between psychiatrist and patient call for statutory protection, the formulation of a statutory provision deserves more careful collaborative study by the legal and medical professions than it has yet received.

But this little pamphlet would not be the place for such a discussion. Its purpose is to inform the psychiatrist about some of the questions of confidentiality and privilege that he is likely to encounter. And while, as said, it does not cover all these questions, that is perhaps intentional. To discuss them all would perhaps be to commit that all-too-common sin of pedants, of telling people more about a subject than they care to know.

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2 Pollack v. United States, 202 F.2d 281 (5th Cir. 1953) (lawyer acting as business agent or accountant not within the privilege); *In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954) (communication concerning intended "wrongful" acts not privileged); Note, 47 MICH. L. REV. 416 (1949).

3 See Model Code of Evidence, rules 220-223 (1942).

4 Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175, 203 (1960).