MEDICAL/PSYCHIATRIC RECORDS, THE EMR AND THE ETHICAL CHALLENGE OF CONFIDENTIALITY

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(I) CURRENT REALITIES:

1. Managed Care has adopted the EMR as part of the new standard of care and efficiency: Hospitals across the US and large group medical practices are already utilizing EMR. Large groups and managed care are becoming part of the Electronic Data Interchange (EDI)

2. State and federal legislation encouraging/requiring electronic submission of medical service claims within an established timetable is already in the works.

3. DOD has initiated a proposal for a paperless care system through EMR and EDI. Currently: federal and state laws require that patient information be kept confidential with additional requirements for psychiatric records, records of minors and information regarding communicable diseases:

   state statutes and the Federal Privacy Act ensure confidentiality of medical records from government entities

   JCAHO, medicare regulations, PROs all require confidentiality of medical records

4. Malpractice insurers consider proper medical records an essential feature in risk management for medical malpractice in the current climate of escalating malpractice litigation. The Medical Professional Liability Agency, Ltd. (MedPro), an affiliate of Frontier Insurance Company, is offering a 5% reduction in malpractice premiums to internists who have computerized their practice and use EMRs, while the Michigan Physicians Mutual Liability Co. offers a 5% premium reduction to physicians using a specific leading medical software MedicaLogic in their EMR

5. The National Academy of Science's Institute of Medicine recommended the adoption of the EMR as a standard for patient medical records (1991).

   While EMR is a major technological advance with benefits for efficient communication of information for patient care and for continuity of care, the threats to patient privacy and confidentiality are real and cannot be ignored.

(II) ETHICAL PRINCIPLES

1. AMA Code of Medical Ethics (1980 Revision) "Section 4: A physician shall respect the rights of patients, of colleagues and of other health professionals, and shall safeguard patient confidence within the constraints of the law".
2. Opinions of the AMA Council on Ethical and Judicial Affairs: 1994 update, specifically addresses confidentiality. Section 5.05 states in part:

"The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds should be reported as required by applicable statutes or ordinances."

In summary, the AMA's position is that

a) Confidentiality is a fundamental tenet of the physician-patient relationship.

b) That patients have a right to confidentiality.

c) That physicians have a fundamental role in preserving patient privacy

d) EMR, like all other forms of patient records, must remain confidential, accurate and comprehensible, secure and free from unauthorized access.

(III) THE AMERICAN PSYCHIATRIC ASSOCIATION'S RESPONSE

The APA has been at the forefront of ethics and has spearheaded efforts to ensure patient privacy and confidentiality in this new era of EMR. Specifically, the APA provided testimony against The Medical Records Confidentiality Act of 1995 and successfully argued that:

1) "Federal legislation should not undermine the traditional doctor-patient confidential relationship by taking the physician out of the information-disclosure process."
Physicians must remain the guardians of patient confidentiality.

2) "Federal legislation should not permit the disclosure of confidential information that identifies an individual without the individual's consent." Sensitive information in patients' psychiatric records "should not be required" to be transmitted electronically.
3) "Federal legislation should not preempt, supersede or modify state confidentiality, privacy, privilege or medical record disclosure statutes or federal or state common law findings that protect patient medical record information."

While the APA was successful and the Bennett Bill is now being re-written, the fight is far from over. Practicing psychiatrists have a major stake in preserving privacy/confidentiality. There is considerable controversy in our field about the already existing state/federal mandates for exceptions to confidentiality (ie. abuse/Tarasoff statutes). (6) In a recent book, psychiatrists in general and psychoanalysts in particular were taken to task for their collusion/collaboration with societal pressures for reporting on their patients and thus becoming "The New Informants". (7) The 1996 Draft of the Revised Ethics Principles for Psychoanalysts by the American Psychoanalytic Association allows as "ethical" the destruction of medical records by psychoanalysts as well as the option "to keep no records" in an effort to ensure the confidentiality/privacy of their patients.

Such recommendations, no matter how well intentioned, actually are counter productive, putting clinicians at grave legal risk, increased malpractice risk and do not address the problem. The fact remains that with the 1980 AMA revision of the Principles of Medical Ethics, at least physician-psychoanalysts and all psychiatrists are no longer exclusively dedicated to the individual patient but are expected according to section F of the AMA Ethical Principles to "recognize a responsibility to participate in activities contributing to an improved community". This means that psychiatrists and the rest of the mental health field have a duty to both advocate for the treatment needs of patients and their families and to protect both the welfare of their individual patients and of the community. This ethical requirement is consistent with the numerous state/federally mandated exceptions to privacy/confidentiality of individual patients. The practice of psychiatry is full of ethical dilemmas. Psychiatrists are expected to educate their patients through the process of informed consent as to the realities of their problems and the risks for harm that their problems carry, both to themselves and to their support system/community. Our strength as a profession involves our activism as advocates for the treatment needs of our patients based on our capacity to continue to render ethical, scientifically based treatment.

For decades now the profession has debated the issue of psychiatric records. In June 1996, the US Supreme Court recognized the need to preserve the confidentiality of psychotherapeutic records in the Jaffee v. Redmond case (96 D.A.R. 6783). The case created a federal psychotherapist-patient privilege and noted "... effective psychotherapy... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears". Psychotherapists, including psychiatrists, can no longer avoid the need to keep medical records. Currently, existing guidelines included an initial evaluation, a diagnostic impression, treatment plan and progress reports which avoid sensitive, private information such as dreams, free associations, or names of other individuals in the patient's life. However, with review requirements for reimbursement, clinicians have been left with the dual conflict: appeal adverse decisions to ensure treatment by providing more and more information vs. preserving patients' privacy/confidentiality. Todate, ethical clinicians have resolved this dilemma by having their patients read, review and
sign for any release of information to third party reviewers However, the prospect of
electronic transmission makes it impossible for physicians to assure the confidentiality of
any EMR. In view of the reality of lack of confidentiality in EMR and the continuing
stigma associated with any psychiatric treatment, it is best to not transmit psychiatric
records electronically.

(IV) THE CALIFORNIA LEGAL REQUIREMENTS FOR MEDICAL RECORDS

Effective 2/96, California became the first state to mandate medical records by California
physicians and surgeons. SB 668 adds Section 2266 to the California Business and
Professions Code which defines as "unprofessional conduct" "failure by a physician and
surgeon to maintain adequate and accurate records relating to the provision of services to
their patients". The Board of California has interpreted "adequate and accurate records"
to mean: 1) legible records that identify the patient, 2) data to support Dx, 3) Data to
justify Rx, 4) accurate documenting of Rx results, 5) accurate documenting of "advice
and cautionary warnings"

Prior to the passage of SB 668, California already mandated medical records for all
patients who were treated with pharmacotherapy, requiring documentation of medication
dosages and patient response. The new law goes further and actually sets specific
standards for medical records. While these laws make it easier for physicians to advocate
for their patients' medical needs and ensure proper patient care, in the context of managed
care; they are a major challenge for psychotherapists who have to be sensitive to patients'
privacy/confidentiality needs. Often patients in California opt out of psychotherapeutic
treatment under managed care in order to protect their privacy and confidentiality
because of the requirements involved in managed care.

(V) RECOMMENDATIONS

In view of the current managed care climate and the legal requirements, the ethical
dilemmas of psychiatrists have increased greatly. Psychiatrists have to strive to keep
medical records with the clear recognition that their patients may read their own records.
This is so even though most states have laws that specifically authorize that records be
released to another mental health professional, of the patient's choice, if the patient is
considered at risk at the time to obtain their own records. However, the fact is the records
belong to the patient and that the professionals are the custodians of the patient's records
and are ethically and legally bound to preserve patient's privacy and confidentiality in
order to maintain the integrity of the treatment.

The following are minimum recommendations:

a) ensure that the patients are fully informed as to the fact of required record keeping

b) keep records with the full realization that the patients will read them as well as third
party reviewers
c) insist that psychotherapy records are separated from the main medical record and are not electronically transmitted but have specific access safeguards, always requiring that the clinicians obtain specific patient authorization for any release of records

d) continue to advocate for patient privacy/confidentiality regardless of type of practice setting.