



80. Medical confidentiality and medical records privilege regarding psychiatric treatment for victims of violence and sexual assault

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Background

The removal of medical confidentiality in cases of mental health treatment for victims of sexual assault raises complex legal, ethical and treatment issues and poses ethical dilemmas for practitioners.

The professional obligations of physicians address, first and foremost, their basic duty to maintain patients' medical confidentiality in order to foster a relationship of trust, which is the foundation of medical treatment. Another basic obligation requires practitioners to be loyal to their patients and forbids harming them. This is grounded in rules of medical ethics dealing with physician-patient relationships and is also mentioned in the chapter regarding physicians and the judicial system. For example, a position paper written in 2004 stated that "Physicians should not act against those who are under their care."

This principle is clear, accepted and codified in every system in which there are relationships of trust necessary for treatment or representation, where patients are required to expose themselves in order to receive proper treatment. Attorney-client relationships and journalist-source relationships include many protections; how much more so when dealing with life-and-death situations such as in physician-patient relationships, where the physician's ethical duty to protect the patient should be even more apparent.

Treatment of victims of sexual offenses and the criminal proceedings related to these offenses force the victims to relive their difficult experience. Some victims describe the encounter with the assailant as the "first rape" and the feeling of exposure to evidence collection and treatment as a "second rape."

Regarding evidence collection, there are clearly defined rules meant to minimize the harm done to victims. Specially trained pediatricians, gynecologists and physicians involved in forensic medicine are entrusted with these duties. Collecting bodily evidence from victims requires their informed consent and the evidence is kept in order to give them time to file a police complaint or press charges. If no complaint is filed, the samples are saved for three months. The members of the Ethics Board think the samples should be kept for an even longer period.

The collection of evidence includes gathering genetic samples to identify the assailant, taking pictures of body parts hurt in the attack, including private regions, and other methods of evidence collection. All these are carried out very delicately with all the sensitivity required in such cases.

These situations are complex and distressing, but are clearly necessary to investigate



the incident, treat the victim's complaints and prevent the assailant from repeating such offenses.

Nonetheless, the Ethics Board was recently presented with cases where the police and the prosecution demanded that victims agree to a broad waiver of medical confidentiality regarding psychotherapeutic treatment they received or are still receiving. The contention was that the waiver would allow a more in-depth investigation or strengthen the prosecution's case. One such case, also covered in the media, was the Kastiel affair, in which a rape victim was required to waive her confidentiality and expose all the records of her treating psychologist. Following this affair, the Israel Psychological Association published a position paper that clarified their strong opposition to the exposure of treatment materials pertaining to victims of sex crimes and violence.

Psychiatrists have approached the Ethics Board on this issue. As a result, we were horrified to discover that victims who decide to undergo mental treatment at a third stage, sometimes long after the actual assault, may experience a "third rape," exposing their ailing psyche to the police and prosecution, and then occasionally to the defense and the assailant. This course of action is dangerous and harmful. This practice can harm the delicate and complex relationship of mental health patients with their caregiver and may profoundly damage their trust in people in general. After all, these are situations where a person harmed another person. Mental health caregivers work hard to gain the trust of patients, but they may destroy that trust with their own hands when the details of the sensitive conversations during therapy are exposed to the assailant and those who support him.

The Ethics Board held a sensitive and complex discussion focusing on the social order and the distinctly defined roles of people in various positions in society during such a case and in general. One of the issues raised was the right of those accused of violent assault to a presumption of innocence: The accused are entitled to a fair trial and it is their right to defend themselves with an attorney to the best of their abilities. The role of the police and the prosecutor is to investigate criminals and put them on trial with evidence against them. The court's role is to judge according to the laws of the state and pursue the truth. Between all these stand the victims of the offense, who could be hurt during the investigation and legal proceedings and should be defended as much as possible. The physician's role is to treat patients in the best way possible and to stand by their side.

Psychiatrists, members of the Ethics Board, added some important professional information. The medical records detailing the feelings and thoughts of patients are not documents that necessarily contain facts or the "absolute truth" about events. Often, they contain a victim's thoughts, associations with life situations, knowledge, imagination and more. This is the technique of psychotherapy. Therefore, it is doubtful that there is much value in exposing the emotional privacy and the influences of the assault on the victim, while the damage done by the repeated invasion of privacy could harm the victim's quality of life, severely hurt the mental health treatment process and create a



negative incentive for victims to press charges in the future.

The right of patients to privacy is stipulated several times in Israeli law.

The Basic Law: Human Dignity and Liberty (section 7) states that all persons have the right to privacy, and that there should be no violation of the confidentiality of their conversations, writings or records.¹⁰⁰

The Patient's Rights Law (section 19) states that a clinician or any other staff member of a medical facility may not disclose any information concerning a patient that came to their knowledge during their services or in the course of treatment. Regarding disclosure of medical information to a third party, the law states that a clinician or a medical facility is allowed to disclose information to another party under conditions specified by the law, including if the patient has given his consent or if the clinician or the facility is so instructed by law.¹⁰¹

The Privacy Protection Law defines publishing any matter relating to a person's private life, including their medical condition, as an infringement of privacy.

The Privacy Protection Law and the Penal Code even define criminal punishment for violating the right to secrecy. According to the Evidence Ordinance (section 49), a physician is not bound to give evidence in legal proceedings on any matter relating to a person who has availed himself of his services, if such matter reached him in the course of his work as a physician, unless that person has waived the privilege or the court has found that the necessity to disclose the evidence for the purpose of doing justice outweighs the interest in its non-disclosure. The Ordinance further states that where privilege is claimed under this section, the claim should be dealt with in camera. If the court decides to hear the testimony, it may hear it in camera.

In other words, the law deals with maintaining physician-patient confidentiality during legal proceedings and stipulates that confidentiality can be waived by the patient or by the court, after it has examined the matter and determined the appropriate balance between investigating the issue and maintaining medical confidentiality.

Clearly, the right to medical confidentiality is a substantial right in Israeli law, due to its obvious importance to the relationship of trust between a physician and a patient, which is necessary for comprehensive quality medical treatment. Confidentiality becomes doubly important in the context of psychotherapeutic treatment that includes documenting a person's innermost thoughts.

The right to confidentiality belongs to the patient; therefore, he may decide to waive medical confidentiality. Absent patient consent, a judge may obligate the physician to present him with medical records in order to examine them and weigh the importance of the information to the legal proceedings against the damage that may be caused to the

100 See https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

101 See <http://www.patients-rights.org/index.aspx?id=4225>.



patient. In this framework, physicians may explain their reservations and the risk caused to the patient in exposing the medical records.

Thus, the members of the Ethics Board offer the following guidance to psychiatrists in treating patients:

1. Physicians should consider medical confidentiality a primary value during treatment, and even more so during mental health treatment.
2. Generally, patients are entitled to receive medical information regarding their condition, including their medical records.
3. Physicians should speak with patients undergoing mental health treatment and explain the implications of waiving medical confidentiality, including the disclosure of information to third parties.
4. Physicians who feel that exposing medical records could hurt the patient should do all in their power to prevent the exposure and, if possible, explain the consequences to the patient.
5. Physicians should exercise discretion and should not directly provide third parties with medical records containing information that they believe could be harmful to the patient if exposed.
6. In certain situations, physicians should demand the involvement of the court, which can then discuss the request to waive confidentiality in camera. Physicians will then be able to present the judge with the level of risk to the patient.