LEGAL ISSUES

More than Two People in the Room

Legal and ethical issues when working with couples, families and groups

All 50 states and the District of Columbia have laws governing many aspects of health care services such as consent to treatment, confidentiality and access to records. However, these laws focus mainly on situations in which there is one patient[1] in the treatment room.

As a result, situations involving more than one patient – couples, families and group counseling – or involving collateral contacts can at times become challenging to manage. This is especially true when issues such as participants' roles, treatment goals, limits to confidentiality and access to treatment records are not clearly agreed upon at the outset of treatment.

As in many complex areas of practice, familiarity with applicable state law, knowledge of relevant ethical standards and advance planning are all important factors in managing these cases. This article is intended to provide related guidance for psychologists.

Who is a patient and who is a collateral?

Identifying who is the patient (or patients) and making sure that all involved parties are aware of this information at the outset of any treatment intervention is crucial. When there is one adult patient, establishing the patient-therapist relationship is usually straightforward. If you are providing couples or group therapy, however, there will be more than one patient and each will have certain protections and rights regarding the treatment itself and the treatment records, as described in more detail later in this article.

Individuals who may be in the treatment room but are not patients (for example, collateral contacts) will not have the same rights as patients, and therefore should not have the same expectations. An example of a collateral contact would be the husband of a depressed patient attending part or all of a therapy session with his wife to relate his concerns about his wife's symptoms and/or learn how to support her recovery. This would not be a couples therapy session, as only the wife is the patient and the goal of the session is to address *her* mental health condition. Therefore, the therapist's primary duty is to the wife, and the wife would generally control access to the treatment records.

When the patient is a child and a parent participates as a "collateral," the situation is more complex because the parent is usually also the child's legal representative and therefore has additional rights and responsibilities. For information about parents' rights regarding treatment records, please see *Working with Children and Adolescents* (www.apapracticecentral.org/good-practice/secure/winter11-working.pdf).

The Trust offers a useful "Sample Outpatient Services Agreement for Collaterals" (apait.org/apait/download.aspx) that defines collaterals as follows: "A collateral is usually a spouse, family member, or friend, who participates in therapy to assist the identified patient." The document also outlines the role of collaterals and clarifies the attendant rights, risks, benefits and limits to confidentiality.

Please also note that billing and payment arrangements do not determine who is identified as a patient or a patient's legal representative. For example, if you are treating a 20-year-old man who asks that bills be sent directly to his parents, the parents still do not have the right to access treatment records without their son's express consent. Your patient would need to agree in advance to release to his parents any information about the treatment included on your bills (for example, dates of service).

Confidentiality and privilege

The establishment of a psychotherapist-patient relationship determines how to handle issues such as confidentiality,

1. The terms "patient" and "client" may be used interchangeably in this article to refer to recipients of psychological services.

privilege and access to records. The concepts of confidentiality and privilege are closely related and often confused. "Confidentiality" refers to laws and ethical standards that require professionals to protect the privacy of patients' records and other communications. "Psychotherapist-patient privilege" refers to the patient's legal right to keep treatment information from being disclosed as evidence in court proceedings.

State laws, the Health Insurance Portability and Accountability Act (HIPAA) and the American Psychological Assocation (APA) Ethical Principles of Psychologists and Code of Conduct (Ethics Code) all provide confidentiality protections for health care information (with narrow exceptions for situations such as child abuse reporting). However, most of these resources do not provide detailed guidance regarding how to handle confidentiality in situations involving more than one patient or collateral contacts.

Similarly, state laws on psychotherapist-patient privilege may not provide clear guidance regarding therapy involving multiple parties. According to Knauss & Knauss (2012):

> [A]pplication [of privilege] to family or group therapy varies depending on the state law or local interpretations of state law. The traditional view is that privilege is automatically waived when discussions are held in front of casual third persons (making them public as opposed to private discussions) and that the privilege laws…must be interpreted narrowly. As a consequence, the application of privilege in family or group therapy could be inconsistent and depends on the specific wording of the state's statute or judicial interpretations of that statute. Psychologists are urged to be familiar with their state laws in this area. (p. 36)

For example, even if your state law waives the psychotherapist-patient privilege in situations involving "casual third persons," the privilege arguably still applies to therapy involving multiple patients or collateral contacts because these participants are not "casual" – they are an integral part of treatment. This is essentially the approach taken by California law, which states that confidential communications between patient and psychotherapist are privileged if the information is disclosed to "*no third persons other than those who are present to further the interests of the patient* in the consultation" [emphasis added] (California Evidence Code, §1012).

Given these complexities and potential gray areas, it is especially important to be aware of the applicable rules in your jurisdiction and to implement an informed consent process that ensures all parties understand the relevant limits to confidentiality and privilege. It is also important to remember that psychologists should be careful about giving clients guidance on legal topics and should recommend that clients obtain legal counsel if the situation warrants. Psychologists may also need to seek legal advice if a situation is unclear.

Working with couples and families

The APA Ethics Code provides a helpful framework for establishing therapeutic relationships involving couples or families. Standard 10.02 states: "When psychologists agree to provide services to several persons who have a relationship (such as spouses, significant others, or parents and children), they take reasonable steps to clarify at the outset (1) which of the individuals are clients/patients and (2) the relationship the psychologist will have with each person. This clarification includes the psychologist's role and the probable uses of the services provided or the information obtained."

Many states have adopted the Ethics Code or similar ethical standards or rules for professional conduct for psychologists. For example, Ohio's Rules of Professional Conduct include the following: "When services are provided to more than one patient or client during a joint session (for example to a family or couple, or parent and child, or group), a psychologist… shall, at the beginning of the professional relationship, clarify to all parties the limits of confidentiality" (codes.ohio.gov/oac/4732-17).

Many states have adopted the [APA] Ethics Code or similar ethical standards or rules for professional conduct for psychologists.

APA's Record Keeping Guidelines (www.apa.org/practice/guidelines/record-keeping.pdf) are also relevant. Guideline 11 states: "Multiple Client Records: The psychologist carefully considers documentation procedures when conducting couple, family, or group therapy in order to respect the privacy and confidentiality of all parties." The application section of Guideline 11 explains that the informed consent process may include providing information about how the record is kept (for example, jointly or separately) and who can authorize its release. In addition, it suggests that in some situations such as group therapy it may make sense to create and maintain a complete and separate record for all identified clients; whereas if a couple or family is the identified client, then a single record may be appropriate.

Issues regarding access to records and confidentiality rarely arise when a couple is actively engaged in couples' treatment. However, if the couple later decides to split up, one spouse may subpoena the record as part of a divorce or child custody proceeding. In such cases, the psychologist should refer to the informed consent documents, relevant laws and ethical requirements. Generally, however, you would need a court order or the consent of both parties in order to release couples therapy records – and both parties' consent is an unlikely scenario in such cases.

A similar analysis would apply to any request for release of family therapy records. According to Atkins (2009): "When receiving a request for records or a subpoena for records of an individual member of a family or couple…you will need permission from each member of the family or couple, or the representative for the client in the case of a child…Without authorization from each member you should not release records unless you are mandated by the court."[2]

For information about determining who is a minor's legal representative for purposes of consent to treatment and release of records, please see *Working with Children and Adolescents* (apapracticecentral.org/good-practice/secure/winter11-working.pdf). For more general information and resources on family therapy, please visit the APA Division 43, Society for Family Psychology website (www.division43apa.org).

Group therapy

As with couples and family therapy, thorough informed consent procedures are essential when conducting group therapy. Ethics Code standard 10.03 (Group Therapy) states: "When psychologists provide services to several persons in a group setting, they describe at the outset the roles and responsibilities of all parties and the limits of confidentiality."

As described in the *Ethics Code Commentary and Case Illustrations*: "Psychologists are professionally obligated to maintain the confidentiality of group clients/patients, except when required by law to reveal child or elder abuse, or threats of harm to self or others. However, although group members must be advised to maintain confidentiality about other group members, they are not held to professional codes of conduct."

In other words, the psychologist cannot guarantee that all group members will maintain confidentiality regarding information disclosed during group sessions.

Some of the potential limits on confidentiality in group therapy can be mitigated by careful record-keeping procedures. Knauss & Knauss (2012) recommend that group therapists keep separate records for each member of the group. They also note that separate records may be kept in a variety of ways that allow individual members' access to their own records without compromising the confidentiality of other members. For example, either completely separate records can be kept for each group member, or a brief paragraph description of each session (using initials to identify group members) can be included in each member's file and then supplemented with information pertaining only to that particular patient.

Additional information on group therapy, including Breeskin's (2011) "Procedures and guidelines for group therapy" (bit.ly/49GroupTherapy) is available at the APA Division 49, Group Psychology and Group Psychotherapy website (bit.ly/Div49). The Association for Specialists in Group Work (ASGW): Best Practice Guidelines (www.asgw.org/pdf/Best_Practices.pdf) may also be helpful. Although the ASGW guidelines are aimed primarily at professional counselors, much of the information is relevant to all mental health professionals who provide group therapy.

Multiple or sequential roles

Another complex issue that often arises when multiple participants are involved in treatment is whether multiple or sequential roles are appropriate. For example, should

2. If a patient's attorney subpoenas the joint records, the analysis is clear: You must get releases from all the parties involved or have an order from the court directing that you release the records. However, if a patient requests access to joint records under the HIPAA Privacy Rule, the analysis falls into a gray area. The Privacy Rule does not address the conflicting rights of access and privacy among multiple patients receiving the same services from a provider. This is another good reason to have agreements on this issue prior to starting therapy with multiple parties. Members who experience this situation without a prior agreement can contact the APA Practice Legal & Regulatory Affairs Department at praclegal@apa.org.

group therapists also treat group members individually? Should a couples' therapist treat one member of the couple individually during and/or after the couples' course of treatment? Some basic information is presented below, yet a thorough discussion of these issues is beyond the scope of this article.

The Ethics Code provides an excellent framework for initial consideration of these questions. Standard 3.05 (Multiple Relationships) defines multiple relationships and requires psychologists to refrain from entering into such relationships "if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness…or otherwise risks exploitation or harm." Standard 3.06 (Conflict of Interest) similarly requires psychologists to refrain from "taking on a professional role when...professional, legal, financial or other interests or relationships could reasonably be expected to (1) impair heir objectivity, competence or effectiveness in performing their functions as psychologists or (2) expose the person… with whom the professional relationship exists to harm or exploitation." Standard 10.02, which specifically addresses couples and family therapy, states: "If it becomes apparent that psychologists may be called on to perform potentially conflicting roles (such as family therapist and then witness for one party in divorce proceedings), psychologists take reasonable steps to clarify and modify, or withdraw from, roles appropriately."

For example, it is important to maintain a clearly defined role in cases involving custody issues. The APA Guidelines for Child Custody Evaluations in Family Law Proceedings include the following: "7. Psychologists strive to avoid conflicts of interest and multiple relationships in conducting evaluations. Psychologists conducting a child custody evaluation with their current or prior psychotherapy clients and psychologists conducting psychotherapy with their current or prior child custody examinees are both examples of multiple relationships" (www.apa.org/practice/guidelines/child-custody.pdf).

In many cases, while it may be legally and ethically permissible to engage in multiple or sequential roles, there are important clinical and risk management issues that should be taken into consideration. Risk-management experts advise against sequential roles such as providing couples counseling and then switching to individual therapy for one member of the couple or treating an individual and then shifting to couples' therapy. If one member of the couple later feels harmed by the switch in roles, he or she could complain to a licensing board that you had an unethical conflict of interest and your objectivity was impaired.

Although it is not uncommon for a psychologist to treat the same patient concurrently in individual and group therapy, these arrangements can also lead to dilemmas regarding issues such as: confidentiality of information revealed in individual sessions; group dynamics when some but not all group members are in concurrent individual treatment; and potential conflicts of interest when the therapist self-refers an individual patient to group therapy or vice-versa (Knauss & Knauss, 2012).

Given the significance of clinical considerations (in addition to legal and ethical requirements) in deciding whether multiple and/or sequential roles are appropriate, it is important to be familiar with relevant scholarly literature and best practices. In addition, consulting with colleagues may be helpful.

More on informed consent

As described previously, informed consent is particularly important in situations where there are more than two people in the room, since there may be limits to the level of confidentiality that can be assured and participants' roles and responsibilities may not be as clear as in individual therapy. In addition, individual participants in families or couples therapy may have conflicting agendas or expectations, which can be managed most effectively by establishing at the outset of treatment a solid, basic framework for working together. Therefore, your informed consent procedures in all treatments involving multiple participants should clearly address, preferably both in writing and verbally, topics such as how records will be kept, who will have access, and limits to confidentiality.

Ethics Code Standard 10.01 describes the general requirements for informed consent as follows: "When obtaining informed consent to therapy…psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers."

Ethics Code Standard 4.02 offers more specific guidance regarding discussing the limits of confidentiality: "Psychologists discuss with persons (including to the extent feasible persons who are legally incapable of giving informed consent and their legal representative)…with whom they establish a scientific or professional relationship: 1) the relevant limits

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of confidentiality... and 2) the foreseeable uses of the information generated through their psychological activities."

Several sample informed consent agreements that may be useful in developing your own forms and policies for working with multiple parties are available from The Trust www.apait.org/apait/download.aspx) and the Center for Ethical Practice (www.centerforethicalpractice.org/ethical-legal-resources/practice-resources/sample-handouts/).

Implementing thorough informed consent procedures and being knowledgeable about relevant laws, rules and standards are critical for the practitioner. So are maintaining a focus on the best interests of your patients and obtaining clinical and/or legal consultation when needed to help you smoothly navigate the difficult situations that can arise when there are multiple participants in treatment.

If you have further questions about working with couples, families, groups or collaterals, please contact the APA Practice Directorate's Legal and Regulatory Affairs Department at praclegal@apa.org or 800-374-2723.

Please note: Legal issues are complex and highly fact specific and require legal expertise that cannot be provided by any single article. In addition, laws change over time and vary by jurisdiction. The information in this article should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions regarding individual circumstances.

ADDITIONAL REFERENCES AND RESOURCES

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