Court Rules in Patient Privacy Case

A decision in a Massachusetts fraud investigation protects some, but not all, of a psychiatrist's notes from public disclosure

A recent decision by the Massachusetts Supreme Judicial Court, in a case involving access to a psychiatrist's notes, could have the effect of eroding the confidentiality of some medical records—even though the decision is seen by some as one that supports a patient's right to privacy. The decision has been eagerly awaited by medical and legal scholars in the mental health field who have joined a renewed debate about threats to confidentiality.

The case (*Commonwealth v. Kobrin*, No. SJC-3671) originated more than a year ago when the state's attorney general subpoenaed the complete medical records for all Medicaid patients of a Fall River psychiatrist named Kennard C. Kobrin as part of a grand jury investigation into possible Medicaid fraud. Kobrin turned over his appointment calendars and billing records but refused to turn over therapy notes on the grounds that they are protected by a Massachusetts law that specifically protects psychiatrist-patient communications. (Most states and the District of Columbia have recognized a special psychiatrist-patient privacy privilege.)

The subpoena for notes of patient communications quickly catapulted the Kobrin case from a routine Medicaid fraud investigation to one in which an important principle of confidentiality was at stake. Thus, the Massachusetts Psychiatric Society, backed up by the American Psychiatric Association in Washington, D.C., joined Kobrin's defense with an amicus brief. Says society president Bernard Katz, "There's no valid reason to subpoena psychotherapy notes in this case." Although Kobrin is not a member of the state society and is not known personally by its leadership, the decision to support him in this stage of the case was made as a matter of principle. (At this point, there has been no indictment of Kobrin and no court hearing on the question of Medicaid billing.)

On 2 July the Supreme Judicial Court ruled in Kobrin's favor, saying that he did not have to turn over notes that would reveal what a patient told him. However, the court chose to define "patient communications" narrowly, seeming to limit it strictly to what a patient said. The court ruled that the doctor must turn over information about drugs he may have prescribed, electroshock therapy if it was administered, and notes that reflect his opinion about the patient's condition and progress.

Thus, the court said on the one hand, "Those portions of the records . . . which reflect the patients' thoughts, feelings, and impressions, or contain the substance of the psychotherapeutic dialogue are protected and need not be produced." On the other hand, in outlining the portions of the record that can be revealed, the court said in a footnote that " . . . notations that the patient has suffered any of the following may be released: disturbance of sleep or appetite; . . . impaired concentration or memory; hopelessness; anxiety or panic; dissociative states; hallucinations. . . . " The judges, thus, went a long way toward granting the state, and through open court proceedings the public, access to a substantial amount of information. The doctor could be required to report that his patient has hallucinations, but is allowed to keep confidential what he hallucinates about.

> The court limits "patient communications" strictly to what a patient said.

Tufts University psychiatrist Carol Nadelson, who is president of the American Psychiatric Association, says she wishes the decision had been a little cleaner. "I'm disturbed even about revealing a diagnosis that can unfairly label a person." Although the issue in the Kobrin case centers around a Medicaid fraud investigation, Nadelson notes that the problem of eroding patient privacy exists in all areas of medical practice. "Insurance companies already are asking for more details than they used to," she says, "and some patients who can afford it are choosing not to use their insurance just to maintain privacy."

The confidentiality of medical records has eroded gradually as access to sensitive, personal information has been granted to an increasingly long list of people who have a "need to know." Complexity of care, particularly for a hospitalized patient, means that a number of hospital staff will have access to medical records. Insurance companies are another factor in the erosion of privacy. The majority of medical care in the United States is paid for by either private insurance, such as Blue Cross–Blue Shield, or by a federal or state reimbursement plan, such as Medicare and Medicaid. Insurers have a justifiable interest in verifying that medical services for which they pay have actually been delivered. The problem facing doctors, hospitals, and the courts is just how much information should be turned over. How far does one go in invading a patient's right to confidentiality in order to satisfy someone else's need for access to records?

A judicial decision in favor of any measure of confidentiality did not come easily in the Kobrin case. In May 1984 after receiving the subpoena of his records, Kobrin, on the advice of his attorney, Robert Griffith, immediately contacted as many of his Medicaid patients as he could to ask whether each wanted to assert the right to privacy that was established in a 1968 state law on psychiatrist-patient privilege. Twenty-seven of them invoked their statutory privilege in writing, asking that their psychiatric records not be produced for the grand jury. Then, Kobrin asked the court to quash that part of the subpoena demanding the records. The motion was denied. So were various other motions that Griffith made to protect the psychiatric records and in the end, they were ordered to be turned over to the attorney general who had custody of them when Kobrin appealed to the full Supreme Judicial Court.

In arguments before the court, assistant attorney general Michelle A. Kaczynski, claimed that provisions in the Medicaid law that require participating physicians to keep records "as are necessary to fully disclose the extent of services provided" called for disclosure. Furthermore, she maintained that " . . . Federal Medicaid law and the psychotherapist-patient privilege are in conflict and that, under the supremacy clause of the Federal Constitution, the privilege

must yield." Kaczynski also argued that access to the full record would reveal whether there were notes at all and would, by their length and content, indicate whether Kobrin had seen his patients as often or for as long a session as he billed Medicaid for.

Griffith and the psychiatric society, whose brief was written by Washington attorneys Joel Klein and Richard Taranto on behalf of the APA, argued that the Medicaid law does not require disclosure of full psychiatric records; if it did, they said, Medicaid patients would be consigned to second-class care. They also successfully challenged the presumption that there is any necessary connection between the extent of note-taking and services rendered. Note-taking is known to vary greatly from doctor to doctor, just as therapy sessions vary from those in which a lot is said to those that consist mainly of repetition or even silence. The court was persuaded that the notes would not be of substantive value to the state in this investigation—particularly because neither the necessity for or the quality of care is at issue here.

Any decision favoring wholesale disclosure of the records would also adversely affect the very nature of the doctor-patient relationship and interfere with psychotherapy itself. Fear of disclosure could inhibit patients from talking freely with their doctors, they noted. Furthermore, the likelihood of disclosure would affect note-taking itself. Quoting a U.S. District Court decision in a case in Hawaii, they pointed out that "Psychiatrists may be disinclined to record in their files extremely personal, sensitive confidences of a patient if they know those files may be reviewed and copied by state officials at any time. The threat of searches may therefore decrease the likelihood that the very information most valuable to another treating psychiatrist, a history of the patient's emotional and mental problems, will be available."

There is anecdotal evidence that fear of searches by government agencies or insurance companies is taking its toll on note-taking. "I don't put sensitive material in the file and I teach medical students not to include anything that would be embarrassing to either the patient or the doctor," one psychiatrist reports. And he is not alone.

In the Kobrin case, the Supreme Judicial Court, in its effort to balance the competing rights of the patient to privacy with those of the state, said that any invasion of the patient's rights must "be no broader than necessary for effective oversight of the Medicaid program." In reaching a narrow definition of just what those rights are, the court also decided to leave it to judges to decide case-by-case what should be revealed and what kept confidential. Although the court appears to be protecting privacy by its ruling that "The psychiatrist's records of patient conversations shall be withheld," the scope of its definition of what may be released is sufficient to compromise the idea of privacy.

The court does, however, suggest a new approach to note-taking in the interest of maintaining confidentiality. Psychiatrists could, for example, be required to keep two sets of notes with substantive accounts of therapy sessions in one file and those that document that care was in fact provided in another.

The issues raised by this case and by others are "terribly disturbing," says APA president Nadelson. "We need to consider what we really need to know before we agree that the courts or insurance companies get confidential information," she declares. "This problem has been around a long time but we've taken another step down the road. It's very important that society continues to be sensitive to what we may be sacrificing in terms of some major civil rights to privacy."—**BARBARA J. CULLITON**

Problems Plague ASAT Program

The Defense Department's antisatellite (ASAT) weapons program, long a topic of political controversy, now faces a bevy of technical troubles. According to a recent internal Air Force audit, the ASAT weapon, as well as a special target vehicle created for ASAT tests, both suffer from defects, some of them serious. As a result, the likelihood that the next ASAT test will be fully successful is less than 50 percent, and nothing can be done beforehand to alter this projection.

The audit, which was disclosed in a 15 June report by the General Accounting Office (GAO), was ordered by Air Force Under Secretary Edward Aldridge, Jr., because of the program's persistent cost overruns and schedule delays. In the last year, for example, the official cost estimate for development and procurement of 15 ASAT weapons has increased by $190 million and the schedule for initial operation has slipped by 1 year. Further delays are expected, the GAO said.

Of the two tests conducted to date, only one—involving a simple launch toward a point in space—has been judged fully successful by the Air Force. In the second, the ASAT apparently failed to maneuver properly so that its homing mechanism could acquire and track a star. Several weeks ago, the third test, which was initially scheduled for late July, was indefinitely postponed so that the ASAT and two target vehicles could be returned to the factory. The ASAT needed a new, stronger "structural element," which the Defense Department declines to identify. The target vehicles had dead or malfunctioning communications receivers, which may require 2 to 3 months to repair.

According to the GAO, the audit identified 30 technical concerns "that needed to be resolved" before the third test flight is conducted, including several that carry a high level of risk. It also pinpointed additional problems that will require resolution after the flight, and concluded that component tests and engineering analyses needed substantial improvement.

In the face of all the problems, a spokesman for the Defense Department went out of his way on 12 July to assert that there were "no plans to scrap the program." Contrary to widespread rumors that the Air Force is increasingly unenthusiastic about the program and wants to kill it, Aldridge's motivation in ordering the review was primarily to "reestablish and maintain confidence" in it, the spokesman explained.

Even if the technical uncertainties are resolved, however, Congress may have soured on the program, now expected to cost at least $4.1 billion, more than twice the amount estimated in 1978, when it was initiated. In the House of Representatives, there is strong sentiment on political grounds alone in favor of banning any ASAT tests against objects in space so long as the Soviet Union continues to observe a similar, self-imposed proscription. Final congressional action is expected later this summer.

—**R. JEFFREY SMITH**