Practice Bulletin 1
Informed Consent to Review

This practice guideline offers information and support for clinicians who seek to help their patients become substantially informed about the benefits and risks that can result from a decision by the patient to give consent that directs their clinician to share confidential information about the patient's psychoanalysis or modified psychoanalytic treatment with a third party payer. It is intended primarily to guide clinicians when review of a patient's treatment is requested in the context of third party funding by employers, insurance or entitlement programs. Other methods of third party funding, (e.g. by spouses, parents, other relatives, in-laws, or friends) will be the subject of future study. This guideline serves to revise and replace Practice Bulletin 1: Informed Consent to Review, which was approved by the American Psychoanalytic Association in 1991 and published twice subsequently. (Gray, Beigler and Goldstein, 1997).

A. Considerations pertaining to the context of informed consent to review:

The proliferation of managed care and other cost containment systems has intensified concern about the effect of ongoing third party claims review on the therapeutic alliance and ultimately on the outcome and effectiveness of a psychoanalytic treatment conducted with third party authorization and reimbursement. (CoPR, 2000) The committee has concluded that consent forms that third parties or their agents ask patients to sign may not adequately explain the risks posed by these review methods and the release of confidential clinical information to third parties. (Bortnick Griffith, 1998) In such circumstances, consent so obtained from patients may be considerably less than informed.

External quality assurance and managed care reviews are not isolated matters. They are components of the actuality in which patients receive health care. Patients may find it customary to sign consent forms that authorize their doctor to release confidential clinical information to third parties and/or consent to reviews by third parties as a condition for third party reimbursement for health care services. Absent discussion of the issue with their clinician, patients may not be aware that a consent may authorize greater disclosure of their treatment records than they may have originally assumed. Similarly, patients may assume that they do not have any choice in the matter of signing and "consenting" if they wish to be allowed to obtain the health care services they are seeking. (Bortnick Griffith, 1998)

Reviews by third parties are fundamentally different from peer review. Peer review is a collegial process that is conducted within the ambit of confidentiality of a professional organization. Its ultimate aim is to assure that the professional services are

appropriately selected and appropriately performed. Third party generated reviews (e.g. claims reviews, utilization reviews, and quality assurance reviews involving insurance companies, managed care companies, health maintenance organizations and government administrative agencies) are conducted by professional reviewers. Sometimes these reviewers are professional peers of the clinician, and sometimes they are not. In either case, such a review generally does not fit the traditional model of peer review because the professional reviewer is paid by the third party and must represent the interests of the third party. (CoPR, 2000)

As a general rule, the law recognizes a patient's interest in keeping information regarding treatment confidential and private. (*Jaffee v. Redmond*, Supreme Court of the United States, 1996) In some instances the clinician is empowered to assert it on behalf of the patient. Prior to giving consent authorizing a third party to receive clinical information about their treatment, patients or those who act on their behalf (e.g. if the patient is a minor) should inquire about the nature and specifics of the third party's request for review and/or information about their treatment.

- Are there clear limits on the information requested?
- What are those limits?
- Who is authorized by the third party to have access to the information?
- What safeguards exist to prevent further dissemination of information beyond those authorized to have access?
- Are these safeguards effective?

B. Treatment planning considerations:

When a patient is contemplating a decision about the extent to which third parties may be informed about their in psychoanalytic treatment, the patient can benefit from an understanding of some important technical features that a psychoanalytic treatment plan should include:

- Psychoanalysis is established as a unitary therapeutic procedure that continues from start to finish and is composed of many psychoanalytic sessions. (Gray and Cummings, 1997)
- It is vital to construct a psychoanalytic treatment plan that allows the patient to feel safe enough to talk freely and openly with their analyst in order to express their thoughts and feelings fully and without reservation.
- Privacy and confidentiality are critical preconditions for effective psychoanalysis and modified psychoanalytic treatment. (JCC, 1999) Privacy means that the treatment is conducted by the patient and analyst in a setting that is free from distraction, intrusion, listening, viewing or monitoring by other people. (Stone, 1961; Dewald, 1965; Langs, 1975; Etchegoyen, 1991). Confidentiality is defined as an understanding between patient and analyst that, absent patient authorization or legal compulsion, the analyst will not disclose anything about the treatment to anyone outside the treatment situation or take any actions outside the treatment situation based on what he or she hears inside the treatment situation. (Dewald and Clark, 2001; JCC, 1999)

Analysts who are reluctant to work within a third party system may choose to decline to do so and should inform the patient of this choice before the treatment starts. To avoid misunderstanding, information regarding this choice may also be useful for patients who do not ask to explore the availability of third party support at the outset of treatment, because an issue of third party involvement might emerge at a later point during the treatment.

When complex interactions with third parties are or may become part of the treatment plan, this committee believes that before psychoanalysis formally begins, it is appropriate for both patient and psychoanalyst to reach and undertake to abide by an understanding in respect to third party involvement. While each treatment situation may vary, we recommend that the understanding between psychoanalyst and patient be informed generally by the considerations and recommendations contained in the practice guidelines of the American Psychoanalytic Association that pertain to external review of psychoanalysis (CoPR, 2000), charting psychoanalysis (Gray and Cummings, 1997; Cummings and Gray, 2000; Cummings, 2000), and interacting with third parties (Cummings and Gray, 2001).

As part of the process of initiating psychoanalytic treatment, each clinician will have developed and will use a procedure to offer prospective patients an opportunity to get information on which to base a decision to accept or to decline a psychoanalytic treatment plan. We acknowledge that some clinicians have an authoritative, prescriptive approach, while others tend to foster patients arriving independently at the decision to undertake psychoanalysis. We state no preference for one style over the other. In respect to consent for third party review, we do not include a model consent form with this revised guideline. We believe psychoanalysts should exercise individualized deliberation and care in approaching the issues involved in release of information concerning psychoanalytic treatment. Psychoanalysts may tailor their approach, and any form employed, to the needs and condition of their patients, the purpose of any intended release, and the analyst's and patient's assessment of the risks and benefits of release of information.

C. Consideration of benefits and risks:

The patient's decision regarding consent to third party involvement in the treatment plan may be further informed by consideration and discussion of the benefits and risks of review. The potential for third party financial support of psychoanalytic treatment is a benefit that may motivate patients and their analysts to consider compliance with review requests. Third parties sometimes emphasize additional benefit from the "second opinion" function of review that can either support or seek to change the treatment planning. Two central benefits of the system of review that is recommended by the American Psychoanalytic Association are the elimination of the need for ongoing review of treatment and the elimination of the need for the treating analyst to disclose confidential clinical information to the third party. (CoPR, 2000)

There are two general types of risk arising from reviews of psychoanalytic treatment that are requested by third parties: (1) risks that affect the treatment process internally and (2) risks that involve aspects of the patient's life that are external to the treatment.

1. **Internal risk to treatment:** The Committee on Peer Review collected case reports thatsupport the notion that reviewed cases involving release of confidential clinical information to third parties may end prematurely or may suffer major distortions of the therapeutic alliance (Gray, 1992). These resulting risks of review could be explained, in many cases, by the ways that the technical features of a psychoanalytic treatment plan noted above conflict with the conditions of review imposed on the treatment process by the third party. (Cummings, 1999)

2. **External risks:** Once a clinician discloses information, as consented and directed by the patient, to a party outside the clinical treatment situation, it is no longer possible to insure absolutely that the released clinical information will be protected from unauthorized or unlawful use or subsequent disclosure to additional parties who may be interested in obtaining the information. (Stith-Coleman, 1999) It is difficult for the patient and clinician to predict the extent and importance of these risks for the present and future course of the patient's life. For comparison with the conditions of risk anticipated in a particular case, the patient and clinician might choose to consider various documented and reported problems experienced by other patients who consented and directed their clinicians to disclose clinical information to outside parties. Reported problems include:

a. **Employment discrimination**: Some employers may improperly attempt to obtain and use personally identifiable clinical information about employees and applicants in making decisions about who to hire, lay off or promote. Most workers who are insured through their employers are enrolled in some form of managed health care that gathers available clinical information that has been disclosed by clinicians about the employees. In a 1996 survey of Fortune 500 companies by researchers at the University of Illinois, 35% said they had used individual medical information to make job-related decisions. (Rubin, 1999, 1998; Lewin, 1996) New legislation aims to limit this employment discrimination; however the effectiveness of the legislation and its enforcement in curbing such practices remains unclear.

b. **Insurance discrimination**: Through a consent or authorization form, a third party may attempt to obtain the right to share information with other entities, some of whom may maintain large databases. For example, it has been reported that one medical information organization collects individually identifiable clinical information that can be used subsequently if patients apply for life, health, or disability insurance. Information so received is not supposed to be used as the basis for denial of an application. (Bortnick Griffith, 1998; McMenamin, 1996) The information might be used to make further inquiry and/or might affect terms, conditions, and premium rate for the insurance policy offered to the patient.

c. **Financial discrimination**: It has been reported that patients' clinical information held by a third party was obtained by an agent of a financial institution and used in the processes of making decisions involving patients' loans. (Gorman, 1996) Since financial institutions and insurance companies have been allowed to

merge, some institutions may attempt unlawfully to share or use clinical information that affects the terms and conditions offered to patients in regard to credit, loans, and other financial matters. Federal legislation has aimed to limit the sharing of the individually identifiable clinical information between the insurance and banking wings of these large merged entities. Whether these laws can mitigate the risk of financial discrimination may depend on the ability of those responsible for enforcement to gain access and information about the inner workings of these large merged companies.

d. **Misunderstanding and distortion**: Employers, insurance companies and financial institutions have been reported to be able to obtain individually identifiable clinical information held by third parties and make decisions regarding the patient without the patient knowing that the information was obtained. In such instances, it is difficult for the patient to know what clinical information was obtained and to be able to correct misunderstanding or distortion of the information. (Rubin, 1998; Lewin, 1996) New legal access provisions, such as the federal HIPAA privacy regulations, have been designed to address this problem. (Code of Federal Regulations, Vol. 45, Part 164)

e. **Disclosure for commercial and marketing purposes**: Some consent forms from third parties may contain clauses that seek to allow the third party to use the patient's clinical information for commercial and marketing purposes. For example, a January 1999 California HealthCare Foundation and Consumers Union publication reported that Medical Marketing Service advertises a data-base available to pharmaceutical marketers that includes the names of 380,000 who are reported to suffer from clinical depression; for additional details seehttp://www.mmslists.com. Some federal and state laws prohibit the use of patient's health care information for commercial purposes, except in cases where the patient waives his or her rights under these laws by signing consent or authorization to allow such disclosures.

f. **Candidates for private or public executive office**: When patients or former patients seek public office or executive status in private companies, those who compete with them politically have been able, through various means, to obtain clinical information that was held by third parties or institutions and to use it politically, attempting to embarrass and/or defeat the candidate. (Rubin, 1998; Rich, 1997, Lewin, 1996)

The task of protecting confidentiality depends on the third party's willingness to authorize treatment in the context of psychoanalytic practice guidelines that have been carefully developed to assure safe conditions for treatment in the context of third party involvement. The practice guideline entitled "Interacting with Third Parties" (Cummings, 2001) lists ten recommended conditions. If these conditions are approved by the third party, it is expected that a safe psychoanalytic treatment plan can be established for the patient that also involves the third party.

If these conditions are not approved by the third party, in whole or in part, the psychoanalyst may choose to discuss with the patient options that would permit safe,

confidential psychoanalysis or modified psychoanalytic treatment for the patient. Such options may include establishing a psychoanalytic treatment plan at a mutually agreeable fee or payment plan without third party involvement. (This option may be limited by laws and regulations of entitlement and insurance programs that forbid participating providers to conduct any covered procedure except as authorized by the program. If psychoanalysis and modified psychoanalytic treatment (CPT 90845) is included as a covered procedure, the analyst and patient may be forbidden the option to establish a treatment plan outside the program on a private, fee-for-service basis; may be required to follow detailed procedures if they wish to do so without violating the law; and/or may face implications in their other dealings with the payer if they do so. A psychoanalyst is advised to consult legal counsel to determine what prohibitions or restrictions may apply in a given situation.)

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