

THE AMERICAN PSYCHOANALYTIC ASSOCIATION

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TESTIMONY OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION
before the
Health, Education, Labor and Pensions Committee
of the United States Senate
On Proposed Changes to the HHS Privacy Regulations

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The American Psychoanalytic Association (APsaA) submits the following testimony to be included in the record of the above hearing held before the Senate Health, Education, Labor and Pensions Committee on April 16, 2002.

APsaA, a professional organization of psychoanalysts throughout the country, was established in 1911 and is one of the oldest associations of mental health professionals in the United States. APsaA's approximate membership of 3,500 professionals is engaged in private and public clinical practice, teaching and research. APsaA members, most of whom are M.D.s and Ph.D., have affiliations with many of the most prominent academic and medical institutions in the country.

This hearing was convened in response to the amendments proposed on March 27, 2002 by the Department of Health and Human Services (HHS) to the federal medical Privacy Rule that has been in effect since April 14, 2001. If enacted, these proposed regulations would eliminate privacy rights that all Americans now possess. APsaA is deeply concerned about and strongly opposed to the proposed elimination of the right currently held by all citizens to not have their personal health information used or disclosed without their consent. 67 Fed. Reg. 14, 776.

The proposed amendments to the Privacy Rule would replace the right of individuals to give or refuse consent for the disclosure of personal health information with blanket "regulatory permission" furnished by the federal government. The latter would allow the use and disclosure of identifiable health information without the individual's knowledge or consent and even against the individual's will. 67 Fed. Reg. At 14, 781.

APsaA has long recognized that privacy of personal health information is essential to quality health care. The single most important indicia of a right of privacy are the right to not have information disclosed without one's permission. These views are reflected both in the preamble to the final regulations (65 Fed. Reg. At 82464-68) and in the Surgeon General's report on Mental Health.

The rulemaking record contains extensive evidence showing that protecting the privacy of identifiable health information, and particularly identifiable mental health information, is essential to preserving access to quality health care. 65 Fed. Reg. at 82464-469; 82472-474; 82514.

The record also is replete with survey evidence indicating that the protection of the privacy of personal health information is essential for the public to retain trust and confidence in the health delivery system and that this trust and confidence is increasingly being eroded by developments in technology that dramatically increase the ability of entities to compile and disseminate identifiable health information and to obtain and use genetic as well as other identifiable health information. 65 Fed. Reg. at 82465-466.

Based on our professional judgment and experience, it is our belief that the proposed changes to the Privacy Rule will have a chilling effect on the utilization of health care services and will therefore be detrimental to the health of our citizens and our nation. This holds especially true for the provision of mental health care, particularly psychotherapy. It is now beyond dispute that the failure to provide strict privacy protection for communications between a psychotherapist and a patient will eliminate access to effective psychotherapy. See findings to this effect in *Jaffee v. Redmond*, 116 S.Ct. 1923 (1996) and *Mental Health: A Report of the Surgeon General*, 449 (December 1999).

Elimination of the right of consent effectively eliminates the individuals' right to health care privacy. Under the proposed amendments to the Privacy Rule, sensitive personal health information could be used and disclosed against the individual's will, even if the individual pays privately for the services.

We are in strong agreement with the finding in the preamble to the current Privacy Rule that "few experiences are as fundamental to liberty and autonomy as maintaining control over when, how, to whom, and where you disclose personal material." It is our considered opinion that failure to preserve the current right of consent in federal law will have the following adverse effects:

- Patient confidence and trust in the clinician-patient relationship will be further eroded.
- Access to quality health care will be impeded as individual's refrain from making the open and frank disclosures that are necessary for accurate diagnosis and treatment.
- Federal privacy laws will be out of step with statutory and/or common laws in all 50 states and the District of Columbia, the ethical standards of nearly every medical profession (as well as the Hippocratic Oath); and the tradition of medical practice in the United States since the founding of the nation; and
- administrative burdens on clinicians will increase as they are forced to disclose patient information that is no longer protected by the patients' right to consent to uses and disclosures.

The occasional need for access to health information before consent can be obtained is not a new problem and certainly does not warrant eliminating the traditional right of consent. While we recognize that there may be extraordinary circumstances where a limited amount of an individual's health care information must be disclosed without consent, the general rule must remain that personal health information will not be used without the individual's consent. As history has shown, such a standard is necessary in order for citizens to remain confident that the health delivery system serves their interests.

Sincerely,

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