Reasons to Support the Petition on Confidentiality

AMHA — USA and the National Coalition of Mental Health Professionals and Consumers invite you to join us in a petition campaign about confidentiality.

Client privacy is fundamental for fostering trust in therapy. In August 2002, the "Privacy Standards" of HIPAA **eliminated the need for clients' consent** the Federal level to release information that traditionally required patients' permission. Now, **legislative moves to conform state laws to HIPAA** are on fast track to passage in some states. Further undermining privacy, corporate health care institutions increasingly demand that records be presented for third party review. To prevent more deterioration of client rights, we are circulating the **Licensed Psychotherapists Petition on Confidentiality.**

This petition campaign is one step toward a **"registry" of professional opinion--a** strategy to reclaim the healing arts as a collaborative endeavor of professionals and the culture, rather than letting corporations define healing modalities!

We are not petitioning anyone or any institution at this time. **All petition signers are placed in a registry on the web open for all to view.** As elaborated below, the registry uses the legal principle, of "respectable minority", as a basis for affirming practice standards endorsed by a community of educated therapists rather than imposed by the legal and legislative forces of managed care, insurance, and pharmaceutical companies.

THE FIRST PROFESSIONAL PRIVACY PETITION

In 2000, the Colorado Board of Psychological Examiners proposed that all licensed psychologists necessarily give every client a diagnosis and keep records in a manner reviewable by third parties.

An ad hoc committee of psychologists in Colorado mailed a petition challenging such requirements. Over 27 % **of all Licensed Psychologists** in Colorado signed and returned that petition **approving a standard allowing** that in many circumstances **clients may wisely request that no notes be recorded** and/or **no diagnosis be made.** Was that over reactive or too radical? Not according to the **American Psychiatric Association's resource paper** on "Documentation of Psychotherapy by Psychiatrists", revised in response to HIPAA in March 2002. In "suggested format" for "variations in documentation procedures", this APA document flatly states that proper documentation "may include a patient's request or the clinician's judgment that there be no identifiable documentation" (p 3). The APA's action and the Colorado psychologists' work have important implications for how privacy of therapy is legally defined in this era when psychotherapy is packaged as a commodity.

THE PETITION THAT STARTED THIS CAMPAIGN

In Oregon, in September 2002, AMHA-OR members began circulating the Oregon Licensed Psychotherapists Petition on Confidentiality. That petition continues to gather signatures.

CONTEMPORARY ECONOMIC AND POLITICAL CONTEXT OF PSYCHOTHERAPY

With healthcare comprising **7-14% of the GNP, a** powerful medical/finance capital complex seeks to determine how healing is legally encoded. No, this is not a conspiracy theory but simply normal business practice. Only in theory do modern medical interventions emerge from pure scientific research. In reality, appropriate medical and therapy practice is increasingly determined by profit driven corporations that set **"quality control" standards,** [i] bias **"best practices" protocols,** stipulate **"medical** necessity", restrict treatments by **"cost/benefit** analysis," retain contractual authority to refuse publication or delete information [ii] over a high percentage of medical research, etc. Recast as "products," the healing arts are further **subject to "orthodox standards" created by case law.** Millions of people encounter these arbitrary terms only in disputes with insurers.

RECORD KEEPING, STANDARDIZATION, REASONS TO KEEP RECORDS AND ALTERNATIVES

One unfortunate aspect of this corporate intrusiveness affects record keeping. With increasing litigation and the advent of third-party payers into the arena of therapy, "medical record" protocols became routine for psychotherapy. Insurers require records to verify and "manage" the therapeutic care they pay claims on. Consortiums of insurers have formed "non-profit" auditing firms to review therapists' records. Under the "non-profit" auditors' cloak, these insurers determine "quality" standards. On a larger scale, corporations gave enormous input into HIPAA which sets forth detailed record keeping protocols as Federal law. We have **concern that the form of record keeping advocated by third party payers may be insinuated as a standard of practice by default even when no insurance is involved. A** '97 Hawaiian court case did inscribe an aspect of this into law by giving the biggest insurer in the state the right to inspect medical records **"including those paid directly by a patient** or billed to another insurer [iii]".

One argument for keeping records centers on **"continuity of care";** that argument is imported from the model of medical services. In some settings, a patient may see one physician one visit and a different doctor the next. "Continuity" of medical care is then preserved by records of symptoms, diagnoses, diagnostic considerations and prescriptions. But does psychotherapy fit that model? Rapport between client and therapist plays a paramount role in psychotherapy. But the complexity of therapy is not easily captured by notes and clients rarely change therapists from one visit to the next. Though there may be valid arguments for the continuity criteria, there are equally valid reasons to **place the confidentiality criteria higher** than continuity from one therapist to another.

Along with the 27% "respectable minority" of Colorado psychologists and the American Psychiatric Association, and the growing numbers who are signing this petition in various states, we assert there are numerous circumstances in which clients might wisely prefer to have no records kept and no diagnosis recorded—and we support clients' right to maintain that level of privacy when both client and therapist agree.

CIRCUMSTANCES WHEN CLIENTS MIGHT WISELY CHOOSE NOT TO HAVE RECORDS KEPT

The US Department of Health and Human Services cites research that adolescents avoid treatment or disclose less without assurance of confidentiality. People of some celebrity or going into business on their own have been turned down for health insurance for having used their previous insurance for as little as an Adjustment Disorder while whole families have been denied for one member's serious illness. Anyone applying for life insurance might be just as wary as a person being evaluated for child custody. Drugs and sexual matters are particularly sensitive concerns. **Under HIPAA law enforcement agencies, the government and many other entities have expanded claim to health care records sent to insurers without the consent of the person receiving care.**

Sometimes doctors and therapists are patients too. Recently, the health plan insuring 70% of Hawaiians required that all physicians release their personal medical records in order to qualify as a "covered provider". Those professionals may be surprised to learn they've released information formerly considered therapy notes. HIPAA specifically **excludes** the following categories of material from its definition of "psychotherapy notes": "any summary" of "diagnosis, functional status, treatment plan, symptoms, prognosis, and progress," [iv] "results of clinical tests" and medications. That information, according to HIPAA is "always placed in the patient's **medical record"** which is **"routinely sent to insurers** for payment [emphasis added]" [v].

THE PRINCIPLE OF RESPECTABLE MINORITY

Professionals Can Reclaim Psychotherapy to the Commons

There is a legal principle called **"respectable minority"** invoked in medical liability suits. A number of court rulings support medical treatments as appropriate when even a small minority of practitioners value a particular approach (in one case, as few as six). Bear in mind that treatments are by no means strictly standardized in Western medicine; there's a different dominant treatment for prostate cancer in each of several of the most developed countries in the world. Given hundreds of different therapy theories, the 27% of Colorado psychologists (along with the 37,000 member APA position) **builds strong collective endorsement** for the choice not to keep records or give a DSM-IV diagnosis when appropriate. Those numbers have tremendous legal implications: A "registry" of professional opinion will serve as a powerful legal tool, on this issue and on many issues about which therapists often find themselves at odds with

corporatized medicine.

Why Build a Registry? The Concept of the Commons

The US media promotes the idea that there is an intelligent "market" force or "profit motive" that acts for the overall good. But there is no such law of nature. There is, however, a long **history of legal opinion for the protection of the commons—not** just public property (in Roman law, "res publicae") but also inherited knowledge, water access, cultural activities, ocean passage, and political space and voice ("res communes"). Nevertheless, there are enumerable examples of violations of tangible aspects of the commons--air, noise, and mining pollution or the abuse of civil rights. Less obvious examples come into focus with the current controversy over "intellectual property rights". The phrase "healthy growing up" is now corporate property. Indigenous healing plants and germ plasm bring billions per year to drug companies that patent and sell their derivatives but give virtually nothing to the developing countries or people from where the plant knowledge came. Crucial questions are being debated: who owns the earth's genetic and cultural inheritance? Who owns medicine and psychotherapy? Who defines medical necessity? Who decides the number of sessions for particular diagnoses? Who decides "best practicesiv[vi]"?

Do the Healing Arts Belong to the Commons?

For a moment, consider the healing arts as an archetypal activity as much as art, star gazing, or tool making. From this perspective, the **healing arts rest on a collective inheritance.** Aside from the intuitive appeal of such arguments, mountains of **anthropological data** detail healing knowledge as a **central feature of human activity across cultures.** There are also explicit legal precedents. In a 1996 decision, the US Supreme Court guarded the confidentiality of one person to protect the functioning of the **"institution"** of psychotherapy because **"the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance".**

The Expropriation of the Commons in the Medical and Psychotherapy Fields

There are hundreds of troubling examples of incursions into the commons. Some argue that the profit motive drives research. But a number of studies demonstrate that drug companies' primary contribution [vii] is marketing billed as research and development! In some cases, drug companies merely buy patent rights at very low cost from work done under government grants at public universities. Damage to the commons comes via control over research, quality control standards, political dealing, etc. Though **medical research rests on centuries of shared knowledge,** universities and research companies now sign contracts reserving industry's rights to refuse publication or prevent sharing of materials with others [viii]. Legal reprisals draw the boundaries. Up to *25%* of researchers avoided areas of research out of fear of lawsuits [ix]. In one instance, the New Zealand Health Department and the British Medical Association's

journal delayed action in fear of a drug company's legal threats while an asthma drug continued to cause deaths [x].

Most HMOs abide by accreditation standards set by the National Committee on Quality Assurance [NCQA]. Though officially non-profit, the NCQA is sponsored and run by representatives of major corporations'. Six of those companies also sat on the intellectual property rights committee of the World Trade Organization in 2000. The NCQA deals precisely in intellectual property--"performance measurements", "behavioral health" conventions, etc. in which those corporations have enormous investments.

Further down the food chain, insurers send bulletins to therapists mandating how therapy should be done according to the NCQA [xi] or they simply assume authority and decree treatment protocols. In a set of guidelines for record keeping, a recent insurance company bulletin stated: "The record should include documentation that each therapy session was an active, directed process and the therapist regularly took stock of specific important treatment issues." Even if that fits your style of therapy, **please consider the choice to respect a long history of other approaches to therapy with rich intellectual and cultural grounding.**

One Creative Response to Preserve Psychotherapy for the Commons

In other fields, people are creatively responding to similar problems. Over *25%* of all computer servers now use the Linux operating system software. Linux relies on a General Public License [GPL] permitting anyone **to use or modify it for free.** But only if those modified **programs** also **abide by that same distribution license. Microsoft now** considers Linux a major threat! Other attempts to recoup the commons include new patent laws, a public domain library,
native seed banks, and deeds with easement clauses protecting land from future environmental degradation. Can we also protect psychotherapy from corporate confiscation?

It is sad and absurd for professionals to abandon the healing arts to corporate claims! **By collecting professional opinions into a** registry, we **consolidate a basis for legal decisions** and **move to protect the art and science of psychotherapy.** True, this is only a beginning towards a viable reference "library" of collective professional opinion to counter managed care. But in time, a more developed registry on the web can provide a ready response to future challenges confronting our profession and society. Taking the Colorado experience as a model, a group in Michigan just garnered signatures from 30% of 6,000 psychologists in their state x[xii] on an issue about continuing education!

Who Gets to Define Psychotherapy? Please add your voice.

You won't be alone in signing this petition! You join with AMHA and National Coalition members, with Colorado psychologists, with the American Psychiatric Association and many colleagues who have already signed this petition.

In effect, we ask whether you prefer that decisions about psychotherapy be made by

- legal departments of insurance companies?
- the so called “clinical staffs” of HMOs?
- pharmaceutical company lobbyists?

Or do you prefer the expressed wisdom of licensed professionals who understand and practice psychotherapy?

Signing the Petition on Confidentiality adds your support to a practice standard defined and endorsed by a community of Oregon professionals on an issue critical to the integrity of our profession. Thank you for taking the time to read and evaluate this material.

If you agree with the worthiness of this project, please go one more step. Sign the petition on the back of this mailing and send it to the address below.

We deeply appreciate your consideration.

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[i] McDowell, B. “Who Controls Quality Control?”

[ii] Estimates vary, see Valenstein, E., Blaming the Brain, p.192, NY Free Press, NY ‘98; Bollier, D., Silent Theft, p.135-146, Routledge, Ny ‘02

[iii] Lind, I. Y., “Medical Data Private? Judge: No”, Hawaii Star Bulletin Dec 17, ‘97

[iv] Federal Register, Vol. 65, No. 250 p. 82497

[v] Federal Register, Vol. 65, No. 250 p. 82622-23

[vi] JAIVIA, Feb 6, 2002; Vol 287, 6 12-17; Best practice committee members have an average of 10.5 fiduciary relationships with drug companies per doctor.

[vii] e.g., Nader, R. & Love, J. Federally Funded Pharmaceutical Interventions, Testimony before
US Senate; and Bodenheimer, T., “Uneasy Alliance”, New England Journal of Medicine, Vol. 342,
1539-44,May 18, 2000

[viii] Bollier, D. Silent Theft, p. 140; Routledge, New York ‘02

[ix] Merz, J.F. Gene Patents & Other Genomic Inventions, July 13, 2000; **www.house.gov/iudiciary/merzO7l3.htm**

[x] Valenstein, E. Blaming the Brain, p.276-80; NY Free Press, '98; there are *many* similar examples

[xi] The Network Link, Vol.3, Issue 1 MHN; BluePrint Bulletin, Blue Cross, Nov 2001

[xii] www.psychologymce.org see petition cover letter