CASE AND COMMENTARY
Overriding Patient Confidentiality
Commentary by Erica Ozanne Linden, JD, MPH

Case
Sarah Smith is a 42-year-old woman with a family history of breast cancer. Her
mother died of breast cancer at age 39, her grandmother at 42, and a maternal aunt
at 45. Sarah herself has a 20-year-old daughter. She is concerned about her own risk
of breast cancer and visits her gynecologist, Dr. Walsh, to discuss her options. Dr.
Walsh takes Sarah's family history and informs her that there is a genetic test that
can be used to screen women to identify those at risk for breast cancer. Sarah's
doctor explains to her that women who have mutations in the BRCA1 or BRCA2
genes have a substantially increased risk of developing breast cancer.

Sarah asks Dr. Walsh whether she should be tested for one of the mutations. Dr.
Walsh educates Sarah about breast cancer genetics and thoroughly discusses with
her the risks, benefits, and limitations of the genetic testing. Some of these risks
include a potential negative impact on a patient's medical and life insurance,
employment discrimination, and emotional and psychological distress.

As part of her counseling, Dr. Walsh thoroughly explains to Sarah that the
management options for women identified as having mutations in the BRCA1 or
BRCA2 genes include close monitoring, chemoprevention, or prophylactic surgery,
including prophylactic mastectomy. Dr. Walsh also explains that none of the
treatment options guarantees that the woman will avoid getting breast cancer, and
tells Sarah that the option of a prophylactic mastectomy is highly controversial
because of its drastic nature.

After lengthy consideration, Sarah decides to undergo the testing. Dr. Walsh orders
the tests for BRCA1 and BRCA2 mutations and finds that Sarah has a mutation of
the BRCA2 gene. Dr. Walsh then informs Sarah of the test results. Sarah tells her
doctor she wants to keep her test results private, because she does not want any of
her family members to know the results. She does not want them to worry or treat
her differently. She says there is no reason for her life to change unless she
develops cancer. She will agree to the preventive measures that Dr. Walsh advises,
excluding mastectomy, but she does not want anyone to know that she "might" have
cancer in the future. "Everyone might have cancer in the future," Sarah says.

Dr. Walsh doesn't know how to respond. Courts have split on whether to create an
exception to the physician-patient privilege when revealing genetic information to a
third party may help a patient's family avoid harm. In Pate v Threlkel, 661 So.2d 278 (Fla. 1995), the Florida Supreme Court held that a physician has a duty to warn a patient of the genetically inheritable nature of his or her disease, but that the duty to warn is satisfied by telling the patient.

In a similar case, Safer v Pack, 291 NJ Super. 619 (NJ Super. Ct. App. Div.), a New Jersey Superior Court reached a different decision. In Safer, the Court held that the duty to warn may not be satisfied by simply informing the patient and may require that "reasonable steps" be taken to assure that the information reaches the parties at risk. However, the court did not specify what those "reasonable steps" might be.


Questions for Discussion
1. Does Dr. Walsh have an obligation to inform Sarah's daughter of her mother's test results and explain to her that she may also have an increased risk for breast cancer?
2. Given that case law is not explicit on what physicians should do, how should Dr. Walsh proceed in this case if Sarah refuses to tell her daughter?

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