Breach of Confidentiality Claims

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Therapists and counselors are expected to be keenly aware of their duty of confidentiality, but it is often the case that confidential information will be shared with a third party – sometimes lawfully and sometimes unlawfully. There are some breaches of confidentiality that are the result of negligence and some that are the result of intentional or willful conduct. I use the word “breach” to describe professional misconduct or an unlawful act – which could result in civil liability (the patient sues the practitioner for money damages) or an administrative action by a licensing board affecting the practitioner’s right to practice. In addition to “breaches,” therapists and counselors often lawfully break confidentiality by disclosing a patient’s confidential information to a third party with and without a signed authorization.

Most states have enacted laws or regulations (rules) that specify the various circumstances when disclosures of otherwise confidential patient information are mandated and the circumstances where disclosures are allowed – in both cases, without the signed authorization of the patient. In California, for example, the law specifies over two dozen such exceptions to the duty of confidentiality. Each state mandates the disclosures that must be made prior to the commencement of treatment, including disclosures regarding exceptions to confidentiality. Some state laws (like in California) require very few disclosures, allowing the practitioner to largely decide the nature and extent of the disclosures to be made. Nevertheless, patients are typically informed, prior to commencement of treatment, either in writing or orally, or both, of the major relevant exceptions to confidentiality.

One common exception to the duty of confidentiality (where a signed authorization is generally not required) occurs when the practitioner is communicating with insurance companies, HMOs, and other payers in order to obtain payment for covered mental health services or to determine whether continued payment is warranted. It is important in such situations to reveal only the minimum amount of information necessary in order to accomplish the intended purpose. If a signed authorization is obtained, the disclosures are determined by the terms of the authorization. Disclosure of too much information can lead to a patient’s claim of breach of confidentiality. For example, mental health practitioners should not reflexively comply with every request by an insurer for a patient’s treatment records. It is not uncommon for compromises to be reached in terms of the amount of information ultimately provided. Practitioners should be ready and able to advocate for patient privacy in appropriate circumstances.

An allegation sometimes leveled against therapists involves situations where therapists made contact or communicated with physicians or other licensed health care practitioners who may be treating or may have treated the patient, or situations where another health practitioner made contact with the treating therapist. The contact might be made by telephone or other means and might involve the sharing of information, including treatment records. In some situations, the

therapist may have contacted the other practitioner (or responded to another practitioner) without the prior knowledge or permission of the patient – perhaps when an unexpected circumstance occurs. When the patient finds out about such contact, a claim or complaint may be asserted.

The primary defense to such claims or complaints is that the law (for example, in California) allows licensed health care providers to disclose patient information to other licensed health care providers or health facilities without the patient's signed authorization if done for the purpose of diagnosis or treatment of the patient. Practitioners must know the nuances of the law in their state to determine the breadth of such an exception. Of course, practitioners will often disclose to the patient, prior to the commencement of treatment, that this exception to confidentiality exists. Practitioners must be careful if the patient is uncomfortable with this exception to confidentiality and desires that no contact be made. It is generally unwise for mental health practitioners to treat a client who insists upon a significant limitation to this public policy exception to confidentiality.

Another allegation sometimes made against mental health practitioners occurs when the practitioner makes disclosures to others in circumstances where the practitioner believes or determines that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim(s). In such cases, the disclosure is typically made to a person(s) reasonably able to prevent or lessen the threat, including the target of the threat. When a patient finds out that such a disclosure has been made, the patient may reflexively claim that an unlawful breach of confidentiality occurred. Depending upon the specifics of the statutory and case law in the state in which the disclosure occurs, the practitioner will often have an effective and well-accepted defense. This right or duty to protect is typically disclosed or explained to patients before treatment begins, and it includes situations where the patient presents a danger to self or to others.

Patients who participate in couples counseling or family therapy should expect to receive information from the practitioner that lays out the confidentiality parameters of the treatment. This is sometimes done in a written "no secrets" policy. Failure to provide such information at the outset can result in a claim alleging breach of confidentiality – for example, when the therapist reveals some information to the family unit being treated that was learned from one of the participants when others were not present in the session. Practitioners may also face claims for revealing patient information at a workshop or class/seminar, or for revealing patient related information in an article or book. The accusation may be that the practitioner did not sufficiently mask the identity of the patient or that the practitioner used or exploited patient information, without authorization, for professional or financial gain. With respect to articles or books, and where there was an anticipated financial gain for the practitioner/author, my view has been that a written agreement (or signed authorization) should have first been obtained (not a risk free or easy endeavor) before writing about (exploiting?) a patient's treatment.

Obtaining a proper authorization or written agreement in such situations, or deciding to forego doing so, must be carefully done or considered in order to avoid ethical or legal problems. Legal

advice is usually both necessary and wise.***** Some believe that if the masking (both of identity and treatment rendered) is properly done, the necessity of seeking agreement or authorization from the patient is obviated. While that might sometimes prove to be the case, more may be required in certain situations. With respect to workshops and seminars, where the presentation is made for academic purposes and not for commercial or financial gain, masking of the patient's identity is usually sufficient and not likely to generate problems.

Breach of confidentiality claims are sometimes asserted when a therapist or counselor makes a required child abuse or elder abuse report – or any other report that is mandated by state law. The aggrieved person may allege that the report that was made was not authorized under the applicable reporting law, or that it was made in bad faith, or that too much information was revealed, or that there was otherwise an improper breach of confidentiality. Mandatory reporting laws in the various states usually contain provisions related to the content of reports and immunity from liability for mandated reporters. The immunity granted should be broad enough and strong enough to defeat most breach of confidentiality claims arising from the filing of a mandated report. Some state laws may require the "good faith" of the reporter, which is usually not a difficult standard to meet.

Patients and practitioners sometimes conflate the notions of confidentiality and privilege. The concept of privilege involves the right to withhold or prevent testimony or the production of records in a legal proceeding. The privilege is held by the patient and may be waived by the patient, while the duty of confidentiality is imposed upon the practitioner by state law and is essentially a restriction on the volunteering of information outside of the courtroom/litigation setting. When the practitioner properly complies with a subpoena by producing treatment records or delivering accurate and truthful testimony at trial or deposition, there is no breach of confidentiality simply because the evidence turns out to be embarrassing or harmful to the patient, resulting in patient anger and retaliation. Before complying with a subpoena, the practitioner must make sure that the psychotherapist-patient privilege has been appropriately asserted and resolved.

AFTERTHOUGHT:

I have spoken with therapists whose spouses accused them of breaching the confidentiality of patients by revealing to the accusing spouse both the identity of one or more patients and some content from the therapy. The allegations may surface during and within a therapist's divorce proceedings and in a complaint by the spouse to the licensing board. There are defenses that can be raised, but perhaps that is for another article!

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