Breach Of Confidentiality? – No Revelation To Third Party

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… What duty of confidentiality does a therapist or counselor have with respect to the use of the information gained during a counseling session? For instance, suppose that a therapist learns something from a patient involving financial or business information related to a publicly traded company. It may be unlawful insider information or not. Or, suppose that a counselor learns that a client is selling a valuable parcel of real property. Should the therapist or counselor take action on this kind of information in an attempt to benefit, either directly or indirectly, from the information shared in the confidential counseling or therapy session? The short and safe answer to the question is “no.”

An interesting question presented is whether or not the therapist or counselor would technically be violating confidentiality if he or she acted upon the information gained during the course of treatment. Generally, a breach of confidentiality takes place when the therapist or counselor releases confidential information to a third party without the written authorization of the patient (assuming the practitioner is not otherwise required or permitted by law to make the disclosure). In the situations described above, the practitioner is not necessarily releasing any information to a third party. In the first scenario, the therapist might just act upon the information by investing in the company, and in the second scenario, the counselor’s wife might engage a realtor in order to buy the property.

Depending upon state law, and how the relevant statutes are worded, it may be *arguable* that neither situation involved a breach of confidentiality. It is true that the therapist or counselor learned of the information during a confidential session, but the information itself may not be confidential. If a patient tells her therapist about how wonderful a resort was, or how excellent a new restaurant was, is not the practitioner permitted to try either? In the two scenarios, the information learned had nothing to do with the mental or emotional condition of the patient or with any other aspect of the professional relationship. I mentioned in a previous article the case where a therapist learned from a patient that a large employer was presently hiring, and gave that information, which was public information (the hiring was advertised), to another patient. This sharing of information with another patient caused some problems for the therapist, but it was my view that technically, a breach of confidentiality did not occur.

With respect to the scenario concerning acting upon the financial or business information revealed during therapy, if it were unlawful insider information, the therapist would likely be in trouble. Perhaps the patient felt, because of confidentiality, that it was safe to talk about inside information with the therapist. The fact that the therapist used that confidential information to further his or her own financial interests and thereby compromised the patient’s position by exposing the patient to federal prosecution, and arguably exploited the patient for the therapist’s own financial gain, seems to be the essence of the wrongdoing. While a licensing board could argue breach of

confidentiality, it may not be the best or most appropriate charge. With respect to the scenario involving the hiring of a realtor to buy the property, the issue of an unethical dual relationship seems much more the focus of inquiry than breach of confidentiality.

MINORS AND PRIVILEGE

… Each state treats this subject somewhat differently, and in some cases, it is not easy to determine who the holder of the psychotherapist-patient privilege is when the patient is a minor. I have previously written about this subject and indicated that in many instances, the child is the holder of the privilege where the child is the identified patient. This may be so, at least in some states, even where the child is of tender years. For example, case law in California has held that a child who was seven years of age was the holder of the privilege and the child's therapist was the one who could and should assert or claim the privilege on behalf of the child.

In juvenile dependency cases, where a child may be removed from the home as a result of suspected child abuse, the determination of who the holder of the privilege is may be quite difficult. For example, in one state the law provides that either the child or the counsel for the child may invoke the psychotherapist privilege. If the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. The above provisions apply, with the informed consent of the child, if the child is found by the court to be of sufficient age and maturity to so consent. The capacity of the child to give informed consent is presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of age.

Counsel is the holder of the privilege if the child is found by the court not to be of sufficient age and maturity to so consent. The law makes clear that counsel for the child shall have access to all records with regard to the child maintained by, among others, a health facility or health care provider. What is the law in your state regarding this complex determination re: holder of the privilege? It is important to remember, when dealing with privilege, that the therapist or counselor's duty is to protect the patient's privacy and to protect the privilege until such time as the holder of the privilege has been identified and a waiver of the privilege is clearly established.

SOMETHING LIGHTER

… Last month I wrote about the Red Flags Rule. As a follow up to that topic, I recently read a post from a disgruntled dentist who was frustrated by the government's "reckless, heavy-handed, one-size fits-all laws…." He asserts that since he doesn't put patients' identifiers on his computer, his Red Flags policy is simple and in compliance: "Staff, if you notice anything unusual in relation to our patients' accounts, or if you are handed an unusual looking drivers license, notify me immediately. The Management"

HEALTH CARE FRAUD

… According to the National Health Care Anti-Fraud Association, which is an organization founded in 1985 by several private health insurers and federal and state government officials to combat health care fraud, the most common fraudulent acts include, but are not limited to:

1) Billing for services, procedures and/or supplies that were never provided or performed;

2) Intentionally misrepresenting any of the following, for purposes of obtaining a payment – or a greater payment – to which one is not entitled:

- the nature of services, procedures and/or supplies provided or performed;
- the dates on which services and/or treatments were rendered;
- the medical record of service and/or treatment provided;
- the condition treated or the diagnosis made;
- the charges for services, procedures and/or supplies provided or performed;
- the identity of the provider or the recipient of services, procedures and/or supplies; and

3) The deliberate performance of medically unnecessary services for the purpose of financial gain.

Read these examples of health care fraud and think carefully before, for example, complying with a patient request that might involve any of these practices.

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