Child Abuse - Emancipation of Minor, Confidentiality, Privilege

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NOTE: The articles below were first published on the CPH and Associates' website in February and May 2008. They appear here with non-substantive changes. Nuances or special situations regarding the duties of confidentiality and the child abuse reporting laws, and the basics or practical applications of the psychotherapist-patient privilege laws are subjects and issues that are likely to be encountered by psychotherapists working in a variety of settings.

CHILD ABUSE – EMANCIPATION OF MINOR

… What is the effect, if any, of your state's emancipation of minor laws on your duty as a mandated reporter of child abuse? The answer to this question varies from state to state, but it is an important question to think about and to answer. One example of how this question may arise involves consensual sexual intercourse between minors or between a minor and an adult. Suppose that a fifteen-year old minor tells her therapist or counselor that she engaged in consensual sexual intercourse with her twenty-two year old friend. Suppose further that such information must be reported by the practitioner as a part of his or her duty to report known or suspected child abuse.

Does the duty to report change if the minor tells the therapist that she has been declared by the court to be emancipated? In order to answer this question, reference must be made both to the child abuse reporting law and to the laws dealing with emancipation of a minor. For instance, how does the child abuse reporting law define the word "child?" Does the child abuse reporting law mention anything about emancipated minors, and if so, does it provide the necessary guidance? In most states, the definition of "child," for purposes of reporting child abuse, is simply "a person under the age of eighteen." No reference may be made to emancipated minors. In such a case, it is necessary to look at the statutes dealing with emancipation.

The laws dealing with emancipation will typically specify the age at which emancipation may be sought by the minor and/or a parent. In one state, the age is as low as fourteen. In that state, there is also a statute that specifies the legal effects of emancipation. That law specifies that an emancipated minor can enter into legally binding contracts, own real property, establish his/her own residence, sue or be sued, and consent to medical, dental or psychiatric care without parental consent, knowledge or liability, among other things. This law, however, does not say anything

about the minor no longer being subject to the child abuse reporting laws because of his or her emancipation. Thus, since the child abuse and neglect reporting law in that state defines a minor as a person under the age of eighteen, emancipation would apparently have no effect upon the duty to report child abuse under the circumstances specified above.

Not every question, however, is as easy to answer. Suppose, for example, that the emancipated minor in the question posed in the first paragraph is married to the twenty-two year old. Would sexual intercourse between the two married persons be required to be reported as child abuse? A review of the applicable laws in the state in question reveals that there is an exception made in the case of sexual intercourse between spouses. In any event, it seems highly unlikely that a child protective services agency would investigate a report of child abuse if a report were made for the consensual sexual intercourse of a fifteen year old with her adult husband. It must be mentioned that just because the minor states that she is emancipated and lawfully married, that does not make it so. Sometimes patients lie or are mistaken, but licensed practitioners are not generally expected or required to act as investigators. A therapist involved in such a situation might, *depending upon circumstances*, need to call child protective services and report the facts (and indicate that this does not appear to be child abuse) and either allow CPS to investigate and then close the case, or preferably, to decide, with the input from the therapist, that no report will be taken or that no report need be made. Such conversations should of course be documented in the treatment records.

CONFIDENTIALITY – CHILD ABUSE INVESTIGATIONS

… Therapists and counselors are generally aware of their child abuse reporting duties. But, situations can occur that may raise issues concerning the duty of a licensed mental health practitioner to maintain confidentiality once a mandatory report is made. Suppose, for example, that a client or patient tells a therapist about conduct that requires the practitioner to report child abuse. Further suppose that the practitioner makes the child abuse report in accordance with the requirements of state law. A few days later, an investigator shows up at the practitioner’s office and wants to talk with the practitioner about the client or patient. Should the practitioner cooperate? Must the practitioner cooperate?

The answer to these questions depends upon the provisions of state law. One state’s law, for example, allows the practitioner to cooperate with investigators – but does not require cooperation. After specifying the required contents of a child abuse report, that state law says that information relevant to the incident of child abuse or neglect *may be given* to an investigator from an agency that is investigating the known or suspected case of child abuse or neglect. Thus, if the practitioner is treating the alleged child abuser, it would generally be wise for the practitioner to refuse to cooperate with the investigator by maintaining confidentiality. Of course, the practitioner can talk with the investigator if there is a signed authorization from the patient allowing the practitioner to

cooperate.

A somewhat different case is presented if the therapist or counselor is treating the victim of the alleged child abuse. Once the required report is made, the investigator, as in the example above, may seek additional information from the practitioner. In this case, the practitioner may be more willing to cooperate with the investigator and would, in the state referred to, be permitted to do so. If the law allows cooperation, the practitioner would not be required to seek written authorization. However, a good habit is to seek a written and signed authorization whenever confidential information about the patient is sought by a third party – even if the third party is an investigator from a governmental agency charged with the duty to investigate child abuse reports. Research the law in your state regarding your right or duty to cooperate with investigators following the required report of child abuse.

PRIVILEGE – A COMMON WAIVER

… The psychotherapist-patient privilege is an important aspect of patient privacy. As has previously been written about in these pages, the privilege generally “belongs” to the patient and can be claimed (asserted) or waived by the patient. It is different from confidentiality. Privilege involves the right to withhold testimony in a legal proceeding. The privilege, however, is not absolute. Thus, there are times when the privilege may not apply – such as, when patients have put into issue in a lawsuit their mental or emotional condition. This typically occurs when a patient alleges, for example, that she suffered mental and emotional distress as a result of the defendant’s negligence or wrongful act and when the patient seeks monetary damages for the damage done.

While this is primarily a legal issue affecting the introduction of evidence, it is important for practitioners to be aware of this exception. Patients or clients will often be surprised when they learn that a subpoena has been served for their records or the therapist’s testimony, and when they are for the first time informed that they may have waived the privilege by making the assertions they make in the complaint (the formal pleading). Patients will sometimes call and express concern or outrage. The practitioner may need to encourage the patient to talk with the patient’s attorney to fully understand why it may be necessary to divulge what was thought to be protected and private (in order to prove the case). Also, the practitioner may want to alert the patient or the patient’s attorney to the existence of material in the file that may be “highly charged” or particularly embarrassing.

In most if not all states it is possible for the patient’s attorney to seek a protective order in order to suppress disclosure of particularly sensitive matters. A protective order is best sought in situations where the information to be released is highly embarrassing or prejudicial, but of little probative value. While each case is different, be assured that the lawyer on the other side of the issue will likely argue against the issuance of a protective order. Generally, courts like all relevant evidence

to be introduced and may initially be reluctant to issue such an order, but protective orders are by no means a rarity when it comes to the production of mental health records or receipt of the practitioner’s sworn testimony at a deposition, court hearing, or trial.

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