Confidentiality

Avoiding Liability Bulletin - June 2021

NOTE: The following article was first published on the CPH and Associates' website in July 2009. It appears below with minor changes. The article attempts to distinguish between breach of confidentiality violations and other forms of unprofessional conduct.

CONFIDENTIALITY

What duty of confidentiality, if any, does a mental health practitioner have with respect to the use of the information gained during a psychotherapy treatment session? For instance, suppose that a practitioner learns something from a patient involving financial or business information related to a publicly traded company. It may be unlawful insider information or not. If not, should the practitioner use this knowledge for self-benefit or for the benefit of others? If it was insider information and the practitioner acted upon it, would this constitute a breach of confidentiality? Or, suppose that a practitioner learns that a client is selling a valuable parcel of real property. Should the therapist take action on this kind of information in an attempt to benefit, either directly or indirectly, from the information shared in the confidential treatment session? The short and safe answer to each of these questions is "no."

An interesting question presented is whether or not a mental health practitioner would technically be violating confidentiality if they acted upon information gained during the course of treatment. Generally, a breach of confidentiality takes place when a metal health practitioner 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 practitioner might engage the services of a realtor to pursue a possible "arms-length" purchase.

Depending upon the wording of state law, it may be that neither situation involves a breach of confidentiality. It is true that the practitioner 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 little or 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 the other patient caused problems for the therapist, but it was my view that a breach of confidentiality did not occur.

With respect to the scenario of 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 therapist used that information to further their own financial interests and thereby compromised the patient's position by exposing the patient to possible federal prosecution and arguably exploited the patient for the therapist's own financial gain, all of which seems to be the essence of the wrongdoing. While a licensing board might 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. Additionally, conflict of interest and exploitation are legal and ethical principles that may be involved.

NOTE: The following article was first published on the CPH and Associates' website in June 2016. It appears below with minor changes.

CONFIDENTIALITY – PEER GROUP COMMUNICATIONS

When participating in peer group communications, whether a more formal or structured listserv, or an informal group of mental health practitioners, questions or concerns about patient confidentiality may sometimes arise, perhaps unexpectedly, among participants. Some participants may be rather open when sharing information pertaining to a patient or former patient (e.g., with seeking a referral or some clinical information), while others may be more circumspect. With respect to determining whether there has been a breach of confidentiality, much depends upon the applicable law and the particular facts and circumstances of each situation, but a few general thoughts are worth keeping in mind.

If the purpose of the disclosures is to help in the diagnosis or treatment of the patient, and if the disclosure is to another licensed person or persons, no signed authorization from the patient may be necessary. This is the case in many states and for covered providers under HIPAA, which protects *individually identifiable* health information, as do state confidentiality laws. I have written about this common exception to confidentiality on several prior occasions. Thus, if there was a group of therapists who regularly shared patient information for the purposes of consulting with

their peers to help in the diagnosis or treatment of their respective patients, there would typically be no problem with respect to confidentiality.

While there may be insufficient reason to share the name of a particular patient, a revelation of the name *might not* (see below) constitute a violation, since the entire disclosure may be to other therapists for diagnostic or treatment-related purposes. Those who learn of the name are hopefully aware of the importance of confidentiality and may have expressly or impliedly agreed to not further disclose any of the information shared. Moreover, there may be some circumstances where disclosure of the name is appropriate, necessary, or defensible. If for some reason revelation of a name to the other practitioners did constitute a technical breach, the likelihood of harm or damage to the patient seems limited.

In any event, unless there is good reason to reveal the name of a patient, revelation can easily be avoided. Sometimes, however, sharing the details of a patient's treatment in a peer group may provide so much detail that the identity of the patient may become known, even if the name of the patient is not divulged. Such a situation could occur when some of the participants in the group are from the same general community or the patient described is well known – in the public eye. It is wise to mask details of a particular situation so that the identity of the patient is well protected. Some details may not be relevant to the diagnosis or treatment and can be changed without jeopardizing the clinical aspects of the case. Masking is often done by practitioners who present case studies to colleagues or to students. Much clinical information is often revealed, but practitioners are careful to mask the identities of patients.

The further away one gets from a peer group that provides a place for clinical consultation amongst a select group of participants, the more careful one needs to be. This is because the general exception to confidentiality that deals with communications with other health care providers for purposes of diagnosis or treatment of the patient will likely no longer be applicable or may be compromised by the "presence" of others who are not there to discuss or opine upon the patient's diagnosis or treatment – albeit that the others are therapists. If, however, the identity of the patient is well- protected or adequately masked, there would likely be nothing wrong with discussing the clinical aspects of the case in the presence of those others. Whatever the kind of peer group (a clinical consultation group or a multi-purpose group or listserv), the sponsors, leaders, or initiators of such a group would typically discuss or promulgate rules of operation, issue cautions, and seek some form of agreement or promise from the participants as to their expected behavior relative to patient confidentiality.

With respect to consultations between two licensed practitioner for purposes of diagnosis or treatment of a patient, it is my view that the name of the patient can and probably should be revealed. The law allows for this and does not contemplate that consultations will be done for the benefit of anonymous persons. Consultants might want to know the names of the patients being treated for business, legal, or other reasons, not the least of which is to have a full and accurate idea of the identities of those who may be affected by the consultations. Also, it is wise to know the

identity of the patient in case there is some unexpected or possible conflict that may arise. It is certainly better to find out about this before consultation services begin.

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