Possession Of Child Pornography

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…. A reader indicated that on a list serve she visited there was “considerable disagreement over the expectations of confidentiality for a client in possession of child pornography.” She asked that I consider writing about this topic. I am not surprised that there was considerable disagreement. Many interesting issues and questions can arise for the practitioner in this area, and clear, helpful answers depend upon the factual and clinical particulars involved, and most importantly, the precise question(s) asked. Since I did not participate, I do not know what questions were asked and what principles or assertions were being put forward. As an aside, my experience with list serves, and the informal opinions or views expressed by the participating therapists, is that there is a reasonable chance for miscommunication to occur and/or misinformation to be shared. Nuances are sometimes overlooked, questions are not precisely asked, and the chance for disagreement, sometimes confusion, is heightened. At least, that is my perception!

The reader asks about “the expectations of confidentiality for a client in possession of child pornography.” I am assuming, for purposes of the discussion that follows, that a patient or client, or someone else, tells the treating therapist or counselor that the patient/client possesses, or has possessed, some form of child pornography. Perhaps the same issues and questions are raised by asking whether a therapist or counselor has a duty to file a child abuse report when made aware, either directly or indirectly, that the patient possesses or has possessed, child pornography. Possession, manufacture, or distribution of child pornography is typically a crime at the state level and may constitute a federal crime as well. The discussion that follows represents my views on the subject and they are not intended as advice in a particular case.

Ordinarily (there are exceptions in state law), therapists and counselors are not required to report the already committed crimes of their patients. During the course of therapy or counseling, patients may reveal past conduct that technically constitutes a crime, whether a misdemeanor or a felony. For example, if a patient tells his or her therapist that in the past he has committed multiple petty thefts, this is generally viewed as confidential information. But every state (I trust) has enacted laws requiring mental health practitioners and others to report child abuse and elder or dependent adult abuse (or similarly titled kinds of abuse). Most practitioners (again, I trust!) inform their patients or clients, in writing and at the outset of treatment, of specified information about their practices, including but not limited to, information that is required to be provided as per state law, the fees for professional services and for missed sessions, office policies, insurance or other third party payment matters, and information related to privacy and confidentiality concerns.

With respect to confidentiality, written disclosures would typically be made regarding the exceptions to confidentiality, such as the duty to report child abuse, elder abuse, and dependent adult abuse, and the right or duty to take action in cases where the patient poses a serious danger of violence to others or to self. If the practitioner discusses some or all of the written information provided to the

client or patient, he or she should clearly want to discuss confidentiality, since confidentiality is generally seen as the “cornerstone” of counseling and psychotherapy. It would not be typical, however, for the practitioner to, at the start of treatment, get into much detail about the technicalities concerning what constitutes child abuse, including what constitutes sexual exploitation or sexual abuse of a child, or related terms, including child pornography. This kind of information would more likely be discussed with a patient when a particular situation arises during the course of treatment, or when the patient asks questions about what constitutes child abuse or the limits of the child abuse reporting law.

Suppose that the patient shares information about his or her possession of child pornography. Once child pornography is “on the table” in the session, no matter how it got there, questions of confidentiality are in the forefront. May the practitioner assure the patient of continued confidentiality as they discuss the clinical and treatment issues that may be involved? Is the therapist mandated by law to break confidentiality by, for example, filing a child abuse report? Must the patient have be informed that his or her expectations of confidentiality depend upon the content of the therapy and the determinations made by the practitioner as treatment proceeds? These are weighty questions, and the answers are necessarily dependent upon state law, both with respect to confidentiality laws and child abuse reporting laws. This discussion is based upon California law. The laws in other states would have to be carefully studied in order to determine how a particular state might address these or related issues and questions. Of course, the particular facts and circumstances of each case will necessarily affect the answers to these questions.

Possession of child pornography is a crime, as is producing, preparing, publishing, or printing child pornography with intent to distribute to others. There has been a marked increase in child pornography crimes as a result, in significant part, of the emergence of the Internet. California law criminalizing the simple possession of child pornography is contained within a rather complex series of statutes in the Penal Code dealing with obscenity. Essentially, material that depicts minors engaged in or simulating “sexual conduct” constitutes child pornography. The term “sexual conduct” is defined broadly, and includes, among other things, intercourse, oral sex, lewd and lascivious acts, and masturbation. If such acts are done with a minor, and such acts are depicted in a film, photograph, or otherwise, it likely constitutes child pornography. The prosecution must prove that the crime was knowingly committed and that the defendant knew or reasonably should have known that the person involved or depicted was a minor (under 18 years of age).

If a patient told his therapist that he possessed a photograph or video tape clearly depicting child pornography, the therapist has knowledge or reasonable suspicion that the patient has committed a crime. As mentioned earlier, the past crimes of the patient are ordinarily confidential and not reportable. That is the general rule extant in California and, I hope, in most if not all states. However, if the crime committed by the patient constitutes child abuse, for example, then the therapist would be mandated to make a report and thereby break confidentiality. If not mandated to make a child abuse report, then knowledge by the therapist that the patient possessed child pornography would be confidential, just as it is confidential when a therapist in California learns that

a patient possessed illegal drugs, embezzled money from his or her employer, or committed another misdemeanor or felony. Thus, if not mandated to report child abuse, the patient can be assured that the communications with his or her therapist (at least thus far) are confidential. It must be said, and a caution issued, that there are many different scenarios that could and do occur in actual practice where the possession of child pornography by a patient, when taken together with the other facts and circumstances existing in the case, may lead the competent and prudent practitioner to reasonably suspect that child abuse has occurred, thus triggering a mandatory report.

In order to determine whether knowledge of the commission of the crime of possession of child pornography (or reasonable suspicion thereof) would trigger a mandatory report in California, we must look to the child abuse reporting law, which is found in Sections 11164 through 11174.3 of the California Penal Code. “Sexual exploitation” of a child constitutes reportable (mandated) child abuse under this law. Sexual exploitation is a form of sexual abuse, and it includes conduct involving matter depicting a minor engaged in obscene acts in violation of specified sections of the obscenity laws that address preparing, selling, or distributing obscene matter, employment of a minor to perform obscene acts, and other active participation in the exploitation of a child. No such conduct is involved in a case involving simple possession of child pornography (a felony). It is important to note that the section of law dealing with simple possession of child pornography is not mentioned in the child abuse reporting law as one of the sections that, if violated, would trigger a mandatory child abuse report. In contrast, and as stated above, the child abuse reporting law specifies those sections of law dealing with obscenity and child pornography that would constitute reportable sexual abuse of a child (sexual exploitation).

In summary, the child abuse reporting law in California makes no reference to the section of law that makes it a felony to possess a photograph, film, slide, video tape, photocopy, CD-Rom, computer floppy disc (and other media) depicting a person under the age of eighteen personally engaging in or simulating specified sexual conduct. It therefore appears to this writer that the crime of possession of child pornography, assuming no other involvement (e.g., production, sale, distribution, aid in the recruitment of subjects etc.), is not a crime that would require breaking confidentiality under the child abuse reporting law, or otherwise. Remember, our scenario here assumes that the patient’s possession of the pornographic material does not, based upon the totality of circumstances, cause the practitioner to reasonably suspect that the patient has abused or is abusing a child.

What if the therapist or counselor actually sees the pornographic material and it appears that a very young girl is engaged in sexual intercourse with an older man? Must the practitioner report child abuse because the photo itself provides evidence that the unknown young girl in the photo has been the victim of sexual abuse (and the abuser is the unknown older man)? The child abuse reporting law in California requires a report whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child

abuse. In this case, the therapist did learn of the apparent sexual abuse of the child in the photo in his or her professional capacity. Did this practitioner “observe a child” being abused by merely looking at the photo? Would the therapist be better served by not reporting this to anyone, but rather, respecting the patient’s confidentiality?

My view is that the practitioner would be acting appropriately by respecting the patient’s right to confidentiality and by not making a child abuse report as a result of the knowledge that the patient possesses or was in possession of material that constitutes or appears to constitute child pornography. The fact that the therapist may have seen the picture does not change my view that this information is confidential. Mere viewing of the photo should not, and in my view would not, transform this situation from a non-reportable one (where confidentiality is protected) to one requiring a child abuse report (where confidentiality is compromised) on the basis of the content depicted in the photo. The therapist must be careful in making his or her assessment of the patient and the entire situation because, if it is later revealed that the patient has been abusing one or more children, the fact that the therapist knew of the patient’s possession of child pornography could be used in litigation as some evidence that the therapist was negligent in assessing the patient and was criminally responsible for his or her failure to report child abuse.

The legal and ethical duty of confidentiality is the cornerstone of therapy, and licenses can be revoked for violations of patient confidentiality. If there is to be a mandatory exception to confidentiality, as there is when a child abuse report must be made, the exception must clearly be stated in the law. Clarity is necessary because the failure to make a required child abuse report by a mandated reporter is a crime, and crimes must be clearly articulated (not vague and ambiguous) in the law before someone can be lawfully prosecuted and convicted of a particular crime. I see no statement in California law to the effect that possession of child pornography, or the incidental viewing of it by a therapist, would require the filing of a child abuse report. I would argue that the spirit and intent of the reporting law, as well as its specific language, does not require a report solely because of the viewing of the pornographic matter by the therapist, or because of knowledge that a patient possessed child pornography.

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