Confidentiality

written by Richard Leslie | May 24, 2016

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… While confidentiality is generally considered to be a cornerstone of psychotherapy, most mental health practitioners realize that there are multiple exceptions to confidentiality – some of which are required and some of which are permissive. Since it is the individual states that regulate the practices of medicine (including psychiatry) and the various licensed professions that provide mental health care, one must generally refer to state laws or regulations to determine the extent of confidentiality and the exceptions to confidentiality. Of course, HIPAA and its implementing federal regulations also affect the duty of confidentiality for those mental health practitioners who either are employed by a "covered entity" or for those who are themselves considered a "covered entity" under the "Privacy Rule" (the federal regulations implementing HIPAA).

I have long believed that if a prospective patient were informed about all of the exceptions to confidentiality (and in greater detail then appears below), this might scare the consumer away from seeking mental health care. Each state and each profession regulated within the state is governed by its own laws and regulations regarding not only the duty of confidentiality, but the disclosures regarding confidentiality that are required to be made to a patient before the commencement of treatment. Additionally, the ethical standards of the various mental health professions may contain other requirements or suggested behavior with respect to disclosures to be made to patients prior to the commencement of therapy. For the purpose of illustration only, let me explain why some believe that the many exceptions to confidentiality, if fully disclosed to prospective patients, might make some prospective patients a bit uneasy. I rely upon California law for the purposes of the following "tongue in cheek" illustration.

I know how important the privacy and confidentiality of our work together is for you, and I recognize that during the course of therapy you may be revealing very personal and sometimes embarrassing details of your life to me. Full, open, and frank communication is an important factor influencing the outcome of therapy. Before we commence treatment, I do want to inform you that under California law and the ethical standards of my profession, you are entitled to confidentiality in our work together. However, the duty of confidentiality is not absolute. There are many exceptions to confidentiality, some of which are mandatory and some of which are permissive. While most or many of these exceptions may not apply to you individually, I cannot predict with any accuracy what will develop as we proceed with your treatment.

Therefore, in the spirit of full disclosure, I want to inform you of the following exceptions to your privacy and confidentiality – times when I may be required or permitted to make disclosures, at least to some degree, about you or your treatment without your written authorization:

1. If disclosure is compelled by the child abuse reporting laws – e.g., when I reasonably suspect that child abuse or neglect has occurred.
2. If disclosure is compelled by the elder abuse reporting laws – e.g., when I reasonably suspect that elder abuse has occurred
3. If disclosure is compelled by the dependent adult abuse reporting laws – e.g., when I reasonably suspect that dependent adult abuse has occurred
4. If disclosure is required or permitted because you are in such mental or emotional condition as to be dangerous to yourself or to others
5. If disclosure is required or permitted when you communicate to me, either directly or indirectly, an imminent and serious threat of physical violence against a reasonably identifiable other
6. If you sue me for alleged negligence or malpractice, I will share your treatment records and other information with my attorney and my insurer
7. If I sue you for fees owed by you, the fact of our professional relationship may be disclosed in the lawsuit
8. If I decide to consult with another health care provider for purposes of your diagnosis or treatment, your treatment records and communications with me may be revealed
9. In the event of your death, disclosures may be made to a coroner to determine, among other things, the cause of your death
10. If you file a complaint against me with the state licensing board, I may forward your records and other information to my attorney and to the licensing board
11. If you file a complaint against me with the Ethics Committee of my professional association, I may reveal your records and other information in the course of that proceeding
12. If you file a claim for reimbursement with an insurer, I may share information with the insurer about your diagnosis, progress, prognosis, and the treatment plan
13. If I am ordered by a court to disclose records or information pertaining to you or your treatment
14. If there is a search warrant lawfully issued to a governmental law enforcement agency authorizing the seizure of your records
15. If disclosure is compelled by a party to a proceeding before a court or administrative agency pursuant to a subpoena for my appearance and testimony or a subpoena for my records pertaining to your treatment
16. If disclosure is otherwise required or permitted by law

Please feel free to ask me about any of these exceptions to confidentiality. We can discuss these public policies in more detail if you have any questions.

Again, the above information illustrates that there are many exceptions to confidentiality. While the above examples are based upon California law, each state and perhaps each profession will have its own list of mandatory and permissive exceptions to confidentiality. Therapists and counselors will of course disclose to patients that which is required by state law or regulation, or by the ethical standards of the profession. Practitioners who are “covered entities” under HIPAA will make their required disclosures in the Notice of Privacy Practices that they provide to their patients. Beyond that, practitioners will use their best judgment as to the extent of disclosure necessary or appropriate under

the circumstances.

Breach of confidentiality is one of the more common allegations in malpractice claims or lawsuits. Obtaining the patient’s signed authorization to release information to a third party protects the practitioner, provided of course that the disclosures made are consistent with the scope of the written and signed authorization. As described above, however, there are times when a written authorization is not required. How much must or should a patient be told about these exceptions to confidentiality – and to what degree? Can some of the information be provided as the circumstances may dictate, and not necessarily prior to the commencement of treatment? How much are you required to disclose?