Confidentiality / Privilege – Death of the Patient

written by Richard Leslie | May 24, 2016

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… I previously wrote about this topic, in a limited way, where I addressed the issue of the county coroner or medical examiner seeking information from a therapist or counselor in order to determine whether the death of the patient was the result of suicide or murder. When a patient dies, whether as a result of ill health, suicide, murder, or accident, the therapist or counselor will likely come face-to face with the issues of confidentiality and privilege. These issues can arise in any number of ways.

As indicated above, perhaps the county coroner or medical examiner appears at the practitioner's door seeking access to a deceased client's records. Perhaps the spouse of a deceased client calls the practitioner and wants to come in and talk about the state of the deceased's mental or emotional condition prior to death, or about other private information. Perhaps there will be a will contest or other kind of lawsuit where the therapist or counselor will be subpoenaed to testify or to produce records. Maybe the patient was severely injured in an auto accident and subsequently died from the injuries suffered in the crash. Perhaps the spouse is now pursuing a wrongful death claim on behalf of the deceased or the estate. Whatever the circumstance, the therapist or counselor must understand some basic principles in order to make the right decisions.

One principle that is helpful to remember is that generally, confidentiality survives the death of the patient. In other words, the deceased patient continues to be entitled to confidentiality, and the practitioner is under a continuing duty to protect the confidentiality of the records and information pertaining to the deceased patient. Similarly, the psychotherapist-patient privilege, which "belongs" to the patient, survives the death of the patient. Thus, the practitioner's first instinct after the patient dies and upon receiving a request for information about the deceased patient should be to resist disclosure. Therapists and counselors seldom get in serious trouble for first protecting confidentiality and privilege, even if it is later determined that disclosure is mandated or permitted.

With respect to the county coroner or medical examiner, and as indicated in the July 2005 Avoiding Liability Bulletin, disclosure to the county coroner or medical examiner (or some other designated official) may be required or permitted by state law for a specified purpose – the most common of which would be to aid in the determination of whether the death of the patient was the result of suicide or murder. Reference to state law is necessary in order to determine the extent of the access, and the time frame and manner of the required or permitted disclosure to the investigating government official.

With respect to the situation in which a spouse of a deceased client wishes to meet with the

practitioner, care must be taken – and the therapist or counselor may be required to walk a very fine line. On the one hand, confidentiality must be protected. On the other hand, the concerned spouse should not necessarily be ignored. Practitioners often want to have some interaction with the surviving spouse, both out of a human concern and out of a desire to not do anything at such a critical time that will anger the surviving spouse. Depending upon the circumstances, meeting with the surviving spouse can be useful in bringing closure and showing compassion. This can sometimes be accomplished without breaking the confidentiality of the deceased client. Surviving spouses will often understand and respect the need for the therapist to continue to preserve confidentiality.

Meeting with the surviving spouse may be more difficult in situations where the patient or client has committed suicide. In such situations, the surviving spouse may be seeking information that will ultimately be used against the therapist or counselor in a lawsuit or claim for damages that seeks to place blame on the practitioner for failure to recognize the risk to the patient, or for failure to take appropriate action to prevent, or to try to prevent, the suicide. Often, the therapist or counselor will have to balance the risks and benefits of not meeting with or giving any information to the surviving spouse, or meeting with the surviving spouse and sharing a limited amount of information. In such circumstances, it is useful to remember that the beneficiary or personal representative of the deceased patient, depending upon state law, is generally the one who may sign authorizations and obtain access to records on behalf of a deceased patient. In such situations, legal consultation may be both wise and necessary.

With respect to will contests or other lawsuits, the issue of psychotherapist-patient privilege will likely be involved. Depending upon the kind of case, the privilege may be waived by someone acting on behalf of the deceased patient (such as a guardian appointed for the purposes of pursuing the lawsuit on behalf of the deceased – to wit, a guardian ad litem), or the practitioner will be in a more ambiguous position and will have to assert the privilege and await direction from the holder of the privilege or a ruling by the court. Sometimes, identifying the holder of the privilege (e.g., the “personal representative” of the patient) is not easy. Perhaps there will be two holders of the privilege, each with a different position regarding waiver. Legal consultation may be both wise and necessary in such circumstances.

It is important to remember that if a practitioner is to err when faced with these kinds of dilemmas, it is usually better to err on the side of protecting confidentiality or privilege, at least at the start! One can change their position when confronted with the governing law.