

Crimes and Confidentiality

written by Richard Leslie | October 31, 2022

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NOTE: Last month I wrote about a situation involving the intended dangerous behavior of a patient - some of which would constitute criminal conduct if carried out. The article briefly addressed the issue of how the duty of confidentiality is affected by the criminal conduct of the patient. This article addresses that issue more fully. It was first published on the CPH Insurance' website in February 2015, and appears here in substantial part.

CRIMES AND CONFIDENTIALITY

In the December 2014 issue of the Avoiding Liability Bulletin I asked a series of questions related to past criminal acts committed by adult patients and how such information, gained during the course of treatment, would affect the mental health practitioner's duty of confidentiality. This article will explore some of those questions and the public policy and professional issues raised by them. The questions assume that the practitioner is licensed to provide mental healthcare, that the practitioner is acting in a treating role rather than in an examining role, and that the practitioner is providing services in a private practice setting. The laws of each state may vary, sometimes in fine nuance, on some of these questions and with the comments that follow. Thus, the discussions below should not be taken as legal advice in particular situations, but are meant to stimulate thought, discussion, and research.

The duty of confidentiality is critical to the effectiveness and acceptance of the various mental health professions in particular, and to society in general. Those in need of mental health treatment will be more likely to seek and obtain mental health care, where they may have to reveal the very personal and sometimes compromising, embarrassing, or incriminating details of their lives, if they feel reasonably secure that the communications between them and their therapists will remain confidential. Without full and open communication between psychotherapist and patient, the likelihood of successful treatment may be defeated, diminished or delayed. Full and open communication can occur more easily and naturally when the patient is assured that confidentiality is the rule rather than the exception.

HIPAA and state laws recognize the importance of confidentiality, but also recognize that confidentiality is not absolute. There are numerous public policy exceptions to confidentiality. With respect to state law, a wrongful breach of confidentiality by the licensed mental health practitioner could mean revocation or suspension of one's license and civil/monetary liability for damages caused by the breach. Some of the exceptions to confidentiality are mandatory and others are permissive - the latter exceptions being left to the discretion of the practitioner. HIPAA and some states require that certain

disclosures be made to the patient, prior to the commencement of treatment, regarding confidentiality and its exceptions. Other states may leave the manner and extent of such disclosures to the discretion of the practitioner.

Question: If patients reveal that they steal from department stores, must that be kept confidential?

Comments: I hope that the answer to this question in your state is “yes.” Patients may admit to actions that constitute crimes, such as possession of meth, cocaine, or some other illegal drug, or an offense such as an assault or battery, petty or grand theft, or other actions that violate state law. The general rule is that the already committed crimes of a patient, with some exceptions (e.g., child abuse, elder abuse, and dependent adult abuse reporting laws), are confidential. The fact that a client may be continuing to steal would likely not trigger any action by the therapist, other than continuing to treat the patient in a competent manner. Practitioners must be familiar with the laws in their respective states of practice that define the duty of confidentiality and the exceptions to confidentiality. Additionally, practitioners must be aware of any case law that affects the duty of confidentiality (e.g., the famed *Tarasoff v. University of California* decision of the California Supreme Court in 1974, which created the so-called “duty to warn”).

Questions: If patients reveal that they sell cocaine, must that information be kept confidential? What if the sales are to high school students?

Comments: Selling cocaine is a crime (felony) in all states. In California, if this information was shared with a therapist, the duty of confidentiality would obtain, and the therapist would not be required to make a report to a law enforcement agency or to anyone else. There is no statute that requires a report to authorities and therefore the general duty of confidentiality would be in effect. If the sales are to high school students, this presents an interesting issue. Since a child is usually defined (in child abuse reporting laws) as a person under the age of 18, one must determine whether the actions described would require a report under the applicable child abuse reporting statutes. Selling cocaine to high school students would seemingly not constitute neglect or sexual abuse. Whether or not such conduct constitutes some kind of child endangerment or physical abuse that would require a report is highly fact and situation dependent. My experience with this issue has been that usually the patient has not shared enough with the therapist to require a child abuse report, and thus, confidentiality has been maintained. The child abuse reporting laws in California impose no investigative duties on mandated reporters.

Question: If your patient tells you of a homicide committed years ago, is that confidential?

Comments: A past homicide would be treated as confidential in California. It should be noted that while a homicide often is a criminal act, it is not always a crime. For example, a homicide could be justifiable, as in the taking of another’s life in self defense. But even if the homicide described is a crime, the past crimes of the patient are confidential, and the law in California does not carve out an exception for a past homicide. Threats of future violence, including murder or serious physical injury, are a separate topic (dangerous patient) that has been generously discussed in prior articles (see the [Archives](#)).

Question: What if your patient tells you of a crime committed against a senior citizen – must that be kept confidential?

Comments: As soon as “senior citizen” is mentioned, the practitioner should be thinking about whether the actions described require an elder abuse report – whether physical abuse, abandonment, isolation, financial, neglect or otherwise. Elder abuse reporting statutes can be written rather broadly, so care must be taken to determine whether confidentiality must still be maintained or whether a report is required.

Question: What if a nineteen year-old patient tells the therapist that he had consensual sexual intercourse with his sixteen year-old girlfriend?

Comments: In California, this information would be confidential, and a child abuse report would not be required – even though the act described is a crime called unlawful sexual intercourse (statutory rape). I have spoken with many police agencies where I was calling to inform them that the “advice” they were giving therapists – that a report is required – was wrong. It is not an easy task to convince the captain in charge of the sex crimes unit that not all sex crimes against minors require a report by mandated reporters! Simply put, the law in California carves out an exception to reporting by mandated reporters for this particular age differential. The sexual intercourse must of course be consensual. What is the law in your state?

DEFINITION OF “PSYCHOTHERAPY”

I have written about this before and have shared this definition at workshops. So in case you have not read this before, I again present this thought-provoking definition – which is not of my creation. The author of this definition, Daniel B. Hogan, wrote a multi-volume work dealing with state regulation of psychotherapy. He took the position that the state should not regulate a profession that cannot be adequately defined.

“Psychotherapy is an unidentified technique, applied to unspecified circumstances, with unpredictable outcomes, requiring rigorous training”