Crimes and Confidentiality

written by Richard Leslie | May 24, 2016

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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/clients 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 by the state 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 with 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 or counselors 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. Healthier patients make for a healthier and safer society.

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 laws, a wrongful breach of confidentiality by the licensed mental health practitioner could in some cases 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 your client tells you that he steals from department stores, must that be kept confidential?

Comments: I hope and trust that the answer to this question in your state is "yes." Clients will often admit to actions that are crimes, such as possession of marijuana, cocaine, or some other illegal drug,

or an offense such as an assault or battery, petty or grand theft, or other actions that may constitute a crime. The general rule is that the already committed crimes of your patient, with some exceptions (e.g., child abuse, elder abuse, 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 knowledgeable about 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).

Questions: What if your client reveals that he sells 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 is 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 and Neglect Reporting Act in California imposes no investigative duties on mandated reporters.

Question: If your client 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 client tells you of a crime she 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 still applies.

Question: What if a nineteen year-old patient tells his therapist that he has 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 heading up 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?

Questions: What if your client admits to viewing or possessing child pornography? What if the patient received the pornography from a friend? What if the patient knowingly downloaded the pornography but did not share it with others?

Comments: Is the viewing of, or simple possession of, child pornography considered reportable child sexual abuse or sexual exploitation of a child (by the viewer or possessor) in the child abuse and neglect reporting law in your state? While possession of child pornography is a federal and state crime, it may not be reportable as child abuse. Viewing alone (without possession) may likewise not be reportable as child abuse. If the therapist knows or reasonably suspects that the patient is involved in the sexual assault (e.g., rape, statutory rape, incest, sodomy) or sexual exploitation of a child, a report would likely be required. Such determinations are highly fact and situation dependent.

Sexual exploitation typically involves preparing, selling, or distributing obscene matter involving children, employment of a minor to perform obscene acts, or inducing, promoting, trafficking in, recruiting, printing, distributing, or depicting children engaged in obscene acts. It also involves conduct by parents, or others responsible for a child's welfare, such as permitting or encouraging a child to pose, model, or engage in prostitution or a live performance involving obscene sexual conduct. Note the absence in the above general description of the words "possess" and "view." In a report to the Legislature regarding what is reportable under California's child abuse reporting law, a Deputy Attorney General wrote, "The term sexual exploitation is self explanatory and well-defined in the reporting law. Basically, it involves the use of a child for pornography or prostitution." Stated otherwise, sexual exploitation of a child refers generally to the creation and distribution of child pornography.

The manner in which the pornographic material is received by a "mere" viewer or possessor should not necessarily or ordinarily affect the question of whether the possession or viewing of the material by a patient would itself trigger a mandatory child abuse report. Federal prosecutors, for example, would likely not charge a person with the crime of sexual exploitation of a child who simply viewed and possessed child pornography. Rather, a federal charge of possession of child pornography would be likely. Similarly, I would think that state prosecutors would not charge a mere possessor/viewer of child pornography with sexual exploitation of a child. They would likely charge the person with possession of

child pornography, a felony. In California, the statute criminalizing the simple or “mere” (no producing, selling, distributing, recruiting, etc.) possession or control of child pornography is not among the statutes specified in the reporting law (relating to sexual exploitation) that would trigger a report. What is the law in your state?