HIV / AIDS and Confidentiality

written by Richard Leslie | May 24, 2016

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… Your client tells you that he has just tested positively for HIV/AIDS. Is this information entitled to the confidentiality that other patient communications enjoy? The answer to this and related questions necessarily depends upon state law, professional ethics, and the facts and circumstances of each particular situation encountered. At one end of the spectrum of circumstances possible is the situation where the patient has simply communicated to the therapist or counselor the results of the testing – that is, the existence of a medical condition or disease. At the other end of the spectrum is the case where the patient finds out the results of the test and proclaims that he is intent upon infecting as many people as possible and that he wants to take as many down with him as possible. In the middle, there are a myriad of possible circumstances.

The laws that impact upon the question are those dealing with confidentiality and the exceptions to confidentiality, the particulars of the "dangerous patient law" in the state, and the laws specifically pertaining to HIV/AIDS – that is, the duty or right, if either exists, of the health practitioner to inform sexual partners of the patient's condition or to otherwise break confidentiality in order to protect one's health or safety. By use of the term "dangerous patient law," I am referring to both statutory provisions and to case law. In California, for example, there are statutes that deal with the dangerous patient and allow for disclosure (breaking confidentiality to some degree) under specified circumstances, and there is case law (e.g., the famed Tarasoff v. Regents University of California decision of the California Supreme Court in 1976) that created a therapist's duty to use reasonable care to protect the intended victim against a patient's threatened violence. The exercise of that duty will often result in some degree of breaking confidentiality.

While the answer to the question posed above necessarily depends upon the facts and circumstances involved, the general duty to protect confidentiality, and the instinct that the practitioner should generally have to protect the patient's privacy, will usually protect the information from disclosure by the mental health practitioner. In California, there is a statute that specifically relates to HIV/AIDS and privacy. Without getting too deeply into its many provisions, the statute allows a physician and surgeon who has the results of a confirmed positive test to detect HIV infection to disclose to a spouse or sexual partner certain limited information. The physician may do so only after discussing with the patient a host of matters, including methods of avoiding risks to others, and only after the physician has attempted to obtain the patient's voluntary consent for notification of his or her contacts. This right to make permissive and limited disclosures is granted only to the physician and surgeon.

It has long been my view that the Tarasoff case, and the duty created by the Court (not a "duty to warn" as is commonly believed), is inapplicable to the situation where the therapist knows of the positive

results of a test and knows, for example, that the patient is continuing with his or her sexual relationships, perhaps without the intent to notify a sexual partner or take other precautions. I believe such situations to be inapplicable because the Tarasoff decision deals with situations where the patient communicates to the therapist a serious threat of physical violence against another, or situations where the therapist determines that the patient poses a serious danger of violence to another. Consensual sexual contact between adults, despite the risks thereof, does not, in my view, constitute physical violence.

There are statutes in California that deal with confidentiality and establish the general requirement of obtaining a signed authorization from the patient before releasing confidential information to third parties. These statutes contain provisions that specify the mandatory and permissive exceptions to confidentiality, and they allow disclosures without obtaining the signed authorization of the client. The most relevant (to the question posed above) permissive disclosure allows a psychotherapist to disclose information, consistent with applicable law and standards of ethical conduct, if the psychotherapist, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim, and the disclosure is made to a person reasonably able to prevent or lessen the threat, including the target of the threat.

Whether or not this statute would allow a therapist, under certain circumstances, to reveal the fact of the patient's condition (HIV/AIDS) to the spouse or sexual partner of the patient has not been tested. I have long held a bias in favor of confidentiality, and have often stated that I would rather defend someone who maintained confidentiality, rather than defend someone who broke confidentiality and thereby revealed the patient's medical condition. If there were a case at the dangerous end of the spectrum mentioned above, it might be arguable that the patient was posing a threat of "violence" (a liberal interpretation) against a third party and that there was a duty to protect the intended victim. It might also be argued that the patient, because of the expressed intent to infect and harm others, constituted a serious and imminent threat to the health or safety of another and that disclosure was necessary and appropriate under the circumstances.

What is the applicable law in your state, and do applicable ethical standards shed any light on this issue?