Privilege and Confidentiality – A Deeper Look

written by Richard Leslie | November 1, 2017

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In the September 2017 issue of this Avoiding Liability Bulletin, I raised several questions regarding the related but different principles of confidentiality and privilege. More particularly, I wrote about a situation where a licensed mental health professional reveals to a spouse the identity of a patient who enjoys some degree of notoriety in the community. The practitioner cautions the spouse about the sensitive and private nature of the information and discloses a few details about the treatment. The following questions were asked:

> *Has the practitioner breached confidentiality? Is there a husband/wife statutory privilege for confidential communications in the state? Does the fact that the communication between the practitioner and the spouse is privileged help in the defense of the practitioner during a licensing board enforcement action alleging breach of confidentiality? Are all communications between a licensed mental health practitioner and patient confidential? Are all privileged communications between a mental health practitioner and patient confidential?*

Yes, the practitioner has breached confidentiality. The practitioner revealed both the identity of the patient (the fact of the relationship) and some of the details of the treatment (which would necessarily include the content or subject matter of the communications between patient and practitioner). While the cautions issued to the spouse are wise, they do not obviate the wrongful breach. I have previously written about the view or argument that the fact of the relationship alone may not be covered by the law related to breach of confidentiality, but when coupled with the sharing of the details of treatment, the wrongful breach seems clear. The particulars and nuances of state confidentiality and privacy laws and regulations, and the case law, would obviously affect the answer to the question of whether the fact of the relationship alone is technically protected.

Some may ask about the likelihood that confidential information would be shared with a practitioner's spouse and the likelihood that such a breach would ever be discovered by the licensing authority. I leave the answer to the first part of the question for the reader to ponder. My experience with this issue has been that the licensing board may find out about the breach as a result of a deteriorated relationship between practitioner and spouse, including a bitter divorce/child custody battle. The spouse may raise the matter during the divorce/custody proceeding (there generally is no "husband-wife privilege" in a proceeding brought by or on behalf of one spouse against the other spouse) and may be referred to the licensing board, or the spouse may initially raise the issue of breach by contacting the licensing board.

While the likelihood of such a situation arising is hopefully minimal, the principles involved (the

differences between confidentiality and privilege) are worthy of exploration.

There likely is a “husband/wife privilege” for confidential communications in your state of practice. As with the psychotherapist-patient privilege, the so-called husband/wife privilege involves the question of whether testimony in a legal proceeding or administrative hearing will have to be given (or can be blocked by a holder of the privilege) and whether the privilege will protect the confidential communications from disclosure in the particular proceeding. In California, the so called husband-wife privilege is called the “privilege for confidential marital communications.” The privilege provides, in significant part, that a spouse has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he/she claims the privilege and the communication was made in confidence while they were spouses. The specific provisions of this statutory privilege, as they exist in a particular state, become crucial when and if the mental health practitioner attempts to prevent the spouse (or ex-spouse) from testifying at the legal proceeding or the formal hearing by claiming or asserting this privilege.

The practitioner might argue that the communications with the spouse were confidential because the spouse was cautioned about the sensitive and private nature of the information and because of the special relationship, recognized in law, between husband and wife. If a court (or administrative law judge) believes that the communications between the practitioner and the spouse were intended by both to be confidential, the judge might find that the privilege applies – thus allowing the practitioner to block the testimony of the spouse. Without the spouse’s testimony, the enforcement action by the licensing board may be substantially weakened.

Counter-arguments would of course be advanced and might be persuasive in a particular case– thus allowing the testimony of the spouse to be obtained because the privilege for confidential marital communications is found to be inapplicable. For example, perhaps the privilege does not apply in licensing board/administrative proceedings (in a particular state). Or perhaps, and not uncommonly, the court or administrative law judge makes an incorrect or questionable ruling because of the desire to obtain relevant and material evidence – perhaps the only such evidence that exists. The more relevant and material the testimony, the more likely it may be that a court or administrative law judge will incorrectly rule against the existence of the privilege. Court challenges and appeals from such adverse rulings can be expensive and thus unlikely.

In the event that the testimony of the spouse is allowed, the fact that the information was disclosed to a spouse, with cautions, might be used by the practitioner to argue for a more lenient “punishment” if the government proves its case. The practitioner might point out that while confidentiality was breached, the privilege belonging to the patient was not compromised and the disclosures were limited – both as to content and person. A principle of law in California that applies to the psychotherapist-patient privilege and the privilege for confidential marital communications is that a disclosure that is itself privileged is not a waiver of any privilege. The practitioner would thus point out that since the communications with the spouse were privileged, there was no waiver or compromise of the psychotherapist-patient privilege held by the patient – and that the harm to the patient (caused by the

breach of confidentiality) is limited in scope. Revealing patient information to one's spouse (with cautions) is not the same situation as revealing such information at a large party while intoxicated – but both are breaches of confidentiality!

With respect to the last two questions asked above, all communications between a licensed mental health practitioner and patient are not confidential. Mental health practitioners sometimes communicate with patients in situations where there is no expectation of confidentiality or where the law mandates or permits otherwise confidential information to be disclosed. All privileged communications between a licensed mental health practitioner and patient are confidential, since in order for a communication to be privileged as a matter of law, it must be a confidential communication between practitioner and patient made during the professional relationship – that is, during the course of the diagnosis and treatment of the patient. In California, and I suspect elsewhere, a privileged communication includes information obtained by an examination of the patient, the diagnosis made, and the advice given by the practitioner in the course of the professional relationship.

DUE PROCESS

What due process protections exist for you in your state of practice if you are ever accused by the licensing board of unprofessional or wrongful conduct? I recently received a call from a therapist (and have received similar calls for many years) who informed me about the lack of adequate due process protections in her state and inquired about the best way to effectuate changes to the system (not to be discussed here). Before changes can reasonably be expected, and before demands are made, it is important to understand and appreciate that "due process" in criminal proceedings is far different (and more protective) than "administrative due process" in licensing board enforcement actions. Thus, persons accused and prosecuted for crimes (felonies and misdemeanors) have due process rights significantly greater than licensees of the State who are accused of unprofessional or wrongful conduct.