LAW & ETHICS:
Confidentiality and Privilege
Guidelines for California Social Workers and Marriage & Family Therapists

3 CEUs

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Course Objectives

After completing this course, the student will:

1. Be familiar with ethical standards regarding confidentiality and privilege, using the codes of ethics from the American Association for Marriage and Family Therapy (AAMFT), and the National Association of Social Workers (NASW).
2. Utilize case studies to understand breaches to confidentiality in clinical practice.
3. Identify sound legal and ethical practices in regards to confidentiality and privilege.
4. Identify exceptions to the mandate of confidentiality permitted or required under California law.
5. Understand the legal concept of privilege and how it relates to confidentiality.
6. Identify important ways that confidentiality and privilege impact professional practice, including record keeping, treatment of minors, treatment of couples, reporting suspected abuse, and managing dangerous patients.

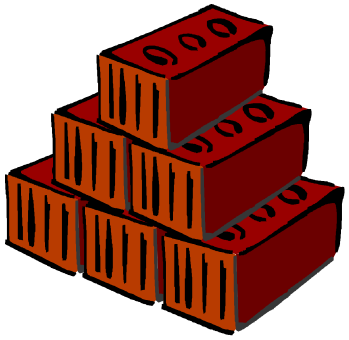
IMPORTANT DISCLAIMER: The information in this course is meant to give the professional an overview of the subject of dual relationships, confidentiality and privilege and the legal and ethical statutes that might be relevant in professional practice. This information is NOT meant to be an exhaustive examination of the subject, nor is it meant to take the place of professional legal counsel. The reader is advised to seek appropriate legal or professional consultation when necessary, and to verify all information based on their professional circumstances.

Confidentiality and Privilege

Confidentiality

The principle of confidentiality is a cornerstone of psychotherapy. As therapists, it is one of the first things we discuss with our clients at the commencement of treatment. In order to provide treatment that is both ethical and lawful, a thorough understanding of both confidentiality and the related principle of privilege are essential. While these principles are linked, there are differences between them that should be understood. Confidentiality is addressed in both legal statutes and ethical standards. It is the basic principle that ensures the privacy of the client in the therapeutic relationship. Only under limited circumstances will the therapist breach confidentiality, the most well-know of which are in the case of reporting child or elder abuse, or if the client is a danger to self or others. Privilege is a legal term. It is related to confidentiality, but is a separate concept. Privilege has to do with the unique relationship that a psychotherapist has with a client under the law, which renders communication between the client and psychotherapist as "privileged." It is important for mental health professionals to understand both confidentiality and privilege, and how they inform the practice of psychotherapy.

Confidentiality is a cornerstone of psychotherapy



Ethical Standards of Confidentiality

Professional organizations develop ethical principles to guide and inform the practice of their professions. For the purposes of this course, the ethical guidelines of the American Association For Marriage & Family Therapy (AAMFT) and the National Association of Social Workers (NASW) are used. Other professional organizations, such as the California Association of Marriage & Family Therapists (CAMFT), develop similar guidelines for their members. It is strongly recommended that practicing professionals join a professional organization in order to stay informed about important ethical and legal issues that affect their profession. Most organizations provide free, legal and ethical consultation to their members on issues that arise in their professional practice.

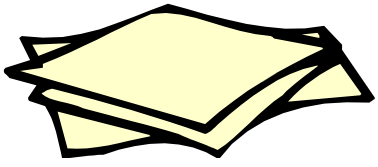
AAMFT Ethical Standards of Confidentiality:

AAMFT offers clear guidelines to its members on the subject of confidentiality. These guidelines cover many aspects of confidentiality, including client interactions, record keeping, teaching, supervising, research, and consultation. It is important to remember that confidentiality informs nearly every aspect of professional practice, and it should be kept in the forefront of every practice decision.

> *Marriage and family therapists have unique confidentiality concerns because the client in a therapeutic relationship may be more than one person. Therapists respect and guard the confidences of each individual client.*
>
> 2.1 Marriage and family therapists disclose to clients and other interested parties, as early as feasible in their professional contacts, the nature of confidentiality and possible limitations of the clients' right to confidentiality. Therapists review with clients the circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. Circumstances may necessitate repeated disclosures. [i]

One way to make sure that clients are informed about confidentiality is to develop a policy of always discussing it with a client in the very first session. Confidentiality should be a part of any complete Informed Consent document, and it should be verbally reviewed with the client before commencement of treatment.

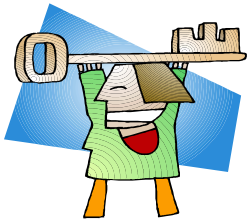
> 2.2 Marriage and family therapists do not disclose client confidences except by written authorization or waiver, or where mandated or permitted by law. Verbal authorization will not be sufficient except in emergency situations, unless prohibited by law. When providing couple, family or group treatment, the therapist does not disclose information outside the treatment context without a written authorization from each individual competent to execute a waiver. In the context of couple, family or group treatment, the therapist may not reveal any individual's confidences to others in the client unit without the prior written permission of that individual. [ii]



As part of their practice, therapists should develop written consent forms to release confidential information that comply with all applicable laws. Therapists who are treating couples or families should also clearly explain at the beginning of treatment the ways that confidentiality and privilege impact their communications with the therapist.

> 2.3 Marriage and family therapists use client and/or clinical materials in teaching, writing, consulting, research, and public presentations only if a written waiver has been obtained in accordance with Subprinciple 2.2, or when appropriate steps have been taken to protect client identity and confidentiality. [iii]

If using actual clinical materials, protecting the client's identity is paramount. When you are developing case examples of this nature, imagine your client reading it. If your client could recognize the example as his or her own, you have violated confidentiality. Focusing on process rather than content is the key. Think about the therapeutic process you are conveying—rather than the content—and then build specific details around that process that are generic—not specific to a particular client.



Focusing on process rather than content is the key.

> 2.4 Marriage and family therapists store, safeguard, and dispose of client records in ways that maintain confidentiality and in accord with applicable laws and professional standards. [iv]

While there are not specific standards on storing records, it is generally considered a good idea to keep client records in a locked file cabinet, and if electronic records are kept, to use password protection. When disposing of records, it is safest to shred or burn them, or use a professional document destruction company. Written policies regarding document storage, transportation, and destruction should be developed, as a reference for the therapist, and then enforced. Additionally, therapists should consider under what circumstances it is acceptable to transport client records. The safest policy would be for records to remain at a single, secure location. Any exceptions should be limited to exceptional circumstances, and clearly designed to protect client records during transport.

2.5 Subsequent to the therapist moving from the area, closing the practice, or upon the death of the therapist, a marriage and family therapist arranges for the storage, transfer, or disposal of client records in ways that maintain confidentiality and safeguard the welfare of clients. [v]

This is an important point for therapists in private practice, and one that is routinely overlooked. Having a written policy about the handling of client records, especially in the event of death or incapacitation of the therapist, is crucial to protecting client confidentiality, and a client has a reasonable expectation to that protection. A therapist may wish to partner with a colleague, each offering to take responsibility for the records of the other in the event of death or incapacitation. A written policy should be established and a copy given to the designated colleague that includes specific instructions for accessing client records, and perhaps a prewritten letter that would be sent to each client. This letter could include the name of the designated colleague and specific information regarding the client's records and how to access them if necessary, as well as offering the opportunity to process the loss with the designated colleague, or to obtain a referral from the colleague if additional therapeutic intervention is necessary.

2.6 Marriage and family therapists, when consulting with colleagues or referral sources, do not share confidential information that could reasonably lead to the identification of a client, research participant, supervisee, or other person with whom they have a confidential relationship unless they have obtained the prior written consent of the client, research participant, supervisee, or other person with whom they have a confidential relationship. Information may be shared only to the extent necessary to achieve the purposes of the consultation. [vi]

Consultation is an important aspect of effective therapy. However, confidentiality can be easily compromised during consultation. Just as in therapy, it helps to focus on the process and not get stuck on the content. Identify the general themes and issues before seeking consultation. This will keep you focused, and will help you get better feedback from the consultation process.

NASW Ethical Standards:

NASW also has clear standards of confidentiality for its members. These standards cover many aspects of social work, so it is imperative that social workers have a thorough understanding of confidentiality and how it informs their practice.

1.07 Privacy and Confidentiality

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply. [vii]

Social workers process a great deal of information with clients. It is imperative that they be aware of the types of information that are confidential.

(b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client. [viii]

Because social workers are often in a position to speak for or advocate for their clients, this is allowed within ethical standards as long as a valid consent is available. Social workers need to make sure that the person who gives consent for a client is legally authorized to do so.

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed. [ix]

The exception to confidentiality is made when it is necessary to file a suspected child abuse report, or if the social worker deems the client to be a danger to self or others.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent. [x]

It is always best practice to discuss any disclosure of confidential information with clients, if at all possible. There are times when it is not possible, and may even endanger the safety of the social worker. In these cases, safety is paramount.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship. [xi]

(The above principle is similar to an AAMFT principle discussed in the previous section.)

(f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements. [xii]

Social workers often work with multiple people within a system. Clearly defining policies about confidentiality with all involved parties from the start helps establish clear boundaries and a sense of safety in the treatment process.

(g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling. [xiii]

(h) Social workers should not disclose confidential information to third-party payers unless clients have authorized such disclosure. [xiv]

(i) Social workers should not discuss confidential information in any setting unless privacy can be ensured. Social workers should not discuss confidential information in public or semipublic areas such as hallways, waiting rooms, elevators, and restaurants. [xv]

The above principles give clear, specific guidance to social workers about confidentiality in clinical practice.

(j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection. [xvi]

Whenever a social worker receives a court order regarding a client, it is prudent to consult with their professional association, or other knowledgeable person, such as an attorney, regarding the situation.

(k) Social workers should protect the confidentiality of clients when responding to requests from members of the media. [xvii]

It is a good idea to withhold any comment to members of the media prior to professional consultation, and discussion with the client.

(l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access. [xviii]

(m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible. [xix]

(n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure. [xx]

(o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death. [xxi]

(p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information. [xxii]

(q) Social workers should not disclose identifying information when discussing clients with consultants unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure. [xxiii]

(The above principles are similar to AAMFT principles discussed in the previous section.)

(r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards. [xxiv]

The records of a deceased client should continue to be protected. Social workers and therapists are advised to seek legal consultation if this situation arises.

1.08 Access to Records

(b) When providing clients with access to their records, social workers should take steps to protect the confidentiality of other individuals identified or discussed in such records. [xxv]

If actual copies of records that include the names of others are provided to the client, any other names present in the record should be completely marked out with permanent marker. Alternatively, a summary can be given that does not include names of other individuals.

Professional Statutes

California legal statutes clearly address the issue of confidentiality. The most pertinent statutes pertaining to the practice of Marriage & Family Therapy and Clinical Social Work are found in the Business and Professions Code, and are virtually identical in wording. Confidentiality is addressed in this section of the California Code because it is relevant to the practice of the profession, and is specifically related to what constitutes professional and unprofessional conduct. It is clear from the following statutes that failure to maintain confidentiality is not only unethical, but also unlawful.

The following section pertains to Marriage & Family Therapists:

> **4982**. The board may refuse to issue any registration or license, or may suspend or revoke the license or registration of any registrant or licensee if the applicant, licensee, or registrant has been guilty of unprofessional conduct. Unprofessional conduct shall include, but not be limited to:
>
> (m) Failure to maintain confidentiality, except as otherwise required or permitted by law, of all information that has been received from a client in confidence during the course of treatment and all information about the client which is obtained from tests or other means. [xxvi]

The following section pertains to Clinical Social Workers:

> **4992.3.** The board may refuse to issue a registration or a license, or may suspend or revoke the license or registration of any registrant or licensee if the applicant, licensee, or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to:
>
> (m) Failure to maintain confidentiality**,** except as otherwise required or permitted by law, of all information that has been received from a client in confidence during the course of treatment and all information about the client which is obtained from tests or other means. [xxvii]

From the statutes above, it is clear that failure to maintain client confidentiality is considered unprofessional conduct, and is grounds for suspension or revocation a therapist's license.

Release of Confidential Medical Information

Another section of California law that has pertinence to a discussion of confidentiality has to do with confidential medical information. In the following section of the Civil Code, specific instruction is given pertaining to the release of such information.

56.11. Any person or entity that wishes to obtain medical information pursuant to subdivision (a) of Section 56.10, other than a person or entity authorized to receive medical information pursuant to subdivision (b) or (c) of Section 56.10, shall obtain a valid authorization for the release of this information. An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor shall be valid if it:

(a) Is handwritten by the person who signs it or is in a typeface no smaller than 14-point type.

(b) Is clearly separate from any other language present on the same page and is executed by a signature which serves no other purpose than to execute the authorization.

(c) Is signed and dated by one of the following:

(1) The patient. A patient who is a minor may only sign an authorization for the release of medical information obtained by a provider of health care, health care service plan, pharmaceutical company, or contractor in the course of furnishing services to which the minor could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60).

(2) The legal representative of the patient, if the patient is a minor or an incompetent. However, authorization may not be given under this subdivision for the disclosure of medical information obtained by the provider of health care, health care service plan, pharmaceutical company, or contractor in the course of furnishing services to which a minor patient could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60).

(3) The spouse of the patient or the person financially responsible for the patient, where the medical information is being sought for the sole purpose of processing an application for health insurance or for enrollment in a nonprofit hospital plan, a health care service plan, or an employee benefit plan, and where the patient is to be an enrolled spouse or dependent under the policy or plan.

(4) The beneficiary or personal representative of a deceased patient.

(d) States the specific uses and limitations on the types of medical information to be disclosed.

(e) States the name or functions of the provider of health care, health care service plan, pharmaceutical company, or contractor that may disclose the medical information.

(f) States the name or functions of the persons or entities authorized to receive the medical information.

(g) States the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information.

(h) States a specific date after which the provider of health care, health care service plan, pharmaceutical company, or contractor is no longer authorized to disclose the medical information.

(i) Advises the person signing the authorization of the right to receive a copy of the authorization. [xxviii]

The main points to consider in this section of law are the specific guidelines it gives to therapists when creating a release of information form, and who may authorize a release of confidential information. The statute outlines two ways of executing a release. Either the person signing the release must write the release, or if it is a form, the typeface must be at least 14-point font, must be separate from any other language on the page, and the signature must serve only to execute the release. Additionally, the release must state the name of the person or party who may release the information, the name of the person or party who is authorized to receive the information, the specific uses and limits of the information, and the specific date after which the release ceases to be in effect. Following is a sample of how this information might be presented on a form:

AUTHORIZATION TO RELEASE CONFIDENTIAL INFORMATION

I (Name of Client) authorize (Name of Therapist) to release (Specific Type of Information) to (Name of Recipient) for the purpose of (Specific Purpose of Information). This release will be in effect from (Effective Date) to (Date of Expiration). I understand that I am authorized to receive a copy of this authorization.

Signature of Client Date

Patient Dangerous to Self or Others

California Civil Code also addresses the issue of a client who is a danger to self or others. In this case, breaking confidentiality is permitted because the law imposes on the therapist a duty to warn an intended victim of a client's serious threat of physical violence.

The psychotherapist must make reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

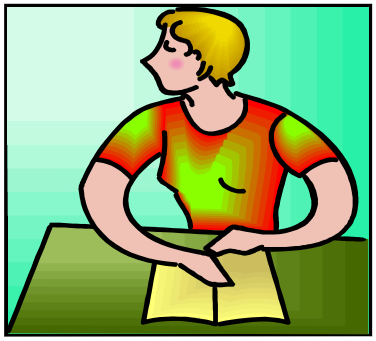
43.92. (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. [xxix]

(b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency. [xxx]

A complete discussion of the issues involved in managing a dangerous patient is beyond the scope of this course. For the purposes of this discussion, it is important to remember that the law is clear that there is " no monetary liability on the part of, and no cause of action shall arise against," a therapist who takes action under this statute, even though discharging this duty will surely involve breaking confidentiality. Therapists should be careful to only provide as much information as necessary, and not share more than what is necessary to communicate the threat.

Privilege and California Law

Privilege is related to confidentiality, but it is solely a legal principle. It is found in the Evidence section of law, because it pertains to information that is brought into evidence in a legal proceeding. The following section of the California Code deals with the principle of privilege:



1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege.

(b) A person who is authorized to claim the privilege by the holder of the privilege.

(c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapy corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and Professions Code, or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities. [xxxi]

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014. [xxxii]

The Holder of Privilege

In most cases, the holder of privilege is the client, not the therapist. If a client has a guardian or conservator, then this person would hold the privilege. The personal representative of a deceased client could also hold privilege. If the client is a minor child, the child holds the privilege, not the parents. If the child has an attorney, the attorney can waive or assert privilege on behalf of the child. The court can also appoint a guardian ad litem to act on behalf of the child in legal matters. The only way the parent could waive or assert privilege for the child would be if the parent were specifically appointed as guardian ad litem for the child by the court. The court will make the decision regarding the privilege of a minor child if there is no attorney or guardian ad litem for the child.

The therapist needs to assert the privilege until instructed otherwise by the client or the court.

If a therapist receives a subpoena, the correct course of action is to assert the privilege on behalf of the client until instructed to do otherwise, either by the action of the client in waiving the privilege (in writing), or when instructed by the court that there is an exception to privilege. There are situations in which privilege does not apply. If a client makes his or her mental or emotional condition an issue in a legal proceeding against another party, then privilege does not apply. If a judge orders an examination of a client's mental or emotional condition, then communications pertaining to this specific purpose are not privileged. If a therapist determines that a client is in need of hospitalization for a mental illness, then communications in the course of this type of proceeding are not privileged. However, it is important to remember that whenever a therapist receives a subpoena for records or testimony pertaining to a client, it is not up to the therapist to determine whether or not privilege applies. The only thing the therapist needs to do is assert the privilege until instructed otherwise by the client or the court. Therapists should always seek legal advice whenever they interact with the court on issues of confidentiality and privilege.

Special Issues In Clinical Practice

Protecting Client Confidentiality in the Office and Beyond

Client confidentiality needs to be a consideration in all aspects of professional practice. It is important for therapists to consider how client confidentiality will be protected, and develop policies before they are needed. Client records should be secured, typically in a locked file cabinet. Electronic files should be password protected. Arrangements should be made regarding how to contact the client. Ask specifically about what type of information can be left on voicemail or answering machines, and what type of communication is acceptable for email messages. Also inquire as to how to direct written correspondence. All of these details should be discussed at the beginning of treatment, and kept in the client's file for reference. Also discuss with clients that you will not acknowledge a client if you see them in public, unless they initiate contact. Always be careful to keep the fact of the therapeutic relationship confidential from anyone who inquires. For instance, suppose you work with a woman you know to be married. If you receive a call from your client's husband wanting to share information about your client, you should not acknowledge whether you do or do not have a therapeutic relationship with his wife. While it may seem obvious that the husband is aware of your relationship with his wife, you cannot take it for granted. Speaking to him would be a breach of confidentiality unless your client gives you written permission to share confidential information with her husband, and approves the purpose for that communication.

Exceptions to Confidentiality

Most therapists are familiar with the major exceptions to confidentiality. These include the legal mandate to report suspected child abuse, suspected elder abuse, the ethical obligation to protect a client who is a danger to himself, and the duty to warn an intended victim if a client threatens physical harm, or if the therapist believes that the client is a danger to others. These exceptions to confidentiality should be clearly stated in a therapist's "Consent for Treatment" form, and verbally discussed with the client at the commencement of treatment. A complete discussion of each of these exceptions is beyond the scope of this course. Therapists should stay abreast of changes in the law that affects their obligations regarding these issues.

Exceptions to confidentiality should be clearly stated in a therapist's "Consent for Treatment" form, and verbally discussed with the client at the commencement of treatment.

The Dangerous Client

A client who presents a danger to others can be a complex situation to manage. In California, the law grants immunity to therapists who break confidentiality when a client communicates a threat to an identified victim, in the Civil Code section 43.92[xxxiii] discussed previously. Under the landmark Tarasoff decision, [xxxiv] a therapist must also take reasonable precautions to protect an intended victim if the therapist *determines* that the client is dangerous, even if that determination is made in the absence of direct communication from the client. In any case, thorough documentation of any determination made, and the rationale behind that determination, is essential to avoiding liability. Therapists would also be wise to seek legal consultation from their professional association, or any other source of professional advice that they choose to use.

A Client With AIDS/HIV

A therapist has a duty to warn if the therapist becomes aware that a client poses a serious and imminent threat of physical violence against an intended victim. But what if the therapist discovers that his or her client has AIDS or is HIV positive, and is engaging in unprotected sex? Can a therapist breach confidentiality in this case, and warn the unsuspecting partner? While laws and ethical standards may vary in different states and different professions, in the State of California there is no mandate or permission to break confidentiality in this situation. Although AIDS/HIV is a serious condition, having consensual sex with one or more partners does not meet the criteria of threatening imminent physical violence against an intended victim. A therapist who breaks confidentiality in this situation opens the door to charges of unprofessional conduct.

Treatment of Minors

It sometimes comes as a surprise to therapists that the parent of a minor child does not hold privilege for the child. As discussed previously, the child hold the privilege unless the child has an attorney or a guardian ad litem appointed by the court. If a child does not have an attorney or a guardian ad litem, the court makes the decision regarding the privilege of the child. Even if the parent consents for the treatment of the child—and is the child's legal guardian—the parent does not hold the privilege. The only way the parent holds the privilege for the child is if the court specifically appointed the parent to act as the guardian ad litem for the child in legal decisions.

What about parental access to the mental health records of the child? In the State of California, a minor child's confidentiality is protected under the law. If the therapist determines that sharing the child's mental health records with the parent(s) would negatively impact the child, or the therapeutic relationship, the therapist can deny access to the parent. However, the therapist will need to weight the obvious cost/benefit ratio in denying a parent access to the child's records. The parent requesting the records may also be the person who is authorized to consent for treatment, and the therapist's denial of access could result in the parent prematurely terminating the child's treatment. For the purposes of this discussion, however, it is sufficient to note that the State of California extends the right of confidential treatment to minor children under the law, and a therapist who denies a parent access to a child's records if it is deemed detrimental to the child's treatment would be acting within the bounds of the law.

Treatment of Couples/Families

Treating couples and families raises important issues with regard to confidentiality and privilege. From the beginning of treatment, the therapist needs to decide who is the client. If a therapist is treating a couple or family, generally it will be the couple or family who is the client. This needs to be clear to the participants. Generally, if individual issues arise with one or more participants in the treatment unit, they should be referred to another therapist for individual treatment.

Regarding privilege in couple or family therapy, if the therapist receives a subpoena for records, privilege should be asserted unless every participant in the treatment unit waives privilege in writing. It is not enough for just one member to waive privilege. Additionally, if one participant requests records, the therapist would need to get written authorization from all parties before releasing records.

Many therapists have a "No Secrets" policy when it comes to treating couples and families. A "No Secrets" policy is an important clinical tool for therapists who might have some individual sessions with members of the treatment unit as part of the treatment plan for the couple or family. Because the therapist makes clear from the outset of treatment that the "client" is the couple or family, a "No Secrets" policy allows the therapist to use information from individual sessions to advance the goals of the couple or family. A "No Secrets" policy can be included in the therapist's Consent for Treatment document. It usually states that the therapist will not keep secrets between members of a family or couple, but will use his or her clinical judgment to determine whether and how information shared in individual sessions will be disclosed in joint sessions. An opportunity might also be extended to the individual to share any pertinent information personally, prior to the therapist making such a disclosure.

Having a "No Secrets" policy ensures that the therapist will not be triangulated into the family system.

The therapist should also make it clear that any information shared in this way has the sole purpose of advancing the goals of the couple or family. Such a policy is not a mandate that the therapist *must* share everything that takes place in an individual session. Rather, it ensures that a therapist will not become triangulated into a system and confined in his or her ability to advance the goals of treatment. Therapists must exercise their clinical judgment in determining what information should be shared as part of the couple or family treatment, and what information can be kept private. Individual members of the treatment unit should be informed that they could receive a referral for individual treatment if there are issues that they wish to work on privately, with complete confidentiality from the couple or family unit. This referral should be to another therapist whenever possible.

Conclusion

The issues of confidentiality and privilege are of paramount importance to the lawful and ethical practice of Marriage and Family Therapy and Clinical Social Work. Professionals in these fields can ensure the integrity of their practice by considering the ways that confidentiality and privilege affect the various aspects of their practice. Again, joining a professional organization is one of the best ways to keep abreast of changes in the law that affect your practice, and afford you the safety of legal and ethical consultation when you need it.

One of the best ways to understand what constitutes unethical and illegal behavior in regards to confidentiality and privilege is to examine case studies of possible clinical scenarios. Any resemblance of the facts of these case studies to actual people or events is unintentional.

Case Study #1: A Custody Dispute

Evelyn is an MFT working in a clinic setting. She begins seeing a couple, Nora and her husband Leo, for marital therapy. One issue in the marriage is how to deal with their 4-year-old son's asthma. Nora believes that Leo does not take their son's health condition seriously enough, because he continues to smoke. Nora states that she does not allow Leo to smoke in their home, but Leo does smoke in front of their son when Nora is not around. Nora also states that she handles all of her son's medication because Leo doesn't want to learn how to do any of it. Evelyn spends one session focused on working on a plan to get Leo more involved in managing their son's asthma, but

Leo is resistant, and states that Nora is making a big deal out of nothing. After several sessions, Leo decides that therapy isn't working and he moves out of the couple's home and files for divorce. Evelyn continues to see Nora in individual therapy to work through the divorce issues. Custody of the couple's children (a son, and a daughter, age 6) becomes a point of contention, as Nora believes that Leo is a danger to their son. Nora states that Leo continues to smoke in the children's presence, and does not give their son's medication when necessary. At Nora's request, Evelyn meets with the children and discusses their time with their dad. Both children state that dad smokes around them, and that it sometimes triggers the boy's asthma. They both say that sometimes dad forgets to give medications, but usually one of the children reminds him. A few weeks after this session, Evelyn receives a subpoena from Nora's attorney requesting records of the couple's session that dealt with managing the asthma, and records of the session with the children. Nora also offers a signed release to access these records. She tells Evelyn that she needs these records to use in her custody case against Leo.

Discussion

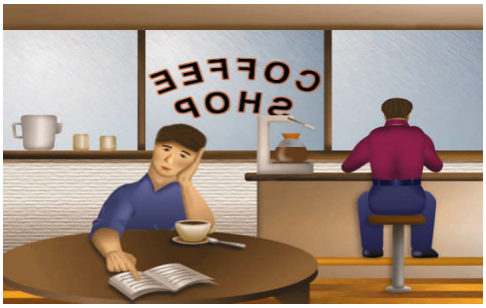
Therapists are often caught in the middle of custody disputes with their clients. One of the biggest mistakes therapists make is to improperly release confidential records when they receive a subpoena from a client's attorney. In this case, the therapist should not release records of the couple's sessions together, because *both* Nora and Leo must waive their privilege, in writing. While Nora agrees to waive her privilege, it is highly unlikely that Leo will also waive privilege. Therefore, the therapist must claim the privilege until both parties waive it. In regards to the records of the minor children, the therapist must also claim privilege for the children's records unless the children have an attorney of their own, or a guardian ad litem. While Nora can consent for treatment of the minor children, she cannot waive the children's privilege unless the courts has specifically appointed her as the guardian ad litem for the children. Another issue pertaining to confidentiality in this case is the question of whether or not the child with asthma is in danger of medical neglect while in the care of his father.

If the therapist believes that a child is in danger, this necessitates a Suspected Child Abuse Report to the proper authorities.

If the therapist believes that the child is in danger, this necessitates a Suspected Child Abuse Report to the proper authorities, in which case confidentiality can lawfully be breached. Evelyn needs to clearly document in the case notes how this determination was made. This situation would not fall under Tarasoff or the duty to warn under California law, as Leo is no longer Evelyn's client. Further, even if Leo was still a client, the allegations of danger to the son in this case do not meet the requirements of imminent, serious physical harm threatened to another.

Case Study #2: Safeguarding Client Records

Gary is an LCSW who works for a foster family agency. He frequently transports written client records between the agency office and his client's homes. He also completes case notes while in the field, sometimes stopping at a favorite coffee shop to get caught up on paperwork. While Gary's agency has a written policy regarding records, Gary is not familiar with it. One day, he inadvertently leaves a folder with client information on a chair in a coffee shop. The information includes the name of a teacher at a local school, who is the mother of a child in foster care on Gary's caseload. Gary realizes that he has misplaced the folder when he gets back to the office. When he returns to the coffee shop, the folder is no longer there, and the person at the counter states that no one has turned it in. Several weeks later, the foster family agency informs Gary that an attorney representing the mother of Gary's client has contacted them, alleging a breach of confidentiality. Gary later discovers that a person in the coffee shop who picked up the folder was a coworker of the mother. That person gave the folder to the mother.



Discussion

Gary compromised his client's privacy by failing to protect his client's records. The agency has a written policy that states that employees have an obligation to exercise care and prudence in the handling of confidential information, but no specific policies and procedures are delineated to define what this means. The agency should develop specific policies regarding the handling of client records, and provide training on those policies and procedures. Agency social workers should be aware of the policies, and consequences for their violation. Additionally, Gary is personally liable even though his agency did not have a clear policy in place, because he is responsible for practicing within the legal and ethical boundaries of his profession. The law clearly states that breaching confidentiality is a violation, and ethical standards are similarly clear. Gary could have taken steps to protect client records by transporting records in a locked briefcase or other such container when necessary, and he could have chosen to complete paperwork at the office or other secure location. Therapists who keep client records on laptop computers should also consider confidentiality issues if they are working within view of others, and what the ramifications will be if their computer is lost or stolen.

Case Study #4: Client Referred by County

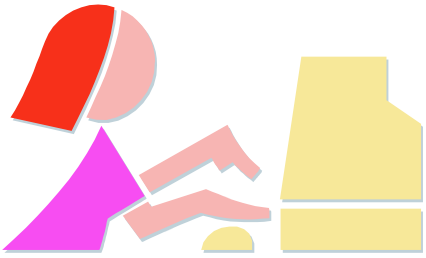
Manny is referred to Bill, an LCSW, by the local Department of Social Services. Bill has a contract with the local County office to provide therapy to Manny for anger management as part of a family reunification plan. The County pays for the therapy, and expects to receive quarterly updates about Manny At the beginning of therapy, Bill obtained a written release from Manny for the exchange of confidential information between Bill and the County social worker responsible for Manny's case, and forwarded a copy of this release to the social worker. However, after three months, Manny has made little progress in therapy, and tells Bill that he doesn't want Bill to give any information about his treatment to his social worker, because Manny is concerned that it will jeopardize his family re-unification plan.

Discussion

In this situation, Bill properly discusses the limits of confidentiality with Manny at the beginning of treatment, and obtains a release. However, Bill must maintain the confidentiality of the client when requested, even though the County Department of Social Services has referred Manny and is paying for treatment. Bill should require that Manny offer a written withdrawal of his consent for exchange of information, and forward this to the social worker. It would also be useful for Bill to discuss with Manny the possible results of his decision to withdraw his consent, as this will also impact his family reunification plan, and his ongoing treatment.

Case Study #5: A Parent's Right to Know

Rita is a 17-year-old girl who is referred to therapy with Yolanda, an MFT, by her parents. Rita's parents are concerned that their daughter has become withdrawn and secretive over the last several months. She spends hours online, usually on MySpace.com. Her parents are concerned about who she might be meeting online, and don't know what to do to protect her. They are also concerned that she seems depressed. During the course of therapy, Rita develops a trusting relationship with Yolanda, and discloses to her that she has a boyfriend on MySpace who is 37 years old. Rita has never met this man, as he lives in another state. They do not have current plans to meet, but Rita says that they have talked about getting married after she turns 18. Rita does not want her parents to know about this relationship. Rita's parents, however, want Yolanda to inform them of any information that impacts the well-being of their child.



Discussion

There is not an issue of privilege in this case, as there is no subpoena for records in a court proceeding. However, confidentiality is an issue. If Yolanda believes that disclosing this information to Rita's parents would harm the therapeutic relationship, she can withhold this information. If, however, Yolanda believes that Rita is a victim of sexual exploitation, she must break confidentiality to report this to the proper authorities. Yolanda should discuss with the parents and the minor client all limits to confidentiality at the beginning of therapy, and should also clearly point out that California law respects the confidentiality of the psychotherapist-patient relationship, even when the client is a minor. An alternate approach to this situation would have been to treat this problem in the context of family therapy. If this approach had been taken, a "No Secrets" policy could have been discussed at the beginning of therapy, and used in this situation. The "client" is then the family, and the goals of therapy would be specific to the family rather than to one individual within the family. This would have allowed the therapist to request that the child share the information in a family session, or the therapist would share the information for the purpose of advancing the goal of better communication within the family. The advantage of family therapy in this case would have been to strengthen the parent/child relationship, and to circumvent the therapist being triangulated into the relationship between the parents and the child.

References

[i] AAMFT Ethical Standard 2.1

[ii] AAMFT Ethical Standard 2.2

[iii] AAMFT Ethical Standard 2.3

[iv] AAMFT Ethical Standard 2.4

[v] AAMFT Ethical Standard 2.5

[vi] AAMFT Ethical Standard 2.6

[vii] NASW Ethical Standard 1.07 (a)

[viii] NASW Ethical Standard 1.07 (b)

[ix] NASW Ethical Standard 1.07 (c)

[x] NASW Ethical Standard 1.07 (d)

[xi] NASW Ethical Standard 1.07 (e)

[xii] NASW Ethical Standard 1.07 (f)

[xiii] NASW Ethical Standard 1.07 (g)

[xiv] NASW Ethical Standard 1.07 (h)

[xv] NASW Ethical Standard 1.07 (i)

[xvi] NASW Ethical Standard 1.07 (j)

[xvii] NASW Ethical Standard 1.07 (k)

[xviii] NASW Ethical Standard 1.07 (l)

[xix] NASW Ethical Standard 1.07 (m)

[xx] NASW Ethical Standard 1.07 (n)

[xxi] NASW Ethical Standard 1.07 (o)

[xxii] NASW Ethical Standard 1.07 (p)

[xxiii] NASW Ethical Standard 1.07 (q)

[xxiv] NASW Ethical Standard 1.07 (r)

[xxv] NASW Ethical Standard 1.08 (b)

[xxvi] California Business & Professions Code 4982(m)

[xxvii] California Business & Professions Code 4992.3(m)

[xxviii] California Civil Code 56.11

[xxix] California Civil Code 43.92(a)

[xxx] California Civil Code 43.92(b)

[xxxi] California Evidence Code 1014

[xxxii] California Evidence Code 1015

[xxxiii] California Civil Code 43.92

[xxxiv] Tarasoff v. Regents of University of California

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