

Confidentiality and its Exceptions (Including the US Patriot Act)

By Bonnie R. Benitez, Attorney
Previously employed with CAMFT

The Therapist
(July/August 2004)

Updated in June 2012 by Sara Kashing, J.D., Staff Attorney

An overarching principle in psychotherapy is the need for and requirement of confidentiality. Confidentiality is also a rather complex rule, with several exceptions, nuances, and both legal and ethical implications.

Confidentiality is defined as a restriction on the volunteering of information outside of the courtroom setting, not to be confused with the concept of psychotherapist-patient privilege. These terms are not synonymous. They apply in different circumstances and are addressed in separate sections of law. The psychotherapist-patient privilege affords the holder of the privilege (usually the patient) the right to withhold testimony (your testimony) in a court of law. The psychotherapist-patient privilege arises from the special relationship therapists have with their patients. It is an exception to the general rule that requires testimony from witnesses who are subpoenaed to provide such testimony. Privilege involves a separate and distinct set of rules that will not be addressed in this article.

Confidentiality is both a legal and an ethical issue. Generally, therapists are prohibited from disclosing confidential communications to any third party, unless mandated or permitted by law to do so. Typically, therapists should err on the side of being overly cautious, protecting the confidentiality of patients, unless faced with a mandatory exception to confidentiality such as reporting child, elder or dependent adult abuse. Because mandatory reporting is designed to encourage such reports, therapists are well advised to err on the side of reporting in uncertain circumstances.

Legal Requirements

MFTs are legally required to maintain confidentiality and can subject themselves to possible disciplinary action, exposure to civil liability or criminal action. The legal requirements of confidentiality, as well as most legal exceptions to confidentiality can be found in California statutes. The mandate of confidentiality can be found in various sections of the California codes.

One of the key sections, specifically pertaining to MFTs, is Business and Professions Code 4982(m), which defines as unprofessional conduct the "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." Engaging in unprofessional conduct may result in disciplinary action against one's license, and possible criminal penalties as specified in Business and Professions Code 4983, which reads: "any person who violates any of the provisions of this chapter is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both."

Ethical Standards

The CAMFT Ethical Standards for Marriage and Family Therapists enumerates several standards with regard to confidentiality, including:

1. Responsibility to Patients

1.5.5 Marriage and family therapists are encouraged to inform patients as to certain exceptions to confidentiality such as child abuse reporting, elder and dependent adult abuse reporting and patients dangerous to themselves or others.

1.4.2 When therapy occurs by electronic means, marriage and family therapists inform patients of the potential risks, consequences, and benefits, including but not limited to, issues of confidentiality, clinical limitations, transmission difficulties, and ability to respond to emergencies.

2. Confidentiality

Marriage and family therapists have unique confidentiality responsibilities because the "patient" in a therapeutic relationship may be more than one person. The overriding principle is that marriage and family therapists respect the confidences of their patient(s).

2.1 Marriage and family therapists do not disclose patient confidences, including the names or identities of their patients, to anyone except a) as mandated by law b) as permitted by law c) when the marriage and family therapist is a defendant in a civil, criminal or disciplinary action arising from the therapy (in which case patient confidences may only be disclosed in the course of that action), or d) if there is an authorization previously obtained in writing, and then such information may only be revealed in accordance with the terms of the authorization.

2.2 When there is a request for information related to any aspect of psychotherapy or treatment, each member of the unit receiving such therapeutic treatment must sign an authorization before a marriage and family therapist will disclose information received from any member of the treatment unit.

2.3 Marriage and family therapists are aware of the possible adverse effects of technological changes with respect to the dissemination of patient information, and take care when disclosing such information. Marriage and family therapists are also aware of the limitations regarding confidential transmission by Internet or electronic media and take care when transmitting or receiving such information via these mediums.

2.4 Marriage and family therapists store, transfer, transmit, and/or dispose of patient records in ways that protect confidentiality.

2.5 Marriage and family therapists take appropriate steps to ensure, insofar as possible, that the confidentiality of patients is maintained by their employees, supervisees, assistants and volunteers

2.6 Marriage and family therapists use clinical materials in teaching, writing, and public presentations only if a written authorization has been previously obtained in accordance with 2.1 d, or when appropriate steps have been taken to protect patient identity.

2.7 Marriage and family therapists, when working with a group, educate the group regarding the importance of maintaining confidentiality, and are encouraged to obtain written agreement from group participants to respect the confidentiality of other members of the group.

Clearly the ethical standards provide considerably more guidance to practitioners than the law. But many ambiguities still remain, particularly when working with minors, families or groups. Additionally, there are many exceptions to confidentiality, both mandatory and permissive, which must be both comprehensively understood and carefully navigated by the prudent therapist.

Mandatory Exceptions To Confidentiality

Most of the mandatory exceptions to confidentiality are well known and understood. They include reporting child, elder and dependent adult abuse, and the so-called "duty to protect." However, there are other, lesserknown exceptions also required by law. Each will be presented in turn.

Mandatory Reporting

The Child Abuse and Neglect Reporting Act (CANRA) can be found in Penal Code 11164 to 11174.3. The definition of "child abuse or neglect" includes physical injury inflicted by other than accidental means upon a child by another person, sexual abuse as defined in neglect as defined in willful cruelty or unjustifiable punishment as defined in and unlawful corporal punishment or injury as defined in 11165.4

The Elder Abuse and Dependent Adult Civil Protection Act can be found in Welfare and Institutions Code 15600 to 15659. "Abuse of an elder or a dependent adult" means either of the following:

- (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or
- (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.²

When faced with a child, elder or dependent adult abuse reporting situation, it is important to keep in mind that these laws provide for an exception to what would have been confidential. Mandatory reporting laws specifically define the abuse that must be reported, prescribe the timing and method of such reporting, the immunities that come with reporting and penalties for the failure to report. Mandatory reporting requirements do not create a license for therapists to disclose confidential information in a manner that exceeds the bounds of the reporting requirements themselves. In other words, once a mandatory report has been made to the appropriate authorities, that information, and any previous or subsequent information not subject to a mandatory report, remains confidential.

Tarasoff and the "Duty to Protect" Therapists have a duty to warn when a patient communicates to the therapist a serious threat of physical violence against a reasonably identifiable victim or victims. If there is a duty to warn, under the limited circumstances specified above, the duty shall be discharged by the therapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

Once a therapist makes such a warning, Civil Code 43.92 provides immunity from any liability that may arise should the patient carry out his/her threat. In addition to the immunity from liability, 43.92 also makes clear that therapists are not expected to predict the violent behavior of their patients.

If, however, the therapist fails to warn when such a threat has been made, he/she may be liable not only for the harm that befalls the intended victim or victims, but also to other reasonably foreseeable victims who may be injured if the threat is carried out.

It is important to note that no such duty exists when a non-patient makes the threat, or when the patient is the target of a threat. In addition, the duty to warn does not exist when the patient is threatening suicide. However, under 1024 of the Evidence Code, the therapist is permitted to breach confidentiality if the therapist believes it is necessary to prevent the threatened danger.

Lesser-Known Mandatory Exceptions

Civil Code 56.10(b) provides for several other exceptions to confidentiality that rarely arise. According to this section, a therapist must disclose information if the disclosure is compelled by any of the following:

- a court pursuant to an order of that court;
- a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority;
- a party to a proceeding before a court or administrative agency pursuant to a subpoena (this section does not, however, address the applicability of the psychotherapistpatient privilege);

- an arbitrator or arbitration panel, when arbitration is lawfully requested by either party, pursuant to a subpoena (again note the applicability of the psychotherapist-patient privilege), or any other provision authorizing discovery in a proceeding before an arbitrator or arbitration panel; or a search warrant lawfully issued to a governmental law enforcement agency;
- the patient or the patient's representative pursuant to a request for patient records in accordance with the Health and Safety Code;
- a coroner, when the patient is the decedent and is the subject of the investigation;
- or when otherwise specifically required by law.

The Patriot Act of 2001

Section 215 of the Patriot Act of 2001 contains a troublesome exception to confidentiality in that it not only requires therapists (and others) to provide Federal Bureau of Investigation (FBI) agents with books, records, papers, documents, and other items, but it also then prohibits the therapist from disclosing to the patient that the FBI agent sought or obtained the items under the Act.

In 1978, Congress, through the Foreign Intelligence Surveillance Act (FISA), created the Foreign Intelligence Surveillance Court (FISC) to supervise FBI surveillance in foreign intelligence investigations. The FISC hears FBI applications for orders and warrants, including Section 215 orders. Under FISA, the FBI was required to make an application to the FISA Court for an order requiring documents for an investigation to protect against international terrorism or clandestine intelligence activities. Unfortunately, the FISA Court meets in secret, rarely published its decisions and allows only the government to appear before it. Section 215 of the Patriot Act amends FISA in several ways, and creates an ethical quandary for therapists in that those who are ordered to turn over records or other "tangible things" are prohibited from mentioning to anyone else that the FBI sought the information.

In another circumstance, a therapist faced with a subpoena for patient records, for example, would first contact the patient to determine whether the psychotherapist-patient privilege is being asserted or waived. However, such an option is not available under the Patriot Act. A therapist faced with a Section 215 order would be in violation of federal law, and possibly subject to legal action, if he/she discloses to anyone that the FBI has sought or obtained what would otherwise be confidential patient information. Clearly such a situation would interfere with the therapeutic alliance. Third-party interference in the therapeutic relationship would normally be addressed in treatment. However, a therapist who has complied with a Section 215 order may find him/herself in a conflicted role, unable to process the very nature of the conflict with anyone, especially the patient. One could argue that such a circumstance would create an unethical dual relationship, or other conflict of interest, which may require the therapist to prematurely terminate treatment, without the ability to process the reasons for the termination with the patient.

Therapists are not alone in their concerns about Section 215 orders. Any person or entity can be served with a Section 215 order. However, therapists have unique relationships with their patients, which may be permanently damaged by gag provisions of the Act. If you are concerned about the implications of the Patriot Act, contact your Congressman to express your concerns, or the American Civil Liberties Union (ACLU) at www.aclu.org to find out what you can do to help.

Permissive Exceptions to Confidentiality

There are three sections of law that address the permissive exceptions to confidentiality, Civil Code 56.10(c), Evidence Code 1024, and Penal Code 11166.05.

Civil Code 56.10(c) contains a list of circumstances in which therapists and other providers of health care may disclose confidential information, including, but not limited to disclosures made to another provider of health care for purposes of diagnosis and treatment of the patient, billing or administrative services for providers of health care, to the county coroner's office during the course of an investigation, for review by any private or public body responsible for licensing or accrediting the provider of health care and to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental

authority, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made.

Unfortunately, due to legislation in 1999, any disclosure made in accordance with this section must also comply with 56.104, which prohibits therapists, and others, from releasing any information that specifically relates to the patient's participation in outpatient treatment with a psychotherapist, unless the person or entity requesting that information submits to the patient, and to the provider of health care, a written request, signed by the person requesting the information or an authorized agent of the entity requesting the information, that includes specified information, including:

- the specific information relating to a patient's participation in outpatient treatment with a psychotherapist being requested and its specific uses;
- the length of time during which the information will be kept before being destroyed or disposed of;
- a statement that the information will not be used for any purpose other than its intended use; and
- a statement that the person or entity requesting the information will destroy or return the information immediately after the length of time specified for its use has expired.

While such a written request might seem to be protective of patient privacy, 56.104 requires that such a request be sent to the patient within 30 days of receiving the information, thus turning the "request" into a notification after the fact.

CAMFT has been working to restore the ability of therapists to communicate with other health care providers without the written authorization of the patient. However, until such a change in law is achieved (which may occur this year), therapists are advised to obtain written authorization prior to releasing any patient information to another health care provider, or anyone else, in accordance with the permissive exceptions outlined in 56.10(c).

Evidence Code 1024 provides an exception to the psychotherapist-patient privilege and confidentiality in circumstances in which a patient is in such mental or emotional condition so as to be dangerous to him/herself, others, or another's property only when such a disclosure is necessary to prevent the threatened danger. For example, this section would apply in situations where a patient is threatening suicide and the therapist determines that informing a loved one of the patient is necessary to keep the patient from doing him/herself harm.

Penal Code 11166.05 is contained in the Child Abuse and Neglect Reporting Act (CANRA) and provides for the permissive reporting of mental suffering of a child, or circumstances in which a child's emotional wellbeing is endangered.

Confidentiality and Group Therapy

Therapists treating patients in groups should develop a group confidentiality agreement. Such an agreement should address not only the therapist's duty of confidentiality to the group, but also the rules of confidentiality, as established by the therapist, for group participants. For example, the therapist may want to have each group participant agree to keep all information disclosed in session confidential as a condition of participation in group therapy.

Confidentiality and Conjoint Therapy - "No Secrets"

Therapists who treat couples should develop a policy with regard to information shared with the therapist by one member of the couple outside of the presence of the other member of the couple. Such a policy should state that such information might be disclosed to the other member of the couple at the therapist's discretion. In other words, the therapist will not allow him/herself to be put in the position of holding the secrets of a patient participating in conjoint therapy. Each of the conjoint patients should be informed of

and agree to this policy. Too many therapists find themselves practicing without such a policy, and then being asked, by a patient in conjoint therapy, to keep a secret from the other person receiving treatment.

Absent a "no secrets" policy, the therapist may find him/herself in a situation where one member of the couple tells the therapist in a private session that he/she is planning to leave his/her partner despite the therapy. It would be unethical for a therapist with such information to continue to work with the couple knowing that one of the patients is not an honest and active participant of the treatment and has a contradictory agenda. The therapist is also in a bind should he/she choose to terminate therapy because of the information he/she has received. The therapist would have to provide a reason for termination, leaving the unknowing member of the couple in the dark. "No secrets" policies are an essential tool for anyone doing conjoint work.

Confidentiality and Third Parties Who Attend Therapy

Many patients will, at some time during the course of their therapy, bring a third party into a session or sessions. For example, an adult man who is focusing, at a given point during individual therapy, on his relationship with his sister, will have her attend a session or two. And while it may be obvious to the therapist that the third party "visitor" is only attending the session(s) for the purpose of the treatment of the actual patient, the visitor may see things differently. This issue may not even arise until some time later when the actual patient is requesting that the therapist send a copy of his records to his/her attorney. It is at this point that the therapist may realize that there is information contained in the record about that visitor. Is the visitor entitled to confidentiality? Perhaps. Would the visitor have an expectation of confidentiality? Probably. The therapist can address these and other issues when the visitor first attends the therapy session with the patient. The therapist should inform the visitor that he/she is not a patient and therefore is not entitled to confidentiality or psychotherapist-patient privilege under the law. Obviously the therapist will respect the confidential nature of the session, but the visitor should have no expectation of the legal protections afforded to the patient.

Confidentiality and Minors

Therapists who treat minors often find themselves walking a fine line between respecting the minor's need for confidentiality and the parent's desire to be informed about the minor's treatment. Generally, the younger the child, the more the therapist should be willing to share with the parents, the older the child the less the therapist should be willing to share with the parents. However, therapists are wise to make it clear to parents of minors of any age that effective therapy cannot be done if the child does not trust the therapist. Parents should not expect therapists to act as a "conduit of information" from their minor child. Therapists should tell parents that information will be shared, as the therapist deems appropriate.

If there is an age at which to draw a line with regard to sharing information with parents it is twelve. Some minors, who are 12 or older, are entitled to the same level of confidentiality as an adult. Minors who did or could have consented to their own treatment are afforded this right. Although this rule does not apply to all minors 12 or older, it provides a helpful guideline for therapists dealing with parents seeking information about their child's treatment. Therapists treating minors who are 12 or older may want to have a policy that requires the minor's written authorization prior to the release of any confidential information.

Conclusion

Although confidentiality is a cornerstone that differentiates the therapist-patient relationship from many other professional relationships, it also has a myriad of exceptions, both mandatory and permissive, which therapists must be equipped to navigate. This article includes many statutory exceptions to confidentiality that apply to therapists working in most settings. However, it is not an all-inclusive catalog of exceptions. Therapists working in certain specialized settings, including those that are funded with federal dollars, may be required to comply with laws and regulations, which differ from what has been listed here. In addition, this article does not address the complicated interplay between HIPAA and California law, which has been addressed in previous articles published in *The Therapist*.

This article appeared in the July/August 2004 issue of *The Therapist*, the publication of the California Association of Marriage and Family Therapists, headquartered in San Diego, California. This article is intended to provide guidelines for addressing difficult legal dilemmas. It is not intended to address every situation that could potentially arise, nor is it intended to be a substitute for independent legal advice or consultation. When using such information as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained herein.