

CONFIDENTIALITY OR PRIVILEGE

Which is it?

Many experienced clinicians in Washington don't understand the basic difference between *Privilege* and *Confidentiality*. Of course, that's understandable, since the Washington State Legislature - the people who make the laws - tend to get the terms mixed up themselves.

Until last year, Washington MFT's looked to Revised Code of Washington (RCW) Section 18.19.180 for some guidance. The law was titled "Confidential Communications," for goodness sake. Yet, if you read through the statute, you will find language about "privilege" lurking there. (The legislature made some changes in the law, but we'll get to that later.)

Because *Privilege* and *Confidentiality* are so fundamentally different it is interesting that even the lawmakers get confused.

The cleanest definition of these concepts is probably found in Keith-Spiegel and Koocher's *Ethics in Psychology* text:

"*Confidentiality* refers to a general standard of professional conduct that obliges a professional not to discuss information about a client with anyone. Confidentiality may also be based in statutes (i.e. laws enacted by legislatures) or case law (i.e. interpretations of laws by courts). But when cited as an ethical principle, confidentiality implies an explicit contract or promise not to reveal anything about a client except under certain circumstances agreed to by both parties."

"*Privilege* (or privileged communication) is a legal term describing certain specific types of relationships that enjoy protection from disclosure in legal proceedings. Privilege is granted by law and belongs to the client in the relationship....A client is usually not permitted to waive a privilege selectively."

Generally speaking, you can expect issues of *privilege* to arise in four situations: (1) When a lawyer wants you to give a deposition and testify about your client and the therapy; (2) When a lawyer seeks your file pertaining to a client; (3) When a judge subpoenas you to come to court to testify about your client or the therapy; and (4) When the judge wants you to bring the records into court as evidence. (It is a good practice to at least consult with a lawyer before you provide any of this information.)

Now, turning back to the law mentioned earlier, this statute was replaced last year (for MFT's) by RCW 18.225.105 - which is the section covering MFT's and their licensure. The law doesn't mention "confidentiality" any more...but that's okay - it still is talking about confidentiality, since it's not limited to the four situations described about when a therapist would otherwise be *compelled* to testify in a court setting.

The new law generally says that MFT's can't disclose the contents of the disclosure statement or any information received from a client in your professional capacity, and then lists *five* exceptions. These *sort of* track the exceptions in the earlier law (which covered all three certified mental health professionals in Washington).

The first exception (found in both) allows the MFT to disclose with the *written* authorization of the client or their personal representative if they die or become disabled.

The second exception (found in both) allows the MFT to disclose if “the person waives the privilege” by bringing charges against the therapist. (A client can’t claim that all these horrible things were said or done in therapy and then, when the therapist wants to provide contemporaneous, comprehensive session notes to disprove the claims, say - “No. These records are private.”)

The third exception is a little different from the old law. RCW 18.19.180 involves mandatory disclosure for child and elder abuse under RCW 26.44. Under recent changes in the law, child abuse, only, is dealt with under RCW 26.44 and now dependent adult abuse is addressed under RCW 74.34. The new law also adds RCW 71.01.250 as an exception. This section deals with involuntary commitment proceedings.

The fourth exception is more of a change. Under the old law, the therapist may disclose in response to a subpoena from the Secretary of Health or a court of law. The “court of law” language was dropped from the new law and the secretary’s subpoena power is expressly limited to disciplinary proceedings against the therapist. Court subpoenas are covered elsewhere.

The fifth exception represents, by far, the most interesting change. Under the old law, MFT’s could (but were not required to) disclose any statement that revealed “the contemplation or commission of a crime or harmful act.” That’s about as broad as you can get. After, all, what’s a “harmful act” that the client contemplates? While most of us were told in our law and ethics classes that a therapist needed only to disclose the contemplation of a crime so as to protect the possible victim (indeed, under the *Tarasoff* doctrine, we *had to* disclose), under RCW 18.19.180 as it applied to MFT’s, we could disclose the commission of a past crime without fear of sanction from the state for violation of confidentiality.

There’s a pretty significant change in the new law. This exception no longer applies to the past commission of a crime or harmful act. It is prospective only and comes into play only if the MFT reasonably believes “that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual.” On top of that, MFT’s, no longer are bound by the *Tarasoff* compulsion to disclose, as the law goes on to say, “however, there is no obligation on the part of the provider to so disclose.”

This leads us to the question posed at the beginning. Does this law talk about *privilege* or *confidentiality*? Well, once again, the answer seems to be both....sort of. Bear in mind that privilege only comes into play when you are being *compelled* to disclose in a legal proceeding. The circumstances described in RCW 26.225.105 are, for the most part, outside this arena. So it’s a *confidentiality* statute. Yet, courts have interpreted the earlier, pre-licensure, version of this law as a *privilege* statute. This is very important, since privilege has to be found in a statute passed by the legislature in Olympia or it doesn’t exist. Psychologists and psychiatrists in Washington have their own, explicit, privilege statute. The only law that comes close for MFT’s is RCW 26.225.105.