PRIVILEGE AND CONFIDENTIALITY

As you know, a new privilege law became effective on July 26, 2009. This provides an excellent opportunity to review "privilege," "confidentiality" and their differences. The first point I'd like to make is that the legislature has once again taken something fairly simple and straightforward and written a law about it that mashes concepts together so that the result looks like a sandwich after it has been stepped on by an elephant.

First let's define our terms. There is a difference between "privilege" and "confidentiality." Confidentiality is an ethical mandate that requires therapists to maintain a client's confidence. You don't reveal information about a client you obtained in the course of your professional counseling role. You get a call from your client's wife asking about the therapy; you get a letter from a client's employer asking for a summary of treatment; you have a message on your voice mail from your client's divorce lawyer wanting to talk about your client – mum's the word. You say nothing. You keep your client's confidence. It's one of the foundations of the therapeutic relationship. That's clear enough. Let's move to the next step in our analysis.

There have to be some exceptions to this rule. For instance, if your client signs a paper specifically requesting that you speak to their employer, for instance (and let's assume it's really important to your client's future in their job that you be able to speak with the employer) – would we want a blanket, no exceptions law that says, "Doesn't matter what your client wants. You speak to no one, ever, under any circumstances." Over time, a number of commonly accepted exceptions to this important rule of confidentiality have arisen and are found in many codes of ethics (see, for example the AAMFT Principle II).

These common exceptions include the express, written waiver of confidentiality by the client. Other exceptions – all of which make intuitive sense – are those times when the client makes a complaint against you to your licensing agency (permitting a client to complain about what occurred in therapy and at the same time preventing you from talking about what happened in therapy in your defense doesn't seem fair or reasonable); when the state's licensing department demands to see a therapist's records by subpoena (how can this regulatory agency determine if a therapist is acting unethically or even criminally if they are blocked from ever getting information about the therapy?); when a client reveals child abuse (which the therapist is legally required to report) or when the client shares in session their intention to go out and blow away their spouse with the shotgun that's sitting loaded in their car. These are all reasonable exceptions to this rule that says, "What happens in the therapy office stays in the therapy office." They can all actually be found in the law which sets forth the exceptions to confidentiality for Washington counselors, RCW 18.225.105. Go on line and look it up.

Okay, that's confidentiality. Privilege is a related, but very different concept. It only applies in legal proceedings. It only arises if a lawyer or judge wants to compel you to provide information obtained in the course of therapy in a legal proceeding. There are only two kinds of legal proceedings you have to deal with – hauling your records into court and giving testimony in a trial or hauling your records to a lawyer's office and testifying in a deposition. There are two kinds of information you may be asked to provide – either testimony, where you talk about the therapy, or producing your records, which are written reflections of your therapy.

Privilege is an old concept in law and applies only to certain specified relationships. For hundreds of years, it has been accepted that a lawyer cannot be compelled to testify about what a client said to her - the obvious rationale being that a client would not be completely candid with his lawyer (and the lawyer's job would be hobbled) if the client knew that his lawyer could be called onto the stand and made to share everything he said to her. Over time other relationships became protected by this notion of privilege. Things we say to our doctors are also protected by privilege, because, if it weren't so, we might withhold information critical to our treatment. Pillow talk between spouses has been protected by a privilege for a long time, as well. Things we share with our clergy in the course of confession or spiritual counseling are also granted this protective shield. Much more recently (say the last 40 years) psychologists and, later, other masters-level therapists have been granted this privilege in state after state. Here's the important point you have to remember about all of this: Privilege is specifically granted in the laws of a state to protect a particular relationship. There is no accountant/client privilege, for example, in our statutes (Revised Code of Washington – R.C.W.), so if your accountant is called onto a witness stand and asked questions about your taxes, a lawyer can't say, "Objection! That is privileged." If it's not written specifically into the law, it's not a relationship granted the protection of a privilege.

Now, every law is a reflection of a public policy – and the particular public policy underlying privilege reflects a tension between two competing and very legitimate concerns. On one hand, as mentioned above, we want to protect information conveyed in certain relationships. On the other hand, every time information is kept from a judge or jury in a trial, there is a chance that an injustice may ensue. The legal-type people who want decisions made based on all information don't like privileges very much and the doctor, spouse, therapist, etc, - people darned well want that information protected. So how do we reconcile these two competing points of view? We enact a privilege, and then carve out exceptions to that privilege so the chances for its abuse are limited. These exceptions to privilege are pretty universal (the same from state to state and in federal courts) and they all make intuitive sense.

One exception is that the client can't share some of the information, but then try to block revelation of any further information. The law's reaction is to say, "Hey, wait a minute, if you want the protection of this privilege, it's not a game – you either throw the blanket over everything or nothing – you can't pick and choose what you want to have revealed." That makes sense, right?

Another exception is that you can't shield conversations when an unnecessary third party is present. So, for example, if my discussion with a client in my conference room is absolutely protected, because it is based, in part, upon my expectation that it is private, then having someone else present – my divorce client brings their mother to my office and they sit in on the meeting – negates this expectation of privacy. So the law says, "Sorry. If you share information in this special relationship with someone else there who doesn't need to be there, no privilege." Again, makes sense, right?

Another exception which comes up with medical or mental health treatment is when the patient places their physical or mental condition at issue in a particular case. I can't sue the guy who rear-ended me for whiplash, seeking billions of dollars in damages, but yet say that their lawyer can't get information from the doctor who treated me for neck pain over the 5 year period preceding the accident. That certainly wouldn't be fair!

Of course, the client (patient, spouse, etc.) can expressly waive this privilege and just simply sit back and allow the doctor (lawyer, spouse, therapist, priest) to testify without objection.

The point is that confidentiality and privilege are different. They arise in different contexts and their exceptions arise out of different policies and concerns. The problem in Washington is that for years our legislature has muddled up the two concepts – using the word "privilege" in statutes about "confidentiality" for example.

Well they basically did it again and stepped on the privilege sandwich. After years of discussion and debate the legislature finally conferred a "privilege" on the master's level therapist/client relationship (the psychologist/patient privilege has been on the books for years) in the new statute RCW 5.60.060 (9). It's actually in the part of the Washington evidence laws that contain the doctor-patient and lawyer-client privileges. So far, so good.

But then the legislature proceeds to name the exceptions to privilege as the same exceptions to confidentiality that you'll find in 18.225.105. That's all well and good, but the darned legislature continues to mush confidentiality and privilege together. If you compare this, for example, to the privilege laws in the Evidence Code of California where I used to practice, you'll see that down south, they name the privilege and then name the commonly understood exceptions to privilege (waiver through partial disclosure, unnecessary third party present, placing physical condition at issue, etc.).

So what advice is there for a therapist to understand their obligations regarding privilege? Here are the rules you should follow:

1. *Never* allow an unnecessary 3rd person to overhear or take part in your therapy or counseling sessions (note that conjoint sessions will be okay because the other

person/people present are in furtherance of your therapeutic task – so sessions where your client's mom joins won't waive the privilege).

2. *Never* voluntarily share part of what you learn about a client in therapy, thinking you can protect the rest if a lawyer wants to compel you to testify.

3. *Be aware* that if you have to make a mandatory disclosure under an exception to confidentiality (client danger to self or others; child abuse reporting) that information will never be protected by a privilege because it has since been disclosed.

4. *Always* respond to a subpoena you receive (or 14 day notice that you will be receiving a subpoena) by contacting your affected client. Every subpoena must be preceded by a notice that you will get that subpoena 14 days away or later and your client needs that time to decide if they are going to seek a protection order blocking you from sharing information you received in your therapy. *Never ever, ever, ever* ignore this notice or the subpoena you may subsequently receive. Call your client, and with a release, their lawyer (they will almost always be involved in a legal proceeding and have a lawyer) to discuss what steps the client and their lawyer will wish to take.

This last point is the most important – whether the discussions in your office (and the resulting notes) will ever be revealed in a legal proceeding will be determined in a protection order hearing that needs to be brought by your client, even before you ever get the subpoena. So your job is not to inadvertently blow your client's privilege - by something like non-required partial disclosure - and then let your client's lawyer deal with getting a protection order if that's what your client wants.

Finally, I welcome any of you to send me questions you may have about the operation of confidentiality or privilege law to joe@josephshaub.com. In the coming month I will post these questions and my responses on my website, josephshaub.com.