Domestic Violations of Confidentiality

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In mental health practice, protecting the confidentiality of psychological information provided by clients is the cornerstone of professionalism. Often there are inadvertent violations of this axiom. On the basis of true examples, this article reveals the pitfalls associated with an office in the home, unsecured documents in the home, the telephone answering machine in the home, the family Internet account, the family computer, the shared fax machine, the shared mail box, the family dining table, the accidental revelation, the errant spouse, and exposure through litigation. Possible exceptions and special situations are discussed, and safeguards are recommended.

A resounding "Never!" should be what every mental health practitioner answers to the question, "Have I unwittingly failed to protect any client’s confidentiality?" Regrettably, my experience as an attorney advising and defending practitioners has revealed that a substantial number of well-meaning mental health practitioners inadvertently lower their guard and inappropriately reveal confidential information to family members and others. The violations seem to occur regardless of professional discipline, level of training, or years of practice. The problem often seems to arise because practitioners do not clearly separate their professional lives from personal relations.

Public policy, law, and ethics give high priority to protecting confidential client information. Especially noteworthy, ethics codes are both prescriptive and descriptive about the matter. For example, psychologists "have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult," they should "discuss confidential information obtained . . . only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters," and "maintain appropriate confidentiality in . . . accessing . . . records under their control, whether in written, automated, or in any other medium" (American Psychological Association, 1992, p. 1606). Similarly, counselors should "make every effort to ensure that privacy and confidentiality of clients are maintained by subordinates," and they are "responsible for securing the safety and confidentiality of any counseling records . . . whether the records are written, taped, computerized, or stored in any other medium" (American Counseling Association, 1995, p. 34). Marriage and family therapists must "respect and guard confidences of each individual client" (American Association for Marriage and Family Therapy, 1991, p. 3). Social workers "should protect the confidentiality of all information obtained in the course of professional service, except for compelling reasons"; moreover, they should "not discuss confidential information in any setting unless privacy can be ensured" and should "protect the confidentiality of clients' written and electronic records and other sensitive information" (National Association of Social Workers, 1996, pp. 10–11). The ethics code for psychiatrists (American Psychiatric Association, 1992) declares, "Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care" (p. 5).

Although the degree of explicit language varies somewhat among the ethics codes for mental health professionals, it is implicit in each of them that a client must authorize access by anyone to confidential information, unless it is otherwise justified by law.

The entire matter of confidentiality of client information is governed by law. All 50 states and the District of Columbia have some form of psychotherapist–patient privilege (Zuel, 1997). Smith (1996) pointed out, "Almost all of these privileges have been adopted by statute" (p. 1). In 12 states (i.e., Alaska, Arizona, Florida, Idaho, Iowa, Massachusetts, Nebraska, Oklahoma, Pennsylvania, South Carolina, Washington, and Texas), statutory law requires that authorization by the client must be in writing (Glossoff, Herlihy, Herlihy, & Spence, 1997).

The Ethical and Legal Framework

By emphasis and specificity, ethics and law have consistently supported strict confidentiality for the communications between the mental health client and practitioner, even to the point of protecting the identity of those who are service recipients. Absolute confidentiality can be circumvented only by legal process (e.g., a subpoena or court order), a reasonable need to know (e.g., persons within the clinical team, including office personnel), protection from bodily harm (e.g., mandatory reporting, duty to warn of dangerousness), or exercise of the legal rights of the practitioner (e.g., when the client sues a therapist). Any other release of confidential information to a third party or accommodation of unreasonable access to the confidential client information by a...
third party would presumably or potentially be a violation of professional standards.

The Achilles’ Heel

With the foregoing declaration, the Achilles’ heel of confidentiality for mental health information is laid bare in the context of the professional’s personal life. Regrettably, the following examples are factual, as revealed in the course of my having served as defense counsel for mental health practitioners faced with ethics, regulatory, and malpractice complaints.

Before describing problematic scenarios, I must emphasize that the aforementioned ethical standards, which are supported by law, make it clear that there is no exception to confidentiality extended to spouses, family members, and friends who would allow access to client information without knowledge of and authorization by the client. If a spouse, family member, or friend works in the office in a formal fashion, there is a limited right to know; the right extends only as far as performing job duties and does not reach to information for other purposes.

An Office in the Home

Having an office in the home is problematic for the mental health practitioner. One risk is that the proximity of family members can be disruptive to the quality of treatment (e.g., children yelling or playing musical instruments while therapy is being provided to a client). Another risk is that the setting could foster alleged role violations (e.g., allowing the client to sit at the kitchen table for a cup of coffee with the therapist’s spouse), all of which can jeopardize confidentiality.

It is commonplace for the identities of the clients who come to the practitioner’s home for professional services to be known to family members, as well as anyone else who might chance to be there. Obviously, visitors could recognize or hear the name of a client, and a breach of confidentiality could ensue.

Another scenario occurs when family members use the telephone in the office area, either for isolation from other family members or to have, say, the charges for long distance calls appear on the bill for the business telephone. In sitting at the practitioner’s desk during the telephone conversation, the family members will likely be able to observe confidential client information.

Unsecured Documents in the Home

Having professional documents at home also carries the risk that unauthorized persons may see them. Several practitioners have revealed that they leave records and unfinished reports in parts of the house shared with other family members and their friends.

After chance to see a report involving a local celebrity on the laptop word processor, a teenage daughter commented excitedly to the parent–practitioner about it. In another situation, the parent–practitioner arrived home and was greeted by his son who said, “You had a fax from [name of client] and I put it on the counter in the kitchen.” At the time, other youths were seated at the table with the documents in plain view.

The Telephone Answering Machine in the Home

Continuing in the same vein, one practitioner returned from a social engagement with a man whom she was dating and decided to check her answering machine in his presence. As the messages were played, the male companion heard the recorded messages. After hearing one, he said, “I know her; I didn’t know she was in therapy with you.”

When I presented this example in a seminar, one practitioner reported, “Between sessions, I go into the secretarial area and play the messages that came in during the past hour. I know that clients in the waiting room can hear them too, but I don’t know have any other choice, I have to hear my messages.”

The Family Internet Account

Increasingly, electronic mail (E-mail) is being used to transmit client information that is intended to be confidential. As though the medium were not risky enough, commonly more than one person uses the family Internet account for E-mail. Thus persons other than the practitioner may have the necessary password to access any and all communications that are received by E-mail, as well as those that are stored in the sent mail folder.

One practitioner receives a high volume of E-mail regarding complaint cases against other mental health professionals. These communications involve information that is definitely confidential and could have a damaging effect if it were used inappropriately. The E-mail account is in the name of the practitioner’s teenager. The practitioner’s spouse and teenager have unfettered access to the E-mail that is received and stored.

Similarly, a supervisor has arranged for several interns (working under the auspices of various unrelated clinics) to have the access code to a single E-mail account, which allows any one of them to potentially read E-mail intended for any of the others. Many of the communications are about particular clients being seen by the different interns.

The Family Computer

Much like the shared Internet account, several family members typically use the home computer. Although it is possible to lock a folder (which precludes access without a code), practitioners seldom do this. Also, documents remain on the hard drive, and readily available software, such as Norton Utilities, allows access. As reported elsewhere (Woody, 1997), a practitioner gave her home computer to a charity, which sold it; the purchaser contacted the practitioner (anonymously), telling her that he had accessed confidential client information that was stored in the hard drive. The caller indicated that, fortunately for the practitioner, he intended to cleanse the hard drive but chastised her for her failure to protect the confidential information.

The Shared Fax Machine

This investigation of the topic of domestic violations of confidentiality revealed that many practitioners share a fax machine with someone who is not part of their practice. Indeed, it is not unusual to have a practitioner rely on a fax machine that is placed in another location, such as an office of a friend, dentist, lawyer, or accountant down the hall or even in another building (sometimes even in another person’s residence). Certainly, these people have no right to know confidential information about the practi-
tioner's clients, and in some cases, the practitioner had not oriented them to protecting confidentiality.

One practitioner makes use of a fax machine across the hall in her husband's construction business. The fax machine is in a room where subcontractors and their workers congregate to drink coffee, and it is common for them to push aside documents intended for the practitioner that were placed by clerical staff on the communal table (proven by coffee stains).

The Shared Mail Box

One practitioner has business mail and family mail delivered to the same postal box. Spouse and children alike pick up the mail. When sorting the mail, each reads the name of the sender.

In one instance, there was no name for the sender, and the spouse opened the letter. When seeing a handwritten letter, the spouse read passionate words reflecting positive transference toward the practitioner; however, there was no sexual message per se. The spouse, a nontherapist, became incensed and delivered an angry message to the client's answering machine.

The Family Dining Table

Perhaps the place for most domestic violations of confidentiality is the family dining table. From my private discussions with practitioners, many admitted to discussing cases, presumably without revealing names, with family members, often recounting the humorous, bizarre, or criminal actions of their clients. Besides the lack of respect for the dignity of the client that these revelations demonstrate, some comments might reveal enough information for family members to surmise or know the identity of certain clients.

The Accidental Revelation

Even in a scenario beyond the immediate control of the practitioner, the breach of confidentiality can lead to liability for the professional. Regardless of the place or activity, the professional must be constantly on guard.

As a practitioner was making a bank deposit, the teller looked at a check received from a client and said, "Oh I know her and about her problems; how's she doing in therapy?" Taken aback, the therapist stammered, "She's doing a lot better; she's not as depressed as she used to be."

During the intermission at a concert, a practitioner and spouse encountered a client and a social companion. In the course of introductions, the practitioner revealed the client's status to the spouse and the social companion.

The Errant Spouse

There is no reasonable basis for believing that a practitioner's spouse will be prepared, by virtue of marital status, to honor the rights of clients. With or without benefit of professional training, a spouse has emotions and personal needs, and they may trigger an inappropriate response toward a client, leaving the practitioner to shoulder the liability.

A practitioner's husband was waiting outside the office to transport her home. As her last client, a physically attractive female, left the office and passed by the husband, he identified himself to the client and (as the client later asserted and the spouse readily admitted) "tried to hit on her." At the next session, the client was distraught about the incident, and believed (correctly) that her identity as a client was now improperly known by the husband and that he had sexually harassed her. Moreover, the husband continued to try to get his practitioner-wife to tell him more about the beautiful client, which led to marital discord.

Exposure in Litigation

Regrettably, all practitioners do not have successful marriages. Divorce situations have arisen in which the attorney for the practitioner's spouse has used legal discovery procedures to "follow the money," appropriately tracking revenues and expenditures for possible financial and amorous misdeeds. For example, subpoenas and court orders have been used to obtain practitioners' datebooks and telephone records, which in the process has jeopardized uninvolved clients' rights to confidentiality. In a related vein, in civil (nondivorce) litigation in which the practitioner is involved as a party or serving as an expert witness, legal process has been used to obtain the same sort of information, again jeopardizing uninvolved clients' rights to confidentiality.

Discussion and Recommendations

Assuming that training and experience cannot totally eliminate the risk of domestic violation of confidentiality, the onus for constructing safeguards is on personal decision making. Thus, the goal should be to recognize any bona fide exception, eliminate rationalizations and misconceptions, and maintain protective strategies.

There is no definite exception to confidentiality that allows access to confidential client information by spouses, family members, or friends—unless the client authorizes this. Although rare, circumstances may justify an exception on a case-by-case basis. For example, a spouse, family member, or friend who works in the practitioner’s office has a limited right to know, that is, to access the confidentiality records to perform job duties. Also, in the event that a practitioner is unexpectedly incapacitated or dies, someone must review the confidential information to appropriately wrap up the practice. The foregoing examples call for responsible planning in advance.

From the onset of services, clients should know and accept the arrangements for "coverage" for when a practitioner is on vacation or leave and know and accept that other personnel and professionals in the practice will have access because of a "team approach." In other words, policy statements that clarify confidentiality, including the actions for emergency or unexpected situations and the limited right to know, can prevent allegations of violation of confidentiality.

Attempts to justify disclosing confidential client information to spouses, family members, and friends are usually of two types: an idiosyncratic family reason and financial rationale.

The idiosyncratic reason harbors notions like, "I need to talk to someone about these matters"; "My spouse insists that I share my cases and assumes me that she won't share the information with others"; and "My kids know not to talk about what I tell them, or who calls on the phone or E-mails me." On the surface, these justifications might seem somewhat plausible, but they lack any support from public policy, ethics, and law.
As for a financial reason, common responses are, "I get so few faxes, there’s no reason for me to buy a machine"; "I can’t afford to pay for my own E-mail account"; "It’s foolish to spend money for a post office box separate from the family mail box"; "I don’t have a convenient place to put answering or fax machines that would be inaccessible to others"; or "It is cost prohibitive to have a professional telephone answering service." The financial reason, much like the idiosyncratic reason, relies on justifications that are somewhat plausible, at least from the pragmatic point of view of the practitioner, but they too lack any support from public policy, ethics, and law.

Why is the practitioner’s family and financial situation not determinative? In establishing the standard of care, the test is not what the particular practitioner prefers; it is what the reasonable and prudent practitioner would decide, with deference given to the interests and welfare of the client. Therefore, the criteria for an acceptable standard of care are not satisfied simply because a practitioner’s spouse demands to monitor cases, it is inconvenient to keep access to confidential client information away from family members, or an unwelcomed additional expense would be incurred.

Stated bluntly and without reservation, there is no reason for sharing confidential client information with any person outside the professional service team, unless the client (or his or her legal agent) authorizes it, it is justified by law (e.g., mandatory reporting, duty to warn), or it is required by legal process (e.g., a subpoena or court order). On the matter of legal process, the practitioner must be prepared to safeguard confidential client information, such as by filing a motion for a protective order.

Admittedly, financial concerns are relevant in this era of reduced fees from managed care and rising overhead expenses. Nonetheless, the mental health professional must conceptualize the security of confidential client information as an essential cost of doing business and maintain adequate safeguards against domestic violations.

References

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