Background

By rule or law Minnesota licensed health professionals, presumably including psychologists, are required to report misconduct or impairment in other Minnesota licensed professionals. Instead of a single statute or standard, these standards are found in professional licensure laws and/or the rules which were promulgated in connection with these laws.

These standards have evolved predominantly following a scrutiny of licensure boards brought about as part of the state legislature's study of sexual misconduct by health care professionals. Following hearings in late 1984, a Task Force on Sexual Exploitation by Counselors and Psychotherapists began work over a several year period, leading to major changes in Minnesota statutes in 1985 and 1986.

After a reporting duty was added to the Minnesota Medical Practice Act in 1985, the Nursing Practice Act was amended in 1987 to include similar duties. That same year social workers and marriage and family therapists were licensed for the first time, and those acts also contained mandatory reporting duties for licensees. Other health care professions added duties at various points.

There is a lack of uniformity in these requirements, and one very bizarre feature—the duties to report other licensed health care professionals are not found in one's own licensure law but rather in that of the person to be reported. This is not unique to duties to report professional misconduct. The original Minnesota "duty to warn" standard which referenced a number of professions was part of the psychology practice act until it was realized that this made no sense. Today only psychology and social work have such a standard in their laws. So to find what duties a licensed psychologist might have, one must look beyond our own licensing law.

For example, 148.102, Subd. 2 Licensed Professionals, describes the following duty to report to the Board of Chiropractic Examiners:

> A licensed health professional shall report to the board personal knowledge of any conduct which the professional reasonably believes constitutes grounds for disciplinary action under section 148.10 by any doctor of chiropractic including any conduct indicating that the doctor of chiropractic may be incompetent, or may have engaged in unprofessional conduct, or may be physically unable to engage safely in the practice of chiropractic. No report shall be required if the information was obtained in the course of a patient relationship if the patient 1) is a doctor of chiropractic and the treating health professional successfully counsels the doctor of chiropractic to limit or withdraw from practice to the extent required by the impairment; or 2) is a patient or former patient of the doctor of chiropractic and the treating professional is a psychologist from whom the patient is receiving psychotherapeutic services.

This is unusual in that if a psychologist learns of the misconduct from someone he or she is treating, there is no reporting duty. Less unusual is the exception to reporting if the professional has successfully counseled the professional in question to limit or withdraw from practice. It is noteworthy that as regards this exception, the treating professional would have in effect taken on a duty to judge that the intervention was successful and that the chiropractor was no longer a risk to the public. If he/she was wrong about this, any victim might have a cause of action against the professional who chose not to support.

The nursing practice act contains a somewhat different reporting duty and does not exempt psychologists in any fashion. Section 148.263 Reporting Obligations, Subd. 3, Licensed Professionals, reads:

> A person licensed by a health-related licensing board as defined in section 214.01, subdivision 2, shall report to the board personal knowledge of any conduct the person reasonably believes constitutes grounds for disciplinary action under sections 148.171 to 148.285 by any nurse including conduct indicating that the nurse may be incompetent, may have engaged in unprofessional or unethical conduct, or may be mentally or physically unable to engage safely in the practice of professional, advanced practice registered, or practical nursing.

The medical practice act has a similar set of requirements as the nursing practice act, but in Minnesota Statutes 147.111, subd. 4, allows a reporting exemption which bears some similarity to the chiropractic practice act described above. However, there is an exception to reporting:

> No report shall be required if the information was obtained in the course of a physician-patient relationship if the patient is a physician or a person holding a residency permit under section 147.0391, and the treating physician successfully counsels the person to limit or withdraw from practice to the extent required by the impairment.

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Unlike the chiropractic practice act, this exemption is not extended to psychologists—it applies only to physicians who are treating the physician in question.

Still another approach is found in the social work practice act, which requires a licensed social worker to report other licensed health professionals to their boards (148.240D, subd. 3) and to report social workers (subd. 5) to the board of social work when he/she knows of conduct which they "reasonably believe constitutes grounds for disciplinary action." So the social work practice act requires social workers to report psychologists to the board of psychology although, as will be clear below, the psychology practice act does not ask them to do this.

The Psychology Practice Act

The rules of the Board of Psychology, 7200.4900, Subpart 10, Complaints to the Board, states:

> A psychologist, for purposes of this subpart the "first psychologist," shall file a complaint with the board when the first psychologist has reason to believe that a second psychologist is having or has had sexual contact with a client in violation of subpart 8, or has failed to report abuse of children or vulnerable adults in violation of part 7200.4700, subpart 11. This requirement to file a complaint does not apply when the belief is based on information obtained by the first psychologist in the course of providing psychological services to the second psychologist. Nothing in this part relieves the first psychologist from the duty to file a report as required by Minnesota Statutes, section 626.556 or 626.557, regarding abuse of children and vulnerable adults.
>
> Subpart 11, Communicating complaints to psychologist or board.
>
> A psychologist informed of conduct of another psychologist which appears to be in violation of any rule of conduct other than those listed in subpart 10 may directly communicate with or seek to counsel the other psychologist or may file a complaint directly with the board.

So under the psychology practice act only psychologists are required to report other psychologists, and the reporting duty extends only to sex with a client or a failure to report child abuse or abuse of a vulnerable adult. An exception is granted when the information was obtained in the course of providing psychological services to the second psychologist. This could presumably include the provision of services such as supervision and would not be limited to just the psychotherapeutic relationship.

At present the Minnesota Board of Psychology has worked on revisions to the rules and is hoping to have public hearings on these revisions some time in early 2011. Some of the proposed changes are focused on making the rules clearer by referring to "the provider" instead of the "first psychologist." The new proposed rules add two additional bases for a report to the board:

> A. is unable to practice with reasonable skill and safety as a result of a physical or mental illness or condition, including but not limited to, substance abuse or dependence, except that this mandated reporting requirement is deemed fulfilled by a report made to Health Professional Service Program (HPSP) as provided by Minnesota Statute 214.33, subd. 1;
>
> and
>
> D. has employed fraud or deception in obtaining or renewing a psychology license.

The proposed rules will have an exception only for the reporting of sexual misconduct, and it will be limited to situations in which "the information is obtained in the course of treating the other professional for the sexual behavior." So the proposed rules will narrow the exception and clarify that it applies to a treatment relationship, and that the treatment must include treatment for the sexual behavior. They will also add the reporting duty regarding impairment due to a physical or mental illness or substance abuse which is a part of other health care professional licensing laws, with the option of a report to HPSP in lieu of a board complaint. However, psychology will continue to not require reporting of other sorts of professional misconduct or incompetence.

One of the advantages of the requirements proposed is that the threshold for a report as regards impairment is practice-related—namely that the psychologist is deemed unable to practice with skill and safety—not just that he/she has a personal problem.

The legal and ethical challenge

Psychologists have an ethical and legal duty to maintain the privacy of their clients through keeping information provided by clients confidential. Any limitations regarding privacy such as brought about by reporting duties must be communicated to clients as part of obtaining informed consent to provide services.

Beyond the Code of Ethics of the APA and the psychology licensure law, there are many other legal stan-

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dards relating to confidentiality of client communications. Certain areas of service provision have additional confidentiality requirements. For example, CFR 42 which covers drug abuse related prevention, assessment, and treatment services contains additional restrictions for psychologists who provide services in such settings.

Warnings about responsibilities to report child abuse and neglect, the abuse or neglect of vulnerable adults, and the possibility of having to breach privacy in order to prevent a suicide or a violent act towards a third party are typical of client information sheets.

However, what is it that psychologists should reveal to clients about limitations on privacy that could occur in connection with reporting duties? Like all such disclosures, the challenge is to present them in a clear fashion. Both ethically and legally, for there to be informed consent, the client needs to understand what these duties entail. This takes us back to the original question: What are psychologists' duties to report the misconduct of other professionals that might be learned in an otherwise confidential context?

The duty to report other psychologists is contained in the psychology practice act and can be relatively easily explained. The only "trick" is to be clear to a client that people are sometimes confused about the profession of a past service provider, and that sometimes professionals have more than one license.

But, the question is, do psychologists have a legal or ethical duty to report other health care professionals?

Licensure laws regulate the practice of a given profession and the prosecution in connection with a licensure law is carried out by the Board created to oversee that profession. As such it makes no sense that the rules of a board which regulates another profession can apply to psychologists. Certainly no board has jurisdiction over psychologists other than the Minnesota Board of Psychology.

Given the importance of the duty of maintaining confidentiality—both ethical and legal—it is hard to conceive of how this would be overshadowed in any way by the reporting requirements to be found in the licensing laws for other professions.

Obviously, it is possible to have such duties created through obtaining client consent for such reporting. However, I question whether simply including some mention of this in a consent form really satisfies either ethical or legal requirement for informed consent. The complexity of explaining all of the requirements, which vary profession to profession, to a client in the context of obtaining informed consent would seem to be challenging at best. Second, one needs to ask whether this needlessly complicates setting up service relationships.

Given the challenges of encouraging people to seek help for mental health problems and the anxiety which often accompanies help seeking, it becomes hard professionally and ethically to justify adding more limitations to privacy and more complexity absent a clear legal duty to do so.

Obviously in situations where clients come in with complaints about other professionals, one can discuss complaint options and assist the client in taking action. The question is whether it is essential to make a report without client consent.

Moving forward:

It would be good for all of us to review the proposed changes in the rules of the Board of Psychology.

It is time to ask that the many practice acts be "cleaned up" to not present mandates for professionals who are outside the scope and jurisdiction of the law. It is not helpful to have such requirements in rules and laws which go beyond the scope of the various boards in question.

If it is deemed to be good public policy to have such broad mandatory reporting, then the proper approach legislatively would be to have a single over-arching statute. This would also provide for consistent standards—it is completely unworkable to have so many standards.

Editor's Note: *Gary Schoener, M.Eq., Licensed Psychologist, serves as director of Consultation and Training for the Walk-In Counseling Center (www.walkin.org). He is a frequent contributor to the* Minnesota Psychologist.

75th Anniversary Annual Convention Proposals Due by January 7, 2011

See pages 5-6 of this issue for additional information

