Confidentiality for counselors can involve multiple issues and have different laws that apply depending upon the setting. School settings require the knowledge of FERPA. Mental health counseling involves a knowledge of HIPPA and a more recent Supreme Court decision Jaffee.

I. School Records and School Counselors: A Practical Guide to the Federal Education and Right to Privacy Act of 1974

The ethical standards for professional school counselors as set forth by the American School Counselor Association (ASCA, 2004) states that it is the responsibility of all school counselors to a) hold students as their primary obligation, b) be concerned with the educational, academic, career, personal, and social needs and to encourage the maximum development of every student, c) respect the value's and beliefs of all students without imposing the personal values of the counselor, and d) be knowledgeable of laws, regulations and policies relating to students and to strive to protect and inform students regarding their rights. Most professional school counselors are familiar with the duty to address the educational, academic, career, personal, and social needs of students. However, the duty to remain current on all laws, regulations and policies concerning students and their rights is an integral part of every school counselor's job.
Cumulative records, whether students believe it or not, follow them throughout their academic career. These files hold invaluable information about each student including grades, test scores, and much more. In the past 30 years the role of schools and school personnel concerning the maintenance and security of school records has evolved. The most significant piece of legislation concerning the handling school records has to be the Federal Education and Right to Privacy Act (FERPA) of 1974. FERPA has had a lasting effect on the role of school counselors and their duty to the students under their care.

FERPA Parts

The Federal Education and Right to Privacy Act is a four part act giving parents and eligible students the right to inspect and review school records (Kazalunas, 1977). Part I revokes disbursement of federal funds to any educational institution that prevents access to school records to parents or eligible students. Part II stipulates that before schools insist that students receive medical, psychological, or psychiatric examinations or participate in school programs that are designed to modify values or behaviors parental consent is required. Part III denies federal funds to schools that release student records to third parties without parental consent unless it is to comply with a court order. Part IV requires the Secretary of Health, Education and Welfare to "develop regulations to ensure the privacy of students in regard to federal surveys" (Kazalunas, 1977, p. 244).

Rights of Parents and Students

Under FERPA (1974) parents and eligible students have the right to inspect and review student records maintained by the school. Schools are not obligated to provide copies of records unless it is impossible for parents or eligible students to review the records in person. If copies are provided, schools may charge a fee (FERPA, 1974). If parents of eligible students believe the records contain information that is inaccurate of misleading, schools must consider a request from the parent or student to amend those specific records. If schools decide not to amend those records, FERPA (1974) offers parents and

students the chance to request a hearing on those matters. If after the hearing the school decides not to amend the student records, parents and students have the right to place a statement in the records regarding their objection to the specific information (FERPA, 1974)

School Responsibilities

Specific guidelines for the maintenance and handling of school records are set forth under FERPA. Schools are required annually to provide parents and eligible students a copy of their public records policy (FERPA, 1974). These policies must adhere to the following: 1) student records containing personally identifiable information must be kept confidential and must not be released without written consent of the parent or eligible student, 2) parents/guardians of students under 18 have the right to inspect student records, 3) the record-keeping system of the school district must be described in sufficient detail for parents and eligible students to access those records, 4) school personnel with access to student records must be identified by title, 5) each student record must contain a record of access with the signature of each staff member when that record is withdrawn, 6) parents and eligible students have the right to appeal anything they consider to be incorrect and the right to a hearing and/or the right to provide a written statement challenging the contested material, 7) school policies must define what constitutes directory information and under what circumstances that information may be released. Also, any record "maintained by a physician, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity… and used in the treatment of an eligible student… in an institution of post-secondary education, are excluded from the definition of education records in FERPA and are not automatically accessible to the student" (Alexander & Alexander, 1992, pp. 525-526).

Release of Information

FERPA allows the release of almost all information not specifically restricted. This information includes educational records such as "1) cumulative academic files…, 2) business records regarding payment of tuition and fees, 3) financial records, except those relating to parents' financial records, 4) student extracurricular activities records, 5) career guidance records, 6) placement office records, 7) letters of recommendation, unless a students has specifically waived his right, 8) student housing records…, 9) employment records of students employed as a result of their status as students," i.e. medical or psychology student interns (Hollander, 1992, p. 50).

FERPA restricts access to certain information. This information includes 1) personal files kept in the sole possession of the teacher, administrator, or staff, 2) law enforcement records of crimes committed on school grounds, 3) health treatment records made by physician, psychiatrist, or other health professionals or paraprofessionals may only be released by court order, 4) letters of recommendation if students' rights have been waived, 5) parents' financial records, 6) employment records, except in cases acting of paid medical or psychology internships as mentioned above, 7) records maintained before enrollment or after attendance (Hollander, 1992).

Release of information to third parties is permissible under the following circumstances. Directory information may be released to a third party only after public notice has been given as to what directory information constitutes and after students and parents have been given ample time to request that information not be released (Hollander, 1992). Information may be released to third parties under court order.

According to FERPA, information may also be released to 1) another institution at which a student enrolls, 2) certain government officials who monitor the educational system (i.e. any official who is auditing a federally funded project), 3) research organizations, 4) accreditation organizations, 5) parties dealing with financial aid, 6) and "parents if a student is considered a dependent under Section 152 of the Internal Revenue Code" (Hollander, 1992, p. 52).

Any information may be released with the written consent of eligible students or parents. Also, any information released to third parties must be protected from impermissible redisclosure (Hollander, 1992). Third parties must agree not to redisclose any information without written consent unless it is to personnel of the institution which the information was originally disclosed or personnel from the disclosing institution that would have originally been disclosed.

Definitions

Certain definitions apply to FERPA regulations. According to FERPA (1974):

- "Directory information" refers to information contained in a school record of a student that would not generally be considered harmful or an invasion of privacy. It includes but is not limited to the student's name, address, telephone listing, electronic address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status, participation in officially recognized sports or activities, weight and height of members of athletic teams, degrees, honors, and awards received, and the most recent educational agency attended
- "Disclosure" means to permit access to or the release, transfer, or other communication of personally identifiable information contained in educational records to any party, by means, including oral, written or electronic means.
- "Education records" means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. These records do not include the following: 1) records that are kept in the sole possession of the maker, are used only as a personal memory aid, 2) records of the law enforcement unit of an educational agency or institution, 3) records relating to an individual who is employed by an educational agency or institution if that students employment is not as a result of their status as a student, 4) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education that are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional as mentioned before, 5) records that contain only information about an individual after he or she is no longer a student at that agency or institution.
- "Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.
- "Parent" means a parent of a student and includes a natural parent, a guardian or an individual acting as a parent in the absence of a parent or a guardian.
- "Student," means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

Hollander (1992) also states that parents that have the right to access student records if they claim their child as a dependent on their federal income taxes and have not had their rights revoked as a result of divorce or separation. Walker and Larrabee (1985) go one to

define other pieces of information contained within school records. Anecdotal records are "observations of interest, prominent abilities (art, athletics, leadership), relationships with peers and school personnel, and disciplinary incidents" (p.211). Case summaries are usually used with students with a personal or social dilemma that impedes their educational growth. The information is used to in understanding the student and to aid in planning counseling sessions and interventions (Walker & Larrabee, 1985). Finally, Recommendations include remarks of previous counselors and teachers or remarks as a result of staff conferences.

FERPA History

Ball (1973) was concerned with the extent to which school counselors actually involved themselves in the due process of their students. According to Ball, most school counselors are ignorant of the laws that affect students and lack an understanding of those laws. Due process, which is linked with the Fourteenth Amendment, is applies to school authorities as officials of the state. Ball (1973) breaks due process into substantive and procedural due process. Though Ball was more concerned with procedural due process as it applies to school disciplinary actions, the definition given to substantive due process, the constitutional rights to freedom of speech, freedom of assembly, privacy, and personal liberty, is what affects the current discussion of FERPA and school records (Ball, 1973). After FERPA, no school counselor would be able to keep themselves in the dark regarding the federal and state regulations regarding school record keeping.

School records have been with us since the 1820s and 1830s and have continued to evolve over the years (Burky & Childress, 1976). In the 1960s a transition in the way school records and the rights of individual in relation to educational institutions began. In the 1961 case of Van Allen v. McCleary (1961) the court found that a parent had the right to inspect records maintained by school authorities. Also, in 1969, the Russell Sage Foundation conducted assessed the legal and ethical aspects of record keeping and as a result of detected abuses "the Foundation developed and distributed guidelines dealing with the collection, maintenance, and dissemination of student records (Burky & Childress, 1976, p. 162). Later, the National Education Association adopted codes regarding the rights and responsibilities of students which outlined policies to protect the privacy rights of parents and students (Burky & Childress, 1976). These events garnered the attention of Senator James Buckley and led to the development of FERPA which is also known as the Buckley Amendment.

Though many lobbyists pushed for the Buckley Amendment to be considered separately from the Elementary and Secondary Education Aid Bill, in July of 1974 the it passed the Senate attached to the Elementary and Secondary Aid Bill, which was then signed to law by President Ford (Burky & Childress, 1976). From July to November 19, 1974, the date FERPA became effective, school officials rushed to respond to the Buckley Amendment. Their major areas of concern were "the rights of parent and students of legal age to inspect school files containing letters of recommendation, observations by teachers, counselors, and psychologists, and other information that previously, in many cases, was not accessible to parents or students" (Burky & Childress, 1976, p. 163). Until the implementation of FERPA student's school records were often thought to be privileged communications (Wilhelm and Case, 1975).

At the time, many professionals feared the impact that FERPA would have on the education system and school counselors specifically. According to Wilhelm and Case (1975), administrators feared parental review of school records would result in libel suits again school personnel, negative publicity in the media, "parental resentment and lack of cooperation in the attainment of educational goals," and decreased voter support for the funding of school (p. 85). Wilhelm and Case categorized six distinct types of statements often found in school records: "1) libelous, unverified statements regarding the student, 2) unverified statements regarding parents, family or home, 3) ambiguous, opinionated, subjective descriptions of the student, 4) factual but biased statements with negative implications, 5) factual but inconsequential statements with negative implications that add nothing to understanding the student, 6) inferential statements with negative implications that may or may not be verifiable (Wilhelm & Case, 1975).

Obviously, the right to confidentiality is the foundation of any therapeutic bond between counselor and client. However, Getson and Schweid (1976) and Kazalunas (1977) believed that FERPA would leave the door open for parents to insist on the release of any information revealed in a session between school counselor and student. They feared that a law aimed at the protection of students' rights and privacy would in essence dissolve that confidentiality. Getson and Schweid (1976) were doubly concerned with the possibility that records could be reviewed by parents in cases where the records contained information of child abuse where the parent is the offender. Kazalunas (1977) notes that "confidential case notes in the form of personal memoranda addressed to themselves and inaccessible to anyone else" (p. 247). Though this practice does not stick to the letter of the law outlined in FERPA it does however keep the spirit of the law intact. Getson and Schweid (1976) suggest that counselors only maintain records that, when reviewed by the parent, would not pose a threat to the welfare of the student and they also stress to inform students of the limitations to privacy due to parents rights to inspect records. This and other suggestions for working within FERPA guidelines will be discussed later.

For the first fifteen years of its inception in 1974, FERPA remained relatively unchanged. However, in 1979, it was amended to allow access to records without parental permission to educational authorities conducting audits and program evaluations (Daggett, 1997). Again in 1986, a reference made to the Internal Revenue Code was updated. In the 90s, FERPA was amended three times. In 1990 an amendment to Buckley tagged onto the Student Right to Know, Crime Awareness, and Campus Security Act, allowed disclosure of the outcome of school disciplinary proceedings to victims of violent crimes (Daggett, 1997). In 1992, a portion of the legislation reauthorizing the Higher Education Act of 1965 amended FERPA's language concerning law enforcement records. Finally, the Improving America's Schools Act of 1994 had two sections which amended FERPA allowing greater parental access and lightening Buckley's enforcement on schools: changing the requirement of complying with subpoenas of school records, replacing the exception for unconsented disclosures regarding and exception to reporting to juvenile justice authorities, adding required penalties for violations by persons to whom schools disclose records, adding language allowing schools to notify staff regarding disciplinary actions against a student where safety of other risks are involved (Daggett, 1997). Thus remains the Buckley Amendment to this day.

School Counselor Ethical Standards

The American School Counselors Association (ASCA) recognizes the need for school counselors to be an integral part of the maintenance and handling of school records. ASCA's updated *Ethical Standards for School Counselors* (ASCA, 2004) mirrors the guidelines outlines in FERPA. With regard to student records, professional school counselors must protect the confidentiality of students' records and releases of personal information in accordance with prescribed laws, i.e. FERPA and any other state laws, and school policies. Student information that is stored and transmitted electronically must be treated in the same way as traditional records (ASCA, 2004). Professional school counselors must maintain and secure records necessary for rendering professional services to the student as required by confidentiality guidelines and guidelines required by laws, regulations, and institutional procedures (ASCA, 2004).

The school counselor must keep sole possession notes separate from students' educational records, recognize the limits of sole possession records and understand that those records are a memory aid for the creator and in absence of privilege may be subpoenaed and become educational records when they are shared with others, include information other than professional opinion or personal observations and/or are made accessible to others (ASCA, 2004). School counselors must also establish a reasonable timeline for purging sole possession notes or case notes. The ethical standards suggest shredding these documents when the student transitions to the next level, transfers or graduates. However, discretion is recommended before destroying these notes in the case that they be needed by a court of law, i.e. notes on child abuse, suicide, sexual harassment, or violence (ASCA, 2004).

FERPA Case Law

A review of the case law surrounding the Federal Education and Right to Privacy Act of 1974 revealed several cases that affected FERPA as we know it today and what cases that will affect FERPA in the future. A brief description of the cases are listed below.

Van Allen v. McCleary (1961): The court held that a parent is entitled to inspect a child's records by school authorities. This court case set the stage for the legislation that would become the Federal Education and Rights to Privacy Act.

Page v. Rotterdam-Mohonasen Central School District (1981): The courts found that John Page, the students biological father, had right to inspect and discuss school records. The courts stated that even though the mother and father were living separate under terms of a separation agreement giving rights of custody to the mother and with visitation rights given to the father, the parents were not divorced and the father held all rights to access provided under FERPA even though the mother had signed a statement with the school district not to transmit school records to the father. This case upholds the rights of all parents to access regardless of separation or divorce without legal termination of parental rights.

Fay v. South Colonie Central School District (1986): Fay, the student's father, brought action against the school district for violating his rights under FERPA, as a parent with joint legal custody. The courts found the school district liable for denying Fay access to

his children's school records. The father claimed compensatory damages for the school districts refusal to provide records, however, his claim was remanded to determine the amount of, if any, damages would be rewarded. This is yet another case that upholds the rights of divorced parents to access children's records in absence of a termination of parental rights.

Falvo v. Owasso Independent School District (2000): Falvo claimed that the district's peer grading policy infringed on her children's right to privacy under FERPA. On appeal the courts decided that the grading practice was illegal because students had access to each other's work. The court decided that the "education record" under FERPA consisted of the student's work. This decision has dangerously expanded the scope of education records provided by FERPA.

II. HIPAA and Its Implications for Counselors

Below are detailed four essential concepts contained in HIPPA legislation: 1) Informed consent, 2) Separate notes, 3) Record of releases, and 4) Use versus disclosure.

Health care privacy was once entrusted to family doctors, who maintained their own record keeping system. Increasing technology has not only impacted the way individuals communicate, but also the way they store information. Technology affects the way health care is provided, documented, and paid for (Health and Human Services, 1997). Health care information is disclosed to health care providers, insurers, and third parties (Health and Human Services, 1997). Disclosure of health information requires legislation to protect the privacy of patients.

Here are some interesting statistics according to the U.S. Department of Health and Human Services: 24 percent of Healthcare leaders polled knew of specific violations of patient confidentiality; 1 out of 5 Americans believe that they are victims of improper disclosure of health information; 2 out of 3 Americans do not trust health plans and government programs to maintain confidentiality all or part of the time (Health and Human Services, 2003).

HIPPA History

The Health Insurance Portability and Accountability Act of 1996 was designed to amend the Internal Revenue Code of 1986. Its goal was, "to improve portability and continuity of health insurance coverage in the group and the individual market, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and to standardize and simplify the administration of health insurance." (PUBLIC LAW 104-191).

The following chart serves as a visual illustration for the organization of the Health Insurance Portability and Accountability Act of 1996. Using the chart it is easy to decipher the various aspects that are incorporated into this Act.

HIPAA of 1996					
Title I	Title II	Title II	Title III	Title IV	Title V
Insurance Portability	Fraud and Abuse -medical liability reform	Administration Simplification -Privacy -Security -EDI -transactions -code sets -identifiers	Tax Related	Group Health Plan	Revenue Offsets

Congress was unable to decide upon legislation for privacy, so the Clinton Administration's Department of Health and Human Services took over and published privacy regulations in December of 2000 (American Counseling Association, 2003). The Bush Administration brought privacy regulations that removed the provisions requiring patient consent for routine use of health information (ACA, 2003). This meant that day-to-day disclosures for purposes of health care treatment, payment for services, and/or health care operations (related to business) did not require an individual's consent (ACA, 2003). The final rule took effect on April 14, 2001 and stated that "covered entities" had until April 14, 2003 to comply with the regulations.
The law applies to three groups of covered entities as defined by The Centers for Medicare and Medicaid Services (CMS):

- Health Care Providers: Any provider of medical of other health services, or supplies who transmits any health information in electronic form in connection with a transaction for which standard requirements have been adopted.

- Health Plans: Any individual or group plan that provides or pays the cost of health care. Must include over 50 enrolled persons.

- Health Care Clearinghouses: A public or private entity that transforms health care transactions from one form to another.

(CMS, 2003)

Covered entities require administrative, physical, and technical safeguards. These safeguards ensure confidentiality, integrity, and availability of healthcare information and protect against any unreasonably anticipated threats or hazards to the security or integrity of information. (CMS, 2003, p.93)

Privacy Standards

"The Standards for Privacy of Individually Identifiable Health Information (Privacy Final Rule) establishes, for the first time, a set of national standards for the protection of medical records and other health information." (CMS, 2003, p.94) The Department of Health and Human Services (DHHS) issued the Privacy Final Rule to implement HIPAA; they are also responsible for enforcing the rule. The privacy standards define the limits to use and disclosure of individual health information (called "protected health information" or PHI) to covered entities.

Privacy regulations do not override state laws or regulations, which normally are stricter towards privacy. The privacy regulations provide a "floor" rather than a "ceiling" of protection (ACA, 2003). HIPAA preempts contrary state laws, except when:

- The Secretary of HHS determines that the state law is necessary for certain specified purposes (e.g., prevent fraud or abuse) or is principally focused on controlled substances

- The state law relates to health information privacy and is more stringent than HIPAA (e.g., greater restrictions on use or disclosure, provides greater rights of access or amendment, narrows scope or duration of authorizations)

- The state law provides for the reporting of disease or injury, child abuse, birth or death, or for the conduct of public health surveillance, investigation or intervention

- The state law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals

(CMS, 2003)

Smith v. American Home Products Corp.Wyeth-Ayerst Pharmaceutical 372 N.J. Super.105, 855 A.2d 608

This case serves as an example of how state law regarding patient privacy is not preempted unless it is contrary to federal objectives contained in the Health Insurance and Portability Accountability Act. If a state law is more stringent and protective then it is not preempted. This case held that "HIPAA did not preempt New Jersey law protecting disclosure of mental health information, HIPAA did not preempt informal discovery in the form of ex parte interviews with medical providers, but HIPAA did preempt New Jersey law regarding content of patient disclosure authorizations"

What information is protected?

Under the Privacy Final Rule protection is guaranteed to all "individually identifiable health information", also called PHI, kept or transmitted by a covered entity or business associate. Individually identifiable health information includes information related to personal identifiers and demographic data. Personal identifiers include name, address, telephone numbers, birth date, and Social Security Number. Demographic data pertains to the following areas: the individual's past, present, or future physical or mental health; the provision of health care to the individual; the past, present, or future payment for the provision of health care to the individual. (CMS, 2003, p.95) Exceptions include federally protected education records, which are covered under the Family Educational Rights and Privacy Act, as well as employment records that a covered entity holds as an employer. (CMS, 2003, p.96)

De-identified Health Information

De-identified health information is information that does not identify or provide a basis to identify an individual. (CMS, 2003, p.95) Information that is considered de-identified health information faces no restrictions on use or disclosure. "There are two ways to de-identify information: use a formal determination by a qualified statistician; or remove specified identifiers of the individual and of the individual's relatives, household members, and employers."(CMS, 2003, p.95)

In order to provide clarity it is imperative to know how “use” and “disclosure” are defined under HIPAA. Use is defined as “the sharing, employment, application, utilization, examination, or analysis of PHI within an entity that maintains such information” (CMS, 2003). Disclosure means “the release, transfer, provision of access to, or divulging any other manner of PHI outside the entity holding the information” (CMS, 2003).

Minimal Use and Disclosure

Another key aspect of the Privacy Final Rule is limiting use and disclosure to the minimum necessary. “A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.” (CMS, 2003, p.97) However, there are a few circumstances when the minimum necessary requirement is not imposed. These situations apply to necessary treatment of an individual, complaint investigations, and/or disclosure that is required by law.

Jafee v. Redmond (95-266), 518 U.S. 1(1996)

Jafee v. Redmond was the first case in which the Court recognized a psychotherapist privilege. Officer Redmond responded to a call about a fight at an apartment complex. Redmond shot and killed Allen after he failed to drop his weapon. Redmond received counseling after the incident. “The court ordered notes made by Beyer, a licensed clinical social worker, during counseling sessions with Redmond, rejecting their argument that a psychotherapist patient privilege protected the contents of the conversations. At the trial, the jury awarded petitioner damages after being instructed that the refusal to turn over the notes was legally unjustified and the jury could presume that the notes would have been unfavorable to respondents. The Court of Appeals reversed and remanded, finding that "reason and experience," the touchstones for acceptance of a privilege under Federal Rule of Evidence 501, compelled recognition of a psychotherapist patient privilege. However, it found that the privilege would not apply if in the interests of justice, the evidentiary need for disclosure outweighed the patient's privacy interests” (Jafee v. Redmond, 518 U.S. 1 (1996). The court concluded that Beyer's notes should have been protected.

Implications for Counselors

Many question whether counselors fall in the category of “covered entities”? By asking two simple questions, “Do I provide health care?” and “Do I or my agency/clinic conduct standard transactions in electronic form?” an individual can determine if they are a covered entity and need to comply with HIPAA regulations. The privacy regulation will influence and impact counselors and their practices (ACA, 2003). The American Counseling Association states that counselors should be aware of the set of client expectations that the privacy regulations will establish.

Psychotherapy Notes

Psychotherapy notes have strict requirements more so than other health care information under HIPAA. Psychotherapy notes should be excluded from an individuals’ regular medical records. Psychotherapy notes are defined by the following regulations: “Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.

Psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." (ACA, 2003)

Many mental health professionals feel that this is an improvement in confidentiality; however this means that counselors will need to keep separate records (ACA, 2003). Psychotherapy notes will have to be separated from basic treatment information (ACA, 2003). Counselors can share their psychotherapy notes with their clients, but are not to compelled to do so under the privacy regulation (ACA, 2003). Clients do have the right to access the rest of their medical record; they can inspect, obtain a copy, and request amendments (ACA, 2003). Clients have the right to request a record of the disclosures (except routine disclosures) that are made regarding their protected health information (ACA, 2003).

Consent

Informed consent refers to the client's right to agree to participate in counseling and other provided services. Informed consent outlines what the client can expect from the counseling process. Clients must be provided with a notice policies and procedures, including their client rights. It is important that these policies be discussed and the client understands and agrees to abide by them if they wish to participate. Having the client sign informed consent provides documentation, which is important to keep on file, especially if confidentiality must be broken. The following list contains situations where disclosure is permitted without an individual's consent:

Disclosures to Personal Representatives

- A health plan must treat a personal representative (e.g., parent of a minor, executor, guardian) as the individual, with the same rights of access to the individual's PHI, unless it determines, in the exercise of professional judgement, that doing so is not in the best interests of the individual
- While a parent is normally the personal representative of an unemancipated minor, that is not the case for the PHI when the minor may lawfully obtain the health care service without the consent of the parent or the parent assents to an agreement of confidentiality between the minor and a provider

Disclosures Required by Law

- A health plan may use or disclose PHI without consent of authorization to the extent that such use or disclosure is required by law and is limited to the relevant requirements of such law
- Disclosures about victims of abuse, neglect or domestic violence, disclosures for judicial and administrative proceedings, disclosures for law enforcement purposes

-If a disclosure is made about an individual's victim status, it must promptly be reported to the individual that such a report has been made, except if it would endanger the individual

Disclosures for Public Health Activities

- To a public health authority authorized by law to collect or receive information for the purpose of preventing or controlling disease, injury, or disability
- To a public health authority or other appropriate government authority authorized by law to receive reports or child abuse or neglect
- A person subject to the jurisdiction of FDA with respect to an FDA-regulated product or activity, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated to the quality, safety or effectiveness of such FDA-regulated product or activity
- To a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public intervention or investigation

(CMS, 2003)

Electronic Record Keeping

Electronic transactions refer to the transfer of electronic information for specific purposes. There are several types of electronic data that is moved electronically. Electronic Data Interchange (EDI) where data is moved between two entities (CMS, 2003). Web-based applications involve using the Internet to transmit information (including e-mail). Direct Data Entry (DDE) allows providers to key data directly into a certain form and send it to the health plan's computer. Additional sources of electronic media include sending a diskette/tape, using a credit card swipe machine, and using a "faxback" telephone voice response. (CMS, 2003)

Counselors who potentially could be conducting marketing involving clients or looking for client participation in research should further examine the HIPAA provisions for these areas.

Enforcement

Civil and criminal penalties for violations of regulations exist. They can begin anywhere from a $100 civil penalty to a maximum penalty of $25,000 per year for each standard violation. Criminal penalties are imposed for wrongful disclosures of health information for up to a maximum of $250,000. Complaints and violations should be filed to the U.S. Department of Health and Human Services Office for Civil Rights (ACA, 2003).

Conclusion

The Health Insurance Portability and Accountability Act of 1996 inevitably changed the way health information is handled and disclosed. HIPAA stands as a law that promotes security, privacy, standardization and efficiency in the health care industry. HIPAA affects every individual in the United States in some shape or form and especially counselors. As counselors there are implications for everyone to incorporate into their own practice. The primary goal of a counselor is to ensure confidentiality. HIPAA provides a standard for how an individuals' health information should be treated and it is our ethical obligation to follow through with it.

III. Jaffee v Redmond: Federal Clarification of Confidentiality

Case Facts: On June 27, 1991, Officer Redmond, who was alone on patrol duty in that area on the day shift, responded to a dispatcher's report of a fight in progress at the Grand Canyon Estates apartment complex in the Village of Hoffman Estates, a suburb of Chicago, Illinois. Redmond was the first police officer to arrive at the scene. Officer Redmond testified that, as she pulled into the apartment complex parking lot, she saw two African-American women running toward her car, waving their arms above their heads, one of whom stated that there had been a stabbing inside the building. Redmond relayed this information to her dispatcher and requested assistance and an ambulance.

As Redmond approached the apartment building, five men ran out the front door yelling and screaming. One of the men was waving a pipe above his head. At this time, Officer Redmond testified that she ordered the man carrying the pipe to drop the pipe and also ordered everybody to the ground. After repeating the command "Drop the pipe" several times to no avail, Officer Redmond was forced to draw her service revolver. Almost immediately thereafter, two more men--a Caucasian man followed by an African-American man in hot pursuit--came running out of the door of the building. Officer Redmond testified that the African-American man, later identified as Ricky Allen, Sr., was armed with a butcher knife, was chasing and gaining on the Caucasian man, and was "directly behind" and poised to stab him when she fired the fatal shot. Officer Redmond testified that she commanded Allen to drop the butcher knife several times before firing:

I ordered the black male subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground. . . . I was yelling at him to drop the knife and get on the ground. . . . [H]e did not drop the knife and he did not get on the ground. . . . [I yelled] at least three times. I just kept yelling the minute I saw him.

Officer Redmond explained the moment before the shooting as follows:

As [Allen] was gaining speed on the first subject until they were directly--he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with the knife and made the downward motion, I fired one shot at him.

Redmond testified that she "didn't even have time to square up," when she fired her weapon "[b]ecause the second subject was about to kill the first subject with the knife." She noted that only three or four seconds elapsed from the time Allen emerged from the apartment building door until the time she fired. Four of Allen's brothers and sisters, all of whom witnessed the shooting, testified that Allen was unarmed when Officer Redmond fired her weapon.

Officer Redmond testified that after she fired the single shot at Ricky Allen, Sr., he fell to the ground and she ran toward him with her gun at her side. She observed the butcher knife lying on the grass approximately two or three feet from his body. She repeated her

request for backup support and an ambulance on her portable radio, as "people came pouring out of the buildings." Redmond stated that several people within the crowd "started to charge" at her, as they were "yelling," "screaming," "swearing" and "quite hysterical." She raised her gun when one person from the crowd came within arm's length, and ordered everyone "to get back, get down, get beyond the sidewalk, get on the ground." In her testimony, Officer Redmond made it clear that no one from the crowd attempted to come to Allen's aid, and that the knife was not moved from the place it landed when Allen fell to the ground until it was retrieved by one of the investigating officers.

After the shooting, Officer Redmond sought counseling from Karen Beyer, a licensed clinical social worker[3] certified by the state of Illinois as an employee assistance counselor and employed by the Village. Officer Redmond met with Beyer for the first time three or four days after the shooting incident and continued counseling for approximately two or three sessions per week through at least January of 1992, six months after the shooting.[4]

During pre-trial discovery, the plaintiffs learned that Officer Redmond had participated in a number of counseling sessions with Beyer, the licensed clinical social worker. At Officer Redmond's deposition, the plaintiffs inquired regarding the substance of her communications with Beyer. Officer Redmond refused to respond to this line of questioning, contending that her communications with a licensed clinical social worker were privileged. The plaintiffs subsequently subpoenaed Beyer to testify at a deposition and to produce her credentials as a counseling professional as well as all her "notes, records, [and] reports pertaining to Mary Lu Redmond."

Legal Summary: In *Jaffee v. Redmond* the United States Supreme Court recognized a new privilege in federal courts for confidential communications between a psychotherapist and her patient. Although a psychotherapist-patient privilege was among the privileges recommended to Congress in 1972 by the Judicial Conference Advisory Committee, Congress ultimately created no specific privileges and instead adopted Federal Rule of Evidence 501, which provides that privileges in federal court "shall be governed by the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience." Since that time, every state has enacted some form of psychotherapist-patient privilege. But the federal circuits that considered the issue before *Jaffee* were split.

The Court noted the states' unanimous legislative determination that a psychotherapist privilege is warranted and also examined the history in the federal courts of the psychotherapist privilege proposed in rejected Federal Rule of Evidence 504. In addition, the Court considered whether the private and public interests served by the proposed privilege were sufficiently important to outweigh the general rule in favor of using all available evidence to ascertain the truth at trial.

The Court first noted that "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and

trust.'" The patient's private interests in confidentiality are significant, the Court concluded, because successful psychotherapy depends on the patient's willingness to discuss "facts, emotions, memories, and fears," public disclosure of which "may cause embarrassment or disgrace." The public interest is also served by protecting therapist-patient communications because doing so facilitates treatment and the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Weighing these considerations, the Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."

In fashioning the new privilege, the majority disagreed with the Seventh Circuit's ruling that this privilege should be subject to a balancing test in each case to determine whether the need for the evidence in question outweighed the patient's interest in confidentiality. Having concluded that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment," the Court ruled that the privilege would be ineffective in promoting appropriate treatment if patients could not know in advance that their statements to therapists would be protected from disclosure. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."

Like the attorney-client privilege, the privilege created in *Jaffee* is unconditional rather than qualified. In so holding, the Supreme Court went beyond the holdings of any of the circuit courts that had previously recognized the psychotherapist-patient privilege. The Supreme Court did not, however, attempt to fully delineate the scope of the privilege, leaving that to be developed on a case-by-case basis in the lower courts. The lower federal courts have already begun to grapple with the difficult task of upholding the policy behind the privilege while limiting its scope in various ways, including defining the characteristics of a psychotherapist and creating certain exceptions to the privilege.

Case Law
Jaffee v. Redmond 518 US 1 (1996)
Confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure.

Three areas of clarification arose following the Jaffee decision: 1) Who is a psychotherapist? 2) What communications are protected? 3) What exceptions to protection exist?

Who is a "Psychotherapist"?
Equal Employment Opportunity Commission v. St. Michael Hospital (E.D. Wisc. Aug. 8, 1997)
Marriage Counseling records fell within privilege established in Jaffee.

Fox v. Gates Corporation 179 F.R.D. 303 (D. Colo. 1998)

"the court uses the term 'psychoterapist' generically to include a psychologist, psychiatrist, counselor or other mental health therapist"

Greet v. Zagrocki 1996 WL 724933 (E.D. Pa. Dec. 16, 1996)
Notes from EAP program for ETOH counseling were held privileged in light of Jaffee even though no licensed psychotherapist was involved, but based on the 'counseling' nature of services.

United States v. Schwensow 151 F.3d 650 (7th Cir. 1998)
Statements made to AA volunteers not privileged because workers did not possess credentials that might qualify them as licensed, nor did they hold themselves out as counselors

Speaker v. County of San Bernadino (82 F. Supp. 2d 1105) (C.D. Cal. 2000)
Police officer reasonably believed communication with marriage, family and child counselor was privileged court upheld Jaffee privilege. While counselor was licensed, she was acting outside scope of license.

What communications are Protected?
Kamper v. Gray 182 F.R.D. 597 (E.D. Mo. 1998)
No privilege if counseling was required as a condition of employment to undergo evaluations and client knew the results would be submitted to his employer.

Williams v. District of Columbia 1997 WL 224921 (D.D.C. Apr. 25, 1997)
Privilege was granted when counseling was required as a condition of return to employment, but treating professional was only to give a "Yes" or "No" back to employer.

Greet v. Zagrocki 1996 WL 724933 (E.D. Pa. Dec. 16, 1996)
Privilege granted because EAP was required to maintain confidences

What Exceptions to Protection Exist?
Jaffee v. Redmond (footnote 19)
"Although is would be premature to speculate about most future developments in the federal psycho-therapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by therapist."
Patient-Litigant Exception
Lanning v. Southeastern Pennsylvania Transportation Authority 1997 U.S. Dist LEXIS 14510 (E.D. Pa. Sept. 17, 1997)
Claimant sought monetary damages for injuries which included "injury to their emotional well being". (Despite not asserting recovery for treatment of emotional distress….)

Vanderbilt v. Town of Chilmark 174 F.R.D. 225 (D. Mass. 1997)
Hucko v. City of Oak Forest 185 F.R.D. 526 (N.D. Ill. 1999)

Allen v. Cook County Sheriff's Department 1999 WL 168466 (N.D. Ill. Mar. 16, 1999)
Merely asserting emotional distress does not waive the privilege. Claimant must use the privileged communication as evidence before waiving the privilege.

Dangerous-Patient Exception
United States v. Glass 133 F3d 1356 (10th Cir. 1998)
Is the threat serious?
Is disclosure the only means of averting harm?

United States v. Hayes 2000 WL 1289028 (6th Cir. Sept. 14, 2000)
While therapist may disclose serious threat to victim, this does not constitute a waiver of privilege in a subsequent criminal trial.

Fraud Exception
In re Grand Jury Proceedings (Gregory P. Violette) 183 F3d 71, 72
Must show client was engaged or planning criminal or fraudulent activity when attorney-client communication took place, and
The communications were intended by the client to facilitate or conceal the criminal or fraudulent activity

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Relevant statutes

TCA 63-22-114 (marriage and family counselors)
The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed. However, nothing contained within this section shall be construed to prevent disclosures of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

63-11-213. Privileged communications. (psychologists/psych examiners)
63-23-107 (Social Workers)
68-24-601-609 (Drug and Alcohol Counselors) Licensure
1200-30-1-.13 rules governing licensure
A licensed A & D abuse counselor shall conduct his professional practice in conformity with the NAADAC Code of Ethis and these rules
“I shall do everything possible to safeguard the privacy and confidentiality of client information except where the client has given specific, written, informed, and limited consent or when the client poses a risk to himself or others.”