PROTECTED COMMUNICATION FOR MENTAL HEALTH WORKERS

Michael Herzbrun, Ed.D.
Acting Dir., Wellness Center
St. John Fisher College
Rochester, NY

OUTLINE

I. THE PROBLEM

NY State Education Law 6434 does not specifically address the role of medical and mental health providers in the college's plan and investigation; nor does it cite the (Federal and NY State) laws establishing protection (PHI ~ protected health information) between patient and provider.

A. Example, scenario campus attorney to campus adminstration
B. N.Y. Education Law 6434 - Investigation of violent felony offenses
C. New York State defines "violent felony offenses" (e.g., murder, manslaughter, burglary, arson, illegal sale of firearms, rape….) *See Appendix A.*

II. LEGAL PROTECTION OF COMMUNICATION

A. Federal
1. HIPAA *See Appendix C.*
2. Supreme Court upholds limitations to confidentiality in "duty-to-warn" ruling (cf. Tarasoff v. Regents of University of California), but rejects therapist's right to testify against patient in court.
3. Supreme Court holds that a psychiatric social worker cannot release notes to a court regarding her therapeutic treatment of a police officer (Redmond) who shot and killed a suspect (Allen) in the line of duty. (Jaffey, on behalf of Allen's estate)

B. New York State
1. Legislation
   a. New York State amends common law protection of communication (for attorneys) to include physicians.
   b. New York State enacts law assigning duty to physicians to protect patient confidentiality.
   c. New York State enacts law assigning duty to psychologists to protect patient confidentiality
   d. New York State holds that privilege is broader for a psychologist than for a physician
   e. New York State does not mandate a Tarasoff warning (!)
   f. New York state may differ from other states in the matter of Tarasoff.
   g. New York State protects a social worker's communication in family court, despite the mandatory reporting requirements.
   h. New York State exempts pastoral or professional counselors from reporting statistical information about crimes.

2. Rationale for New York State laws protecting physician-patient relationship (and Appendix B)
   a. the purpose: removal of inhibitions
   b. based on a relationship
   c. professional relationship is contractual
   d. sense of moral propriety
   e. right of privacy

III. LIMITATIONS TO PRIVILEGE

A. New York State requires a "waiver" of privilege.
B. New York State accepts certain compelling limits to "privilege" in the public interest.
1. child abuse
2. danger to others
3. public peril

IV. APPENDICES

A. Violent Felony Offenses

B. Physician-Patient Privilege: other NYS Court Cases addressing rationale

C. Miscellaneous readings: NYS Attorney General website; the Clery Act; Mandated Reporters (NYS); FERPA; Exemption for AOD counselors; Common Law; US Constitutional Right to Privacy; NYS Legislature website and enactments (incl. HIPPA); Disclosures to law enforcement officials

I. THE PROBLEM

NY State Education Law 6434 does not specifically address the role of medical and mental health providers in the college's plan and investigation; nor does it cite the (Federal and NY State) laws establishing protection (PHI ~ protected health information) between patient and provider.

A. Example, from campus attorney to campus administration:

Scenario: A student informs a health care provider at the wellness center that she is the victim of an alleged sex crime. The victim does not want the matter reported to the police. HIPAA (Federal Law § 164.512[f]) requires the healthcare provider to provide a certain level of confidentiality for the patient/victim. The Violent Felony Offenses Act (New York Law), in contrast, requires that *"each college…adopt and implement a plan providing for the investigation of any violent felony offenses occurring at or on the grounds of the institution"*. NY Educ. Law § 6434. The NY statute requires such plan to provide for the investigation and reporting of crimes to local law enforcement. … "…It would appear that these two statutes contradict each other…"

B. N.Y. Education Law 6434 - Investigation of violent felony offenses
Investigation of violent felony offenses.
1. Each college shall adopt and implement a plan providing for the investigation of any violent felony offense occurring at or on the grounds of each such institution, and providing for the investigation of a report of any missing student. Such plans shall provide for the coordination of the investigation of such crimes and reports with local law enforcement agencies. Such plans shall include, but not be limited to, written agreements with appropriate local law enforcement agencies providing for the prompt investigation of such crimes and reports…
2c. "Violent felony offense" means a violent felony offense as defined in subdivision one of section 70.02 of the penal law.

C. New York State defines "violent felony offenses" (e.g., murder, manslaughter, burglary, arson, illegal sale of firearms, rape….) *See Appendix A.*

In developing a "plan," should faculty and staff be aware of all those offenses that require reporting to law enforcement personnel?

II. LEGAL PROTECTION OF COMMUNICATION

A. Federal

1. HIPAA *See Appendix C*
2. Supreme Court upholds limitations to confidentiality in "duty-to-warn" ruling (cf. Tarasoff v. Regents of University of California), but rejects therapist's right to testify against patient in court.

In U.S. v. Hayes, 227 F3d 578 (6th Cir 2000), the court decided that there was not a dangerous patient privilege exception to the federal psychotherapist-patient testimonial privilege. In that case the government sought to prosecute a mentally ill individual for making threats against a federal employee during several psychotherapy sessions. Following the patient's making these threats his therapist warned the intended victim about them. The victim contacted federal law enforcement officials who then arrested the patient and charged him with threatening to murder a federal official. The District Court suppressed testimony by the psychotherapist based on the federal psychotherapist-patient privilege, and subsequently dismissed the case. The Government appealed. The Court of Appeals affirmed the dismissal holding, noting,

> "[o]n the one hand [the defendant] should be applauded for seeking professional help for the mental and emotional difficulties he was suffering. Yet, because the psychotic delusions for which he sought treatment took the form of homicidal intentions toward an employee of the federal government, [he] now finds himself facing a felony conviction and incarceration because his professional care givers are prepared to testify against him. ... [R]ecognition of a 'dangerous patient' exception surely would have a deleterious effect on the 'atmosphere of confidence and trust' that is implicit in the psychotherapist/patient relationship...
>
> While early advice to the patient ~ that in the event of disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim ~ may have a marginal effect on a patient's

> candor in therapy sessions, an additional warning that the patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue. ... Thus, if our Nation's mental health is indeed as valuable as the Supreme Court has indicated, and we think it is, the chilling effect that would result from the recognition of a 'dangerous patient' exception and its logical consequences is the first reason to reject it. ... We think that allowing a psychotherapist to testify against his or her patient in a criminal prosecution about statements made to the therapist by the patient for the purpose of treatment arguably 'serv[es] [a] public end,' but it is an end that does not justify the means. ... [unlike a psychotherapist testifying at a civil commitment hearing] a psychotherapist's testimony used to prosecute and incarcerated a patient who came to him or her for professional help cannot be similarly justified." Id. at 584-585.

3. Supreme Court holds that a psychiatric social worker cannot release notes to a court regarding her therapeutic treatment of a police officer (Redmond) who shot and killed a suspect (Allen) in the line of duty. (Jaffey, on behalf of Allen's estate)

In Jaffe v. Redmond, 518 US 1, 9 (1996), the United States Supreme Court noted that, "the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.' Id. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination , objective information supplied by the patient, and results of diagnostic tests. Effective psychotherapy , by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rule of Evidence, a psychiatrist's ability to help her patients 'is completely dependent upon [the patients'] willingness and ability to talk freely . This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule ... there is wide agreement that confidentiality is a sine qua none for successful psychiatric treatment.'" Id. at 10-11. The Court went on to note, "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance. ... If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." Id. at 11-12.

B. New York State Legislation
cf. http://jaffee-redmond.org/cases/bierenbaum.htm

1. New York State amends common law protection of communication (for attorneys) to include physicians.

The first testimonial privilege, that between attorney and client, existed at common law as early as the sixteenth century. In 1828, New York became the first state to eliminate the common law rule that physicians could be compelled to disclose information acquired while treating their patients. [Prince, Richardson on Evidence, 5-301(11th Ed. Farrell).] Over the years, the physician-patient privilege has been extended to include various other licensed health care providers.

a. New York State enacts law assigning duty to physicians to protect patient confidentiality.

The physician -patient privilege in New York State is set forth in CPLR [Civil Practice Law and Rules, NYS] 4504. That statute provides, in pertinent part, "[u]nless the patient waives the privilege, a person authorized to practice medicine ... shall not be allowed to disclose any information which he acquired attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

b. New York State enacts law assigning duty to psychologists to protect patient confidentiality

The psychologist-patient privilege in New York State is set forth in CPLR 4507. That statute provides, in pertinent part, "[t]he confidential relations and communications between a psychologist registered under the provisions of article 153 of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed."

c. New York State holds that privilege is broader for a psychologist than for a physician

The psychologist-patient privilege is broader than the physician-patient privilege. People v. Wilkins , 65 NY2d 172 (1985).

d. New York State does not mandate a Tarasoff warning (!)

New York State does not mandate a Tarasoff warning; however, if the warning is nevertheless given, the professional is not liable for breach of confidentiality. Although New York State has recognized that a mental health professional has a "duty to protect" third parties from the foreseeable behavior of a dangerous patient, neither statute nor case law in New York mandate that a mental health professional provide Tarasoff warnings to an identified potential victim ("a duty to warn"). However, the Appellate Division, Fourth Department has held that providing Tarasoff warnings to a potential victim without the patient's authorization does not render the mental health professional liable for a breach of confidentiality when there is justification or excuse for such action based on a showing of circumstances and compelling interests. See, Clinger, supra, 84 A.D.2d at 487.

e. New York state may differ from other states in the matter of Tarasoff.

Nebraska exceeds Tarasoff, when patient presents an unreasonable risk to others not identified. In McIntosh v. Milano, 403 A.2d 500 (NJ, 1979), another case where, like Tarasoff, the identity of the potential victim was known to the psychiatrist in advance, the court held "a psychiatrist or therapist may have duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person." Id. at 511-12. In Lipari v. Sears, Roebuck & Company, 497 F.Supp. 185 (D. Nebraska 1980), where a specific potential victim was not known as one was in Tarasoff and McIntosh, the court expanded the nature of therapists' duty to protect, holding that, "[t]he relation between a psychotherapist and his patient gives rise to an [affirmative duty] for the benefit of third persons. This duty requires that the therapist initiate whatever precautions are reasonably necessary [to protect] potential victims of his patient. This duty arises only when, in accordance with standards of his profession , the therapist knows or should know that his patient's dangerous propensities present an unreasonable risk of harm to others." Id. at 193.

f. New York State protects a social worker's communication in family court, despite the mandatory reporting requirements.

In People v. Bass, 140 Misc.2d 57 (Supreme Court , Bronx County 1988), the defendant, a father, had sought counseling from a certified social worker regarding his prior sexual abuse of his nine-year-old daughter. After being told of these activities the certified social worker reported the defendant's statements to the New York State Child Abuse and Maltreatment Central Registry as required by Social Service Law 413. The People sought to introduce the defendant statements to two certified social worker at defendant's trial. They argued that because the certified social worker was required to report defendant statements pursuant to Social Service Law 413 and because the statements are permitted to be disclosed by the social worker in Family Court in child abuse proceedings pursuant to Family Court Act 1046 (a)(vii), the certified social worker-patient privilege was not applicable . The Family Court rejected the People's application. Narrowly construing these statutory exceptions to the privilege, the court found that the exception to the privilege created by the mandatory reporting requirements of Social Service Law 413 did not constitute a waiver by the defendant of the certified social worker-patient privilege and that the exception to the privilege created by Family Court Act 1046 (a)(vii) to permit the use of otherwise privileged material at child protective proceedings in Family Court was not meant to apply equally to criminal cases. Id. at 60.(8)

g. New York State exempts pastoral or professional counselors from reporting statistical information about crimes.

The 1999 regulations change existing Department policy[14] and exempt "pastoral or professional counselors" from having to report statistical information about crimes that are reported to them although, at their discretion, they may refer students to a voluntary, confidential reporting program if their school has one.[15] To qualify as a mental health or pastoral counselor exempt from having to report crimes, a person must be providing counseling as part of his or her official duties at the school and be functioning within the scope of his or her professional license or certification. The exemption does not include non-professional or informal counselors… The counselor exemption was enacted over the objection of several groups, including the Student Press Law Center. The SPLC unsuccessfully argued that simply noting the number of crimes reported to a counselor would not violate

anyone's privacy and would result in more accurate reporting, particularly with respect to sexual assault crimes, which experts say are often not reported to law enforcement authorities…

14 *See Dept. of Education letter to Moorehead State University (Sept. 13, 1996) stating that "officials of the institution involved in student counseling are not excluded from the institution's statistical reporting obligations (counselors are excluded only from the timely warning requirements of 34 CFR 668.47(e))."*
15 *64 Fed. Reg. 59069-70 (1999) (to be codified at 34 CFR §668.46(c)(6)).*
Retrieved from "Student Press Law Center" http://www.splc.org/knowyourrights/legalresearch.asp?id=19

2. Rationale for New York State laws protecting physician-patient relationship

a. Removal of inhibitions. The purpose of the physician-patient privilege is to remove any legal inhibition to full disclosure by the patient to the physician, and to foster full, candid and open communication between physicians and their patients so that physicians can assess, advise and treat their patients properly. People v. Sinski, 88 NY2d 487, 491, 494 (1996).

b. Based on a relationship. To achieve this goal, communications between physician and patient are protected from disclosure, thereby assuring patients that information they provide to their physicians which might result in humiliation , embarrassment or disgrace, remains confidential. In order for the physician-patient privilege to exist in a specific case, there must be a physician-patient relationship, the privileged information must be acquired by the physician while attending the patient and the information must be necessary to enable the physician to act in his or her professional capacity. See, generally, People v. Decina, 2 NY2d 13 3, 143 (1956), Fisher v. Fisher, 129 NY 654, 655 (1892).

c. Relationship is contractual. Physicians and other licensed health care providers have an implied contractual obligation to maintain the confidentiality of information disclosed to them by a patient that is necessary to their diagnosis and treatment of that patient. See, MacDonald v. Clinger , 84 AD2d 482, 483 (4th Dept. 1982). This is particularly and necessarily true in the professional relationships between mental health professionals and their patients. See, Doe v. Roe, 93 Misc2d 201, 210-211 (New York County 1977).

d. Sense of moral propriety. Over one hundred years ago, the Court of Appeals wrote "[t]he disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it."[iii] *See* Davis v Supreme Lodge, Knights of Honor*, 165 NY 159, 163.*

e. Right of privacy. While New York State has never based "privilege" in the privacy interpretations of the constitution, the court nevertheless observed that "'the value placed on privacy, manifested both by general concerns for privacy and by the specific concerns for an individual's bodily integrity found in constitutional, statutory, and common law doctrines, suggests a strong policy basis' for the privilege."[iv] See *Dillenbeck v Hess* (1989) 73 NY2d 278, 539 NYS2d 707, quoting, Developments in the Law, Medical and Counseling Privileges, 98 Harv L Rev 1530, 1548 [1985].

For further NYS court transcripts that address rationale, see Appendix B.

III. LIMITATIONS TO "PRIVILEGE"

A. New York State requires a "waiver" of privilege.

NY Court of Appeals has long held that the physician-patient privilege is to be given "a broad and liberal construction to carry out its policy," has narrowly construed statues limiting the privilege, and has rejected claims that there is a general public interest exception to the privilege. Sinski, supra, at 492.

Testimonial privileges are self-triggering and are waived only by affirmative action on the part of the person cloaked with the privilege. Unless there is a waiver by the beneficiary of the privilege, no disclosure may be allowed absent a statutory exception to the privilege. See, People v. Easter, 90 Misc. 2d 748, 749 (County Court, Albany County 1977). \

B. New York State accepts certain compelling limits to "privilege" in the public interest.

1. [child abuse] The New York State Legislature has enacted a number of statutory provisions which preclude or limit the physician-patient privilege. For instance, Social Services Law 415 and the Family Court Act 1046(a)(vii) require disclosure of privileged information in cases involving suspected child abuse or maltreatment.

2. [*danger to others]* The Mental Hygiene Law authorizes disclosure of privileged information when a patient presents a serious danger to others [33.13(c)(6)] or for use in guardianship proceedings [81.09(d)] .

3. [Public peril] Notwithstanding the duty to maintain confidentiality, where a patient is a danger to himself or to others, a mental health professional may be required to disclose otherwise confidential information to the extent necessary to protect a threatened interest. "The protective privilege ends where the public peril begins." MacDonald v. Clinger , 84 AD2d (4th Dept. 1982)., at 487, citing Tarasoff v. Regents of University of California , 529 P.2d 553, 561 (1974), vacated and modified on rehearing, 551 P.2d 334 (1976). The duty to protect flows from the special relation that exists between a mental health professional and the patient which imposes a duty upon the mental health professional to control the patient's conduct* and by the special relation that exists between the mental health professional and the potential victim of a dangerous patient . See, W. Prosser, Law of Torts, 325-26 (4th ed. 1971).

* [How does a mental health professional "control" the patient's conduct? A mental health professional may satisfy his or her duty to protect by a variety of methods that are appropriate to a particular situation including, but not limited to, hospitalizing a potentially dangerous patient for inpatient treatment, increasing the frequency of outpatient contacts with the patient to monitor better the patient's mental status and to provide support, initiating psychopharmacological treatment for the patient's symptoms, utilizing various psychotherapeutic interventions such as cognitive therapy or placing the patient in a partial hospitalization (so-called "day hospital") program.]

Appendix A

Section 70.02: Sentence of imprisonment for a violent felony offense
1. Definition of a violent felony offense….
(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder… **rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75;** assault in the first degree as defined in section 120.10, [etc.]
(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); **reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05**,… **rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65**
Section 130.65:
Sexual abuse in the first degree
A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact: 1. By forcible compulsion; or 2. When the other person is incapable of consent by reason of being physically helpless; or 3. When the other person is less than eleven years old. Sexual abuse in the first degree is a class D felony.
course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66 [insertion of foreign objects], facilitating a sex offense with a controlled substance as defined in section 130.90,

§130.90 Facilitating a sex offense with a controlled substance.
A person is guilty of facilitating a sex offense with a controlled substance when he or she:
knowingly and unlawfully possesses a controlled substance or any preparation, compound, mixture or substance that requires a prescription to obtain and administers such substance or preparation, compound, mixture or substance that requires a prescription to obtain to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article; and commits or attempts to commit such conduct constituting a felony defined in this article.

Appendix B
Physician-Patient Privilege
NYS Court Cases addressing rationale

February 13, 2008
Retrieved at http://www.nydwi.com/Articles/41/Physician-Patient_Privilege/

Shuman, The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw LJ 661, 671 [1985].
CPLR [Civil Practices Law and Rules]' 4504
Unprotected at common-law,[viii] the source of the modern privilege is CPLR '4504, which provides:

> *4504. Physician, dentist, podiatrist, chiropractor and nurse.*
> *(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.*

This statute and its predecessor[ix] created the privilege to the extent that it is known in New York, the first state to honor the prohibition.[x]
See, Edington v Mutual Life Ins. Co., 67 NY 185, 194.
"The privilege applies not only to information communicated orally by the patient, but also to 'information obtained from observation of the patient's appearance and symptoms, unless the facts observed would be obvious to laymen.'"[xi]
Dillenbeck v Hess (1989) 73 NY2d 278, 539 NYS2d 707, quoting, Fisch, NY Evidence ' 544, at 361 [2d ed].

"Its purpose is to protect those who are required to consult physicians from the disclosure of secrets imparted to them; to protect the relationship of the patient and physician and to prevent physicians from disclosing information which might result in humiliation, embarrassment or disgrace to patients."[xii]

Steinberg v New York Life Ins. Co, 263 NY 45, 48, 188 NE 152.

Its purpose is also to enable the patient to make full disclosure to the physician so as to obtain the full benefit of his or her medical skill[,][xiii]

Green v Metropolitan St. Ry. Co., 171 NY 201, 204, 63 NE 958.

upon "the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help and securing adequate diagnosis and treatment."[xiv]

Williams v Roosevelt Hosp. (1985) 66 NY2d 391, 395, 497 NYS2d 348.

The statute prevents disclosure by the physician and likewise bars the patient from being compelled to testify as to what he or she told the physician in confidence.[xv]

Hughson v St. Francis Hospital (1983, 2nd Dept) 93 AD2d 491, 463 NYS2d 224.

The privilege belongs to, is personal with, and generally is asserted by the patient. In the absence of a waiver, however, it may be asserted by the patient's physician.[xvi]

Grand Jury v Kuriansky (1987) 69 NY2d 232, 239, 513 NYS2d 359; *Prink v Rockefeller Center* (1978) 48 NY2d 309, 314, 422 NYS2d 911, cer den, *Y and X v Kuriansky*, 482 US 928, 96 L Ed2d 698, 107 S Ct. 3211.

The prohibition against the testimony of physicians is not limited to testimony concerning parties to an action, but applies to any patient, whether a party or not,[xvii] but any party to the action may object to the admission of such evidence.[xviii]

The privilege applies in criminal cases by virtue of CPL '60.10.[xix]

People v Wilkins (1985) 65 NY2d 172, 490 NYS2d 759.

Despite some authority to the contrary,[xx]

See, People v Ackerson, (1991) 149 Misc2d 882, 566 NYS2d 833.

the Court of Appeals seemingly endorses a liberal interpretation of the statute and the aims it seeks to enforce.[xxi]

Matter of a Grand Jury Investigation of Onondaga County (1983) 59 NY2d 130, 463 NYS2d 758 ["a broad and liberal construction to carry out its policy"]. Perhaps the best rule of construction is that cited by the dissent in *Williams v Roosevelt Hospital* (1985, 1st Dept) 108 AD2d 9, 487 NYS2d 767, affd, 66 NY2d 391, 488 NE2d 94, 497 NYS2d 348: "In interpreting the scope and application of a statutorily created privilege it is an oft-stated principle that the statute creating a privilege must be given a broad and liberal construction in favor of the protection of confidential communications, while a statute waiving or suspending the privilege must be 'strictly construed and confined to the specific exception created by it'" *Williams v Roosevelt Hospital* (dissent per Carro, J., quoting in part *Matter of Investigation of Criminal Abortions*, 286 App Div 270, 274, lv denied 309 NY 1031; *see, also, Matter of Keenan v Gigante* (1979) 47 NY2d 160, 166, 167, 417 NYS2d 226, cert den, *Gigante v Lankler*, 444 US 887, 62 L Ed2d 118, 100 S Ct. 181.

Appendix C
Miscellaneous Resources

~ NYS ATTORNEY GENERAL'S OFFICE (Eric T. Schneiderman)
http://www.ag.ny.gov/victim-rights/rape-and-sexual-offenses-state-statutes-2006
Rape and Sexual Offenses Statutes (2006)
Rape Crisis Counselor Confidentiality – Civil Practice Law §4510(b)
Recognizes confidential communication between a rape crisis counselor and a client, except when the client has authorized disclosure, reveals intent to commit a crime or a harmful act or files charges against the counselor or the rape crisis program.

~ THE CLERY ACT (The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act)
http://www.law.cornell.edu/uscode/text/20/1092
The Clery Act is a federal statute codified at 20 U.S.C. § 1092(f), with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46. The Clery Act requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. Compliance is monitored by the United States Department of Education…

(4)(A) Each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of title 42, other than a foreign institution of higher education, that maintains a police or security department of any kind shall make, keep, and maintain a daily log, written in a form that can be easily understood, recording all crimes reported to such police or security department, including—
(i) the nature, date, time, and general location of each crime; and
(ii) the disposition of the complaint, if known.
(B)
(i) All entries that are required pursuant to this paragraph shall, except where disclosure of such information is prohibited by law **or such disclosure would jeopardize the confidentiality of the victim,** be open to public inspection within two business days of the initial report being made to the department or a campus security authority.

~ MANDATED REPORTERS ~ NEW YORK
http://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm?event=stateStatutes.processSearch
Citation: Soc. Serv. Law § 413

The following persons and officials are required to report:
Physicians, physician assistants, surgeons, medical examiners, coroners, dentists, dental hygienists, osteopaths, optometrists, chiropractors, podiatrists, residents, interns, psychologists, registered nurses, social workers, or emergency medical technicians
Licensed creative arts therapists, marriage and family therapists, mental health counselors, or psychoanalysts
Hospital personnel or Christian Science practitioners
School officials, including but not limited to, teachers, guidance counselors, school psychologists, school social workers, school nurses, or administrators
Social services workers, daycare center workers, providers of family or group family daycare, or employees or volunteers in a residential care facility or any other child care or foster care worker
Mental health professionals, substance abuse counselors, alcoholism counselors, or all persons credentialed by the Office of Alcoholism and Substance Abuse Services
Peace officers, police officers, district attorneys or assistant district attorneys, investigators employed in the office of a district attorney, or other law enforcement officials

~ FERPA
http://www.pc3connect.org/otherdocs/Confidentiality%20and%20the%20Law.pdf

FERPA applies to all educational records that are defined as any personally identifiable record collected, maintained, or used by a school that the student has attended. Personal logs, treatment records, and directory information, however, are exceptions to the above act. The above mentioned are excluded for the following reasons: Personal logs are records of instructional, supervisory, administrative, and associated educational personnel that are the sole possession of the individual and have not been shared with any other peer or professional. Treatment records are records of a physician, psychiatrist, psychologist, or other recognized professional acting in his or her role as a professional and used only in connection with the treatment of the student. Directory information are records that include the student's demographic information, grade or field of study, participation in extracurricular activities, physical descriptions, and dates of attendance (FERPA, 1974; Underwood & Mead, 1995).

~ AOD COUNSELORS
Federal regulations under the Drug Abuse Office and Treatment Act (1976) now guarantee confidentiality to youths receiving alcohol and other drug services. These laws and regulations protect any information about a youth if the youth has received alcohol and/or drug related services of any kind including school-based identification. Any individual making an unauthorized disclosure faces a criminal penalty and a fine. When a teacher, counselor, or other school professional identifies student behaviors that could indicate a drug and/or alcohol problem, they can discuss this with the student or other school personnel. However, from the time an evaluation is conducted and/or a student assistance program begins alcohol or drug related counseling, the federal regulations are in effect (Coll, 1995)…

Coll, K. M. (1995). Legal challenges for school counselors engaged in secondary prevention programming for students with substance abuse. The School Counselor, 43, 35-41.

ROLES AND RESPONSIBILITIES OF COUNSELORS AND EDUCATORS

Confidentiality is a concept that is based on ethical principles (American Counseling Association, 1995) and is important to the counseling relationship because it facilitates trust and the establishment of a therapeutic relationship. It is important to note, however, that what is ethical behavior under professional codes of ethics is not necessarily legal and vice versa. However, confidentiality has gained legal status throughout the United States through licensing laws for counselors with several states specifically granting the right of privileged communication to school counselors. It should be noted that this privilege belongs to the client and not the counselor.

Privileged communication is a legal concept that is defined by statute and applies to communication that originates in a confidential relationship. As previously noted, some states have enacted specific right of privileged communication for school counselors, others have not. A recent court decision known as the Jaffee decision may have given mental health counselors privileged communication in federal cases. The U.S. Supreme Court held that the communications between psychotherapists and their patients are privileged and do not have to be disclosed in cases heard in federal court (Jaffee v. Redmond et al., 1996). **This case has yet to be tested and does not apply to cases other than those in federal court (Remley, Herlihy, & Herlihy, 1997).**

~ COMMON LAW

http://www.enotes.com/healthcare-reference/doctor-patient-confidentiality

The concept of "doctor-patient confidentiality" derives from English COMMON LAW and is codified in many states' statutes. It is based on ethics, not law, and goes at least as far back as the Roman Hippocratic Oath taken by physicians. It is different from "doctor-patient privilege," which is a legal concept. Both, however, are called upon in legal matters to establish the extent by which ethical duties of confidentiality apply to legal privilege. Legal privilege involves the right to withhold EVIDENCE from DISCOVERY and/or the right to refrain from disclosing or divulging information gained within the context of a "special relationship." Special relationships include those between doctors and patients, attorneys and clients, priests and confessors or confiders, guardians and their wards, etc.

The Oath of Hippocrates, traditionally sworn to by newly licensed physicians, includes the promise that "Whatever, in connection with my professional service, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." The laws of Hippocrates further provide, "Those things which are sacred, are to be imparted only to sacred persons; and it is not lawful to impart them to the profane until they have been initiated into the mysteries of the science." Doctor-patient confidentiality stems from the special relationship created when a prospective patient seeks the advice, care, and/or treatment of a physician. It is based upon the general principle that individuals seeking medical help or advice should not be hindered or inhibited by fear that their medical concerns or conditions will be disclosed to others. Patients entrust personal knowledge of themselves to their physicians, which creates an uneven relationship in that the vulnerability is one-sided. There is generally an expectation that physicians will hold that special knowledge in confidence and use it exclusively for the benefit of the patient.

Federal Rule of Evidence (FRE) 501 provides that any permissible privilege "shall be governed by the principles of common law" as interpreted by federal courts. However, in civil actions governed by state law, the privilege of a witness is also determined by the laws of that state. Most states recognize some form of doctor-patient privilege by express law (STATUTE), but over time, there have been many exceptions that have chipped away the use or scope of the privilege.

In recent years, many courts have held that doctors also owe duties to protect non-patients who may be harmed by patients. For example, without a patient's permission or knowledge, doctors may warn others or the police if the patient is mentally unstable, potentially violent, or has threatened a specific person. In some states, the duty to report or warn others "trumps" the right to confidentiality or privileged communication with a doctor. Courts will decide these matters by balancing the sanctity of the confidentiality against the foreseeability of harm to a third party.

~ CONSTITUTIONAL RIGHT TO PRIVACY

The fundamental right to privacy, guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution, protects against unwarranted invasions of privacy by federal or state entities, or arms thereof. As early as in *Roe v. Wade,* 410 U. S. 113 (1973), the U. S. Supreme Court acknowledged that the doctor-patient relationship is one which evokes constitutional rights of privacy. But even that right is not absolute and must be weighed against the state or federal interest at stake.

For example, in *Whalen v. Roe,* 429 U.S. 589 (1977), a group of physicians joined patients in a lawsuit challenging the constitutionality of a New York statute that required physicians to report to state authorities the identities of patients receiving Schedule II drugs (controlled substances). The physicians alleged that such information was protected by the doctor-patient confidentiality, while the patients alleged that such disclosure was an invasion of their constitutional right to privacy. The Supreme Court did not disagree with the lower court's finding that "the intimate nature of a patient's concern about his bodily ills and the medication he takes . . . are protected by the constitutional right to privacy." However, the high court concluded (after balancing the state's interests) that "Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy."

~ NEW YORK STATE LEGISLATURE WEBSITE and ENACTMENTS (incl. HIPAA)
http://assembly.state.ny.us/leg/

A00694Enacts the "patient privacy protection act"
A02788Protects the right of privacy of victims of sex offenses or offenses involving the transmission of HIV who are under the age of 18
S03296Enacts the "patient privacy protection act"
A00214Makes certain provisions of law relating to social work and mental health practitioners permanent
A02691Creates a distinctive plate for New York state licensed mental health counselors
A10336Relates to sexual offenses by health care or mental health care providers; requires certain officers to report certain sex offenses to law enforcement
The HIPAA legislation explicitly addresses interaction between federal and state law. Generally, "covered entities" are required to comply with both HIPAA and state law whenever possible. If it is not possible to comply with both, HIPAA preempts any contrary provision of state law, including state law provisions that require written records rather than electronic ones. State law is not preempted in the following circumstances:

- When state law is necessary for regulation of insurance or health plans, prevention of fraud and abuse, or reporting on health care system operations and costs
- When state law addresses controlled substances
- When a state law relates to reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention
- When a provision of state law is more stringent than the requirements of the federal Privacy Rule

The most difficult of these exceptions is the stringency exception. A provision of state law is defined to be more stringent if it prohibits or restricts use or disclosure of PHI that would be permitted under the Privacy Rule.

Specifically, a more stringent state law:

- Permits greater rights of access and amendment to the individual who is the subject of the PHI
- Provides more information about use, disclosure, rights and remedies to the individual
- Narrows the scope or duration of express legal permission required from the individual for use or disclosure or reduces the coercive effect of the requirement for legal permission for use or disclosure of PHI
- Increases the duration or requires more detailed accounting of disclosures
- Provides greater privacy protection to the individual
- Permits greater rights of access and amendment to the individual who is the subject of the PHI
- Provides more information about use, disclosure, rights and remedies to the individual
- Narrows the scope or duration of express legal permission required from the individual for use or disclosure or reduces the coercive effect of the requirement for legal permission for use or disclosure of PHI
- Increases the duration or requires more detailed accounting of disclosures
- Provides greater privacy protection to the individual

Although many analyses of interaction between HIPAA and state law (called "preemption analyses") have been performed on behalf of health care companies and professional associations, these analyses are advisory in nature. There is general agreement that final decisions about the applicability of specific provisions of state and federal law will be made by the courts.

~ DISCLOSURES TO LAW ENFORCEMENT OFFICIALS

The Privacy Rule includes a standard for disclosures to law enforcement officials. The standard permits the following types of disclosures:

- Pursuant to a legal process or otherwise required by law, including disclosures of certain types of wounds, and disclosures in response to court orders, subpoenas, and administrative requests. Administrative requests must be specific and limited, relevant to a legitimate ongoing investigation, and must demonstrate that de-identified information (that is, information without individual identifiers) cannot be used.
- Limited information disclosures for the location of a fugitive, suspect, material witness or missing person.
- Information about an individual who is or is believed to be a victim of crime if the individual agrees to the disclosure or, under specific rules, if the individual is unable to agree or object.
- Information about decedents.
- Information about crime on the premises of the covered entity if there is a good faith belief that the disclosed PHI is evidence of a crime.
- Limited disclosure in emergencies in order to alert law enforcement about the commission of a crime.
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Additional disclosures to law enforcement officials are permitted under other parts of the Privacy Rule. For example, disclosure is permitted if a covered entity believes that an individual may pose serious threat to health and safety and the disclosure may help law enforcement authorities reduce the harm or apprehend the individual. Although disclosures to law enforcement authorities may be made without individual authorization and, in some cases, without giving the individual an opportunity to agree or object, such disclosures generally become part of Accounting for Disclosures that an individual can request from a covered entity. If a law enforcement official requests that law enforcement-related disclosures not be listed in the Accounting for a specified period of time, the entity providing the Accounting must suspend the individual's right to see a listing of such disclosures.
Jaffee v. Redmond established privilege for communications between a psychotherapist and a patient.