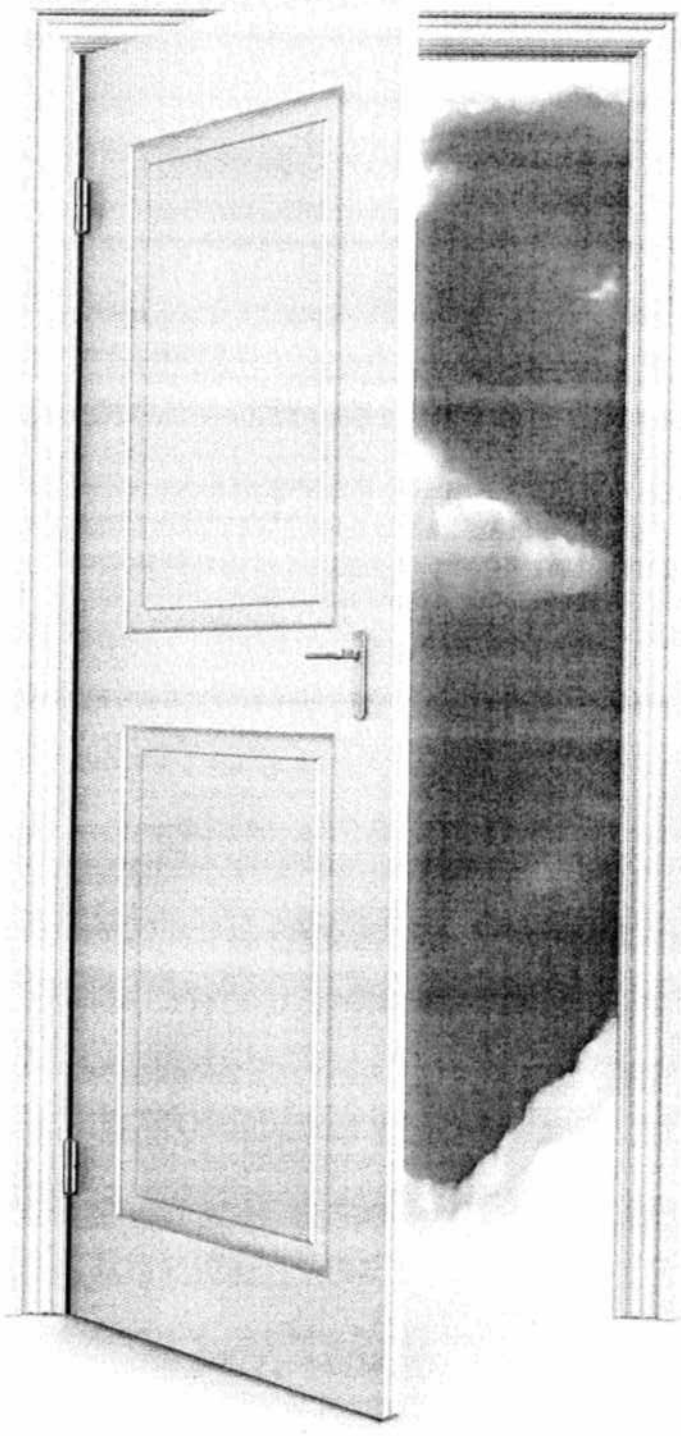
The California Psychologist

May/June 2011

Volume 44 • Number Three



New Practice Opportunities

CLIP & SAVE

Work Place Electronic Communication and The Shrinking Psychotherapist Patient Privilege

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In communicating electronically with patients, psychologists should be aware that any such communication may become the subject of litigation, even when the patient intends the communication to be confidential, and the psychologist takes steps to preserve the patient's confidentiality. Few events can be more damaging to a patient, and to the patient-therapist relationship, than having a court determine that a trusted communication between a patient and her therapist is not privileged. Potential consequences may include the infliction of further trauma on a patient who must sit idly by as an embarrassing communication is magnified on a screen before a jury, and her therapist is compelled to testify regarding its contents. Nevertheless, this is the risk psychologists face when accepting and responding to electronic communications from a patient using an employer-provided electronic device. Based on the January 13, 2011, decision by the California Court of Appeal in *Holmes v. Petrovich Development Co. LLC* ("*Holmes*") an employee's communications to her therapist may lose protection under the patient-therapist privilege when transmitted from any workplace device.[1]

Employers Monitor Employee Activity

Enjoying what may be characterized as an illusion of privacy, people routinely use employer-provided email accounts, computers, fax machines, smart phones, and other electronic devices to conduct personal communications on the job. At the same time, health care providers are making it easier for patients to communicate electronically, and to access health care information such as appointment scheduling, test results, and treatment summaries. Enjoying the convenience, efficiency and peace of mind that such technology affords, employees take advantage of this increased access through employer-provided electronic devices.

In an effort to control the personal use of such devices by employees, two-thirds of employers monitor their employees' web site visits according to a 2007 survey by the American Management Association, and the ePolicy Institute.[2] Nearly half of all companies monitor e-mail, and close to half track content, keystrokes, and time spent at the keyboard. 45% monitor time spent on telephones including logging telephone numbers called. Another 25% record phone conversations or monitor employee voicemail.

It is in this context that Gina Holmes sued her employer based on allegations of pregnancy disability discrimination. The dispute arose when Holmes notified her new employer that she might take the full four months allowed for maternity leave under California law, and her employee handbook, as opposed to the six weeks she had initially estimated after confirming she was pregnant.[3] In subsequent e-mail exchanges with her employer, she disclosed personal details about her pregnancy, including a history of miscarriages.[4] Her employer circulated the emails to employees and legal counsel. He also wrote to Holmes stating that he felt deceived by her, but would comply with her request, and wanted her to remain employed.

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Holmes subsequently used her workplace computer to e-mail an attorney, complaining that her boss had said things that were hurtful, and that he had circulated the e-mails containing her personal disclosures. She claimed that her workplace had become hostile, and wanted to know her rights. Holmes also forwarded e-mails from her employer, and sent documents through the company's fax machine. The attorney later e-mailed Holmes to say she should delete their "attorney-client communications" from her work computer because her employer might claim a right to access it.[5] After litigation ensued, the trial court denied Holmes' claim that the attorney-client e-mails were privileged, and allowed the documents to be introduced against her at trial. The trial resulted in a defense verdict.

The Court of Appeal upheld the trial court's decision, and concluded that the e-mails from Holmes to her attorney regarding possible legal action did not constitute a confidential attorney-client communication. The Court found on the facts of the case, that Holmes had used her employer's computer to send the e-mails even though 1) she had been told of the company's policy that its computers were to be used only for company business, and that employees were prohibited from using them to send or receive personal e-mail; 2) she had been warned that the company would monitor its computers for compliance with the company policy, and might inspect all files and messages at any time; and 3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages have no right of privacy with respect to that information or message. The Court reasoned that the e-mails sent through her company computer were "akin to consulting her lawyer

in her employer's conference room, in a loud voice, with the door open, yet unreasonably expecting that the conversation . . . would be privileged."[6]

Review of Privilege Basics

Unless provided by statute, no person may refuse to be a witness, refuse to disclose information, or refuse to produce documents or things in response to a subpoena, or to prevent another from doing so.[7] The few statutory exceptions to this rule include the attorney-client privilege,[8] the psychotherapist-patient privilege,[9] the sexual assault counselor-victim's privilege,[10] and the domestic violence counselor-victim privilege.[11] Each privilege is similar in its requirements. Pursuant to the therapist-patient privilege, a patient may refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and their psychotherapist.[12] The privilege does not belong to the therapist. Rather, it must be asserted by the holder of the privilege, or one authorized by the holder of the privilege, or by the individual who was the patient's psychotherapist at the time of the communication. A psychotherapist may not claim the privilege if there is no holder of the privilege in existence; or if he or she is otherwise instructed by an authorized person to permit disclosure.[13] While "holder of the privilege" generally refers to the patient, it may also mean a guardian or conservator of the patient, or the personal representative of the patient if the patient is deceased.[14] For these reasons, a psychologist may not simply refuse to respond to a subpoena compelling him or her to appear and testify without determining whether there is still a "holder of the privilege" and whether the holder intends to authorize disclosure.

If a patient's conduct may be reasonably interpreted as consent to the disclosure of a privileged communication, the privilege is lost.

Critical to the existence of privilege, is the preservation of confidentiality, and the limitation of any disclosure. If the holder of the privilege voluntarily discloses or consents by word or conduct to the disclosure of a significant part of a privileged communication, the privilege is lost.[15] Inadvertent disclosures, however, do not necessarily defeat the privilege. To be privileged, a patient-therapist communication need only contain information transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, *so far as the patient is aware*, discloses the information to no outside third person.[16] Privilege is not defeated by mere "eaves-droppers," or "unintended others who otherwise receive the communication."[17] The privilege extends to statements between therapists and third persons intended to assist in the diagnosis, or treatment of a patient's mental condition, and includes information shared in the context of group counseling, so long as the information is disclosed in confidence and in an effort to accomplish the purpose of the patient's therapy.[18]

In *Holmes*, the Court analyzed the meaning of a confidential communication as that term is used in both the attorney-client privilege and the psychotherapist-patient privilege.[19] The information must be transmitted "in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client . . . or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[20] The Court emphasized that an e-mail communication does not lose its privileged character solely because it is communicated by electronic means, or because persons involved in the delivery, facilitation, or storage of the electronic communication may have access to its content.[21] Rather, despite Holmes' claims that she relied on password protection, the Court held that an individual can have no reasonable expectation of confidentiality when the electronic means used belongs to the employer; and the employee agreed to the employer's policies providing that electronic communications are not private, may be monitored, and may be used only for business purposes.[22] Had Holmes used her home computer, privilege would have been maintained, even if some unknown person involved in the delivery, facilitation or storage of the communication had access.

Under Standard 4 of the APA Ethical Principles, psychologists have a duty to take reasonable precautions to protect confidential information obtained through or stored in any medium, (4.01) and to discuss the relevant limits of confidentiality with their patients (4.02). Psychologists should review their polices with respect to electronic communications, and discuss them with their patients, emphasizing the limits on confidentiality from using company devices. While the *Holmes* decision was largely impacted by the employer's policies and the employee's awareness of those polices, a practitioner should assume that any communication through such devices may find itself in litigation.

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1 *Holmes v. Petrovich Development Co., LLC ("Holmes")* (2011) 191 Cal.App. 4th 1047

2 American Managements Association. (Feb. 28, 2008). *2007 Electronic Monitoring & Surveillance Survey.* Retrieved from http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/

3 *Holmes, supra,* 191 Cal.App. 4th at pp. 1053-1054.

4 *Ibid.*

5 *Id.* at pp. 1055-1056.

6 *Id.* at p. 1069.

7 Cal. Evid. Code § 911.

8 Cal. Evid. Code § 954.

9 Cal. Evid. Code § 1014.

10 Cal. Evid. Code § 1035.8.

11 Cal. Evid. Code § 1037.5.

12 *Menendez v. Super. Ct.* (1992) 3 Cal.4th 435, 448.

13 Cal. Evid. Code § 1014; *Roberts v. Super. Ct.* (1973) 9 Cal.3d 330, 341.

14 Cal. Evid. Code § 1013.

15 Cal. Evid. Code § 912, subd. (a).

16 *Menendez, supra,* 3 Cal.4th at p. 447.

17 *Id.* at p. 448.

18 *Ewing v. Goldstein* (2004) 120 Cal. App. 4th 807, 818.

19 Compare Evid. Code § 952 with Evid. Code § 1012.

20 *Holmes, supra,* 191 Cal. App. 4th at pp. 1064-1065.

21 *Id.* at p. 1065 [citing Evid. Code, § 917, subd. (b)].

22 *Id.* at p. 1068.

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