

What Happens in Therapy, Stays in Therapy. Unless...

Exploring the Ethics of Confidentiality

Kathryn S. Krase, PhD, JD, MSW

Krase Consulting

Learning Objectives

1. Explain the ethical obligation to keep client information confidential.
2. Demonstrate the legal obligation to keep client information confidential.
3. Competently discuss with their clients these obligations so that clients make an educated decision when sharing information with the professional.
4. Appropriately respond to ethical, legal, and moral conundrums faced when considering to breach client confidentiality.

Session Outline

- Introductions
- The Ethics & Law that Govern Confidentiality
- Keeping Client Confidences: From the Basic to the Difficult
 - Talking about Clients to Others
 - Client Records
 - Duty to Warn Protect from Harm
- Case Studies & Practice Implications
- Conclusions/Questions

Introductions

Kathryn S. Krase, PhD, JD, MSW

- Principal Consultant with Krase Consulting
- Expert on professional ethics.
- Substantial experience consulting with government and community based organizations to develop policy & practice standards.
- Disclaimer: Limits of my reach today

Who are YOU?
(What do you do? Where are you?)

The Ethics & Law that Govern Confidentiality

Revisiting Ethics in Professional Practice

What do you think about when you hear “Ethics”?

Where were you exposed to “Ethics”?

Why do all professions have “ethics”?

Are “ethics” and “the law” the same thing?

Ethical Principles Common Across Professions

BENEFICENCE

Doing Good

NON-MALEFICENCE

Avoiding Harm

AUTONOMY

Right to Make Decisions for Yourself

JUSTICE

Fairness/Equity



Where are these Ethical Responsibilities Defined?

*Our Ethical Codes
& the Law*



Purposes of Professional Code of Ethics

- Identify core values on which profession's mission is based
 - Socialize new practitioners
- Summarize broad principles reflecting core values
- Establish standards to guide professional practice
- Identify considerations when conflict or ethical uncertainties arise
- Provide standards to which the professional itself, as well as the general public, can hold the profession/professional accountable



Law on Professional Practice

- Making law is more involved than making ethical codes
- The law (largely)defers to professional codes of ethics

Maryland/ MBSWE Regulations

- Ethics: Title 10 Maryland Department of Health Subtitle - 42 Board of Social Work Examiners - Chapter 03 Code of Ethics
- Supervision: Title 10 Maryland Department of Health - Subtitle 42 Board of Social Work Examiners - Chapter 08 Supervision
 - <https://health.maryland.gov/bswe/Pages/Supervision.aspx>
- Licensing:
 - <https://health.maryland.gov/bswe/Pages/Online-Application.aspx>

Interpreting Ethical & Legal Standards

DO NOT PROVIDE GUIDANCE FOR ALL SITUATIONS
ALLOWS FOR VARIANCE

Pay attention to the use of language:

- Permissive Standards: “may”
- Suggestive Standards: “should”
- Restrictive Standards: “must”

Case Example

A therapist finds themselves emotionally spent after a particular session with a client who was processing the recent passing of a family member who sexually abused them as a child.

The therapist wants to process their feelings by talking to someone.

Who can they share with?

Who can they NOT share with?

What makes sharing ethical/unethical?

Legal/illegal?

**Most Common
Professional Ethics Violation**

**CONFIDENTIALITY
VIOLATION**

But, no one usually knows...

Defining “Confidentiality”

- Keep information private
- “Hold confidences”



Protected Health Information (PHI)

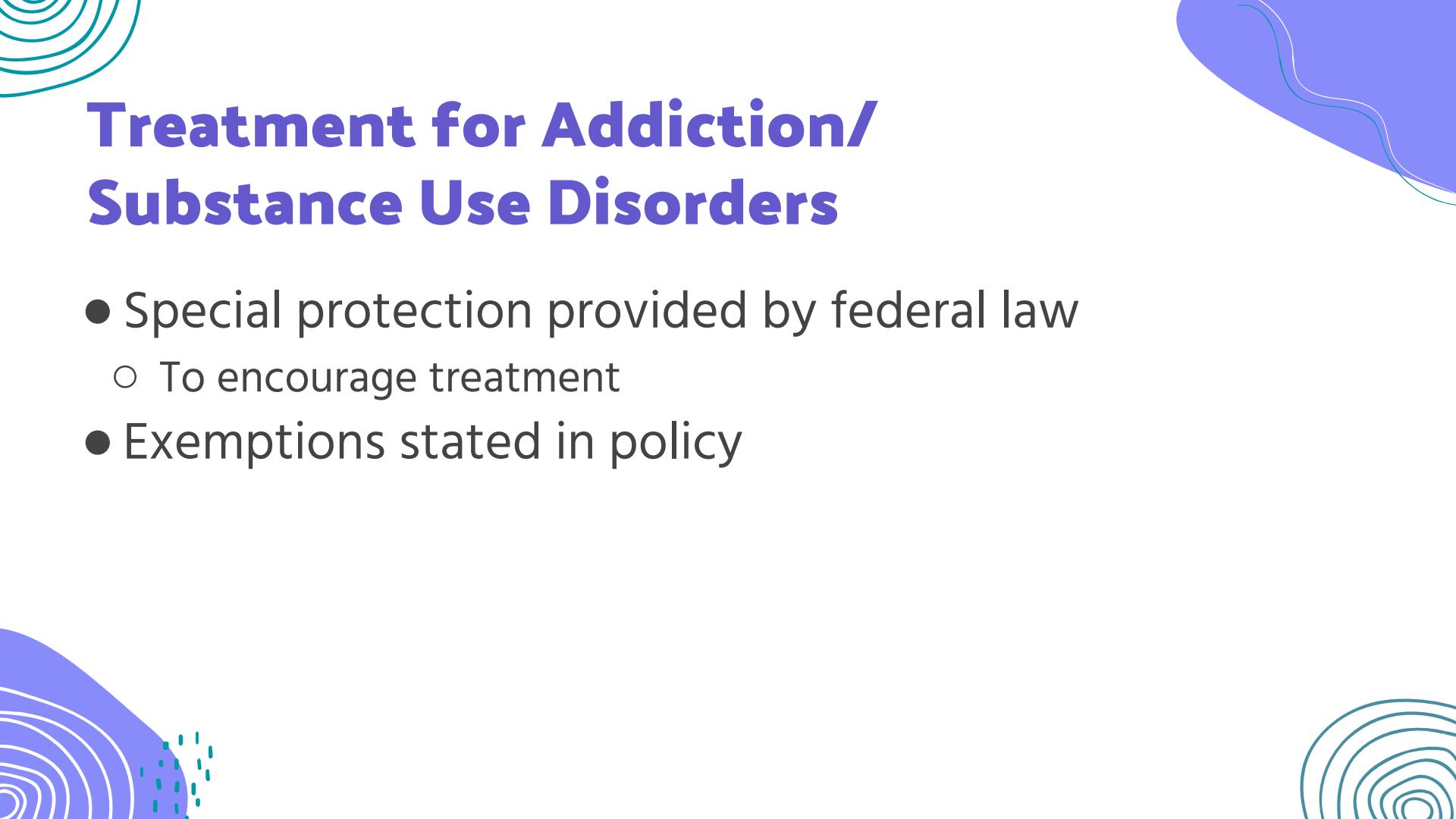
- What is PHI?
 - Information that can be linked to a particular person (ie., is person-identifiable) that arises in the course of providing a health care service.

Sharing PHI: Definitions

- “Use”: internal sharing of PHI
 - Examples
- “Disclosure”: external sharing of PHI
 - Examples
- Rules governed by HIPAA

What is HIPAA?

- Health Insurance Portability and Accountability Act of 1996
 - Federal Law
- Promotes greater sensitivity/awareness of private information
- Provides exceptions for legally required reports to public health and other government authorities.



Treatment for Addiction/ Substance Use Disorders

- Special protection provided by federal law
 - To encourage treatment
- Exemptions stated in policy

Nuts & Bolts

- When sharing PHI (use & disclosure), you GENERALLY need to have client's permission to do so
- Important to explain confidentiality expectations & limitations through INFORMED CONSENT PROCESS
 - **Clients get to choose what they share with you**

Confidentiality vs. Privilege

- Not synonymous terms; but related
 - Confidentiality is professional responsibility provided through ethics & law
 - Privilege protects information from admission in legal proceeding.
- Privilege derives from relationship with expectation that information passed within the relationship will remain confidential.
- Privileges you know about?

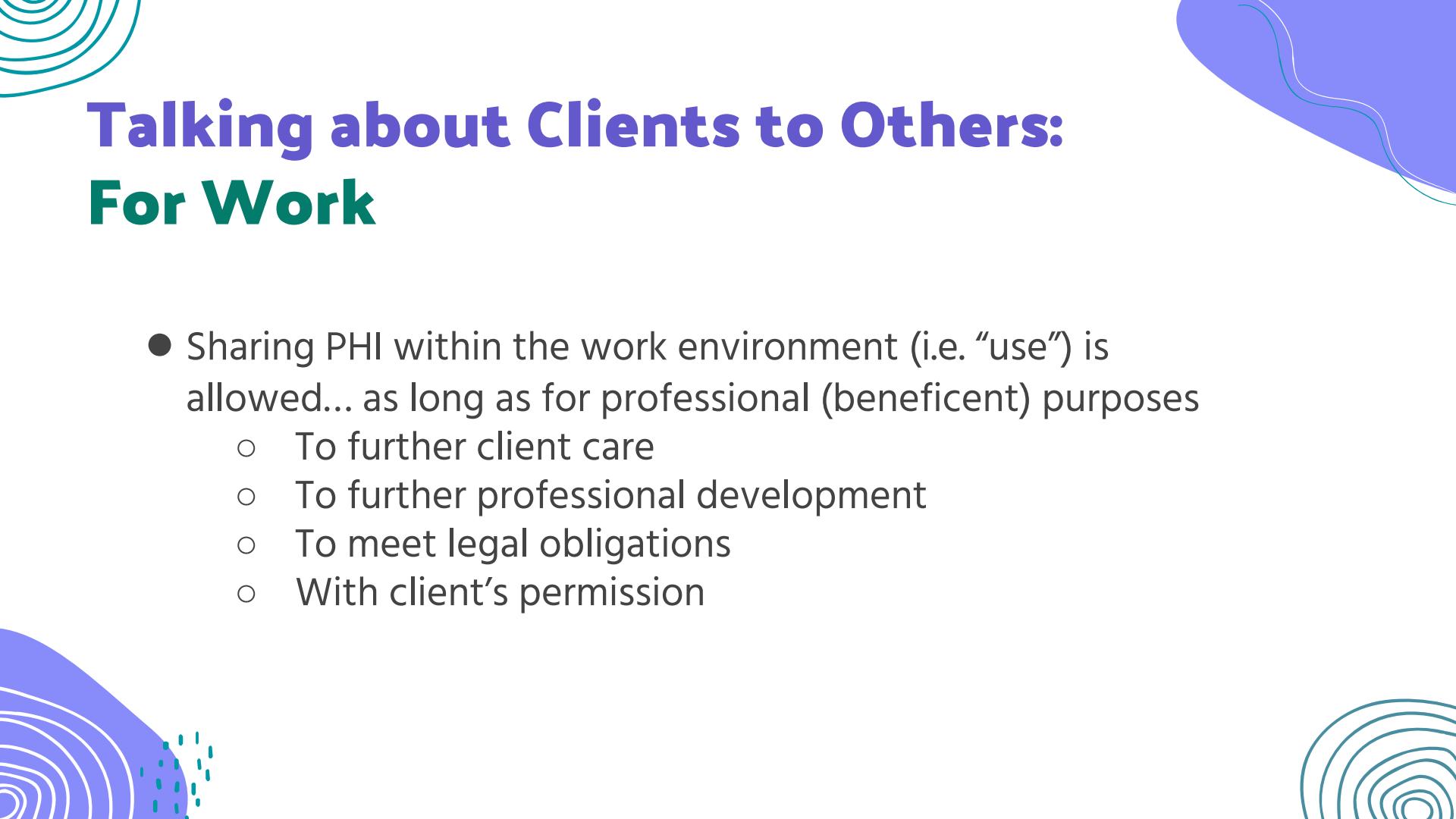
Therapist Privilege?

- Jaffee vs. Redmond (U.S. Supreme Court 1996)
- Limited to confidences exchanged in therapeutic relationship
 - Not case management, etc
 - Limitation: Best Interests (of Children)

Keeping Client Confidences: From the Basic to the Difficult

Talking about Clients to Others

- We are HUMANs, not machines
- Talking about work is natural
 - *At work AND outside of work*
- Must be thoughtful of our obligation to client



Talking about Clients to Others: For Work

- Sharing PHI within the work environment (i.e. “use”) is allowed... as long as for professional (beneficent) purposes
 - To further client care
 - To further professional development
 - To meet legal obligations
 - With client’s permission



Talking about Clients to Others: Outside of Work

- Consider beneficence of sharing outside of the professional relationship
 - Non-beneficent purpose: NOT OK
 - Whose beneficence...?
 - Beneficent purpose: Walk the line carefully
 - With permission v. without



Complications in Confidentiality

Extra-Office Communication

- We don't just work/communicate in our offices
- Professionals standards based on in person contact
- Technology changes EVERYTHING
 - Teletherapy
 - Videoconferencing
 - Texting
 - Email

Case Example

A therapist finds themselves emotionally spent after a particular session with a client who was processing the recent passing of a family member who sexually abused them as a child.

They are used to sharing their daily lives on social media...

Can they share their experience through:

- Posts on their personal Facebook page
- On an anonymous Twitter/X/Blue Sky feed
- On their professional podcast

What makes sharing ethical/unethical?
Legal/illegal?

Complications in Confidentiality

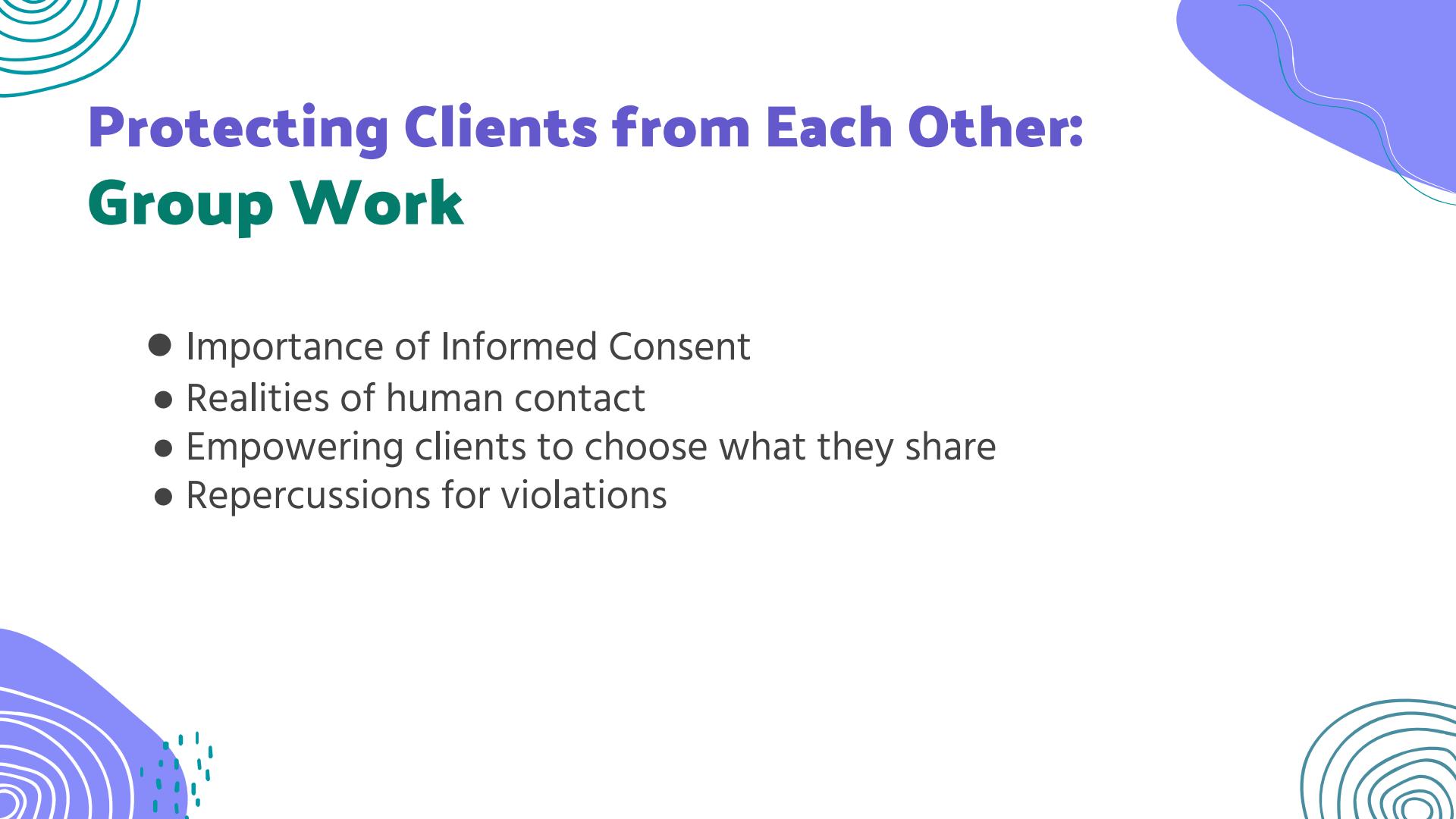
Internet & Social Media

We can “know” our clients in ways not previously possible
But should we?

Your clients have access to “know” YOU, too!
Who are you online?

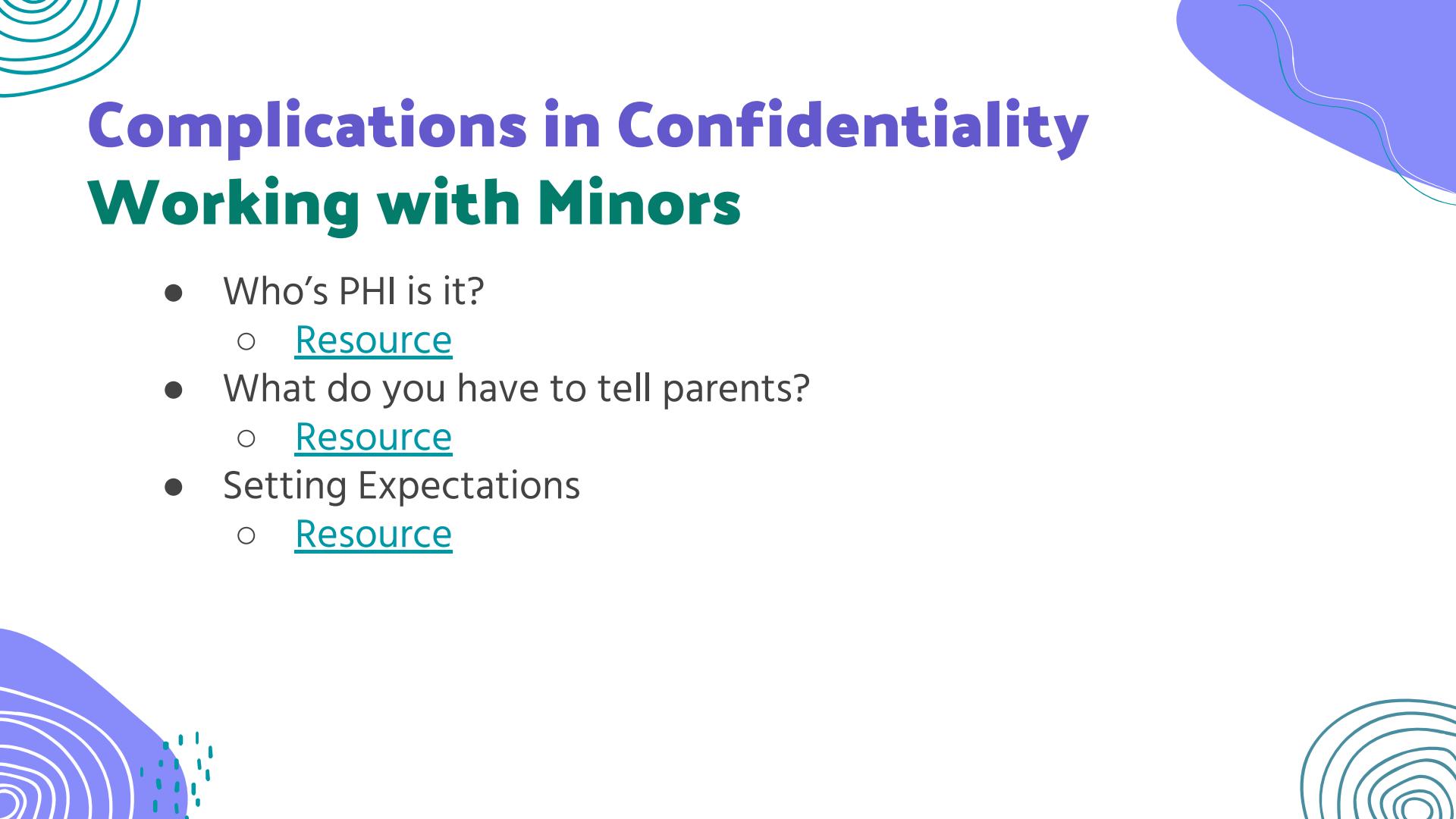
Protecting Clients from Each Other Couples/Family

- Importance of Informed Consent
- Realities of human contact
- Empowering clients to choose what they share



Protecting Clients from Each Other: Group Work

- Importance of Informed Consent
- Realities of human contact
- Empowering clients to choose what they share
- Repercussions for violations



Complications in Confidentiality

Working with Minors

- Who's PHI is it?
 - [Resource](#)
- What do you have to tell parents?
 - [Resource](#)
- Setting Expectations
 - [Resource](#)



Complications in Confidentiality

Adults with Cognitive Impairment

- Who's PHI is it?
- What do you have to tell guardians?

Client Records: Expectations

- Obligations:
 - To keep & maintain records
 - Records are accurate, current, and pertinent
 - Include: nature, delivery, progress, results and fees.
- Security
 - Electronic and physical records
- Retention
 - Depends on the state
 - When no state guidance, look to prof ethics
- Reminder: What you write is subject to “discoverability”
 - RESOURCE

Release/Disclosure of PHI: Client Authorized

- Client Release
 - Written
 - Verbal
- Client right to release
 - Ensuring understanding
 - Obligation to minimize breach

Release/Disclosure of PHI: Compelled through Subpoena/Court Order

- Subpoenas are not all the same
 - Lawyer subpoenas
 - Judge ordered subpoenas
- Right to challenge/limit
 - Ethical obligation to limit disclosure
 - Professional autonomy
 - Asserting privilege

Release/Disclosure of PHI: Testimony in Court

- Called to testify
 - Voluntary
 - Subpoena
- Ethical obligation to limit disclosure
 - Assert privilege

Release/Disclosure of PHI: In Defense of Professional

- Credibility of client
- Support evidence of standard of care

Case Examples

A professional requests a client's records from you.
How should you proceed?

- What if the professional is:
 - A therapist working with the client's family member
 - A child protective services worker
 - An attorney who represents your client
 - An attorney who represents the client's former partner
 - An attorney who represents the client's child

Case Example

- 8 year-old evaluated at family's request due to school problems
 - Developmental and family history
 - Met with both parents
 - Assessed school progress reports
 - Administered cognitive and personality tests.
- Evaluation Outcome:
 - Mild perceptual learning disability
 - Difficulty coping with family stressors
 - Recommendation: Counseling
- Received signed release from school
 - "Any" information available relating to emotional & educational needs

What should be shared?

Duty to Warn: From Client-Caused Harm

- Tarasoff Case
- Breach of confidentiality required to protect
 - Varies by State
- Criteria
 - Special Relationship
 - Reasonable prediction of harmful conduct
 - Serious danger
 - Foreseeable victim
- Releasing Duty
 - Reasonable Care

Duty to Warn: From Self-Harm

- Breach of confidentiality required to protect
 - Varies by State
- Criteria
 - Special Relationship
 - Reasonable prediction of harmful conduct
 - Credibility of ideations
- Releasing Duty
 - Reasonable Care
 - Who do you tell?

Case Example

- Adult client told parent of intent to kill former partner's new partner
 - Parent told therapist
- Therapist told parent to have client hospitalized
- Inpatient psychiatrist discharged client over therapist's objection by telephone
- Client killed new partner and themself.
- Therapist sued by parents of new partner

**Did therapist meet obligation?
(Ewing v. Goldstein)**

Duty to Protect: Mandated Reporting Laws

- Child Maltreatment
- Elder Abuse
- “Vulnerable persons”
- Obligations differ
 - by state
 - by role



Duty to Protect: Mandated Reporting Laws

- NOT ALL SUSPICIONS ARE REQUIRED TO BE REPORTED
 - Meet legal definitions
 - Burden of Proof: Reasonable
- Negative impacts on professional relationships
 - Micro, mezzo and macro levels
- #SupportNOTReport



Protecting Yourself

- Preparation: Informed Consent
 - Example [1](#), [2](#), [3](#)
- Telehealth Consent
- Minimize exposure to liability
- Meet professional standards of care
- Seek guidance/legal advice

Central Takeaways

Confidentiality obligation has limitations

Support client right to autonomy, whenever possible

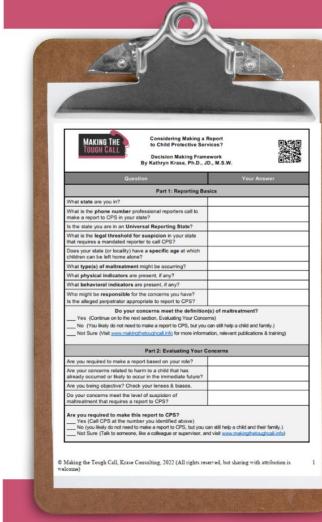
Professional responsibility to minimize breach

Conclusions/ Questions

Kathryn S. Krase, PhD, JD, MSW
kathryn@kraseconsulting.com

<https://www.kraseconsulting.com>

makingthetoughcall.info/thankyouguide



FREE GUIDE FOR MANDATED REPORTERS

Considering making a report to Child Protective Services and not sure where to start?

Download our free guide with
Making The Tough Call's Decision
Making Framework

DOWNLOAD TODAY



References

- **American Psychological Association. (2017). Ethical principles of psychologists and code of conduct (2002, amended effective June 1, 2010, and January 1, 2017).**
<https://www.apa.org/ethics/code/>
- **American Counseling Association. (2014). 2014 ACA code of ethics.**
<https://www.counseling.org/docs/default-source/default-document-library/2014-code-of-ethics-finaladdress.pdf>
- **Bryan, V., Sanders, S., & Kaplan, L. (2016). The helping professional's guide to ethics: A new perspective. Lyceum Books.**
- **Lustgarten, S. D., Garrison, Y. L., Sinnard, M. T., & Flynn, A. W. (2020). Digital privacy in mental healthcare: current issues and recommendations for technology use. Current Opinion in Psychology, 36, 25-31.**
- **Muller, L. S., & Fink-Samnick, E. (2019). Duty to warn 4.0. Professional Case Management, 24(3), 160-164.**
- **National Association of Social Workers. (2020). NASW code of ethics.**
<https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics- English>
- **Pozgar, G. D. (2005). Legal and ethical issues for health professionals. Boston: Jones and Bartlett Publishers.**
- **Wortzel, H. S., Borges, L. M., Barnes, S. M., Nazem, S., McGarity, S., Clark, K., ... & Matarazzo, B. B. (2020). Therapeutic risk management for violence: clinical risk assessment. Journal of**