First Amendment Rights & the Psychotherapist-Patient Privilege

Increased challenges in politics have raised questions about what social workers can and cannot discuss with their clients. This has also led to concerns around adverse consequences social workers may face, such as license revocation or job loss.

However, legal precedent suggests that confidential communication between a licensed psychotherapist or psychologist is protected under psychotherapist-patient privilege. This privilege has been extended to “licensed social workers,” which has different interpretations between lower courts. The Supreme Court has set four criteria that social workers must meet for the psychotherapist-patient privilege to apply to their work. Those four criteria are:

1. The social worker must be licensed to conduct psychotherapy.
   This criterion likely applies to LCSWs, as well as LMSWs practicing psychotherapy under the supervision of a LCSW. It is recommended that LMSWs in this situation document their supervisory relationship.

2. The patient must make the communication in the course of psychotherapy.
   Clinical counseling is psychotherapy and thus protected, whereas supportive counseling is not. The Texas Administrative Code's (RULE §781.102) definitions of both are as follows:
   - **Clinical counseling**: "The use of clinical social work to assist individuals, couples, families or groups in learning to solve problems and make decisions about personal, health, social, educational, vocational, financial, and other interpersonal concerns."
   - **Supportive counseling**: "...help individuals create and maintain adaptive patterns. Such methods may include...building community resources and networks, linking clients with services and resources, educating clients and informing the public, helping clients identify and build strengths, leading community groups, and providing reassurance and support."

3. The communication must be made with a client's reasonable expectation of confidentiality.
   There should be an explicit understanding that these communications will not be shared outside of the treatment setting. Ensure that you have obtained informed consent documentation.

4. The communication must not fall under any exception to the privilege.
   These exceptions can be found in Texas Rule of Evidence 510(d) and include:
   - Proceedings against the professional, such as license revocation or a client suing for malpractice
   - Written waivers of the privilege
   - Action to collect, or if the social worker sues a client to collect payment for services rendered
   - Communication made in court-ordered examination
   - Litigation in which a party’s claim or defense relies on the client's physical, mental, or emotional condition
   - Cases regarding abuse or neglect of an "institution" resident