Patient Reveals Sex With Prior Therapist – Protecting the Public?

written by Richard Leslie | March 1, 2019

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In California, when a patient reveals to a psychotherapist that during the course of a prior treatment the patient engaged in sexual intercourse or other sexual behavior or sexual conduct with the previous psychotherapist, there is a requirement to give the patient a specified brochure (a government publication) and to discuss the contents of the brochure with the patient. Some may ask why there is no requirement for the subsequent therapist to report such alleged unlawful or criminal behavior on the part of the prior therapist. The simple answer is that the patient's confidentiality and privacy should be protected and should not be breached by the treating practitioner. The patient should be the one who chooses to report the wrongdoing after the patient has been made aware of information regarding therapist sex with patient and the several options that can be pursued. Not all states address the situation similarly, and some may require more of the therapist, such as making a report to the board, seeking the patient's authorization to report, or other action aimed at encouraging that a report be made. What is the law in your state?

A question that consumer advocates in California and elsewhere may ask is why the brochure must be given only in the limited circumstance indicated above. They might ask why there is no requirement for the brochure to be given to all patients at the outset of all psychotherapist-patient relationships. If the brochure was distributed at the outset, consumers would be made aware of this important information in a timely manner and throughout the universe of those seeking mental health care – rather than the select few who receive the brochure after the wrongful act or crime has been committed. They might argue that since this behavior is not the result of negligence, but rather, an intentional act, and since this is one of the worst violations which can cause great psychological harm to patients, early and widespread distribution of the brochure would serve to protect consumers – some of whom may be vulnerable when commencing psychotherapy. Moreover, the brochure has for years contained a so-called "Patient Bill of Rights," which seemingly applies to all patients (but is only distributed to a select few) and is largely unrelated to the issue of sexual involvement with a prior therapist.

Suppose a patient revealed to her current California therapist that her prior therapist told her that because he was attracted to her, it was his ethical duty to terminate the therapeutic relationship and to refer the patient to another practitioner. The sexual relationship then began a few weeks after the referral was made and the new therapeutic relationship had commenced. While the current therapist could discuss the situation with the patient and choose to give her the brochure, there appears to be no mandate to give the brochure under such a circumstance. Even though it is unlawful and unprofessional conduct (in California) to engage in sexual relations with a patient during or within the two years

following termination, this specific behavior apparently does not warrant the mandatory giving of the brochure. Terminating therapy and making a referral, and then engaging in sexual relations, was formerly and for many years a way for therapists to attempt to avoid being held accountable. The enactment of “the two year rule” was an attempt to stop that practice.

DISCLOSURES TO PATIENT

Some of the common questions that licensed mental health practitioners ask revolve around the specific content and extent of disclosures that are or should be made to patients prior to or at the commencement of treatment – usually in an office policy document or what some describe as an informed consent document. On more than one occasion, I have written (in the Avoiding Liability Bulletin) about the important distinctions, sometimes misunderstood by licensees and regulators, between the doctrine of informed consent and voluntary or mandated disclosures. Some practitioners seem to want to throw everything into a disclosure statement in order to avoid a later claim by the patient that he or she was not made aware of something and that the failure to disclose it constituted negligence or some kind of wrongdoing or malpractice. Other practitioners are comfortable disclosing whatever is required under state law or regulation plus selected and limited information.

Following is a partial list of disclosures that practitioners may want to include (or if required, must include) in a disclosure statement of some kind: a) something about the nature of therapy or psychotherapy – including something indicating that there is no guarantee of a cure, b) something about the practitioner’s licensure, qualifications, and clinical orientation c) something about confidentiality and the most common exceptions thereto – both mandatory and permissive exceptions, d) something about the practitioner’s availability in general and in cases of emergency, e) something about termination of therapy by the practitioner and by the patient, f) something about the fee for services to be performed, including any policy regarding raising fees, “sliding” fees, and fees to be charged when the patient cancels an appointment or fails to show, g) the practitioner’s policy re: insurers/managed care and other third party payers, and h) something about the practitioner’s “no secrets policy” (if there is one) regarding family therapy or couple therapy.

Other disclosures that some inquire about that may be questionable, or that may require careful and nuanced discussion and drafting, include such things as 1) the likely or expected outcome of therapy, 2) the likely length of therapy, c) the nature and extent of the therapist’s record keeping system and the patient’s access to the records, 3) a statement regarding the various rights of the patient, 4) the potential risks of psychotherapy or couple therapy – including such things as the possible separation and divorce, 5) the alternatives to treatment with the licensee, including the alternative of no treatment, self help, or referral to a higher level of care, 6) the patient’s right to not use the available sessions, 7) attaching a copy of the Code of Ethics of the applicable professional association, 8) the right of the practitioner to sue the patient or refer the matter to collections if payment of fees owed is not made, and 9) something about the psychotherapist-patient privilege. If there is a required disclosure that addresses any of these issues, that disclosure must of course be made.

CONVICTION OF CRIME AND PROTECTING THE PUBLIC

Licensing boards throughout the country, in varying degrees, emphasize that their primary duty is to protect the consumer – the public – from incompetent or unprofessional licensees (those engaging in prohibited or "unprofessional conduct") and from some who are pursuing the license. While this is a worthwhile and appropriate mission, the zeal with which protection of the public is pursued can sometimes become excessive and unfairly onerous upon those licensees that the board pursues or those applicants blocked from unfettered entry into the profession. Legislators who from time to time review the performance of licensing boards not only examine how effectively and efficiently the board processes applications for licensure, but they always concentrate on the enforcement statistics that the board presents –and licensing boards know this well.

I have previously written about concerns that some have regarding the situation where an applicant or a licensee has been convicted of a crime that appears to be unrelated to one's practice of psychotherapy or if related, it is of a minor nature or well in the past. It is believed by some that licensing boards have been overzealous in their pursuit of applicants and licensees, including the imposition of onerous probationary terms and conditions, when the conviction of a crime is reported to the board. In California, recently enacted laws impose a variety of limits on occupational licensing boards with respect to this conviction of crime issue and to other conduct of licensees or applicants. The law also addresses the tendency of licensing boards to determine crimes to be substantially related to the qualifications, duties, or functions of particular licenses when such a relationship may be tenuous at best.

This successful legislative effort recognized that there was a need to set reasonable limits on the power of licensing boards to prevent qualified people from entering a wide variety of professions or to revoke or otherwise limit an existing license to practice. The legislation was opposed by the Board of Behavioral Sciences (it licenses LMFTs, LCSWs, LPPCs and Educational Psychologists), the Board of Psychology, the Medical Board, the Department of Consumer Affairs, and other occupational licensing boards. The legislation was supported by a wide array of community based and human rights organizations, including the American Civil Liberties Union. Licensing board activities (e.g., supporting or opposing legislation, promulgating rules/regulations) must be monitored closely in order to protect against overreach – despite the good intentions (protecting the public) of the regulators. This California legislation (AB 2138) was passed in 2018.