Alphabet Soup (A through M) – A Potpourri of Issues/Questions

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – December 2014

The following questions and information are intended to stimulate thought, research, and discussion. I will address some of these issues in future Bulletins. The Archives section on this website contains information about and discussion of some of these questions/issues.

Advertising – when is it appropriate to refer to yourself in advertising as an expert or specialist in the treatment of a particular population of patients/clients or the treatment of a particular mental health condition or disorder? What is your liability if you are unable to produce sufficient evidence of your expertise or specialization when challenged, as upon cross-examination of you/your testimony? Who will decide whether your advertising of expertise or specialization is supportable? If certified in a specialty, what is the bona fides of the non-governmental certification entity? Do you want to be held to a higher standard of care than the standard of care for the reasonably prudent practitioner?

Business – Running a therapy or counseling practice not only means that you are practicing your profession, but also that you are conducting a business. Are you a solo practitioner – a sole proprietor? Are you in a partnership? Are you in a loose group? Why haven't you incorporated as a professional corporation? Do you know the advantages and disadvantages of a sole proprietorship, partnership, loose group affiliation, or incorporation as a professional corporation (if permissible in your state)? What form of business would allow you to lawfully practice with practitioners of another licensure – such as, one or more physicians or mental health practitioners of various licensures?

Crimes – Are the past criminal acts committed by your adult patient or client to be kept confidential? If your client tells you that he steals from department stores, must that be kept confidential? What about the fact that your client sells cocaine? What if the sales are to high school students? If your client tells you of a homicide committed years ago, is that confidential? What if the crime is against a senior citizen? What if the nineteen year old patient had consensual sexual intercourse with his sixteen year-old girlfriend? What if your patient admits to viewing or possessing child pornography? Are those crimes to be kept confidential? What if the patient received the pornography from a friend? What if the patient knowingly downloaded the pornography but did not share it with others? One or more of these questions concerning crime and confidentiality are often answered incorrectly – so be careful – the consequences for the practitioner and the patient can be great.

Death of the Client/Patient – Does death of the patient trigger any duties on the part of the therapist or counselor? Does the duty of confidentiality remain? Is the psychotherapist-patient privilege still

applicable? What if the death of the client is due to suicide – how is confidentiality or privilege affected? Must the practitioner cooperate (e.g., share information) with an investigating coroner or medical examiner? What if family members want to talk with the therapist or are questioning whether the therapist did enough to prevent a suicide or warn close family members?

Exploitation – One way that a therapist or counselor might be found "guilty" of exploiting a client is by treating the client when it should be reasonably clear to the prudent practitioner that the client is no longer benefiting from the treatment. Such an allegation could arise in a number of different scenarios, one of which is when an insurer is reimbursing for the care and treatment continues for the primary purpose of the practitioner's financial gain. Another way that a mental health practitioner might be exploitative is when entering into certain dual relationships with current or former (shortly following a termination of the professional relationship) patients.

Fees – in particular, sliding fee scales! Are you aware of the advantages and disadvantages of a so-called sliding fee scale? Is a sliding fee scale a recipe for trouble in a private practice sole proprietorship? Should such a method of determining the fee to be charged only be used by nonprofit and charitable corporations? On what bases would fees differ? If the patient has health insurance covering mental health treatment, how does the fee slide (if at all) – that is, in what direction?

Guardian ad litem – A guardian ad litem is a person who has been appointed by the court to represent the interests of, for example, a minor who is involved as a party in litigation. For example, the guardian ad litem might be the parents of a child who was injured in an automobile accident or it might be a non-parent, depending upon the case. Usually, the guardian ad litem would be the holder of the psychotherapist –patient privilege during the course of the litigation and would have access to mental health records of the minor. Each state's law must be checked to see the extent of the power granted and the exact title of the appointed representative.

HIPAA – If you use the acronym, don't make the mistake of using HIPPA! HIPAA is federal law. Federal regulations (rules) implement the laws. The Privacy Rule is a series of regulations that require that the patient receive certain information regarding, among other things, privacy, confidentiality, and patient access to records. HIPAA applies to those health care providers who meet the definition of "covered entity." Are you a covered entity (sole proprietors can be "covered entities')? Do you know the difference between "psychotherapy notes" and "psychotherapy treatment records" under the Privacy Rule and whether or not the patient has the right of access to either or both?

Immunity – Are there one or more immunity statutes in your state protecting mental health practitioners for various acts or failures to act? Immunity statutes are important because they provide a safe harbor for practitioners, provided that the practitioner complies with the requirements of the immunity statute. Child abuse reporting laws, elder abuse reporting laws, and duty to warn statutes typically provide practitioners with immunity from liability. This means that lawsuits against practitioners can be dismissed by the court early in the process or that the filing of a lawsuit may be discouraged. The extent of the immunity varies with individual state laws. You should be aware of all of

the immunity laws that apply to licensed mental health practitioners in your state.

Joint Custody– State statutes often define terms like joint custody, joint legal custody, and joint physical custody. It is critical that practitioners understand the law surrounding these terms, since it is important to make sure that the parent bringing a child to treatment has the legal authority to alone authorize or consent to treatment of the child. While it is nice to have the consent of both parents, circumstances may not always allow for that to occur. Making this determination, and being clear about it, will help practitioners deal with the other parent who later calls demanding that treatment immediately cease.

Keeping records – What if a patient requests in writing that you destroy your records of the patient's treatment (prior to the time frame dictated by law) because he or she is concerned about privacy and confidentiality? Does state law provide you with the option to comply with the patient's request if you deem it reasonable and if the patient is willing to absolve you from liability for early destruction of the records? Are records to be kept for the protection of the practitioner, for the protection of the patient, or to assist licensing boards in investigating complaints? Should the patient and the practitioner, if they agree, be able to decide this question without interference from the state?

LLC– I sometimes hear practitioners talking about doing business as a limited liability company instead of a sole proprietorship, partnership or professional corporation. It is important to research the propriety of such an entity in your state. In California, for example, it is considered against public policy for a licensed health care professional to conduct business as a limited liability company. The public policy concept, simply put, is that the health practitioner's liability for professional negligence should not be limited, since this would be detrimental to the consumer of health care services. Other states may allow this or a similar form of business, with limitations intended to protect the public.

Medical/Psychological – It is well accepted that there is a relationship between physical/medical problems and psychological/mental health issues. I recall a case where the evidence revealed that had a referral been made to a physician for a medical examination/evaluation, the patient's mental health problems would likely have been more quickly and properly treated. Mental health practitioners should be aware of this relationship and should, in appropriate cases, refer the patient to a physician for a medical exam, and/or should obtain medical records from a prior treating physician. In a malpractice lawsuit, it would not be uncommon for the opposing lawyer to ask the defendant mental health practitioner (among related questions): Isn't it a fact that you never referred the patient to a physician for a thorough medical exam or evaluation?

(N through Z in 2015)