Answers to April Review

written by Richard Leslie | May 1, 2020

Avoiding Liability Bulletin – May 2020

NOTE: In the April 2020 issue of this Avoiding Liability Bulletin, I asked twenty questions on a variety of topics. My answers to those questions appear below. As stated in the April 2020 introductory note, the laws in each state often differ with the laws in other states, so the answers to these questions may also differ. My answers will, as always, rely upon or reference California law. The reader is encouraged to determine how the law in your state treats any particular issue and how the law may differ with the answers provided by me below.

1. If an adult patient informs her therapist that she was abused when she was a minor, the therapist is not under a duty to report the child abuse or to investigate the current whereabouts of the abuser.

TRUE. The adult patient who was abused when she was a minor is able to make a decision, perhaps with the help or support of her therapist, as to whether or not to report the past abuse herself. Since there is no child who is now being abused (as per the information available to the treating therapist), a child abuse report is not required. Generally, there is no duty imposed upon the therapist to investigate either the current whereabouts of the abuser or whether the abuser is presently abusing children.

2. If a parent slaps his or her 17 year old child in the face when he uses foul language at the dinner table, such conduct would not be reportable when the 17 year old child informs his therapist of such conduct.

TRUE. In states where corporal punishment is not prohibited (where reasonable parental discipline is allowed), a slap in the face of a 17 year old who uses foul language at the dinner table would not ordinarily constitute child abuse – primarily because there was no physical injury inflicted by other than accidental means.

3. If the slap in question #2 were to cause the boy's lip to bleed from a small cut, a report would not be required if it was determined by the therapist that the injury inflicted was accidental and unintended.

FALSE. If the slap in question #2 results in a cut of the lip of the 17 year old, a child report would be required because there has been a physical injury inflicted by other than accidental means. While there may have been no intent to cause the physical injury, the slap in the face was not accidental – it was an intentional act.

4. If a pre-licensed supervisee was to fail to make a required child abuse report, the licensed supervisor should immediately direct the pre-licensed person to file a report, even though the report would be late as per the applicable child abuse reporting requirements.

FALSE. While a late report by the pre-licensed supervisee might suffice in some cases, it is often better for the licensed supervisor to make the report when he or she first is informed of the failure to report. The supervisor found out about the abuse in his or her professional capacity and is under a duty to make a report immediately or as soon as practically possible.

5. A licensed therapist is required to report child abuse even if the patient tells the therapist that the abuse now being revealed was previously reported to the authorities.

TRUE. Unless the licensed therapist is able to verify that a previous report was in fact made, which is sometimes difficult to do in a timely manner, a child abuse report should be filed. It is not uncommon for patients to either be mistaken or to mislead the therapist in an attempt to avoid a report being made. The therapist should mention, in the report to be made, that the patient has stated that a report was previously filed.

6. When a licensed therapist is treating a minor who is twelve years of age or older with the consent of both parents, either parent is the holder of the psychotherapist-patient privilege.

FALSE. Since neither parent is being treated and is thus not a patient, neither parent is the holder of the privilege. The 12 year old patient, who in California can consent to his or her own treatment under most circumstances, is the holder of the privilege and may assert/claim the privilege or waive it.

7. Licensed therapists are allowed to deny the request of a parent to inspect the records of the therapist who is treating their child, regardless of the age of the child.

TRUE. California law essentially requires therapists to deny parental access when the therapist determines that access to the records would have a detrimental effect on the practitioner's professional relationship with the minor patient or the minor's physical safety or psychological well-being. If the minor has his or her own right of inspection (e.g., most minors who are twelve or older), then a parental request to inspect the records must be denied. The law provides that the decision of a practitioner as to whether or not the records should be accessed by a parent does not attach any liability to the practitioner unless his/her decision is found to be in bad faith.

8. When a minor patient who is a court ordered emancipated minor informs her therapist that she was abused by her uncle while she was an emancipated minor, there is no duty to report child abuse.

FALSE. A court ordered emancipated minor is treated as an adult for multiple purposes, as specified in state law. Typically, an emancipated minor can enter into contracts in his or her own name

and can buy or sell real estate, sue or be sued in his/her own name, and engage in other activities as an adult. In California, there is nothing in the emancipation law that suggests that an emancipated minor is not considered a "child" for purposes of the child abuse reporting law, which simply says that a child is a person under the age of 18 years.

9. Prior to the delivery of telehealth (aka telemedicine) services to a patient, licensed mental health practitioners are required to obtain the consent of the patient, which may be oral.

TRUE. Each state law may require something different from the other states, and the laws or regulations re: telehealth may change from time to time – as new issues are identified. In California, for example, the telehealth law requires verbal or written consent from the patient (it previously required informed consent) for the use of telehealth. The law requires that the consent be documented.

10. When treating a patient in your state of practice via telehealth, such treatment might need to stop when the patient leaves the state for business or personal reasons and thereafter seeks one or more telehealth sessions while out of state.

TRUE (But). In California, a regulation passed by the licensing board for the practitioners named in question # 11 provides that licensees in California may provide telehealth services to clients located in another jurisdiction only if the California licensee meets the requirements to lawfully provide services in that jurisdiction, and delivery of services via telehealth is allowed by that jurisdiction. The Board curiously states, in explaining this regulation "several states currently consider a client located in their state to be under their jurisdiction." Would a state, whether its laws allow telehealth services or not, try to limit or prevent a practitioner in California from taking a telephone call and providing services to a California client who happens to be physically located in that other state? Could that state's licensing authority credibly allege that the practitioner in California was practicing without a license in their state simply because the California client was physically located there when the call was made? This regulation is dangerous – both for practitioners and patients. How does your state treat this issue? Federal and state policymakers will likely be taking a careful look at the regulation of telehealth with respect to jurisdictional limitations and other issues as a result of the coronavirus pandemic.

11. When treating a patient via telehealth, the practitioner is required to ascertain where the patient is physically located at the start of each session, including the address.

TRUE. In California, the licensing board for LMFTs, LCSWs, and LPCCs has passed regulations that impose various requirements on practitioners who treat patients via telehealth. One of those requirements provides that each time a licensee provides services via telehealth, he or she shall verbally obtain from the client and document the client's full name and address of present location at the beginning of each telehealth session.

12. When treating a patient via telehealth, practitioners must warn the patient that if

he/she leaves the state at any time or for any reason, the practitioner may be prohibited from continuing to treat the patient because the licensing board in the state where the patient is physically located may take the position that the practitioner is "practicing without a license" in that state.

FALSE. There exists no statutory or regulatory requirement for practitioners to warn patients who are being treated via telehealth that their treatment is or might be jeopardized if the patient leaves the state (California) at any time or for any reason. While such a "travel warning" is not required, applicable regulations require the California practitioner to check with the state or jurisdiction where the patient is located to see whether telehealth may be lawfully delivered by the practitioner in California. This requirement is onerous (e.g., who does the practitioner talk with, will a timely response be made orally) and arguably unenforceable if contested. It is difficult to believe that a state licensing board would take the position that the California practitioner is practicing without a license merely because the California patient, currently outside of California, wants or needs a session (via telehealth) with his or her California practitioner. This regulation is dangerous – both for practitioners and patients.

13. Licensed mental health practitioners are generally required to inform patients, prior to the commencement of treatment, of the mandatory exceptions to confidentiality, including the duty to report elder abuse.

FALSE. There are many exceptions to confidentiality, some of which are mandatory and some of which are permissive. Typically, practitioners are not required to inform patients of each and every exception to confidentiality. While certain disclosures are required to be made by practitioners (e.g., the fee to be charged), there is no requirement in California to inform patients of the mandatory reporting laws. Prior attempts to require such disclosures have been met with arguments that such a requirement would have the effect of lessening the reporting of child or elder abuse by driving some prospective patients away or by influencing them to remain silent about prior abuse.

14. Licensed mental health professionals are generally permitted to release patient information, such as a diagnosis, to other licensed health practitioners without the patient's signed authorization.

TRUE. This is perhaps the most important exception to confidentiality under California law, which was recognized and adopted under HIPAA's federal regulations. The release of patient information to other health care providers or health care facilities must be for purposes of the diagnosis or treatment of the patient. If so, no written and signed authorization from the patient is required.

15. If a patient threatens his or her therapist with imminent and serious physical violence, the therapist is permitted to inform the police of the threat and to provide the name and home address of the patient.

TRUE. Threats of imminent and serious physical violence by patients need not be kept

confidential, for if that was the case, therapists would be vulnerable and without adequate protection. The dangerous patient exceptions to confidentiality would allow the practitioner to notify the police. Since the practitioner is the intended victim, any duty or right to warn the intended victim is rendered unnecessary.

16. Supervisors in non-profit corporations are generally not liable for the negligent acts of their supervisees.

TRUE. Supervisors in non-profit corporations are generally not liable for the negligent acts of their supervisees. The employer of the supervisee (the non-profit corporation) would typically be liable for the negligent acts of the supervisee. The supervisor could be found liable if, for example, there was proof or evidence that the supervisor was negligent in providing supervision and that the negligent supervision contributed to the supervisee's negligence and harm to the patient.

17. If a patient demands to see a copy of the treatment records during a therapy session, the therapist has a right to deny the request and to inform the patient that his/her right to access the records is not absolute.

TRUE. The right to see or inspect a copy of the treatment records (or the originals) is not absolute. For example, an oral request or demand to immediately see the records would not need to be honored. California law requires that a written request be made and that a number of days prior notice be given. Additionally, the practitioner has the right to deny the request (for specified reasons) or to provide a summary of the records.

18. When the identified patient is a couple, the mental health practitioner should generally not provide copies of the records to one member of the unit without a valid authorization from the other member.

TRUE. When a mental health practitioner is treating a couple, the couple is typically considered to be the patient, so requests to inspect the records or to obtain a copy of the records should properly be made by the couple rather than one member of that dyad.

19. When a licensed mental health practitioner is served with a subpoena for the treatment records of a patient, the practitioner must take care not to assert the psychotherapist-patient privilege until the patient, who is the holder of the privilege, directs the practitioner to do so.

FALSE. When a licensed mental health practitioner is served with a subpoena for the treatment records of a patient, the practitioner would usually assert the privilege upon service of the subpoena. California law specifies that the privilege shall be claimed by the person who was the psychotherapist and who made or received a communication subject to the privilege whenever he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege. Thereafter, contact with the patient and the patient's attorney is necessary to ascertain

whether they are waiving or asserting/claiming the privilege and whether they are in agreement with each other.

20. The duty of confidentiality and the psychotherapist-patient privilege survive the death of the patient.

TRUE. The duty of confidentiality and the psychotherapist-patient privilege both survive the death of the patient. With respect to confidentiality, a signed and valid authorization to release a deceased patient's records or selected information would have to be signed, for example, by the personal representative of the deceased. With respect to privilege, the holder of the privilege when the patient is deceased is again the personal representative of the deceased. Practitioners must proceed carefully when the patient is deceased to ensure that the personal representative (e.g., the executor) is clearly identified and empowered to act on behalf of the deceased. Letters of appointment of the personal representative are typically issued by a probate court.