AVOIDING LIABILITY – SOME BASICS

written by Richard Leslie | September 1, 2022

Avoiding Liability Bulletin – September 2022

NOTE: This article was first published on the CPH Insurance's website in November 2014. It is republished here as a reminder of some basic and important principles that mental health practitioners must understand in order to protect their professional licenses while competently performing lawful and ethical services to patients. It appears below with minor and non-substantive changes.

AVOIDING LIABILITY – SOME BASICS

Much of what I write in this monthly column/blog is about a variety of specific legal topics and issues that affect mental health practitioners in the practice of their profession, such as confidentiality, privilege, child and elder abuse reporting, dual or multiple relationships, dangerous patients, access to records, treatment of minors, insurance fraud, termination and more. Knowledge of the laws and ethical principles related to these and other topics discussed each month in this blog is a prerequisite for attempting to avoid liability. Certainly, mental health practitioners desire to avoid liability. However, there are things that mental health practitioners intentionally do (as opposed to practicing negligently) that will affect or result in liability – in one form or another. Hopefully, this article will serve as a reminder of some basic principles to understand so that liability exposure can be minimized.

Before further addressing avoiding liability, a few comments about "liability" follow. Liability, simply put, is the state of being liable. Being "liable," according to the dictionary, essentially means legally bound or obligated, as to make good or make whole any loss or damage that occurs in a transaction. In other words, the person involved is legally responsible for his or her behavior and may have to "pay a price." Liability is a broad legal term with a variety of nuanced meanings. As described in one case, it is the condition of being responsible for a possible or actual loss, penalty, expense, or burden. One can have liability in a criminal matter, in an administrative proceeding (enforcement/disciplinary action) by a governmental entity, or in a civil matter. Mental health practitioners should be concerned about these kinds of matters because it is not uncommon for practitioners to be involved in one or more of such matters. Members of professional associations may have liability for a violation of professional ethics (not addressed in this article) – which could ultimately trigger licensing board notification and involvement (depending upon state law).

In a criminal case (e.g., *driving under the influence of drugs or alcohol, possession of illegal drugs, assault or domestic violence, insurance fraud, shoplifting/petty theft, false advertising),* the standard of

proof is guilt beyond a reasonable doubt. Many criminal cases are resolved by a plea of guilty or "no contest" sometime before trial. Both are typically considered convictions for purposes of licensing board disciplinary actions. It is not uncommon for mental health practitioners to be involved in criminal matters. The examples mentioned above are just some of the different kinds of criminal cases commonly seen. What may at first appear as unrelated to a license to practice mental health or psychotherapy may in fact (and in law) be related. Thus, a driving while intoxicated conviction could result in the loss or suspension of one's professional license – even though the criminal case does not directly involve patient care. Most state laws allow for a licensing board disciplinary action based upon the conviction of a crime substantially related to the qualifications, functions, or duties of the licensee. Licensees must realize that their behaviors outside of the office (not involving patient care) can impact their professional careers.

With respect to administrative or enforcement matters brought by licensing boards, the standard of proof is typically less than in a criminal case and something more than in a civil case (preponderance of the evidence) – often, it is the clear and convincing evidence standard, or something similar. A significant number of actions by licensing boards are the result of their being informed that a licensee has been convicted of a crime. Boards receive reports from police agencies, prosecutorial agencies, and the courts. Many of these reports may be required by law. Disciplinary action by a licensing board could also be the result of the practitioner's failure to pay child support or the failure to pay state income taxes (in those states where the law specifies that the licensee is subject to discipline for such actions). Whether the result of a criminal conviction or a failure to pay such required obligations, these kinds of cases usually have nothing to do with direct patient care issues, yet the license to practice is jeopardized. Liability in most of these cases is clearly preventable or avoidable by the licensee.

As described above, many licensing board enforcement actions are the result of intentional conduct or misconduct by the licensee, rather than the result of "mere" negligence. In fact, in California and elsewhere, negligence is not considered such "unprofessional conduct" as might result in disciplinary action by the relevant state agency. Most states require proof of gross negligence, incompetence, or repeated negligent acts as a predicate for state action affecting professional licenses. Often, when gross negligence or incompetence is alleged, the actions of the accused are also intentional. Thus, liability in such cases could have been avoided by the practitioner. Don't massage the patient's shoulders to relieve pain, don't go on cruises with patients, and don't enter into business relationships with patients. I was once asked by a therapist whether I thought she could attend the patient's wedding. I answered "Yes, but don't get drunk and jump up on the table to dance." She understood!

Negligence (broadly, the failure to provide that level of care of the reasonably prudent practitioner of like licensure under the same or similar circumstances), or allegations of negligence, may result in a civil action against the practitioner for monetary damages. The standard of proof in a negligence action is typically the preponderance of the evidence rule – that is, a majority of the evidence points to negligence (e.g., negligence is more likely than not). In criminal cases, the standard of proof (the highest) is guilt beyond a reasonable doubt. As mentioned above, clear and convincing evidence, or something similar, is the standard in licensing board administrative proceedings. The least rigorous

standard of proof is in civil actions for negligence. Avoiding a negligence action is of course important, but the reality is that there are not an overwhelming number of cases that simply involve allegations of negligent care resulting in physical or emotional harm to the patient.

Negligent patient care can be avoided by keeping current with and sharpening diagnostic and treatment skills through ongoing education, training, and supervision, and by consulting with colleagues and experts often, or at least when needed. One of the best pieces of advice I received when I began private practice as an attorney was to not accept every case or client that came my way, even though I was in the process of building my practice. Learning to say “no” to a potential client may be the best decision a mental health practitioner can make. Practitioners must use their best judgment and their instincts in order to identify the right circumstances in which to say “no.”

Another way to limit liability is to make a referral when it becomes clear that the patient’s problem would be better treated by someone with more knowledge or expertise in the clinical area involved. It is important to consider including in one’s disclosure statement, given to the patient at the outset of treatment, the ethical and legal principle that the practitioner does not and will not practice beyond the level of their competence, as established by their education, training, or experience. Letting the patient know, in advance, that a referral may need to be made under such circumstances may be helpful to both the patient and the practitioner. Patients will presumably receive a better level of care, and practitioners will be stopped from getting in deeper, beyond the level of their competencies or their comfort zones.