Brief Reminders/Questions

written by Richard Leslie | October 1, 2024

Avoiding Liability Bulletin – October 2024

***NOTE:** This article was first published on the CPH and Associates' website in January 2017. It appears below with minor changes. The purpose of these brief comments and questions Is to help the reader spot issues when they arise and to generate further thought and research.*

BRIEF REMINDERS/QUESTIONS

Advocacy: Do you consider yourself to be an advocate for your clients? Is advocacy a part of your legal or ethical responsibilities or does it depend upon the circumstances? When you testify in court, you would generally not be an advocate. You would be there to honestly and truthfully answer the questions that you are asked and you would not exaggerate, embellish, or hide things to protect your client.

Barter: While most practitioners do not engage in barter with patients, one never knows when a circumstance will unexpectedly arise where the issue of barter will be raised. What does the law say, if anything, about barter? What about the applicable ethical standards? Is barter permitted, but only at the request of the patient? Can you accept either goods or services in exchange for your professional services? May you engage in a barter arrangement provided that there is no exploitation on your part? State law and ethical standards usually provide the answers to these questions.

Confidentiality: Is the fact of the therapist-patient relationship confidential? While you ordinarily would not tell an investigator (whether police or otherwise) whether you were treating a particular patient, many counseling or therapy practices (including nonprofit agencies and clinics) have waiting rooms, as with physicians, where patients may recognize one another or otherwise learn the identity of another patient. There is usually one door for ingress and egress. Typically, confidentiality laws are concerned about the confidential communications between patient and practitioner. Those confidential communications are protected by laws dealing with the psychotherapist-patient privilege.

Dependent Adults: It is important to know the definition of this term, or similar terms, that are typically included in elder abuse reporting statutes. This sometimes overlooked aspect of the reporting laws can result in a failure to report suspected or known abuse. Practitioners typically know that a child is defined as a person under 18 years of age, or that an elder is defined, in part, as a person who is 65 years of age or older (state law may vary with respect to age). Sometimes practitioners may forget about those between the ages of 18 and 64 who may "qualify" as a dependent adult or similarly named protected person. Failure to report dependent adult abuse is typically a crime and subjects the

practitioner to liability. In some cases, a domestic violence victim may meet the definition of "dependent adult."

Evidence: Your records may used as evidence in a lawsuit. You may be forced to testify in a lawsuit or at a deposition. Your testimony is evidence. Your curriculum vitae or advertising material may be used as evidence in a lawsuit or administrative proceeding. Be careful when you put things in writing. As I have written before, I have seen cases lost or severely compromised because the practitioner was proven to be dishonest about some written material unrelated to the treatment.

Family Unit: When you are treating a family, it is essential that you are clear with those being treated as to who is considered to be the client and the nature of the relationship that the practitioner will have with each person present at the session. Failure to be clear at the outset can result in conflicts between one of the individuals in treatment with the family unit. What if one of the individuals seeks confidential personal therapy – is a referral required? Is a referral wise?

Felonies and misdemeanors: Many patients commit crimes during the course of therapy or have committed crimes in the past, and they may reveal such activity to their therapists or counselors during the course of treatment. Crimes can involve petty theft, grand larceny, fraud, drug use or sales, violence against others, possession of child pornography, driving under the influence, spousal abuse … and the list goes on. Some crimes may have been committed a long time in the past. While some states may require the reporting of certain criminal activity of patients, the general rule seems to be that the past crimes of the patient are confidential. Of course, there are statutory exceptions related to child abuse, elder abuse, and dependent adult abuse reporting. There may be other exceptions, and it is important, or critical, for practitioners to know where the lines are drawn.

Guarantor of a cure: You do not want a client to be able to point to any written material, whether it be from an advertisement (containing testimonials or otherwise), or from the written disclosures and information you give to the client at the outset of treatment, that can be interpreted as a guarantee of a cure or an assurance that treatment will be successful.

Incorporation: Mental health practitioners who are in private practice often conduct business as sole proprietors, sometimes under a fictitious business name. Others may choose to incorporate their practice for a variety of reasons, including having an inter-disciplinary practice. Care must be taken to form the appropriate kind of corporation. I have spoken with therapists who were doing business as a general business corporation or as an LLC, in violation of a particular state law. In some states, a health professional who wishes to practice in the corporate form must form a professional corporation – of one kind or another – depending upon one's licensure. One of the advantages of doing business as a professional corporation is that the corporation may be allowed to hire persons of various licensures (e.g., psychologist, physician, LCSW, etc.) to perform services within their respective scopes of practice. Thus, in some states, a mental health professional corporation may be able to offer and receive payment for medical services rendered by a licensed physician. The physician may be a shareholder in the corporation or merely an employee. Check the law in your state.

Joint holders of privilege: It is important to remember that there are times when there are joint holders of the psychotherapist-patient privilege, such as when the mental health practitioner is treating a couple and where the identified patient is the couple. In such circumstances, the practitioner would typically assert the privilege on behalf of the joint holders (the couple or the family unit, for example) and resist releasing treatment records or information to third parties (or to an individual member of the unit being treated) until the consent of all joint holders is obtained.

Kickbacks: This word may not typically be used, but it should be remembered that in most states there are restrictions or prohibitions against health care professionals offering to pay or paying for the referral of a client or patient, or receiving payment for a referral made, in any manner and to any degree. Such a payment is considered to be a kickback, as that term is typically understood. Referrals for health care services should be made solely in the best interests of patients and should not be made because of a payment made or received for the referral. Payment for referrals by health care professionals, whether in the form of money or otherwise, is typically a crime.

Parental access to records: It is important to know, with the attendant nuances that may apply in the particular state involved, when the practitioner may lawfully deny a parent access to the child's records. In some cases, it may be the duty of the practitioner to deny parental access. In divorce and custody cases, it is not uncommon for the noncustodial parent (physical custody) to seek the records in situations where the custodial parent has unilaterally authorized the treatment of the minor. The noncustodial parent may still retain joint legal custody (both parents share the right and responsibility to make decisions related to the health, education, and welfare of the minor) and often feels entitled to access the records. This feeling of entitlement may be misguided. Often, if the minor is someone who could have consented to treatment on their own behalf, the minor is the one who controls access to the records. Check the law in your state so that you are prepared for such situations.

Termination: Is there ever a duty or obligation to terminate treatment with a client against the wishes of the client? In my view, the general answer to this question is "yes," subject of course to a state law or regulation that provides otherwise. From an ethical perspective, and in an effort to steer clear of a charge or allegation involving financial exploitation of a client, mental health practitioners are usually on good ground and arguably acting under an ethical duty when they terminate the relationship because they have determined that the client is no longer benefiting from the treatment and that further treatment would solely be for the financial gain of the practitioner.