Confidentiality – Disclosures to Patients

written by Richard Leslie | October 2, 2023

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Below you will find topics that I have written about in prior issues of the Avoiding Liability Bulletin.

I make brief comments* here and *I ask questions* to highlight some things to keep in mind or to ponder and research in order to help you minimize the likelihood of incurring liability. Once you spot the issue or recognize the problem, it is usually possible to ascertain, through research or consultation, the applicable laws, regulations, case law, or ethical principles that will govern.

CONFIDENTIALITY – DISCLOSURES TO PATIENTS

It is critical to know which exceptions to confidentiality, if any, must be disclosed to the client prior to the commencement of treatment. Most state laws or regulations specify required exceptions to confidentiality (e.g., reporting child or elder abuse) and permissive exceptions to confidentiality (e.g., sharing information with other licensed health practitioners or facilities for the purposes of diagnosis or treatment), where a signed authorization from the patient is not required. The full list of mandatory and permissive exceptions to confidentiality may be so long as to render it impractical, unnecessary, or in some cases, unwise to disclose all of them to the client – unless required. The federal HIPAA Privacy Rule specifies disclosures regarding confidentiality that must be made in the Notice of Privacy Practices given to patients of covered entities/providers.

In addition to whatever disclosures may be required by state law, practitioners may choose to disclose some of the more common exceptions to confidentiality – such as the child abuse, elder abuse, and dependent adult abuse reporting duties, laws that allow communications with other health care providers or facilities for diagnosis or treatment purposes, and laws that allow disclosure for purposes of obtaining payment (insurance reimbursement). Some may also choose to disclose the exceptions related to patients who are determined to be dangerous to self or others. The exact nature of the various disclosures will depend upon applicable state law.

EVIDENCE

The evidence you will typically deal with during litigation consists of your treatment records and your testimony in court or at a deposition. As for treatment records, they can be subpoenaed in civil or

criminal cases. Whether the records can be kept out of evidence, either entirely or partially, will depend upon the assertion of the psychotherapist-patient privilege by or on behalf of the holder of the privilege and the court ruling as to whether the privilege has been waived or is inapplicable. Generally, the privilege is waived by operation of law when patients put into issue in a lawsuit their mental or emotional condition – that is, when they allege that they suffered mental or emotional harm as a result of the actions of the party being sued.

As for your testimony, opposing lawyers will usually look to challenge and impeach your credibility as a witness by, among other things, exploiting differences between your testimony and your records, or by challenging the accuracy of your curriculum vitae. It is therefore important to be accurate in describing your background. I have seen exaggerations or misstatements in advertisements or in resumes negatively affect the very outcome of the case because of the damage done to the therapist's credibility.

SCOPE OF LICENSE

Does the scope of your license, allow you to perform psychological testing or to advertise the fact that such testing is a part of the services that you offer? Must the testing be done with patients that you are treating, or may you perform the testing for patients referred by other practitioners? Does the scope of your license allow you to give nutritional advice or to recommend dietary supplements to existing clients? Does the scope of your license allow you to engage in limited, non-sexual physical contact with your client or is physical contact specifically prohibited? Is hugging a client or other nonsexual touch lawful and appropriate under certain circumstances**?** Do you understand the difference between the scope of your license and the scope of your competence?

PRIVILEGE

Privilege involves the right to withhold testimony in a legal proceeding. As soon as the practitioner knows that a subpoena for records or for testimony in court or at a deposition is soon to be served, or as soon as it is served, the practitioner should be ready to assert the privilege and communicate with the "holder" of the privilege. Do you know who the holder of the privilege is when you are treating a minor with the consent of a parent? Do you know who the holder of the privilege is when you are treating a couple? Do you know who the holder of the privilege is when the patient is deceased? Does the law in your state provide for joint holders of the privilege? Generally, the holder of the privilege is the patient – but depending upon circumstances and the law in your state of practice, there are some fine points that you must understand in order to avoid making a mistake.

Can you explain the difference between a confidential communication and a privileged communication? Are all confidential communications privileged? Are all privileged communications confidential?

DANGEROUS PATIENT

When a therapist determines that the patient presents a serious danger of violence to another, the

therapist may be under a duty, statutory or otherwise, to take steps to protect the intended victim. This is not necessarily the case in every state, since some states may not impose an affirmative duty to warn or protect third parties. In states where there is a duty, the practitioner must know when the duty arises, what the precise duty is, and whether a particular course of action may result in immunity from liability for the practitioner. In California, many practitioners have long thought (mistakenly) that the famed "Tarasoff" decision of the California Supreme Court in 1976 created a duty to warn. Actually, the Court originally did create such a duty – but shortly thereafter, they corrected themselves! The Court stated that once the duty arises, the therapist incurs an obligation to use reasonable care to protect the intended victim against the danger. This duty can be discharged in a variety of ways – depending on the particular circumstances.

If it is proven that the practitioner acted as a reasonably prudent practitioner would have acted under the same or substantially similar circumstances, can liability ultimately be avoided even though the client, after leaving a session, commits an act of violence against a supervisor at work? Is there a "duty to predict" dangerousness in the state in which you practice? Must the patient actually communicate to the therapist a threat of physical violence against another before any duty to protect arises?

CHILD ABUSE REPORTING

Does the law in your state require that you disclose to the patient, prior to the commencement of treatment, the child abuse reporting requirement imposed upon you? Many therapists do disclose their reporting duty even though disclosure may not be required by law. Some legislators have felt that disclosure of the reporting duty might inhibit patients from sharing information about the abuse, while others argue that knowledge of the reporting duty might help those who have been abused, and even those who have abused, to eventually share their experiences with their therapists – to reach out for help, knowing that it will be reported.

Is a court-ordered emancipated minor still considered to be a "child" for purposes of the child abuse reporting law in your state? Is it true in your state that *generally* there is no need to report child abuse when an adult patient tells you of experiencing physical abuse that occurred when the patient was a child?

ELDER ABUSE REPORTING

Your client tells you of an incident involving the financial fraud suffered by her 70 year old father residing in another state. Is an elder abuse report required? Does the abused elder need to be located in your state of practice in order for a report to be required? Do you believe that you are bound by the reporting laws of other states or only the reporting laws of the state in which you practice? Are you aware of the definition of financial abuse in the elder abuse reporting law? What if the abuse is committed by an entity (e.g., an insurance company or bank) rather than a caretaker or other individual? Mandated reporters may fail to recognize the existence of reportable financial abuse of an elder because its definition is broader than they imagined and because the elder may not be mentally or

physically impaired and may be competent in all respects.