

Contact with Patients Between Sessions Curtailed in California: A Dangerous Precedent

written by Richard Leslie | January 2, 2018

Avoiding Liability Bulletin - January 2018

At the beginning of the professional relationship between psychotherapist and patient it is important for practitioners to think about how and when, if at all, they will inform their patients of their availability between regularly scheduled in-office sessions. Typically, practitioners want to see their patients during regularly or specially scheduled sessions. There are many practitioners who are open to other contact with their patients in between scheduled sessions, whether by email, text, telephone, or other electronic means. The manner of conducting one's practice should be determined by the practitioner, provided that there is compliance with existing laws, regulations, and ethical imperatives. Hopefully, the laws, regulations, and ethical imperatives are reasonable and appropriate, and do not unnecessarily restrict patients and practitioners from interacting in mutually agreeable ways.

Those practitioners that are open to such contact need to be clear with their patients as to the financial implications of such "inter-session" contact (the fees to be charged or the basis upon which the fees are to be determined) and the nature, extent, and manner of any such communication. Such clarity should be expressed in writing, typically given to patients at the outset of treatment. Availability for "emergencies" should also be covered in the disclosures that are given to patients at the outset of treatment. Many practitioners' answering machines say that "if this is a life-threatening emergency call 911." The definition of "an emergency" is of course important, as is the communication between practitioner and client so that the particular term used is clearly understood. Some state laws or regulations, and relevant ethical standards of professional associations, may require or encourage practitioners to disclose the extent of their availability in emergency situations and for other contacts between sessions.

Telephone contact between sessions, or a session conducted via telephone, whatever the length of the call, may be appropriate and necessary in a wide variety of circumstances. Some telephone sessions may be billed to a health insurer and be reimbursed. Telephone calls could come from patients, sometimes unexpectedly, while at home or at other locations within or outside of the state, since patients will travel - whether related to business, pleasure, vacation, family, or for other purposes. I have previously written about the California licensing board that has issued a travel warning to California consumers. It essentially warns consumers that their California-licensed mental health practitioners may not be permitted to provide telephone counseling or other mental health services via the telephone (or otherwise electronically) when the traveling patient calls from outside of California

unless, among other things, the practitioner first checks with the state that the particular patient is located in to determine if the law in that state allows the California licensee to provide professional services. The travel warning arises from, and is related to, a recent and problematic board regulation related to the delivery of health care services via telehealth.

This warning to consumers of mental health services in California, issued by the licensing board for marriage and family therapists, professional clinical counselors, educational psychologists and clinical social workers, is outrageous insulting, and dangerous. I know of no state that would claim or take the position (based upon a reasonable and constitutional interpretation of its licensing law) that a person from California, who is traveling in that state, cannot lawfully access their California therapist via the telephone (or via other electronic means) because the therapist would be practicing without a license (typically a crime) in the state where the traveling patient happens to be located. The California practitioner who answers a telephone call and provides mental health services to the California client who calls while located in another state has simply done what would be expected of a competent and ethical practitioner. The therapist has been available to the patient in a time of need, perhaps acute need or crisis, just like they agreed to at the outset of treatment!

But apparently, in California, the licensing board may try to suspend or revoke the license of some California practitioners that they regulate – depending upon the particular state or country that the patient happens to be located in when the telephone call is made by the patient. Should the mental health practitioner tell the patient that I cannot talk to you if you travel to States A, E, N, etc., but if you travel to States B, C, F, etc., feel free to call me? Patients and consumers in California, to the extent that they know about this travel warning and choose to abide, are being disrespected, unjustifiably scared, and unduly deprived of the services of their therapists and counselors – at a time that may be of great importance to them. The previously mentioned licensees in California are in danger of disciplinary action simply for being available to the patient (via the telephone), whether in a time of great need or otherwise. If a telephone session does not occur because of the practitioner's fear of possible disciplinary action, the issue of abandonment could be raised by the patient.

Travel in the United States should not rob or jeopardize the patient's/client's right to communicate via telephone with, and receive services from, their trusted therapist or counselor in California. In this technologically advanced time, when telehealth and telemedicine laws are aimed at increasing access to mental health care, such thinking (the travel warning issued to California consumers by a state licensing board and the newly imposed duty of a practitioner to check with some other state to see if a telephone call can be answered and the patient served) is both curious and bizarre. In contradistinction to the state licensing board, the Veterans Administration has recently proposed federal regulations that would allow state licensed mental health practitioners employed by the VA to provide telehealth services irrespective of the state that the patient or practitioner is located in at the time service is provided.

Readers may think that such a misguided and dangerous assertion of power by the State (the travel warning) would be challenged – not only for the licensees affected, but for the welfare and best interests

of patients. It appears that this travel warning has occurred without opposition or protest from the four affected professions. A class action lawsuit by California patients, claiming among other things, that the State of California is impermissibly and unconstitutionally limiting access to their treating professionals in California, might result in relief from such unjustified interference with so vital a relationship as psychotherapist and patient. No California patient should believe that if he/she is traveling to another state, access to his/her California mental health practitioner by telephone (or other electronic means) may be prevented or limited by some other state's licensing law (or, as the licensing board asserts, by the absence of a telehealth law in the other state).

It appears that the full import and reach of the travel warning and the telehealth regulations promulgated by the licensing board has not yet been realized by patients and practitioners. The negative and disruptive implications for California practitioners and patients are too numerous to fully discuss here. Practitioners in other states should be watchful and knowledgeable about similar attempts at public policy in their respective states. Technology is rapidly changing. States and regulatory boards will continue to tweak or enact telehealth laws and regulations. Practitioners and trade associations throughout the country must be vigilant in order to avoid unintended consequences and unnecessary and unreasonable incursions into the vital mental health practitioner -patient relationship.