Death Of The Practitioner – Coverage, Records, And Professional Wills

written by Richard Leslie | May 24, 2016

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Death – what an unpleasant thought! However, I was asked to comment on the subject, so I will. The more complete background is that several insured practitioners have asked CPH Insurance about what happens to their coverage when they die. Suppose that an insured therapist or counselor dies, and then his or her estate is sued for the alleged negligence or wrongdoing of the practitioner that occurred prior to death and while engaged in active practice. Is there professional liability coverage after the death of the practitioner? Does the coverage "die" with the death of the practitioner? Will the insurer defend the case? If there are records in existence, what will or should happen to patient records once the practitioner dies? These questions give rise to one other question (at least for this article) – is it necessary to prepare a "professional will?"*Some* thoughts on these subjects follow.

Coverage

I do not speak for the insurer (or any insurer) on coverage questions, but merely express my views about the subject generally, and these views are not applicable to a particular set of circumstances faced by an individual insured. Coverage decisions are of course made by the insurer and depend upon many factors, not the least of which are the policy provisions and applicable state law.

When an insured therapist or counselor dies, his or her coverage does not necessarily die. While there is seemingly no coverage for acts, errors, or omissions that occur after the death of the practitioner (since there can be no acts, errors, or omissions by a person once dead), there is coverage for acts, errors or omissions that occurred while the practitioner was alive, assuming that the premium had been paid, the policy was in full force and effect, and the act, error or omission was a covered professional incident. There could be a factual scenario where the insured knew about a possible claim (or should have known), failed to notify the insurer as required under the policy, and then died. While the insurer could try to deny coverage because of the alleged lack of proper notice by the insured, the insurer would, in most situations involving death of the insured, have a heavy burden in court should its decision to deny coverage on this basis be challenged. Of course, much depends upon the particular facts and circumstances of the case.

Suppose that a mental health practitioner negligently treated a patient or is engaged in a dual

relationship with the patient that caused emotional harm to the patient. Assuming that the therapist dies at some point during the course of treatment, perhaps suddenly and without prior warning, the patient or client is not precluded from filing a claim or suit against the therapist's estate for the negligence of the practitioner that occurred during the course of treatment. There would, in my view, be coverage under such a circumstance and a claim or suit should be defended (or settled, depending on the circumstances) by the insurer, and any judgment should be paid – within policy limits. On the other hand, suppose that the therapist or counselor who died unexpectedly left a "professional will," and suppose that those charged with carrying out the duty to wind down the business handle things in a shoddy and negligent manner. Would the malpractice insurer cover claims or suits arising out of the negligence of the executor or licensed professional hired to assist in the winding down of the practice? My un-researched opinion is that, at a minimum, the insurer would be reluctant to accept coverage for such events happening after the death of the insured.

Records

In defending cases involving the death of the therapist, the insurer and the law firm retained to represent the deceased practitioner (and estate) are both without a very important witness – the alleged wrongdoer. Defending such a case, in the event that it is not settled, could prove difficult. However, depending upon the facts and circumstances, such as the nature and extent of the treatment records and the relative strength or weakness of the allegations, a case may be successfully defended. For example, even if the plaintiff proves some amount of negligence, he or she may have trouble proving monetary damages (harm). Further, a jury or judge may be disinclined to render a judgment against someone who is not there to defend himself/herself, unless the case for negligence is clear and the harm is substantial.

As for the treatment records, it would generally be a mistake for anyone to destroy the records after the death of the practitioner, even if done to protect patient privacy. Records are kept for the benefit of both the therapist or counselor and the patient. Patients have specified rights to access (inspect, copy, amend/addend) their records under state law and under HIPAA (for covered providers). Concerns about privacy of the patient (and therefore, destruction of the records) should give way to maintenance of the records in a safe and secure manner so that the patient can continue to be treated by the subsequent therapist or counselor (or facility), who might want or need the benefit of the treatment records. Confidentiality of the content of the records must be uppermost in everyone's mind. It is important to remember that HIPAA regulations and most state laws (check if you are not sure) allow licensed health practitioners to share patient records and information with other health care providers and certain health care facilities for the purpose of diagnosis or treatment of the patient – without a written authorization (although one may be easily obtained).

Many states have laws that require the records to be kept for a prescribed period of time. The time frame is usually different for adults and minors. Some of these laws may address how the

requirement to keep records is affected by the death of the practitioner. State law may also specify what happens to the records upon the death of the therapist and what actions the estate of the therapist or others must take to announce the death of the therapist. State law may specify the location and manner of access to the records. Other states may have no law that covers the time frame for the maintenance of treatment records, other than laws that establish psychotherapist-patient privilege and the duty of confidentiality. Licensed marriage and family therapists in California are required by law to keep that amount of records consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered. However, no time frame is specified for how long records must be kept after the termination of treatment, although there is such a law that applies to licensed psychologists.

The "Professional Will"

With further respect to the death of the practitioner, there is the topic of the "professional will." I only address in this article the issue of whether there is a duty to have a professional will, and what the liability might be for not having one. I posit this scenario: A healthy 45 year-old therapist or counselor, in a sole private practice, dies suddenly and unexpectedly in an automobile accident or in a home invasion robbery turned fatal. The practitioner had no professional will, but did have a traditional will disposing of his or her personal and real property. Suppose further that a patient claimed harm and sought monetary damages for the manner in which her transfer to another therapist took place (after the death of her therapist), or questioned the quality of the referral made, or complained about the fact that no referral was made and she was forced to find her next therapist without assistance. What if she alleged that the deceased practitioner was negligent in not having a professional will? What is the liability of the estate, if any, for the alleged negligence of the practitioner?

I do not believe that a mental health practitioner has a duty (absent a law, regulation, or applicable ethical standard establishing or suggesting such a duty), nor do I believe there should be a duty, to prepare for one's sudden and unexpected death by establishing a written plan that is intended, either directly or indirectly, to take care of the patient's needs after the unexpected death of the practitioner. I believe that the liability of the deceased practitioner and the estate in the scenario described above should be minimal, if not non-existent. A key determinant of liability would be whether or not there is any law, regulation, case law, or ethical code provision that imposes such a duty.

In California, for example, there is no legal or ethical obligation for LMFTs to prepare for their untimely death by executing a professional will. Some may desire to prepare a professional will to make it easier (at least that is the goal) for their estates to deal with the proper closing of their practices. I have no quarrel with that desire. The prudent therapist could, however, in his or her standard last will and testament or trust, instruct the executor or trustee to protect patient confidentiality, to preserve patient records, and to hire a licensed person or persons to help with the winding down of the deceased's practice. Notes can be left covering the many details involved

with closing a practice.

Most private practice therapists and counselors, at some point in their professional careers, decide to retire or change professions. They may sell their practices or simply wind them down over a period of time. In the process, some patients may be referred to other practitioners, some may see their course of treatment end because of improvement (or perhaps lack of improvement), and the practitioner may limit the number of new cases initiated. Thus, there is a deliberate winding-down – at least ideally. In the process, patients are told that their treatment records will remain with the practitioner (or elsewhere) in safe-keeping and will be informed about how to access the records. While it is possible to address the issue of the practitioner's death in a disclosure statement given to the patient at the outset of therapy or counseling, this topic is typically not addressed (unless there is a requirement to do so). While such disclosure statements may contain information about termination of therapy, they typically do not address termination because of the death of the patient or the practitioner, although they could.

The American Counseling Association's *Code of Ethics* provides, in relevant part, that counselors prepare and disseminate to an identified colleague or "records custodian" a plan for the transfer of clients and files in the case of their incapacitation, death, or termination of practice. The provision does not specify when this is to be done or in what form the plan should be. Whether or not such a provision would be interpreted by a court to create a duty on the part of the practitioner to have a professional will or other plan would depend upon many factors, not the least of which would be a determination as to whether the provision should be viewed as a guideline or suggested practice, or whether failure to comply with such a provision constitutes per se unethical conduct. Liability might be imposed by a court or jury if either is convinced that the failure to provide for a professional will violated the standards of the profession and therefore constituted negligence. (See Section C.2.h. of the ACA *Code of Ethics*)