# DISCLOSURE TO PATIENTS – "NO COURT FOR ME"(?)

written by Richard Leslie | September 6, 2024

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***NOTE:* Last month's article addressed the issues surrounding disclosures to patients, some of which are required and some of which are up to the sound discretion of the practitioner. This article focuses on one particular disclosure that some practitioners either make or desire to make. This article was first published on the CPH website in June 2015. It appears below with some minor changes.**

Every so often I am told by a mental health professional that somewhere in their disclosure document, their written policy statement, their informed consent form, or in a contract or agreement to be signed by the patient, there is a provision stating that the practitioner will not testify or otherwise get involved with attorneys during civil litigation or other legal or administrative proceedings. Sometimes the written document may contain a clause expressing agreement by the patient not to subpoena or ask the therapist to testify in a legal proceeding brought by or against the patient, either during the therapeutic relationship or thereafter. Some patients routinely sign these agreements and do not protest such provisions at the outset of treatment. Such provisions may never become an issue, since there may be no litigation during the course of therapy or thereafter. But that is not always the case.

My response to the many questions that are asked about the appropriateness and enforcement of such provisions in a disclosure document or contract has been consistent. The questions usually arise when unexpected litigation occurs or the prospect of litigation becomes known. I typically have advised inquirers that my view is that such provisions are generally not in the best interests of the patient, unwise, problematic, against public policy, unenforceable, and possibly unethical or unlawful.

Depending upon the facts and circumstances of the particular situation, I could see a licensing board conducting an investigation, upon a complaint by a patient who signed such a form, that the licensee's actions in "requiring" the signing of such an agreement as a condition of treatment constitutes a violation of one or more laws, regulations, or ethical principles.

Therapists who have utilized such a form often discover, when the need for the therapist's testimony at a hearing, deposition, or trial becomes apparent, that the agreement is very likely unenforceable. The basic reason why such an agreement would be determined by a court to be unenforceable is because there are legal principles or statutes that say, among other things, that no person has a right to refuse to be a witness and that no person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing in any legal or administrative proceeding. These legal

principles and laws constitute the public policy of the state. The laws of each state will vary in fine nuance as to how these principles are stated and, Importantly, with regard to the exceptions to these basic principles.

The laws with respect to psychotherapist-patient privilege provide an exception to these general principles. Thus, if the patient was sued by someone, or even where the patient sues another, the privilege may apply and the general principles stated above would be inapplicable. The patient would be able to block the testimony of the therapist by claiming the privilege. But since the privilege belongs to the patient and not the therapist, the patient may waive the privilege and may want, even need, the therapist's testimony in order to prevail in the litigation. Were the therapist permitted to refuse to cooperate and rely upon the agreement signed at the outset of treatment, the patient's case (and justice) would be harmed or jeopardized. Again, since no person may refuse to be a witness or to testify in a legal proceeding (and assuming the patient waives any privilege that may exist), the agreement would on Its face violate public policy(the law).

Sometime after therapy commences, a patient may be involved in a divorce or custody dispute, an auto accident, or may be unlawfully discharged from employment, or may be arrested for driving under the influence of alcohol or drugs. Some situations may involve an event occurring prior to the commencement of therapy, where the patient has no idea at the time of the occurrence that the therapist's testimony may later be crucial to the patient's case. If the therapist was permitted to rely upon the signed agreement, the patient would be harmed (financially or otherwise) because supportive evidence could not be accessed for use in court. Usually, once the patient obtains representation, the patient and therapist will both learn that such a provision is unenforceable. The therapist can simply be subpoenaed to testify at a deposition, hearing, or trial, and the therapist's records can be subpoenaed as well. Since the patient wants the information, the protective psychotherapist-patient privilege is inapplicable.

Somewhat differently, if a patient was to seek to engage a therapist and disclosed that he is soon to be involved in a matter (for example, a custody or visitation dispute) that may be litigated, and that the therapist's testimony and records would likely be needed, the therapist would be permitted to decline the case. The therapist might simply let the patient know, for instance, that they are uncomfortable with testifying in court and would be willing to refer the patient to another therapist. Generally, patients would not want to engage a therapist who might be hesitant to become involved in expected litigation, and would thus not force the issue. But if a patient signed such an agreement because they had no idea that they would be involved in some form of litigation during the course of therapy, a different situation is presented.

Mental health practitioners should expect that during their careers they will encounter litigation. Hopefully, the litigation will not be a lawsuit by a patient against the practitioner for alleged negligence or other wrongdoing, nor will it be an administrative matter, such as a licensing board enforcement action. Some practitioners are quite familiar with court proceedings and regularly testify as ordinary or expert witnesses in civil and criminal proceedings, including child custody and visitation proceedings,

domestic violence cases, or in a variety of other matters. Learning about privilege, subpoenas, providing testimony, recordkeeping, and report writing should be a part of the education, training, testing, and armamentarium of mental health professionals of all licensures.