

Expert Testimony

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin - March 2012

... In a recent disciplinary action brought by the California Board of Behavioral Sciences against a licensed marriage and family therapist, charging the therapist with unprofessional conduct based upon the therapist's involvement in a dual relationship with a long-term patient (in therapy for over 15 years), the Administrative Law Judge (ALJ) found against the Board and ordered that the Accusation against the therapist be dismissed. After the BBS reviewed the ALJ's proposed decision, the Board adopted the proposed decision and the therapist was thus exonerated. The decision is particularly interesting because it addresses the topics of dual relationship and expert testimony.

More specifically, the Board alleged that the therapist was incompetent, grossly negligent, and that the therapist recklessly engaged in conduct that resulted in emotional harm to the patient. The Board alleged, among other things, that the therapist engaged in a dual relationship with the patient when she began babysitting for the patient and helping with childcare. The expert witness for the Board of Behavioral Sciences, and the expert witness for the licensee, both relied upon the Ethical Standards for Marriage and Family Therapists, published by the California Association of Marriage and Family Therapists, which among other things, defines "dual relationship." The Board's expert opined that "all dual relationships are unethical." When given the aforementioned standards for review, which state that not all dual relationships are unethical, the Board's expert amended his opinion by stating that he agreed that a dual relationship that did no harm to a client was not unethical; however, he could not think of any type of dual relationship that did not harm a client. Thus, he maintained his opinion that all dual relationships are unethical.

The Administrative Law Judge (ALJ) noted that nothing in the ethical standards specifically prohibited social interaction with clients, sessions in locations other than an office (such as the client's home), giving clients gifts, doing favors for clients or disclosing personal information to clients. The expert for the licensee testified that none of the practices engaged in by the licensee, either individually or collectively, were unethical, and that no inappropriate dual relationship existed. The licensee's expert testified that a therapy relationship always existed between the therapist and the patient, and that the actions of the therapist were in furtherance of the therapeutic relationship. The Judge noted that there was no evidence of exploitation by the therapist, nor was there clear and convincing evidence (the burden of proof) that the therapist's objectivity was impaired. The Judge found that the evidence indicated that the therapist was a compassionate, caring individual and that there was no actual intent to harm the patient.

The ALJ found that the licensee's care and treatment of the patient did not constitute gross negligence or incompetence. "Gross negligence" is defined in California as "the want of even scant care or an

extreme departure from the ordinary standard of conduct.” “Incompetence” has been defined as a “general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission.” The Judge stated that the standard of care for a given profession is a question of fact, and in most circumstances, must be proven by expert witnesses. The ALJ then indicated that the credibility of the expert witnesses in this matter was evaluated pursuant to the factors set forth in law – among other things, the demeanor and manner of the witness while testifying, the character of the testimony, the character of the witness for honesty, and the existence or absence of any fact to which the witness testified.

The ALJ explained, in part, that the testimony of one credible witness may constitute substantial evidence, including the testimony of a single expert witness. The ALJ cited prior California case law, which stated, in essence, that the weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion; its value rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion. Such an opinion is no better than the reasons given for it, and if it is not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence. The expert’s opinion, the ALJ explains, is no better than the facts on which it is based and, by quoting from another case, the ALJ makes the point that “where the facts underlying the expert’s opinion are proved to be false or nonexistent, not only is the expert’s opinion destroyed, but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness.”

A pretty powerful decision, don’t you think?