General Topics / Considerations for Mental Health Professionals to Prevent Exposure to Licensing Board Complaints

written by Guest Author | October 2, 2017

Written August 2017 (Published October 2017)

Below is a second outline to the previous article, "An Outline of Commonly Encountered Litigation Issues for Mental Health Professionals (And How to Navigate Them)," written by Attorney John M. Cox. This was also originally presented to the American Association for Marriage and Family Therapy in 2015 and specifically addresses considerations or general topics to prevent licensing board complaints and enforcement investigations for alleged board rule violations specific to mental health professionals. The outline below has also been modified slightly to apply to all mental health licensures [and thus is not specific to only marriage and family therapy licensees].

It is always advised to know your state regulations and to consult an attorney in your specific state for individualized issues related to your professional liability risks. As a CPH & Associates mental health professional liability policyholder, you are entitled to 2 hours of attorney consultation per policy year related to malpractice risks you're concerned may result in a claim. To leverage this resource, you need to call CPH & Associates and provide a brief explanation of your situation and we'll be happy to connect you with an attorney so you may receive advice on your issue. If it is a situation you think *MAY* result in a claim, we do ask that you fill out an "incident report" upon scheduling this attorney consult.

Again, as an outline, these topics have been abbreviated and serve as a high-level overview.

FILE OPENING / INITIATION OF PROFESSIONAL RELATIONS

A Licensee generally may ONLY provide mental health counseling therapy in the context of a professional relationship.

1. Disclosure of ALL payment and business rules at inception of client relationship:
    - Should be in writing if professional seeks to enforce those policies on a later date. Examples include:
        - Office procedures;
        - Fees/after-hours fees;
        - Payment requirements; and,

        - Costs of incidental charges (i.e., copies of a file; $50 flat administrative fee to prepare file for copying).
2. Administrative disclosures should be in writing to avoid "he said/she said" situations, which licensing boards will generally find in favor of a complainant if not supported by a signed/written disclosure. Have your new client sign and date all forms, evidencing they were given notice. Maintain these forms as a part of your treatment file.
3. Obtain a signed consent for treatment (for all participants/parents/guardians). If parental rights are in question, "reasonable" efforts to determine whether the parent/signatory has the right to consent (if a parent's suspected custody rights are in fact terminated).
    - Have clients sign all forms and return prior to commencement of services, when possible. If not possible prior to commencement of service, follow up to ensure they are executed soon afterward.
4. Rules of confidentiality, including limitations to that rule (such as client in imminent danger to self or others; disclosure to medical or law enforcement regarding personal/imminent mental/emotional injury) also need to be disclosed in writing.
5. Other rules as governed by your state licensing board rules, examples:
    - No rebate/ "credit" for referrals.
    - No collateral business relationships allowed/i.e. swapping/counseling services for roofing work.
    - No activities sought to further therapist's personal or family needs/interests (i.e., therapist solicits recommendations from oil services patient for references for child recently out of college).
    - Services prohibited to/amongst individuals from whom a dual relationship exists, such as:
        - Family members;
        - Business associates;
        - Personal friends;
        - Education associates (teachers, students); and,
        - Others with whom therapy could be jeopardizing due to the dual relationship.
6. A well-documented file will aid greatly in the event a patient or third party files a board complaint.

BOUNDARIES / DUAL RELATIONSHIPS

A licensee shall set and maintain professional boundaries, including the initiation of what would be considered by a licensing board to be a "dual relationship."

- Examples include those relationships listed in the 4th bullet under #5 within "**FILE OPENING / INITIATION OF PROFESSIONAL RELATIONS**," above.
- Terminate the professional relationship when/if it becomes reasonably clear that a client is not benefiting; if client requires continued treatment, must document in writing the efforts to refer to appropriate services/continued therapy.
- Only provide those services that are within his or her professional competency (i.e., if not certified to perform psychological testing, then do not interpret the raw data).

- All services must be based on an assessment, evaluation or diagnosis and treatment notes should reasonably reflect a diagnostic code and conformity/progress with same.

ACCURATE RECORDS / RECORDS KEEPING

A licensee shall keep accurate records.

1. Always keep records in a manner consistent with defending your actions/recommendations to a state board/tribunal in future.
2. Keep records with an eye toward someone (another peer reviewer or the licensing board) reviewing them in the future with a "critical eye" by including:
    - Accurate dates;
    - Types of services rendered;
    - Clearly defined diagnostic codes;
    - Progress notes;
    - Billing records;
    - All signed acknowledgments/waivers/forms; and,
    - Maintain on site or offsite secured for 5 years/date of last treatment of adult (Texas rule – please look into your specific state rules for any variations)
3. Disposal of records after 5 years must be done in a manner that protects client confidentiality:
    - Read and know your own State's rule. Texas general rule: 5 years/5 years past 18 year old date of birth (minors);
    - EXAMPLE: WRONG WAY: moving company removes records with assurance they will "dispose". They drop in dumpster, dumpster unprotected, records in public domain. RIGHT WAY: hire a professional shredding service. Require that they issue a certificate of destruction. Maintain same for your records; and,
    - Avoid inexpensive route-get a certificate of destruction.
4. If an independent practice, establish an "estate plan" for dissemination of records/transfer of client services in event of licensee death/incapacity to assure continuity of care and confidentiality.

ACCESS TO / RELEASE OF CLIENT RECORDS/REQUEST FROM CLIENTS FOR RECORDS

1. Strict compliance with governing state statute regarding release of records is essential.
2. Texas licensing boards assess an automatic deferred suspension for any deviation in the rule in its statute!!! (Chapter 611 Texas Health and Safety Code), when a client requests release of their records. (please look into your specific state rules for any variations)
3. Texas Health and Safety Code, Chapter 611 (please look into your specific state rules for any variations): On receipt of written request, a professional, as promptly as required under the circumstances but NOT LATER THAN THE 15TH DAY following request shall:
    - Make available for exam or copy (if copies requested) during regular business hours;
    - Inform if information requested does not exist (and document!);

    - Reasonable fee allowed but signed client disclosure in file needed to support;
    - May be able to withhold records because fee not paid; but do not risk it! Better to release the records and avoid a possible later board complaint for failure to do so; and,
    - If client facing an emergency situation (court hearing, other detrimental situation like an in-patient hospitalization) then cannot withhold because of non-payment of fee.
4. Be wary of these situations-if in doubt, release the records even without payment so long as signed written consent in file. Must document in writing for your file that the records were sent or client was notified in writing or by phone they could be picked up by 15th day! (Texas – please look into your specific state rules for any variations). If notification is by phone, document in writing the date on which it occurred by internal memorandum.
5. Train Staff to document this:
    - Maintain a copy of any email or create an internal memorandum that a phone call was placed and client informed that records are ready for pick up; and,
    - Train your staff to document that they followed the rule!
6. Some licensing boards recommend sending the records certified mail/return receipt requested with a cover letter to provide absolute evidence they were sent.

SEXUAL MISCONDUCT

1. Sexual contact as defined by state penal codes.
2. Requests/innuendos may rise to be classified as sexually suggestive situations.
3. Requests for offsite meetings/encounters can lead to a presumption of intent (home sessions, sessions conducted during unusual hours where all staff off duty, "emergency" meeting at a hotel bar).
4. "Sexual Exploitation": a pattern, practice or scheme of conduct which can reasonably be construed as being for reason of sexual arousal (e., asking a patient details about sexual preferences when it bears no constructive relationship to the therapeutic relationship/goals).
5. Learn to be wary of any patient who themselves attempts to raise these issues in a context that may be inappropriate or off-topic.
6. Classes of individuals prohibited from sexual contact:
    - Client
    - Former client (2 year minimum-Texas – please look into your specific state rules for any variations);
    - Associate or intern whom licensee is supervising;
    - Intern in a graduate program over whom licensee offers professional/educational services; or
    - Clinical supervisor or supervisee of licensee.
7. No new therapeutic relationship with individuals over whom licensee had a prior sexual relationship.
8. Former Clients: Boards generally will even scrutinize (heavily) any sexual contact with a former client even if 2 years or the State mandated period has passed. Licensee will bear the burden, if a board complaint is filed, to demonstrate that there was/has been no exploitation, in light of all

relevant factors, including but not limited to:
    - Amount of time passed since therapy terminated;
    - Nature/duration of therapy;
    - Circumstances of termination;
    - Client's personal history;
    - Client's current mental status;
    - Likelihood of adverse impact on client and others; and,
    - Whether licensee made any suggestion/innuendo during therapy that was suggestive of a post-therapeutic romantic/sexual relationship.

REQUIRED REPORTING PER STATE STATUES (EXCEPTION TO RULES OF CONFIDENTIALITY)

Licensees must follow applicable state statute regarding required reporting of otherwise confidential information. Typical situations include:

1. Abuse/neglect of minor.
2. Abuse/neglect of elderly or disabled persons.
3. Abuse/neglect/illegal/unprofessional/unethical conduct in an in-patient faculty.
4. Sexual exploitation by another licensee or other mental health services provider (not limited to your own licensure):
    - Required to be done in Texas (please look into your specific state rules for any variations) within 30 days to:
        - District Attorney; and,
        - Licensing board or other state licensing agency.
    - Must notify 'victim" of duty to report, and find out if victim wants to remain anonymous.

PRIVILEGE / WHO CAN CLAIM [TYPICALLY]

1. The patient;
2. Authorized persons by statute (parent, legal guardian); and,
3. The professional (but only on behalf of the patient).

AUTHORIZED DISCLOSURE-ONLY TO: (EXCEPTION TO CONFIDENTIALITY)

1. Governmental agency if disclosure required/authorized by law.
2. Medical/law enforcement in cases where imminent/physical-mental harm by patient to patient or others is deemed likely.
3. Persons possessing legal written consent of the client, parents (minors), guardians (of minors or persons deemed incompetent).
4. A deceased patient's personal/legal representative.
5. If required by an Order of a court.
6. Other situations typically specifically addressed by state statute.

RIGHT TO DENY ACCESS TO RECORDS / TREATMENT FILE

1. Professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patients' physical, mental or emotional health.
2. State board rules may require if records are being intentionally withheld, that you give patient a written statement of generally what you are withholding and why you are withholding a portion of the file (example: detrimental to your continued treatment, progress) and maintain a copy of same in file.
3. Must "reassess" propriety of withholding each time a request is made.
4. Must delete information about treatment to another person who has not consented to the release.
5. Reasonable fees can be charged for this administratively, but only in accord with your written office policies/disclosures that patient has been given and signed/acknowledged at inception of treatment.

About our Guest Author: John M. Cox is a member of the American Bar Association (Tort and Insurance Practice Section; Section of Litigation), State Bar of Texas, Dallas Bar Association, Texas Association of Defense Counsel, the Defense Research Institute, and the CLM Alliance. He practices in the areas of complex/catastrophic personal injury defense, wrongful death and survival actions, products liability, premises liability, professional liability and malpractice, medical, pharmacy, and mental health professional liability and malpractice, transportation (trucking) and automobile accident litigation, environmental litigation, commercial litigation, insurance coverage litigation, construction litigation, administrative law, and consumer law. For more information on John M. Cox & his Dallas-based firm, click here!