Immunities from Liability

written by Richard Leslie | May 24, 2016

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… While I have written about this topic before in a variety of contexts, it is worth repeating and consolidating. Therapists and counselors are, of course, concerned about avoiding liability. This is usually accomplished by acting in a competent manner and avoiding negligence – that is, avoiding actions or omissions that are below the standard of care of the ordinarily prudent practitioner of the same licensure under the same or similar circumstances. Ordinarily, a therapist or counselor is not "immune from liability," as that term of art is generally understood, when he or she acts competently and appropriately. A patient or client may nevertheless decide to file a claim or suit against a practitioner in any case and the practitioner will need to defend against the allegations. This will typically involve the malpractice insurance carrier and may result in a settlement for nuisance value, a defense verdict, or a dismissal of the charges.

Under certain circumstances, however, the practitioner may be entitled to immunity from liability. This immunity is typically granted under state statute. It essentially means that if a lawsuit is filed, the practitioner will be entitled to have the case dismissed at an early stage of the proceedings, often upon a motion for summary judgment or a similarly titled motion made early in the legal proceedings. Perhaps the prime example of immunity statutes is found in the child abuse reporting laws of the various states. While I cannot speak for each state, the typical law essentially provides that a mandated reporter shall not have any liability (civil or criminal) for making a child abuse report that is mandated or authorized under the state statute. In California, the immunity from liability is absolute – it applies even where the mandated reporter was negligent in making the report, such as where the practitioner negligently (and suggestively) used an anatomically correct doll that resulted in a report being made.

California recently added a provision to its child abuse reporting law that extends the immunity to situations when reports are made by the mandated reporter where the knowledge or reasonable suspicion of child abuse or neglect is obtained outside of the reporter's professional capacity or outside the scope of his or her employment. In these situations (in California), a child abuse report is not mandated – but rather, a report is permitted. The California immunity statute also provides, among other things, that no person required to make a child abuse report shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse or neglect without parental consent, or for disseminating the photographs with the required reports.

Finally, the statute also allows the mandated reporter to recover attorney's fees (up to $50,000) and costs from the State when those fees and costs are incurred as a result of defending an action that is brought against the mandated reporter for making the required or authorized report – provided that the case is either dismissed by the court pursuant to the immunity statute or the mandated reporter

prevails in the action, should it for some reason not be dismissed at an early stage of the proceedings.

As with child abuse reporting laws, elder abuse reporting laws and dependent adult abuse reporting laws (or similarly titled laws) typically contain immunity from liability provisions for mandated reporters who make required or authorized reports of known or suspected elder or dependent adult abuse. These laws may also provide immunity for taking photographs of suspected victims of abuse and for dissemination of the photographs with the required reports.

Another possible immunity from liability may be found in the statutes dealing with the patient who is an imminent danger of physical violence to another. As has been stated in other articles I have written for the CPH's Avoiding Liability Bulletin, the laws (including case law) differ from state to state with respect to the duty of a therapist or counselor when a patient threatens physical violence against another. Some states have enacted statutes that are intended to provide practitioners with a zone of protection ("safe harbor") in this nettlesome area of practice. Thus, in California, a law was enacted that provides immunity from liability for psychotherapists who make reasonable efforts to communicate a patient's serious threat of physical violence against a reasonably identifiable victim when the communications are both to the victim and to a law enforcement agency.

While the general duty in California is based upon the famed California Supreme Court's Tarasoff v. University of California decision of 1976, that duty does not require both of the actions specified above. The general duty is to take reasonable steps to protect the identified victim. That duty may include warning the victim, calling the police, hospitalizing the patient, or taking other appropriate action. Depending upon circumstances, one or more of these actions may be appropriate. While such action may not result in liability for the therapist because he or she may ultimately be found to have acted reasonably under the circumstances, the therapist in such case is not entitled to immunity from liability. To be within the zone of protection offered by the immunity statute, both actions specified in the statute must be taken. Massachusetts has an immunity statute that allows the psychotherapist to take any one of several actions specified in the law to attain immunity. Is there an immunity statute in your state regarding the dangerous patient issue? What must be done to attain immunity?

There may also be immunity statutes in some states that protect members of ethics committees or peer review committees of mental health professional associations. Generally, the immunity from liability will apply to acts or proceedings undertaken or performed within the scope of the functions of these committees, which are formed to maintain the professional standards of the particular mental health profession and which are authorized in the association's bylaws. Immunity may only be granted if the member acts without malice and in a good faith or reasonable belief that the action taken by him or her is warranted by the facts. The exact conditions or limitations of the grant of immunity to peer review bodies or ethics committees will likely vary in fine nuance from state to state, as will its applicability (or non-applicability) to specific professions.

There may be a related statute that protects members of a peer review or ethics committee (and perhaps others who are present – such as a witness) from having to testify in a legal proceeding as to

what transpired at a meeting attended by such member of a committee (or other person in attendance). Similarly, the records of the peer review or ethics committee may be protected by statute from discovery in many kinds of legal proceedings. Technically, these latter two protections related to ethics or peer review committees are privileges that are granted by statute rather than immunities from liability. Do these privileges exist in your state and for your profession?

People who provide information to professional societies (such as a professional association of mental health practitioners) may be entitled to statutory immunity from liability if the communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of specified mental health practitioners. Likewise, immunity may exist for communications made by a person to a hospital, hospital medical staff, professional licensing board or professional school offering a qualifying degree program – if intended to aid as indicated above. As with other immunities, the exact conditions or limitations of the grant of immunity varies in fine nuance from state to state, as does its applicability.

Finally, a statutory immunity from liability may exist for certain professional association referral services, where members of the public are referred to members of the referral service. The immunity may apply to the association itself and to its agents, employees, or members. The immunity granted to the referral service (and others) may apply to acts of negligence or conduct constituting unprofessional conduct committed by a professional to whom a member of the public was referred. There likely will be limitations or conditions to such a grant of immunity, as well as exceptions to the grant of immunity itself. For example, the immunity may not exist if there has been a failure by the referral service (or its agents or employees) to disclose the nature of a known disciplinary action taken by a licensing board against the professional person to whom the member of the public was referred. My usual caution of variations on a state-by-state basis applies to this possible immunity!