Immunity From Liability

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Therapists and counselors typically purchase malpractice insurance in order to protect themselves from claims and lawsuits alleging, among other things, that the practitioner was negligent (by acting in a certain manner or by the failure to act in a certain manner) with respect to the treatment of a client or patient. If negligence is proven, or is apparent or arguable, the practitioner may have liability (e.g., responsibility to pay money damages). Plaintiffs' lawyers can easily and inventively allege theories of negligence (or intentional misconduct) in their efforts to establish liability. In most states, therapists and counselors are given "immunity from liability" in limited circumstances. It is useful to know when immunity from liability may be available, how one achieves it, and what it actually means.

Immunity from liability essentially means that one is not subject to a lawsuit or to monetary liability if the circumstances extant meet the requirements of a particular statute granting immunity. When it is said that one is not subject to a lawsuit, it must be remembered that generally, anyone can sue anyone else for anything. A statutory grant of immunity would mean that once a lawsuit is filed and served, the lawsuit can be dismissed forthwith upon the proper request (e.g., a motion for summary judgment) by counsel for the person entitled to the immunity. If one is not covered by a grant of immunity, this generally means that the case will not be dismissed at an early stage of the proceedings and that the issue of negligence, and the resulting liability if one is found to be negligent, will be determined at trial by either judge or jury.

Immunity from liability is created by statute. It is the exception rather than the rule. It is not easy for immunity statutes to be passed by state legislatures because associations representing trial lawyers will usually lobby intensively to prevent or limit the grant of immunity. Trial lawyers generally favor a public policy that allows for the filing of lawsuits without limitation or interference, and the trial of those lawsuits without the threat of a premature dismissal as the result of a statutory immunity. In order for an immunity statute to be passed, there will generally need to be a strong public policy interest demonstrated in order for a legislature to grant immunity to a particular kind of "actor." There are immunities granted in law to a variety of "actors," such as judges, law enforcement officers, governmental entities or individual office-holders, good Samaritans, and health care practitioners.

With respect to therapists and counselors, one of the most common immunities granted by state law is the immunity from civil or criminal liability for reporting (as required or authorized) known or reasonably suspected child abuse or neglect. Each state's law may be worded differently, and nuances exist between the various state laws. For instance, in one state the immunity applies whether or not the therapist was negligent in determining that a report must be made. The immunity in this particular state is absolute, and would apply even if the therapist was grossly negligent, or arguably, if the therapist did

not act in good faith in making the report. Additionally, the immunity applies if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment, but nevertheless filed a child abuse report – although not required. How broad is the immunity for reporting child abuse or neglect in the state in which you practice?

Another common immunity granted to therapists or counselors can usually be found in the "elder" or "dependent adult" (or similar title) abuse reporting laws. This immunity will usually be patterned after the immunity granted in the case of child abuse reporting, but it need not, nor may not, be identical. Another area of the law where one may find an immunity granted (by statute) to psychotherapists involves dangerous patients. In California, for instance, where the famed Tarasoff case was decided by the California Supreme Court in 1976, there is a statute that provides immunity from monetary liability to therapists who, under specified circumstances, take certain actions in order to prevent the threatened violence of the patient. The same statute, described below, also provides immunity from monetary liability to therapists who fail to predict and warn of and protect from a patient's violent behavior.

With respect to the specific actions that must be taken, this immunity statute provides that the therapist must make reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency. If the therapist complies with the statute, assuming that his or her actions have been triggered by the communications of the patient to the therapist of a serious threat of physical violence against a reasonably identifiable victim, he or she will have no monetary liability and a cause of action shall not arise. I have often thought of a case where the therapist does make reasonable efforts to communicate the threat as specified above, but is aware that the police are not going to do anything – despite the notification to them by the therapist. Assuming that the therapist should have hospitalized the patient when the police indicated that they would not act, the therapist would nevertheless be entitled to immunity from liability under the statute – even if the failure to hospitalize constituted negligence.

Under this statute, the failure to make reasonable efforts to communicate the threat to the victim and to a law enforcement agency does not necessarily mean that the therapist was negligent, or that the therapist will be held liable. It simply means that the therapist will not be entitled to the immunity granted by the statute, and therefore, the case may proceed to trial. As to the issue of whether or not the therapist acted reasonably or negligently, a judge or jury will ultimately decide the matter. In many of these cases, therapists will decide to hospitalize patients. While hospitalization may constitute reasonable action, and while the therapist may ultimately be found to have acted without negligence, there is no immunity from liability because the statute has not been followed. In other states, however, hospitalization of the patient may entitle the practitioner to immunity from liability. Additionally, some states may offer immunity if solely the intended victim is notified of the threat (e.g., no notification of law enforcement). Obviously, one must carefully examine the immunity statute in the state in which he or she practices in order to determine what actions may result in this broad protection for the practitioner.

There may be a variety of other immunities in state law that, in one way or another, affect therapists or counselors, although they are not often discussed. For instance, in some states, there may be immunity granted to persons who serve on professional association ethics committees or other peer review committees – under specified circumstances and with specified limitations. Likewise, there may exist some immunity for persons who communicate with specified educational institutions about the character or fitness of persons pursuing a license to practice in a health care profession, or for communications with health care licensing boards investigating a complaint. In some states, professional associations may have immunity from liability for operating a referral or information service for the public.

It is important to remember that with each grant of immunity there will likely be limitations or exceptions. Careful attention must therefore be given to the terms and conditions of the immunity statute involved. While it is advantageous to have immunity from liability, it also should be remembered that if immunity from liability does not apply, this does not generally mean that the therapist or counselor will later be held liable. It simply means that the case will likely not be subject to early dismissal and that it may proceed to a trial. Of course, the vast majority of lawsuits are eventually settled (where immunity from liability does not apply).

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