Immunity from Liability

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NOTE: This article was first published on the CPH Insurance's website over twelve years ago (June 2008). It is republished here with minor changes. While avoiding liability is the goal of all practitioners, that goal is not always met. Sometimes, practitioners engage in intentional wrongdoing (e.g., insurance fraud or sexual relations with a patient). Practitioners may sometimes use judgment that is below the standard of care of the reasonably prudent practitioner of the same or similar licensure and under like circumstances. If there are statutes that grant immunity from liability, practitioners should, when appropriate, want to take full advantage of the protections offered. This article explains some of the more common immunities that may exist under state law.

IMMUNITY FROM LIABILITY

Mental health practitioners typically purchase malpractice insurance in order to protect themselves from claims and lawsuits seeking monetary damages and 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 arguable, the practitioner may have liability (that is, responsibility to pay money damages). Plaintiffs' lawyers can allege theories of negligence (or intentional misconduct), sometimes inventively, in their efforts to establish liability. In most states, practitioners are granted "immunity from liability" in limited circumstances. It is useful to know when immunity from liability may be available, how one obtains 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 licensed mental health practitioners, 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. 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 licensed mental health practitioners may 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, where the famed Tarasoff case was decided by the California Supreme Court in 1976, there is a later-enacted statute that provides immunity from monetary liability to therapists who, under specified circumstances, take certain actions in order to prevent the patient's threatened violence.

With respect to the specific actions that must be taken in order to obtain immunity from liability, the 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 the therapist's 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, the therapist will have no monetary liability and a cause of action "shall not arise." Consider the case where the therapist does notify or inform law enforcement of the threat but is aware that the police are not going to do anything – despite the notification by the therapist. Assuming that the therapist should have then hospitalized the patient when the police indicated that they would not act, the therapist should nevertheless be entitled to immunity from liability under the statute (assuming reasonable attempts to notify the victim were also made) – even if the failure to hospitalize constituted negligence.

Under this California 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 or be settled. As to the

issue of whether or not the therapist acted reasonably or negligently, a judge or jury may 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 California 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 only the intended victim is notified of the threat (e.g., no notification of law enforcement). Practitioners must carefully examine the immunity statute in the state in which they practice in order to determine what actions may result in immunity.

There may be a variety of other immunities in state law that, in one way or another, affect mental health practitioners, 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 be 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 necessarily 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).