“Immunity from Liability” vs. “No Liability”

written by Richard Leslie | April 3, 2017

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Last month I wrote about dangerous patient issues and the nature and breadth of the mental health practitioner’s duty to protect third parties (e.g., members of the public) from the violent acts of the patient. In that article, I wrote about the possibility of obtaining immunity from liability under state law in specified dangerous patient situations. A reader asked me to explain the difference between a practitioner “having no liability” and “having immunity from liability.”

In a typical malpractice case, the practitioner will have no liability if it is ultimately determined that the practitioner exercised due care (the reasonably prudent practitioner under like circumstances test) in the treatment of the patient. Stated otherwise, there is liability if the practitioner is found to be negligent in the treatment of the patient and that the patient suffered harm (physical or emotional) as a proximate result of the negligent acts. These determinations are ultimately made by a judge or jury if and when the case goes to trial. When a claim or lawsuit is initially reviewed, the practitioner’s attorney will make a determination as to whether there is liability – that is, vulnerability to the claim of negligence and the resultant harm. Of course, most claims do not go to trial, but rather, they are settled – either for nuisance value (e.g., to avoid the costs of litigation and to quickly close the case) or for a more substantial amount based upon the degree and nature of the negligence and the extent of the harm.

“Having immunity from liability” typically means that under certain prescribed circumstances (defined in a state statute), a lawsuit, if brought, will not be able to advance to trial and will be summarily dismissed by a court (on a motion by the practitioner’s attorney for summary judgment) at the beginning of the case. The very existence of an immunity statute hopefully prevents or deters lawsuits. But if brought, the practitioner’s attorney would demonstrate that the practitioner took the action(s) required by the immunity statute and would ask the court to dismiss the case. Some areas of practice and law that typically provide immunity from liability for mental health practitioners are the child abuse, elder abuse, and dependent adult abuse reporting laws, and in dangerous patient situations – such as when a patient communicates a threat of imminent physical violence against a third party. The extent of the immunity, and the acts required to be taken by the practitioner in order to get the immunity, are spelled out in the immunity statute.

SUING THE CLIENT – A RARITY, BUT …

Most mental health practitioners may never find themselves in a situation where they have to decide whether or not to sue a client. But the reality is that there are occasions where a lawsuit is not only seen by practitioners as appropriate, but also viewed as helpful in protecting self interests. A well managed

business (e.g., a sole proprietorship or a counseling agency) can often avoid the need to assess whether or not to sue, but not everyone does the right thing all of the time. Moreover, there are circumstances that can arise unexpectedly that will immediately raise the issue. Suppose a client physically attacks a therapist and causes substantial physical injury. Though rare, it has happened in the past. The therapist in such a situation might report the crime to the police, might be the key witness in the criminal prosecution, and might decide to bring a civil lawsuit for monetary damages against the client. As I often caution, everything depends upon the facts and circumstances involved.

Some clients may not be worth suing – that is, they may represent more trouble than potential benefit: others might invite a lawsuit! A common situation where practitioners are faced with the decision of whether or not to sue the patient is when the patient owes the practitioner money. This situation can often be avoided by appropriate practice management, but as stated above, not everyone manages their practices appropriately all of the time. Unexpected circumstances may present themselves that may warrant continued treatment without receipt of timely payment. In many circumstances, practitioners will ultimately decide not to pursue the debt owed by the patient either because the amount of the debt is not great or because they may feel vulnerable to igniting a counter-claim or a complaint to the licensing board.

I have spoken with therapists who were owed money and were leaning toward suing the patient, but after I asked questions about their insurance billing practices or suggested that they could have seen the patient without charging a fee for a limited period of time (short enough to effectuate an in-person termination) and then made a referral, they decided to walk away from the idea. I might also raise the question, in an appropriate case, of whether the therapist could be accused of unwittingly or negligently allowing a debtor-creditor relationship to be established which negatively affected the treatment. Even though such an accusation can be rebutted, the therapist might simply want to forego the risk of sparking trouble. In some circumstances, a lawsuit might be justified and a helpful strategic move. After a justified lawsuit is filed, a subsequent claim or complaint from the patient might be viewed or argued as simply a retaliatory afterthought which lacks merit.

Thinking about suing the patient for monies owed raises the issue of referral to a collection agency. It has been my consistent belief that such referrals are unwise for a variety of reasons – not the least of which is that a lack of integrity or bad business practices by the collection agency may cause harm to the patient or may be considered harassment. What research will the practitioner do before referral to the debt collector? Additionally, some practitioners make the referral to collections before they provide adequate notice to the patient, which can ignite patient anger and cause problems for the practitioner.

If the debt is worth pursuing, a small claims court action, where the practitioner can be face to face with the patient, can be effective (both legally and sometimes “clinically”). In some cases, the patient will not appear on the trial date and a default judgment can be obtained. Once the judgment is obtained, payment is more likely, though not guaranteed. I have spoken with a therapist who pursued enforcement of a judgment, which could have led to seizure by the sheriff of the patient’s assets in order to satisfy the judgment. The patient eventually paid the therapist.

While it is possible to sue your patient, the need to do so should be rare. Reasonable efforts to resolve the matter can often be made before resorting to litigation. If suit is to be brought, great care must be exercised as the matter progresses. For example, the fact of the therapist-patient relationship will surely be revealed during the course of the legal proceedings, but the confidential communications between patient and practitioner remain confidential (e.g., the patient's diagnosis or mental/emotional condition). The patient has likely not waived the psychotherapist-patient privilege by failing to pay what may be duly owed! The duty of confidentiality remains. Care must be taken by the practitioner to not allow zeal or revenge to be the cause of an inadvertent or intentional breach of confidentiality.