Informed Consent: Part 1

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – August 2006

… In the July 2006 issue of this Bulletin I answered one of the several questions I raised about "informed consent" – that is, whether the informed consent had to be written, dated and signed. Another question raised was whether therapists can be found civilly liable for failure to obtain "appropriate" informed consent even though they disclosed all that the state law required, or whether there is immunity from liability for making the required disclosures.

Although state laws and regulations vary, the typical situation is that state laws do not usually provide immunity from liability for making the required disclosures. In other words, a lawsuit can be brought alleging that the therapist failed to obtain the "appropriate" informed consent because he or she failed to make some other disclosure (one not specified in the law or regulation) that would have affected the patient's decision to proceed with treatment. Plaintiffs' attorneys and others seemingly argue that there is a never-ending list of things that should be disclosed to patients prior to the start of therapy.

For example, suppose that a patient is assaulted or raped in the parking lot of the therapist's office when she leaves the office one evening. It might later be alleged that the therapist should have made disclosures regarding the fact that the office is located in a high crime area or that the therapist should have disclosed that no security is provided in the building or in the parking area. It might further be alleged that had these disclosures been made, the patient would not have entered into this particular professional relationship.

A more common example follows. Suppose that a therapist or counselor engages in a prohibited dual relationship with the patient (e.g., a sexual, romantic or business relationship) and that the relationship later sours and results in a lawsuit by the patient against the therapist. It is possible that the lawsuit will contain an allegation that the therapist failed to obtain the informed consent of the patient prior to entering into the secondary relationship, and that the therapist failed to disclose, among other things, the risks to the therapeutic relationship (and to the therapy) and the potential benefits presented by entering into the secondary relationship.

If taken to an extreme, one can imagine allegations that the therapist failed to inform the patient that therapy could result in the patient discovering why he or she is so disliked by others, and further, that this could result in depression and ultimately in his or her attempted suicide. Or, perhaps the absurd allegation will be that the marriage and family therapist or mental health counselor failed to inform the patient that professional mental health services could instead be rendered by a licensed psychologist or a psychiatrist and that those practitioners might have more training than the MFT or mental health counselor. While anything can be alleged in a lawsuit, proving lack of "appropriate" informed consent in

these extreme circumstances will hopefully be difficult.

Once one understands the informed consent requirements imposed by state law and other legal authority, compliance should be easy. Compliance with established laws, regulations and ethical standards related to informed consent should assure that the licensing board will not pursue disciplinary action against the practitioner for unprofessional conduct. Compliance, however, will not necessarily assure that a lawsuit against the therapist will not be brought.