Informed Consent: Part 2

written by Richard Leslie | May 24, 2016

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… In the March 2006 (Volume 1) issue of the Avoiding Liability Bulletin, I briefly wrote about and contrasted the words "consent" and "authorization," and indicated that I would write about "informed consent" in a future issue. "Informed consent" (as opposed to a simple consent to treatment by an adult patient or by a parent on behalf of a minor) essentially and generally involves the disclosure of information to the patient and the discussion of such information with the patient so that he/she is agreeing to treatment with knowledge of the material facts necessary to make his/her decision.

The various mental health professions treat the issue of informed consent somewhat differently (e.g., in their ethical standards), and state law and regulation likewise may vary from state to state and from profession to profession. For instance, in some states and with respect to certain professions, practitioners may be required to obtain a patient's signed, "informed consent" at the outset of routine therapy/counseling by providing the patient with written information specified in law or regulation. Failure to obtain this required informed consent typically constitutes unprofessional conduct. In other states and with respect to other professions, a signed, written informed consent at the outset of treatment for routine psychotherapy is not required by statute or regulation.

The doctrine of informed consent has developed largely as the result of case law (published court decisions) with respect to the medical profession. As a general rule, physicians do not need the signed, informed consent of the patient for a simple and common treatment or procedure, where the risks or dangers are remote and commonly understood to be remote. They simply need the patient's consent. Of course, the person consenting must have the legal and mental capacity to consent. For example, minors may lack the legal capacity to consent to treatment and will generally need the consent of a parent or guardian before treatment can begin. With respect to routine (simple and common) medical care, consent to treat may be express or implied from the circumstances.

Physicians typically seek informed consent either where a statute or regulation requires a written and signed informed consent, or where the circumstances warrant it. Where there are significant risks or perils from a certain treatment or procedure, the physician must, at a minimum, carefully let the patient know what the risks and benefits of the proposed treatment or procedure are, what the alternative treatments or procedures are (including the alternative of no treatment), and must discuss this information with the patient, allowing the patient to ask questions. The touchstone of the physician's duty of disclosure is the patient's need for adequate information to enable an intelligent choice. The test is, in essence, what would a prudent person in the patient's position have decided if adequately informed by the physician of all significant perils.

With respect to psychotherapy and counseling, and as stated above, the issue of informed consent may be treated differently from profession to profession and from state to state. The reader should of course abide by state legal requirements and by the ethical standards of their profession. Patients must, of course, knowingly consent to treatment. And, in a general sense, their consent must be informed. The questions really become – informed of what, informed of how much, and informed in what manner?

Even when state law or regulation specifies what has to be done, many questions can arise. For instance, does state law specify the minimum disclosures necessary and leave it open to the therapist or counselor to add other disclosures? If state law specifies that the practitioner must disclose the potential risks and benefits of treatment, does the law specify in any way what the typical risks of counseling or therapy are? Can therapists be found civilly liable for failure to obtain "appropriate" informed consent even though they disclosed all that the state law required, or is there immunity from liability for making the required disclosures?

Further, are therapy, psychotherapy or counseling inherently dangerous treatments? If the possible consequences of marital therapy or couple counseling is that the couple will mutually decide to divorce, is that a risk or a benefit of treatment? Are therapists required to tell prospective patients that therapy could result in great stress, self-doubt, depression and perhaps suicide? Are mental health counselors or marriage and family therapists, for example, required to tell prospective patients that an alternative to treatment by a person of their respective licensure is treatment by a psychiatrist, psychologist, or clinical social worker (with appropriate explanations of the differences)? Must the informed consent be in writing, and must it be signed and dated by the patient?

The answers to all of these questions may or may not be found in applicable laws, regulations or ethical standards. They are, however, important (and hopefully interesting) questions to ponder. If state laws or regulations do answer any of these questions, then the applicable state law or regulation will govern. The answers to these questions cannot be adequately addressed this month, but let's start with the last question first – must an informed consent be in writing, and must it be signed and dated by the patient?

First, you will abide by state requirements with regard to written, signed, and dated informed consent documents. In the absence of a state law or regulation that governs, one would typically look to the applicable ethical standards. Some of the standards, however, do not specify that a signature (dated) must be obtained on a written document. In other words, some standards would allow the therapist to have discussions with the prospective patient, to make certain disclosures to the patient, and to document those discussions and disclosures in the treatment records. Under HIPAA privacy regulations, the requirement for obtaining a signed "informed consent," prior to the commencement of treatment, was entirely eliminated by the U. S. Department of Health and Human Services in favor of the Notice of Privacy Practices (specified written disclosures) that must be given to the patient. The patient's signature is not required to be on the Notice, but the "covered provider" must make a good faith effort to obtain the patient's written acknowledgment of receipt of the Notice.

Even if not required by HIPAA, state law, regulation or ethical standards, it is my view that practitioners

should obtain a written informed consent, signed and dated, from patients when they are planning to a) provide online therapy, b) videotape or audio record sessions, c) permit third-party observation, d) provide therapy that includes touch, e) provide Christian counseling or similarly focused treatment, f) provide hypnosis or hypnotherapy g) provide EMDR or similar services, h) hold retreats or do hiking or other physical activities with clients, g) provide treatment that is new, innovative or experimental in nature, h) provide treatment that is inherently dangerous or more risky than usual, and i) provide family therapy or couple therapy using a “no secrets” policy – which affects expectations and understandings about the confidentiality of each participant. This list is illustrative rather than exhaustive.