Keeping Your License – Some Thoughts

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The most valuable business asset you have is your license. While I have known people who have had their licenses revoked and continued to see clients for remuneration, they usually did so under a different rubric, such as life coach or some other name. They sometimes ask clients to sign a form that declares that they understand that the practitioners are not practicing psychotherapy or therapy. If and when the licensing board becomes aware of this, they will likely launch an investigation (often undercover) and file formal charges when they determine that despite the change in language, services are being rendered within the scope of the license. It does not matter what the practice is called, but rather, what matters is the actual service performed or offered to be performed – for remuneration.

Aside from the obvious necessity of keeping your license active by renewing and paying the licensing fee on time and by complying with continuing education requirements, some obvious things that you can do to avoid liability (including licensing board actions) are to use good judgment, provide competent care, and "yes" – avoid being convicted of a crime (driving while intoxicated/under the influence, possession of a controlled substance, domestic violence, failure to pay court-ordered child support or certain taxes, false or misleading advertising, and insurance fraud are just some common or possible charges). Additionally, do not engage in other forms of intentional wrongdoing – such as, but not limited to, sexual contact with a client (a crime in some states), engaging in an unethical dual relationship with a client, or intentionally or knowingly failing to report child or elder abuse (typically a crime). While these may be self evident cautions, it is important for practitioners to be reminded of them – since so many licenses have been jeopardized or lost because of such conduct.

Complaints by patients to licensing boards usually do not simply allege negligent treatment. In fact, simple negligence may not constitute unprofessional conduct or grounds for discipline in most states. Gross negligence, incompetence, or repeated acts of negligence are typically actionable by the state – but not an isolated act of negligence. Simple negligence allegations are made in a claim or civil lawsuit against the practitioner, and such allegations are often defensible. The vast majority of difficulties encountered by licensed practitioners involve either criminal conduct or other conduct that is the result of intention. Practitioners are often surprised when they find out that an act seemingly unrelated to patient care – like driving a vehicle under the influence of alcohol after leaving a friend's wedding – can result in disciplinary action by the licensing board, and possibly, the suspension or revocation of the license.

Licensees who practice as sole proprietors, or in a partnership with one or more others, or who perhaps practice in the proper corporate form, at some point may consider hiring an intern, associate or other titled person who is pursuing a license and who is allowed by state law to perform services in a private

practice setting, typically as a W-2 employee. Hiring such a pre-licensed person may be done for a variety of purposes and with varying motivations, and as with any decision, one must examine the upside and the downside. With respect to the downside, hiring an intern does increase one's liability – arguably substantially. Not only is the intern performing patient care services that can result in liability, but there is a requirement that the intern or associate be supervised. In any claim or lawsuit against the negligent intern or associate, it is almost certain that the employer/supervisor will also be a target. An allegation of failure to properly supervise will likely be made, and thus, the employer is exposed not only because of the alleged negligence of the employee, but because of the alleged failure to properly supervise. A failure to properly supervise can also result in an enforcement action against the licensee.

Compliance with state requirements regarding supervision is not necessarily enough to successfully counter a claim of improper or negligent supervision. State requirements may be viewed and argued as the minimum required, but the circumstances of the particular situation may require more. Of course, if the employee was in fact negligent, that liability is likely (in most states) imputed to the employer. When the employer-employee relationship is closely examined by the attorney for the aggrieved party or others, it may be found that the relationship was inappropriately established or maintained. For example, there have been many cases where interns (or other pre-licensed persons) were essentially advertising and conducting their own private practices, with money from patients flowing directly to them in violation of applicable law. In such situations, the employer's license is in significant jeopardy.

INVOLUNTARY vs. VOLUNTARY COMMITMENTS – PRIVACY RULE

As a result of the gun violence in early December 2015 in San Bernardino, California and previous similar mass assaults, the HIPAA Privacy Rule was amended in February 2016 to help keep guns out of the hands of persons who have, among other things, been involuntarily committed because they were adjudicated to be an imminent danger to themselves, to others, or because they were gravely disabled. In proposing and pushing this measure, the U.S. Department of Health and Human Services (DHHS) was careful to point out that the measure does not impose any reporting requirement upon covered mental health care providers, that it does not involve the revelation of the details of treatment or the confidential communications between doctor and patient, and that the permissible reporting to NICS (see below) once an adjudication occurs does not apply to voluntary commitments.

DHHS believed that the Privacy Rule did not adequately address reporting by states and certain covered government entities, and that an express provision in the Privacy Rule that allowed (not required) limited reporting to the FBI's National Instant Criminal Background Check System (NICS) would be helpful in keeping guns out of the hands of those involuntarily committed and adjudicated (e.g., a commitment decision is made). The Department took pains to point out that they were protecting the confidential communications between practitioner and patient because it did not want to inhibit people from seeking mental health treatment. The rule also permits reporting to NICS when a defendant has been found incompetent to stand trial and in other limited circumstances. The great bulk of such reporting is typically done by and through the civil court system in the various states.

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