Leaving an Agency and Non-compete Agreements

written by Richard Leslie | April 1, 2023

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Two recent events have caused me to revisit this topic – yet again. One of those events was a conversation with a mental health practitioner from a state other than California. The practitioner had signed an agreement when first employed which seemed to limit the practitioner's ability to "take patients with her" when leaving the agency. Such agreements can be written in a variety of ways – intended to protect the practice of the employer/agency or private practice. Practitioners typically sign such agreements because they are anxious to be hired and because they are not looking far enough down the road. Eventually, however, the time comes when they are ready to leave the agency or practice and are faced with the dilemma of what happens with the patients that they are treating.

These non-compete agreements are typically governed by state law, and various states do not always look kindly on such agreements. In California, these agreements are viewed unfavorably by the courts, and the chances of successfully challenging such agreements are favorable. In the state in question, non-compete agreements were generally enforceable, but not always. One exception that would likely make the agreement unenforceable was if it negatively affected or harmed the public. Doesn't such an agreement harm the public if the patient is prevented from continuing in therapy with the practitioner who has been treating the patient for months or years? Should the economic interests of the practice owner outweigh the best interests of the consumer/patient? Wouldn't it be best if the patient was made aware, in a timely manner, of the departure of the practitioner from the agency or practice, and the right of the patient to continue being seen at the agency or to follow the treating practitioner to a new location and practice? I trust that courts of the various states might nullify such agreements that negatively affected the rights of the patient.

The other event that recently occurred was the fact that the Federal Trade Commission has made public their examination of the use and misuse of non-compete agreements nationwide, where employees who leave are in effect prevented from competing with their former employer – perhaps for a lengthy period of time or for a geographically wide area. More specifically, the FTC has proposed a rule which is based on a preliminary finding that non-compete agreements constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act. The Commission has already sought public comment on the proposed rule. Their intent seems clear – they want to ban such agreements nationwide and they intend that the ban would apply to all kinds of workers – from hairstylists and warehouse workers, to doctors and business executives. If the FTC is successful, those who employ mental health practitioners will have to recalculate the financial advantages and disadvantages of doing so, and will have to recognize that the patient should not be bound by some contractual arrangement

between the employing agency or practice and the employed practitioner. The proposed rule would also apply to independent contractors. It seems likely that nationwide changes are soon coming.

<u>NOTE</u>: The following article was first published on the CPH Insurance's website in December 2012. It appears below with minor changes.

JOINT HOLDERS OF THE PRIVILEGE – Meaning and Implications

The physician-patient privilege and the psychotherapist-patient privilege involve the right of the patient to prevent the introduction of the practitioner's testimony or records in a legal proceeding. Confidentiality, a closely related subject, involves the duty of a physician or mental health practitioner to not release patient records or information without the signed authorization of the patient, unless disclosure without a written authorization is mandated or permitted by state law (or HIPAA, if applicable). Patients have a general right to access their own records – that is, a right to inspect the records and a right to a copy of the records. This right of access has its limitations.. Reference to state law regarding privilege, confidentiality, and access to records is necessary to determine the law in a particular state and in a particular circumstance.

There are many circumstances where more than one person will be seen in therapy, such as in couple or family therapy. In such cases, the identified patient may be the couple or the family unit, however configured. Depending upon state law regarding the psychotherapist-patient privilege (or a like-named privilege), there may be joint holders of the privilege when the patient is more than one person. With respect to joint holders of the privilege, California law provides that where two or more persons are joint holders of the psychotherapist-patient privilege, a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. This law may be similar to how other state statutes treat this subject matter, but it is important to ascertain such information in each state. It is arguable that the multiple members of group therapy are each considered a joint holder of the privilege since they are all present to further the interests of each other in the group therapy..

Suppose that a couple is being seen in therapy and that the practitioner has made clear to the parties, in writing or otherwise, that the identified patient is the couple. Suppose further that the practitioner is served with a subpoena for the treatment records of one of the parties to the couple therapy who either decides to waive the privilege voluntarily or has waived the privilege as a matter of law. The other party should nevertheless be entitled to assert or claim the privilege and prevent the records from being disclosed in the particular lawsuit. That party might instruct the treating practitioner to assert the privilege – and generally, the practitioner would be obligated to resist release of the records until there is agreement between the couple or until the court orders disclosure after considering the issue of privilege.

Thus, it should generally be understood that the privilege is not always held by an individual, and that the therapist must be clear with participants as to who the patient is at any given time throughout the

course of the professional relationship. It should also be understood that when seeing a couple or a family unit, there is always the possibility that the respective interests of the parties may change with time – and a dispute might develop involving the records. The parties may be at polar opposites, with the practitioner in the middle. When placed in such a situation, it is useful to have knowledge in this area of the law.

Similar principles (to joint-holders of the privilege) may apply with respect to releasing records pursuant to a written and signed authorization from the patient, which involves the duty of confidentiality. Once the principle of joint holders of the privilege is established, it is easier to make a convincing argument that the same principles apply to confidentiality, release of information with a signed authorization, and to the patient's access to records. Before releasing any of the records pursuant to a signed authorization, the practitioner would ordinarily need the signed authorization of each of the participants in the therapy. Suppose that a therapist is treating a couple and that a few of the sessions were individual sessions with each of the parties. The records of those individual sessions would ordinarily be viewed as records of the couple therapy, and the individuals involved would typically be informed of this reality. Thus, the person who was seen in an individual session would not necessarily control the release of those particular records. Rather, the signed authorization of both participants in the therapy would likely be required.

Suppose that a licensing board is investigating a licensee, who is being accused of wrongdoing by one member of a family unit that is being treated. Suppose further that the licensing board asks for a copy of the treatment records pertaining to the complainant and forwards a signed authorization from that person. In order to release the records, assuming that there is no law or regulation that would otherwise require their release, the therapist would typically need the signed authorization of each member of the family unit before releasing any of the records. My experience over the years (in California) has been that it is not unusual for licensing boards to send authorizations that are not legally adequate – and when a therapist asks for the proper authorization to be sent, the licensing board becomes "testy." My experience is that the judiciary generally recognizes that more than one person may be the patient and that it may take the authorization of more than one person before records can be accessed or released.

With respect to the right of a patient to inspect or to obtain copies of the records, there may be certain restraints upon access when the identified patient is more than one person. Suppose that a couple is being treated and that they subsequently break up. Should either one of the participants in the therapy be entitled to a copy of all of the treatment records upon their individual request or demand? It is my view that neither party should be entitled to the records unless there is authorization granted by both parties. For those who think similarly, it is important to inform the couple or the family unit (at the outset of treatment) about your view of who the patient is, and how that gets implemented with respect to release of records, privilege, and access to the records.

It is important to remember that each state may have different laws with respect to these matters, and those laws, to the extent that they differ with my views or with ethical standards that may apply, must

be respected.