Advertising, Options for Patient Request for Copy of Records & Holding Insurers Accountable

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ADVERTISING

Advertising is one way in which therapists and counselors can attempt to expand their private practices. Mental health practitioners vary in their views about advertising – both with respect to the nature and extent of any advertising undertaken and the manner in which they desire to be perceived by the public. The most important and common caveat with respect to advertising is that the advertisement must not in any way be false, fraudulent, misleading, or deceptive. Such an advertisement can result in disciplinary action by a licensing board and typically constitutes a crime – usually a misdemeanor. State statutes or ethical standards regarding unlawful or unethical advertising may contain provisions related to prohibited actions or the use of prohibited words or phrases.

Two common provisions should be thoroughly understood – especially by those who might consider using testimonials. One such provision prohibits statements intended or likely to create false or unjustified expectations of favorable results. Another common provision prohibits statements or claims that are likely to deceive or mislead because of a failure to disclose material facts. Solicitation of testimonials from current patients may be prohibited or limited by ethical standards or by state laws/regulations. Before venturing into this area of advertising, or any advertising, think carefully and do your research. Leave the “huffing and puffing” to treadmill activity.

PATIENT REQUEST FOR COPY OF RECORDS – OPTIONS

When a patient requests a copy of his or her treatment records, the therapist or counselor must usually think and act relatively quickly. However, knowledge of the applicable law may allow the practitioner some leeway. It is critical to know what the timelines are, what the triggering event is that gets the clock ticking, and what the options are for the practitioner. As with so much that I write about, the actions of the practitioner will depend upon the many facts and circumstances that are involved in the particular circumstances at hand.

With respect to the triggering event, it is important to know whether the applicable law requires a written request from the patient, or whether an oral request for a copy of the records is sufficient to start the clock ticking. Typically, a written request is required, and the clock starts to run when the

request for records is received by the practitioner. The law may also specify that the written request is to be accompanied by a fee to defray the costs of copying and may specify other conditions or details.

This information is important to keep in mind because many requests for records are made orally – sometimes in an angry message left on voice mail or during a telephone conversation. In such cases, it is likely that the time within which the practitioner must act does not begin to run. In many of such situations, one or more conversations with the patient may resolve the matter without the necessity of supplying a copy of the records. In other situations, the patient may be satisfied if the opportunity to inspect or review the records is offered. In any event, there may be time to try to work things out – as long as the practitioner fully understands when the clock begins to run.

Of course, a patient's request for records may be accommodated by the practitioner whether or not the request is technically/legally sufficient. But most practitioners are hesitant to release copies of records to patients and only do so if required or if considered safe and appropriate under the circumstances. Obviously, much of the information contained in the records is highly confidential and sometimes embarrassing or potentially damaging. Once records are in the hands of the patient, the records are likely to be kept rather than destroyed, and the chances for others to view this confidential information are increased. Therapists and counselors who take time to discuss these matters with clients are sometimes able to avoid providing a copy of the records.

I have often spoken with therapists who have wanted to resist patient requests for records and have utilized the detailed and nuanced provisions of the law in order to resist these requests, at least initially. Such cases might be encountered with a controlling or bullying client. The client may assert that the practitioner is required to provide a copy of the records forthwith or within days, but the client may be unaware (and there may be no requirement to inform the client) that a written request, and perhaps more, is required. Full knowledge about the triggering event allows the practitioner in such a situation to interact with the patient with some measure of confidence and without feeling intimidated. Sometimes, a client who is in couple or family therapy may insist upon a copy of the records, not realizing that the therapist or counselor will likely not be able to ethically or legally comply with the request of just one of the participants in therapy. With respect to the parent or guardian of a minor patient, a denial of access to the parent or guardian may be appropriate, even required, if the minor has the right of inspection and copying under the applicable law.

The patient may request specific parts of the records, or may request "any and all" records. In most states, the law will contain exceptions that allow the practitioner to deny a properly made request or provide a summary of the treatment records in lieu of the actual records. These two alternatives to providing a copy of the records usually have detailed prerequisites, requirements or qualifications attached to them, so care must be taken to strictly comply with whatever is required when providing a summary or denying the request outright.

MENTAL HEALTH PARITY – HOLDING INSURERS ACCOUNTABLE

While not related to avoiding liability, there is federal legislation that should be of interest to counselors and therapists nationwide. Congressman Joseph Kennedy (MA) is the sponsor of HR 4276, the Behavioral Health Coverage Transparency Act of 2015. The bill addresses several concerns for practitioners regarding the federal mental health parity law passed in 2008 (the Mental Health Parity and Addiction Equity Act). Among other things, the bill addresses the weak and inconsistent adherence to existing parity laws by insurers.

The bill provides for increased transparency for consumers seeking coverage for mental illness and substance use disorders, provides for random audits of insurers by federal regulators re: parity compliance, and mandates a review of denial rates for mental health claims as compared to medical claims. As per the press release announcing introduction of the bill, a recent National Alliance on Mental Illness report concluded that insurers currently deny authorization for mental health care at nearly twice the rate they do for medical care, often providing no information about the criteria used for making their decisions. While the prospects for the bill are not great, it brings increased attention to this important issue.

At a 9/9/16 hearing of the House Subcommittee on Health (Committee on Energy and Commerce) regarding federal parity laws and regulations, concerns were raised by Congressman Kennedy and others that reimbursement rates in some areas are so low, especially in Medicaid programs, that there is often a shortage of providers. This shortage of providers raises access to care and quality of care issues. The hearing revealed that state Medicaid programs are not required by federal law to report to the federal government (Centers for Medicare and Medicaid Services) their reimbursement rates, even though Medicaid is a state/federal partnership. The subcommittee hearing made clear that there is a confusing patchwork of agencies, both federal and state, that are dealing with parity issues – the result of which is inadequate enforcement against insurers.