October's True or False Answers

written by Richard Leslie | October 31, 2019

Avoiding Liability Bulletin – November 2019

***NOTE*: In the October 2019 issue of this Bulletin, I asked twenty-five questions regarding various areas of practice (and the law) that may be encountered by practitioners during the course of their careers. While the discussions below cannot address the law in every state and are primarily based upon California law, the reader should determine whether the law in their state of practice is consistent with the answers and content appearing below.**

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The first six questions in the October 2019 Bulletin relate to the psychotherapist-patient privilege. The answers to those questions are contained in the content appearing below. Is the law in your state of practice the same as described below? If not, what are the differences?

It is important for practitioners to distinguish between confidentiality and privilege, and when necessary, to discuss both issues with patients. Privilege involves the right to withhold testimony and records in a legal proceeding. Practitioners need to understand the basic principles of privilege so that they do not release records or provide testimony before the question of privilege is resolved. Knowledge of these principles can help practitioners deal with attorneys who are pressing them, for example, for the release of records pursuant to a properly served subpoena. Even though the psychotherapist is not the holder of the privilege, California law provides that the psychotherapist who received or made a communication subject to the privilege shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and is authorized by statute to claim the privilege.

Not all communications between practitioner and client/patient are privileged. State laws generally provide, among other things, that it is the confidential communications between psychotherapist and patient in the course of that relationship that are privileged. Some communications, even if made in confidence, are statutorily not protected. The privilege is relevant in both civil and criminal cases. The holder of the privilege is generally the patient and not the psychotherapist. With respect to minors, state law must be referenced. In California, the law provides that if the patient has a guardian or conservator (words of art, and not intended to be a reference to parents of a minor), the holder of the privilege is the guardian or conservator. No mention is made of a parent or parents in the case of a minor patient – thus, the minor patient is the holder of the privilege.

Despite the death of the patient, the privilege still exists. In California, the privilege is then held by the "personal representative" of the deceased patient. When the identified patient is a couple (or more than one person), the law provides that the couple (or other dyad) are joint holders of the privilege and that

one joint holder of the privilege may waive the privilege for that joint holder, but such waiver does not affect the right of the other joint holder to claim the privilege,

CONFIDENTIALITY

Questions 7-10, 13, and 15 in the October 2019 Bulletin relate to confidentiality. The answers to those questions are contained in the content appearing below. Is the law in your state of practice the same as described below? If not, what are the differences?

Perhaps the most helpful exception to confidentiality that practitioners should be aware of is the right of the practitioner to communicate with other health care providers and facilities without the signed authorization of the patient. In California, for example, this right has long been contained in statute and served as a model for HIPAA regulations. This right to communicate must be for the purposes of diagnosis or treatment of the patient. Even if a patient objects, the practitioner may reasonably believe that disclosure of the information to a physician, for example, may be necessary and in the best interests of the patient's mental or physical well being. HIPAA regulations recognize this right to communicate with other health care practitioners. Do you know whether there is a similar statute in your state of practice, and do you know the particulars and limitations of such a law? Must the practitioners be licensed? Must the facilities be licensed? Can the disclosures between practitioners be for any purpose other than the diagnosis or treatment of the patient? Can the patient prevent disclosure?

State laws typically enumerate the times when confidential information may be disclosed to a third party without the signed authorization of the patient and the times when information must be disclosed. In California, disclosure of information may be compelled by a court order (perhaps issued after an argument over whether the privilege applies). For example, when a practitioner or the patient asserts the privilege in a legal proceeding, perhaps at a deposition, a court may have to rule on that issue and may protect the claimed privilege or order the release of the information. Most if not all states have mandatory reporting laws for child abuse, elder abuse, and dependent adult abuse. Mandatory disclosure may also be compelled when requested by a medical examiner or a coroner who is investigating the death (suicide or suspicious death?) of the patient.

When a signed authorization from the patient is necessary, practitioners must be sure that the authorization form used or received is valid and in compliance with applicable state law or HIPAA. In California, state law specifies the required elements of an authorization form. I have spoken with therapists who have used or relied upon invalid forms who were rightfully concerned about their vulnerability for a claim by the patient of negligent breach of confidentiality. In California, failure to include a date after which the therapist is no longer authorized to disclose the information, or failure to state the specific uses and limitations on the use of the information by the persons or entities authorized to receive the information, can result in an invalid authorization form.

If a patient informs his/her therapist or counselor of participation in a prior felony crime, the California

practitioner must generally keep this information confidential. Practitioners are often aware of the past (and sometimes current) criminal acts of their patients. However, I have read some state laws that surprised and concerned me because they required disclosures by licensed mental health practitioners of certain crimes committed by patients – so be aware of the breadth and limitations of the duty of confidentiality. Therapists are permitted to sue their patients and can do so without breaching confidentiality. If the law was otherwise, a practitioner would have no way to recover monies owed by the patient, or to sue the patient for monetary damages when the patient, for example, causes physical harm to the therapist. I have spoken with many therapists who were thinking about suing their patients due to the patients' threats, harassment, stalking, or other harm to person or property (such as stealing treatment records).

Access to Records

Questions 11 and 12 in the October 2019 Bulletin relate to access to records. The answers to those questions are contained in the content appearing below. Is the law in your state of practice the same as described below?

While practitioners will generally provide copies of treatment records to patients who make requests pursuant to applicable law (for example, upon receipt of a written request), there are times when they will want to deny the patient's request **or** provide a summary of the records in lieu of the entire record. In difficult and contentious cases, therapists in California have used the technicalities of the statute to delay their compliance until they are sure of the proper action to be taken. State law may specify the circumstances under which a summary can lawfully be provided as well as the kind and extent of information that must be included in the summary. With respect to denials, state law will typically describe the circumstances when a denial may be made as well as the specific action(s) that must then be taken by the practitioner. All options have required time frames within which action must be taken by the practitioner.

Under California law, patients are not always entitled to a copy of their treatment records. Practitioners in California may lawfully (and arguably, shockingly) provide a summary at their discretion (with no pre-conditions). In contrast, and under HIPAA regulations, a summary can only be provided if the patient agrees. Denials can be made under specified circumstances, such as demonstration of a substantial risk of significant adverse or detrimental consequences to the patient in seeing his or her records. If a denial is made, state laws will typically require the practitioner to take certain actions or steps to justify and explain the denial (similarly with HIPAA regulations). Under these federal regulations, patients are not entitled to a copy of all of the treatment records in the practitioners' files (for example, they are not entitled to "psychotherapy notes," as that term is defined in the federal regulation).

NOTE: Next month, this Bulletin/Blog will address one or more other questions asked in the October 2019 Bulletin. Some of the remaining questions are more difficult to answer than those answered above. In short, they may deal with scenarios where the law may be unclear and where issues may simply be arguable. We shall see!