

# Potpourri

written by Richard Leslie | January 4, 2022

## **Avoiding Liability Bulletin - January 2022**

***Note: The following material presents a variety of issues that can and do arise and is intended to encourage readers to ponder or further pursue research and learning about one or more of these issues or topics. I intend to answer some of the questions raised in this issue of the Bulletin and to discuss some of these issues or topics more fully in future issues. Readers can research many of these issues or topics on the CPH Insurance's website, where my prior articles may be found in the archives.***

**Advocate** – Health care practitioners do not typically think of themselves as advocates for their patients. They are treatment providers. They report or testify truthfully and dispassionately and stick to the facts. They express professional opinions consistent with their findings and honest belief. With respect to licensed mental health practitioners, there may be times when it is appropriate to advocate for a patient or client and there may be times that it would not be appropriate to do so. Is it appropriate for you, in your state of practice, to ever be an advocate for a patient? What does state law or applicable ethical standards have to say, if anything, about being an advocate for a patient? Should you let a patient know, at the outset of treatment, that you are not an advocate?

**Business License** – If a licensed mental health practitioner fails to obtain a business license in the local jurisdiction where a license is required, would the state licensing board or agency have the lawful authority to take disciplinary action against the licensee for conducting an unlicensed business?

**Child Abuse** – If a nineteen year old tells her therapist that she was sexually abused by her high school teacher two years earlier, is the therapist under a duty to ascertain whether the teacher is still teaching at the same or some other school? Is the therapist under a duty to report child abuse? Should the therapist seek the patient's written and signed authorization in order to make a report? Should the therapist *encourage* the patient to make a report?

**Psychotherapist-patient privilege** (or otherwise-named privilege) – Do you know who the holder of the privilege is when the patient is 12 years of age or older or when the patient is under twelve years of age? Is the psychotherapist ever the holder of the privilege in your state of practice? If the psychotherapist is not the holder of the privilege, but an adult patient is, may the therapist nevertheless assert the privilege on behalf of the patient under certain circumstances?

**Emotional Support Dogs/Animals** – Psychotherapists are sometimes asked by patients or clients to write a letter or to provide documentation to a state or federal agency, or some other entity, in support of the patient's attempt to be accompanied by an animal on airline flights, in restaurants, and

elsewhere – depending on the kind or purpose of the particularly named “license” for the animal. Has your state passed any laws or regulations that set standards or pre-requisites for practitioners before such recommendations or letters may be written? California recently passed a set of requirements applicable to health care practitioners who provide letters or documentation to support a client’s need for an emotional support animal. The law became effective on January 1, 2022. It distinguishes between an emotional support animal and a guide, signal or service dog.

**Fees** – May a private practitioner charge a patient any fee that is agreed to by the patient, no matter how high the fee? Where is the line drawn – and who draws it? Does the licensing board have any authority to take disciplinary action against a licensee if it believes that the fee was too high, despite the informed consent of the patient? Does your professional association’s Code of Ethics allow for action by an ethics committee if it determines that the fee was excessive? May you lawfully raise a patient’s fee more than once in a calendar year?

**Termination** – Do you address the issue of termination in the disclosure statement or the informed consent form that you give to the patient at the outset of treatment so that the patient understands that you may be under an ethical duty to terminate the therapeutic relationship under certain circumstances? Should the disclosure let the patient know that a termination is appropriate if you determine that the patient is not benefitting sufficiently from the treatment? Should all grounds for a termination be disclosed?

**Telehealth** – If you are a practitioner who has decided to do more work via telehealth, how comfortable would you be, or how comfortable are you, providing sessions via telehealth to your patient who is temporarily in another state or country? How do the laws and regulations in your state of practice address this issue? Does it seem reasonable to you that a licensing authority would try or want to prevent you from providing services to your patients via telehealth simply because the patient is not physically present in the state in which you practice? Could you be successfully sued by the patient for abandonment or negligence after you refuse to treat the patient (who may be in significant need) because of the patient’s temporary presence in another state? How might you find out if the licensing authorities within Brazil, Thailand, or Alaska would have a problem with you speaking on the telephone (or via other appropriate means) with your client who is located there (sarcasm intended)?

**Recordkeeping** – Does the applicable law and ethics in your state of practice allow you to keep minimal records if requested to do so by a patient or client and if based upon the reasonable concerns expressed by the patient or client regarding privacy – assuming that there is no issue of insurance coverage or reimbursement – and assuming you are comfortable with the request because of the nature of the services being rendered?

**HIPAA** – not HIPPA! – If you are a “covered provider” under HIPAA (federal law) and the federal regulations implementing HIPAA, are you well aware of the difference between psychotherapy treatment records and psychotherapy notes? Do you know whether or not the patient has the right to access (for example, to inspect or copy) either or both categories of records? Are psychotherapy notes

protected from a subpoena issued by an adverse party seeking any all records pertaining to the treatment of the patient?

**Professional corporations and medical services** – Is there any lawful way for a business owned by a non-physician licensed mental health practitioner to provide medical services to clients or patients of the business? In California, for example, a marriage and family therapist professional corporation, or a licensed clinical social worker professional corporation, and other professional corporations, may employ a physician (and a variety of other health care practitioners) to provide services within the scopes of their respective practices as employees of the corporation. Physicians and other health care practitioners may also be shareholders in such corporations with certain limitations. Formation of a professional corporation should be accomplished with the advice and services of an attorney familiar with such entities because there are various technicalities and requirements that must be addressed. The laws in each state vary with respect to the proper manner for particular mental health practitioners to practice in the corporate form and to employ other health care licensees to perform services within the scopes of their respective licenses.

I was once contacted by a licensed marriage and family therapist in California who formed a marriage and family therapist professional corporation, which hired/employed a physician to perform certain evaluations that only a physician could lawfully perform. The MFT professional corporation billed the appropriate payers, which, together with the psychotherapy services being provided by employees of the corporation, resulted in significant income for the MFT owner – into several hundreds of thousands of dollars per annum. She was accused of committing a felony (in the nature of fraud) for having the MFT professional corporation bill for a physician’s services and she thereafter sued her accuser (either an employee of the insurer or an attorney for the insurer – I forget – it was many years ago!) for defamation.

The therapist’s attorney asked me to be an expert witness with respect to the power and authority of a marriage and family therapist professional corporation. I had been involved in pursuing the legislation that would allow LMFTs the same rights as psychologists and other health care providers who were permitted to form professional corporations and have other kinds of licensees as shareholders and employees of the corporation. The judge allowed me to testify even though I was providing my opinion on the meaning of the law – a determination usually reserved for the judge. As I recall, there was a judgment and award of damages for the defamation suffered by the therapist. I do not remember the amount of the award, but her lawful behavior was confirmed by the court’s decision.