Reminders and Information to Avoid Liability

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A. **Advertisements** by licensed mental health practitioners must not be false, fraudulent, misleading or deceptive. Care should therefore be taken before representing yourself as an "expert" or "specialist." What facts allow for such a representation? Can you support your claim and be confident in doing so? Are you willing to be held to the standard of care of the expert practitioner rather than the standard of care of the ordinary and prudent practitioner? Isn't the specialist expected to know more than the ordinary practitioner in the area of the declared specialty?

B. **Barter** may not be specifically prohibited by law, but some ethical codes and standards seem to frown on barter or provide conditions around barter that limit its appropriateness. This is so because some barter arrangements create conflicts and lead to exploitation or distortion of the professional relationship. Be sure to review the ethical standards applicable to your practice and any law or regulation that may be applicable. See item "**Y**" below.

C. **Confidentiality** is the cornerstone of psychotherapy, but it is not without exceptions – some of which are mandatory (e.g., child abuse and elder abuse reporting) and some of which are permissible (e.g., when communicating with other licensed health care providers or facilities for purpose of diagnosis or treatment – depending upon state law). The fact of the relationship (as opposed to the content of the communications) may be considered to be confidential – so be careful about acknowledging that someone is your patient.

D. **Domestic violence** occurring in a home where a child resides may constitute child abuse if the child observes the abuse. In some states, and depending upon the circumstances, domestic violence may constitute child abuse if it occurs in a home where the child resides – whether or not it is witnessed by the child. For example, if a parent is high on meth and attacks the other parent with a knife – this may constitute child abuse – even if the child is sleeping and unharmed. Check this out in your state of practice.

E. **Emotional abuse of a child** may be reportable as child abuse, depending upon state law and the circumstances involved. There is a difference between non-severe emotional abuse and severe

emotional abuse, especially with respect to whether a report is permissible or required. This can be a tricky area of the law, but reporting emotional abuse may be an important option for the mandated reporter who encounters a situation where the child's mental health is at risk, but there is no physical abuse or neglect..

F. **Financial abuse of an elder** constitutes a mandatory report in most states. Be sure you know the definition of an "elder" before reporting. There are some nuances in this area of the law (as there are in many areas of the law!). For example, in California an elder is someone who is 65 or older *residing in California*. Thus, if a patient in California were to tell his therapist that he physically assaulted his 70 year old uncle in (and who resides in) Texas, this would not be reportable in California. The practitioner in California is of course not bound by Texas' mandatory reporting laws. Thus, the communication is confidential.

G. Guilty pleas in a criminal case may jeopardize your license, as may a plea of "no contest" (*nolo contendere*). While no therapist contemplates being convicted of a crime, the reality is that many are – whether it is for driving under the influence of alcohol or drugs, possession of a controlled substance, insurance fraud, petty or grand theft, or a crime categorized as domestic violence. Before pleading guilty or no contest, consider fighting the case where appropriate (such as when you believe you are innocent or where your lawyer believes that the evidence of guilt is weak). Obtain representation early.

H. **HIPAA**, through its implementing regulations regarding parental access to the treatment records of minor patients, defers to state law concerning the rights of parents to inspect or obtain copies of the mental health records of minor patients. In California, the law is written broadly – allowing practitioners wide latitude in denying access to parents and providing protection if the angry parent sues or complains, or threatens such action. What is the law in your state? Can you protect the records from discovery by the "snoopy" parent?

I. **Immunity from liability** does not mean that a practitioner cannot be sued by a patient. It means that if sued, the immunity statute can be raised as a defense, usually in a motion for summary judgment, and the case can be dismissed at an early stage of the proceedings – assuming that the judge finds that the facts and circumstances fall squarely within the dictates of the immunity statute. Immunity is typically granted to mandated reporters of child abuse or elder abuse. In some states that immunity is absolute and unconditional. In other states, the immunity is available only if the therapist or counselor acts in good faith.

J. **Joint legal custody** is a concept that is usually important in determining such things as which parent can authorize treatment of a minor, which parent can sign an authorization form to release information pertaining to the minor patient, and perhaps, which parent can have access (inspect or copy) to a child's mental health records. Joint legal custody generally means that both parents share the right and responsibility to make the decisions relating to the health, education, and welfare of the child.

K. Keep good records – not only with respect to treatment, but also with respect to your discussions

and consultations with others that are intended to help you make the right clinical or legal decisions. Do not neglect to keep good records relating to your responsibilities to be sure that your practice remains compliant. In other words, calendar the expiration date of your license and your professional liability insurance policy. Keep accurate records regarding the continuing education courses or workshops that you have completed.

L. **Leaving an agency** can create problems for the mental health practitioner who decides to "take patients" with them. Not doing things correctly and ethically can cause conflicts between the departing therapist and the owner of the business. These conflicts often put the patient in the middle of the dispute – something that should be assiduously avoided. In some cases, there are contractual provisions (for example, a non-compete provision) that attempt to govern the situation when someone leaves an agency – some of which may be unenforceable. Remember, no one "owns" the patient. Patients should be free to see the practitioners of their choice.

M. **Minors** are entitled to certain rights with respect to obtaining their own treatment – without parental consent. They may also have rights with respect to inspecting their records, obtaining copies of the records, preventing parents from having access to the records, and signing authorization forms. Each state likely handles these matters somewhat differently. In California, minors are given broad rights – they can generally sign authorization forms if twelve or over, they can generally authorize treatment if twelve or over, and they generally have the right to inspect or copy their own records if twelve or over.

N. **Notice of Privacy Practices** – Under HIPAA, mental health practitioners are required to provide their patients with this form – which must contain information specified in federal regulations (The Privacy Rule). This is required of those who are "covered providers." One of the disclosures that must be made, and one that was patterned in significant part after California law, is that confidential patient information may be shared, without the patient's written authorization, with other health care providers for purposes of diagnosis or treatment of the patient. Is that the law in your state for those who are not HIPAA covered providers?

O. Oral authorization to release records to a third party is generally not legally sufficient – either under HIPAA or applicable state law. State law may also require (as does HIPAA) that a valid authorization to release information pertaining to a patient contain specified information or elements. One such element may be the date upon which the authorization expires (or the specific date after which an authorization is no longer valid).

P. **Privilege** (whether called "psychotherapist –patient privilege" or a similar name) refers to the right of the patient to prevent his or her therapist from testifying in a legal proceeding and to prevent the treatment records from being introduced into evidence in a legal proceeding. The holder of the privilege is generally the patient, but a psychotherapist would be the one who initially asserts the privilege when the patient is not around and the therapist is served with a subpoena for records. Understanding privilege is essential to lawfully resisting (unless the patient and his or her attorney waive the privilege) disclosure when served with a subpoena.

Q. **Questionable billing practices** may get the practitioner in trouble. It is not okay to bill insurers for sessions not actually held, even if the practitioner has a policy where patients are informed that they are responsible for the fee if there is an unexcused "no-show." If the bill clearly indicates that the patient did not show and that no services were rendered, a bill could be submitted to the insurer but would likely be challenged. Some practitioners have found themselves in trouble for billing (in their own names) for services rendered by pre-licensed employees – full disclosure was not made. Insurance fraud is a serious offense!

R. Remember to renew your license and your malpractice insurance policy in a timely manner. Practicing without a license or malpractice insurance, even if the result of a clerical error can have significant adverse consequences when an unexpected event occurs during the period of time when there has been a lapse. Don't rely upon the state or the malpractice carrier to remind you – calendar the key dates and avoid stress and possible liability exposure,

S. **Service of a subpoena** upon a psychotherapist should not trigger fear – especially if the practitioner understands the laws related to the psychotherapist –patient privilege. While the law of each state may differ with respect to how a subpoena is to be complied with, contested, or resisted by a psychotherapist, it is important to understand that the practitioner will usually want to ascertain whether the patient and the patient's attorney will be claiming or asserting the privilege, or whether the privilege is being waived. It is also important to make sure that the patient and the patient's attorney are in agreement with each other.

T. **Termination of therapy** should generally be thought of as a process. A sudden termination by the practitioner could amount to an abandonment, which would jeopardize the license of a practitioner who acts too quickly. For example, terminating a long-term client by leaving a telephone message could be considered tantamount to an abandonment, or gross negligence. Of course, each case is different and sometimes there are extenuating circumstances.

U. **Unethical dual relationships** must be avoided, but what about other dual relationships? Depending upon state law and applicable ethical standards, not all dual relationships are necessarily unethical. While engaging in a dual relationship may not be wise in many circumstances, some ethical standards recognize that not all dual relationships are unethical, and that some dual relationships cannot be avoided. The key in such circumstances is to make sure that there is no exploitation of the patient and that the practitioner's judgment is not impaired.

V. **Violating confidentiality**, whether intentionally or negligently, can result in a civil lawsuit for damages, disciplinary action by the licensing authority, and in some cases (in some states) criminal prosecution. It is critical that practitioners understand the exceptions to confidentiality – those that are mandatory and those that are permissive – and their limitations.

W. **Waiver of the psychotherapist-patient privilege** can occur by operation of law or by a signed or express waiver of the privilege by the patient. An example of an express waiver would be when a

patient and the patient's attorney inform the practitioner that the patient is waiving the privilege. An example of a waiver of the privilege by operation of law is when the patient has communicated the otherwise confidential information to a friend or other third party. Another example of a waiver by operation of law is when the patient has put their mental or emotional condition into issue in a legal proceeding. The latter example is quite common.

X. **X- ray therapy** is outside the scope of practice/license of psychotherapists. While this is obvious, there are some less obvious services that raise scope of license questions. I have talked with therapists who have made suggestions or recommendations to patients about taking (or not taking) certain medications or dietary supplements. I have also talked with mental health practitioners who have used massage, even in a limited way, during the course of treatment. I remember one case where the therapist massaged the patient's shoulders in order to relieve pain. There are limits to what your license allows – know them well!

Y. **Yard-work** and gardening, to be performed by a patient at the practitioner's home in exchange for professional services being billed at $150 per hour, and "paid for" at the rate of $30 per hour, is an example of exploitation and an unethical dual relationship. The stark contrast is apparent, and exploitation by the practitioner is easily argued by the later- disgruntled patient. The patient could be considered to be in a separate business relationship with the practitioner to perform personal services. And, wait until the practitioner wants to complain about the quality of the patient's labor or decides to terminate therapy!

Z. Zzzz – do not fall asleep while performing professional services!