Scope of License / Child Abuse Reporting / Signed Authorization to Release Confidential Information

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SCOPE OF LICENSE

Professional liability claims arising from services provided by a physician are not covered by the CPH & Associates policy.

In the May 2019 issue of this Bulletin, I asked whether the reader (presumably, a licensed mental health practitioner) was permitted to hire a physician to practice medicine as an employee of the reader's practice. I suspect that in your state of practice it would be unlawful, for example, for a licensed marriage and family therapist in private practice to hire a physician to perform medical services. The practitioner who hires the employee would be paid by patients who were receiving care from the physician-employee, and would thus be receiving money for medical services performed – which is typically unlawful and a crime. The same analysis would likely apply if an LMFT, LCSW, or LPCC were to hire or partner with (pursuant to a formal partnership agreement) a psychologist to perform psychological services (that is, practice psychology).

Interestingly, however, a physician may lawfully be employed by a marriage and family therapist professional corporation (and other kinds of professional corporations) in California. The LMFT professional corporation would receive payment from patients who are seeing the physician and the physician can lawfully perform services within the scope of the physician's license. The LMFT professional corporation is also permitted to hire other specified licensed health personnel (such as licensed psychologists and LCSWs) to perform services within their respective scopes of license. The formation of the professional corporation that will be performing a variety of health care services often presents questions and issues that require legal consultation, such as the issue of obtaining adequate and appropriate professional liability insurance coverage for the corporation and its employees, and questions related to the ownership of shares in the corporation and the percentage of shares that must be owned by certain licensed practitioners.

How does your state of practice provide for, if at all, the integration of differently licensed health personnel into a lawful entity providing services within the respective scopes of license of the various licensees?

CHILD ABUSE REPORTING

Reporting laws vary from state to state, and as I am wont to say, they sometimes vary in fine nuance. One area of possible confusion (and variance between the states) involves consensual sexual intercourse between a minor and an adult (for example, a nineteen year old and his sixteen year old girlfriend). While such conduct may constitute a crime, it may not be reportable by a treating psychotherapist who is told by the patient about such conduct.

In California, many practitioners have contacted law enforcement agencies to inquire whether such incidents are reportable. With considerable frequency, practitioners have received incorrect information from these agencies, primarily police or county sheriffs' agencies. Law enforcement personnel mistakenly think that merely because the sexual conduct constitutes a crime it is reportable as child abuse. This may not be the case with respect to some situations (like the one described above), despite the fact that the conduct constitutes a crime. Thus, it is important to distinguish between criminal conduct involving sexual activity with a minor and sexual conduct requiring a child abuse report to be made. Don't rely solely upon law enforcement agencies to accurately tell you whether some situations have to be reported. A call to Child Protective Services may be helpful, but experience has shown that reliance upon such opinions or advice also has its risks. Nuanced knowledge of the law is best!

California law requires a child abuse report to be made when the practitioner, while acting in his or her professional capacity or within the scope of his/her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. It specifies that the pregnancy of a minor does not, in and of itself, constitute a basis for a reasonable suspicion of sexual abuse. What is the law in your state? If a twenty year old informs the practitioner that he has engaged in consensual sexual intercourse with his sixteen year old girlfriend, is this the crime sometimes referred to as statutory rape or unlawful sexual intercourse? Is it reportable as child abuse by the treating practitioner? What if the conduct described was consensual sodomy or oral copulation?

SIGNED AUTHORIZATION TO RELEASE CONFIDENTIAL INFORMATION MAY NOT BE REQUIRED

Mental health practitioners of all licensures in all states are expected to be familiar with authorization to release information forms, both with respect to the required content of such forms and the signature(s) required before confidential information about a patient can be lawfully released. The content of such forms and the required signatures may be dictated by state law or by HIPAA regulations (the Privacy Rule), or by both – depending upon circumstances. While authorizations to release information are routinely used, even when they need not be, it is important to remember that there are times when use of an authorization form is not required in order to release or share confidential information about a patient.

The right or duty of a practitioner to release information to others, without the patient's authorization, is typically recognized in state law and in the above-referenced federal Privacy Rule. One such

circumstance that I have written about in past articles in this Avoiding Liability Bulletin is when the practitioner releases information to other health care providers or health facilities for the purpose of diagnosis or treatment of the patient. I have spoken with practitioners who want to release information to other licensed practitioners and to practitioners who are seeking information from a physician, a prior therapist, or other licensed health care practitioners. Many seemed surprised when they learned for the first time or were reminded that a written and signed authorization from the patient was not required. State law must be referenced in order to determine the various circumstances when the patient's signed authorization is not required.

The need to exchange confidential treatment information in a timely or prompt way may be called for by the circumstances – such as, in emergency or acute situations, perhaps where the patient or another is in danger of serious harm. Knowledge of this general principle related to authorization forms, which is based upon sound public policy, can be very useful. It allows, depending upon state law, free and unencumbered communication between health care providers in order to promote the health and welfare of patients. It is sometimes the lack of communication with other health care professionals that can get practitioners in trouble. Failure to communicate with a patient's physician or prior therapist could, depending upon circumstances, result in civil liability when the failure to communicate is determined to be the result of negligence.

I have spoken with practitioners whose patients told them, either at the outset of treatment or sometime during the course of treatment, that they did not want their practitioners to contact their current or former physicians or therapists. Again, knowledge of this important exception to the usual requirement of a written authorization can be quite useful. If a patient informs the practitioner of his/her desire that no communication take place with prior or current treatment providers, and depending upon the circumstances, the practitioner may want to know or explore the reasons for such a desire, or may want to let the patient know of his/her unwillingness to treat under such limiting conditions, or may nevertheless communicate with the other health care practitioner(s).

An agreement to allow communication with other health care providers to be dictated or controlled by the patient seems imprudent, unwise, and risky. It can compromise the treatment by depriving the practitioner of all relevant medical or psychological information regarding the patient. Knowledge of the law, and the public policy reasons supporting it, can give the practitioner the confidence to do what he or she determines is in the patient's best interests – and in many cases, the practitioner's best interests.