Spousal Abuse & Confidentiality

written by Richard Leslie | June 1, 2017

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Therapists and counselors will encounter a variety of situations where they learn of (or reasonably suspect) an act that constitutes, under state law, some form of spousal abuse, such as an assault or battery. Whether such knowledge or suspicion necessitates a report to a governmental authority or remains confidential depends upon a variety of factors. Most importantly, the practitioner must know whether there is a law that requires a report when spousal abuse is known or reasonably suspected, much like the laws dealing with child abuse and elder or dependent/vulnerable adult abuse reporting*. Such a law may specify that it applies to spousal or domestic abuse situations or it may be more generalized – like requiring a report when there is a known or reasonably suspected physical injury inflicted upon a person and where the injury is the result of assaultive or abusive conduct.

Child abuse and elder abuse reporting laws* are long-standing exceptions to confidentiality, but such is not the case with regard to spousal abuse. In many states, mental health practitioners are not required to report a battery or assault by an adult against another adult, including if the acts are between spouses or partners. Such conduct generally remains confidential. In California, legislation was enacted many years ago that requires reports by certain employed “health practitioners” who provide medical services for a physical condition when they learn that they are treating a person (e.g., between the ages of 18 and 64) who is the victim of assaultive or abusive conduct. The author of the bill initially included mental health licensees in the legislation, but there was strong and effective opposition by mental health professional associations to such a significant inroad into the duty of confidentiality.

The laws dealing with “vulnerable adults” or “dependent adults,” as defined by state law, may allow or mandate a report when such an adult is the victim of a battery or assault or other form of physical or emotional abuse. It is important to know the precise definition of the applicable term so as to avoid overlooking either the opportunity or the requirement to make a report to the appropriate governmental agency. The definition of “dependent adult” or “vulnerable adult” in state law may be written broadly or vaguely enough to allow a report to be made in some spousal abuse situations that might otherwise be non-reportable. Certainly, care must be exercised in making such a judgment. There likely is, or should be, an immunity statute related to dependent adult or vulnerable adult abuse that protects mandated reporters for making, in good faith, reports as authorized by law.

Professional associations must be zealous and strong protectors of confidentiality laws. Strong confidentiality laws encourage the public to seek help for medical, emotional, and mental health problems without fear of disclosure – both with respect to medical care, and more importantly, due to the nature of the information disclosed and the stigma issue, mental health care. It is easy for some to argue for increased exceptions to confidentiality, and those arguments may at first seem reasonable –

but erosions to confidentiality are dangerous for society in general and for mental health patients in particular, as well as for the various mental health professions and their practitioners.

CUSTODY/VISITATION DISPUTES – BOARD COMPLAINTS

Mental health practitioners sometimes find themselves involved in rendering professional services to one or more clients who are, or who will be, involved in a custody or visitation dispute. The practitioner may be treating the child or children who are affected by the dispute, one or both of the parents, or may be a court appointed custody evaluator, visitation monitor, or mediator for some aspect of the dispute. The possible roles will vary, but the reality in such situations is that one or more of the parties involved may become displeased or angry with the mental health practitioner – especially if there is a belief that the practitioner is improperly favoring one party over another or that the practitioner has in some manner acted inappropriately, unethically, or in violation of the law. A claim or lawsuit, or a complaint to the licensing board, is not unusual in such situations.

With respect to licensing board complaints, it has been my experience that mental health licensing boards generally understand that custody and visitation disputes often become contentious and that one of the parties may become angry with the practitioner if, for example, the practitioner's professional opinion "favors" one parent over another. Such "favoring" could be the result of testimony, written reports, expert opinions, or otherwise. The boards generally, or hopefully, realize that these complaints must be examined with care so as not to unfairly jeopardize the practitioner's license and professional well-being. Many of the complaints that arise from custody and visitation disputes are closed without formal action, but some may properly move forward. As usual, the facts and circumstances matter.

When and if the licensing board investigates or inquires about such a complaint, it may request a copy of the practitioner's records. Depending upon the circumstances, the records may contain information derived from one or more of the persons seen by the practitioner. The authorization form that the board sends to the practitioner must be carefully scrutinized by the practitioner (or the attorney representing the practitioner) so as to avoid a reflexive and inappropriate disclosure. Each state has its own laws that govern what constitutes a valid authorization form and who must sign the authorization form. There may also be laws that specifically govern disclosures to an investigating licensing board. It has been my experience that licensing boards will sometimes request a copy of treatment records and other documents by providing the practitioner with an inadequate or invalid authorization form.

One such example occurs when the board requests the records pertaining to a minor's treatment. Whether the practitioner (and the defending attorney) wants to fight the board in every way possible to protect his or her license and livelihood or wants to fully and obediently cooperate, records need not be released reflexively, even when a licensing board (the state) is involved. I am aware of multiple situations where the Board has provided the licensee with an authorization for the release of a minor's records with the signature of one of the parents having joint legal custody of the minor patient. In some of those cases, the authorization of both parents having legal custody was required by the court order.

In others, the signature of the minor was required.

Even in cases where the authorization is signed by both legal custodians, cases involving minors who are twelve or older (the age will likely vary by state law) may require that the authorization be signed by the minor – not a parent or parents. In California, minors who are twelve or older, under many conditions, are authorized to consent to mental health care and to control access to their own records. The licensing board may have to be made aware of the fact that the minor's privacy and confidentiality needs to be protected, and that the minor's privacy rights should not be sacrificed because of the feuding parents. In addition to making sure that the correct person signs the authorization form, it is also important to determine exactly what information has been designated for release.

Earlier in this article I posited whether a practitioner might want to fully cooperate with the board or might want to fight the board in every way possible. Each licensee must make that decision, hopefully with the help of counsel. In some states, there may be a requirement in law or regulation that speaks to the need for licensees to cooperate with the board during an investigation. The precise meaning of such a requirement may not always be entirely clear or easily and effectively enforced, since a practitioner is allowed to protect his or her rights and to hold the board accountable to act properly and with the appropriate authority. I have previously written about a case where a court repeatedly overturned or blocked a licensing board's otherwise justified disciplinary action because the court found that the board improperly interpreted the law and repeatedly denied administrative due process to the licensee.

CPH & Associates Blog Tip:

*For online references related to individual state statutes for child abuse reporting, click here! For elder abuse reporting state statue resources, click here!