

The Alphabet Revisited

written by Richard Leslie | November 1, 2023

Avoiding Liability Bulletin - November 2023

NOTE: This article was first published on the CPH and Associates' website in November 2011. It appears here with some changes. I hope you find these items/reminders helpful. Hopefully, these brief items will remind you of some of the basics and will spur further research on your part.

Avoid using testimonials – or be careful – they may send the wrong message. Although testimonials are generally not prohibited by law or ethical standards, they do present some problems and do require caution. For example, if patients are solicited to do a testimonial, an ethical violation may occur – the patient may feel exploited or that undue pressure was used. The client may be reluctant to say “no” to the therapist.

Break confidentiality without the patient’s written authorization only when required or permitted by law. Generally, this will occur in cases involving the mandated or permissive reporting of child abuse or neglect, elder abuse, dependent adult abuse, or in situations involving a patient threatening (or presenting a threat of) serious violence to self or to others. Does the law in your state allow practitioners to communicate with other licensed health practitioners or facilities, without the signed authorization of the patient, for the purposes of diagnosis or treatment of the patient? It should, as does HIPAA and California law.

Child abuse reporting – one of the tricky areas of reporting involves an adult (18 or over) who tells her therapist that she was abused when she was a child. Related to that scenario is the case where the seventeen year old tells his therapist about abuse that occurred far in the past. In the first scenario, this would generally not be reportable. The adult can report it herself. In the second scenario, this would generally be reportable, since the patient is still a child. Does the law in your state of practice agree?

“Deposition coverage” for a practitioner’s reasonable legal expenses under the CPH and Associates’ professional liability program is conditioned upon the compulsory appearance of the insured at the deposition. So, when the patient’s attorney asks you to voluntarily appear at the deposition, you might want to insist upon being served with a subpoena! Check your insurance policy for conditions and limitations.

Ethical standards or Codes of Ethics are typically established and enforced by professional associations. Some licensing agencies in some states may pass regulations referring to ethical standards, but usually, state agencies pass laws and regulations defining unprofessional conduct, the violation of which could lead to revocation of the license. Ethics Committees of professional associations typically (but not

always!) affect one's membership – not licensure.

Forget key dates at your peril! When does your malpractice policy renew? When does your license expire? When must you renew your license? When do your continuing education requirements have to be fulfilled by? Have you promptly advised your professional association, the licensing board, and your malpractice insurer of your change of address?

Gifts to and from patients can be problematic. Although not unlawful or unethical, the giving or receiving of gifts may be misinterpreted by the patient. Of course, everything depends upon the facts and circumstances of each case. I remember advising one therapist that if he gets a gift for the patient's wedding, the patient may accuse him of being a tightwad. "I pay you \$200 per hour, two times a week for the past year, and this is what I get?"

Hypnosis to help a patient who was the victim of a crime recall or remember the details of the crime may jeopardize the patient's testimony (about things remembered prior to the hypnosis) if the hypnosis is not conducted in accordance with certain conditions. Do you know whether the law in your state addresses this issue?

Informed consent is often misunderstood. It is both a legal and an ethical principle and may mean different things in different states. I like to ask, what are the risks of ordinary therapy? If there are any, must they be disclosed in writing prior to the performance of services? Does a state statute or regulation articulate these risks? Taken to the extreme, do therapists really need to tell patients that therapy might help them discover who they really are, that they may not like the discovery, that they may get depressed and that they may contemplate suicide? I think not!

Just say "no" to anything to do with sexual contact with a patient – no matter what your state of being and state of mind may be at any given moment – and no matter how authentic your feelings may be! You can have sex with everyone else in the world, except minors!

Keepp going to workshops and seminars in excess of what is required by state law or regulation if not unduly burdensome, because it may come in handy when you are being cross-examined. For example, "So Dr. Green, you only complied with the minimum continuing education required by the state, and did not do one hour more than the minimum requirement, is that correct?"

Liability comes in several ways – criminally, civilly, and administratively. You can insure yourself, to a limited degree, for two of the three!

Missed sessions should not be billed to insurance companies as if an hour of psychotherapy was performed. This is one of the more common forms of insurance fraud.

Nolo Contendere – this plea in a criminal case, which is a "no contest" plea, is generally considered to be the same as a guilty plea for criminal purposes, but cannot be used in a civil case to prove that the violation occurred or to show liability. Under the law of most states, a plea of no contest in a criminal

case will have to be disclosed to the licensing board and will allow the licensing board to take disciplinary action. Beware – should you ever be arrested!

Owner of the business – is there a law in your state of practice that requires a practitioner in a group practice, operating under a fictitious business name, to inform the patient of the name and licensure of the owner(s) of the business/practice? There should be!

Privilege and confidentiality are different things. Can you clearly explain the difference to a client? In brief, privilege involves the right to withhold testimony in a legal proceeding, while confidentiality is a restriction on the volunteering of information by the practitioner (outside of the courtroom setting).

Quash – is defined as vacate, to make void, to abate or annul. So don't talk to a lawyer about "squashing" a subpoena. You might want it quashed, however!

Reasonable suspicion – it is important to remember that the legal standard for reporting child abuse is reasonable suspicion (or a similar term, depending upon state law). Does the pregnancy of a minor constitute reasonable suspicion of child abuse? In California, the law says that the pregnancy of a minor does not, in and of itself, constitute a basis for a reasonable suspicion of sexual abuse? What does the law in your state of practice say about this issue?

Suicidal patients – Is there a duty to break confidentiality and alert or warn others or merely the right (discretion) to break confidentiality if deemed necessary to prevent a suicide? Is there a duty to hospitalize? Perhaps there is no statutory duty to do so in every case, but remember, there is a general duty to provide competent care and to act as a reasonably prudent practitioner of like licensure would act under the same or similar circumstances.

"The protective privilege ends where the public peril begins." This quote from a well-known California Supreme Court decision (referred to as "the Tarasoff decision") involving a patient who threatened imminent and serious physical harm to another, is an artful way of defining the time when a therapist in California must act to protect the intended victim from the threatened danger. When, if at all, is the time when a practitioner must act in your state?

Unprofessional conduct – licensing laws for mental health practitioners typically contain a provision that defines "unprofessional conduct" (or a similar term). Practitioners should be aware of all of the reasons why a license may be revoked or suspended by the State. One such reason usually involves the conviction of a crime (such as driving under the influence or theft), which could lead to action by the regulatory board. You may think that a particular crime is unrelated to your license, but the State may think and argue otherwise.

Violence by a patient against their therapist is not privileged or confidential, and the practitioner may seek protection by making a police report (hopefully, this occurs rarely) or otherwise. I was once asked by an agitated caller (a relative of a patient) if it was ethical or lawful for a therapist to slap a patient in the face. My response was "it depends." The caller was aghast. But as you should know by now, it

depends upon the particular facts and circumstances involved!

When in doubt (clinically or legally), consult and document your records. While not a panacea, it can make you look good (prudent) when your actions are being picked apart by the opposing attorney at trial or at a deposition.

Xyster – If the patient's surgeon leaves a xyster in the patient following surgery and if the she sues the surgeon for physical harm caused by the surgeon's negligence, the psychotherapist –patient privilege will likely protect the treating therapist's records from discovery and allow the patient to prevent the testimony of the therapist, which might otherwise be damaging.

Your best interests – when is it permissible to act in your own best interests rather than in the patient's best interests? One such circumstance may be when the patient files a complaint to the licensing board or files a lawsuit against the practitioner. When else?

Zealous witness – defined in Black's Law Dictionary as “an untechnical term denoting a witness, on the trial of a cause, who manifests a partiality for the side calling him, and an eager readiness to tell anything which he thinks may be of advantage to that side.” Get the point? You do not want to be thought of or seen as a zealous witness. There may be times when you cannot be of help to your patient because of your legal and ethical duty to testify truthfully.