

The Alphabet Revisited

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin - January 2011

I return to my ABCs (see the [July 2010 issue of the Avoiding Liability Bulletin](#) for the prior one) and hope you find a few of these items/reminders helpful. Pardon my occasional attempts at humor! 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 very 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 his or her therapist or counselor. What would your answer be if a patient asked whether the testimonials he read are any indication of the likely outcome of his therapy or counseling?

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) imminent and serious violence to self or to others. Does the law in your state allow therapists or counselors to communicate with other licensed health care providers without the signed authorization of the client? It should, as does HIPAA and California law – provided that the communication or the release of information is for the purposes of diagnosis or treatment of the patient.

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 her 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.

“Deposition coverage” for a practitioner’s reasonable legal expenses under the CPH Insurance’s 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 policy for conditions and limitations.

E –Therapy becomes problematic when you practice across state lines. It is unlawful to practice in a state where you do not hold a license, and arguably, it is where the patient resides that determines where the services are being performed. Calling the therapy something else, such as coaching, may not and should not help – and may be proven to be a misrepresentation.

Forget key dates at your peril! When does your malpractice policy renew? When does your license expire? When must you renew? 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 \$150 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 done in accordance with certain conditions. Do you know whether the law in your state addresses this issue? In California, the law is found in the Evidence Code (Section 795 for those who are interested!).

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 or counseling? 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, does a therapist or counselor really need to tell a patient that therapy might help him discover who he really is, that he may not like the discovery, that he may get depressed, that it may lead to a divorce or separation, and that he 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!

Keept 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 (e.g., assault and battery, petty theft, unlawful trespass, driving under the influence) 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!

Oral copulation between like-aged minors is reportable (mandated) as child abuse in California, and perhaps in other states as well. Sexual intercourse between like-aged minors is not reportable as child abuse in California. What is the law in your state with regard to these particular matters?

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!

Red Flags Rule – What do you know about this federal rule (Federal Trade Commission) regarding identity theft? Are you in compliance? Do you need to be in compliance? What position has your professional association taken with respect to the need to be in compliance?

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 involving a patient who threatened imminent and serious physical harm to another, in my view, is an artful and literary 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 therapist or counselor must act in your state? *(I realize that use of the word "the" for "t" can be seen as an easy way out, but see what I had to do for "x"!)*

Unprofessional conduct – each state's licensing laws for the various mental health professions contain a section of law 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 petty 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. See my comments under "**N**olo Contendere" above.

Violence by the patient against the therapist or counselor is not privileged or confidential, and the practitioner may protect himself/herself 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 or counselor's records from discovery and allow the patient to prevent the testimony of the therapist or counselor, which might otherwise have been damaging or embarrassing. By the way, the word is xyster – not shyster!

Youth suicide – what do you know about youth suicide? With bullying being so prominent in the news, it is important that practitioners get training and/or education in youth suicide prevention and treatment. The resources online are plentiful. Many if not most states are involved with this issue. Which racial/ethnic group of youth are statistically the most likely to commit or attempt suicide in your state?

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 and your patient's attorney because of your legal and ethical duty to testify truthfully.