The Risks Of Counseling / Therapy?

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – November 2011

One of the most important elements, if not the most important element, of *informed consent* is the obligation to inform the patient of the potential risks and benefits of treatment – that is, some form of psychotherapy, therapy, or counseling. It should be understood from the outset that each state likely treats this subject matter differently. For example, a state may require (for a particular licensed health care practitioner) that a written and signed informed consent be obtained before certain kinds of treatment (procedures) occur, or before any treatment occurs. Other states may not refer to the term "*informed consent*," but may simply require that certain disclosures be made in writing prior to the commencement of treatment. Ethical standards of the various mental health professions treat the subject matter somewhat differently. With respect to HIPAA, federal regulations do not require that the patient first give his or her *informed consent* prior to treatment, but they do require that certain disclosures about the practitioner's privacy policies and related matters be made.

Obviously, patients must *consent* to treatment. *Consent* is sometimes express and often implied. Patients must be mentally competent to *consent* to their own treatment. Additionally, minors under a certain age may not be able to lawfully *consent* to their own treatment, and thus the practitioner will need the *consent* of a parent or guardian before treatment can begin. Depending upon the circumstances (including state law), this *consent* may also be express or implied. Generally, the time when *informed consent* becomes important (other than when required by law, regulation, or ethical standards) is when there is treatment that *does not involve* a simple and common "procedure" (e.g., an hour of counseling or psychotherapy) where the risks or dangers are remote and commonly understood to be remote. Stated otherwise, the test as to whether *informed consent* may be necessary is to ask whether a prudent person in the patient's position would decide not to pursue therapy or counseling if he or she is adequately informed of all of the significant perils or risks involved.

What are the risks, if any, of therapy, psychotherapy, or counseling? Is therapy or counseling an inherently dangerous activity? Must prospective patients or clients be informed of particular risks, or of any and all risks? May a patient claim, no matter how many disclosures were made by the practitioner, that the therapist failed to disclose something of such importance that it would have influenced the patient not to enter upon the therapy or counseling? A discussion of these questions is overdue. I wrote about "informed consent" in the July 2006 issue of the Avoiding Liability Bulletin. In that article, I answered the question concerning whether or not the informed consent had to be in writing, signed and dated by the patient, and stated that I would write about other questions raised in the article in a subsequent issue of the Bulletin.

In my view, psychotherapy, therapy, or counseling is generally not an inherently dangerous or risky

undertaking. Generally, the risks or perils of therapy or counseling would, in my view, seem remote to most consumers. Of course, there is the risk that therapy may not be "successful," however that word might be defined or the degree of success judged. A weekly hour with a counselor or therapist to deal with relationship problems or parenting issues is in my view routine treatment, as is treatment of patients or clients for a variety of mental health problems or conditions. With respect to the doctrine of *informed consent*, it is generally understood that "full disclosure is not required where the explanation of every risk attendant upon treatment would result in alarming the patient, and who might as a result refuse to undertake that which involved a minimal risk." In other words, and stated less "legalistically," there is no duty to scare a patient away from counseling or therapy. Of course, *informed consent* must be obtained, or specified disclosures must be made, when required by statute or otherwise required or indicated.

In some articles and in some therapist disclosure statements that I have read, it seems that some practitioners believe that unless the prospective patient is informed of everything that could possibly happen or go wrong there has not been sufficient disclosure. I have often stated the following at workshops, tongue firmly implanted in cheek, to make my point about how some may go too far with respect to *informed consent*. The supposedly prudent therapist or counselor concerned with *informed consent* says the following to the prospective patient or client:

"I want you to know that during the course of therapy/counseling you may discover more about yourself and better understand why so many people do not like you, or why you are having trouble with your relationships, and this may lead you to get depressed – perhaps even contemplate suicide. I'm not saying this will happen, but I'm just informing you that this is possible. I also want you to know that there are alternatives to seeing me in therapy/counseling. You can see a psychologist rather than me. I'm a licensed professional clinical counselor (or marriage and family therapist) with a master's degree. A psychologist has a Ph.D. You can also see a psychiatrist, who is a physician and can prescribe medication that you may need. I will make a referral if you would like to be treated by a psychiatrist or a psychologist. There are also things you can do of a self-help nature, or in a group setting, and some studies show that these remedies may be as effective as counseling or therapy. If you see me about relationship problems, this could lead to your discovery that a divorce is the right thing for you to do, which could lead to major problems regarding custody of your children and major financial problems for you."

Okay, enough! My obvious point is that there is no duty to scare a patient away, nor is it wise to do so.

On the other hand, practitioners should strive to provide adequate information to patients so that they can make meaningful decisions about their therapy.

In my view, the potential risks and benefits of therapy would be disclosed and discussed, and informed consent would and should be obtained, when the proposed treatment involves novel or experimental techniques, or when there is a risk of harm that could result from the utilization of a particular technique or approach. I have generally recommended that the potential risks and benefits of treatment be

disclosed, and that written informed consent be obtained, when the therapist is providing online therapy, or is videotaping or audio recording sessions, permitting third party observation, providing hypnosis or hypnotherapy, providing EMDR, when the treatment includes touch, for Christian or spiritual counseling or other special focuses (e.g., reparative therapy), and for retreats, hikes, and other physical activities. This list is illustrative rather than exhaustive, and depending upon circumstances, the disclosures and content of the informed consent will vary. The informed consent under the above circumstances should address (explain) the nature of the recommended treatment and the alternatives to the treatment recommended, including the possibility of no treatment of the kind proposed (e.g., the use of touch).

I do not think that it is necessary or wise to inform patients as to the likely outcome of routine therapy or counseling. I am reminded of the definition of psychotherapy (not mine) that I have previously shared with readers – that is, "psychotherapy is an unidentified technique, applied to unspecified circumstances, with *unpredictable outcomes* – requiring rigorous training." As I explained in the past, this definition is attributed to an attorney who wrote a multiple volume work on the regulation of psychotherapy. In that work, a viewpoint was expressed to the effect that the states should not regulate a profession that cannot be clearly defined. It is hard to predict the outcome of therapy, since there are so many factors that can affect it. However, if one is proposing a form of treatment where the evidence is that the treatment may not be beneficial or may be harmful, disclosures about the likelihood of success and the potential harm will be needed. The answer to the question of whether a patient may claim that the practitioner failed to disclose something of such importance that it would have influenced the patient not to enter treatment is "yes." Even though the practitioner may have disclosed much, a patient (and lawyer) may later claim that something critical was not disclosed – such as, that the therapist had a serious drug or alcohol problem that was likely to negatively affect treatment!

One of my criticisms of some state laws requiring that informed consent be obtained from the patient, and that the potential risks and benefits be disclosed at the outset of treatment, is that those statutes rarely specify what any of the risks are – leaving it to the discretion and judgment of the practitioner to define the risk. In California, for example, the telemedicine statute required, among other things, that the risks of telemedicine (e.g., online psychotherapy) be disclosed to patients. However, the statute contained no specification of any of the supposed "risks." If the Legislature thought that there were risks, significant enough to require written and verbal informed consent, why not specify what those risks are? Why were practitioners expected to discern or define all of the risks and perhaps be liable for not disclosing something that is later, with the benefit of hindsight, alleged to be a risk? Recent legislation in California has repealed the requirement of informed consent prior to the delivery of telemedicine or "telehealth." Effective January 1, 2012, the law will contain no requirement that potential risks be disclosed. Shazaam!!

Protect your career in mental health with malpractice insurance

Get a Quote & Apply online