Treating Children – Selected Legal Issues

written by Richard Leslie | May 26, 2016

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… Therapists and counselors treat children both with and without the consent of one or both parents. It is not uncommon for practitioners to get confused about what the rights of the minor patient may be in particular situations, what the rights of a parent or the parents are, and how confidentiality and privilege are affected under particular circumstances. Marital dissolution and custody proceedings can complicate matters or involve the practitioner in the bitter controversy that a battle over custody and visitation may bring. I would suspect that in most states, as in California, a substantial number of complaints to licensing boards arise within the context of a marital dissolution (divorce) proceeding or a custody and/or visitation dispute. This article is intended to focus the reader on some legal aspects of treating children and to raise some questions that practitioners must answer in order to avoid difficulties.

A complaint to a licensing board may come from a parent who is angry that his or her child is being treated by a mental health practitioner without that parent's prior consent, and that the practitioner has therefore done something wrong. In California, for example, a psychotherapist may treat a minor without the consent of a parent under several circumstances. One such circumstance is if the parent who authorized the minor's treatment had sole legal custody pursuant to a court order. Another example (in California) is when the court has ordered joint legal custody, but has not specified in the court order that the consent of both parents is necessary in order to obtain health care services for the child. Additionally, psychotherapists may treat most minors without a parent's consent if the minor is twelve years of age or older. Thus, in each of these circumstances in California, the parent's complaint may be without merit. What are the laws in your state with respect to treating a child without the consent of one (or both) of the parents?

Access by a parent to a practitioner's records is another aspect of treating children that can be problematic for the practitioner. In California, again by way of example, psychotherapists are given broad latitude in denying access to the minor's records when a parent makes a written request to inspect or obtain a copy of the records. This right to deny access (some consider it a duty to deny access) to the parent provides the therapist with immunity from liability if the denial is made in good faith. The reasons for denial of access are several, but the broadest reason for denial is if the therapist determines that access to the records would have a detrimental effect on the therapist's professional relationship with the minor patient or the minor patient's physical safety or psychological well-being. What is the law in your state? Additionally, does your state law allow or require the parent to be provided with a summary of the records under certain circumstances?

When treating a child, the subject of psychotherapist-patient privilege may arise. This typically arises when a subpoena for the child's records is served upon the mental health practitioner or when the

practitioner is subpoenaed to testify in court or at a deposition. The question that then arises concerns who the holder of the privilege is – e.g., is the parent the holder of the privilege or is the child the holder? This is usually important to determine because the practitioner's first instinct in most instances should be to assert or claim the privilege on behalf of the patient – who is likely the holder of the privilege. In most circumstances, the holder of the privilege is the patient or the court appointed guardian or conservator of a patient.

In California, the general rule is that a minor patient is the holder of the privilege – not the parent. This is the case even with respect to minors of tender years, who may not be capable of asserting or waiving the privilege on their own behalf. If a parent has been appointed as "guardian ad litem" in a lawsuit (guardian for the purposes of pursuing the lawsuit on behalf of the minor) then the parent/guardian is the holder of the privilege. In California custody and visitation disputes, the court may appoint an attorney to represent the interests of the child. In such cases, the attorney has the right to assert or waive the privilege on behalf of the child and to interview mental health professionals who have provided care to the child. What is the law in your state?

With respect to receipt of a subpoena, and as I have mentioned before, each state's laws will dictate how a subpoena is to be responded to by the treating therapist or counselor. It is important to understand these laws because the first instinct of the practitioner, as mentioned above, should be to protect the privacy of the patient. Sometimes the privilege will not ultimately be upheld (after assertion by the therapist) because the patient has tendered his or her mental condition in the lawsuit, such as when a minor who is injured in a medical malpractice case is suing the defendant for monetary damages for the physical and emotional harm suffered as the result of the negligence of the physician.

With respect to authorization to release patient records to a third party, the patient generally must sign an authorization form to release records. In California, a minor who is able to consent to mental health treatment on his or her own behalf is the person who would sign an authorization form. In California, this would essentially be any minor who is twelve years of age or older and who, in the opinion of the therapist, is able to participate intelligently in outpatient mental health counseling. What is the law in your state with regard to who is to sign an authorization form to release the minor's records to a third party?

As I have mentioned as recently as last month, consensual sexual intercourse or other activity of a sexual nature involving a minor patient will present the practitioner with child abuse reporting questions. Sometimes the minor patient may reveal information regarding sexual activity with other minors, and sometimes the sexual activity revealed may be with an adult. In California, certain sexual acts of a minor may be reportable as child abuse even if the acts are with another minor, while other sexual acts with an adult may not be reportable as child abuse – even though the particular acts may constitute a crime. What are the applicable laws in your state of practice? If a minor patient asked about these issues in order to determine the extent that confidentiality can be expected, would you be able to accurately respond?

Whether treating children or adults, other child abuse reporting questions may arise. One such question that may arise is whether an emancipated minor is considered a “child” for purposes of the child abuse reporting law. In other words, if an emancipated minor tells his or her therapist or counselor about something that would otherwise be reportable as child abuse, is it in fact reportable? In California, an emancipated minor would generally be considered to be a “child” for purposes of the child abuse reporting law. Another question that may arise involves emotional abuse of a child, including non-severe emotional abuse. Does “emotional abuse” have to be reported, or may it be reported? Is there immunity from liability for making a report that is not required, but permissible? The answers to the questions asked throughout this article constitute just some of the basic information that practitioners must understand.

For more information related to this topic, please visit our Parental Rights to Access Child’s Records blog.