October's True or False Answers – Part 3

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Avoiding Liability Bulletin – January 2020

AVOIDANCE OF LITIGATION (Question 17 in the October 2019 Bulletin)

Some practitioners try to avoid seeing clients who are or may be involved with litigation – whether it be a bitter custody battle within a dissolution of marriage case, or a case where the patient is a plaintiff in a lawsuit seeking monetary damages arising from an auto accident, where physical and psychological harm may be alleged, or a wrongful discharge from employment case where it is alleged to have caused economic and psychological harm. Of course, such scenarios could arise and first become known well after treatment has commenced, or they could be known at the time the prospective patient first seeks professional services.

Practitioners invite trouble when they insist upon having prospective patients sign a form where they promise not to involve the practitioners in litigation. Such an agreement flies in the face of the well-accepted principle of law that no person has a privilege to refuse to be a witness in a legal proceeding or to refuse to disclose any matter or refuse to produce any writing, object, or other thing. Such an agreement might be determined to be void as a matter of law, or may simply be unenforceable by the practitioner, since this principle of law is vital to the administration of justice. An exception to this general principle is found in the privilege statutes applicable to licensed mental health practitioners, but *the privilege is held and may be waived by the patient* – not the practitioner. By asking the patient to sign such a form, the practitioner, it might be argued, is exerting undue pressure on an unwitting or unknowledgeable patient.

Attempts by a practitioner to dissuade a prospective patient from involving the practitioner in litigation, as in question 17, could prove to be problematic for the practitioner. Telling a patient that you *prefer* not to treat patients who intend to involve you in litigation seems a bit ambiguous and confusing, especially when the very next phrase says that in the event that such involvement is requested, you will not willingly provide testimony in any court proceeding. Does that simply mean that you will require a subpoena before testifying, or does it mean that you will be at odds with the patient at a time when the patient needs you to simply tell the truth and to provide testimony and records that may support the patient's allegations? Asking to be served with a subpoena is not problematic, but refusing to testify or produce records in the legal proceeding might constitute conduct that will subject the practitioner to jeopardy – both with the court and the patient.

In some cases, it might be argued that informing a prospective patient of the content of question 17 is unethical and hence impermissible. Of course, if the practitioner makes clarifying disclosures to the patient explaining the reason(s) for his or her *preference* and its limitations or exceptions, and

explaining that he or she will simply be asking that any testimony or production of records be obtained by way of subpoena, the disclosure would be permissible and not unethical. Turning a prospective patient away who informs the practitioner that he/she is involved in a bitter custody dispute is not problematic, but refusing to testify for a patient when litigation later occurs (based upon the practitioner's mere preference) may subject the practitioner to legal or ethical jeopardy.

Not all testimony will necessarily be helpful to the patient's case, and practitioners must be careful that they do not agree to testimony that the patient or the patient's attorney may be seeking from them. Practitioners must be prepared to inform the patient and the patient's attorney of the limitations to what they are willing to testify to and what they can clinically support. Finally, practitioners should think about what disclosures they should initially make regarding their fees for testifying in court or at a deposition, and for consulting with the patient's attorney if and when they prepare to be a witness in the legal proceedings.

TERMINATION (Questions 22 and 25 in the October 2019 Bulletin)

There are many reasons why a termination of treatment may appropriately occur. The patient has the right to terminate treatment at any time and for any reason. The practitioner may properly terminate treatment for a variety of reasons, some personal and some professional/clinical. Documentation of the termination process is important because once a proper termination occurs the therapist owes no duty to treat a former patient who thereafter seeks professional services. A refusal or declination to treat the former patient would hopefully be based upon a good faith reason and an offer to make a referral, if the patient is amenable, would generally be wise and of minimal risk.

If the termination process is poorly handled and poorly documented, the patient may be able to successfully argue that there was no termination of the professional relationship and that the patient had a reasonable expectation that the therapist-patient relationship, although temporarily suspended, was still in effect. In such a case, the patient would likely take the position that the practitioner still owed a legal and ethical duty to the patient. A refusal to treat in such a case might result in an allegation of breach of an ethical or legal duty, and perhaps an allegation of abandonment.

When a conflict of interest or dual relationship arises during the course of therapy, a termination of treatment may in some cases be appropriate, but may not be legally and ethically required. Practitioners in such situations must be aware of the controlling ethical and legal standards that apply, and may want to seek clinical or legal consultation. Generally, if there is no likelihood of exploitation by the practitioner and no impairment of the practitioner's judgment, and if the practitioner's effectiveness and objectivity is not jeopardized, continued treatment may well be appropriate. The dual relationship or conflict of interest may be of a minor nature or may be more substantive, and each situation must be judged based upon its own facts and circumstances.

BEGINNING OF THERAPIST-PATIENT RELATIONSHIP (Question 24 in the October 2019 Bulletin)

While there is much written about the topic of termination of treatment, there is not as much written about the question of when the professional relationship actually begins. The relevance of this question may not be readily apparent in most cases, but there could be circumstances where this question must be addressed by the practitioner. Reference to state law or regulations may produce little or no assistance. From a technical and legal perspective, once the therapist-patient relationship begins, the therapist owes a variety of duties to the patient. Prior to that point, the person seeking treatment is properly referred to as a prospective patient.

In the situation described in question 24, the therapist and prospective patient spoke on the telephone and orally agreed to a fee of $150 an hour. An appointment was made for the first visit. By letting the prospective patient know that the fee was $150 an hour, the therapist would likely be complying with an important law, such as the one that exists in California. That law *requires* (in pertinent part) that prior to the commencement of treatment, the practitioner disclose to a *prospective patient* the fee to be charged. A failure to do so constitutes unprofessional conduct, which can result in discipline by the licensing authority. A prospective patient, by definition, is not a patient. In general, the mere disclosure of the fee(s) to a prospective patient, together with making an appointment for the first visit, would not be enough to conclude that the therapist-patient relationship had begun.

Some simply assert that the relationship begins when treatment first begins. A review of the ethical standards of the various mental health professions suggests that the relationship begins after the practitioner first meets with the prospective patient and discloses whatever is required to be disclosed at the outset of treatment (including HIPAA and state law requirements), and after the practitioner has obtained the consent or informed consent of the patient. After this process, which typically includes an opportunity for the prospective patient to be able to ask questions and to agree to the practitioner's terms and conditions of treatment, whether in writing or otherwise, the prospective patient can then knowingly consent or agree to the commencement of treatment.

What could happen if the prospective patient in question 24 called the therapist before the appointment date with some kind of a "crisis" situation (e.g., a threat of self harm) and demanded to see the therapist forthwith? Could the therapist confidently state that he or she is uncomfortable commencing treatment under these circumstances and explain that there has not yet been an agreement between the parties with respect to the establishment of the therapist-patient relationship? Could the practitioner let the prospective patient know that no therapist-patient relationship has yet been established because there has been no informed consent obtained from the patient?

Therapists would be wise to clarify (in the initial telephone conversation) that the therapist-patient relationship is not established until there is a thorough discussion (typically at the first session) and the prospective patient's agreement with the practitioner's terms and conditions of treatment. Some therapists also explain, in the initial contact via telephone, that the first meeting will be for the purpose of determining whether the relationship is a good fit for both parties.