

AVOIDING LIABILITY BULLETIN

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ADVERTISING – PRE-LICENSED PERSONS

... It is important for licensees who employ pre-licensed persons in private practice settings to assure that the advertising by the pre-licensed persons, if any is done, is reviewed by those employers. I have too often seen or learned about advertisements that were written by an employee, paid for by an employee, and seemed to advertise the intern's or associate's (pre-licensed) own practice. While that may or may not have been what was going on or intended, there is something wrong with such an arrangement – unless the conduct is authorized or permissible under state law. From the viewpoint of the owner of the business, or from the viewpoint of a nonprofit corporation hiring pre-licensed persons, why would pre-licensed employees be allowed to make final decisions about advertising?

If I owned a private practice and employed two registered interns to work in my private practice, I would want to make the decisions on what services, and which person's services, were going to be advertised – and why. I would also want to carefully review the content of each advertisement, including business cards. I have recently heard about nonprofit corporations that employ interns and allow them to advertise as though they were sole proprietors, on the theory that these nonprofit corporations are training pre-licensed persons to develop their own private practices. Such a purpose for the corporation would seem to make it ineligible for nonprofit status on a state or federal level. I do not know how prevalent this practice is, but I have concerns.

It is important to remember that state law or regulation will likely require, at least to some extent, licensed and pre-licensed persons to make certain disclosures to consumers, both in advertisements and at the outset of the relationship with the client.

PRE-LICENSED EMPLOYEES - DISCLOSURES

... Pre-licensed employees, such as registered interns or those similarly titled, should disclose to clients at the outset of treatment that they are not licensed, that they work under supervision, and the name of their employer. In some states, one or more of these disclosures are required by law or regulation, or by applicable ethical standards. The reason why these disclosures should be made, whether they are required or not, is that they are fundamental to the client's understanding of the nature of the professional relationship they are about to enter upon. If there is a misunderstanding about such basic and fundamental issues, it could lead to liability for the pre-licensed person and for the employer.

Allegations that the practitioner held himself/herself out as being licensed, or did nothing to dispel that belief by the patient, are more easily answered if the disclosures made (especially those made in

writing) clearly indicate that the practitioner is not licensed. I believe it is useful to specifically inform clients – for example – “I am not a licensed marriage and family therapist. I am a marriage and family therapist registered intern (or whatever the exact title of the status is under state law). I am employed and supervised by _____, who is a licensed marriage and family therapist.”

The consumer of health care services has a right to know the name of the business entity where the treatment is taking place and who owns the business. Usually, the client will write a check to that entity or to the individual owning the business. Some may not realize or may ignore the fact that there are advantages to making these disclosures. The main advantage is that a claim alleging that the practitioner had the intent to deceive is virtually eliminated.

TERMINATION

... In the January 2012 issue of this Bulletin, under the title of Termination of Therapy – Client Stops Attending, I wrote about the situation where the client stops coming to therapy. A reader had asked about the therapist’s liability for suicidal behavior and safety of the client and whether the therapist had to “close the file” and send notification to the client. As described in the article, these situations occur when the client may have unilaterally terminated without communicating a termination to the therapist - there are simply successive missed sessions without any communication. I pointed out that it is dangerous to allow such situations to occur because there can be liability, depending upon the circumstances, for acts that occur after or between the missed session(s). The therapist should want to seek clarity about the status of the professional relationship. As far as the therapist may know, there has been no termination.

In the article, I explained that when clarity about the relationship is sought by the therapist, the patient may then inform the therapist of the intent to end therapy. I also indicated that the therapist will be in a better position to discern what action may be warranted, and I indicated that the therapist may want to let the patient know that one or more termination sessions are appropriate and that there will be no charge for these sessions. The reader wrote to express dismay at my statement regarding the free sessions, indicating that I was essentially stating that the offer of free sessions was required. To the contrary – such an offer is not required.

The offer of one or more free termination sessions, however, is something that therapists have used with patients in such situations. These situations may involve patients who are, for one or more reasons, upset with the therapist or the therapy and who simply walk away – they do not attend one or more successive sessions. These situations may be more likely to result in some kind of claim, complaint, or lawsuit against the therapist or counselor. Practitioners in such situations should know that their conduct may come under scrutiny. It is in this context that the therapist or counselor may decide to offer the patient (who may already be reluctant to attend further sessions) one or more free sessions in order to seek appropriate closure.

The practitioner may believe that the patient will be unwilling to accept the offer, but may want the patient’s treatment records to reflect that the offer was extended and refused. Such action, by no means required, may help the therapist feel more confident that when his or her actions are later reviewed, he or she will appear to have acted reasonably and ethically. Moreover, if the patient accepts the offer, this may provide the therapist with an opportunity, not otherwise available, to repair the relationship.

FICTITIOUS BUSINESS NAMES

... Do not use a fictitious business name (d/b/a) that is false, misleading, or deceptive. While this statement is easily understood, some may advertise and thus hold themselves out in a manner that they may not consider or know is misleading. For example, if an individual practitioner holds herself out as Mary Doe (intended to be fictitious) and Associates, when in fact Mary Doe is a sole proprietor, this name and advertisement is misleading. There may be other private practitioners who have their offices in the immediate vicinity, but they may all be sole proprietors – thus, they are not actually part of Mary Doe’s business, as the term “and Associates” indicates.

Use of the word “Corporation,” or “Inc.,” or “LLC” would be false and misleading if there is not a lawfully formed corporation or limited liability company, as the case may be. In some states, a limited liability company is not permissible for specified health care practitioners. I have occasionally seen fictitious business names that included words such as “medical,” “psychology,” and “institute,” each of which raised my concerns. Of course, each situation is different and state laws will vary.

Issues may also arise with respect to some “counseling centers” that hold themselves out as distinct business entities (e.g., the XYZ Counseling Center or the Minor Street Counseling Center). Who owns the XYZ Counseling Center? Sometimes, the answer I have received is “no one. We are all individual practitioners and we just use the name of the Center.” I typically ask whose name or names are on the fictitious business name statement that was filed. Presumably, or at least arguably, the owner(s) of the business is the person (or persons) who signed the statement. He or she (they) may incur liability, depending upon the circumstances, for the negligent acts of the others who hold themselves out as employees of the Center, or perhaps, as partners or co-owners.