Mandatory Reporting, Confidentiality When Communicating With Other Health Care Professionals and Access to Records vs. Subpoena for Records

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MANDATORY REPORTING – DIFFERENT KINDS

Most licensed mental health practitioners are aware of their duty to report knowledge or reasonable suspicion of child abuse, elder abuse, and dependent or vulnerable adult abuse. They are also keenly aware of their duty to report such abuse within specified time frames, since a violation of such laws can result in serious consequences for licensees – that is, possible civil, administrative, and criminal liability. Practitioners may not be aware of other reporting duties that state law may impose upon licensees (or others that affect licensees).

For example, there may be a law that requires a report to be made to the licensing board when a malpractice or related claim or action against the practitioner is settled or when there is a malpractice judgment entered against the practitioner. The reporting duty could be imposed upon the licensee, the court, or the malpractice insurance company (or another) depending upon the particulars of the situation (insured/uninsured and the nature of the underlying claim or litigation) and applicable law. Settlements for so-called “nuisance value” may also need to be reported – depending upon the amount of the settlement. Failure to make a required report may result in a fine or other consequences specified in state law.

State law may require licensees to report to the licensing board, either upon renewal of the license or sooner, any conviction of a crime (felony or misdemeanor) – such as driving under the influence of alcohol or drugs, sexual contact with a patient, battery, petty theft, and unlawful possession of drugs (just to name a few). A plea of “no contest” may also need to be reported to the licensing board. Such pleas are sought by defendants in criminal proceedings in order to protect their rights when contesting future civil proceedings involving the same conduct. Failure to make a required and truthful report can result in disciplinary action and other negative consequences. When a report is made, the licensing board may seek to take action against the practitioner if the criminal conduct is substantially related to the qualifications, functions, or duties of the licensee (or a similar standard).

Additionally, a professional association’s executive director, or other representative or employee, may be required, under specified conditions, to report certain findings or final actions taken by an association’s ethics committee or board of directors against a member of the association. Such conditions may include situations where the practitioner’s membership is suspended for a specified period of time or is otherwise disciplined for reasons connected to the practitioner’s competence or professional conduct. Whether or not such a statute exists in your state, and

whether it applies to a particular professional association, depends upon the specific wording and interpretation of the statute. Such statutes may be found in the sections of state law dealing with health care peer review and peer review bodies, including those that deal with hospital staff privileges.

Finally, don’t forget to notify the licensing board of a name change or an address change within the time frame and under the circumstances that may be specified in law or regulation.

CONFIDENTIALITY - COMMUNICATING WITH OTHER HEALTH CARE PRACTITIONERS

Are you fully aware of the law or other legal authority that allows you to break confidentiality (release patient information) without the written and signed authorization of the patient? Are you aware of the many of such exceptions to confidentiality that the law may allow? Perhaps the most important aspect of the law to understand is that which HIPAA has long-recognized in its regulatory scheme known as the Privacy Rule, significant parts of which were influenced by long-existing and well accepted California law. The exception to confidentiality to which I refer is the right of the mental health practitioner to share information with other licensed health care providers or facilities, without the written and signed authorization of the patient, if done for purposes of diagnosis or treatment of the patient.

Understanding this exception to confidentiality helps the practitioner deal with situations where clinical prudence might call for the practitioner to seek information from (or share information with) other practitioners in order to properly deal with the treatment situation extant. It allows, among other things, the practitioner to speak with a patient’s physician or former therapist and to share information with the patient’s physician or other health care provider. Such sharing of information may be necessary for the rendering of safe and appropriate care. Unfortunately, not all licensed practitioners and virtually no health care facilities may know about this exception to confidentiality - or they simply choose to routinely require a signed authorization. But in times of urgency, this is an important principle to remember. Convincing or simply educating a colleague that a signed authorization is not required (when the information is shared for purposes of diagnosis or treatment) is more easily accomplished when reference to the specific statute is given to the hesitant practitioner.

Those who are governed by state law should be familiar with the statutory language in their state that allows such communication or sharing of information so that the breadth or limitations of this well-accepted general principle are well understood. For those who are covered by the HIPAA -related Privacy Rule (because they are a “covered entity”), my assumption in this article is that the reader is familiar with the federal regulation that, among other things, allows covered health care providers who have a direct treatment relationship with the patient to disclose the patient’s personal health information, without the patient’s written authorization, to carry out the health care provider’s own treatment, payment, or health care operations.

ACCESS TO RECORDS vs. SUBPOENA FOR RECORDS

I have spoken with practitioners who have conflated the laws that deal with a patient's access to records and the laws that govern the practitioner's reaction to a subpoena for records issued by the attorney for a party adverse to the interests of the patient. Perhaps the practitioner receives a subpoena for a patient's records from the attorney for the person or entity (e.g., a former employer or health care practitioner) that the patient is suing. Part of the lawsuit alleges that the defendant negligently or intentionally caused emotional or psychological harm to the patient. Some practitioners mistakenly think that in such situations they have the option to provide a summary of the records in lieu of the complete record, especially when the patient is reluctant for the treatment records to be released.

The right of a mental health practitioner to provide a summary of the records becomes relevant when a patient requests (usually a written request) a copy of the treatment records – not when a properly issued subpoena for records has been served on behalf of a party adverse to the interests of the patient. When there is litigation initiated by the patient, the defendant may (depending upon the specific allegations) be entitled to the complete treatment record of the patient. It is possible for the patient's attorney to seek a protective order to protect certain portions of the record from disclosure, but protective orders are not easily obtained and, if granted, tend to be limited in scope.

Once the patient puts his or her mental or emotional condition into issue in a lawsuit by alleging mental or emotional harm, justice requires that the plaintiff (the patient) prove the harm or damage alleged and that the defendant be allowed to fully contest the allegations. The psychotherapist-patient privilege is waived as a matter of law. Production of the records is necessary in order to ensure a fair proceeding and a just result. In the absence of an agreement between the parties or a protective order (both rare), there are no summaries allowed in this scenario!

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