Alphabet Soup for the New Year (2014)

Avoiding Liability Bulletin - January 2014

-**A**dvertisements by licensed mental health practitioners must not be false, fraudulent, misleading or deceptive. Care should therefore be taken before one represents himself or herself as an "expert" or a "specialist." What supports such a representation? Can you back up your claim and be confident and comfortable in doing so? Are you willing to be held to the standard of care of the expert practitioner rather than the standard of care of the ordinary (non-expert) practitioner? Is a specialist expected to know more than the ordinary practitioner (in the area of declared specialty)? Also, see "Y" and "Z" below.

-**B**usiness licenses are generally required by cities and other governmental entities for those individuals, partnerships, corporations, or other entities conducting a business in the particular jurisdiction. Practitioners who conduct a private practice should check to see whether or not a business license is required in the jurisdiction(s) that may govern the particular locale. While doing business without such a license is generally viewed as a relatively insignificant violation (perhaps a late fee or fine will be assessed), it could result in negative publicity or embarrassment. An exception to this general view might be where a zoning violation is involved.

-**C**onfidentiality when providing family therapy presents special issues for the practitioner. The duty of confidentiality is owed to the family unit being treated, but practitioners may want to be able to share information obtained from one of the individual members of the family unit when seen in one or more individual sessions. The practitioner in such circumstances may want to use a "no secrets policy," where the family might be informed at the outset that the individual session is generally (there may be exceptions) considered to be a part of the family therapy and that the practitioner may be sharing information learned in the individual session with the family unit – as the practitioner deems clinically necessary or appropriate. Care must be taken in drafting such a document.

-**D**riving under the influence of alcohol (or drugs) convictions can result in the loss of one's license - and I am not referring to the practitioner's driver's license. I am referring to the reality that in many or most states, certain criminal convictions are relevant to the issue of whether or not the "bad act" was reasonably related to the qualifications, functions, or duties of the licensed mental health professional. The fact that patient care was not involved is irrelevant. Don't drink and drive – it has too many bad ramifications for you and the public.

-**E**rrors of judgment may not constitute, or amount to, negligence. The general duty of care for a mental health practitioner is to act as the reasonably prudent practitioner of like licensure would act under the same or similar circumstances. Therapists and counselors must use their best clinical judgment, and not all results can be favorable or effective. Reasonable practitioners may differ on the appropriate intervention, and the failure of one approach does not necessarily mean that the

practitioner was negligent.

-**F**amily law matters, such as custody or visitation disputes, may lead to complaints to the state regulatory board against practitioners who are treating one or more members of the family and who provide the court with a declaration or affidavit "singing the praises" of the client being treated and criticizing one of the parents. Thus- when involved with such legal proceedings, it is important to make sure that any such statements made are authorized, objective, and supportable.

-**G**ifts to or from patients can be problematic, although not necessarily unethical or unlawful. As I have written about before - if you attend a long-term patient's wedding because of the special meaning it would have for the patient and you give the patient a gift – will you possibly be met with "I pay you $150 twice a week for the past year and this is what I get?"

-**H**IPAA requires health care practitioners who are "covered providers" to prominently post and make available their Notice of Privacy Practices on any web site they maintain that provides information about their customer services or benefits. There are now sample Notices (different models) available through the U.S. Department of Health and Human Services. HHS says that these Notices were designed to be clear and easily understandable by the consumer!

-**I**nvoluntary commitment is just one of several options that may be available and appropriate when dealing with the patient who presents an imminent danger of physical violence to self or to others. Are you familiar with the manner in which an involuntary commitment can be initiated by you under state law?

-**J**oint legal custody may have different meanings in different states, and practitioners must be certain that they understand the authority of a parent with joint legal custody who brings a child in for treatment. Does the law or the court order require the consent of both parents before treatment can begin, or can either parent consent to treatment? In some states, as with California, it may be one joint custodian alone (unless the court order specifies otherwise). In some situations, the minor patient (12 or older) may be able to consent to his or her own treatment, even over the objection of a parent with joint legal custody. Practitioner should carefully consider whether or not they should treat, even if legally permissible.

-**K**eeping "good" records, especially at important junctures in the professional relationship, can help practitioners whose judgments or actions are later questioned – whether in a claim or lawsuit by a patient or former patient, or in a disciplinary proceeding. For example, when the treatment plan changes, or when the nature of your relationship with multiple members of a family changes (e.g., when couple therapy ends and individual therapy begins), or when determining whether a patient is a danger to self or to others, or determining whether reasonable suspicion of child or elder abuse exists, accurate and adequate recordkeeping may prove helpful - assuming that the practitioner is acting in a reasonably prudent manner!

-**L**awyers who threaten psychotherapists with contempt of court when the psychotherapist refuses to quickly comply with a subpoena (e.g., initially claims the privilege when a subpoena for records is served) are seldom able to successfully carry out their threats. The manner in which a subpoena is handled by the practitioner varies from state to state, but the existence of the privileged relationship, at least at the outset, should result in a reluctance of the practitioner to reflexively comply. If the subpoena is for an appearance and for testimony in court, the issue of privilege can usually be raised by the patient's attorney – unless the privilege is being waived by the patient.

-**M**andated reporters of child abuse or elder abuse are typically granted immunity from civil or criminal liability for making reports that are either authorized or required under the state's reporting laws. This immunity may apply, depending upon state law, even if the therapist or counselor negligently reports child or elder abuse.

-**N**ever allow your license to lapse and never allow your malpractice insurance to lapse because you simply overlook the expiration date. Don't rely upon notification from others – take the initiative and make sure that you are licensed and covered by insurance by proper calendaring. Some practitioners move and may fail to promptly notify others of the new address – thus, a renewal notice may be missed.

-**O**ral authorization to release records is generally not legally sufficient – either under HIPAA or applicable state law. State law may also require that a valid authorization to release information pertaining to a patient contain specified information or elements. One such element may be the date upon which the authorization expires (or the specific date after which an authorization is no longer valid).

-**P**rivileged information involves the right by a licensed mental health practitioner to withhold testimony or treatment records in a legal proceeding, even if the testimony or the production of records is sought by subpoena. Although the general rule is that no person has a right to refuse to be a witness in a legal proceeding, the psychotherapist-patient privilege (an evidentiary matter) allows a psychotherapist to protect the privacy of the patient's communications and the treatment records by asserting or claiming the privilege when records and testimony are first sought. The patient is usually the holder of the privilege and may waive the privilege, either expressly or by operation of law.

-**Q**uash – not squash! A subpoena may be "quashed."

-**R**eparative therapy now constitutes unprofessional conduct in California if performed with persons under the age of eighteen, regardless of parental consent or authorization. The law essentially says that attempts to change a minor patient's sexual orientation by a mental health practitioner can result in loss of the practitioner's license or other discipline imposed by the licensing board. There could be other consequences for engaging in such conduct, such as the possibility of monetary liability in a civil action.

-“**S**tatutory rape” may not be reportable as child abuse in some states - under certain conditions. Statutory rape, also referred to as unlawful sexual intercourse with a minor, may involve, for example, consensual sexual intercourse between a nineteen year-old boy and his sixteen year-old girlfriend. In California, this act is a crime – but it is not reportable as child abuse. Failure to realize this distinction (as the police often do) can result in a breach of confidentiality when a report is mistakenly made by the uninformed practitioner. Of course, each state may treat this issue differently. What about consensual sexual intercourse with minors in your state?

- **T**ermination of therapy should be well-documented in your records. Sometimes this will be in the form of a termination letter from the patient, who has the right to terminate treatment at any time and for any reason. Sometimes it will take the form of a notation in the treatment record of discussions that have taken place over a period of time in session (termination is usually a process). Great care must be taken when the practitioner writes a letter of termination. It is often prudent to send a letter that confirms previous conversations regarding termination rather than a letter of termination as the first notice.

-**U**nderstanding the differences between the concepts of confidentiality and privilege, and being able to clearly and succinctly explain the differences to patients and others, is essential. Can you do it?

-**V**iolence in the home, such as physical abuse of a spouse, may constitute reportable child abuse, depending upon the circumstances and, of course, depending upon state law. For example, such a report may be required or authorized if the abuse takes place in front of a child and if a weapon is used, or if alcohol or drug abuse is involved. Child endangerment statutes would likely come into play in such situations.

-**W**ritten and signed informed consent may be required by statute, by regulation, or by ethical code provision, and may be applicable only under specified circumstances. Some requirements regarding informed consent may not specify that the consent needs to be signed or in writing, and some may specify that verbal informed consent is permissible (e.g., California’s recently amended telehealth statute). Other informed consent requirements may specify content. When the informed consent is verbal, reference to the process of obtaining the consent should be well- documented in the practitioner’s records.

-e**X**piration of your license, even if the result of innocent error or oversight, can result in difficulties for the practitioner, depending upon the amount of time the license has been in expired status and the particular circumstances extant. If an act of negligence or other wrongful act occurs during the period of lapse, you were therefore practicing without a valid license. While in some cases the jeopardy may not be great and the ability to rectify may be easy, other situations can result in problems for the practitioner. Don’t let your license to practice lapse. Do not solely rely upon being notified by the regulatory board.

-**Y**ellow Stone Counseling Associates – if someone conducted business (private practice) under this hypothetical name, would they be required to inform the patient of the name of the owner of the business and the title of the mental health license held by the owner of the business? If there no associates, partners, or professional employees, would the name of the business be misleading and in violation of the law? Must the owner first file any forms or follow any procedures in order to lawfully use the fictitious business name?

-**Z**ion Park Therapy Center - if someone conducted this hypothetical private practice under such a name, would it be unethical not to inform a client of the owner's name and the title of the license held by the owner of the business? If the owner is conducting this sole proprietorship under such fictitious business name, is the name misleading to the public (the consumer) because of the use of the word "center?"

Author:
Richard Leslie