Child Abuse Reporting-Signed Statement Required?

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State law (likely part of the child abuse reporting law) may require persons who enter employment as a “health practitioner” to sign a statement acknowledging their awareness of certain key provisions of the state’s child abuse reporting law and agreeing to comply with those provisions. Large employers like hospitals and other entities providing health services are typically aware of these requirements and provide the necessary form for the employed “health practitioner” to sign. However, a licensed mental health practitioner who hires an associate, intern, or other titled employee to work in a private practice as a supervised employee may overlook or be unaware of such a requirement. Similarly, a professional corporation or small counseling center may overlook such a provision when hiring licensed mental health professionals or pre-licensed persons. Some states may require licensing boards to notify new or renewing licensees of this or a similar requirement.

Is there such a requirement in your state? Does it apply to your private practice? Do you know the required content of the statement? Do you know the possible penalty or liability exposure for a failure to comply?

LIABILITY – “TRIPLE THREAT”

When considering what the liability risks are in any given situation, it is important to keep in mind that there are different kinds or different levels of liability – that is, there is civil liability, criminal liability, and administrative liability. Sometimes, one wrongful act with a patient can result in liability on all three fronts. The act that readily comes to mind is sexual misconduct or sexual contact with a patient. I assume in making that statement that the state in which the conduct occurs has criminalized sexual relations or sexual contact between a patient and a treating psychotherapist. A failure to report child abuse can also result in civil, criminal, and administrative liability.

With respect to civil liability, when a patient alleges negligent or otherwise wrongful conduct (e.g., intentional, reckless, grossly negligent) against a mental health practitioner, the burden of proof is typically the weakest of the three kinds of potential liability – that is, the plaintiff must prove the allegations by a preponderance of the evidence. In a criminal case, the burden of proof on the part of the state is the most stringent - that is, guilt must be proven beyond a reasonable doubt. In administrative cases, as where a licensing board pursues charges against a mental health licensee, the typical standard is that the alleged unprofessional conduct must be proven by clear and convincing evidence.

ADULT ABUSED WHEN A CHILD

What if it is discovered during the course of treatment that an adult patient was abused when he or

she was a child? Generally, such a discovery would not require a child abuse report to be made because a “child” is likely defined in the state child abuse reporting law as a person under the age of eighteen years. However, what if the adult patient recently turned eighteen years of age and, for example, has told the treating practitioner that she is concerned about her younger sister who still resides with the abuser? In that case, it is likely that a report is justified based upon a reasonable suspicion that a child is currently being abused. Of course, whether or not to report in a particular instance depends upon all of the facts and circumstances involved and the nuances of applicable law.

Most child abuse reporting laws require a report of known or reasonably suspected child abuse, but they do not impose a duty on the part of the mental health practitioner to investigate possible child abuse. The duty to investigate is with law enforcement or the child protective services agency. Thus, if a thirty year old patient tells his therapist that he was abused by a teacher or coach in high school when he was fifteen years of age, the practitioner would ordinarily have no duty to investigate whether the teacher was still employed and still involved in similar behavior. The patient may have some information about the status or whereabouts of the teacher, and despite the passage of time, the patient may wish to make a report to one of the appropriate agencies. In most states, the patient can make the report anonymously.

CHILD ABUSE – SUPERVISOR LEARNS OF FAILURE TO REPORT

Suppose a pre-licensed person employed in a private practice or elsewhere reveals information during the course of a supervision session that leads the supervisor/employer to believe that a required report of child abuse was not timely made by the employee. Perhaps the supervisee did not recognize that the situation was one which required a report, or perhaps the supervisee foolishly but intentionally acceded to the wishes of the patient that a report not be made. In either case, the supervisor believes that there has been a failure to make a timely report.

In most such circumstances, the supervisor will be required and will want to make the report because the supervisor learned of the suspected or known abuse in his or her professional capacity and must therefore make an immediate report. The supervisee may want to make the late report once convinced that a report is required, but the supervisor should generally make the report. The supervisor will be making a timely report, while the supervisee might arguably be admitting to a crime by filing a late report. With proper explanation, and depending upon the circumstances, it may be possible for the reporting supervisor to influence the authorities that they need not pursue criminal prosecution of the supervisee (for failure to report), nor do they need to file a report or complaint with the licensing board.

ADVERTISING – HOW MANY YEARS IN PRACTICE?

Mental health practitioners generally enjoy “commercial free speech,” which allows them to advertise their businesses in a variety of ways and in a variety of media. A widely accepted

principle (typically found in statute) limits and proscribes advertising that contains any false, fraudulent, misleading, or deceptive statement(s). An advertisement that I have seen on more than one occasion is where the practitioner, in listing his or her credentials, says something like "… has 10 years of experience practicing psychotherapy" or "…has been practicing psychotherapy for more than 10 years."

What if four of those years were when the now-licensed practitioner in private practice was an intern, trainee, associate, or other-titled pre-licensed person? Is such an advertisement misleading or deceptive?

TREATMENT RECORDS – REQUIRED CONTENT

There are various aspects to the topic of treatment records and record-keeping by mental health practitioners. One aspect relates to the contents of records and whether there are requirements in law or regulation related to content. I have always believed that the state should have a limited role in mandating the content of records kept by psychotherapists. In California, state law provides great latitude for many licensed mental health practitioners – despite that state's sporadic attempts (by some licensing boards) to mandate specific content. The statutory requirement in California (for most licensees) is that the practitioner must keep records that are "consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered."

Employers of mental health practitioners may require their employees to keep records in a certain manner and to include specific content. Ethics code provisions and standards or guidelines of professional associations may also impact the content decisions of practitioners.

What are the legal requirements, if any, in your state? Are there any applicable ethical standards that either require or suggest content? Does the required content differ when telehealth services are provided?

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