Contracts - Hold Harmless Clauses

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… During the course of practicing the profession, therapists and counselors from time to time enter into written contracts or agreements. For example, a therapist or counselor enters into a contract with his or her malpractice insurance carrier when obtaining coverage for professional liability. Practitioners enter into contracts or agreements with landlords in order to lease or rent office space and when they become providers with HMOs or similar organizations. Additionally, practitioners may enter into contracts with employers, either when they act as W-2 employees or “independent contractors.” Practitioners must be careful before entering into any contract, and often will want to consult with an attorney to learn the full import of signing the contract or agreement.

One of the clauses in the contract or agreement that should be carefully reviewed is known as a “hold harmless” clause. Sometimes, such a clause is combined with or alternatively called an “indemnification clause.” Essentially, a “hold harmless clause” in a contract means that one party agrees to assume liability for certain situations, and releases the other party from responsibility for damages or liability. Stated otherwise, it is the assumption by contract of another’s liability. Such clauses can be unilateral or mutual (e.g., where each party holds the other party harmless for their respective acts of negligence), but I suspect that most clauses encountered by mental health practitioners are initially presented as unilateral – that is, where the mental health practitioner is expected to “hold harmless” or “indemnify” the other contracting party. These clauses, regardless of the kind of contract that they appear in, can be written in a variety of ways, with many nuances.

Practitioners will sometimes be able to negotiate the language of such a clause so that the practitioner does not assume liability for the acts of others. For example, I have reviewed office leases where the “hold harmless clause” was overly broad and one-sided. Sometimes the landlord was unaware of the one-sidedness of the clause because he or she was using a standard form that was obtained from a colleague or trade association. I have also experienced situations where landlords are amenable to amending the clause so that the tenant/lessee is not expected to hold the landlord harmless or indemnify the landlord for damages caused by the sole negligence or intentional misconduct of the landlord or another. For example, the tenant/lessee should not ordinarily be expected to indemnify the landlord or hold the landlord harmless for injuries occurring to a patient who trips and falls in the common areas of an office building, where the landlord has complete and sole control of the maintenance of the common area.

With respect to employment contracts, employers who hire mental health practitioners as independent contractors may insist upon a contractual provision where the independent contractor agrees to indemnify or hold the employer harmless for the harm caused to a patient by the independent contractor. Thus, when and if the employer is sued, the employer can look to the independent contractor to indemnify or hold the employer harmless for the independent contractor’s negligence. Care must be taken by the practitioner that he or she is not assuming

liability for the acts of others that he or she would otherwise not be responsible for – that is, where the additional liability of the practitioner is the result of a contractual agreement (the hold harmless/indemnity clause) that accepts liability for some or all of the acts of others.

Practitioners who are covered by professional liability insurance (and additionally, by general liability coverage) must be aware of clauses contained within these policies that exclude coverage for claims or suits for damages arising out of any liability that the insured assumes under any contract or agreement. The intent of such an exclusion is to protect the insurer from being responsible for the liability that the insured may incur as a result of the insured entering into a contract or agreement containing a broad indemnification/hold harmless clause, where the insured may have agreed to hold the other party or entity harmless for the acts of negligence or intentional wrongdoing of that party or entity. This is clearly not what the insurer agreed to insure. Importantly, such exclusions will typically not apply if the insured simply holds the other party harmless only from the insured's own negligence. Again, one must take care to examine these clauses closely and should not hesitate to consult with an attorney or others.

Some hold harmless agreements may not be enforceable because they violate either a state statute or the public policy of the state as established by case law. For example, a California statute provides that all contracts which have for their object, either directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against public policy. Such a statute could render void a hold harmless/indemnification provision in a contract that is overly broad or one that is "unconscionable." As the reader can discern, this area of the law is rather technical, and the implications for practitioners are real. That is precisely why practitioners must be careful before signing contracts.

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