

## Diversity And The Law

### Avoiding Liability Bulletin - February 2010

In the [December 2009 issue of this Bulletin](#), I gave three examples of, and asked related questions about, the inter-connectedness of diversity issues and the legal issues involved with avoiding liability. I indicated that I would discuss the questions asked, and answer them, in a future issue of the Bulletin. The three examples are repeated immediately below.

One example involved the question of whether a Christian counseling center can hire only Christians to perform Christian counseling services for its nonprofit corporation. Another example involved the question of whether a transgender therapist, who presents as a woman but is biologically a male, has to disclose to the patient, prior to the commencement of treatment or at some other time during the course of treatment, the fact that he is biologically a male. Finally, I asked whether a mandated reporter of child abuse must make a child abuse report when the therapist or counselor knows or determines that a physical injury, scald or burn mark was inflicted as part of an accepted cultural ritual in the country of origin for the family, and not as a result of negligence or criminal intent. Some discussion follows.

With respect to the nonprofit Christian counseling center, it is important to know that there are federal and state laws (and sometimes local laws) that bar discrimination in employment based upon one's religion or religious beliefs. While spiritual or Christian counseling is generally accepted as a lawful activity, it does not necessarily follow (in my view) that only Christians can competently perform Christian counseling. While an employer can lawfully seek to hire those who are competent to perform a particular service, it also seems clear to me that it would be impermissible to state or imply that Jews or Muslims need not apply! One must check the applicability of state or federal law to their particular organization to determine whether and in what way the law may affect the nonprofit corporation's hiring and other employment related operations.

For example, there are exemptions under federal law (Title VII of the Civil Rights Act of 1964 – which applies to employers with fifteen or more employees) for “religious organizations” and “religious educational institutions” that allow such organizations to give employment preference to members of their own religion. The precise meaning of these terms, and the extent and nature of the allowable preference, as well as the manner in which it can safely be implemented, is perhaps the subject for further inquiry by those who are interested. Even though a federal anti-discrimination law may not be applicable, a state or local anti-discrimination law may apply. Most states prohibit employment discrimination based upon religion or religious beliefs. As to whether there is an exemption or exception under state law, and if so, the extent and nature of such, this can be pursued by those who may be interested.

The transgender therapist who presents as a woman but is biologically a male does not, in my view, have to disclose to patients, prior to the commencement of treatment or at some other time

during the course of treatment, the fact that he is biologically a male. I must state at the outset that I am not aware of any state law or regulation, or any ethical code provision that directly governs this topic. Nor am I aware of any case law that has addressed this issue. I have heard arguments from some that counter my position on this issue. They essentially argue that the doctrine of informed consent might require disclosure at the outset of treatment and that the failure to disclose at any time during the course of treatment, depending upon the circumstances, may constitute a fraudulent misrepresentation of some kind.

I argue otherwise. Each state has its own requirements for therapists and counselors regarding their duty to make certain disclosures to clients prior to the commencement of treatment. I am not aware, however, of any state that requires a therapist or counselor to disclose his or her religion, marital status, sexual orientation, or gender identity to the patient – whether at the outset of treatment or otherwise. Without going into great detail, which may be necessary when discussing the doctrine of informed consent, I do not believe that informed consent (as I understand that term's meaning in California) is directly involved here. We are not dealing with a question of the risks and benefits of a particular treatment, whether experimental or otherwise, nor are we dealing with treatment that is inherently dangerous. Again, it is likely that no statute or regulation specifically mandates such a disclosure.

Some might argue that patients are often desirous of seeing a therapist of a particular gender and that they have a right to be told of the actual gender – especially when it becomes known or reasonably believed by the therapist or counselor that his/her gender is important to the client. They might argue that the failure to disclose constitutes a fraud upon the client, or that fraudulent misrepresentations have been made – either directly or indirectly. Since this situation would likely present a case of first impression, the opposing lawyers would make their arguments on either side of this issue and a court or jury would make a decision based upon general principles of tort law.

The defendant practitioner might argue, among other things, that the patient never expressed any concerns or had any questions regarding the gender of the therapist, and more importantly, that there was no misrepresentation. The practitioner might also argue that his or her gender identity and gender expression was a true representation of who the practitioner is – which was clearly apparent to the patient – and that there is no duty to disclose such highly personal information as the practitioner's biological particulars. The practitioner in our example presented as a woman, and presumably did so in good faith. The patient's expectations have been met – the patient's practitioner is, for all intents and purposes, a woman – except for the genitalia. If the therapy or counseling rendered is competent, ethical, and within the applicable standards of care, the therapist should, in my view, prevail.

With respect to the question involving the child abuse reporting requirements of mandated reporters, I must repeat my oft-made statement that state laws vary, often in fine nuance. Also, it is important to point out that mandated reporters typically have immunity from liability for making child abuse reports when they know or reasonably suspect (or a similar standard) that child abuse has

occurred. On the other hand, failure to report child abuse can result in substantial liability for the unwary therapist. Thus, when faced with close calls, mandated reporters often lean in favor of reporting.

In the example presented, the mandated reporter knows or determines that the child has suffered an injury that appears to have been inflicted non-accidentally. In fact, the injury appears to have been inflicted intentionally by the parent. While there may not have been the requisite criminal intent on the part of the parent to constitute a crime or to warrant a criminal prosecution or conviction, there typically need not be a criminal intent present in order to warrant the filing of a child abuse report.

In California, for example, child abuse is defined, in part, as a physical injury (includes a burn or scald mark, or bruise) inflicted by other than accidental means on a child by another person. This appears to be what happened in the example presented. The child abuse reporting law in California does not provide an exception for injuries inflicted upon a child as part of a customary cultural ritual. When the therapist or counselor makes the child abuse report, whether by telephone or in writing, or by both (depending upon state law requirements), he or she should mention the cultural factors involved. The investigators and others can decide whether or not it would be appropriate to charge the accused or whether the cultural factors are more appropriately used in mitigation of any penalty that may be imposed.

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