

## Equal Pay for Equal Work?

### Avoiding Liability Bulletin - August 2015

Note: Rather than write yet another article on avoiding liability, I take a brief summer vacation from that task and provide some thoughts on a topic (fees) that in one way or another has been of interest to mental health practitioners of various licensures in multiple states over a period of years. So, here's something to think about at the beach in August! This article should not be read as being my recommendation for a particular course of action, but rather, it is solely intended to stimulate thought.

Professional associations often hear from members about their concerns that health insurers and other third-party payers inadequately pay for services rendered by professional mental health counselors, marriage and family therapists, and other licensed mental health practitioners for covered mental health or psychotherapy services under group health insurance policies and other managed care arrangements. Because of antitrust considerations (e.g., the fear of government inquiry or intervention), these concerns about the level of payment are sometimes given short shrift by professional associations. While these and other fears of government intervention may at times be overblown and unjustified, there is an exception to antitrust liability when concerns about inadequate fees are voiced in the form of legislative action (the "petitioning the government" exception).

Thus, if a state legislature or government regulatory body (e.g., a state department of insurance or managed care) dealt with a fee proposal and ultimately passed a law or regulation that mandated a certain kind or level of payment, concerns about antitrust violations quickly evaporate. Fee issues that would otherwise trigger antitrust concerns (and antitrust liability) with government regulators can be lawfully discussed when petitioning the government for the desired reforms. When such legislative action is pursued by a professional trade association, there would of necessity be discussions among members of the trade group in order to proceed in a meaningful and effective way.

For well over a decade, there has been talk by many in the insurance industry and the provider community about measuring outcomes and patient satisfaction. Current public policy thinking leans toward payment for results, for quality, or for positive outcomes (performance-based payment) rather than the more mechanical payment per procedure. What if legislation was pursued that prohibited payment differentials for covered mental health services based upon the type of license held by the state-licensed mental health practitioner? Such a proposal would be based upon the premise that each of the licensed mental health professions performs the same basic service when health care insurance is involved – that is, the diagnosis and treatment of mental disorders.

Instead, payment differentials for licensed mental health practitioners might be based upon criteria such as geographic location, the diagnosis, and the quality of care delivered. This would result in a

kind of “equal pay for equal work” standard as health care public policy. With respect to the pay of women in business and industry, this same standard has drawn much support and served to educate the public about an important issue involving fairness and equity. Is it time to challenge the health care/insurance industry in a similar fashion regarding the practice of basing payment differentials upon the kind of mental health license held?

Consider the many arguments that would and could be advanced (on either side of the issue) in a debate over the wisdom of such a public policy with respect to the payment of state licensed mental health practitioners. Consider the benefits that might be realized (and the possible detriments) from a public discussion of the related issues and principles in the state legislature or before regulatory bodies. Imagine the debate surrounding the assertion that the same service is being performed by psychologists, social workers, counselors, and marriage and family therapists – that is, the diagnosis and treatment of particular mental disorders!

Some of the most important legislation, on the state and federal level, has taken multiple years before final passage and ultimate implementation. Simply getting the payment issue exposed in the public arena and challenging health insurance industry practices regarding payment may have advantages. Of course, there are possible pitfalls and numerous questions that would arise from such a proposal. Some critics might say that even if payment differentials were prohibited based upon the kind of license held, that would not prohibit insurers from paying inadequate fees to all – without discrimination! If there was agreement on the merits of the equitable principle advanced by such a proposal, the appropriate or specific manner of determining equal pay for equal work might more easily be achieved.

### Some Questions to Ponder

Is such a proposal wise? Would it be fair? Would it/could it be viewed and argued that it is a selfish attempt by less qualified practitioners to level the payment playing field? Who are the supposed “less qualified” practitioners? On what basis would such an assertion (less qualified) be made and supported? Are some licensed counselors more qualified, more competent, and more effective than some psychologists? Would the implementation of this idea nevertheless leave the amount of the payments to the discretion of insurers and have no effect on the adequacy of the payments? Is the underlying goal of payment-for-performance advocates (e.g., health care policy makers) to reduce costs?

How much of psychotherapy is art and how much is science, and how does health care insurance affect the balance between art and science? Do mental health practitioners of different licensures really do the same thing? Can measurement criteria ever be developed in the mental health field that would allow for equal pay for equal work? Should there be mental health insurance coverage unlinked to the prerequisite of an existing mental disorder?

