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Avoiding Liability Bulletin - July 2021

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Are there circumstances that may arise when a patient falls behind in the payment of fees for professional services rendered and the mental health practitioner (or agency) decides to continue treatment despite the financial difficulties of the patient? From experience, my answer is “yes.” If a practitioner decides to continue with treatment despite not being paid at the time of treatment, there are certain considerations that should be addressed, both before and after the decision to continue treatment. An important consideration should be the desire to avoid a later fee dispute. Fee disputes are unpleasant, and they sometimes lead to complaints to a regulatory body or to claims or lawsuits regarding the practitioner’s actions that may be unrelated to the issue of fees.

If a practitioner does not want to continue treatment with a patient who can no longer pay the agreed upon fee, the practitioner will typically terminate treatment and make one or more referrals for the further treatment of the patient. Of course, whenever there is a termination of treatment by the practitioner (the patient can terminate at any time and for any reason), this too may lead to problems for the practitioner, especially if the termination is not properly handled. As but one example, if the practitioner does not have an “informed consent” form or disclosure form that provides for the possibility of a termination and referral in the event that the patient can no longer pay the agreed upon fee, this failure can be used by the patient by alleging that the practitioner acted unprofessionally, unethically, and unlawfully.

If the practitioner decides to continue treatment because of the particular circumstances involved (e.g., the condition of the patient, the reason for the financial difficulty, the prospect of future payment) there should be clarity as to the new arrangement – well-documented in the practitioner’s records. The practitioner may decide to waive any further charges and proceed on a pro bono basis for a period of time. If that is done, the practitioner needs to be clear about the balance still owing from prior treatment. If the prior treatment is of short duration, a complete waiver might be considered. If no waiver of past due fees is involved and the patient is made aware of this, then the practitioner is still faced with the issue of pursuing payment at some future time.

I am aware of situations where the practitioner continues treatment (for a limited or longer period of time) and continues to bill the patient at the original agreed upon fee or at a reduced fee. Again, if this is done, it should be clear from the practitioner’s records that such an agreement was consummated with a clear understanding from the patient. I remember one case where the practitioner continued to treat the patient for a considerable period of time, building up a large amount of past due fees. The patient was supposedly going to acquire money at some time in the

future. When payment was not forthcoming, the therapist sued the patient for the monies owed. The court ruled that the therapist waived the right to recover because the actions of the therapist created an impermissible (in this particular case) debtor-creditor relationship that negatively affected the treatment (as was alleged by the patient).

There is no simple or hard and fast rule, since the situations that may arise are limitless. But if faced with making a decision when the payment of fees first stops, it is important to be aware of the options and the possible implications of each option. Practitioners are often torn between doing what is best for them (from a practical and legal perspective) and what is best for the patient. In that regard, it is essential that practitioners be aware of the Code of Ethics of the particular professional association(s) involved. There are very likely sections in the applicable ethics code, ethical standards, or standards of practice that address, among other things, the issues of fees, termination, abandonment, informed consent, exploitation, and the obligations of practitioners to their patients and to the profession. Knowledge of applicable laws and regulations, if any, is of course necessary and expected!

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Practitioners have changed the way they practice as a result of the pandemic, which seems to be moderating, and once again, practitioners will be returning to practice in their offices. Innumerable issues surely will arise as a result of the transition back to in-person treatment. A continued and likely increase in the use of telehealth is to be expected, but the return to the office is certain. Because all of this is new, unique and ever-changing, it is sometimes difficult for practitioners to navigate. It is important for practitioners to be aware of the resources available online – which comes from the several state and national professional associations representing the various mental health professions, as well as from governmental entities, both state and local, including licensing and public health authorities. This information is likely to change over time.

As stated above, innumerable issues can arise. For example, suppose a practitioner decides to return to an office setting. Is the practitioner vaccinated? Must the practitioner disclose to patients that they have been vaccinated or that they are unvaccinated? If unvaccinated, is it necessary for the practitioner to wear a mask? Is it permissible to require patients to present proof that they have been vaccinated? If a patient says that they have been vaccinated and that they have lost their proof, is it permissible for the practitioner to refuse to provide in-person treatment or would that impermissibly impugn the character of the patient?

There is no end to the questions that may or will arise. Some circumstances may require legal consultation. Other circumstances may be resolved by the exercise of sound judgment (perhaps after conversations with colleagues), which should be informed, at a minimum, by the resources referred to above. Hopefully, these extraordinary conditions for patients and practitioners alike, will

soon end, or at least significantly lessen.

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