Records - Stolen, Lost or Destroyed

Avoiding Liability Bulletin - May 2006

… A supervisee is receiving off-site supervision (assuming it is legal and appropriate in the jurisdiction) and brings the patient's records with him or her to the supervisor's office in order to allow the supervisor to review the treatment records being kept by the supervisee, who works for a non-profit organization. Before being able to return the files to the agency, they are lost, stolen or destroyed. The supervisee calls the supervisor and tells her what happened. The central question that is raised by this and similar scenarios is: Should the patient be told of the occurrence, and if so, when? Before answering this question, some comments are necessary.

The primary fear of the therapist or counselor when records are lost or stolen is that confidential information will be seen by a third party, thus violating the patient's right to privacy and confidentiality. Accurate and complete records are important for the current therapist, for future treatment providers, and for the patient (e.g., when the patient may be relying upon the records to support his or her position in pending litigation – a common occurrence). Thus, it is important for therapists, supervisors and agencies to develop and implement policies that control access to patient records and that control the location, at all times, of records.

Even were an agency to allow records to be removed from the premises (hopefully, on rare and compelling occasions), it would be wise to take copies of only those portions of the records that are needed, so that if something were to happen to the copies, the original and complete record will still be where it is supposed to be. Additionally, it may be easy to edit the copy so that no personal identifying information is discernable. Of course, if the supervision occurred at the agency, this problem would be avoided in its entirety. Even where the supervision occurs off-site, the supervisor might visit the agency whenever records need to be reviewed. If records are taken off premises, it is best to keep the records in one's personal possession, rather than to leave them in a car or other location.

When records are lost, stolen or destroyed, the practitioner may want to reconstruct the records for treatment purposes. The ability to reconstruct will depend upon the complexity of the case and the length of time that the patient has been in treatment. Records from former providers can usually be obtained again. Dates of treatment might be retrievable from an appointment book or other records. If records are reconstructed, the date of the reconstruction should be apparent and the reason for the reconstruction should be provided. Remember, the therapist might not be at fault in many cases. For instance, an office or home can be burglarized even though reasonable safeguards have been put in place. A natural disaster, fire, or accident of some kind, not the fault of the therapist or agency, might have caused damage or destruction.

Depending upon the length and content of the records, some unintended disclosures can be seriously invasive of the patient's privacy and cause significant harm or embarrassment to the

patient. Other disclosures can be less harmful or damaging. Counselors and therapists who find themselves in this kind of difficulty are rightly afraid of liability, both civilly (lawsuit) and administratively (licensing board/disciplinary action), and usually want to minimize their liability and, if possible, mitigate harm to the patient. Because of the varying circumstances that occur and the different degrees of possible liability, therapists and counselors may need to consult with an attorney and perhaps others to help them navigate their way through a thorny situation.

Generally, the therapist or counselor is better off telling the patient of the missing records– and doing so promptly-rather than suppressing that information for a period of time. If prompt notice is given, the therapist will not later be found to have intentionally kept the information from the patient in an attempt to hide the occurrence. Delaying disclosure may increase the liability for the practitioner and perhaps bring the issue of “bad faith” into the fore. Prompt and full disclosure is easy when the therapist has not acted negligently with respect to the destruction, theft or disappearance of the records. If the loss, however, is the result of a supervisee’s negligence (leaving records in a car in a high crime area), and also the result of the negligence of the employer (who allowed the records to be taken and who had no written policy regarding this issue), the supervisee and employer may not be too anxious to reveal the full and true facts to the patient.

Those who find themselves in this situation may sometimes be reluctant to promptly tell the patient because they are hopeful that the records will be found, returned or recovered. If records are missing because of a theft or other crime, for example, the practitioner will likely make a police report, and will do so promptly. Recovery of the records could occur, for instance, if the stolen car is quickly recovered and the records that a supervisee negligently left in the trunk are still there. While misplaced or lost records may be found or returned, practitioners must carefully evaluate the pros and cons of delaying disclosure and must be certain that they act in good faith. If there is a delay, even if arguably justified, the patient can nevertheless allege that the delay was in bad faith or simply wrong.

Another reason why some are reluctant to promptly notify the patient is that they don’t want the patient to suffer serious emotional distress, especially where the patient is already under great stress. While there may be times when the patient is in such emotional condition as to warrant the therapist to delay disclosure of the loss of records for some period of time (the shorter the better), it is critical that such a reason not be a baseless excuse. Moreover, there must be sound clinical support (e.g., clinical consultation) for any such delay. While prompt notification may subject those involved to some liability for their negligent handling or maintenance of the records, the fact of prompt disclosure may help to mitigate the liability or to show that those involved “did the right thing” once the discovery was made. Again, consultation with an attorney or others may be necessary.

Do not put yourself or your employer in such situations. Think twice before taking records from the place where they regularly are kept!

Author:
Richard Leslie