THE ALPHABET – SOME HINTS ON AVOIDING LIABILITY

Avoiding Liability Bulletin - July 2020

I thought I might have a bit of fun going back to my ABCs and that you might find some of these brief items helpful. The thought here is to remind you of some of the basics that may help you avoid or minimize liability. For any of the topics covered here, further research can be done at CPH and Associates' website, where prior Avoiding Liability Bulletins ***can be found. This article was first published by CPH & Associates in July, 2010. Minor and non-substantive changes have been made in this re-publication.***

Advertise truthfully and without any misleading information. Sounds easy and basic, but many practitioners run afoul of this basic rule. Descriptions of education, training, and experience should not be enhanced in any way.

Break confidentiality (without the written authorization of your patient) only when required or permitted by law – such as child abuse or elder abuse reporting, communicating with a coroner or medical examiner investigating the death of your patient, or when compelled by a court order. It is important to know when this may be done without your patient's express permission. It is also important that the patient is aware of some or all exceptions to confidentiality. How much to disclose is a matter of judgment unless otherwise dictated by law.

Child abuse reporting – remember that there is generally more liability for not reporting than for reporting reasonably suspected child abuse. Additionally, the report(s) must be made within a specific time frame. Failure to report is a crime in most if not all states.

Document records well. Sometimes your best defense is contained in your records. If you don't document it, adverse parties may argue that it did not occur.

Expertise – don't call yourself an expert if you cannot support it and are not prepared to be held to the standards of an expert. Do a self-assessment of your education, training and experience before claiming expertise in a particular area.

Fees – be clear with respect to fees and do not allow balances to accumulate. Think about forgiving the debt of a patient or suing him/her in small claims court before turning the matter over to collections. Fee disputes can lead to more serious allegations from patients or clients, especially when a collection agency is involved.

Guarantee of a cure – never guarantee a cure – either directly or indirectly. Sometimes testimonials can indirectly imply that you are guaranteeing a cure. Let patients know the limits of psychotherapeutic intervention.

HIPAA – know for certain whether or not you are a “covered entity.” Compliance with HIPAA regulations is not necessary, and sometimes problematic, if you are not a covered entity.

Informed consent – what does this term mean in your state? For some, it simply means that certain specified disclosures must be made to the patient prior to the commencement of therapy or counseling. To others, it means that the patient must be informed, among other things, of the potential risks and benefits of services that are considered risky, experimental, or for which there exists little or no evidence of the efficacy of such treatment.

Joint legal custody – when treating a child, it is important to ascertain which parent has legal custody (as opposed to physical custody). In many states, either parent can consent to the treatment of the child where there exists a court order of joint legal custody. Some court orders may specify additional conditions and some state laws may require notification of the other parent where only one gives initial consent to treat. Be careful in this area of practice, since tensions run high in these kinds of cases. Know the law in your state with exactitude!

Kids – who is the holder of the privilege when you treat a minor of the age of six or sixteen? State laws vary, but in many states, the child is the holder of the privilege unless there is a court appointed guardian or conservator.

Liability – remember, there is liability in civil lawsuits for negligence, and liability in criminal cases – like insurance fraud, failure to report child abuse, or sex with patient (in most if not all states). There is also liability with respect to the licensing board for violations of the licensing law (e.g., unprofessional conduct) or other laws.

Malpractice insurance – make sure you never make the mistake of letting it lapse. You may not receive notification of a renewal for a variety of reasons. The responsibility is yours. Also, remember, you are required to promptly notify the insurer, in writing, when you are aware that you may have done something, or not done something, or something may have occurred in your rendering of professional services that may lead to a claim.

Negligence – your failure to act (omission) or your acts that fall below the standard of care – generally defined as that level of care that would be rendered by the reasonably prudent practitioner of like licensure under similar circumstances. A single negligent act or omission is not typically cause for disciplinary action in most states. Gross negligence, however, is typically considered to be unprofessional conduct, which will be acted upon by licensing boards. Gross negligence may be defined as an extreme departure from the ordinary standard of care.

Oral permission to release confidential information is generally not valid. State law usually requires a written and signed authorization. State law may also specify the particular elements to be contained in a valid authorization.

Privilege – the privilege belongs to the patient. You need to protect it until the patient and the patient's attorney direct you otherwise. The laws in each state vary with respect to how the privilege is to be claimed, asserted, or protected. Remember, there is a difference between privilege and confidentiality. If you cannot articulate what the difference is, do some research in the Avoiding Liability Bulletin Archives.

Quasi- Judicial Immunity – In many states, the law provides immunity from liability for those who testify as expert witnesses for the court – such as child custody evaluators, conciliators, or mediators. Impartiality and neutrality of these expert witnesses are expected by the Court.

Renew your license in a timely manner. Renew your malpractice insurance in a timely manner. If you fail at either, you can have huge problems. You could be practicing without a license for a period of time, or you could be without liability insurance just at the time that a claim arises. Timing is critical. Do not rely on others to notify you. They may make a mistake – or the mail could get lost. Be in control of your career!

Suicide – remember, the death of your patient does not generally mean that your duty of confidentiality ends. Additionally, the psychotherapist-patient privilege is usually applicable, despite the death of the patient. The suicide of a patient may result in contact with the therapist or counselor by family members, the coroner or medical examiner, or others. Be prepared!

Termination of treatment – termination by the therapist or counselor should usually be a process rather than something that is handled in one session or solely by sending a letter, or worse, by leaving a phone message. A bad termination may constitute abandonment of the patient. The issue of termination can be addressed in a helpful way in the practitioner's disclosure form that is given to the patient at the outset of treatment.

Uninsured or underinsured - Make sure you have high limits of coverage, especially if you live in a state like California or New York, as opposed to Idaho or South Dakota (kind of kidding!). Premiums are quite reasonable compared to other health professions, including psychology. DO NOT ALLOW YOUR POLICY TO LAPSE.

Violence threatened by patients – it is important to know what the rights and duties are of the therapist or counselor with respect to making warnings to the intended victim and/or the police. Many practitioners have misunderstood the famed *Tarasoff* decision of the California Supreme Court - which did not, contrary to popular belief, create a "duty to warn." Also, it is important to distinguish between what may be done to satisfy the applicable duty and what must be done in order to be "immune from liability." This area of the law can be tricky, and state law varies in fine

nuance.

When to say “no” - One of the best decisions a practitioner can make is to say “no” to a prospective patient that may be presenting with a problem outside the ken of the practitioner, or simply saying “no” to a prospective patient who makes the practitioner uncomfortable.

Xperimental – Okay, I cheated a bit. If you perform treatment that is innovative or experimental in nature, or for which there is little or no clinical evidence of the propriety of the treatment approach, be sure to obtain a signed informed consent from the patient – where you disclose, *among other things*, that the treatment is innovative or experimental in nature (or that there is little or no clinical evidence – or whatever the reality is), and the potential risks and benefits of treatment.

You – sometimes it’s all about *you* -- what is in *your* best interests, as opposed to the patient’s best interests – such as when you are sued by the patient or when a complaint is filed with the licensing board.

Zealousness – Be zealous about your ethics and about continuing to learn and to grow as a professional. And please, zealously read the AVOIDING LIABILITY BULLETIN!

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