Safe Practice: Liability Protection and Risk Management

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Course Objectives

This program outlines key legal and ical information pertaining to maintaining clinical records, privacy regulations and confidentiality, and is designed for early career through senior professionals.

My Educational Background

B.A. (Psychology) U.V.M. (’64)

Ph.D. (Clinical Psychology) Indiana U. (‘68)

Clinical Internship, Columbia U. Psychiatric Inst. (‘67-’68)

J.D. Loyola (Los Angeles) ‘97

My Professional Background

CA Licensed Psychologist since 1/70

CA Licensed MFT (inactive) since 1/69

CA (& D.C.) Attorney at law since 12/97

25 years of Hospital Consultantships

Private Practice of Clinical/Forensic Psychology & Law

Prelude:

Developments in the law

over the past few years

That your professional societies haven't told you about

California's Child Abuse/Neglect Reporting Act

AB 1775 Melendez: This bill made Downloading, streaming or accessing through electronic or digital media, material in which a child is engaged in an obscene or sexual act a mandated report under the Child Abuse and neglect Reporting ACT (CANRA) on 5/22/14

California's Child Abuse/Neglect Reporting Act

Don't forget to add this responsibility to any "informed consent" agreements that you use with patients.

California Becomes the 5th State to Have an End-of–Life Choice Statute

What do these statutes have in common and What can we learn from the four states that Already have enacted them?

New California Law Restricts Guns for Mentally Ill Individuals

(from the Sacramento Bee):

AB 1014 allows temporary restraining orders to prevent individuals who are suspected of having mental health issues or who are potentially violent from purchasing or possessing guns.

January 1, 2016

Gun Violence Restraining Order Law

1. Section 8105 of the Welfare and Institutions Code:

(c) A licensed psychotherapist shall report to a local law enforcement agency, within 24 hours, in a manner prescribed by the Department of Justice, the identity of a person subject to the prohibition specified by subdivision (b) of Section 8100.

What is Section 8100?

Welfare and Institutions Code Section 8100

(b) (1) A person shall not have in his or her possession or under his or her custody or control, or purchase or receive, or attempt to purchase or receive, any firearms whatsoever or any other deadly weapon for a period of five years if, on or after January 1, 2014, he or she communicates to a licensed psychotherapist, as defined in subdivisions (a) to (e), inclusive, of Section 1010 of the Evidence Code, a serious threat of physical violence against a reasonably identifiable victim or victims.

Welfare and Institutions Code Section 8100

Don’t forget to add this responsibility to any “Informed Consent” document you may use with patients.

California law provides immunity for liability to all psychotherapists.

Increased Risk for Custody Evaluators

AB 1843 (Jones/Gordon): Became law on 8/25/14

In prior years, licensing boards had to close complaints against custody evaluators when one of the parties refused to sign a release of information. Per AB 1843, such releases are not necessary for boards to obtain all records.

BBS Licentiates: Record Retention

Per SB578 (Wyland), records dated for all service recipients whose care is terminated as of 1/1/15. Retention is for 7 years for adults and 7 years after minors turn 18.

BUT: The best legal advice is to keep adult records for 10 years (California Adults), when California minors turn 28, and for non-Californians, keep them forever.

BBS Licentiates: Record Retention

Why?

Statutes of limitations on board actions apply solely to California licensing boards.

Where to Get Helpful Clinical Record Forms

trustinsurance.com

centerforethicalpractice.com

Where to Get Helpful Clinical Assessment and Evaluation Forms

https://www.psychiatry.org/psychiatrists/practice/dsm

Clinical Record-Keeping

Ethico-Legal Record-Keeping Responsibilities

We have to keep records:

Patient Needs

Professional Needs

Legal Needs

Clinical Record-Keeping

How long to keep records varies from state to state, but, most importantly, records should be maintained as long as there is a possibility of a law suit or a licensing board action. The only state I am aware of that has such a statute for licensing boards is California (10 years after the last session or when a minor turns 28)

Clinical Record-Keeping

I am aware of NO OTHER STATE that has a statute of limitations for a board action, which means that clinicians who practice in any other jurisdictions should keep copies of records for the lives of their licenses, as their records are their only ways of "telling their stories" in the event of a board action.

Clinical Record-Keeping

Patient Access to Records

State laws generally favor access for patients, but clinicians can deny access based on the belief that reviewing records may harm that patient. A considered approach involves sending the records to an independent mental health professional to review and decide whether to provide patient access.

Clinical Record-Keeping

Patient Access to Records:

Regarding records of the treatment of minors, the minors themselves may have access if they are considered competent to read and understand them, and, on a state-by-state basis, parents typically have access to records of their minor children, but CA statutes allow the clinician to with-hold records/information when a clinician "reasonably believes" that the minor would be at risk of abuse or that the therapeutic relationship with the minor would be compromised.

Clinical Record-Keeping

State-by-State differences in laws & regulations as to how soon, after a proper request, a clinician must provide a copy of records for a patient.

If a patient finds an error, that finding should be entered into the records.

Late entries should be documented as such.

Clinical Record-Keeping

Records should be made available to patients whenever a clinician retires from practice, moves to a more distant location, or when a clinician is no longer able to practice. State laws in 13 states provide for legal actions against clinicians (and their families) who have not made such preparations, and the remaining states are at risk for *HIPAA* actions

Clinical Record-Keeping

Clinicians should have a provision in their informed consent documents that provide for the clinician to charge patients when a case becomes legally complex, requiring the clinician to spend time preparing for hearings, depositions, etc. Without such a provision, the clinician faces having to miss time with other patients without remuneration.

Clinical Record-Keeping

Electronic vs. Paper Records

Advantages: record storage and accessibility

Disadvantages: possible hacking resulting

In loss of privacy

But, paper records kept in an office or transported by car can be risky

Clinical Record-Keeping

And, transferring handwritten records to electronic storage needs to be done by competent providers, who ensure that the newly-installed electronic records are actually properly stored in the electronic back-up system (with two separate back-up systems in place).

Clinical Record-Keeping

For a full (and free) discussion of all of these principles and issues, please see

https://kspope.com/site/records.php

Clinical Record-Keeping

Records and the legal system:

Subpoenas, Court Orders and "dirty lawyer tricks."

These issues vary across jurisdictions, but the best policy is that when clinicians are served with subpoenas, the clinicians should call their attorney or get a referral to an attorney through their state professional society or licensing board.

Records and the legal system: Subpoenas, Court Orders and "dirty lawyer tricks."

Subpoenas, Notices to Consumers, Court Orders and Sheriff's-Coroner's Subpoena

What they are;

What they mean;

How to handle them

Getting Called Into Court

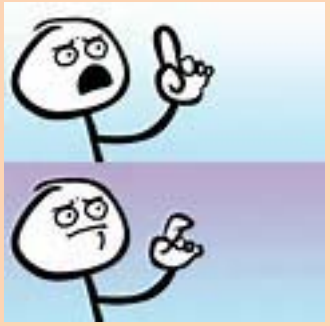
Three categories of witnesses:

“Fact” or “Percipient” witnesses

Expert witnesses

“Treating Expert” witnesses

Forms of Practice and How to Decide Which One You Will Use



Solo Practices

Group Practices

Partnerships

Corporations

Limited Liability Companies

Jurisdictional Issues you need to know

Fees for Professional Services

When starting a practice: be careful how you ask about how much colleagues charge for their services. "Price-Fixing" (Per the Federal Trade Commission): "an agreement among competitors that raises, lowers or stabilizes prices or competitive terms."

Fees for Professional Services

If you become a provider for a health care insurance company that covers mental health services, you will be bound by the contract you sign as to the fees you charge. Make sure that you follow the "rules"of the insurance company's contract with you, as such companies can, and do, notify licensing boards when a professional violates a contract.

Fees for Professional Services

When you work with insurance companies, they will send you a proof of payment whenever they send payment for your services to their insureds. That proof of payment goes in the patients' charts. If you are seeing more than one of their insureds, the proof of payment may be for more than one patient, so make sure that a copy goes in each chart of those patients.

Fees for Professional Services

For colleagues who see private patients without insurance involvement, you can set your fees to be greater than the insurance companies will pay. However, be careful about using "sliding scales" for fees, based on the patients' incomes, because if they meet each other in your waiting room and have a discussion of your fees, you could have a problem.

Fees for Professional Services

Fee increases may reflect your growing expertise, the employment of office staff, equipment, supplies, and other costs.

Fees for Professional Services

How to handle failures to receive payment by non-insured patients:

Your informed consent form should make clear that, if you have not been paid by a certain number of "sessions," care will automatically terminate.

Fees for Professional Services

If you follow what was written in the prior slide, you'll see that a function of taking the suggested position is that you avoid the ethical breach of letting a large balance be created.

Fees for Professional Services

Collection Agencies? Small Claims Court?

Preserving Patients' Confidentiality is critically important.

Fees for Professional Services

The Perils of Being "Nice" in the world of finances.

Modifying fees of insureds without contacting the insurance company.

Coping with Reputational Problems

What's "Defamation"? And how to cope with it.

Spoken, Written and Internet Defamation

Do's and Don'ts

Involuntary Commitment

Examples of Two Types of Statutes that deal with Involuntary Commitment

“Tarasoff” and Welfare/Institutions Code 5150

How to decide which to follow

Involuntary Commitment

Whatever Happened to the "Duty to Warn" in California?

It "disappeared" from the law in 2013

Here's why…

Applications of "New" Forms of Treatment

1. Utilizing the internet:

State-by-State Regulations and how to cope with them

Risks and Dangers of internet practice

www.telehealth.net

2. Utilizing newly-developing techniques

Importance of Informed consent, training and supervision/consultation

Child Abuse: what you need to know as a treating clinician

You need to be more than familiar with child abuse reporting statutes! In California, e.g., there were over 90,000 cases of sustained reports of child abuse events in 2016!

Go to www.mandatedreporterca.gov for both general training and training for mental health professionals

We’re Outta Here!

Thanks for attending (and, especially, for paying attention).