

Protecting Your Counselor License

Edith Brous, MS/MPH, JD, RN



“...[A] licensee may not enjoy the benefits of licensure, yet avoid the burdens that accompany that privilege.”

(Ex Parte Alabama Board of Examiners in Counseling, 2000, p. 358)

INTRODUCTION

Counseling takes many forms and counselors can be licensed in numerous areas including marriage/couples/family counseling, drug and alcohol counseling, pastoral counseling, mental health or psychological counseling, career/vocational counseling, clinical counseling, forensic counseling, school or education counseling, and rehabilitation counseling, among others. The need to safeguard one's livelihood and to understand professional licensure principles is critical for all fields of counseling. The holder of the license has the legal and ethical responsibility to abide by the rules and standards of conduct and can be disciplined for failure to do so. It is important to understand the regulations for the state(s) in which you practice to reduce exposure to licensure sanctions.

LICENSING BOARD AUTHORITY

The act of applying for and obtaining a professional license subjects a counselor to the authority of the licensing board. That authority includes the imposition of penalties and discipline for infractions of practice acts, rules, regulations, ethics, or standards of practice. Challenging a Board decision can be a lengthy legal process in the courts. A 2000 Alabama case demonstrates this authority and the process of appeal.

Theron Michael Covin was a licensed professional counselor working in a private, non-profit corporation. After receiving several complaints about him, the Alabama Board of Examiners in Counseling brought disciplinary charges against him and conducted a hearing. The hearing officer found him guilty of some of the charges, recommending that his license to practice be suspended for six months. The Board adopted the hearing examiner's findings and conclusions, but ordered that his license be suspended for a full year.

Colvin appealed the Board decision to the Montgomery Circuit Court (the trial court). In his appeal, he argued that because he worked for a private, non-profit corporation, he was exempted from Board discipline. The Board asked the Court to either dismiss the complaint, or to rule in its favor. The Court granted the Board's request and ruled that Colvin had to exhaust all administrative remedies before the Court could hear his case and he had not done so.

Colvin appealed the Court's decision to the Court of Civil Appeals which reversed the trial court. It found that the trial court could have heard his case and remanded (sent it back) to the trial court to do so. On remand, the trial court found and so-ordered that because Colvin was employed by private, non-profit corporation, he was excluded from the Board's powers. The Board asked the Court to reconsider and it did so, holding a hearing, then reversing itself, granting the Board's request to find in its favor.

Colvin returned to the Court of Civil Appeals. On appeal, the Court reversed the trial court again, finding that Colvin was exempted from the Board's authority because he worked at a private, non-profit organization. It remanded again, instructing the trial court to reinstate its earlier order in favor of Colvin. The Board then escalated its appeal to the Supreme Court of Alabama, arguing that it was "authorized to discipline Covin by suspending his license because he had voluntarily sought and obtained a license from the Board and had thereby subjected himself to the Board's authority and its code of ethics" (*Ex Parte Alabama Board of Examiners in Counseling*, 2000, p. 357). The Supreme Court agreed with the Board. In holding that the Board did have authority to discipline Colvin's license because he had sought and obtained licensure, the Court stated, "a licensee may not enjoy the benefits of licensure, yet avoid the burdens that accompany that privilege" (*Ex Parte Alabama Board of Examiners in Counseling*, 2000, p. 358).

License holders are held responsible for knowing what their duties are and for meeting deadlines to practice lawfully. An example of this is found in a Texas case. Chris Riley was a professional counselor whose license to practice required annual renewal. She did not renew her license before it expired on December 31, 2002, nor did she renew her license in 2003, 2004 or 2005. When she attempted to renew her license in 2006, the Texas State Board of Examiners of Professional Counselors denied her application on the basis that Texas law required licenses to be renewed within one year.

Riley appealed this decision at a hearing, arguing that the Board had not sent a renewal notice to her. Texas law required the Board to send written notice no

later than 30 days before expiration of the license. She contended that because the Board had not done so, it could not enforce her license expiration. The hearing's Administrative Law Judge (ALJ) concluded that her license should be renewed because the Board had not complied with the notice requirements. The Board rejected the ALJ's interpretation of the law and concluded that, "[i]ts failure to prove it sent notice to Riley prior to her license's expiration 'does not relieve her from the responsibility to renew her license and is not a defense to her failure to renew'" (*Riley v. Texas State Board of Examiners of Professional Counselors*, 2010, p.137).

Riley asked for another hearing, which the Board denied. She then filed suit in court to challenge the Board decision. The district court ruled in favor of the Board, affirming its decision to deny her license renewal. Riley escalated the appeal to the Texas Court of Appeals and the decision was entered in 2010. The Court cited the law which stated that the *licensee* is responsible for timely renewing her license. The Court did not interpret the Board's requirement to send renewal notices as a prerequisite to the licensee's obligation and concluded that the notice served as a reminder, not as a trigger for deadlines. The failure of the Board to send a notice did not relieve Riley from the responsibility to timely renew because license holders were responsible to comply with renewal procedures:

We conclude that the Board's failure to provide notice of impending license expiration as required by occupations code section 503.353 did not excuse, toll, or otherwise affect Riley's independent responsibility to comply with occupations code section 503.354 in order to renew her license to practice professional counseling. Therefore, we hold that the Board properly denied Riley's application for renewal of her license. The judgment of the district court is affirmed (*Riley v. Texas State Board of Examiners of Professional Counselors*, 2010, p.140).

Counselors should review practice acts in their state at least annually to stay current with regulatory requirements. Understanding the board's definition of professional misconduct and reviewing published disciplinary actions can prevent violations. Many state boards also publish practice alerts, advisory opinions, or other communications to provide updated information with which licensees should be familiar. Reviewing counselor claims studies, such as the counselor claims studies published by CNA, can provide a great deal of information regarding safe practices and exposure reduction (CNA, 2014).

INVESTIGATION PROCESS

Complaints to the licensing boards can come from employers, clients, other counselors, the criminal justice system, other administrative agencies, or many other sources. The mission of the licensing board is to protect the public. Any complaint will be analyzed to determine if the board has jurisdiction over the complaint. If the board does not have jurisdiction over the complaint, it will notify the person making the complaint (the *complainant*) that the board does not address the type of complaint that was made. The board might refer the complainant to another agency that does address the complaint. For example, a complaint might involve a labor-management dispute. In such a case, the board can tell the complainant that it does not handle workplace conflicts and make a referral to the administrative agency that does handle such complaints.

Typically, the licensing board only investigates and prosecutes allegations of professional misconduct. The definition of professional misconduct varies by state and includes many concerns beyond clinical practice. If the complaint does involve allegations such that, were they true, would constitute a violation of the practice act, the board will open an investigation. The process also varies considerably from state to state. Some states have the counselor meet with an investigator to answer questions in an interview. Other states require the counselor to respond in writing to questions (sometimes called *interrogatories*). Yet other states presume the allegations to be true unless the licensee files legal documents or appears at a hearing to dispute them.

Counselors should engage an attorney as soon as possible after being notified that an investigation has been instituted. The process of explaining what happened and responding to the complaint varies by state, but licensees must be given notice that charges are pending and have the opportunity to be heard. The process of negotiating charges and penalties also varies by state, as do the collateral problems that can occur as a consequence of having been disciplined. The decision as to whether to accept a settlement or attend a hearing requires an analysis that should be provided by an attorney experienced in licensure defense in your state.

Generally, complaints and accompanying evidence are confidential. Once disciplinary action has been formally taken, however, such discipline is considered public information and can be published in newsletters, on web sites, on social media platforms, or in some other manner.

Disciplinary actions can range from minor, such as a reprimand or censure but without any separation from practice, to revocation, or permanent removal of one's ability to practice as a counselor.

COMMON CAUSES OF LICENSURE DISCIPLINE

Sexual misconduct

Inappropriate sexual or romantic relationships are a frequent source of claims against counselors (CNA, 2014). A provider/client relationship is not a "level playing field" because clients are considered to be vulnerable and counselors are in a position of trust and authority. Counselors have a special relationship with their clients that mandates that their actions be solely for the benefit of their clients. Within the context of that special relationship, the counselor must be careful to maintain and protect professional boundaries.



To avoid boundary problems with clients, counselors must understand transference and counter-transference and know how to resolve them therapeutically. Mishandling transference and becoming sexually involved with clients is considered malpractice which can subject the counselor to lawsuits, licensure discipline, and even criminal charges. The management of transference in counselor/client relationship is explored in a 1986 case.

Ted Kammer was a social worker with the Indian Health Service. Jerrie Simmons was a member of the Chehalis Tribe with a history of physical, sexual and emotional abuse as a child. During a counseling session Kammer conducted with her, Simmons expressed feelings of attraction to him. He encouraged her to act on those feelings and initiated a sexual relationship with her, which continued during the course of his treatment of her. The Tribal Chairwoman notified Kammer's supervisor, Victor Sansalone, of her concerns about their relationship, but Mr. Sansalone took no action to correct Mr. Kammer's conduct, or to replace him. Ms. Simmons's emotional problems worsened and led to a suicide attempt. When she learned, during a subsequent consultation with a psychiatrist, that her psychological problems were due to Kammer's inappropriate management of transference, she filed a claim in the district court. The complaint alleged gross negligence for Kammer and supervisory negligence for Sansalone.

An expert at trial testified that the proper therapeutic response to transference is utilizing countertransference in a manner in which emotional involvement is avoided. The district court noted that the therapist/client relationship differs from other special relationships in terms of sexual involvement:

The crucial factor in the therapist-client relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitative of a client than sexual involvement of a lawyer with a client, a priest or minister with a parishioner, or a gynecologist with a client is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon (*Simmons v. United States of America*, 1986, p. 1366).

The district court found that Ms. Simmons did suffer psychological harm as a result of Kammer's conduct. It ruled in her favor, also finding that some of that harm could have been avoided if Sansalone had intervened:

The impacts [sic] of sexual involvement with one's counselor are more severe than the impacts [sic] of merely "having an affair" for two major reasons: first, because the client's attraction is based on transference, the sexual contact is ordinarily akin to engaging in sexual activity with a parent, and carries with it the feelings of shame, guilt and anxiety experienced by incest victims. Second, the client is usually suffering from all or some of the psychological problems that brought him or her

into therapy to begin with. As a result, the client is especially vulnerable to the added stress created by the feelings of shame, guilt and anxiety produced by the incestuous nature of the relationship, and by the sense of betrayal that is felt when the client eventually learns that she is not “special” as she had been led to believe, and that her trust has been violated (*Simmons v. United States of America*, 1986, p. 1367).

The government appealed the damage award in the U.S. Court of Appeals, Ninth Circuit. The Court noted that sexual relationships between therapists and clients are intertwined with the therapeutic relationship between them. Clients cannot have the same emotional response to sexual contact with their therapists that they would have to sexual contact with others because of transference. It noted that therapists who introduce sexual activity into the relationship can cause additional psychological damage to their clients. Also finding that supervisors who are aware of the negligent actions of subordinates can also be held liable, it upheld the award (*Simmons v. United States of America*, 1986).

What a counselor might consider to be “consensual” sexual relations between the counselor and a client are still considered exploitive or predatory and violate ethical codes of conduct. Some states specifically forbid such sexual relationships in their practice acts and violations of the law can result in serious penalties. As an example, the Iowa code states, “[T]he license of a marital and family therapist or a mental health counselor *shall be revoked* if the board finds that the licensee engaged in sexual activity with a client as determined by board rule. The revocation shall be in addition to any other penalties provided by law” [Emphasis added] (Iowa Code, 2007). The other penalties referred to can be criminal in nature. Iowa criminal statutes also make some forms of sexual contact between a mental health counselor and a client a felony (Iowa Code, 2004).

State of Iowa vs. Patrick Edouard is a case that illustrates the seriousness with which courts take such charges. In this case, Patrick Edouard was a pastor who had sexual relations with four women in his congregation. He was criminally charged with three counts of sexual abuse in the third degree, four counts of sexual exploitation by a counselor or therapist, and one count of engaging in a pattern or practice of sexual exploitation by a counselor or therapist. He admitted to the sexual encounters, but claimed they had been consensual and denied that he had provided mental health care for the women.

The jury did not find him guilty of the sexual abuse charges, but it did find him guilty all of the sexual exploitation charges and he was sentenced five years’ imprisonment. Edouard appealed and the appeals court reversed the conviction, sending the case back to the lower court for a new trial. The basis of the reversal was Edouard’s argument that jury instructions about sexual exploitation had been improper because the jury had not been given the statutory definition of “counseling” and was not told that “counseling” was limited to “modern psychological principles and methods.” He argued that under that definition he had not provided “mental health services.”

The State appealed that reversal decision and the case was accepted for review by the Supreme Court of Iowa. The Supreme Court disagreed that counseling was limited to modern psychological principles and methods and found that there was substantial evidence that Edouard had counseled the four women.

The Court also noted that the relationship between a counselor and a client is imbalanced. The counselor has power and authority over the client so sexual relations are not fully consensual. The Court examined case law holding that the statute forbidding sexual relations between counselors and clients served the interest of protecting vulnerable people from being exploited and of maintaining the integrity of the mental health profession. It also noted a holding from case law that the relationship between a therapist and a former client was the kind of relationship where consent could not be easily refused. In rejecting Edouard’s argument, the Supreme Court affirmed his conviction and sentence (*State of Iowa v. Edouard*, 2014).

Boundary violations and crossings

Boundary violations and boundary crossings can occur in many ways. Zur defines boundary violations and boundary crossings in the following manner:

Boundary crossings and boundary violations refer to any deviation from traditional, strict, ‘only in the office,’ emotionally distant forms of therapy or any deviation from rigid risk-management protocols. *Boundary violations* occur when therapists cross the line of decency and violate or exploit their clients. *Boundary crossing* often involved clinically effective interventions, such as self-disclosure, home visit, non-sexual touch, gifts or bartering (Zur, 2015).

All boundary violations are not sexual in nature and counselors can also violate professional boundaries by engaging in inappropriate communications with clients.

Those inappropriate boundaries can result in serious licensure discipline, as exemplified by an Indiana case. In 2005, Elaine Williams was an Indiana-licensed mental health counselor practicing at Crestview Center in Anderson, Indiana where she was treating a client for dissociative identity disorder, post-traumatic stress disorder, and major depression. Over a period of several years, Williams changed employment a few times, but continued to act as the client's therapist until the client terminated the relationship in 2010. During that time, she visited the client's home several times a week, and at one point entered the client's home through an unlocked door.

The client was admitted to a hospital in 2009, at which time the treatment team identified concerns to Williams's supervisor about the "extensive involvement and knowledge" she had in the client's treatment (*Behavioral Health & Human Servs. Licensing Board v. Williams*, 2014, p. 455). The supervisor spoke with Williams about blurred boundaries and the belief that she was acting as a friend, rather than as a therapist for the client. She recommended that the client's care be transferred to another therapist. After being prohibited from continuing to treat the client, Williams resigned her employment, but continued to see the client. Her supervisor filed a complaint with the Behavioral Health and Human Services Licensing Board regarding her relationship with the client.

The client told Williams in 2010 that she wanted time away from her, but Williams did not honor her requests to be left alone. Instead, she continued to attempt contact with the client in person and by sending letters, calling her, and emailing her. The client contacted the police on two occasions and also moved, changed her telephone number, and changed her email address to avoid the unwanted contact.

The Board determined that Williams had violated mental health counseling laws and revoked her license to practice. Williams filed an appeal of the revocation decision in court and the trial court found fault with the manner in which the Board proceedings had been conducted. It reversed the Board and sent the case back for either a lower penalty, or to hold a new hearing. The Board appealed this ruling and the Court of Appeals of Indiana considered the matter. The Court of Appeals noted that the Board was permitted to impose any penalty authorized by law, and that included license revocation. It held that even though there had never been previous discipline on Williams' license, progressive discipline was not required, and the Board could revoke a license for continuing to practice though unfit due to "failure to keep abreast

of professional theory or practice" as required by law (*Behavioral Health & Human Services Licensing Board v. Williams*, 2014, p. 456).

The Court of Appeals affirmed the Board's decision to revoke her license, noting:

The evidence shows that Williams involved herself in Client A's personal life and continued to contact her despite Client A's requests to be left alone. In her emails to Client A, she expressed her love for Client A and the pain caused by Client A's rejection of her. Williams's unwanted attempts to contact Client A caused Client A to call the police twice regarding Williams's behavior, move away from her home, change her phone number, and change her email account. The situation with Williams was traumatic for Client A and caused her to feel fear. In light of this evidence, the trial court improperly substituted its judgment for that of the Board when it determined that revocation was too severe a sanction (*Behavioral Health & Human Services Licensing Board v. Williams*, 2014, p. 462).

Scope of practice violations

A counselor's scope of practice differs from state to state. What is lawful in one jurisdiction might not be lawful in another. It is critical for a counselor licensed in more than one state to understand what the practice act says in the state in which he or she is currently practicing and to confine practice to that state's laws. Counselors must know what the practice act in their state does and does not permit them to do and only engage in activities that are within their lawful scope of practice. A Maine case provides an example of problems when a counselor exceeds that scope of practice.

During the course of counseling two children, Licensed Professional Counselor (LPC) A. Michelle Cobb diagnosed them with Oppositional Defiant Disorder and Adjustment Disorder with Disturbance of Conduct. She then submitted insurance forms for reimbursement based upon those diagnoses. The parents of the children filed a complaint with the Board of Professionals Licensure and the Board charged her with operating beyond the scope of her license. The state law did not permit LPCs to diagnose or treat mental health disorders and after a hearing, the Board found that she had violated the law when she diagnosed and treated the children. The Board imposed a censure, fined her, charged her for costs, and required her to receive 30 hours of supervised practice. Cobb appealed this decision to the Superior Court.

The Superior Court agreed with the Board that the law did not permit LPCs to diagnose and treat mental health disorders, but sent the case back to the Board to consider the definition of “mental health disorders” and to determine if she had diagnosed such “mental health disorders.” When the Board reconsidered the matter, it found that she had diagnosed “mental health disorders” by using conditions that were deemed to be “mental health disorders” in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Additionally, she had used the DSM codes in completing the insurance forms and had used those terms in her treatment notes. The Board then reinstated its original penalties, but increased the amount of the costs she was charged.

Cobb appealed again. One of her arguments on appeal was that the law was vague. The Court noted that the statute stated, “[c]linical status grants the ability to diagnose and treat mental health disorders.” The law granted clinical status to three of the four categories of licensed counselors (licensed clinical professional counselor, licensed pastoral counselor, and licensed marriage and family therapist) but not to LPCs, “[t]he statute plainly and unambiguously denies clinical status to LPCs, and because it only authorizes licensees with clinical status to diagnose and treat mental health disorders, LPCs do not have the authority to do so” (*Cobb v. Board of Counseling Professionals Licensure*, 2006, p. 276).

LPCs were permitted to render services to “assist” their clients “in achieving more effective personal, emotional, social, educational and vocational development and adjustment” but not to “assess and treat intrapersonal and interpersonal problems and other dysfunctional behavior” (*Cobb v. Board of Counseling Professionals Licensure*, 2006, p. 276-277). The Court found that the statute was not vague, but that it specifically granted the authority to diagnose and treat only to those counselors holding clinical status which did not include LPCs. In finding that Cobb exceeded her scope of practice, it affirmed the judgment of the Board.

Impaired practice

Counselors who have substance use disorders or certain medical or mental health conditions can be exposed to charges of practicing while impaired. It is an ethical violation to engage in a provider/client interaction when unable to practice safely. If personal problems prevent a counselor from adequately performing his or her professional responsibilities, the counselor should obtain professional help and refrain from practice while impaired.

The code of ethics and practice act might also require counselors to report colleagues with impairment. An example of this is the code of conduct for the National Association of Social Workers (NASW):

2.09: Impairment of Colleagues

(a) Social workers who have direct knowledge of a social work colleague’s impairment that is due to personal problems, psychosocial distress, substance abuse, or mental health difficulties and that interferes with practice effectiveness should consult with that colleague when feasible and assist the colleague in taking remedial action.

(b) Social workers who believe that a social work colleague’s impairment interferes with practice effectiveness and that the colleague has not taken adequate steps to address the impairment should take action through appropriate channels established by employers, agencies, NASW, licensing and regulatory bodies, and other professional organizations (NASW, 2008).

The licensing board will separate a counselor from practice if it has reason to believe the counselor cannot safely practice and poses a risk to clients. The separation can be disciplinary in nature, such as suspension or revocation. It can also be non-disciplinary in states with impaired provider programs in place. Professional assistance programs permit the licensee to be treated and monitored as an alternative to discipline. Participation in such programs may not be an option if a client has already been harmed.

Professional misconduct

Because licensing boards are tasked with protecting the public, they have the responsibility and the authority to investigate allegations of misconduct related not only to clinical practice, but to many activities that are non-clinical as well. Practice acts differ in their specificity but are the starting out point for determining what the Board considers to be unprofessional conduct or professional misconduct for which a licensee can be disciplined. Because licensure discipline is public information, reviewing the published actions taken against counselors can also provide warnings about the types of charges and penalties imposed for violations of the practice act. Deviations from standards of care can involve actions that are not directly within counselor/client interactions, as exemplified by the following case.

In *Rhodes v. Ohio Counselor*, Merle Rhodes was a Licensed Professional Clinical Counselor employed as a Youth Specialist in a residential treatment facility for youth offenders. He brought pornographic materials to the facility and did not secure them in a manner that would prevent the juvenile residents from gaining access to them. He was terminated and his employer reported the termination to the Ohio Counselor, Social Worker and Marriage and Family Therapist Board.

At a hearing, an expert witness testified that, “[w]hat a counselor does at home is his or her business, but that it is below the standard of care to bring a pornographic DVD to work and to keep it in an unsecured location such that a juvenile resident could gain access to it” (*Rhodes v. Ohio Counselor, Social Worker and Marriage and Family Therapist Board*, 2009, p. 5). The hearing examiner recommended that his license be suspended for six months and that the suspension be followed by a period of supervised practice. Accepting the hearing examiner’s findings and conclusions, the Board ordered that Mr. Rhodes’ license be suspended for a year, followed by face-to-face supervision for one hour a week for two years. Mr. Rhodes appealed the order and the trial court upheld the Board. He then appealed to Ohio Court of Appeals which also upheld the Board.

Professional misconduct charges can be brought for other non-clinical issues such as non-payment of child support, failure to file tax returns, criminal convictions or failure to notify the board of such convictions, employment termination, addiction or mental health problems that impair practice, licensure discipline in other jurisdictions or failure to notify the board of such discipline, failure to advise the board of name or address changes, dishonesty in applications for licensure or renewal, or many other things that are not directly related to clinical practice.

Moral character

State practice acts require licensed professionals to be morally fit for practice. Criminal convictions, even those not directly related to practice, can bring one’s moral character into question.

This can be illustrated in *Schmitt v. Counselor and Social Worker Board*. Thomas Schmitt applied for licensure as a professional counselor. He responded to an application question asking if he had ever been convicted of a felony or first degree misdemeanor by stating that he had been convicted of menacing by stalking. He sought to have the conviction expunged and the Municipal Court did order the record to be expunged, but it also ordered Schmitt to receive mental health counseling, which he did not attend.

Upon receiving his application for licensure, the State of Ohio Counselor and Social Worker Board requested a probation officer report and that Mr. Schmitt complete a comprehensive mental health assessment. When Schmitt never provided the board with these materials, his application was denied because the Board could not find him to be of good moral character.



Schmitt appealed the Board’s decision and the trial court upheld the Board. He then appealed to the Court of Appeals. In his appeal, he argued that the conviction could not be used to deny his application because the conviction had been sealed. The law stated that an applicant could not be questioned about a sealed conviction unless the questioning bore a direct and substantial relationship to the position for which the person was being considered. He argued that his conviction for stalking did not bear such a direct and substantial relationship to a position as a professional counselor.

The Court of Appeals noted that eligibility for licensure as a professional counselor required that the applicant be of good moral character. It also noted that the law permitted the Board to question applicants about expunged convictions in order to protect the

public. It found that it was Mr. Schmitt's burden to demonstrate that he met the moral character requirements. His failure to obtain counseling as ordered by the Municipal Court, or to provide the Board with the probation officer report and mental health assessment, were sufficient grounds to deny him a license.

Conflicts of interest

Counselors should avoid situations where they can be accused of ethical violations from dual or multiple relationships. Dual or multiple relationships are those in which a counselor has a relationship with a client outside of the therapeutic alliance (Burgard, 2012). Relationships in which a counselor works with more than one member of a family either at the same time or consecutively, can create therapeutic neutrality and confidentiality issues. Conflicts can arise when treating couples, families, or groups. Counselors should clearly identify who the client is, the nature of the treatment, and the limits of confidentiality at the beginning of the counselor/client relationship. It is important to know what the licensing board's position is on such relationships and if they are prohibited in the state in which the counselor practices.

Counselors should clearly identify to the clients that they are bound by ethical and legal responsibilities to avoid conflicts which can be created in such relationships. In some cases, termination might be necessary when conflicts do arise. Counselors seeing a client in collateral visits should understand the potential confidentiality issues and clearly document discussions about privacy, confidentiality, and privilege in the treatment records. While these terms are frequently used interchangeably, there are legal distinctions between them:

- *Privacy* refers to freedom from intrusion into personal matters and personal information;
- *Confidentiality* refers to personal information shared with the counselor that cannot be revealed to a third party in the absence of client consent; and
- *Privilege* refers to the protection from exposure in legal proceedings. Privileged communications are those that occur within the context of a confidential relationship.

Conflicts of interest can also be created in many other ways, such as:

- When counselors promote their own products or services outside the counselor/client treatment setting;

- When counselors exchange gifts with clients;
- When counselors refer clients to colleagues if there is any payment made for such referrals (Counselors should know if such referral payments are lawful in their state.); or
- When self-disclosure compromises the therapeutic relationship or is engaged in for the benefit of the counselor.

Deficient documentation/improper record keeping

The records a counselor keeps can be the best defense against charges of professional misconduct. Having documentation of a discussion regarding the client's goals, the nature of the relationship, consultation referrals, termination, the extent and limits to confidentiality, and the management of potential conflicts of interest can support an effective response to a licensing board investigation.

Billing records must match treatment and accurately reflect the care provided. Counselors must submit claims in a manner that does not expose them to allegations of fraud. Billing for services not provided, misrepresenting the nature of services provided, falsifying conditions or diagnoses or inaccurate treatment dates can lead to licensure discipline, exclusion from participation in insurance plans, or even criminal charges.

Privacy/confidentiality

Because confidentiality is the cornerstone of the therapist/client relationship, counselors have a legal and ethical responsibility to safeguard client information. Violations of client privacy compromise the therapeutic relationship and expose the counselor to legal liability. It is important to understand and remain compliant with disclosure rules under the Health Insurance Portability and Accountability Act (HIPAA), state privacy laws, and employer policies when engaging in communications with health insurance carriers, peer group communications, supervision, communication with other health care providers, group therapy, or other situations where client information is being shared. Counselors must make reasonable efforts to not release more information than is necessary and to obtain written authorizations from clients when required. Clients should be provided with a notice of the practice's privacy policies at the initiation of the therapist/counselor relationship.

Counselors must also understand the exceptions when private information can or must be disclosed. This varies by state law but some examples include the requirement to report suspicions of child, elder or dependent adult abuse, clients at risk of imminent harm

to self or others, lawsuits for payment for services, compliance with court orders or search warrants, and medical examiner investigations of death. Clients who file lawsuits or make complaints about counselors to the licensing board should understand that their records and information about their treatment will be revealed in the investigation.

Privilege is a legal concept that permits counselors to withhold information in legal proceedings. It might be necessary to obtain a legal opinion about what can and cannot be shared, and with whom, when the identified client is a minor. It is important to understand who holds the privilege, who can assert it, and who can waive it.

LICENSURE PROTECTION STRATEGIES

There are many steps counselors can take to reduce the likelihood of a licensure investigation and to assist in their defense if it does occur:

Professional liability insurance

Insurance does not just provide coverage for malpractice lawsuits. More importantly, it provides coverage for licensure defense. Counselors should seek legal advice as soon as they are aware that they are being investigated so they can be represented by an attorney at all stages. The legal fees for representation in disciplinary defense can be considerable if a hearing becomes necessary. Uninsured providers might need to accept a settlement and all of its associated collateral damage if they cannot financially proceed to a vigorous defense before the board. When selecting a carrier, counselors should consider the type of disciplinary defense the policy provides.

Maintain competency

Continuing competency is essential to safe practice. Standards change and information one learns in a preparation for practice program becomes outdated. A counselor's practice must be revised as theories and practice standards evolve. Supervision, continuing education, membership in professional organizations, subscriptions to professional publications, following current research on social media, copies of employer evaluations, and attendance at professional conferences can keep a counselor current and demonstrate a commitment to performance improvement.

Social media

Improper use of social media can be professional misconduct. Never speak about clients on those platforms, even when removing client identifiers. Photos of counselors breaking the law, or behaving unethically can be compromising in disciplinary defense. Facebook, Twitter, LinkedIn, or other platforms are sources of information from professional societies, regulatory

agencies, client safety organizations and professional research associations. Friending or following these groups can keep professionals updated with current issues in their field. Sharing posts from these groups can demonstrate a counselor's connection to current information and evolving professional standards.

Portfolio

It is helpful in disciplinary defense to be able to demonstrate a history of good practice and commitment to standards of care. Licensed professionals should keep a file that contains documentation of a good track record. The file should include licenses and registrations, insurance policies, school transcripts, copies of performance appraisals, letters of recommendation or references, thank you letters from clients, publications or speaking engagements, awards, membership in professional organizations, subscription to professional journals, public interest or volunteer experience, continuing education certificates of completion, or any other documents that speak to professional accomplishments. It is considerably easier to simply go to the file where those documents are stored than to attempt to collect them at the time of an investigation.

The documents should be photocopied and scanned to a flash drive so they can be restored if they are lost. When meeting with an attorney, take the copies of the documents and leave the originals in their safe place.

CONCLUSION

Most counselors will complete their careers without any licensure problems. Maintaining competency as standards change is critical to further reducing such exposure. Understanding the practice act and regulatory requirements can prevent problems from unknowingly violating professional standards of conduct. Counselors can and should seek advisory opinions when faced with potential ethical or scope of practice conflicts. Being represented by legal counsel at all stages can improve the outcome in disciplinary defense and maintaining professional liability insurance can give a counselor peace of mind from knowing that attorney fees will be manageable if an investigation does occur.

References

Behavioral Health & Human Services Licensing Board. v. Williams, 5 N.E.3d 452 (Court of Appeals of Indiana, 2014).

Burgard, E.L. (2013). Ethical concerns about dual relationships in small and rural communities: A review. *Journal of European Psychology*, 4, 69-77. Retrieved from <http://jep.psychology.org/articles/abstract/10.5334/jeps.az/>

Cobb v. Board of Counseling Professionals Licensure, 896 A.2d 271 (Maine Supreme Judicial Court, 2006).

CNA (2014). Understanding counselor liability risk. Retrieved from http://www.hpso.com/Documents/pdfs/CNA_CLS_COUNS_022814p_CF_PROD_ASIZE_online_SEC.pdf

Ex Parte Alabama Board of Examiner's in Counseling, 796 So.2d 355 (Supreme Court of Alabama, 2000).

Iowa Code (2007). Chapter 154D Behavioral Science, §154d.5 Sexual conduct with client. Retrieved from <https://coolice.legis.iowa.gov/Cool-ICE/default.asp?category=billinfo&service=IowaCode&ga=83&input=154D>

Iowa Code (2004). Chapter 709 Sexual Abuse §709.15 Sexual exploitation by a counselor, therapist, or school employee. Retrieved from <https://coolice.legis.iowa.gov/Cool-ICE/default.asp?category=billinfo&service=IowaCode&input=709>

National Association of Social Workers (2008). Code of ethics of the National Association of Social Workers. Retrieved from <https://www.socialworkers.org/pubs/code/code.asp>

Reamer, F.G. (2016). Eye on ethics: The complexities of client privacy, confidentiality, and privileged communication. *Social Work Today*. Retrieved from http://www.socialworktoday.com/news/eoe_0216.shtml

Rhodes v. Ohio Counselor, Social Worker and Marriage and Family Therapist Board, 2009 Ohio 5666 (Court of Appeals, Fifth Appellant District, Ohio, 2009).

Riley v. Texas State Board of Examiners of Professional Counselors, 315 S.W.3d 135 (Court of Appeals of Texas, 2010).

Schmitt v. Counselor and Social Worker Board, 2003 Ohio 3496 (Court of Appeals, Eleventh Appellate District, Ohio, 2003).

Simmons v. United States of America, 805 F.2d 1363 (United States Court of Appeals, Ninth Circuit, 1986).

State of Iowa, v. Patrick Edouard, No. 854 N.W.2d 421 (Court of Appeals of Iowa, 2014).

Zur, O. (2015). Dual relationships, multiple relationships, boundaries, boundary crossings & boundary violations in psychotherapy, counseling & mental health. Retrieved from <http://www.zurinstitute.com/dualrelationships.html>

Author Information:

Edith Brous is a nurse and attorney in New York City.

The author and planners have disclosed no potential conflicts of interest, financial or otherwise.

Editorial Staff

Editor: Kathleen Felix, AA

Managing Editor: Karen DuBois, MSN, RN

Consultant: Gregory White, MS, LMHC, CCHP

Creative and Educational Designer: Hector Ortiz, BFA

CE Consultant: Emily Contrada, MA, MLS, RN, CPHQ