Legal Self Defense for Mental Health Practitioners

Quality Care and Risk Management Strategies

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Legal Self-Defense for Mental Health Practitioners
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To the mental health practitioners with whom, as their attorney or consulting psychologist, I have shared the mission of quality care and risk management, and especially those who have suffered from nefariously motivated ethical and legal complaints and legal challenges.
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For more than three decades, I have been an attorney providing legal counsel to mental health practitioners; that is, psychologists, mental health counselors, clinical social workers, marriage and family therapists, psychiatrists, and other ancillary professionals, such as psychiatric nurses, sex therapists, and various types of educators. Consequently, I have helped them improve practice strategies for achieving quality care, confronting ethics and licensing complaints, and defending against possible or actual legal challenges. I have found that mental health practitioners have unique characteristics and face problems that are not common to other types of health care professionals. Prior to becoming an attorney, I had been a psychologist and health care professional, which adds to my perspective. Throughout my career, I have been a professor, which led to my conducting seminars and teaching undergraduate and graduate courses on ethics and law.

In this book, I share my knowledge and experiences about maintaining quality care and protecting the personal and legal rights of service recipients (also known as service users, clients, consumers, and patients—these terms will be used interchangeably in this book) and mental health practitioners. I will uncover the legal risks of being a mental health practitioner in this day and age.

Given “political correctness,” this book is different from many other books about the legal aspects of mental health services, because it does not hold the rights of the recipient of mental health services to be singularly supreme.
Rather, it recognizes that the professional relationship involving a mental health practitioner and a client or patient should honor the rights of BOTH parties.

The central thesis is that modern mental health practitioners must be cognizant of negative responses from a client or patient. Such responses from a service user may include: failure to abide by policies (including for payments) agreed on at the outset of professional services, not adhering to an individualized treatment plan that embraces essential professional requirements for quality care and risk management, demonstrating inappropriate aggression (i.e., hostile and violent actions), and threatening or filing unjustified ethics and licensing complaints and/or lawsuits.

By definition, every profession should go through substantial changes in order to accommodate shifts in public policies, laws, and the needs of society. As the mental health professions have evolved, the definition, scope of service, required qualifications, ethics, standards, and laws have changed dramatically. This book emphasizes two aspects of the contemporary framework for the mental health practitioner, regardless of discipline: (1) providing safeguards from problems and (2) protecting the rights of BOTH the mental health practitioner and the service user.

Before becoming an attorney, I was a mental health practitioner. Beyond my basic mental health doctoral program (PhD, Michigan State University), postdoctoral training in clinical psychology (University of London) and group psychotherapy (Washington School of Psychiatry), and another doctoral program in public health (ScD, University of Pittsburgh), my ideas about mental health services changed substantially after I completed a law degree (JD, Creighton University). Contrary to the original definition of "professionalism," practitioners are no longer the primary source for regulation of a service discipline. Like it or not, current health-related professionalism is subject to legal monitoring and control by government agencies, third-party payment sources, and the court system.

I have been blessed by a solid law practice, pretty much limited to advising, counseling, representing, and teaching mental health practitioners from all of the disciplines who face dissatisfied and accusatory service users, allegations of ethical and licensure infractions, and threats of legal challenges (e.g., malpractice actions). Providing legal services to practitioners increased my appreciation of the benefits that mental health professionals bring to society. I also have come to recognize, however, that society has adopted some faulty beliefs about mental health services.

My practice of the law has revealed that courts of law generally protect the rights of equal protection and due process, as guaranteed by the United States Constitution. Through astute legislation and under the watchful eye of
the judiciary, the mental health practitioner facing a lawsuit is likely to get a just and fair “day in court.”

With ethics and licensing complaints, especially licensing boards within state government (given the powerful political motive), equal protection and due process for mental health practitioners are not as assured. The conditions in government monitoring and discipline often are similar in the deliberations of ethics committees within a professional association. Because the relationship between a practitioner and a service user has been joined by government and third-party payment sources, the monitoring of quality care too often shows deference to consumers (some of whom are quite pathological), resulting in what amounts to abuse of or at least jeopardy for the practitioner’s personal and legal rights.

At the federal and state levels, regulatory law governs professional practices. Through legislation (e.g., statutes and administrative code rules), governmental agencies define the qualifications for practitioners, the services and practices that can be offered, the system for monitoring the mandatory quality of care, and impose discipline on offending practitioners (e.g., restricting or removing the privilege of practicing provided by licensure). For disreputable reasons, some complainants misuse the regulatory law system—file false and malicious complaints—and in turn, the system allows the abuse of the system to happen. When brought into the regulatory law system by a complaint to a licensing board, more than a few mental health practitioners have been unfairly treated legally and the discipline imposed failed to balance the legal rights of BOTH parties. Said bluntly, the Constitutional rights to be innocent until proven guilty, equal protection, and due process may be, for unjust and wrongful reasons, denied to the practitioner.

Mental health practitioners also must contend with professional ethics committees. I have had the honor of serving on several ethics committees for national- and state-level professional associations, and participating as a source of legal information for multiple committees that were drafting ethics codes. Regrettably, I have observed some members of ethics committees (and licensing boards as well) who are more motivated by personal ambition than by service to the public or the profession. Notions of self-importance and a “political correctness” mentality can contribute to a lack of objectivity (e.g., “If I can find fault with a colleague, it will prove my professional superiority to others”).

Many mental health practitioners lack the wherewithal to protect themselves. Their training may not have prepared them to understand the legal and business aspects of practice in contemporary society. Training in all of the mental health professions typically emphasizes the welfare of the service user,
but it is rare for there to be a focus on modern complex therapeutic relationship issues that may threaten the rights of the practitioner. It is an understatement to assert that mental health practitioners lack a much needed “warrior” mentality when facing allegations of wrongdoing or suffering improper conduct by a service user. A practitioner today needs to be prepared to stand firm and to assertively defend his or her rights, but a mindset of this nature and the relevant skills needed are seldom addressed or cultivated in professional training programs.

This book presents numerous actual cases (of course, name, gender, locale, etc., have been changed to protect anonymity) in which mental health practitioners needed to be mindful of protecting themselves and to implement safeguards proactively. Incidentally, having worked in numerous state jurisdictions and being familiar with published legal cases, the cases mentioned were selected to present a national scope. The information in this book brings ideas about mental health principles, ethics, standards, and laws out of the Ivory Tower and into the sunlight of reality.
Modern societies have unrelenting commitment to promoting constructive, healthy, and rewarding conditions for all people—there is a quest for excellence of life. Regrettably, there is reason to believe that there may be unrealistic expectations that, when unfulfilled, lead to frustration that could accommodate faulty reasoning (Stewart, 2010). For example, the high incidence of mental disorders, as broadly defined, in the United States may be a concomitant of stress and frustration (World Health Organization World Mental Health Survey Consortium, 2004). Logically, when there is a problem, the society focuses on finding remedies, such as relying on government to implement solutions.

Health-related problems have led to marked changes in professionalism relevant to mental health services. By definition, a “profession” is required to benefit society. Based on public policy and law, the government and members of a profession are united in an ongoing effort to ensure that everyone who is granted the privilege to be deemed a professional has the potential to bring benefits to society.

Mental health practitioners must cultivate competency to provide effective services. Through training, ethics, and laws, there are expectations that the practitioner will ensure quality care and maximize the possibility of being helpful to consumers.
In the last half century, society has become increasingly accepting of and dependent on the mental health professions. Social status and financial rewards are accorded to those who complete extensive training, prove to be of acceptable character, and give evidence of knowledge and skills that will be transformed into helpful professional services.

As with any component of society, it is necessary to scrutinize what is and is not occurring, with the objective being to remedy any problem and create additional safeguards for all concerned. However, there is a major dilemma within the mental health professions, which has not been attended to adequately by either society or the professions. This dilemma allows noncompliant clients to jeopardize quality care and impose unjustified risks on mental health practitioners. (The terms service users, patients, consumers, and clients will be used interchangeably in this book.)

Until the mid-1970s, society generally held mental health professionals in high regard. Due to some unfortunate situations and questionable practices by some professionals, considerable suspicion developed toward the integrity of those in the health care industry. There will be further discussion of this assertion later on, among several chapters, including Chapter Three.

Incidentally, some professional associations and malpractice carriers now provide “hot-lines” for legal consultation. One of the risks of contacting a “hot-line” attorney provided by a professional association or malpractice carrier is that the information or advice provided may emphasize professional ethics that are not necessarily compatible with the laws of the jurisdiction(s) relevant to the particular mental health practitioner. State bar associations typically advise consumers to seek legal counsel from an attorney qualified in the given jurisdiction. Also, a “hot-line” attorney may be paid by a malpractice carrier that is, by definition, a financial institution intent on preserving the fiscal assets of the organizations, as opposed to primarily protecting the legal interests of the insured who is calling for advice. This caveat will be repeated purposefully later on.
Therefore, modern mental health practitioners must be cognizant of negative responses from clients. For example, clients may: fail to abide by or comply with policies agreed on at the outset of professional services (e.g., making timely payments); not adhere to an individualized treatment plan that embraces essential professional requirements for quality care and risk management; be inappropriately aggressive (e.g., making threats, acting hostile, or becoming violent); and file unjustified ethics and licensing complaints and/or lawsuits. Consider the following three examples:

**EXAMPLE ONE**
When pressed to pay an overdue account, a former service user said: “Either you forget the debt or I am going to inform the licensing board that you billed for sessions that did not occur.” The practitioner said, “But I have notes for those sessions and they did occur.” The abusive service user replied, “I will say that you falsified those notes, and you know who the licensing board will believe—certainly not you.”

**EXAMPLE TWO**
An highly disturbed service user, who, from the practitioner’s records, was clearly a risk to self and others, rejected the mental health practitioner’s good faith attempt to terminate outpatient sessions and obtain an inpatient placement. The service user declared, “If you try to get me committed involuntarily or refuse to keep seeing me on an outpatient basis, I will have a malpractice lawyer all over your ass.”

**EXAMPLE THREE**
A senior practitioner terminated an employee-practitioner for indisputable dishonesty and breach of the terms and conditions in the legally well-crafted employment contract. In retaliation, the terminated practitioner filed both ethics and licensing complaints against the employer, with a number of false allegations. Interestingly, the licensing board dismissed the complaint, but the professional ethics committee pursued the complaint and based its penalizing decision on an ethical tenet that was contradicted by the laws of the relevant jurisdiction.

Throughout the health care professions, there has been a proliferation of malpractice lawsuits by disgruntled patients (Shapiro & Smith, 2011). Some of these legal actions were well justified, whereas some were for less than honorable reasons (e.g., a highly disturbed client attempting to gain unjust enrichment or pursuing pathological motivations via accusations against the mental health practitioner).
From a legal perspective, there seems to be adequate reason to believe that, in general, any lawsuit that reaches the courtroom will, in fact, receive justice. When there is a seemingly illogical outcome in a court of law, it most often results from a “jury of one’s peers” disbelieving or being shocked by the evidence presented and occasionally as a result of inept lawyering.

Overall, legislatures have crafted wise laws that the judiciary administers well in courtroom proceedings. The outcome usually has ensured equal protection and due process, and justice is done. For mental health practitioners, the same positive critique cannot be given to professional ethics committees or the regulatory law system (e.g., the process of complaints to a licensing board).

In most states, a mental health regulatory agency, for example, the Department of Health, is almost exclusively a source of consumer advocacy and protection. This agency contains the licensing board(s) for the practice of mental health services.

Mental health practitioners delude themselves into believing that, because licensing enhances their professional status (which may or may not be true) and there are mental health professionals on the licensing board(s), the regulatory agency is a source of professional advocacy and protection for the practitioner. Nothing could be further from the truth.

The members of a state licensing board commonly are appointed by the governor, which makes it a political position. Talking to board members quickly reveals that they believe that their role is to police the marketplace, often with a “guilty until proven innocent” attitude.

Complaints made to the licensing board usually are investigated. In some jurisdictions, the investigators often are trained as law enforcement officers and have little or no training in mental health services per se. If the complaint appears plausible for discipline following the investigation, it is then assigned to a prosecuting attorney. Within the prosecutorial framework, any service user can contact the regulatory agency, file a complaint (sometimes without being under oath and/or by an “800” toll-free number), and have an investigation initiated.

Any number of times in my experience, the person making the complaint (the complainant) has admitted later to falsehoods or misrepresentations in the allegations, but virtually never does the regulatory agency take action against the consumer—it would not be politically correct. Out of several hundred licensing complaints for which I have provided legal representation, there has never been, to my knowledge, any effort by a licensing board or prosecutor to hold a complainant responsible
for falsehoods. In the meantime, the mental health practitioner who has
been the subject of the wrongful licensing complaint has suffered emo-
tionally and financially; often the practitioner’s professional reputation is
tarnished, even though the allegations were discredited. For example, one
respondent who sued the licensing board and won told me that the
aftermath resulted in a marked decline in referrals and income in every
subsequent year. I have heard similar stories from numerous practitioners.

Commonly the complainant in a licensing complaint enjoys some
sort of statutory protection from a counteraction by the practitioner.
That is, unless it can be proven clearly by at least a preponderance of the
evidence that the complainant has filed a complaint that was knowingly
false and malicious, the mental health practitioner must face the tax-
payer supported investigation and prosecution without pragmatic
recourse. Certain regulatory sources, such as licensing board members
and even prosecuting attorneys, have commiserated about this prob-
lem, but quickly say, “If the practitioner wants to sue the complainant,
fine, but don’t expect us to be involved against the complainant.” Again,
it would not be politically savvy for a consumer protection agency to
defend the practitioner and oppose the consumer.

Note that the attorney representing the regulatory agency is, in fact,
termed a “prosecuting attorney.” One prosecutor told me that she was
amazed at the naiveté of mental health practitioners who have received
a licensing complaint. She said, “So many of them call and confess their
sins to me, as if I would grant them forgiveness—I now start every letter
or telephone conversation with the statement ‘I am a prosecutor and you
should obtain your own legal counsel because anything that you tell me
can and will be used against you.’”

A complaint without merit can lead to additional problems. Prosecu-
tors have been known to use a complaint about one issue to expand the
investigation in fishing-expedition style to other issues, which they might
detect from reviewing clinical records.

Moreover, one state statute grants immunity from a licensing com-
plaint to court-appointed child custody evaluators and parenting coor-
ninators, unless a disgruntled parent first takes the matter to the appointing
judge and the judge declares the evaluator to have performed unsatisfac-
torily. However, the prosecutorial unit in that state acknowledges that,
should a parent file a complaint against a court-appointed child custody
evaluator or parent coordinator without getting the judicial finding of
unsatisfactory performance, the parent will be asked, in effect, “Is there
anything else that you can complain about that alleges a lack of good faith on the part of the evaluator or coordinator!” The reasoning is clear: The complaint process is for consumer protection. Remember, prosecutors and the like receive salary increases, promotions, and job security according to “successful” prosecutions and consumer satisfaction.

Many practitioners report that a regulatory action is more devastating to them than a malpractice suit. This is because courtroom proceedings must adhere strictly to formal rules (e.g., the Rules of Evidence, Civil Procedure, or Criminal Procedure), legal representation by an attorney is ensured by the U.S. Constitution, and appeals can be made.

DAMAGES FROM COMPLAINTS

Research shows that mental health practitioners who are subjected to any ethics, regulatory, or legal action suffer mightily, with the effects being mental and physical symptoms, marital and family distress, and financial loss (Woody, 2009b). Nothing cuts to the core of a practitioner’s identity more than an assault on his or her professionalism. When the practitioner knows that the complaint is false and comes from a client’s pathology, and there is dubious legal recourse (with the stance of “guilty until proven innocent”), the negative impact on the practitioner is all too often horrendous.

One practitioner said: “I was burned royally by my licensing board—completely vindicated, even received a monetary award from the psychology board by an administrative law judge for the egregious prosecution. But I still suffer from the years of lost productivity and hundreds of thousands of dollars in lost income while fighting the case.” Welch (2010) believes that “psychologists are one angry patient, parent or spouse away from professional ruin” (p. 15).

The mental health practitioner today is without adequate allies. It is erroneous to believe that a professional association will be assuredly understanding of the dilemma that the practitioner faces in the legal arena.
and step forward to offer support. For example, it would not be expedient politically to champion the cause of a member accused of wrongdoing, because it might impact negatively on legislative priorities being pursued by the professional association. Of course, an adverse judgment from an ethics committee, a licensing board, or a malpractice court could tarnish the reputation of the profession in general. The old saw about “rats leaving a sinking ship” comes to mind.

I have seen numerous cases in which a regulatory agency dismissed a complaint for lack of probable cause or a court of law dismissed a malpractice action, yet a professional association continued investigating an ethics complaint, sometimes extending the investigation over several years. Some practitioners who have faced multiple tribunals report that they believe that a professional association, much like a licensing board, tends to see the practitioner as guilty until proven innocent.

Because of the negative attributions seen in ethics committees in professional associations, some practitioners have chosen to cease their memberships. In a nutshell, the ethics model for a decision about a violation is considerably different from the model used for licensing and malpractice actions; more will be said about these differences later on. Suffice it to say, ethics committees are prone to want pristine conduct. Idealism tends to dictate the decision, with little consideration of the realities of practice. Welch (2010) opined: “It is unfortunate that they [psychologists] have to fear . . . [professional ruin] from their national organization, but the sad truth is that they do” (p. 15).

When it comes to malpractice, recipients of mental health services enjoy a wide doorway into the halls of justice. With the prevailing attitudes and prosecutorial governmental system, the hope that the matter will end “in justice” is overly optimistic.

Although only a minimum risk at one time, ethics and licensing complaints and malpractice litigation against mental health practitioners now impose a profound risk. The published frequency of complaints and lawsuits is usually based on only the cases that actually are submitted to ethics committees, licensing boards, and malpractice insurance carriers. Even when these numbers are combined with the annual reports, such as from state regulatory agencies, the total does not reveal the true magnitude or incidence of legal problems faced by practitioners.
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It is important to emphasize that reliable information regarding the number of allegations and complaints of any type cannot be obtained. Many potential complaints or lawsuits are settled, usually financially, without ever being filed, thus eliminating them from the tabulations. My law clients have told me of countless situations in which a mental health service user (usually one from whom the practitioner is trying to collect a justified overdue debt) states unabashedly: “If a settlement of $X-amount is not received, a complaint to the licensing board and/or a lawsuit will be filed.” As I suggested earlier, some clients have even stated openly that they will fabricate alleged wrongdoing on the part of the practitioner, quickly adding, “Since it will be your word against mine, I’ll have the system on my side.” Again, it is impossible to tabulate the number of legal actions, because settlements involving mental health practitioners are not always reported to the state government or anywhere else.

When it comes to using the legal system, it seems that some service users are better versed and prepared for a legal skirmish than mental health practitioners. Steeped in the Ivory Tower illogic that a client always must be nurtured and shown deference, the mental health practitioner may be prone to experience inappropriate guilt. A practitioner might say to his or her attorney, “I know I did not do anything wrong, but I just want to get this over with, settle it however you can.”

Stated bluntly, the present era allows service users with personality disorders and other serious pathology to abuse the legal and governmental systems to the disadvantage and injury of mental health practitioners. Moreover, the practitioner is left with too few allies and resources. This state of affairs should shock the sensibilities of every member of society, the mental health professions, and training programs and trigger a desire for corrective actions. The unjust psychological injury, diminished professional status, and financial penalties suffered by modern mental health practitioners are appalling.
RECONCEPTUALIZING MENTAL HEALTH SERVICES PRACTICE

There are strategies for avoiding ethical, regulatory, and legal problems, which I have detailed elsewhere (Woody, 1988a, 1988b, 1989, 1991, 2000b, 2005, 2008, to name but a few). These strategies require knowledge, skills, and attitudes that are seldom, if ever, dealt with adequately in professional training programs. It is known that training for ethics, standards, and law can reduce misconduct (Price, 2010). Nonetheless, there is a dearth of essential training experiences of this nature.

Part of the problem is that university and other types of professional training programs emphasize the ethics model and ignore or downplay the legal aspects of professional practice. This may be because, in part, some professors are not versed enough in the law or the reality of practice.

Certainly trainees should develop ethical, theoretical, and idealistic ideas, but they also should learn that mental health is now part of the Health Care Industry. In addition to government oversight (which seems destined to increase), mental health practices are subject to managed health care systems and other third-party payment sources. Consequently, business and clinical acumen should be of equal importance. The professional service relationship must be reconceptualized as involving not only the practitioner and the service user, but numerous other accountability sources, such as professional liability companies, health insurance companies, ethics committees, regulatory agencies, and malpractice courts: Training should be adapted and provided accordingly. Reconceptualizing mental health services practice also must include a commitment to continual enrichment of knowledge and refinement of skills by self study and continuing education that is reality oriented.

Affiliations between mental health practitioners must be based on business principles—contracts, corporate entities, policies—not simply on collegiality. While quality care must be maintained for the benefit of the consumer, it must also be maintained to protect the practitioner from the risk of complaints and lawsuits. Just as medical physicians already do, mental health practitioners, regardless of discipline or theoretical preferences, must use diagnostics in a clinical way to improve judgments, that is, avoid biases, and preclude ethical, regulatory, and legal complaints. Compliance with an individualized treatment plan should be required. If the consumer does not adhere strictly to policies
and treatment procedures, a therapeutic method should be used to deal with the noncompliance and, if all else fails, termination of the services. Justification for and the propriety of such actions should be documented in the records.

These ideas for reconceptualizing mental health services practices will be discussed further in later chapters. In no way should this reconceptualization be viewed as lessening the potential benefits to society or the individual service user. On the contrary, by giving equal concern to the quality of care to the service user and the legal rights and protection of the mental health practitioner, the mental health professions are strengthened and individuals and society benefit even more.

**CONCLUSION**

None of the foregoing is intended to be disrespectful or a wholesale condemnation of the mental health professions, university and other training programs, or the ethical, regulatory, and legal systems. Rather, the intention is to reveal that mental health services in the 21st century have changed, and that training and practice also must change to address the reality of societal and professional conditions.

I suggest that any antiquated notions about mental health services be discarded. The service user must demonstrate appropriate adherence to operational and treatment policies and plans; the mental health practitioner must offer well defined and evidence-based services (preferably with support from empirical research); and society must view professional mental health services as being similar to other business-related service relationships, except for clearly relevant ethical, regulatory, and legal prescriptions and proscriptions.

After enduring ethical and licensing complaints and legal challenges, too many mental health practitioners are prone to engage in “crying the blues,” which accomplishes nothing more than catharsis. Instead, all mental health practitioners should lead the effort to reshape the regulatory and accountability sources, through political and legislative efforts, seeking at a minimum equal protection for the client and the practitioner alike.

In part because of the indoctrination that occurs in the name of professionalism during training programs, the typical mental health practitioner is not able to effectively combat criticism generally, and ethical and
regulatory complaints and legal challenges specifically. When faced with opposition, many mental health practitioners find it almost impossible to stand their ground and assert their own rights, such as the right of privacy, equal protection, and due process. Clinging to outdated notions, these practitioners disregard proactively implementing legal strategies.

Over and over, practitioners involved with ethical, regulatory, or legal actions have said, “When this mess is wrapped up, you can bet that I am going to become active in changing the system.” Almost without exception, when the complaint proceedings are over, the practitioner senses such relief that he or she does not want to even think about the situation any more (Sigmund Freud was right about the principle of repression), or expend his or her last remnants of energy on trying to change the system.

In this book, my intention is to enlist the reader in pledging to work toward adopting and maintaining legal strategies for: (1) maintenance of quality care; (2) risk management; and (3) balanced and equal protection for mental health practitioners and their clients. The objectives require open-mindedness and the creation of safeguards against actions by contemporary ethical, regulatory, and legal monitoring and accountability systems. Perhaps with a joining of forces, mental health practitioners from various disciplines can bring about needed systemic changes, such as improved procedures within professional associations and legislative directives and administrative rules. This kind of social action requires the ability and willingness to firmly protect ethical responsibilities and legal rights. Constructive “professional warriorism” is not a hostile-aggressive objective, it is a self-defense approach to professional practice, which will protect and benefit all concerned, including society.