State Law and Legal Issues
2016 Edition

the National Guild of Hypnotists

Legal Issues

Stay Informed of the Law

As a member of the National Guild of Hypnotists you are entitled to the best information available on how to practice safely and lawfully. We have created this document to assist you in your practice of hypnotism and revise it each year. You will find information here on what the laws are in specific states that may affect your right to practice hypnotism. You will also find information on how to keep records, deal with issues concerning client confidentiality, required reporting laws, insurance, and other helpful matters. This document is intended to be read in conjunction with the Code of Ethics, Recommended Standards and Terminology of the National Guild of Hypnotists. If you have not read that document, be sure to do so. It will explain the Code of Ethics of the Guild (which you must follow) and the Recommended Standards for Practice (which we urge you to follow) and the words you should use while holding services out to the public.

The information presented here is intended to offer you more detail on some of the issues presented in the Recommended Standards, as well as other information. This document also provides you with the best information we have regarding state laws concerning hypnotism. These laws are constantly changing, so we urge you to keep in contact with the Guild for updates through your regional Chapter organization.

The Most Common Problems

Every year some hypnotists run afoul of the law. Typically, it is because they have made one or more very common mistakes. Therefore, we want to specifically point out these pitfalls to you so that you do not make them yourself.

First, be careful of the word "therapy." In many states the practice of hypnotism for therapeutic purposes is restricted to licensed healthcare professionals, and in some states "hypnotherapy" is deemed by the court to mean "psychotherapy by means of hypnosis." In those such it is unwise to call yourself a "hypnotherapist" and what you do "hypnotherapy" unless you are a licensed health care professional.

It is the explicit policy of the National Guild of Hypnotists to consider the traditional title of "hypnotist" to be an old, proud and distinguished title, and it is the title voluntarily used by many Guild officers. Many members do the same even if there is no legal reason to do so. It avoids legal entanglements with overly zealous governmental agencies and

the Recommended Terminology of the National Guild of Hypnotists allows us to do everything we need to do under the "nontherapeutic" banner.

Second, be careful about your Title of Practice. The approved Titles of Practice for National Guild of Hypnotists members are those listed in our Standards. If you use any other title while holding yourself out to the public you are placing yourself outside of the Recommended Standards of the National Guild of Hypnotists. Currently, the Guild recommends only the title of Consulting Hypnotist and the titles for its Board Certification. We no longer recommend anyone call themselves a Hypnotherapist for the reasons given above.

The Guild awards specialty certifications in specific areas of hypnotic work such as forensic hypnotism, complementary medical hypnotism, clinical hypnotism and pediatric hypnotism. However, having received a specialty certification does not confer a new title of practice.

For example, a Consulting Hypnotist who has received the specialty certification in complementary medical hypnotism would continue to refer to him or herself as a Consulting Hypnotist, not as a "Certified Medical Hypnotist." However, he or she could state that he or she was "certified in medical hypnotism" on his or her resume, stationary or business card. Similarly, a member who has received the specialty certification in clinical hypnotism could state that he or she held the certification, but is not authorized by the Guild to refer to him or herself as a "Certified Clinical Hypnotist."

Third, use the Client Bill of Rights. Giving each client an accurate disclosure of your training and limits of practice, known in the Guild as the "Client Bill of Rights" is central to our Standards. If you use one you provide yourself substantial protection from any claim that you have misrepresented yourself to the public. Failure to use one dramatically increases your risk. Instructions for creating a Client Bill of Rights are found in the Guild Code of Ethics, Standards and Terminology publication that can be downloaded from the Guild's web site.

Record Keeping Guidelines

Every hypnotist needs to keep some records on clients. While some argue that keeping records at all places you at risk (if they don't exist, they can't be produced in court to justify a legal action against you), this argument is mistaken. The keeping of basic professional records is regarded by the law as an obligation of practice. Your records are the only thing you will have to defend yourself if you are ever charged with hurting a client, placing another at risk or misrepresenting yourself.

Every hypnotist is free to keep his or her records in whatever format he or she feels is best and increasingly electronic records systems used by practitioners impose their own format. However, SOAP notes are an easy format to use to describe your client contacts and we recommend it. SOAP notes are common in most health care environments and having your records in this form will give them a professional appearance.

Using the acronym SOAP to describe the professional encounter with a client creates SOAP notes. When you write SOAP notes it is best to leave no blank lines and to make corrections only by drawing a line through the writing containing the error, so that it ca still be read later. These provisions will allow you to show that your SOAP notes were not altered "after the fact," and this could protect you in a court of law if someone claims you have amended your records.

Here is how to make SOAP notes:

- Date: You give the DATE of the encounter with your client.

- S: You report all SUBJECTIVE information here. Basically, this will be everything the client tells you. An easy way to remember how to use this section is the phrase “WHAT THEY SAID.”

- O: You report all OBJECTIVE information here. Basically, you use this section to record what you observed about the client. An easy way to remember how to use this section is the phrase “WHAT I SAW.”

- A: You use this section to report the APPRAISAL of the client’s situation. You record here what you think is going on with your client. An easy way to remember how to use this section is the phrase “WHAT I THINK THIS MEANS.”

- P: You use this section to record your PLAN for helping the client. You would record what sort of hypnotism you did, any scripts you used, suggestions given and any other recommendations you made (such as a book you recommended.) Finally, you would include what you think you may do at the client’s next session. You may revise this plan when you next see the client, but having the plan listed here both reminds you of your thinking and makes it clear that there is a professional process of reflection included as a part of your care of the client. An easy way to remember how to use this section is the phrase “WHAT I DID AND PLAN TO DO.”

Know the Codes

If you wish to know the precise use of terms in the psychological or medical environment, the terms are defined (and given specific code numbers) in two standard reference works. These are the Diagnostic and Statistical Manual of the American Psychiatric Association (currently in the fifth edition and therefore often abbreviated as "DSM5") and the International Classifications of Diseases of the World Health Organization. The tenth edition is the official guide for the United States. These volumes provide a coding system that allows all human problems to be classified, even sub-clinical difficulties like "caffeine-induced insomnia" or "nervousness." If you are a serious practitioner earning a living as a hypnotist, you probably will wish to own these volumes for reference. However, avoid using the terminology in your records.

Both DSM5 and ICD-10 contain codes used to describe routine human problems that are not the focus of a mental or medical disorder. These codes are called "V-Codes."

As the conditions described are not medical or psychological disorders (and therefore not officially part of the licensed professions), a hypnotist may safely use them in record keeping. Such codes are useful when corresponding with the members of other professions. The common DSM5 V-Codes a Consulting Hypnotist might employ are listed below.

V61.90 Relational Problem Related to a Mental or Medical Condition
V61.20 Parent-Child Relational Problem
V61.10 Partner Relational Problem
V61.80 Sibling Relational Problem
V62.81 Relational Problem Not Otherwise Specified
V62.82 Bereavement
V62.30 Academic Problem
V62.20 Occupational Problem
V62.89 Religious or Spiritual Problem, or a Phase of Life Problem
V62.40 Acculturation Problem
V68.20 Request for Expert Advice

Both DSM5 and ICD-10 contain codes that are used for subclinical problems such as smoking or simple obesity. While hypnotists may work with these conditions, there is debate about using the formal codes for record keeping. Technically, as these disorders are regarded as subclinical, the use of the codes by hypnotists is permissible. However, it may be wise to avoid any use of these codes in your records so that no one can ever put you on the defensive by challenging your right to work with conditions listed as disorders in the diagnostic and statistical manuals. A better solution is to use the V-Code for "expert

advice" to indicate that the client sought expert training from you in using his or her own hypnotic abilities to cope with the problem indicated in parenthesis. Therefore, you might list smoking cessation hypnosis as "V68.20 (smoking)" and weight management hypnosis as "V68.20 (weight loss)."

As hypnotism is a different form of human service than psychology or medicine, unless you are licensed to practice medicine, psychology or some form of counseling, it is dangerous to use the terminology of those professions in your records. Therefore, avoid words like "depression," "anxiety," "compulsive," and “phobia." Similarly, avoid using the words "psychological," "medical," “clinical” or "counseling." As far as reasonably possible, use other descriptive language instead.

We recommend you always follow the Guild’s Recommended Terminology for Hypnotic Practice. Recent Supreme Court decisions have tempered this somewhat and it has become safer to use words like “anxiety” in an informal sense. However, there is always some risk when such language.

Can You Take Insurance?

The quick answer to this question is that you probably cannot take insurance as payment for your hypnotism services. Nor should you want to.

Insurance companies exist to earn money for their stockholders. The only way they earn money is to sell policies and not pay claims. Therefore, they are always looking for a legal way to deny a claim against one of their policies. If you are a member of certain licensed professional groups (for example, a physician or a licensed clinical psychologist), there are state laws that say that insurance companies must pay for your work.

However, if you are a member of another profession, insurance companies probably will refuse to pay for your services. They can do this for any reason they wish. They can refuse because hypnotists do not have any sort of state license. Alternatively (as licensed counselors and marriage therapists have recently found) they can refuse even if you are licensed, if your state does not have a mandated provider law that says they have to pay.

Many policies contain a specific exclusion for hypnotism in any case, and even if the insurance company does pay, they will typically only pay a part of what they consider “customary and usual charges.” However, insurance companies are unregulated in determining what is “customary and usual” and can set that at any figure they wish. Some hypnotists have discovered that insurance companies consider $25 per session to be

“customary and usual” and they offer to pay 50% of that. This is why many successful therapists often refuse to work with insurance companies, even if they are mandated providers in their state.

The Guild feels you are better off if you set up your practice to work entirely outside the insurance system. There simply is no pot of gold at the end of the insurance rainbow. To do this, tell your clients that you do not bill insurance companies, and that your understanding is that most insurance companies do not reimburse for hypnotism. Then, collect your fee at the time of service by cash, check or credit card. Give your client a receipt showing the reason for the consultation, and if the client wishes to send it in to his or her insurance company, he or she may do so. However, to insure good will with clients it is always best to remember to caution the client not to expect the insurance policy to pay the claim. If the client was referred to you by a licensed health care professional and you were told the diagnosis, then you can list that diagnosis on the receipt you provide, along with the name of the referring professional who made it. Be careful you do not appear to be making a diagnosis yourself. You are not allowed to do so.

Some hypnotic practitioners have attempted to bill insurance companies by asking a referring physician to add the hypnotist’s charges to the physician’s superbill by using codes that are intended for use by Physical Therapists. The Guild does not endorse this practice.

Confidentiality

A common difficulty helping professionals have is understanding the importance of confidentiality and the limitations on it.

Like many persons engaged in helping others, hypnotists typically assure clients that anything said in sessions will be regarded as confidential and will not be disclosed. However, there is a fundamental difference between the kind of confidentiality you can promise as a hypnotist and the sort promised by physicians, psychologists and certain other professionals. We can promise confidentiality to a client, but we cannot often promise legal privilege, which is a more powerful sort of confidentiality.

"Basic Confidentiality" means that you do not intend to disclose information shared with you by a client. At most, this promise of confidentiality exists as a civil contract. If you break the confidentiality you have promised, you might be civilly sued for breaking an implied contract with your client. However, you would not be in violation of any law. In addition, if you are placed under oath at a legal proceeding, a judge has the right to order you to break your promise of confidentiality if the judge sees fit.

"Legal Privilege" means that you practice a profession regulated by a law which explicitly says not only that you must keep client confidences, but also that you may not be required to disclose in a court information given to you by a client. If you break confidentiality that is privileged, not only can you be civilly sued, but you have also broken the law and can be punished by the court. Further, except under very narrow circumstances, a judge may not order you to break confidentiality that is legally privileged. The law clearly recognizes privilege regarding information disclosed by a client (or patient) for physicians, lawyers, clergy and psychologists. In some states, privilege also exists for social workers, professional counselors and marriage and family therapists. Therefore it is vital that you be familiar with the laws in your state
In general, if requested by a lawyer or court to disclose any information about a client, you should consult your own lawyer and take the advice you are given. The advice to consult an attorney is good advice, because this issue can be legally confusing.

Test Question: As an example, imagine that you have been called to testify at a court proceeding. Imagine that the material does not fall under any privileged information law in your state. You have been placed under oath and a lawyer asked you to disclose information a client revealed to you believing that it would be confidential.

The promise of confidentiality you made to your client has no legal standing. The judge can order you to testify. However, if you testify without a fight, your client can civilly sue you for breach of contract. What should you do?

Answer: You should refuse to testify at first, explaining that you have given your promise that the information would not be disclosed. Then, if the judge orders you to testify, politely agree to do so, but request the judge's order in writing for your records prior to testimony. When the written order is received (or if the judge, on the record, refuses your request for a written order), you may testify. Your client might still bring a civil suit against you, but such a suit would be unlikely to succeed because you clearly attempted to honor your promise to your client. Also, be aware that it is possible to request the judge to hear your testimony "in camera," which means off the record in the judge's chambers so that the judge can make a decision whether or not your testimony is relevant to the trail. If the judge rules that your testimony is not relevant, the judge may excuse you from testifying at all.

Release of Confidential Information

From time to time the hypnotist may need to discuss a client's care with hypnotism instructors or supervisors, or other professionals. Prior to disclosing confidential information for these purposes it is wise to obtain a signed "Release of Confidential

Information" from the client to insure that the client consents to your plan to discuss the client's care with a third party. You do not need to obtain a release to discuss a case with colleagues or instructors provided you do not share information that would allow your client to be identified. However, if you are discussing a person specifically by name or in a way that would allow another person to figure out whom you are speaking of, a release is needed.

There is no standard format for a "Release of Confidential Information." However, it is generally accepted that such releases should be fairly specific and time-limited. These are the formats we suggest:

The One-Way Release (Use this form if all you need to do is to transmit information to some other party. It is especially useful if the client wants you to send information to an insurance company, as it makes clear how much privacy the courts have ruled the client is giving up if the client attempts to use insurance to pay for your services.)

I hereby authorize [your name] to release to [the other professional's name, or the name of the insurance company] the following specific medical, psychological or educational information he or she may have pertaining to me: [List information to be disclosed.] I state that I have examined the records to be released and approve of this release to the party indicated above. This authorization for the release of confidential information expires ninety (90) days from the date below. I understand that I may revoke this release at any time on written notice to the parties involved, and that information released prior to the receipt of such notice is not a breach of my right to confidentiality. I understand that by authorizing the release of my records to a third party in this way I lose any right to confidentiality or privilege over my records. I understand that by authorizing the release of my records to a third party in this way I create a circumstance where [your name] might be required to enter testimony in a court of law regarding me. I understand that by authorizing the release of my records to a third party in this way I create a circumstance where [the other professional's name, or the name of the insurance company] may reveal the information contained in my records to whomever they wish. I understand that by authorizing the release of my records to a third party in this way I create a circumstance where the records released may be subpoenaed by interested parties to use as evidence in a court of law. [print client's name, attach signature and date]

The Two-Way Release (Use this form if you wish to consult with another professional or to acknowledge a referral. The client gives up much less privacy with this release as the information is passing from one confidential relationship to another. Never use this release to authorize sending information to an insurance company).

I hereby authorize [your name] and [the other professional's name] to release to each other any and/or all hypnotic, medical, psychological or educational information they may have pertaining to me.

This authorization for the release of confidential information expires ninety [90] days from the date below. I understand that I may revoke this release at any time on written notice to the parties involved, and that information released prior to the receipt of such notice is not a breach of my right to confidentiality. [print client's name, attach signature and date]

HIPAA

The U.S. government implemented the Health Insurance Portability and Accountability Act of 1996, usually called "HIPAA" or H.I.P.A.A.

You probably know about this law because every health care provider in your life started handing you a "Notice of Privacy Practices" in April 2003, and your mailbox started to fill with offers from various organizations to sign you up for a class where you could learn how to comply with HIPAA in your work as a hypnotist. Often, the solicitations came with dire warnings about huge fines if you fail to comply.

The purpose of HIPAA is to make it easier for people to carry their health insurance benefits with them from one employer to the next. It is also intended to make it easier for health care providers to work with people who have different sorts of insurance policies by standardizing how records are kept, transmitted and used. Finally, it intends to give the public a measure of protection over who can know private medical information about them.

Corporations and practitioners who are governed by HIPAA are required to disclose to every client what can and cannot be done with private health care information (that is why you have been receiving that "Notice of Privacy Practices"). They are required to have in place a system of business policies that meet common-sense requirements about privacy protection both for paper records and for electronic records. The requirements are basic considerations such as a rule that files are to be kept in secure locations, staff are to be trained in privacy practices, every office is to have a "Privacy Officer" and an "Electronic Security Officer" who insures compliance, etc.

Generally speaking, Consulting Hypnotists who are not also practicing some other regulated profession <u>are not obligated</u> to comply with HIPAA. HIPAA applies to regulated health care professionals and health care corporations. Under the laws of most

states hypnotists are not considered health care professionals. If you called someone in your state government to ask if you must comply with HIPAA and they said "yes," it is likely the person you were speaking to mistakenly believed that hypnotists are regulated health care professionals under the laws of your state.

Some hypnotists are actually dual professionals possessing credentials both as professional hypnotists and in some other form of regulated health care. People such as this are regulated under HIPAA because of their second credential, and should have received information from the appropriate agency about how to comply long before HIPAA was implemented.

However, the wording of HIPAA does contain some ambiguity, which is typical of a huge piece of omnibus legislation such as this. This ambiguity does create problems for hypnotists.

For example, hypnotists in Washington and Colorado are regulated as "unlicensed" psychotherapists or counselors. Does this mean they need to comply with HIPAA? It's not clear. And those states with Health Freedom Laws, such as Minnesota, Rhode Island, California, etc., where hypnotists are authorized to practice "Complementary" medicine are a real muddle. There is no authoritative answer, and it's not clear what governmental body has the authority to give an answer.

In those states where the application of HIPAA to hypnotists is unclear, the individual practitioner must decide how he or she wants to proceed. The Guild can't make an unconditional recommendation as the Guild is not a governmental agency and would be liable for any advice we give. If we said you should comply and it turns out that you don't have to, we could be sued for putting you through considerable inconvenience. If we said you don't have to comply and a court later decides that you do, we'd be liable for having given incorrect information. Because the law is ambiguous and because the Guild does not have the authority to decide this on its own, it's up to you.

Fortunately, there is nothing in HIPAA that says you can't comply with it on a voluntary basis. Therefore, the safest counsel if you are in an "unclear" state, or just want to do what other professionals are doing, is to comply on a voluntary basis even if it turns out you do not have to. It's not really all that hard and there are many books you can obtain that will explain how to comply if you choose to do so.

STATE LAWS

Current Information as of July 2016

Unregulated States (20 states)

To the best of our knowledge, the following states have no regulation that affects hypnotism:

Alabama, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, and Wisconsin.

The Guild recommends you follow Guild Standards and Terminology in these states even though there may not be a legal requirement to do so.

Guild Standard States (15 states plus District of Columbia and Ontario)

We are aware of one or more laws currently on the books that could be interpreted to prohibit a Guild hypnotist who is not otherwise qualified to practice some other profession, from practicing hypnotism. In many cases this prohibition on hypnotism is indirect—the law was not created to ban hypnotism and our concern is only about how some of the language could be interpreted. It is our opinion that you may practice in these states within Guild Standards provided you identify yourself as a “Hypnotist,” call the service you render “nontherapeutic hypnotism,” use only approved Guild Terminology and add to your Client Bill of Rights the following paragraph:

“The services I render are held out to the public as nontherapeutic hypnotism, defined as the use of hypnosis to inculcate positive thinking and the capacity for self-hypnosis. I do not represent my services as any form of health care or psychotherapy, and despite research to the contrary, by law I may make no health benefit claims for my services."

Alaska, Arkansas, Arizona, District of Columbia, Hawaii, Maryland, Mississippi, Missouri, Montana, New York, Ohio, South Carolina, Tennessee, Texas, West Virginia, Wyoming and Ontario.

Regulated States (15 states)

There is an explicit law in these states that regulates the practice of hypnotism. In order to practice lawfully in these states you must comply with the law. Contact the Guild office or your Chapter organization for specific details on how to comply. In all cases you must follow the Recommended Standards. In most cases there is more that you have to do.

California, Colorado, Connecticut, Florida, Idaho, Illinois, Minnesota, New Jersey, New Hampshire (regulation voluntary, otherwise Guild Standard), New Mexico, Nevada (forensic hypnosis and in Clark County, all forms of hypnotism), North Carolina, Rhode Island, Utah, and Washington.