



Counselor Spotlight: Telebehavioral Health

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published the 2nd Edition of our *Counselor Claim Report*. It includes statistical data and legal case studies from CNA claim files, as well as risk management recommendations designed to help counselors and other behavioral health professionals reduce their malpractice exposures and improve patient safety.

You may access the complete report, and additional Risk Control Spotlights, at: www.hpso.com/counselorclaimreport

This Counselor Spotlight focuses on risk recommendations regarding one of the most significant topics from the report: Telebehavioral health, or distance counseling.

Using the internet and other telebehavioral health techniques, also known as distance counseling, may create significant benefits, including the ability to reach underserved or rural communities, and bypassing obstacles that may limit or prevent individuals from accessing face-to-face therapy. Distance counseling can be used for individuals or groups, such as families, and it can be synchronous

(telephone, chat, or visual contact online, which occurs in real time) or asynchronous (e-mail or texting that is not in real time). The American Counseling Association (ACA) *ACA Code of Ethics* (2014) outlines this topic in Section H, which focuses on distance counseling, technology and social media. According to these standards, counselors may decide whether to incorporate telebehavioral health technology and distance counseling in their practice. Those who decide to offer telebehavioral health in their practice should consider how liability exposure may arise from seemingly harmless interactions, as in the following case:

Please note that technology-assisted distance supervision differs from telebehavioral health (providing counseling via technology). For more information regarding technology-assisted distance supervision, please review the Counselor Spotlight: Supervision.

CASE STUDY: Failure to Obtain Informed Consent Prior to Initiating Distance Counseling with a Client

The insured counselor began treating a client who wanted daily contact, so the counselor began exchanging text messages and phone calls with the client almost daily. After several weeks of treatment, the client grew dissatisfied with the care she was receiving from the counselor. The client printed copies of all of the text messages she had exchanged with the counselor, and turned them in to the state licensing board, along with a complaint asserting that the insured had been incompetent and unprofessional.

The board reviewed the text messages the counselor exchanged with the client, as well as the client's mental health record. It determined that the counselor had failed to explain the risks and benefits of counseling via text, there had been no discussion with

the client regarding confidentiality and counseling via text, and the counselor had used unprofessional, derogatory language in the text messages she exchanged with the client. Further, the board found dozens of referenced to phone calls in the text messages between the counselor and the client without corresponding documentation in the client's mental health record.

Following its investigation, the board concluded that formal discipline was not warranted in this case, though it directed the counselor to complete continuing education in the area of ethics, risk assessment and clinical documentation. The board also strongly cautioned the counselor about professional responsibilities and maintaining a high standard of professional ethics. The total cost to defend the counselor exceeded \$12,000.



Risk Management Recommendations: Telebehavioral Health

There are some unique considerations pertaining to distance counseling and technology, including ethical and legal requirements. Consider the following strategies to ensure your ability to deliver distance counseling successfully while managing the inherent risks:

- **Gain the necessary skills before initiating distance counseling** by taking focused courses or attending workshops. Research available programs and retain documentation of successful completion of education.
- **Understand all laws and ethical guidelines governing client interactions, and practice in accordance with the standard of care, the limits of one's license/certification, and all regulations and ethical guidelines.** Counselors providing distance counseling must adhere to the same practice standards they follow when providing traditional in-person counseling services.
- **Check state and third-party requirements related to distance counseling, licensure, and credentialing,** and if unsure, contact the licensing board for additional information and consult an attorney. The ACA recommends that counselors ensure they are appropriately licensed in the state where the client is located during the distance counseling services.
- **Check regulatory board requirements, or if using a third-party for reimbursement of telebehavioral health services, review contractual requirements for client assessment, coding, and claims submission.** For example, some third-parties may require an in-person assessment prior to initiating telebehavioral health services or distance counseling.
- **Recognize potential issues regarding confidentiality, privacy, cyberstalking, and identity theft.** Use a secure, encrypted platform for communicating with clients. Regularly review, upgrade or replace equipment or software, as necessary, to meet evolving technology needs and privacy standards.
- **Review relevant regulatory requirements,** including HIPAA and the Health Information Technology for Economic and Clinical Health (HITECH) Act, which govern privacy and security of protected health information, including electronic transmission. Some states may have higher standards than Federal compliance regulations and statutes; be sure to follow whichever regulation is more stringent.

- **Follow encryption standards when communicating with clients online, and when consulting with other practitioners.** These standards include the selection of a secure platform and a vendor that will sign a Business Associate Agreement as required by HIPAA laws and regulations, stating the company will adhere to federal privacy requirements.
- **Evaluate whether distance counseling is appropriate for a client.** For example, can the client use the required technology? If the client relies on insurance to help cover the cost of services, will the insurance benefits include coverage for telebehavioral health/distance counseling? Are they cognitively and emotionally suited for this type of interaction? Do they have a history of injuring themselves?

Regulations regarding telebehavioral health services and electronic communications may differ from state to state. For example, some jurisdictions prohibit newly licensed professionals who are under supervision from establishing their own private practice, including providing synchronous and asynchronous telebehavioral health services.

- **When initiating the online relationship, verify the client's identity,** for example, by asking for a driver's license. If there is no two-way visual access, agree on an identity verification process, such as a code word or phrase, at the beginning of each counseling session.
- **Obtain informed consent, including a discussion of the purpose of the counseling, privacy and confidentiality, and use of technology with the client.** Obtain a signed consent form and document the consent process in the client's record. If the client is a minor, obtain consent from the legal guardian.
- **Advise the client of their responsibility to be in a private space** in order for each distance counseling session to proceed, as part of the agreement with the client.
- **Obtain informed consent, including a discussion of the purpose of the counseling, privacy and confidentiality, and use of technology with the client.** Obtain a signed consent form and document the consent process in the client's record. If the client is a minor, obtain consent from the legal guardian.

- **Establish a written plan for how to handle an emergent or urgent situation**, starting with obtaining the name and contact information for someone the client would want to be notified. Be sure to have contact information for emergency providers in the client's geographic location readily available.
- **Maintain records that include documentation of observations, services delivered, and treatment plans.** Notify clients how the records are kept electronically, including the type of encryption used and how long records are kept. Be sure records are backed up at a secure, off-site location. Back-ups should be

stored in a format that is retrievable.

- **Transcripts of counseling sessions can be helpful to the client and the counselor; however, they may be used as evidence in a legal action.** Keep in mind that even if you are not recording a session, the client might be doing so unbeknownst to the counselor.

Additional Resources:

For additional information on enhancing clinical and operational processes when it comes to providing telebehavioral health services in your practice, consider the following resources:

- CNA and HPSO, Healthcare Perspective, Telemedicine: Risk Management Issues, Strategies and Resources: http://www.hpso.com/Documents/Risk%20Education/Businesses/CNA_HP17-14_060117_CF_PROD_SEC.pdf
- Ethical and legal considerations of counseling tech, Counseling Today: <https://ct.counseling.org/2017/03/technology-tutor-ethical-legal-considerations-counseling-tech/#>
- Considerations for the use of distance counseling, Counseling Today: https://www.counseling.org/docs/default-source/ethics/ethics-columns/ethics_march_2015_distance-counseling.pdf?sfvrsn=a24522c_4
- Standards for Technology and Social Work Practice from the Association of Social Work Boards: www.aswb.org/wp-content/uploads/2013/10/TechnologySWPractice.pdf
- Practice Guidelines for Video-Based Online Mental Health Services from the American Telemedicine Association: www.integration.samhsa.gov/operations-administration/practice-guidelines-for-video-based-online-mental-health-services_ATA_5_29_13.pdf
- Center for Connected Health Policy, State Telehealth Laws and Medicaid Program Policies: <https://www.cchpca.org/telehealth-policy/current-state-laws-and-reimbursement-policies>
- The Telebehavioral Health Institute maintains a list of video companies that claim to meet federal requirements for privacy and security: https://telehealth.org/telehealth-buyers-guide/wpbdp_category/video
- Rousmaniere, T., & Renfro-Michel, E. L. (2016). *Using technology to enhance clinical supervision*. Alexandria, VA: American Counseling Association (ACA).
- Wheeler, A. M. & Bertram, B. (2019). *The Counselor and the Law: A Guide to Legal and Ethical Practice*. 8th ed. Alexandria, VA: American Counseling Association (ACA).
- For more information on HIPAA topics, such as breach notification, cyber security guidance, and training resources, visit HHS.gov/hipaa

COUNSELOR SPOTLIGHT

For more risk control resources and top findings from the 2nd Edition of the *Counselor Liability Claim Report*, please review additional Counselor Spotlights on the following topics:

- [Informed Consent](#)
- [Identifying Your Client](#)
- [Reporting to Third Parties](#)
- [Boundaries](#)
- [Supervision](#)
- [Release of Records](#)
- [Documentation](#)
- [Preparing for a Deposition](#)
- [What to Do if you Receive a Subpoena](#)

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Self-Assessment Checklist: Telebehavioral Health/Distance Counseling

This checklist is designed to assist counselors in evaluating risk control exposures associated with their current practice. For additional risk control tools or to download the *Counselor Liability Claim Report 2nd Edition*, visit Healthcare Providers Service Organization www.hpsso.com or CNA Healthcare www.cna.com.

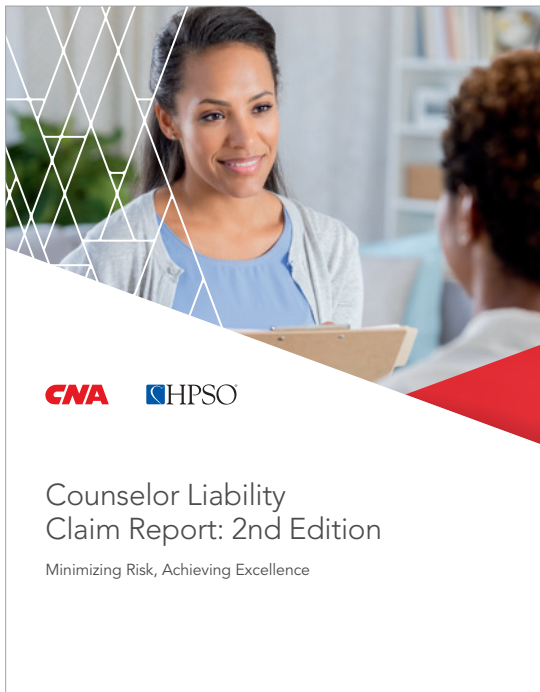
Self-assessment Topic	Yes/No	Comments/Action Plans
Telebehavioral health/Distance Counseling		
I develop necessary knowledge and technical skills I develop necessary knowledge and technical skills related to telebehavioral health/distance counseling before engaging in it.		
I am aware of, and adhere to, the licensure requirements in the state where the client is physically located during the distance counseling session(s) including times when the client and/or practitioner may be traveling.		
I know the legal and regulatory requirements related to distance counseling in the state where I practice and the state where the client is located during the distance counseling session(s).		
I follow secure encryption standards, including HIPAA, HITECH, state and local regulations , when communicating with clients online.		
I verify the client's identity and make a reasonable effort to determine if distance counseling is a good fit for the client.		
I obtain informed consent prior to initiating distance counseling, including: <ul style="list-style-type: none"> - My credentials, the physical location of my practice, and contact information - The risks and benefits associated with distance counseling - The possibility of technology failure, and if that occurs, alternate methods of service delivery - Anticipated response time to communication - Emergency procedures to follow if I am not available - The name and contact information for someone the client would want me to notify in an emergency - Time zone differences - Cultural and/or language differences that may affect delivery of services 		
I document the consent process in the client's record.		
I have contact information for emergency providers in the client's geographic location readily available.		
I adjust my communication style to compensate for the absence of visual cues.		
I maintain secure electronic client records per relevant laws and statutes.		

Self-assessment Topic	Yes/No	Comments/Action Plans
Clinical Records		
I retain client clinical records in accordance with relevant state and federal law and consult state-specific recommendations issued by professional associations.		
I perform periodic audits of clinical records to identify departures from documentation standards and determine opportunities for improvement.		
I safeguard client records from loss and/or unauthorized access.		
When copies of client clinical records are released for legal reasons, I sequester the records to avoid allegations of tampering or making inappropriate late entries.		
I prepare a plan for the transfer of clients and the dissemination of records to an identified colleague or records custodian in the event of my incapacitation or retirement.		

This abbreviated checklist, selected to focus on telebehavioral health/distance counseling, is designed to assist counselors and other behavioral health professionals in evaluating and modifying their current customs and practices, in order to enhance their client-centered care practices and improve safety. It is not intended to represent a comprehensive listing of all actions needed to address the subject matter, but rather is a means of initiating internal discussion and self-examination. Your clinical procedures and risks may be different from those addressed herein, and you may wish to modify the tool to suit your individual practice and patient needs. The information contained herein is not intended to establish any standard of care, serve as professional advice or address the circumstances of any specific entity. These statements do not constitute a risk management directive from CNA. No organization or individual should act upon this information without appropriate professional advice, including advice of legal counsel, given after a thorough examination of the individual situation, encompassing a review of relevant facts, laws and regulations. CNA assumes no responsibility for the consequences of the use or nonuse of this information.

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This information was excerpted from HPSO and CNA's full report, *Counselor Liability Claim Report: 2nd Edition*. www.hpso.com/counselorclaimreport



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In addition to this publication, CNA and Healthcare Providers Service Organization (HPSO) have produced numerous studies and articles that provide useful risk control information on topics relevant to counselors, as well as information relating to counselor professional liability insurance, at www.hpso.com. These publications are also available by contacting CNA at 1.888.600.4776 or at www.cna.com.

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F-13777-619