COUNSELOR EDITION

HPSO Healthcare Providers Service Organization℠

Risk Advisor

Should You Counsel Patients Electronically?

Telephones. E-mail. Blogs. Chat rooms. Electronic alternatives to in-person counseling are varied—and tempting. You can reach people who can't come to your office, hold a session from your den at 9:00 pm on Sunday, or exchange messages when you are traveling. Some clients reveal more about themselves electronically than they would in person. Though you may have heard a lot about these benefits of electronic counseling, you may not know about the potential risks and drawbacks.

Too soon to judge efficacy

So far, clinical evidence supporting the efficacy of on-line therapy remains limited. The American Psychiatric Association Council on Psychiatry and Law notes that some initial research indicates that it is effective in some situations.[1] But proof of long-term value is lacking.

So are legal standards. Suppose you live in Utah and have a client who lives in Wyoming. Must you be licensed in both states? And if you're sued, which state would hear the case? Where should you report domestic abuse? The answers vary from state to state. Even counseling only in-state clients isn't foolproof protection against violating state law since a client could relocate and neglect to tell you.

Preserving privacy is one of the biggest challenges of on-line therapy. No matter how many security precautions you take, data on your hard drive or e-mail messages are vulnerable to hackers. Family members may stumble across or overhear sensitive information about your client. Your own privacy is also at risk, since clients can record your telephone conversations and save e-mail messages.

Detecting impostors can prove more difficult on-line as well. How can you be sure the 40-year-old woman you think you're corresponding with isn't a 20-year-old man? The ease and convenience of e-mail also can invite abuse of the therapeutic relationship. If you get 12 messages from a client in one day, for example, must you answer all of them—and if so, how soon?

Clarifying the legal and practical ramifications will take time, said Scott Hammer, JD, a Chicago attorney who defends malpractice actions against mental health professionals. Critics also raise ethical issues. What standards of care should apply to electronic counseling, given that you can't control all the technical problems that can

erode the quality and continuity of care? And what's your responsibility to clients who could become dependent on the technology, like those struggling with shyness, agoraphobia or physical disabilities? Also, you can't ensure equal access to care since not everyone has a computer.

Practical challenges abound

Consider the value of nonverbal clues. Can you accurately identify a person's mental state without seeing him or her, watching body language, and noting any revealing silences? Also, without personal contact, subtle clues such as the client's cultural background could easily go undetected. Other drawbacks: Some clients don't communicate well in writing, leading to misunderstanding. And those who tend to bend the truth may get away with it more easily when you can't see or hear them.

Electronic counseling may also make it easier for clients to end counseling abruptly, which can be frustrating for you and dangerous for a client who might be unstable. If she is far away—or worse, you don't know where the client lives—preventing a crisis may prove difficult or impossible.

Technical glitches add other complications. Phone and cable lines go down. Computers crash. E-mail messages get lost in cyberspace. Visual images vary in quality. Finally, being reimbursed remains an iffy proposition. "Many managed care plans don't even reimburse for telephone consults," noted Hammer.

These are only some of the risks of electronic counseling. So, before considering the use of this type of therapy, check with your attorney, professional association, licensing board and HPSO. And be sure to review the ACA's Code of Ethics for additional guidelines to ensure that you adequately protect yourself and your clients.[2]

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1. American Psychiatric Association. Frequently asked questions e-therapy. Psych.org/psych_pract/clin_issues/etherapyfaqs.cfm (Sept. 26, 2005).

2. American Counseling Association. 2005. ACA Code of Ethics, 6-8. www.counseling.org/PDFs/ACA_2005_Ethical_Code10405.pdf (Nov. 1, 2005).

In This Issue …

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Did you know...

… that you should call HPSO

immediately if you receive a letter from any state or federal administrative agency, or a licensing or regulatory authority, because your license or certification is protected by the policy offered through HPSO?

A significant risk that many healthcare professionals could face is the suspension or withdrawal of their license or certification. Without your license or certification, you lose your ability to work, which can be devastating. If you are summoned to appear before a licensing or disciplinary board regarding your professional activities or conduct arising out of a covered medical or non-medical incident, your policy will provide you with a means to secure experienced legal representation and reimbursement of out-of-pocket expenses. Employers rarely provide license protection; however, your policy will provide up to $10,000 per proceeding, for your legal defense coverage. Just be sure to contact us right away!

… that you should also call HPSO

immediately if you are deposed?

In almost all cases, there will be court proceedings prior to the actual malpractice trial. A deposition, which can be part of "the discovery phase," is a court sanctioned hearing in which all parties participate in a formal question and answer session to find out information relevant to the lawsuit. Whether you have been called to testify at a deposition or are named in a covered lawsuit as a defendant, CNA, the underwriter of the HPSO program, will ensure that you are prepared for the discovery phase of the suit by assigning a claim consultant and an attorney, when necessary, to represent you at the deposition.

It is important to be properly prepared even if you are deposed for a suit against your employer or a co-worker. Without proper guidance, you run the risk of incriminating yourself and being named in a lawsuit as well.

LESSONS FROM COURT

Patient alleges disclosure

The plaintiff, a city worker, received therapy through the city's wellness program. After ending his employment with the city, the plaintiff claimed that his therapist disclosed information about the therapy to the plaintiff's former co-workers. The plaintiff maintained that the therapist violated state law by disclosing that the plaintiff was in therapy, that he was capable of harming himself and others and that he was unstable. The plaintiff further alleged that the disclosures resulted in his emotional distress and an inability to trust healthcare professionals. The defendant denied violating the law or making disclosures. A defense verdict was returned.

Staff. (2004). Medical Malpractice Verdicts, Settlements & Experts, 20 (11), 44.

Advice from the expert:

Client confidentiality is at the heart of this case. To reduce your risk of liability, follow your employer's rules on protecting the confidentiality of client information. Generally, disclosures about a client can be made only to other healthcare professionals who need to know about the therapy in order to provide appropriate treatment. Unless there is an immediate threat to a third person and the client has the means to carry out that threat, the therapist cannot disclose any information about the client obtained during the course of a professional relationship to others. If there is a valid threat to another person, you must disclose, in good faith, client information to the third party and, in many cases, the police.

Be aware, too, that if you provide false information about a client that lowers his or her reputation in the community, you could be sued for defamation. You can also be sued for emotional distress, although the criteria for making a successful claim vary by state. Consult with an attorney in your state to determine what confidentiality issues you can expect if you disclose client information.

Gayle H. Sullivan, RN, JD
Fairfield, CT

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Marie Bracki, Psych D• Scott D. Hammer, JD • D. Kathleen Lewis, PT, JD • Paul Nelson, CPCU • Gayle H. Sullivan, RN, JD

EDITOR-IN-CHIEF
Michael J. Loughran
EXECUTIVE EDITOR
Dolores A. Hunsberger
SENIOR MANAGING EDITOR
Diane Widdop
MANAGING EDITOR
Alicia R. D'Onofrio
EDITOR
Marian Freedman

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Anne Pompeo
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Mary Asterita
PUBLISHER
HPSO
PUBLISHER'S REPRESENTATIVE
Alicia R. D'Onofrio

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LEGAL LOOKOUT

Moving into management: Responsibilities and risks

Moving into management is a great way to advance your career, but it's not without risk. If you decide to take the next step in your career, make sure you understand what new responsibilities this will entail. Review the job description and required qualifications for the management position. Determine whether your skills can support these new duties.

Also, make sure your training and education reflect the needs of the job. In-service training may be required, or you may choose to take managerial training courses on your own to fill in gaps in your background. Remember, performing tasks that are beyond your scope of practice or your job responsibilities can pose a liability risk.

If you will be supervising others, become familiar with the competencies and assigned duties of each member of your staff. To help protect everyone from liability, review their job descriptions and what procedures their licenses allow them to perform. Consider making necessary changes to protect you, the staff and the facility from a potential lawsuit.

Both you and your staff also should be familiar with the chain of command and where you fit into it. If problems occur or questions arise, you and those you supervise should know where to turn.

Finally, know your facility's policies and procedures and be aware that violating them can have consequences. Become familiar with employment and practice laws in your state, as well as your employer's policies. If you will have hiring and firing authority, for example, you'll have to understand how to properly maintain employee files and what you can and cannot say when interviewing potential staff or terminating a subordinate.

If you're asked to be an expert witness

The role of an expert witness is important: He or she helps jurors determine if a defendant maintained the standard of care or acted in the same way a reasonable and prudent healthcare professional with a similar background in similar circumstances would have acted. But before you agree to testify as an expert witness in a malpractice case, make sure you understand what is expected of you.

If you decide that you may want to offer your services, ask yourself these questions: Am I qualified? Do I feel comfortable with the attorney handling the case? Am I sure I have no conflicts of interest—such as having worked previously with the defendant—that would make me a less-than-ideal witness? Am I well versed in my specialty's standards of care?

If you answered "yes" to these questions, you may be well suited to be an expert witness. You will be asked to review copies of medical records and other documents relevant to the case, and provide an opinion about if and how a standard of care was met, as well as other related matters. If your opinion supports the attorney's position, you most likely will be asked to testify as an expert witness in court.

If you do serve as an expert witness, practice your testimony with the attorney before getting on the witness stand. Avoid looking too rehearsed, which could jeopardize your credibility. Answer questions objectively, honestly and succinctly. Do not volunteer information or provide testimony outside your area of expertise. Speak firmly and, whenever possible, try to use language that laypeople in the courtroom will understand and explain any medical terms. Above all, make sure your professional liability insurance includes a consulting services endorsement, which provides protection if your testimony results in a claim being brought against you. If you need to add this endorsement to your policy, call 1-800-982-9491.

HPSO COVERAGE CORNER

STUDENT ALERT! Keep Your Professional Liability Coverage Active After You Graduate

One of the most frequently asked questions HPSO receives is: Why do I need my own professional liability insurance if my employer already covers me?

You may already understand that your own policy offers coverage that will protect you against allegations of malpractice while you are working on your degree or certification, but you also want to make certain that you have sufficient protection in the event you are named in a lawsuit or need legal defense to respond to a complaint against you with the licensing board or ethics committee, even after you graduate.

While your employer may provide coverage for you, it may not cover you in all cases. You need to be clear about how your employer's coverage protects you. Often, an employer's policy is designed to protect its interests first. If you have your own policy, you will have the benefit of your own representation that is focused on your interests in the event of a lawsuit.

Some healthcare professionals avoid purchasing or continuing their own policy because they may have been told, "having your own insurance will make you a more likely target for a lawsuit." This couldn't be further from the truth. A person can sue you anytime, for any reason. If a patient or client perceives he or she has been injured and perceives that this injury is the result of your providing, or failing to provide, adequate professional services, that patient could sue. This doesn't mean that you have been negligent. It means that the patient or client perceives negligence. Also, no one can know whether you have your own policy, unless you tell someone. In fact, if you are involved in a lawsuit, this information typically won't be uncovered until the "discovery phase." At that point, you will already have been named in the suit.

By continuing your coverage as a professional, you can feel comfortable knowing that if something happens on or off the job, 24/7, you can rely on your own policy to protect you against allegations of professional malpractice.

Meeting the Needs of the

Barriers, compliance and more.

"Education is an essential aspect of caregiving for all elderly patients, but make sure you tailor the message to meet individual needs."

Throughout most of the 20th century, elderly Americans were the fastest growing segment of the population. As you care for these sometimes frail and medically needy individuals, you must pay special attention to their needs—and your own liability risks. Many of the youngest elderly (age 65 - 75) are healthy and hearty, not fully retired, and enjoying a busy and active "early" old age, though they may have chronic illnesses such as arthritis and diabetes.

Those in the intermediate group (75 - 85) are more likely to have several chronic illnesses and may need to depend on others for at least some of their care. Individuals in the eldest group (over 85) are more often frail and in poor health, and may no longer be able to live independently.

Despite their differences, most elderly patients have a common need for assistance in one or more of the following areas: accessing care, comprehending patient education materials, complying with complex medical regimens, receiving appropriate screening, following good health practices, and steering clear of the potential perils of polypharmacy.

Common barriers to care

Limited finances are a significant barrier to care for many elderly patients. According to a 1995 Medicare benefits survey, elderly Americans spent 19% of their income on out-of-pocket healthcare expenses. Additional barriers may include lack of transportation, especially since some elderly no longer drive or have access to public transportation. Many elderly patients don't know how to tap into the healthcare system or negotiate the complicated process of applying for benefits like the new Medicare Part D (Rx) program. Elderly patients facing such difficulties may skip appointments, cut back on medications, or go without expensive devices not covered by insurance, such as hearing aids or eyeglasses. Healthcare providers can play a crucial role in helping patients access the services they need.

Patient education is a must

Education is an essential aspect of caregiving for all elderly patients, but make sure you tailor the message to meet individual needs. Counselors assisting younger, generally healthy clients, for example, may need to offer information on planning for and adjusting to retirement or staying vigorous by adhering to appropriate diet and exercise routines.[1] Getting health messages across to someone older than 75 often presents special difficulties because this population generally knows less about staying healthy than younger, Internet-savvy individuals. In addition, language barriers, poor eyesight or hearing, and cognitive impairments may diminish understanding.

Surmount such limitations by asking the patient's caregiver to attend appointments so she can reinforce your message at home. Use foreign-language interpreters as needed, speak slowly, avoid professional jargon, and provide large-type educational materials. Be sensitive to cultural and generational differences.

Fostering compliance

Elderly patients often need to follow complex medical regimens in managing chronic conditions or are

Elderly–and Avoiding Risk

engaged in long recovery programs—from a stroke or broken hip—making compliance a significant concern.

A variety of tactics can ease these difficulties. Telephone reminders cut down on missed appointments, for instance; so does enlisting the cooperation of a family member or friend. PTs, for example, working with patients who aren't following exercise regimens might devise solutions that better meet their preferences: encouraging exercising during commercial breaks in TV programs, for example, or varying routines. Similarly, the healthcare team can collaborate to help patients manage complicated medication regimens, with pharmacists following drug utilization review or disease management protocols, tracking compliance with asthma or diabetes regimens and informing the prescriber.[2]

Screening—protection for you and your patient

Screening for conditions that are prevalent among the elderly is crucial to protect your patient from harm and to protect you from liability. Check vital signs before, midway and after a therapy session in frail patients and in those with heart disease or chronic obstructive pulmonary disease. Therapists who treat patients at home should check for hazards like throw rugs, wobbly banisters or slippery surfaces.

Because elderly patients typically take multiple medications, conduct a thorough drug review, with an eye toward adverse drug interactions and serious adverse effects. Find out, too, if your patient has had the immunizations recommended for the elderly, such as a yearly flu shot and the pneumococcal vaccine; if not, direct him to a primary care practitioner or ensure that the vaccines are given before the patient leaves the facility.

Counselors—indeed, all providers—"should be alert for signs of depression and suicidal ideation in elderly clients, the age group with the highest rate of completed suicide in the population," said Marie Bracki, public policy chair for the Association for Adult Development and Aging, a division of the American Counseling Association. The PROSPECT (Prevention of Suicide in Primary Care Elderly: Collaborative Trial) study, she noted, found that suicide rates were substantially lower in primary care practices that used nurses, social workers or master's-prepared psychologists to screen for and treat depression.

Every practitioner should screen for and report elder abuse, as well. In fact, most providers in almost every state have a mandate to do so. The standard for reporting is simply a reasonable suspicion that the individual has been abused; it is not necessary to be able to prove that the abuse occurred. The vast majority of states grant immunity from liability to clinicians who act on such a belief. But in a questionable situation, it may be wise to consult an attorney.

When screening for abuse, be on the lookout for physical signs, such as untreated pressure sores, urine burns and bruises or broken bones not likely to have been caused by falls. Counselors are especially likely to detect signs of emotional or financial abuse or neglect, which has the same reporting requirements as physical abuse.

Be alert to legal pitfalls

To work successfully with elderly patients, many of whom are lonely and emotionally needy, it is crucial to develop warm relationships. But this presents a danger—the temptation to become involved with the individual in ways that cross professional boundaries. This so-called dual relationship opens the door to accusations of harming or exploiting the patient, raising the prospect of a lawsuit or discipline by your state licensing board or professional organization. According to Paul Nelson, executive director of the American Counseling Association Insurance Trust, dual relationships are the number one issue in risk management. "There is a thin line between helpfulness and involvement in a personal relationship….too many practitioners give in to temptations or good intentions and find they have crossed over that thin line," he said.

As a healthcare professional, you understand that every elderly patient has unique needs. In trying to meet those needs, keeping patients safe must be your top priority, but avoiding legal risk should remain a concern as well.

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2. Monane M, Cataldi LA. Safe Prescribing: Interdisciplinary Solutions. *Geriatric Times 2000*. www.geriatrictimes.com/g000632.html. (Oct. 1, 2005).

To read about polypharmacy in the elderly, see the Web Flash in the newsletter section of **www.hpso.com**

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HPSO NEWS

Occurrence and claims-made: What are the differences?

In the world of professional liability insurance, there are two types of policies, occurrence and claims-made. It's important to understand the difference between the two coverages.

An occurrence policy, like the one currently offered by Healthcare Providers Service Organization (HPSO), covers you for any incident that occurs during the policy term, regardless of when the claim is filed. As long as the incident occurred during the term that the policy was active, regardless of when you were named in a lawsuit, you are covered.

A claims-made policy also provides coverage for an incident that occurs during an active policy period, but only if the claim is also filed during that active policy period. In other words, if you are named in a lawsuit, the lawsuit must be filed during the policy period when the incident occurred or the policy will not protect you.

What's key with a claims-made policy is that you run the risk of not being covered for a claim discovered after the policy has expired. Therefore, if you decide to terminate a claims-made policy, you will need to purchase tail coverage to continue to protect yourself. This will extend the time that a claim can be reported, but the incident still needs to occur while the policy was active, or you won't be covered.

Also, a claims-made policy can typically cost less than an occurrence policy for the first three to six years (the premium can increase up to 30% a year). It may seem that there is a big difference in price; however, by purchasing a claims-made policy and tail coverage, you can end up spending as much as or possibly a little more than by purchasing an occurrence policy.

The bottom line is, learn the details of your coverage so you are not caught unawares. You may be shocked how policies differ from one another.

find out more @ www.hpso.com

Let Us Know

To report a change of address or to tell us what's on your mind, call HPSO at (800) 982-9491 or write to us at HPSO Risk Advisor 159 E. County Line Road Hatboro, PA 19040-1218 e-mail us at service@hpso.com.

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Coping with Short-Staffing

Staffing shortages are becoming more common in all clinical specialties, making it increasingly likely that you'll be asked to take on more patients or clients than usual, or to assume the duties of an absent coworker. Either situation can hinder your ability to care for patients or clients properly, increasing your risk of a malpractice lawsuit. The key to protecting yourself is to know what to do when you feel overwhelmed.

Determining the best action to take depends on the circumstances. If the short-staffing results in mandatory overtime, evaluate whether you feel able to provide safe patient or client care. If not, you can refuse the assignment. Notify your supervisor and draft a memo documenting the specific reasons. Keep a copy of the memo for your records.

During a department shortage, you may also be reassigned without warning and/or given duties you do not normally perform. If, for example, you are an occupational therapist assistant and are asked to support an OT you don't typically work with, you may want to prepare yourself for the assignment by questioning the OT about any special patient needs. Don't hesitate to ask for help, or even direct supervision, if you are asked to perform a task with which you have limited experience.

Whatever the circumstances, your primary concern must be patient or client safety. If you feel you cannot provide adequate care, notify your supervisor at once. If nothing is done to remedy the situation, document the specific problems in an internal memo—not in the medical record. Include the date and time, number of staff and patients or clients on the unit, the circumstances surrounding each patient involved, whom you notified and any action that was taken. Keep a copy of the memo for your records.

If short-staffing is a chronic problem at your facility and you are considering finding a better-staffed position, be sure to follow your facility's procedures for resigning. No matter how frustrated you feel, never leave in the middle of a shift, which could result in a charge of patient abandonment.

It can be exasperating when you're faced with a staff shortage. Sometimes it's necessary to elevate the issue so management takes notice. Taking action can be intimidating, but keeping quiet belies your position as a patient advocate and can leave you open to a malpractice charge.

Monitoring the Client on Psychotropic Meds

When an individual who requires psychotropic medications comes to you for counseling, you're likely to see the client more often and more regularly than the prescriber. Because of this frequent contact, you are in an ideal position to help ensure that the treatment—a combination of medication and counseling—is successful.

During your initial assessment, determine what medications your client is taking. If an antidepressant has been prescribed, you need to be aware of the indications for the drug, as well as any side effects and complications. This is particularly important if the client is an adolescent because some psychotropic drugs have been linked with increased risk of suicidal thinking and behavior in this age group. If possible, establish a relationship with the prescribing practitioner—typically, a psychiatrist—to ensure that you can spot signs that a drug is not working or is having a detrimental effect. Also, make sure you can distinguish between the symptoms of the client's disorder and the effects of the drug.

It's important, too, to include observations of the client's behavior or demeanor in your documentation. If you notice that a client has developed a facial tick, for example—a potential side effect of many antipsychotics—document it in the client's record. Ask the client to notify the psychiatrist and explain that you will do so as well. Document these actions, as well as every conversation you have with the psychiatrist, in the client's chart, including the time, date and details of both sides of the discussion. Always keep a complete record of all written communications with the psychiatrist or other provider, whether by e-mail, letter or fax.

Though it is primarily the responsibility of the prescriber to determine which medication is needed for the client and to monitor its effectiveness, you can be a helpful resource. Looking out for potential problems with your client's medication, as well as documenting and immediately reporting difficulties to the prescriber, is the best way to reduce your risk of liability and protect your client's well-being.

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Q&As
Addressing your concerns about Professional Liability

Q. **Because I am a mental health counselor, friends sometimes ask for my advice about their problems or their conditions and treatments. What can I tell them without putting myself in legal jeopardy?– K.S., Maine**

A. When you provide advice to your friends about their mental health, you establish a professional relationship. Once this relationship is created, your friends become your clients and you have a duty to provide the same standard of care to them as you would to any other client. This may require taking their history and doing a thorough assessment.

If your friends simply want general information about a behavioral disorder, your legal risks may not be as high. Describing general signs of depression would not necessarily establish a professional relationship, for example, but helping your friend identify if she is depressed would.

Your best bet is to avoid these conversations by suggesting to your friends that they discuss their concerns with their PCP and get a referral.

Q. **Does your insurance program provide coverage for allegations of acts of sexual intimacy, sexual molestation and sexual abuse?– E.J., New Jersey**

A. No coverage is provided for damages sought as a result of sexual misconduct. If you are the subject of a civil suit alleging sexual misconduct occurring in connection with your professional services, you may be provided with defense coverage. However, defense coverage is available only in situations where sexual misconduct has not been fully determined to have actually occurred through legal or regulatory proceedings or legal admission. Criminal proceedings are not covered under your insurance program.

The hypothetical loss scenario for which this response is provided is for illustrative purposes only. Actual claims will be evaluated for coverage based on the specific facts presented, the policy terms, conditions and exclusions. If coverage is afforded, the amounts payable under the policies are subject to the applicable deductibles and limits of insurance. Any defense provided under the policy will not waive any of the rights of CNA under the policy, which are specifically reserved.