Counselor Spotlight: Telebehavioral Health

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published our ***Counselor Professional Liability Exposure Claim Report: 3rd Edition***. TThe report includes statistical data and case scenarios from CNA claim files, along with information on where to access risk management resources designed to help counselors and other behavioral health professionals reduce their malpractice exposures and improve client 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.

HHS Telehealth Policy Updates

Telehealth is an effective tool that expands access to behavioral health services. To support access to telebehavioral health care, telehealth policies allow:

- FQHCs and RHCs can permanently serve as a Medicare distant site provider for behavioral/mental telehealth services.
- Medicare patients can permanently receive telehealth services for behavioral/mental healthcare in their home.
- There are no geographic restrictions for originating site for Medicare behavioral/mental telehealth services on a permanent basis.
- Behavioral/mental telehealth services in Medicare can permanently be delivered using audio-only communication platforms.
- Marriage and family therapists and mental health counselors can permanently serve as Medicare distant site providers.
- An in-person visit within six months of an initial Medicare behavioral/mental telehealth service, and annually thereafter, is not required through December 31, 2027.

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) 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.

Notwithstanding the benefits of telebehavioral health, there are professional liability risk exposures specific to this mode of practice. From a client perspective, there may be challenges such as speech/hearing impairments and lack of available technology. Risk exposures from a counselor's perspective include managing emergencies, privacy breaches, technological challenges, informed consent, and adherence to state licensing laws, among others.

In today's complex healthcare environment, it can be difficult for a counselor to keep abreast of the updated requirements affecting their ability to practice using telebehavioral health. Even if the counselor is providing appropriate therapy to their client, if they are not following current licensing laws or legal requirements for telebehavioral health, (e.g.,) they are placing their professional license and/or their ability to practice at risk. To verify they are they are following current licensing laws and legal requirements, counselors can review the websites of Counseling Compact and Health and Human Services (HHS) Telehealth Policy Updates.

A notable change from the prior *Counselor Professional Liability Exposure Claim Report* has been an increase in the number of claims that occurred outside of the "traditional" office setting using virtual technology. Claims in which counseling was rendered via telebehavioral health increased from 0.0 percent in the 2019 (2013-2017) dataset to 3.9 percent in the 2024 dataset (2018-2023). Furthermore, claims involving telebehavioral health demonstrated the potential for high severity loss exposures in the 2024 dataset with an average total incurred of $317,516. Going forward, it is anticipated that a continued increase in exposures in this area will be realized.

Note on Legal Restrictions

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.

Since telebehavioral health encounters are not face-to-face, boundaries may become blurred, and there may be a propensity to become complacent regarding standards, laws and regulations. Claims involving the telebehavioral health location in the 2024 dataset were related to non-sexual boundary violations, sexual misconduct, and state licensing matters. Closed claims included scenarios in which counselors circumvented state licensing requirements applicable to telebehavioral health by presenting themselves as life coaches or case managers, for which the state requirements may be less stringent, as in the following case scenario:

- A client who was receiving counseling for a substance use disorder, depression and anxiety relocated to a state in which the counselor was not licensed. The counselor offered to provide telebehavioral health services, under the guise of a life coach, in order to circumvent the interstate licensing laws. During the counseling period, the counselor sent numerous text and email messages to the client, as well as posted photographs on social media depicting inappropriate sexual content after "friending" the client. The counselor also billed the client for personal telephone calls, texts and social media chats, unrelated to the client's behavioral health conditions. The client filed a lawsuit asserting that the sexual misconduct and boundary violations exacerbated the underlying behavioral health conditions for which counseling was sought. It was determined during litigation that the counselor violated state licensing laws, as well as the ACA Code of Ethics, section A.5.b. This case was settled in mediation resulting in a total incurred of more than $490,000.

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 applicable laws and ethical guidelines governing client interactions, and practice in accordance with the standard of care, the limits of one's license/certification, and applicable 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 telebehavioral health/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 suicidal ideation?
- ***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.
- ***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 service 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.*** Conduct and document informed consent for transcribed sessions each time a session is being recorded. Keep in mind that even if you are not recording a session, the client might be doing so unbeknownst to the counselor.

Spotlights on Risk Management

To supplement the ***Counselor Professional Liability Exposure Claim Report: 3rd Edition***, CNA and HPSO will publish seven Spotlight documents, which will highlight specific topics and provide greater detail on key risk management strategies and client safety practices.

The following Counselor Spotlights include resources such as case studies, risk control considerations, and self-assessment checklists designed to help counselors evaluate and mitigate risk exposures associated with current practice:

- Defending Your License
- Non-Sexual Boundaries
- Telebehavioral Health
- Liability Risks for Business Owners and Supervisors
- Managing Clients in Crisis
- Well-being and Provider Mental Health
- Documentation

References and 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:

- American Counseling Association. (2014). ACA Code of Ethics. https://www.counseling.org/resources/ethics
- American Counseling Association. Telehealth & Emerging Technology. https://www.counseling.org/resources/topics/professional-counseling/technology-related/telehealth
- American Psychiatric Association. App Advisor Initiative. https://www.psychiatry.org/psychiatrists/practice/mental-health-apps
- Center for Connected Health Policy. State Telehealth Laws https://www.cchpca.org/compare/
- CNA. (2021). Telemedicine: A Brief Guide to the Emerging Risks of Remote Care. Vantage Point®. https://www.cna.com/sites/default/files/assets/748991d3-6b02-4352-a781-7e2862cf1331/CNA-Vantage-Point-Telemedicine-A-Brief-Guide-to-the-Emerging-Risks-of-Remote-Care.pdf
- CNA. (2024). Telemedicine Update: Coordinating Remote and In-person Care. Vantage Point®. https://www.cna.com/sites/default/files/assets/54049bb7-fcd6-4615-842c-2ef19825308c/rc-cna-vantage-point-telemedicine-update-coordinating-remote-person-care.pdf
- Gilmore, A. K., & Ward-Ciesielski, E. F. (2017). Perceived risks and use of psychotherapy via telemedicine for patients at risk for suicide. *J Telemed Telecare. The Joint Commission Journal on Quality and Patient Safety.* 2023; 000:1-10. Retrieved from: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5940577/
- Health Resources & Services Administration. (2026). Telehealth policy updates | Telehealth.HHS.gov
- National Board for Certified Counselors. (2023).
- Rhodes, L. R. (2023). The impact of telebehavioral health on clinical practice. *Counseling Today.* https://www.counseling.org/publications/counseling-today-magazine/article-archive/article/legacy/the-impact-of-telebehavioral-health-on-clinical-practice
- Telehealth.org. Behavioral Health IT Vendor Directory https://directory.telehealth.org/
- U.S. Department of Health and Human Services. HIPAA for Professionals. https://www.hhs.gov/hipaa/for-professionals/index.html
- U.S. Food & Drug Administration. (2022). Device Software Functions Including Mobile Medical Applications https://www.fda.gov/medical-devices/digital-health-center-excellence/device-software-functions-including-mobile-medical-applications

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 Professional Liability Exposure Claim Report: 3rd Edition*, visit Healthcare Providers Service Organization or CNA Healthcare.

Self-Assessment Topic **Telebehavioral health/Distance Counseling**	**Yes/No**	**Action(s) I need to take to reduce risks**
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: • 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 Clinical Records	Yes/No	Action(s) I need to take to reduce risks
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.		
I sequester client clinical records any time I have to make and release copies for legal reasons, 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 information was excerpted from HPSO and CNA's full report, *Counselor Liability Claim Report: 3rd Edition*. www.hpso.com/counselorclaimreport

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