



Law & Ethics of Transitioning to Telehealth (and Back): Washington Telemedicine Training

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Disclaimer

Personal views, not legal guidance...



Outline

- Sources of Law and Ethics
- Telehealth vs Telemedicine
- Video Conferencing Platforms
- Liability and Tech Across Jurisdictions
- Phone, Email, and Text Communications
- Back to in-person services
- Questions



Context

“The patient should come to the therapist’s office for treatment. The _____ or other technological devices (e.g., _____, _____) should not be allowed to create barriers between the therapist and the patient.”



Context

“The patient should come to the therapist’s office for treatment. The **telephone** or other technological devices (e.g., **answering machines, beepers**) should not be allowed to create barriers between the therapist and the patient.”

*Simon, R. I. (1992). Treatment boundary violations: Clinical, ethical, and legal considerations. *Bulletin of the American Academy of Psychiatry and Law*. 20(3), 269-288.



Sources of Law & Ethics Standards



Sources of Law & Ethics

1. Federal

2. State

- RCW (Revised Code of Washington)
- WAC (Washington Administrative Code)
- Caselaw
- Regulatory Opinions

3. Professional Standards

- Ethics Codes
- Common Practice
- Workplace Policies



Sources of Law & Ethics

Ethics Codes:

- AMHCA Code of Ethics (2020)
- NASW Code of Ethics (2017)
- NBCC Code of Ethics (2016)
- AAMFT Code of Ethics (2015)
 - AAMFT Best Practices in the Online Practice of Couple & Family Therapy (2017)
- ACA Code of Ethics (2014)
- APA Ethical Principles of Psychologists and Code of Conduct (2010; 2016)



Poll #1

Washington law specifically identifies which of the following?

- A. The technology we are allowed to use in a clinical setting
- B. The technology we are prohibited from using in a clinical setting
- C. Neither of these
- D. Both of these



Poll #1

Washington law specifically identifies which of the following?

- A. The technology we are allowed to use in a clinical setting
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Sources of Law & Ethics

General Standard for Clinical use of Tech:

For any technology we employ in our practice, we must have current and adequate knowledge, skills, training, and technical understanding to use it competently, safely, and effectively.

AMHCA I.B.6; NASW 1.04 (d); NBCC 22; ACA C.2.b.;
ACA H.1.a.; AAMFT 6.6; AAMFT Online Best Practice;



What is Telehealth?



Telehealth

Working definition of Telehealth:

Any therapeutic intervention provided by a mental health clinician, to a client who is geographically remote from the clinician, and that is facilitated by the use of technology.



Telehealth

Working definition of Telehealth:

Any therapeutic intervention provided by a mental health clinician, to a client who is geographically remote from the clinician, and that is facilitated by the use of technology.

"telemedicine" for insurance purposes does not include the use of audio-only telephone, facsimile, or email. But some of same standards still apply.

RCW 74.09.325



Telehealth

No specific WA laws or regulations regarding
Telehealth for behavioral health professionals...



Telehealth

No specific WA laws or regulations regarding Telehealth for behavioral health professionals

- We must meet all the WA requirements of in-person counseling when we work with clients using technology.
- Ethics codes provide us with the standard of care



Telehealth

If using Telehealth, must be able to meet all existing standards of care in practice:

“Psychologists using telepsychology will be held to the same standard of care as psychologists providing services in-person, including the requirement to meet technical, clinical, confidentiality, and ethical standards otherwise required by law.”

WA Examining Board of Psychology, 2016

<https://www.doh.wa.gov/Portals/1/Documents/2300/2016/TelepsychologyGuidelines.pdf>



Telehealth

There is no legal requirement in WA to have a specific disclosure/consent for telehealth.

As with any clinical intervention or tool, we do need to provide clients with sufficient information to support informed consent.



Telehealth

Should have local resources available:

- When telehealth is ineffective
- In case of emergency
- In case of technological failure or inaccessibility.

ACA H.4.d; AMHCA I.6.d.ii



Telehealth

Informed consent should include

- Anticipated response times;
- the benefits and risks of telehealth;
- the clinician's and the client's responsibilities for minimizing the risks;
- the limits of confidentiality inherent to using technology
- written policies concerning the use of technology in the counseling relationship

AMHCA 1.6.c; NASW 1.03(f); ACA H.2.c; AAMFT 6.2



Training

Knowledge, Skills & Training

If offering telehealth, must have sufficient knowledge and skills regarding current technology and ethical & legal considerations.

This can be developed through training, experience, and/or supervision.

AMHCA I.A.b.6; NASW 1.04(d); ACA H.1.a; AAMFT 6.6



Training

WA Telemedicine Training

Beginning January 1, 2021, a health care professional who provides clinical services through telemedicine ***must*** complete a telemedicine training.

The telemedicine collaborative shall make a telemedicine training available on its web site for use by health care professionals who use telemedicine technology.

RCW 43.70.495



Training

WA Telemedicine Collaborative

<https://www.wsha.org/policy-advocacy/issues/telemedicine/washington-state-telemedicine-collaborative/>



Training

WA Telemedicine Training

The training:

- (a) Must include information on current state and federal law, liability, informed consent, and other criteria established by the collaborative for the advancement of telemedicine, in collaboration with the department and the Washington state medical quality assurance commission;
- (b) Must include a question and answer methodology to demonstrate accrual of knowledge; and
- (c) May be made available in electronic format and completed over the internet.



Video Conferencing Platforms



Telehealth

Technology

Choices of audio, video, and other technology must:

- optimize quality and security of services;
- adhere to standards of best practices;
- be suitably advanced and current to best serve client needs;
- reasonably protect client confidentially;
- account for client cultural, environmental, economic, mental or physical ability, linguistic issues.



Telehealth

What about Skype and FaceTime?



Telehealth

What about Skype and FaceTime?

It's all about HIPAA compliance.

A BAA is how you know if a video platform is HIPAA compliant!



Telehealth

US DHHS HIPAA Enforcement Policy

“Effective immediately, the HHS Office for Civil Rights (OCR) will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide public health emergency. “

March 17th, 2020



Telehealth

US DHHS HIPAA Enforcement Policy

Acceptable communication technologies include:

- Apple FaceTime,
- Facebook Messenger video chat,
- Google Hangouts video, or
- Skype

We should notify clients of the potential privacy risks of these third-party applications, and we should enable all available encryption and privacy modes.



Telehealth

US DHHS HIPAA Enforcement Policy

“We are empowering medical providers to serve patients wherever they are during this national public health emergency. We are especially concerned about reaching those most at risk, including older persons and persons with disabilities.”

– Roger Severino, OCR Director.



Telehealth

Still in effect (for now)

<https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>



Liability and Services Across Jurisdictions



Poll #2

When conducting telehealth, where is the healthcare considered to occur?

- A. The client's state of residency
- B. The clinician's state of licensure
- C. The state of the client's physical location
- D. The state of the clinician's physical location
- E. Both C and D



Poll #2

When conducting telehealth, where is the healthcare considered to occur?

- A. The client's state of residency
- B. The clinician's state of licensure
- C. The state of the client's physical location
- D. The state of the clinician's physical location
- E. Both C and D***



Telehealth

Licensure

Must document and comply with the laws and regulations of ***both*** the ***counselor's practicing location*** and the ***client's physical location***.

Must ensure that clients are aware of legal rights and limitations governing the practice of counseling across state lines or international boundaries.

AMHCA I.A.6; NASW 1.04(e); AAMFT 6.5; ACA H.1.b



Telehealth

Client's State

No state law or policy specifies counseling occurs *only* in Counselor's state.

Many states affirmatively require state licensure for telehealth w/ client in their state:

E.g. CA, OR, MA, NY, & OH



Telehealth

Washington Policy

“Psychologists utilizing telepsychology on patients-clients in Washington State must be licensed to practice psychology in Washington State or have a temporary permit to practice psychology in Washington State. ***Washington State licensed psychologists are encouraged to be familiar with and comply with relevant laws and regulations when providing telepsychology services to patients-clients across state and international borders.***”

<https://www.doh.wa.gov/Portals/1/Documents/2300/2016/TelepsychologyGuidelines.pdf>



Telehealth

Breaking News...

Georgia interstate compact allowing counselors, SWs, & MFTs licensed and residing in another compact member state to practice in all compact states without the need for multiple licenses

<https://www.legis.ga.gov/api/legislation/document/20212022/198243>

Georgia HB395 (2021)



Phone, Email & Text Communications



Poll #3

Does HIPAA require you to have a BAA with your phone service provider?

A. Yes

B. No

C. Maybe



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A. Yes

B. No

C. Maybe



Phone

Traditional Phone vs. VOIP

Traditional phone services (Verizon, AT&T, etc) are ***not*** classified under HIPAA as electronic transmissions.

A traditional phone call or fax may contain PHI (and be subject to the HIPAA Privacy Rule), but it is not considered “a transmission on electronic media,” so it is not subject to the HIPAA Security Rule.

HIPAA Security rule is the source of BAA requirements.



Phone

Traditional Phone vs. VOIP

VoIP phone services are classified under HIPAA as electronic transmissions under the HIPAA Security Rule and require:

- inclusion in our periodic HIPAA risk analysis;
- a Business Associate Agreement with the VoIP service provider.



Poll #4

HIPAA requires that email communications with clients be:

- A. Encrypted
- B. Avoided
- C. Neither



Poll #4

HIPAA requires that email communications with clients be:

- A. Encrypted
- B. Avoided
- C. Neither**



Email & Text

LMFT communicated with minor client's legally separated parents via email in which therapeutic issues were discussed.

Some emails were copied to LMFT and both parents, other emails were just between LMFT and one parent.

What do you think?



Email & Text

DoH determined this to be unprofessional conduct based on the standard of care (not on WA law) and placed the following limitation on LMFT's use of email or text:

“[LMFT] will not use email or text messaging to communicate in a therapeutic context with clients or any person related to clients. Use of email or text messaging is limited by agreement to scheduling or cancelling appointments.”



Email & Text

Does HIPAA allow you to communicate with clients via email and text?



Email & Text

Does HIPAA allow you to communicate with clients via email and text?

Health care providers may communicate electronically with their clients/patients (e.g., e-mail and text), provided they ***apply reasonable safeguards*** when doing so.

45 C.F.R. § 164.530(c)



Email & Text

Health care providers may communicate electronically with their clients/patients (e.g., e-mail and text), provided they apply reasonable safeguards when doing so.

What would be some *Reasonable Safeguards*?



Email & Text

Clients/patients have the ***right*** under HIPAA ***to request communication “by alternative means*** or at alternative locations”

For example, a health care provider should accommodate an individual’s request to receive appointment reminders via e-mail rather than phone call.



Email & Text

“Patients may initiate communications with a provider using e-mail. If this situation occurs, ***the health care provider can assume*** (unless the patient has explicitly stated otherwise) that ***e-mail communications are acceptable*** to the individual.”

“If the provider feels the patient may not be aware of the possible risks of using unencrypted e-mail, or has concerns about potential liability, ***the provider can alert the patient of those risks, and let the patient decide whether to continue e-mail communications.***”



Email & Text

We should avoid personal communications with clients using technology (such as social networking sites, online chat, e-mail, text messages, telephone, and video).

NASW 1.06(e)



Email & Text

We need to take reasonable steps to protect the confidentiality of electronic communications, including using encryption, firewalls, and passwords as appropriate.

NBCC 54; NASW 1.07(m)



Email & Text

We must capture, and maintain in the clinical record, the content of electronic communications (including email and text) with clients and supervisees.

AMHCA 6.C.i; NBCC 54



Back to In-Person Services



Poll #5

What types of clinical services are we currently legally allowed to provide to clients?

- A. In-person services only
- B. Telehealth services only
- C. Both in-person and telehealth services



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In-Person Standards

Essential Businesses (March 23rd 2020)

- Behavioral health workers (including mental and substance use disorder) responsible for coordination, outreach, engagement, and treatment to individuals in need of mental health and/or substance use disorder services.
- Professional services, such as legal or accounting and tax preparation services, when necessary to assist in compliance with legally mandated activities and critical sector services.

<https://coronavirus.wa.gov/whats-open-and-closed/essential-business>



In-Person Standards

CDC Essential Worker Guidelines (April 8th 2020)

- ***Pre-Screen:*** Take temperature and assess symptoms prior to starting work.
- ***Regular Monitoring:*** Even with no temperature or symptoms, continue to self-monitor.
- ***Wear a Mask:*** Wear a face mask at all times while in the workplace for 14 days after last exposure.
- ***Social Distance:*** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- ***Disinfect and Clean work spaces:*** Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

<https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>



In-Person Standards

WA DoH 20-03 Face Coverings (June 24, 2020)

Every person in Washington State must wear a face covering that covers their nose and mouth when in any indoor or outdoor public setting...

In healthcare settings, including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician's or dentist's office, veterinary clinic, or blood bank

https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf (in effect until rescinded or modified)



In-Person Standards

WA DoH 20-03 Face Coverings (June 24, 2020)

The following individuals are exempt from the requirement to wear a face covering:



In-Person Standards

WA DoH 20-03 Face Coverings (June 24, 2020)

Children younger than five years old;

Children who are two, three, or four years old, with the assistance and close supervision of an adult, are strongly recommended to wear a face covering at all times in settings where it is likely that a distance of at least six feet cannot be maintained.



In-Person Standards

WA DoH 20-03 Face Coverings (June 24, 2020)

Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering.

This includes, but is not limited to, persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance.



In-Person Standards

DoH guidance on safe behaviors post-vaccine

If someone has been fully vaccinated, they can:

- Gather indoors with fully vaccinated people in private residences without wearing a mask and,
- Gather indoors with unvaccinated people from one other household in private residences (for example, visiting with relatives who all live together) without masks, unless any of those people or anyone they live with has an increased risk for severe illness from COVID-19.

<https://www.doh.wa.gov/Newsroom/Articles/ID/2678/Department-of-Health-adopting-CDC-guidance-on-safe-behaviors-post-vaccine>



In-Person Standards

DoH guidance on safe behaviors post-vaccine

Vaccinated individuals should continue to wear masks when they're in public, avoid crowds and take other precautions when gathering with unvaccinated people who are at high risk of serious illness from COVID-19.



Questions?