

Oregon Counseling Association
A Legal Update
Mental Health Practice in Oregon

November 2-4, 2017

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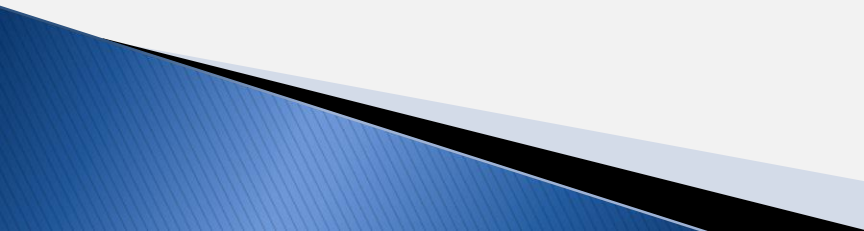
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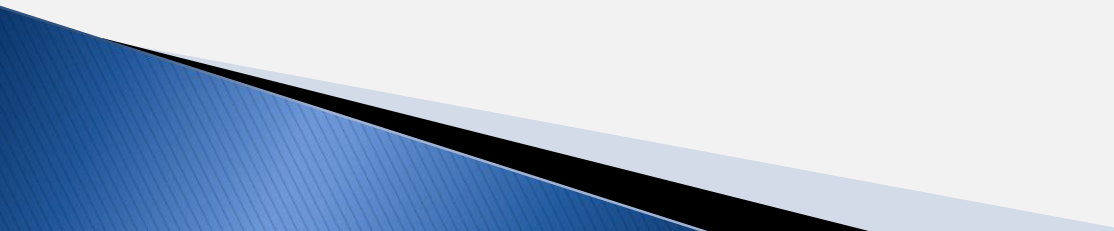
PAUL COONEY is a healthcare attorney who has been in practice for 25 years. Mr. Cooney is a Partner at Cooney, Cooney and Madigan, LLC where he specializes in healthcare litigation and represents a wide variety of healthcare professionals in all aspects of their practice. Mr. Cooney is General Counsel for the Oregon Counseling Association and the Oregon Psychological Association. He represents mental health professionals in malpractice cases, licensing and discipline matters and general business matters. He is licensed to practice in both Oregon and Washington and is a frequent speaker on legal issues and risk management

ACA Code of Ethics

- ▶ When counselors are faced with ethical dilemmas that are difficult to resolve they are expected to engage in a carefully considered ethical decision-making process, consulting available resources as needed. Counselors acknowledge that resolving ethical issues is a process; ethical reasoning includes consideration of professional values, professional ethical principles, and ethical standards. Counselors' actions should be consistent with the spirit as well as the letter of these ethical standards. No specific ethical decision-making model is always most effective, so counselors are expected to use a credible model of decision making that can bear public scrutiny of its application. Through a chosen ethical decision-making process and evaluation of the context of the situation, counselors work collaboratively with clients to make decisions that promote clients' growth and development
- 

How to Avoid Board Complaints/lawsuits

CHARTING IS YOUR #1 RISK MANAGEMENT TOOL

- **Juries tend to believe what is written in the chart.**
 - **Licensing Boards want to see complete chart notes.**
 - **Continuity of Care requires a complete chart.**
 - **Insurance Audits**
- 


**SOMEONE
MAY READ MY
NOTES TODAY**

IDENTIFY YOUR CLIENT

This is where it all starts

- **Professional Counselors/Marriage and Family**


OAR 833-100-0051 (5) Whenever a licensee provides services to groups of clients such as couples, families or therapy groups, special care must be taken related to issues of confidentiality. In group therapy, confidentiality issues are to be discussed in the beginning of the group. The parameters of confidentiality within marriage and family therapy are to be discussed early in the counseling process and a clear understanding achieved with all involved.



IDENTIFY YOUR CLIENT

- **ACA Code of Ethics A.8. Multiple Clients**

When a counselor agrees to provide counseling services to two or more persons who have a relationship, the counselor clarifies at the outset which person or persons are clients and the nature of the relationships the counselor will have with each involved person. If it becomes apparent that the counselor may be called upon to perform potentially conflicting roles, the counselor will clarify, adjust, or withdraw from roles appropriately.

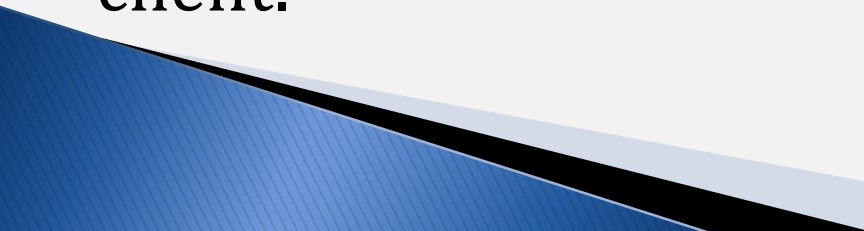


IDENTIFY YOUR CLIENT

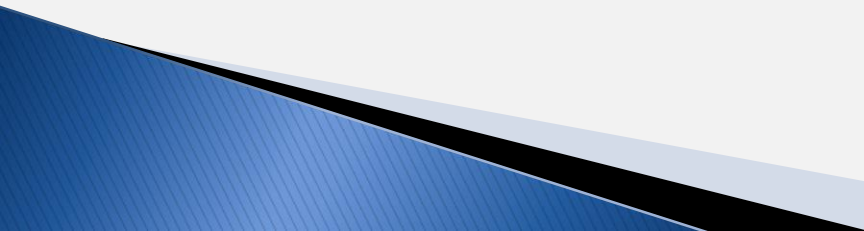
ACA Code of Ethics

B.4.b. Couples and Family Counseling

In couples and family counseling, counselors clearly define who is considered “the client” and discuss expectations and limitations of confidentiality. Counselors seek agreement and document in writing such agreement among all involved parties regarding the confidentiality of information. In the absence of an agreement to the contrary, the couple or family is considered to be the client.



THINGS THAT SHOULD BE CHARTED

- Critical Thinking – Differential Diagnosis
 - Peer Consultations
 - Threatening remarks by the patient
 - Referrals – Even if the client refuses
 - Termination
 - Suicidal Risk Assessment
- 

TERMINATION

OAR 833-100-0021 Responsibility

- (17) A licensee terminates a client relationship when it is reasonably clear that the treatment no longer serves the client's needs or interests. Whenever possible prior to termination, a licensee provides pre-termination counseling and recommendations and alternatives for the client.
- Consider using a termination letter. Give referrals even if not requested
- Consider having termination language in Informed Consent (30,60,90 days)
- Post-termination contact:
 - Request for Records
 - Request for crisis treatment

TERMINATION

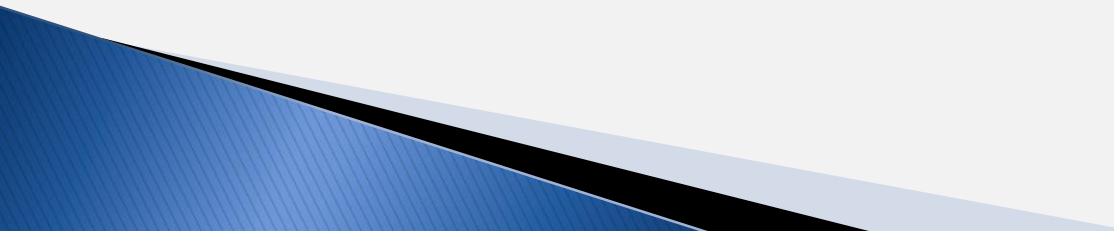
ACA Code of Ethics

A.11.a. Competence Within Termination and Referral

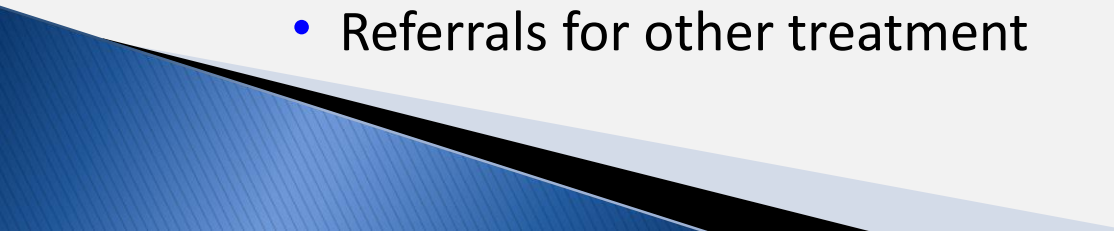
If counselors lack the competence to be of professional assistance to clients, they avoid entering or continuing counseling relationships. Counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives. If clients decline the suggested referrals, counselors discontinue the relationship.

A.11.c. Appropriate Termination

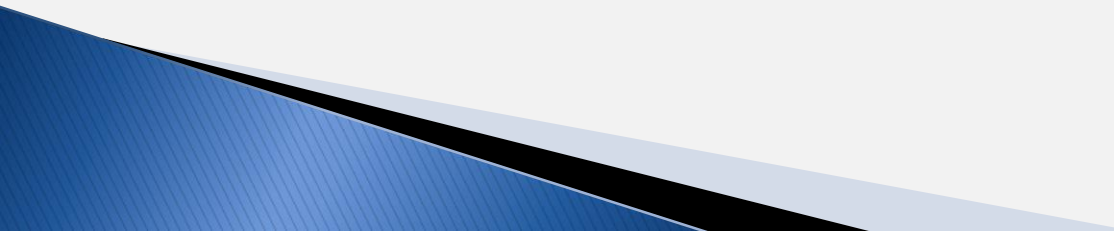
Counselors terminate a counseling relationship when it becomes reasonably apparent that the client no longer needs assistance, is not likely to benefit, or is being harmed by continued counseling. Counselors may terminate counseling when in jeopardy of harm by the client or by another person with whom the client has a relationship, or when clients do not pay fees as agreed upon. Counselors provide pre-termination counseling and recommend other service providers when necessary.



PREPARE FOR INSURANCE AUDITS

- Check with Each Insurer – Ask for Audit Criteria
 - Treatment plan – initial and periodic
 - Start and stop times – in the chart, not schedule book
 - LEGIBLE Content of the therapy session, such as therapeutic interventions used and major themes discussed
 - Number of participants and relationship of the participants to the patient
 - Mental Status Exam, Diagnosis, Progress
 - Referrals for other treatment
- 

ACCESS TO RECORDS

- Patient request
 - Signed Authorization
 - Subpoena or Court Order
 - Health Oversight Agency
- 

ACCESS TO RECORDS – Individual

HIPAA – Individuals have the right to access their records unless it would be physically harmful

ORS 192.553

It is the Policy of the State of Oregon that an individual has:

- The right to access & review protected health information of the individual
- **LPC/LMFT – OAR 833-100-0051**
 - A licensee provides clients reasonable access to records. Parents shall have access to their children's records unless otherwise ordered by the court.

ACCESS TO RECORDS

ACA Code of Ethics

The fundamental principles of professional ethical behavior are:

- **autonomy**, or fostering the right to control the direction of one's life;

ACA Code of Ethics B.6.e. Client Access

Counselors provide reasonable access to records and copies of records when requested by competent clients. Counselors limit the access of clients to their records, or portions of their records, only when there is compelling evidence that such access would cause harm to the client. Counselors document the request of clients and the rationale for withholding some or all of the records in the files of clients. In situations involving multiple clients, counselors provide individual clients with only those parts of records that relate directly to them and do not include confidential information related to any other client (see informed consent)


HIPAA Denial of Access

30 Days written denial, give reason for denial

Reviewable Grounds:

- Reasonably likely to endanger the life or physical safety of the individual or another person. Does **not** extend to concerns about psychological or emotional harm, or
- Reasonably likely to cause substantial harm to a person.
- Must Give review process and complaint process

ACCESS TO RECORDS DECEASED INDIVIDUALS (ORS 192.573)

- An appointed personal Representative
 - Guardian
 - The individual's spouse
 - Adult children
 - Either parent
 - Adult siblings; or
 - Any adult relative or adult friend
- 

ACCESS TO RECORDS SUBPOENAS

HERE IS THE FREE ANSWER
TO YOUR SUBPOENA QUESTIONS

FAX 503-607-2702

- **MYTHS**

- Only Judges can sign Subpoenas!
- I have patients scheduled so I don't have to appear.
- \$30 ???

WHEN CAN YOU DISCLOSE WITHOUT CLIENT AUTHORIZATION?

HIPAA – Treatment, Payment, Healthcare Operations

OAR 833-100-0051 – Where allowed by law

ORS 192.567 – Family, when authorization is not practical

ORS 192.558 – To another provider for treatment purposes

Urgent situations – to avoid harm to patient or others



HIPAA CHARGES FOR COPIES OF HEALTHCARE RECORDS

Oregon Maximum (ORS 192.521)

- \$30 for pages 1 – 10
 - 50¢ per pages 11 – 50
 - 25¢ per pages 51 +
 - Actual postage
-
- Summary charge allowed only if summary is requested by the Patient


Record Retention

833-075-0070 Client Records – 7 years from Date of Last treatment

• A licensed professional counselor and licensed marriage family therapist or registered intern must:


- Maintain client records for each client;
 - Ensure that client records are legible;
 - Keep records in a secure, safe, and retrievable condition; and
 - Notify the Board if client records have been destroyed or lost.
- At a minimum, client records should be recorded concurrently with the services provided and must include:
- A formal or informal assessment of the client;
 - Counseling goals or objectives; and
 - Progress notes of therapy or counseling sessions.
- Licensees and interns must retain client records for at least seven years from the date of the last session with the client.
- Licensees and interns must disclose to the Board and its agents any client records that the Board and its agents consider germane to a disciplinary proceeding.
- Licensees and interns do not withhold records under their control that are requested by the client solely because payment has not been received for services.

RISK MANAGEMENT - INFORMED CONSENT

- Recommended treatment plan
 - Alternatives to treatment, including no treatment.
 - Risks associated with the treatment
 - Limits on Confidentiality
 - Policies on touch
 - Fees
 - Social Media Policy.
 - Termination, transfer or suspension of care
 - Whether a supervisor is being utilized
 - Statement that non-custodial parents have equal rights to access the records
- 

INFORMED CONSENT

- **AVOID LANGUAGE:**

- “I will never release your information without your written consent”
 - “This is a private place for us to discuss difficult issues and I will never reveal what we talk about with your parents.”
 - “I agree not to take any notes.”
 - “I will always discuss confidentiality with you before I release any information regarding treatment.”
 - “I will always keep your secrets safe.”
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INFORMED CONSENT

ONE SIZE DOES NOT FIT ALL

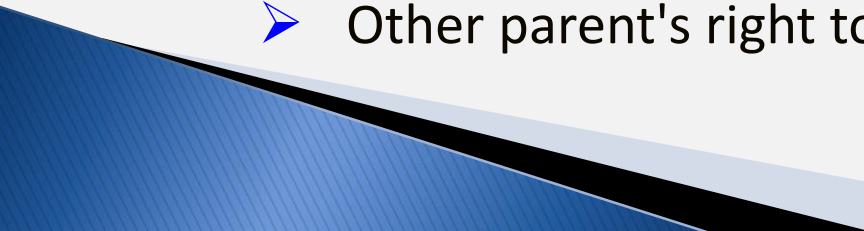
- **COUPLES**

- Who is the client – Best approach is BOTH
- Who can access records?
- One Signature or Two?
- Keeping Secrets

- **EVALUATIONS**

- Purpose of the evaluation
- Who will receive copies of report
- Client's access rights

- **MINORS**

- Policy on Informing parents
 - Access to records
 - Other parent's right to access information
- 

MALPRACTICE & BOARD COMPLAINTS

BREATHE THIS IS SURVIVABLE

- **INSURANCE COVERAGE:**

- Malpractice Lawsuits - \$ 1 million / \$ 3 million
- Board Complaint Defense \$5000 - \$75,000
- Contact an Attorney before talking to the Board
- Make 2 copies of the ENTIRE chart (Emails, billing, etc)
- Pace yourself – Think “MONTHS” not “WEEKS”
- Good Self-Care

MALPRACTICE

LAWSUIT SERVED – STARTS THE CLOCK

- Notify Insurance Company – Send Document
- **Meet with Attorney:**
 - Insurance Attorneys are OK
 - Discuss “Consent to Settle”
 - In Oregon most cases get to trial in 1 year
- Exchange Documents (Discovery)
- Depositions
- Motions
- Settlement
- Trial
- Appeal

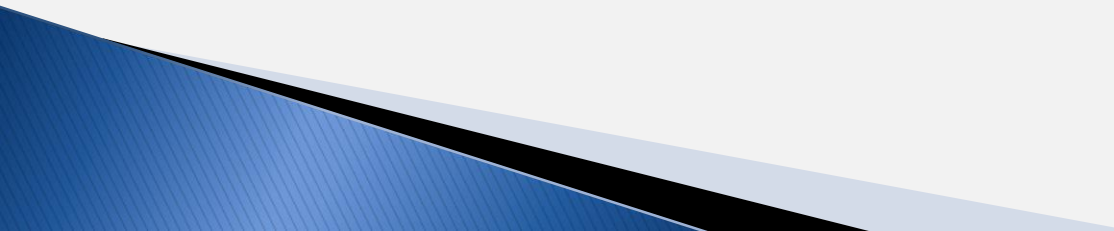
BOARD COMPLAINT PROCESS

- Complaint Letter
- Response
- Investigation / Interview
- **Board Action**
 - Dismissal – Case is Over
 - Further Investigation
- **Notice of Discipline**
 - 1st Public Document!
 - Request for Hearing
 - Negotiation vs. Hearing
 - Hearing
 - Final Order – 2nd Public Document
 - Court of Appeals

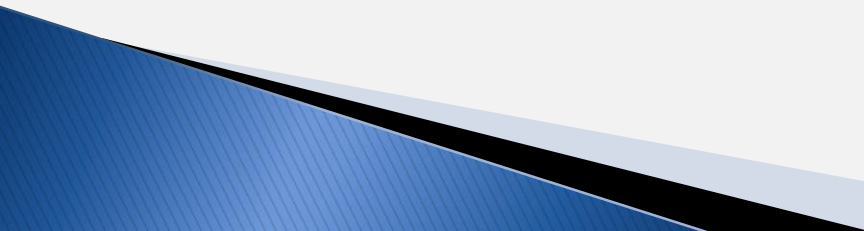
THINGS THAT MAY GENERATE COMPLAINTS

- Multiple/Dual relationships
- Sexual Contact
 - **Cooney's "Cooling Off" Rule**
- Switching Roles
- No Scientific basis for Methods / Opinions
- Refusing to Release Records
- Litigation – Complaints as a Tactic
- Suing Patients for Unpaid Fees – Counterclaim Malpractice
- Making Mental Health Recommendations based on inadequate information
- Use of Touch
- Answering incorrectly on renewal/credentialing form

LITIGATION TRENDS

- Patient Suicide
 - HIPAA Breach
 - Interfering with Family Relationships
 - Sexual Contact with Patient or Former Patient
 - Business Disputes
 - Employment Law
 - Billing Issues - Audit
- 

BUSINESS ISSUES FOR THE PRIVATE PRACTITIONER

- Employee vs Independent Contractor
 - Economic reality test
 - Percentage of Collections Model
 - Anti-kickback problems for Independent Contractors (Federal money)
 - Per Click Model
 - Safe Harbor – Fixed rate, in writing for more than a year at FMV
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AVOID JOINT VENTURES

USE “INDEPENDENT PRACTITIONER”

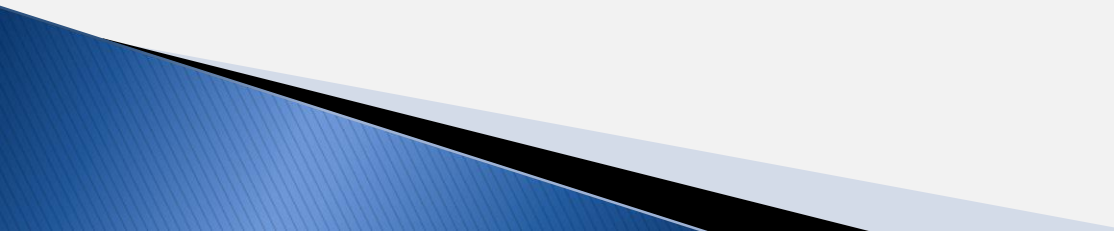
- Office sharing arrangement: Use the phrase **“independent practitioner”** on all documents and advertising.
- Risks of Partnerships (Ostensible Agency)
 - Full liability even if you never saw the patient
 - Full liability if responsible therapist leaves the country

FEE SPLITTING

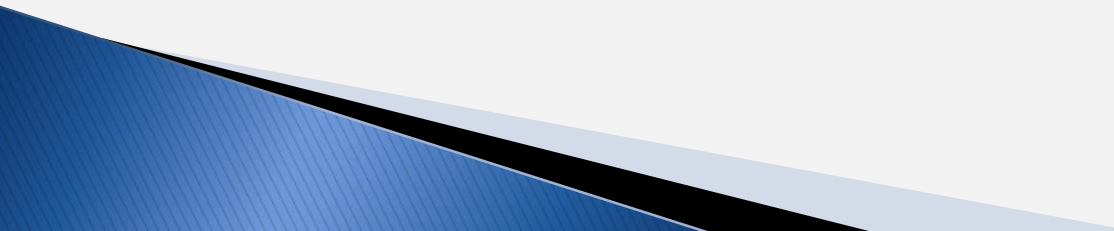
- A.10.b. Unacceptable Business Practices Counselors do not participate in fee splitting, nor do they give or receive commissions, rebates, or any other form of remuneration when referring clients for professional services.

Some States prohibit Percentage business models. Oregon does not prohibit. Federal Government – Anti-Kickback

Spectrum – direct fee for referral, or fees paid for “other services”



FEE SPLITTING

- Determine your own risk adversity
 - Have agreements with people you would refer to even without the financial agreement
 - Have a contract that details the financial agreement. Include language about what the fees pay for (overhead, marketing, billing services, etc)
 - Employee models are safer than independent practitioners.
 - Review referral patterns
 - Services provided under the contract should be at Fair Market Value.
 - Talk to a health care attorney who isn't just a business attorney
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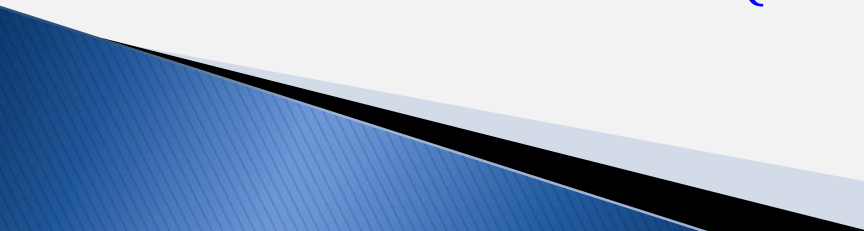
DATA PROTECTION

ENCRYPTION !!

Consider calling Roy Huggins, LPC

www.personcenteredtech.com

[\(503\) 893-9717](tel:(503)893-9717)

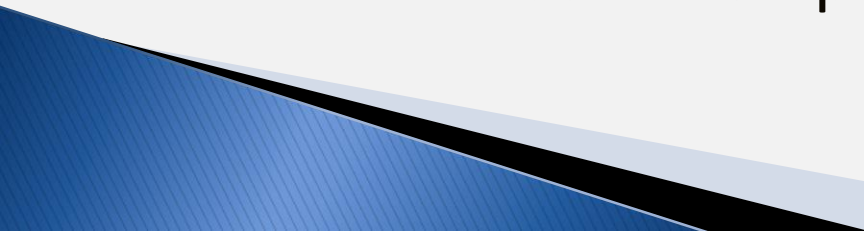


HIPAA BREACH

TREAT ALL BREACHES SERIOUSLY.

THEY MUST BE INVESTIGATED.

CALL DAVID MADIGAN

- Presume there has been a breach
 - Lost Data/Stolen Data/Can't Tell
 - Unauthorized Access
 - Must Perform Investigation
 - Must Attempt to Mitigate Potential Harm
- 

HIPAA BREACH

- Tsunami of Terribles
 - Over 500 Records breached
 - Notify All Patients Involved
 - Notify All Media Outlets
 - Notify Office of Civil Rights
 - 60 Day Deadline
 - Prepare Your Written Policies
- 

WRITING LETTERS

- Avoid Writing “To Whom it May Concern” letters
 - What question is being answered?
 - Who is the audience?
- Avoid writing letters that are beyond the scope of your work
 - Disability
- A summary of your work is always OK
- Assume the letter will be used in court
- Less is more.

Distance Counseling - Insurance

- ▶ **Modifier for synchronous telemedicine service**
- ▶ In 2017 there is a new CPT modifier, 95, for "synchronous telemedicine service rendered via a real-time interactive audio and video telecommunications system." Phone sessions are not included under the "95" modifier.
- ▶ **The psychotherapy services that CPT designates as appropriate for telemedicine**
- ▶ 90832 psychotherapy, 30 minutes with patient.
90834 psychotherapy, 45 minutes with patient.
90837 psychotherapy, 60 minutes with patient.
90845 psychoanalysis.
90846 family psychotherapy (without the patient present), 50 minutes.
90847 family psychotherapy (with the patient present), 50 minutes
90863.
- ▶ **Place of Service**
- ▶ 02 is the code for "the location where health services and health related services are provided or received, through a telecommunication system". It took effect January 1, 2017
 - (From Ofer Zur, PhD – Zur Institute)

Distance Counseling

- **OAR 833-090-0010 Technology-Assisted Services**

- When providing technology-assisted distance counseling services, licensees must:

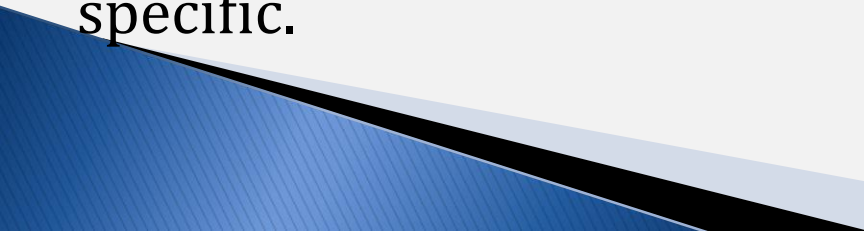
- Use secure web sites and e-mail communications to help ensure confidentiality;

- Determine that technology-assisted services are appropriate, available, and meets the needs of the particular client; and

- Have a working knowledge of the particular technology used to meet the needs of clients.

- Conduct due diligence in confirming the identity of potential clients.

- (2) When the use of encryption is not possible, limit electronic transmissions to general communications that are not client specific.



Distance Counseling

OAR 833-090-0040 Technology and Informed Consent

Professional Disclosure Statement (PDS) prior to service delivery with a means of confirming receipt and acknowledgement of the PDS.

Inform clients of the benefits and limitations of distance service delivery, including:

Issues related to the difficulty of maintaining the confidentiality of electronically transmitted communications;

Names of colleagues, supervisors, and employees, such as Informational Technology (IT) administrators, who may have authorized or unauthorized access to electronic transmissions;

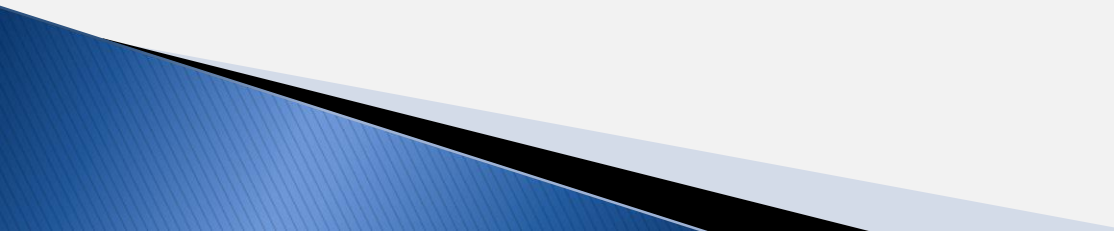
The risks of all authorized or unauthorized people who have access to any technology clients may use in the counseling process. This includes family members, friends, acquaintances, and fellow employees;

Limitations governing the practice of the LPC or LMFT profession in the State of Oregon, including that the laws and statutes regarding the practice of professional counseling and marriage and family therapy differ from state-to-state;

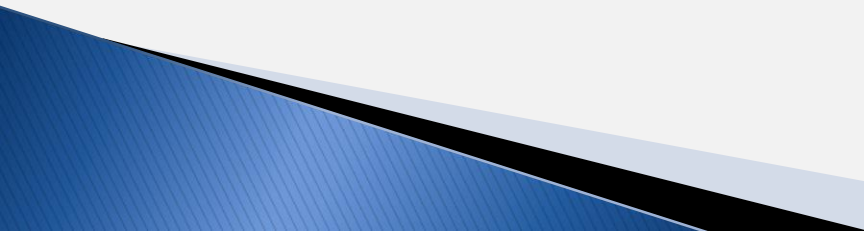
Contact information and alternate methods of contact in case of technology failure;

Emergency procedures for situations when the counselor is not available.

ACA – Distance Counseling

- H.1.b. Laws and Statutes Counselors who engage in the use of distance counseling, technology, and social media within their counseling practice understand that they may be subject to laws and regulations of both the counselor's practicing location and the client's place of residence. Counselors ensure that their clients are aware of pertinent legal rights and limitations governing the practice of counseling across state lines or international boundaries.
- 

ACA - Distance Counseling

- H.3. Client Verification Counselors who engage in the use of distance counseling, technology, and/ or social media to interact with clients take steps to verify the client's identity at the beginning and throughout the therapeutic process. Verification can include, but is not limited to, using code words, numbers, graphics, or other nondescript identifiers
 - H.5.c. Electronic Links Counselors regularly ensure that electronic links are working and are professionally appropriate.
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SOCIAL MEDIA REVIEWS

- *I'm another mental health professional and when I hear about her dealings it leads to believe she's on the take. She recommended a completely inappropriate and obscure treatment for my client and I believe she's doing it for the kickback. Something needs to be done.*
- *Horrible evaluator, cancels appointments repeatedly, dresses inappropriately short tight skirts and no underwear. Office smells like cat pee and poo. She lies, contradicts herself. She is an obvious hired gun who does not keep things neutral and unbiased.*

ACA - SOCIAL MEDIA

H.6. Social Media H.6.a. Virtual Professional Presence:

In cases where counselors wish to maintain a professional and personal presence for social media use, separate professional and personal web pages and profiles are created to clearly distinguish between the two kinds of virtual presence.

H.6.b. Social Media as Part of Informed Consent:

Counselors clearly explain to their clients, as part of the informed consent procedure, the benefits, limitations, and boundaries of the use of social media.

H.6.c. Client Virtual Presence:

Counselors respect the privacy of their clients' presence on social media unless given consent to view such information.



SOCIAL MEDIA

Have a written policy on your use of Social Media

Do not respond to negative reviews online (consider flagging as inappropriate) Client's don't waive HIPAA right to confidentiality

ACA Code of Ethics C.3.b. Testimonials

Counselors who use testimonials do not solicit them from current clients, former clients, or any other persons who may be vulnerable to undue influence. Counselors discuss with clients the implications of and obtain permission for the use of any testimonial.

Always Wear Underwear!

