

Behavioral Health Institute (BHI)

Training, Workforce and Policy Innovation Center

TeleBehavioral Health 301 Training Series

Behavioral Health Telehealth Resource

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Training, Workforce and Policy Innovation Center

The Behavioral Health Institute is a Center of Excellence where innovation, research and clinical practice come together to improve mental health and addiction treatment. BHI established initial priority programs which include:

- Improving care for youth and young adults with early psychosis
- Behavioral Health Urgent Care Walk in Clinic
- Behavioral Health Training, Workforce and Policy Innovation Center
- Expanded Digital and Telehealth Services

Speaker Disclosures

None of the series speakers have any relevant conflicts of interest to disclose.

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DISCLAIMER

Any information provided in today's talk is not to be regarded as legal advice. Today's talk is purely for informational purposes.

Always consult with legal counsel.

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BUILDING TELEHEALTH CAPACITY for BEHAVIORAL HEALTH

TeleBehavioral Health 301

TeleMental Health and Professional Liability

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Learning Objectives

1. List common legal causes of action against mental health providers
2. Understand the basic elements of malpractice
3. Review sources of liability or discipline related to telehealth

Disclaimer

- Not legal advice
- Laws and professional guidelines are evolving
- Variation in state law
- Variation based on discipline

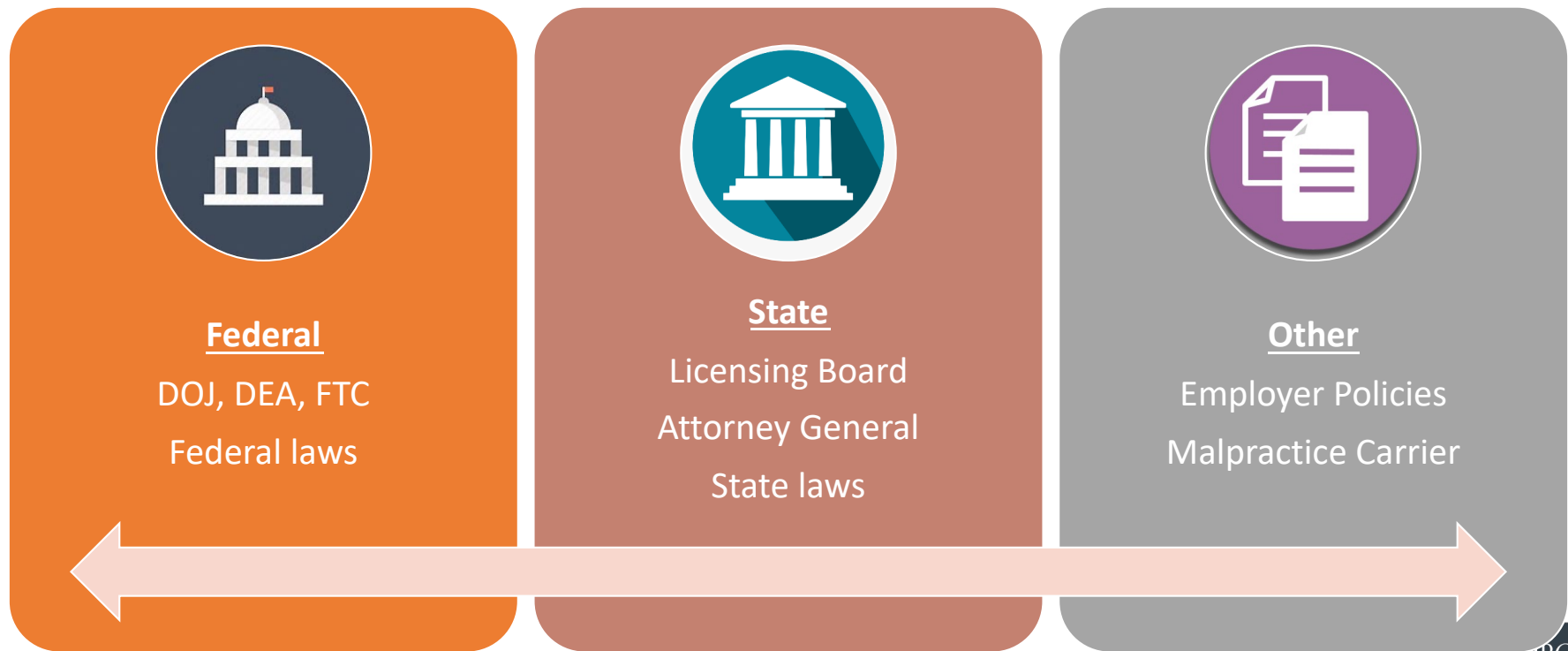
General Concepts

Potential Consequences

- Legal Actions
- Administrative Actions
 - State licensure
 - Clinical privileges
 - Professional societies
 - Medicare/Medicaid exclusion action



Regulating Clinicians



Why do behavioral health clinicians get sued?

- Suicide/attempted suicide
- Incorrect treatment
- Failure to protect third party
- Breach of confidentiality
- Lack of informed consent
- Unnecessary commitment
- Abandonment
- Boundary violations
- Improper supervision

Tort Law

- Tort – a civil wrong
- Remedy – purpose is to make the injured party whole
- Intentional torts
 - Battery
 - False imprisonment
 - Sex with patient
 - Defamation of character
- Unintentional torts
 - Failure to exercise a reasonable standard of care

Malpractice Elements

- Elements of a negligence action:
 - Duty of care
 - Dereliction of duty
 - Direct causation
 - Damages



Standard of Care (RCW 7.70.040)

- “The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances...”
- Modified standard in setting of covid emergency (take into account resources)

Standard of Care

- Based on clinical practice, but determined by the law
- Exercise the degree of care that a reasonably prudent provider would exercise in similar circumstances
- Not “best practices” but reasonable and prudent
- Standard is influenced by circumstances and discipline

Piel and Resnick (2017)

Telehealth



Coming out of the PHE

- During PHE, many waivers to federal and state laws and regulations
 - Examples:
 - HIPAA rules loosened
 - Licensure requirements
- Enforcement expected to resume at end of PHE
- Although federal PHE remains in effect, states ending PHE
- Even if federal PHE waivers remain in effect, responsible for adhering to state law

Licensure Requirements

You are the jury...



Licensure

- Is the Colorado clinician authorized to treat a patient in California?

Facts of the Case

- 19-year-old college student in California completed an online questionnaire, requested fluoxetine (antidepressant)
- Psychiatrist residing and licensed in Colorado reviewed the materials and prescribed the medication
- Psychiatrist was not licensed in California
- Psychiatrist was never physically present in California
- All communications were internet-mediated
- Several weeks later, the patient died by suicide via carbon monoxide poisoning
- Legal and disciplinary proceedings were initiated against the psychiatrist



Hageseth v. Superior Court (Cal. App. 2007)

- California asserted jurisdiction over the out-of-state psychiatrist
- The psychiatrist faced discipline and legal action for unlawfully practicing medicine in California without a valid license
- Key points:
 - Pre-PHE (case decided 2007, events 2005)
 - Patient's state has jurisdiction for care delivered to patients in their state, even if clinician not licensed in the state
 - Clinical services via telehealth are rendered where the patient is physically located
 - Clinician could be subject to professional discipline from licensing board
 - Clinician could be subject to criminal prosecution

Telehealth Licensure Requirements – Clinician and Patient Located in Same State

- Clinician present and licensed in STATE A and patient in STATE A
- Pre-PHE, some states had telehealth requirements
 - In-person examination/appointment before telehealth
 - Special telehealth license
 - Specific informed consent requirement
- State PHE waivers are ending/ended

Example: WA Department of Health - Health Care Professions
with Authority to Provide Telehealth (March 2021)

Licensure Requirements – Clinician and Patient in Different States

- Clinician present and licensed in STATE A and patient in STATE B, C, D...
- Patients are mobile
- General rule: Services are rendered where the patient is located
- Confirm that state licensure requirements are met
- Licensure requirements DOES NOT necessarily mean licensure
 - Variation in state requirements
 - Some states require full license, some telemedicine license
 - Some states had licensure waivers for telehealth pre-PHE

Example – College Student/Vacationer

- Scenario 1 – Patient has follow-up with you only when back in state on breaks from school
- Scenario 2 - Anticipate a several remotes sessions until patient gets established with new provider
- Scenario 3 – Anticipate regular appointments via telehealth



Licensure Requirements - Examples

Washington Department of Health Medical Quality Assurance Commission (2018)

- To promote continuity of care while ensuring patient safety, the Commission interprets [state law] as permitting a practitioner not licensed in Washington to provide medical care to a patient in Washington if the following conditions are met:
 1. The non-Washington-licensed practitioner is licensed in another state or US territory where he or she resides;
 2. The non-Washington-licensed practitioner has an established patient-practitioner relationship with the patient and provides follow-up care to treatment previously performed in the practitioner's state of licensure;
 3. The continuous or follow-up care is infrequent or episodic; and
 4. The non-Washington-licensed practitioner does not set up an office or place of meeting patients in Washington.

Cal. Code Regs. Tit. 16, § 1815.5 - Standards of Practice for Telehealth

- **Licenseses who provide telehealth technologies to patients in California must be licensed in California, although they need not reside in the state. All rules related to informed consent, ensuring the privacy of medical information and other standards must be adhered to, regardless of whether the patient is seen in person or via telehealth.**
- **(a) All persons engaging in the practice of marriage and family therapy, educational psychology, clinical social work, or professional clinical counseling via telehealth, as defined [by state law] with a client who is physically located in this State must have a valid and current license or registration issued by the Board....**

Colorado (Colo. Rev. Stat. 12-245-217)

A person who resides in another state and who is currently licensed or certified as a psychologist, marriage and family therapist, clinical social worker, professional counselor, or addiction counselor in that state to the extent that the licensed or certified person performs activities or services in this state, if the activities and services are:

- I. Performed within the scope of the person's license or certification;
- II. Do not exceed twenty days per year in this state...

Clinician Travel

- General rule is that care is rendered where the patient is located
- Recent example from Alaska (April 2022):
 - Professional counselors in Alaska must be licensed by Alaska before providing distance professional counseling services, regardless of the location of the client receiving the service (12 AAC 62.400)
- Prudent to abide by all laws and regulations of the clinician's practicing state and the patient's physical state



Compacts

- Discipline specific
- Vary in what is permitted
- PsyPact - interjurisdictional telepsychology
- Meet conditions of the compact



Licensure Requirements – Practice Tips

- Confirm patient location at each telehealth encounter
- Become familiar with state licensure requirements where patient is located
 - Contact state licensing board
 - Professional liability carrier
 - Center for Connected Health Policy (CCHP)
 - Multi-state agency, risk management or legal representative
- Seek clarification in writing
- Let patients know that laws are changing
- Pre-emptively ask for case-specific exception
 - Continuity for existing patient
 - Special training/board certification
 - Underserved area
 - Prescribers: If approved, confirm whether can prescribe CS

Standard of Care - Telehealth

You are on the jury again....



Standard of Care

- Did the clinician fall below the standard of care?

Facts of the Case

- Fourteen-year-old child had a long history of mental illness
- Child enrolled in a telepsychiatry research study
- Child participated in a one-time 90-minute video-based session with a psychiatrist
- Psychiatrist provided diagnostic impressions and treatment recommendations to the child's regular treatment providers
- Psychiatrist did not prescribe medications to the child
- Psychiatrist stated in writing that the scope of services was limited
- Nearly one year later, the child died by suicide
- Parents brought a wrongful death action based on medical malpractice

White v. Harris (Vt. 2011)

- 90-minute session created a clinician-patient relationship

Key Points:

- Single telehealth session may impose a duty of care
- Existence of duty is not the same as standard of care
- Court did not address whether standard of care was met
- Court indicated that the standard of care was the same for telehealth as in-person
- Increasing use of telehealth, leading to increased consultation

Standard of Care

- Same standard of care that would apply if the patient was in the clinicians' office
- Standard of care does not require “best care”
- Breach of the standard of care is negligence
 - This is ONE element of malpractice
- Clinician is afforded discretion and clinical judgement

Standard of Care – Care Considerations

General

- Informed consent
- Confidentiality
- Emergencies (medical, psychological)
- Patient monitoring
- Follow-up services
- Documentation

Telehealth

- Clinician competence in use of telehealth platform
- Patient appropriateness for platform
 - Non-clinical factors
 - Patient clinical factors
 - Specific type of clinical service (physical exam)
- Assessment tools (psychological testing)
- Security of technology
- Consent to telehealth
- Technology failures

Establishing Standard of Care

General

- Expert testimony
- Law (statutes, case law)
 - Example: civil commitment, duty to protect
- Guidelines from government agencies (DOH, FDA)
- Practice guidelines (professional organization)
- Research/journal articles
- Facility/organization policies
- PDR/package insert

Telehealth

- Laws specific to telehealth
- Licensing board guidelines
- Professional guidelines on telehealth
 - *APA Resource Document on Telepsychiatry and Related Technologies in Clinical Psychiatry*
 - *AACAP Practice Parameters for Telepsychiatry with Children and Adolescents*
 - *Guidelines from the American Telemedicine Association*
 - *Federation of State Medical Boards Appropriate Use of Telemedicine Technologies in the Practice of Medicine*
 - *APA Guidelines for the Practice of Telepsychology*

Standard of Care – Practice Tips

- Confirm the patient's identity (who, age)
- Confirm location of the patient
- General appropriateness: Become familiar with research on telehealth effectiveness (conditions)
- Specific appropriateness: Consider whether telehealth is appropriate for specific patient
 - Does the telehealth platform permit the clinician to gather needed information?
 - Consider when you need to advise the patient to seek in-person care (e.g., rash)

Prescribing Controlled Substances

- Federal law: Ryan-Haight Act (2008) required one in-person visit prior to prescribing controlled substances
- In-person requirement waived during PHE
 - When federal PHE ends, likely return to in-person requirement
- Pre-PHE, DEA required registration in clinician's state and patient's state
 - Similarly waived during federal PHE
- Biden extended federal PHE 10/13/22 (90 days) → mid-January 2023
 - Hear by mid-November if extended beyond January → [April 11, 2023](#)
 - Even if federal law waivers remain in effect, will need to comply with

Summary of Key Points

- Familiarity with relevant legal parameters is a professional responsibility
- Malpractice claims have been infrequent in telehealth (so far!)
- More cases/more issues are likely to come with expiration of PHE waivers
- Become familiar with licensing requirements where your patients are located
 - Contact licensing boards
 - Examine whether your professional liability coverage will cover telehealth and where
- Think about standard of care generally and specifically for use of telehealth

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Questions and Discussion

