



Optimal Treatment for Anxiety & Mental Health



Hot Ethical Issues in Today's Medical-Legal Environment

By: Craig S. Brodsky



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WHY DO YOU NEED REFRESHERS ON ETHICS?

- You are more likely to have a licensing complaint than a lawsuit
- Ethics guide you in multiple ways:
 - Decision-making
 - Client interactions
 - Maintaining healthy boundaries

TODAY'S TOPICS

Current ethical and legal
trends in mental health

Telemedicine

Covid

Case Examples

LEARNING OBJECTIVES



IDENTIFY ETHICAL AND LEGAL CONCERNS EARLY ON IN TREATMENT



DEVELOP A SYSTEMATIC APPROACH TO SOLVING ETHICAL AND LEGAL CONCERNS IN A PATIENT CENTERED FASHION.



HOW TO IMPROVE SUPERVISION OF AND COMMUNICATION BETWEEN PROVIDERS



CONFIDENTIALITY

SECTION 4: PRIVACY AND CONFIDENTIALITY

- 4.01 Maintaining Confidentiality
- 4.02 Discussing the Limits of Confidentiality
- 4.05 Disclosures



4.01 MAINTAINING CONFIDENTIALITY

Ethical Principles of
Psychologists and Code of
Conduct



Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02

DISCUSSING THE LIMITS OF CONFIDENTIALITY

- (a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)
- (b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.
- (c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.02

DISCUSSING THE LIMITS OF CONFIDENTIALITY

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

Is your app secure?

<https://www.apa.org/practice/guidelines/telepsychology>



4.05: DISCLOSURES

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

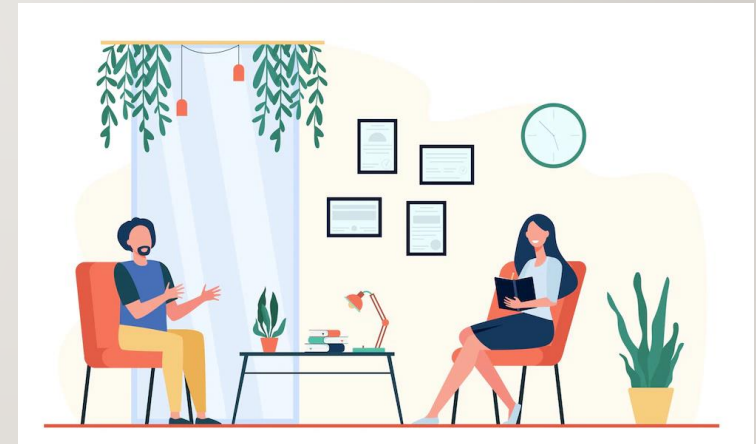


HIPPA AND THE EXCEPTION FOR MENTAL HEALTH INFORMATION

THE PRIVACY RULE

EXTRA PROTECTIONS FOR MENTAL HEALTH INFO UNDER HIPPA

Generally, the Privacy Rule applies uniformly to all protected health information, without regard to the type of information. One exception to this general rule is for psychotherapy notes, which receive special protections.



PSYCHOTHERAPY NOTES

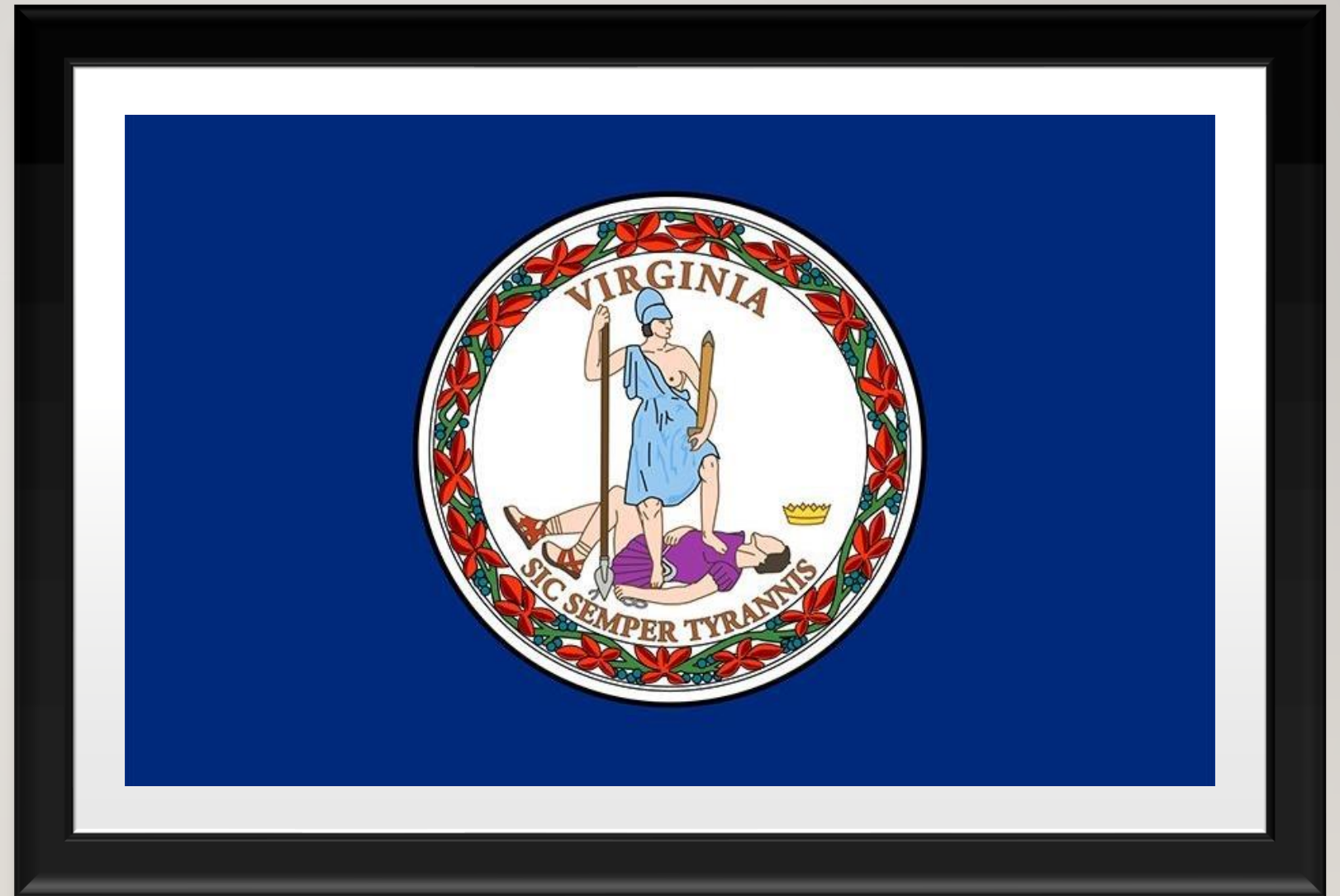
- Definition according the Privacy Rule: *notes recorded by a healthcare provider who is a mental health professional documenting or analyzing the contents of a conversation during a private counseling session or a group, joint, or family counseling session that are separate from the rest of the patient's medical record*
- They do **not** include any information about medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, or results of clinical tests; nor do they include summaries of diagnosis, functional status, treatment plan, symptoms, prognosis, and progress to date. Psychotherapy notes also do not include any information that is maintained in a patient's medical record. *See 45 CFR 164.501.*

PSYCHOTHERAPY NOTES

- Psychotherapy notes are treated differently from other mental health information
 - they contain particularly sensitive information
 - they are the personal notes of the therapist that typically are not required or useful for treatment, payment, or health care operations purposes, other than by the mental health professional who created the notes.
- Privacy Rule requires covered entity to obtain a patient's authorization **prior** to a disclosure of psychotherapy notes for any reason, (*See 45 CFR 164.508(a)(2)*).
- Notable exceptions exist for disclosures required by other law
 - mandatory reporting of abuse
 - mandatory “duty to warn” situations regarding threats of serious and imminent harm made by the patient (State laws vary as to whether such a warning is mandatory or permissible).

CONFIDENTIALITY: STATE LAWS

VIRGINIA



HEALTH RECORDS PRIVACY

§ 32.1-127.1:03.A

There is hereby recognized an individual's right of privacy in the content of his health records. Health records are the property of the health care entity maintaining them, and, except when permitted or required by this section or by other provisions of state law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

WRITTEN AUTHORIZATION EXCEPTIONS

...A health care entity shall obtain an individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by the health care entity is

- (i) for its own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or to improve their skills in group, joint, family, or individual counseling;
- (ii) to defend itself or its employees or staff against any accusation of wrongful conduct;
- (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1, to take precautions to protect third parties from violent behavior or other serious harm;
- (iv) required in the course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or
- (v) otherwise required by law.

CONFIDENTIALITY: STATE LAWS

WASHINGTON, DC



D.C. CODE § 7-1202.07. LIMITED DISCLOSURE TO 3RD-PARTY PAYORS

(a) A mental health professional or mental health facility may disclose to a 3rd-party payor..... pursuant to a valid authorization.... and that the information to be disclosed is limited to:

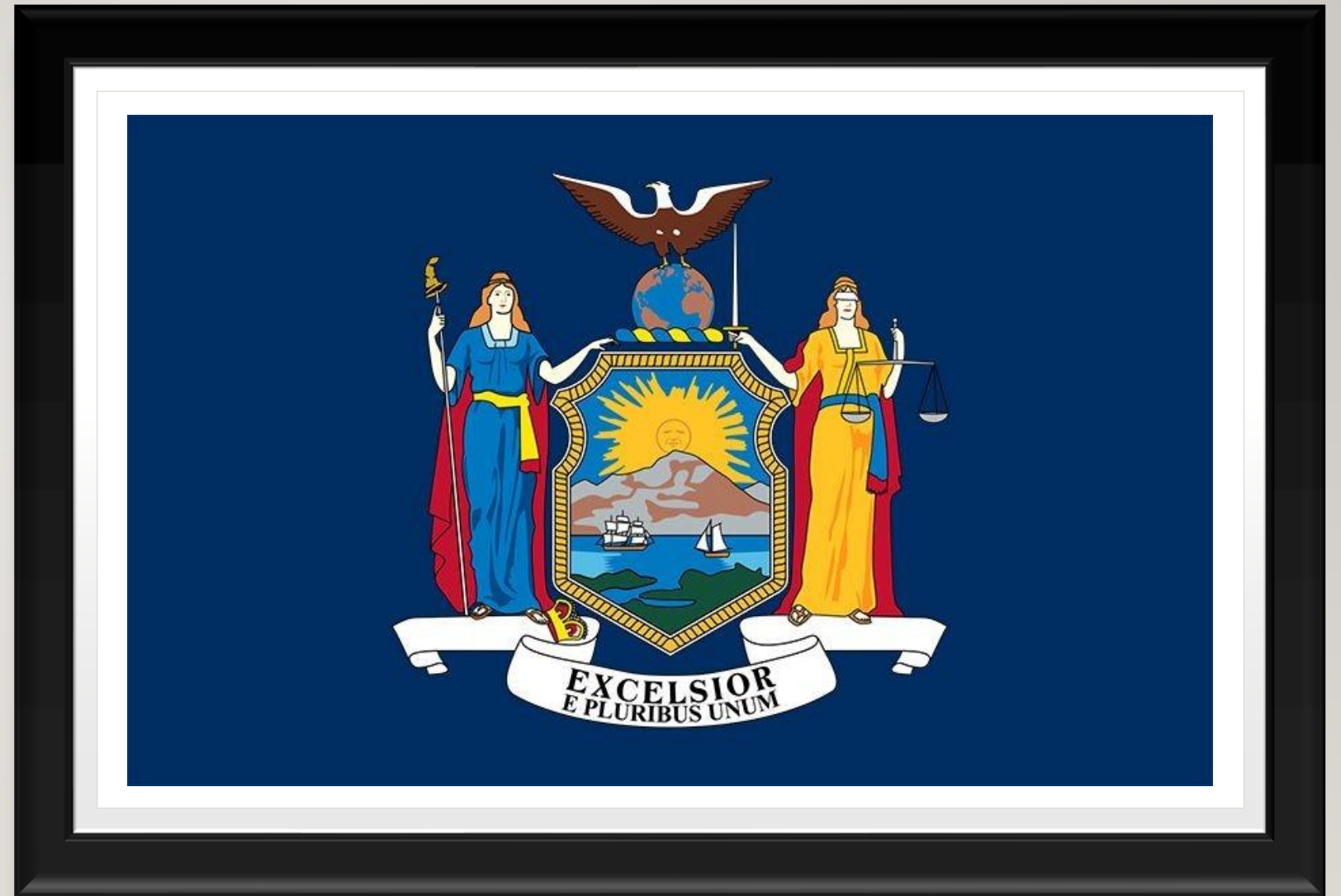
- (1) Administrative information;
- (2) Diagnostic information;
- (3) The status of the client (voluntary or involuntary);
- (4) The reason for admission or continuing treatment; and
- (5) A prognosis limited to the estimated time during which treatment might continue.

D.C. CODE § 7-1202.07. LIMITED DISCLOSURE TO 3RD-PARTY PAYORS

(b) In the event the 3rd-party payor questions the client's entitlement to or the amount of payment benefits following disclosure under subsection (a) of this section, the 3rd-party payor may, pursuant to a valid authorization, or for participating providers, a joint consent, request an independent review of the client's record of mental health information by a mental health professional or professionals. Mental health information disclosed for the purpose of review shall not be disclosed to the 3rd-party payor.

CONFIDENTIALITY: STATE LAWS

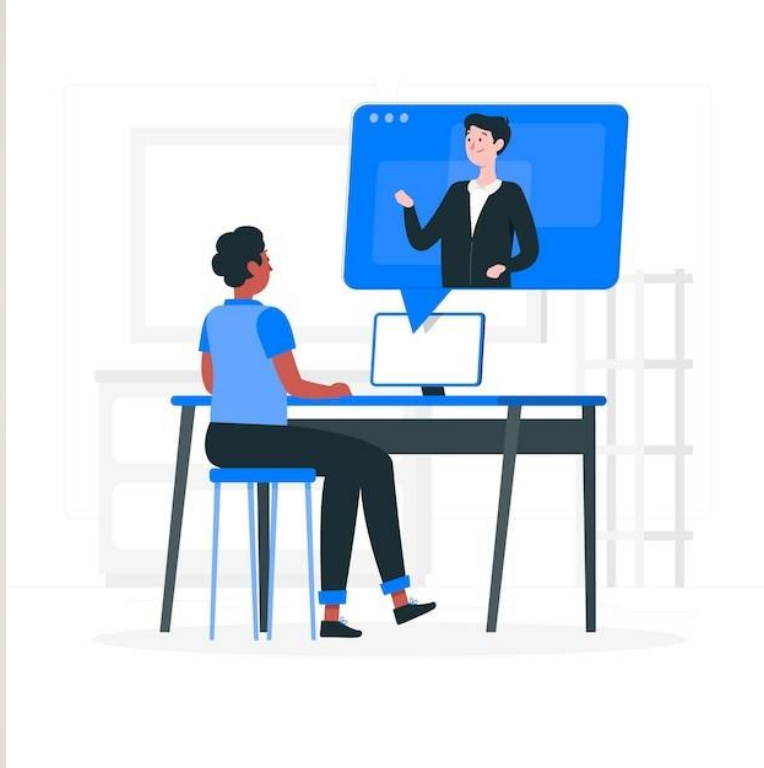
NEW YORK



N.Y. MENTAL HYGIENE LAW § 33.13

- Providers must maintain a record at the office
 - The record must contain information on all matters relating to the admission, legal status, care, and treatment of the patient or client and shall include all pertinent documents relating to the patient or client.
- Providers may have reporting obligations and must be cognizant of confidentiality issues when reporting.
 - Providers should document when reporting is necessary
 - Even when reporting is required, mental health records remain confidential.
 - Any disclosure shall be limited to that information necessary and required in light of the reason for disclosure.
 - Information that is disclosed shall be kept confidential by the party receiving the information.





TELEPSYCHOLOGY

DEFINITION

Telepsychology is defined, for the purpose of these guidelines, as the provision of psychological services using telecommunication technologies as expounded in the “Definition of Telepsychology.”



DISCLAIMER

Nothing in these guidelines is intended to contravene any limitations set on psychologists' activities based on ethical standards, federal or jurisdictional statutes or regulations, or for those psychologists who work in agencies and public settings. As in all other circumstances, psychologists must be aware of the standards of practice for the jurisdiction or setting in which they function and are expected to comply with those standards. Recommendations related to the guidelines are consistent with broad ethical principles (APA Ethics Code, 2002a, 2010) and it continues to be the responsibility of the psychologist to apply all current legal and ethical standards of practice when providing telepsychology services.

GUIDELINES

1. Competence of the Psychologist
2. Standards of Care in the Delivery of Telepsychology Services
3. Informed Consent
4. Confidentiality of Data and Information
5. Security and Transmission of Data and Information
6. Disposal of Data and Information and Technologies
7. Testing and Assessment
8. Interjurisdictional Practice

ARGUMENTS IN FAVOR OF ONLINE PSYCHOTHERAPY

- Increased Access, Availability, and Flexibility
- Therapy Benefits and Enhancements in Communication
- Client Characteristics
- Convenience, Satisfaction, Acceptance, and Increased Demand
- Economic Advantages
- Anonymity and Privacy
- Eliminating Barriers to Engagement
- Informed Consent
- Opportunities for Research
- Therapeutic Relationship
- Online Teaching and Supervision
- Reducing Stigma
- Patient Empowerment and Increased Patient Control
- Worldwide and Cross-Border Psychotherapy
- Adaptability of Services and Personalized Care

ARGUMENTS IN FAVOR OF ONLINE PSYCHOTHERAPY

- Emergencies
- Diminishing Intimacy
- Prohibition Against Free Market
- Worldwide and Cross-Border Psychotherapy
- Opportunities for Research
- Adaptability of Services and Personalized Care
- Online psychotherapy can offer services that specifically match patients' needs [see (19)], facilitating genuinely patient-centered care [see (44)] and individualized treatment and technology options [see (45)].
- Adherence and Compliance

ARGUMENTS AGAINST ONLINE PSYCHOTHERAPY

- Privacy, Confidentiality, and Security Issues
- Therapist Competence and Training
- Communication Issues
- Research Gaps
- Emergency Issues
- Informed Consent Issues
- Technological Competence
- Absent or Incomplete Guidelines
- Legal Issues
- Practicing Across Borders
- Patient Characteristics
- Technical Issues
- Payment and Insurance Issues
- Therapeutic Relationship Issues
- Availability and Access Issues
- Identity and Verification Issues
- Image, Tradition, and Therapist Attitude
- Misuse and Harm

ARGUMENTS AGAINST ONLINE PSYCHOTHERAPY

- Boundary Issues
- Comparability to In-Person Treatment
- Costs
- Increased Liability and Litigation
- Economic Advantages
- Anonymity and Privacy
- Eliminating Barriers to Engagement
- Therapeutic Relationship
- Online Teaching and Supervision
- Reducing Stigma
- Patient Empowerment and Increased Patient Control
- Loss of Therapeutic Control
- Adherence Issues
- Online Supervision and Teaching Issues
- Patient Dependence and Loss of Control
- Autonomy Issues
- Dehumanization
- Stigmatization

TOOLS GAINED FROM COVID

- Increased use of telemedicine
- Telemental health is effective, safe, and will remain in use for the foreseeable future.
- Guidelines need to be developed to ensure safe
- Use of digital mental health tools
- Model can be sustainable



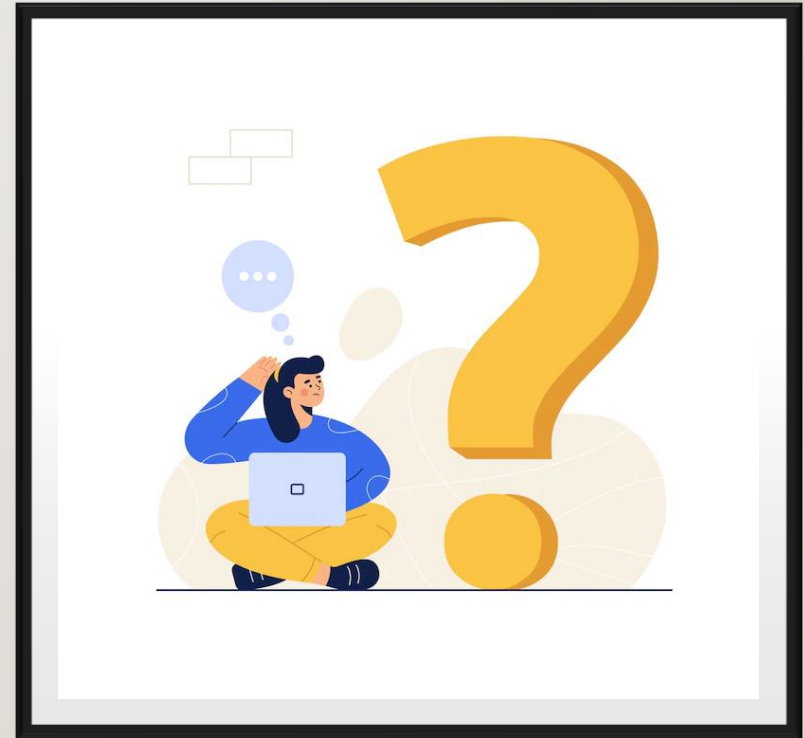


MALPRACTICE IN PSYCHOTHERAPY



WHAT IS MALPRACTICE?

A lawsuit for medical negligence is a claim against a health care provider in which the Plaintiff claims that the provider failed to treat the Plaintiff with the same degree of skill, care or knowledge required of a provider acting in the same or similar circumstances, and that the provider's failure was the cause of injury to the Plaintiff.



THE STANDARD OF CARE

The standard of care is defined as what a reasonable and prudent professional in the field would have done under the same or similar circumstances.

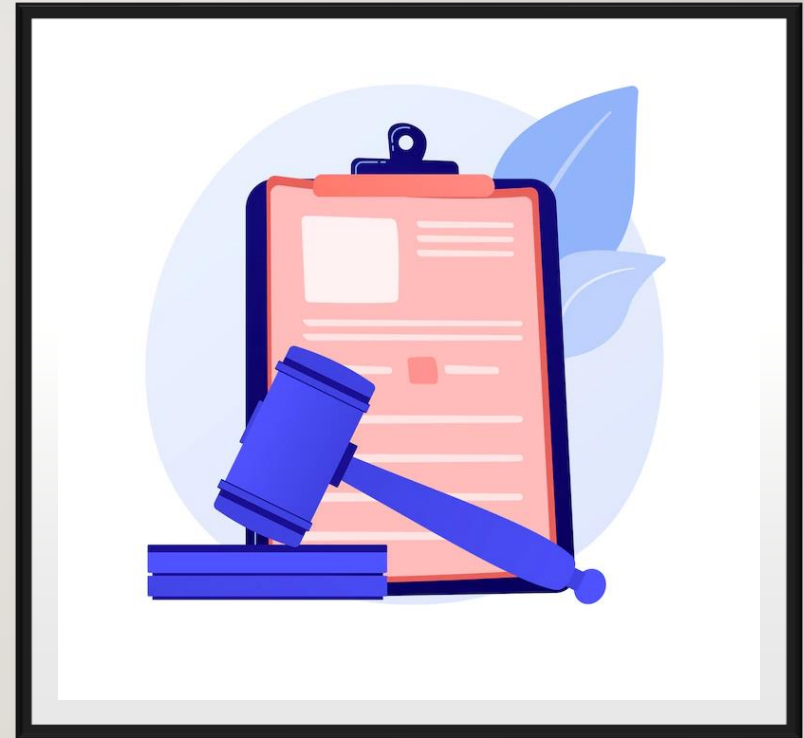


LENGTH OF A MALPRACTICE CASE

- The average length of time it took to close a case was 19 months, with litigated claims taking a little over twice as long as non-litigated claims, 25.1 vs. 11.6 months respectively.
- Claims that were resolved at trial took much longer, averaging 39.0 months for defendant verdicts and 43.5 months for plaintiff verdicts.

CAUSES OF ACTION

- Negligence
 - Duty
 - Breach (Policies)
 - Causation
 - Damages
- Informed consent
 - Failure to advise of a material risk
 - Risk materializes
 - Causation



HEALTHCARE PROVIDERS



- Generally judged pursuant to a national standard of care
- Use the same degree of care, skill and learning that are ordinarily possessed and used by other nationally certified specialists

HOW YOU ARE JUDGED

- Prospective vs. Retrospective analysis
 - Symptoms can be indicative of more than one diagnosis
- Defense themes
 - Educate the judge and jury
 - No “Monday morning quarterbacking”
 - Medicine is an art, not a science
 - Patient safety




CASE EXAMPLES

MD, VA, CA

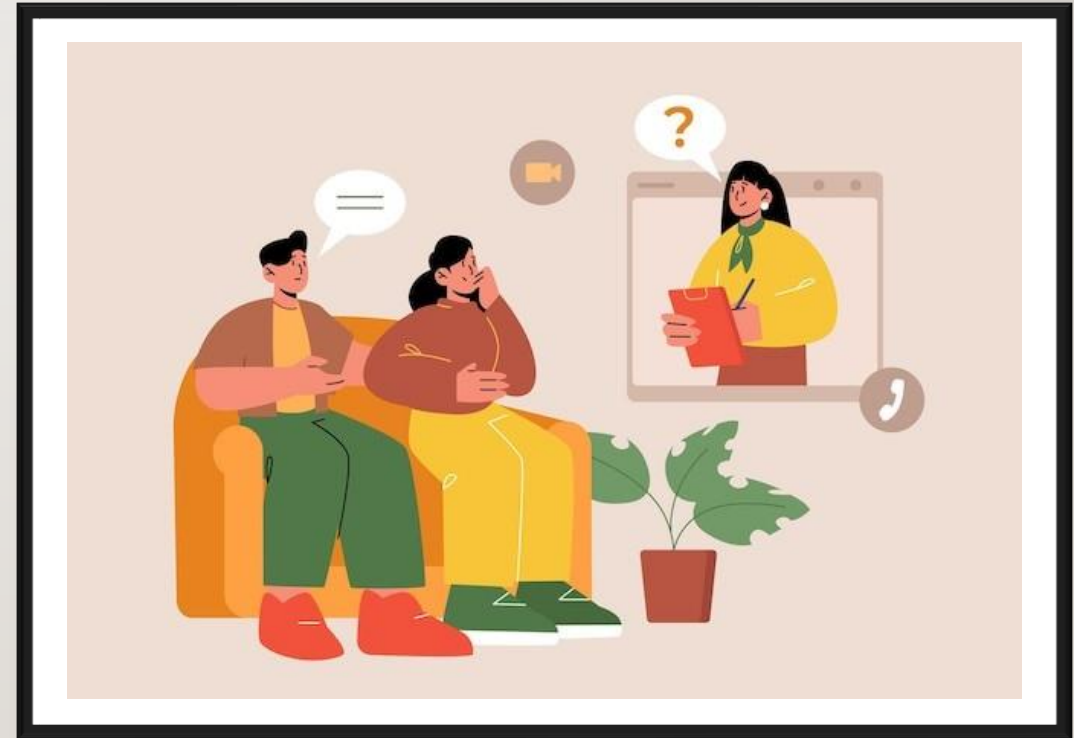
- Failure to Provide Report of Psychological Testing led to further investigation and determination of a lack of competence (MD)
- Inaccurate reporting of patient status (MD)
- Boundary violations involving treating a patient who was a sex offender (VA)
- Other Boundary Issues (VA and CA)
- Criminal Convictions (VA)
- Taking Patient Records without Permission (VA)

NY

- Sending a client multiple inappropriate text messages containing personal information that was unrelated to treatment.
 - Permitting an intern to provide counseling to a client (2 cases)
 - Accepting compensation for professional services rendered by her professional limited liability company (PLLC) while licenses were suspended.
 - Accessing patient records, without the prior consent of the patient or the patient's physician, for a purpose unrelated to treatment of the patient.
 - Conviction of Attempted Assault in the 1st Degree, a class C violent felony.
 - Conviction of Grand Larceny in the 4th Degree, a class E felony.
 - Leaving multiple messages on a former patient's voicemail with inappropriate statements.
 - Conviction of Shoplifting, a class 1 misdemeanor, in the State of Arizona.
 - Sending inappropriate text messages to a patient on more than one occasion, causing said patient to think that licensee and patient were friends.
 - Failing to document a treatment plan.
- 

PRACTICETIPS

- Understand what constitutes a multiple relationship
- Set clear guidelines up front
- Practice self-care
- Make sure you're covered
- Stay connected



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