Let's Talk to an Attorney: a Facilitated Interview
Paul Cooney, JD and Carilyn Ellis, PsyD, MSCP - with audience Q&A Option
Friday April 30, 12:30PM-1:30PM

Topics Discussed During Facilitated Interview - 2021 OPA Annual Conference

A) In person care

Informed consent language vs waiver of liability
See PDF

OSHA and OHA requirements
See PDF

Effect of Vaccination on protocols
Masks are still required for in-office visits. Social distancing. Sanitizing activities.

How long for Tele-health to be covered in Oregon (June 30, 2021)The State of Oregon has reached an agreement with several health insurance companies to continue providing expanded telehealth options through at least June 30, 2021.
The agreement follows guidance issued by the Department of Consumer and Business Services and the Oregon Health Authority in late March requiring health insurance plans of all types to provide coverage for multiple telehealth platforms at the same rate as an in-person visit to limit in-person health care services.

This means health insurance companies will continue to provide coverage for expanded telehealth services for Oregonians and pay for these services at the rates they established during the COVID-19 pandemic.

The following insurance companies have agreed to provide expanded telehealth services through at least June 30, 2021. This list will be updated as more companies join the agreement.

Cambia

Providence

Health Net

Regence

Kaiser Permanente

Samaritan

Moda

United Healthcare

PacificSource

It is important to note, this order does not apply to self-insured plans. The state encourages self-insured plans to cover expanded telehealth services for members. These are plans in which an employer assumes the financial risk of providing health care benefits to its employees. Oregonians with a self-insured plan should ask their employer about their coverage options.

New OBOP Basis for Discipline for not following Gov. Orders

SUMMARY: This new rule sets forth that failure to comply with any applicable provision of a Governor's Executive Order, including failure to comply with Oregon Health Authority guidance, constitutes unprofessional conduct. Violations are subject to Board sanction.

(1) During a Governor declared emergency, unprofessional conduct includes failing to comply with any applicable provision of a Governor's Executive Order or any provision of this rule.

(2) Failing to comply as described in subsection

(1) includes, but is not limited to:

(a) Engaging in the practice of a profession required by an Executive Order to be closed;

(b) Operating a business required by an Executive Order to be closed;

(c) Failing to comply with the requirements of Oregon Health Authority (OHA) guidance implementing an Executive Order, including but not limited to: Page 1 of 2

(A) Failing to screen clients in accordance with OHA guidance prior to providing services;

(B) Failing to limit the number of individuals inside the premises or implement other protocols necessary to maintain physical distancing of six (6) feet;

(C) Failing to implement OHA guidance on mask and face coverings; and (D) Failing to clean and disinfect in accordance with OHA guidance.

(d) Failing to comply with any requirements of a Board of Psychology guidance implementing an Executive Order.

(3) No disciplinary action or penalty action shall be taken under this rule if the Executive Order alleged to have been violated is not in effect at the time of the alleged violation.

(4) The Board may impose sanctions for violations of this rule in accordance with ORS 675.070.

B) Access to records- new laws and rules

While the physical chart belongs to the therapist, the information in the chart is owned by the client. If a client requests records to be given to them, or to be given to someone else, they are requesting a transfer of their property.

PHYSICAL HARM EXCEPTION

Another limited ground for denial exists if a licensed healthcare professional determines in the exercise of professional judgment that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person. For example, a covered entity may deny a suicidal patient access to information that a provider determines in his professional judgment is reasonably likely to lead the patient to take her own life. However, we stress that this ground is narrowly construed in order to protect individuals' autonomy interests and their right under the Privacy Rule to obtain information about themselves, which is fundamental in facilitating individuals' active participation in their own health care. General concerns about psychological or emotional harm are not sufficient to deny an individual access (e.g., concerns that the individual will not be able to understand the information or may be upset by it). In addition, the requested access must be reasonably likely to cause harm or endanger physical life or safety. Thus, concerns based on the mere possibility of harm are not sufficient to deny access. As a result, we expect this ground for denial to apply in extremely rare circumstances. Further, an individual who is denied access based on these grounds has a right to have the denial reviewed by a licensed health care professional designated by the covered entity as a reviewing official who did not participate in the original decision to deny access.

Your informed consent should always include the MANY ways in which we may have to share client records - for example, if requested by the client, the insurance company, concurrent care provision with HIPPA, legal requests etc.

OPEN NOTE LAW

21st Century Cures Act applies only to ONC certified electronic health systems that allow for client portal. Most practitioners don't have that level of health system and are not currently required to upgrade. If you do not have an ONC certified system, these new rules do not apply to you. But clients can still access their records.
You can search to see if your medical record system is ONC-Certified here:
https://chpl.healthit.gov/#/search

From Personcenteredtech.com:: The practice management systems we employ in the mental health field are generally not ONC-certified systems. So, the portions of the rule which apply to EHR makers generally don't apply to those practice management systems. (The practice management systems I'm talking about often have names that start with "Thera-" or "Simple".)

Clients have always had access to their records. There are exceptions for true psychotherapy notes and exceptions where PHYSICAL harm might befall the client or another person.

I have had the same advice for nearly 20 years “Someone may read your notes today” Chart accordingly.

APA Ethics self-determination.
Principle E of the code's General Principles, "Respect for People's Rights and Dignity," begins by stating "Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality and self-determination." Throughout the code are examples of how psychologists respect their clients' right to self-determination. Respecting a client's right to self-determination both manifests a core value of our profession and plays a helpful and important role in providing services that will benefit clients.

There is a clear move towards patient access to their health records, including mental health. An example of this is MyChart.

Right to Access - State of Oregon Policy: Oregon law (ORS 192.552) provides
It is the policy of the State of Oregon that an individual has the right to have protected health information of the individual safeguarded from unlawful use or disclosure and the right to access and review protected health information of the individual.

Show the client what you type into the chart
In many physician’s offices it has been my experience that the physician is often willing to turn the computer screen around as they type in information. It’s a valuable technique in that it catches errors, and includes the patient in what is being said about them. I am beginning to see more of this in mental health.

This will take some adjustments for some practitioners who have held onto the notion that the chart belongs to them. In fact, while the physical chart may belong to the therapist, the information in the file belongs to the client. The client can access the information, request corrections and instruct you to send records to a third party.

EDUCATION AND CHARTING STYLE

It would be prudent to have conversations with clients about the new client portals (if those apply to your practice) and how they might use the information. For example, discussing that they should not share their login password, or store records on a computer that is accessed by other people. Encourage them to discuss anything they find disturbing or challenging.

It is important to also consider how you chart information. Are you typing things you would not say directly to the client? Are you entering information into the chart that might be harmful or used in a detrimental manner (for example, assuming behaviors do not rise to the level of child abuse, is it really a good idea to detail specific complaints by the child against one parent or the other? In highly contested divorces, mental health records can be used in many ways. It might be better to discuss “communication issues” rather than specifics.)

The most frequent question I receive is “Do I have to send my chart to the non-custodial parent? Short answer: Yes. Custodial and non-custodial parents have equal access rights to the records of their children. (ORS 107.154). There are limited exceptions.

SIGNIFICANT PENALTIES FOR NOT SENDING RECORDS

The HIPAA Police (Office of Civil Rights) have been on a rampage recently with fining practices that do not send records when requested. Fines range from $10,000 to $200,000 in 18 recent cases.

The Oregon licensing boards have imposed discipline in cases where records are not sent.

RESOURCES

APA https://www.apaservices.org/practice/business/hipaa/rule-change-access-records

Open Notes.org https://www.opennotes.org/

Roy Huggins, LPC www.personcenteredtech.com

https://personcenteredtech.com/2021/03/30/busting-a-few-myths-about-information-blocking-aka-the-open-notes-rule/

https://personcenteredtech.com/2021/02/26/solo-vs-group-practice-records-releases-open-notes-what-you-need-to-know/

Additional Links from APA PLC 2021:

https://www.apaservices.org/practice/advocacy/state/leadership/plc2021-recordkeeping.pdf

https://www.apaservices.org/practice/business/hipaa/information-blocking-rule-faq

https://www.psychiatry.org/psychiatrists/practice/practice-management/health-information-technology/interoperability-and-information-blocking

C) Work/Life balance - related to OBOP discipline

Provider Addiction
Provider Isolation/Loneliness

> **Consultation:** Increasingly isolated therapists often have diminishing resources for consultation on difficult cases.
> **Referrals:** Isolated therapists often experience difficulty in developing referral resources which can lead them to staying on difficult cases longer than is appropriate or practicing outside their competency.

Multiple Relationships - Lack of appropriate consultation resources and lack of referral resources can result in therapists taking on more complex cases involving closely involved people. It can also lead to seeking out clients for social activities.

D) Medical necessity and termination

If you bill insurance, your care must be "medically necessary." Each insurance has a definition of what this means, so you need to make sure you are documenting medical necessity according to the insurance contract.

It is not patient abandonment to discharge due to no longer meeting medical necessity. If a patient wants to private pay, you have the flexibility to continue therapy, but if they no longer meet medical necessity, you cannot bill insurance for their services, and insurance can require you to pay back any amount retroactively that was not medically necessary.

For EXAMPLE, here is CIgna's Language:

Cigna's Seniors Definition of Medical Necessity for other Health Care Providers

Except where state law or regulation requires a different definition, "Medically Necessary" or "Medical Necessity" refers to health care services that a health care provider, exercising prudent clinical judgment, would provide to a patient. The service must be:

1. *For the purpose of evaluating, diagnosing, or treating an illness, injury, disease, or its symptoms*
2. *In accordance with the generally accepted standards of medical practice*
3. *Clinically appropriate, in terms of type, frequency, extent, site, and duration, and considered effective for the patient's illness, injury, or disease*
4. *Not primarily for the convenience of the patient, health care provider, or other physicians or health care providers*
5. *Not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury, or disease*

For these purposes, "generally accepted standards of medical practice" means:

1. *Standards that are based on credible scientific evidence published in peer-reviewed medical literature generally recognized by the relevant medical community*
2. *Physician and Health Care Provider Specialty Society recommendations*

3. *The views of physicians and health care providers practicing in relevant clinical areas*
4. *Any other relevant factors*

Preventive care may be Medically Necessary, but coverage for Medically Necessary preventive care is governed by terms of the applicable Plan Documents.