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TOP TEN STEPS
to Reduce the Risk of Lawsuits and Licensure Board Complaints

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Step #1
Adopt Legal/Ethical Decision-Making Model and "Tool Kit"

- Ethical decision-making model now mandated by 2005 ACA Code of Ethics (handout and next slide)
- Develop Risk Management Tool Kit
  - Besides model, include relevant Codes of Ethics (ACA, AMHCA, ASCA, AAMFT, etc.)
  - Laws: Federal and state statutes, regulations and relevant case law
  - Publications, articles, and checklists
  - Contact information for local professionals, including peer consultants, attorneys, and colleagues

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Legal/Ethical Decision-Making Model

Wheeler & Bertram
(2009-2010)

For other models, see:

Corey, Corey, & Callanan (2011)
Remley & Herlihy (2005)
Welfel (2006)

1. **Define the Problem/Dilemma/Sub-Issues**: What are the core concerns (legal, ethical, clinical, or a combination)?
2. **Relevant Variables**: Who are the people? What are the issues, dynamics, and multicultural considerations?
3. **Law/Codes/Policy**: What federal/state laws, ethics codes (especially ACA Code of Ethics), and applicable institutional policy apply to the facts?
4. **Personal Influences**: What personal values, bias/prejudice, or counter-transference may be affecting perception?
5. **Outside Perspective**: Whenever possible, engage in colleague consultation and/or supervision and/or obtain legal advice.
6. **Options & Consequences**: What are the possible courses of action and intended consequences? Also consider the unintended consequences. Remember to involve the client in the decision-making unless clinically inappropriate (*e.g.,* where client involvement would likely trigger violence against a third party).
7. **Decide - Take Action**: Implement the decision and be prepared to reconsider options.
8. **Document Decision-Making & Follow-up**: Provide written evidence of clinical/ethical decision-making and results of implementation.

3

Step #2
Consult / Consult / Consult

- "Two heads are better than one"
- Utilize consultation when faced with difficult legal/ ethical dilemmas
- Consider reciprocal relationships
- Note differences between "consultation" and supervision
- Legal consultation is sometimes absolutely necessary
  - Retain local legal counsel
  - Risk management consultation via professional liability insurance
- Practice within the scope of your competence

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4

Step #3
Develop/Utilize Appropriate Informed Consent

- Written document, verbal explanation, commitment to review and renew
  - May be defined by state licensure statute/regulations
- Ongoing process
- Cover emergency procedures, possible risks vs. benefits, credentials, affiliation, referrals, supervision/consultation, etc.
- Ensure process defines confidentiality, privilege, privacy and limits/exceptions

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Step #4
Know the Rules of Confidentiality, Privilege, and Privacy

- Definitions and Rule of Thumb
- Common Issues
  - Faxing, Email, HIV/AIDS, etc.
- Common Exceptions
  - Child and elder abuse reporting
  - Harm to self / others

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HITECH: The New "Teeth" in HIPAA
(a/k/a HIPAA on Steroids)

- Subtitle D, Health Information Technology for Economic and Clinical Health Act (**HITECH** Act), enacted as part of the American Recovery and Reinvestment Act of 2009, addresses privacy and security concerns re/electronic transmission of health information.
- **"Breach notification"** regulations are now in effect for "Covered Entities" (C.E.s) and "Business Associates (B.A.s) if a breach of *unsecured* protected health information occurs
  - *E.g.*, laptop with client records is lost/stolen
  - If approved encryption or approved destruction technology, notification not required
  - Risk assessment required
  - Notice to affected individuals (*e.g.*, clients) required; some breaches require notice (or year-end submission) to HHS and media
  - http://edocket.access.gpo.gov/2009/pdf/E9-20169.pdf
  - http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/breachnotificationifr.html

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HITECH: The New "Teeth" in HIPAA
(cont'd)

- New rules for accounting of disclosures: if client or patient requests an accounting of electronic health records (EHRs), Covered Entities must provide disclosure information for the *prior three years*, if disclosures were made for "treatment, payment or health care operations". Covered Entities should have mechanisms to track disclosures and revise their Business Associate Agreements to ensure that their Business Associates meet these accounting disclosure requirements.
- July 14, 2010 NPRM:
  http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=Z4O0H6/0/2/0&WAISaction=retrieve
  - New B.A. requirements, expanded access rights, limitations on sale and marketing of PHI
  - Extends HIPAA Privacy and Security Provisions to "business associates" of covered entities, including penalties!

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HITECH: The New "Teeth" in HIPAA (cont'd)

- Updated civil and criminal penalties for both C.E.s and B.A.s (up to $50,000 per violation, $250,000 for "willful neglect" and up to $1.5 million for repeated violations!)
- Problems for "Covered Entity" Counselors
  - Breach notification is real
    - Helpline call re/ stolen records
  - Many counselors have HIPAA Notice of Privacy Practice in place but no policies and procedures for other compliance mandates (like security)
  - Counselors use cell/smart phones, laptops, digital copiers and flash drives which often have PHI

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HITECH: The New "Teeth" in HIPAA (cont'd)

- Query: If counselor is not a HIPAA "covered entity," what happens if coverage is provided for a another counselor who is a HIPAA C.E.?
  - Possible business associate obligations if use or disclose PHI on behalf of the C.E.

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How to Respond to a Subpoena

Talk to your attorney and/or school legal counsel or risk management attorney through your professional liability insurance program. If attorney agrees, follow steps below.

1. Contact your client and your client's attorney and discuss the implications of releasing the information. Will client provide written authorization or release information to testify?
2. If "YES" – Obtain a written informed authorization to release information. Ensure that all clients involved sign the authorization.
3. If "NO" – Request that client's attorney file motion to quash the subpoena or motions for protective order. This should eventually lead to a court order from the judge.

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11

4. If you do not receive authorization or your client's attorney refuses to file motion, talk to your attorney. In some instances, your attorney may need to file an appropriate motion. In other instances, "satisfactory assurances" from the person seeking your records that your client has been notified may be sufficient under HIPAA and state law.
5. If you are subpoenaed to appear in court (as opposed to appearing at a deposition), you may be sworn in then ask the judge for an order re/ whether you must testify and release information.
6. Retain copies of all documents; make notes of relevant discussions.

Note: These are general guidelines, which may be superseded by specific state laws. Additionally, HIPAA considerations may apply to counselors who are "covered entities."

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12

Step #5
Understand and Manage Social Media & Networking Risks

Think before you tweet!

- Social networking site legal/ethical issues are likely to increase and lead to lawsuits and licensure board complaints
- Separate professional from private persona and learn to used appropriate privacy settings
- If you employ others who may use online social networking sites or supervise other therapists or graduate students, consider addressing these issues in your privacy policies, personnel policies, and/or HIPAA workforce training
- Confidentiality concerns (*e.g.*, group member interaction)

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- Problems in "friending" clients or being "friended" by clients
  - Depending on the client population you serve, it might be a good idea to address the use of social networking media in your informed consent.
  - Inform clients that it is your policy not to "friend" clients nor accept friend invitations from clients. This policy has been established in order to protect the counseling relationship and to preserve the confidentiality of client information.
- Avoid posting inappropriate pictures or other information on your own social media site that may be seen by clients.
- Think before you "click" and avoid defamatory statements about clients, colleagues, or others.

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- Be careful with documentation. Don't document information from the client's online profile or postings without consent from the client.
- Consider the ethical implications of looking at a client's online information or Googling a client without being invited.
- Remember: When posting information to a social networking/media site…the information should be considered PERMANENT – never to be retrieved, edited, or deleted.

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Step #6
Know Duties…Warn/Protect and Report

- Duty to Warn/Protect: *Tarasoff* (CA) and ensuing cases
  - Duty: to ***"specific identifiable victims"*** **in some states**
  - **Not all states follow *Tarasoff* ; some permit breach of confidentiality but don't mandate it**
  - Some cases expanded duty to anyone within ***"foreseeable zone of danger"***
  - Personal injury vs. property damage
  - Statutory immunity in some states if statute is followed
  - AIDS/HIV
  - Take appropriate action (warning/notifying police/ hospitalization, etc.) per state statute or case law
  - Consult, document, and refer for medication evaluation, etc. as appropriate

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Know Duties…Warn/Protect and Report (cont'd)

- Duty to Report Abuse
  - Child Abuse
  - Elder/Vulnerable Adult Abuse
- Duty to Report Unprofessional Conduct
  - What if it's learned through a privileged relationship?

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Step #7
Document!

- Document circumstances re/ difficult or dangerous client situations (abuse, threats of harm to self/ others, etc.)
  - What you considered, what your ruled out (why), decision made, and follow-up
  - Follow state law/regulatory requirements
  - Lack of uniformity in school settings re/ counselor documentation – action needed?

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Step #8
Manage Boundary Issues and Dual or "Co-occurring" Relationships

- Problems
  - Loss of objectivity
  - Potential for misunderstanding
  - Conflict of interest
  - Increased risk of breach of confidentiality
  - Client exploitation
- Revised language in 2005 ACA Code of Ethics; compare with other Ethics Codes
- Lawsuits and licensure board complaints

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Step #9
Learn and Follow Institutional Policy
(e.g. agency, school, organization)

- *Eisel* Case (Maryland)
  - Facts
  - Lessons learned
- Suicide cases
- Bottom line: Make policy workable!
  - Policy not followed is worse than no policy at all
- Follow rules of supervision
  - Supervision vs. Consultation

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Step #10
Obtain Appropriate Professional Liability Insurance

- Need for insurance in different settings (school counselor, agency, private practice)
- Education policies vs. counseling policies
- Claims-made vs. Occurrence
- Coverage for attorney fees in licensure board matters
- Financial status of underwriter
- Risk management help
- ACA Insurance Trust 800-347-6647 Ext. 284

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21

CEUs and Insurance Discount

1) Purchase and read *The Counselor and the Law* (5th *Ed.*). Call ACA at 800-422-2648, x222, Monday-Friday, 8 a.m. - 7 p.m. (order # 72857)

2) Purchase and take online test for 6 continuing education credits. See www.counseling.org/catl. **ACA members receive a special discount on purchase of the test. Print out a copy of your CEU certificate as soon as you've passed the test.**

3) If you are insured through the ACA-endorsed professional liability insurance program, you're eligible for a *10% discount* on your professional liability insurance program *for 3 consecutive years*. After completing and passing the exam, fax a copy of your CEU certificate, along with your policy number, to: 1-800-758-3635. Alternatively, you may mail your CEU certificate and policy number to: HPSO, 159 East County Line Road, Hatboro, PA 19040. The discount will be applied for 3 consecutive years at your next renewal and cannot be combined with other discounts on the policy. Questions may be directed to HPSO at 1-800-982-9491 or by e-mail at service@hpso.com or to the ACA Insurance Trust at 800-347-6647 x284.

22

References

Corey, G., Corey, M. S., and Callahan, P. (2011). *Issues and ethics in the helping professions* (8th ed.). Brooks/Cole: Belmont, CA.

Remley, T.P. & Herlihy, B. (2005). *Ethical, legal, and professional issues in counseling* (2nd ed.). Person: Upper Saddle River, NJ.

Welfel, E.R. (2006). *Ethics in counseling and psychotherapy* (3rd ed.). Thomson Brooks/Cole: Belmont, CA.

Wheeler, A.M. & Bertram, B. (2008). *The counselor and the law* (5th ed). American Counseling Association: Alexandria, VA.