

Forensic Aspects of E-Therapy

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This month's column, by guest columnists Dr. Patricia Recupero and Ms. Samara Rainey, focuses on forensic issues that arise in providing e-therapy—that is, psychotherapy provided via the Internet. Only limited guidelines and regulations are yet available to guide clinicians involved in providing treatment through this new medium. This column provides valuable information for clinicians who are currently providing e-therapy or are considering this mode of treatment.

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INTRODUCTION

Dr. Cyberfreud specializes in the treatment of eating disorders. He has been successfully treating an 18-year-old woman with anorexia nervosa (“Anna Roe”). Previous attempts at treatment by other clinicians had been unsuccessful. When Anna goes away to college in a different state, Dr. Cyberfreud provides her with referrals to other psychiatrists in her area. Several months later, Dr. Cyberfreud learns that Anna has lost 15 pounds and refuses to see a new psychiatrist in the area. Concerned about her deteriorating condition and wanting to avoid an involuntary hospitalization, Dr. Cyberfreud reluctantly agrees to continue treatment through the Internet. E-therapy goes well, and Anna’s condition begins once again to improve.*

The Need for E-Therapy

In a perfect world, all patients would respond well to the same standardized psychiatric treatments. The clinician would hold 50-minute appointments in his or her office for each case, prescribe medications exactly according to the *Physician’s Desk Reference*,¹ and at the end of the day, everyone would go home happy and all patients would be cured. In the real world of modern psychiatry, not all patients fit the usual mold. Difficult cases of

paranoia, social phobia, agoraphobia, or other conditions and individual circumstances (e.g., patients in remote areas or those with severe physical disabilities or busy schedules) may present unique challenges to the therapist. In some instances, the best or only form of treatment available may be *e-therapy*: the provision of mental health treatment through the Internet.

Balancing Risks and Benefits

E-therapy has provoked controversy in the mental health community. In the example above, numerous legal and ethical concerns may arise for Dr. Cyberfreud and his patient. While the new treatment modality offers many benefits, such as convenience and reaching underserved populations, the risks and drawbacks are numerous, ranging from a lack of nonverbal cues and a risk of misdiagnosis to concerns about the Health Insurance Portability and Accountability Act (HIPAA) and licensure. This column explores hypothetical possibilities and legal realities in order to help clinicians recognize and evaluate risks and benefits of e-therapy and better understand the forensic issues involved.

Background

In 2004, 23% of Internet users searched for information on mental health issues, and 28% surfed for information on a particular doctor or hospital.² With a click of the mouse, web surfers can locate many Internet-based therapy services through Internet search engines. The number of e-therapy providers appears to have grown significantly in recent years. The quality of these services varies from site to site and provider to provider. For example, an informal search by the authors found a website at which a cyber-counselor not only offered e-therapy services but also promoted herbal treatments and alternative medicine products sold on an affiliated

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*Names, screen names, and conversations in the anecdotes are fictitious, and the vignettes are hypothetical.

website. While many e-therapists market their practices through websites, not all providers use websites; some, such as Dr. Cyberfreud, end up providing e-therapy to select patients from their practice for clinical reasons.

Computer Therapy and Therapeutic Technology

An important distinction must be made between e-therapy (the provision of mental health treatment through the Internet) and other uses of computers and technology in therapy, including virtual-reality therapy and cognitive-behavioral coaching by computer programs. However, results from studies evaluating the effectiveness of computers in therapy suggest promise for the future of e-therapy. Wright et al.³ found that outcomes were similar for depressed patients treated by standard cognitive therapy and those treated by computer-assisted cognitive therapy. Other studies have produced positive findings concerning computer-assisted treatments for anxiety,⁴ loneliness,⁵ and eating disorders.⁶ One study found that suicide attempters preferred computerized interviews to interviews with a doctor, with the preference for computers greatest among patients with lower self esteem and higher suicidal ideation and hopelessness.⁷ Some scientists and doctors have even developed purely computerized models of psychotherapy.⁸

Online Psychotherapy

In 2000, a panel of experts predicted that use of online psychotherapy (e-therapy) would increase over the next 10 years.⁹ The nature and extent of e-therapy vary greatly: it may be an adjunctive or a sole form of treatment, and it may use any number of technologies, including chat, instant messaging, videoconferencing, virtual reality, or a combination of methods. The legal and ethical implications of e-therapy may also vary somewhat depending on the means of service delivery.

ANONYMITY AND IDENTITY ON THE INTERNET

CFreudMD: Anna?

ANNA_R18: Who's this?

CFreudMD: Am I speaking to Anna?

ANNA_R18: Maybe. Who are you?

CFreudMD: Kingfisher.

ANNA_R18: Huh?

CFreudMD: May I speak with Anna, please?

ANNA_R18: One sec. [Long pause.] oh hi dr. c!

CFreudMD: Is this Anna?

ANNA_R18: Yeah sorry that was my roommate, she can be annoying sometimes

CFreudMD: Password?

ANNA_R18: Bluebird

CFreudMD: Great. How are you doing, Anna?

Verifying Patient and Clinician Identity for Known Patients

In the hypothetical first e-therapy appointment above, Dr. Cyberfreud uses passwords to protect his patient's confidentiality and to verify that the person behind the screen name is, in fact, his patient. Without passwords, he might have had a dilemma on his hands when the person behind the screen name "ANNA_R18" asked, "Who are you?" If he had said "Dr. Cyberfreud," he would have risked breaching Anna's confidentiality if the person behind the screen name were not his patient. Had he decided not to respond, he would have risked abandoning his patient if "ANNA_R18" were in fact Anna, merely unsure if the stranger messaging her is someone she knows in real life. Because the Internet affords such anonymity, individuals may hide behind screen names and e-mail addresses, masquerading as others or concealing their identities entirely. Dr. Cyberfreud's choice to use a vague screen name further protects Anna's right to keep her e-therapy sessions confidential. If not using passwords, one could instead use a phone call to confirm that Anna is in fact the person engaged in the e-mail or chat exchange. (A detailed discussion of technological strategies for authenticating patients' identities and ensuring secure Internet contacts is beyond the scope of this column but merits further investigation.)

The Problem of Prospective Patients Online

If a therapist receives a request for e-therapy from a stranger on the Internet, verifying the prospective patient's identity becomes even more complicated. In addition, without a face-to-face meeting before beginning e-therapy services, there is a significant risk of misdiagnosis due to the absence of nonverbal cues and the ease with which individuals can deceive others online. On the Internet, deceptive phenomena such as "gender swapping" are common, and people often pretend to be persons they are not. Detection of dishonesty on the Internet is more difficult than in person. Further problems arise if the e-patient provides incorrect contact information, such as a fake phone number. The clinician is then unable to intervene in emergency situations. The authors do not take the position that cli-

nicians should never treat new prospective patients who contact them online, but rather strongly caution that such arrangements may significantly increase risk and should be undertaken only with care and sensitivity to the risks inherent in the situation.

ETHICAL CONCERNS

ANNA: ... yeah but it's really hard at college. the girls here are really pretty and i just feel really fat (5 minutes pass) dr c? u there? (1 minute passes) hello!?! where did u go??? (2 more minutes pass) *r u even listening? i'm gonna sign off i guess*

DR. C.: Sorry! My screen froze! :(

ANNA: jeez... i thought u went off somewhere

Clinician Availability

In the vignette above, Dr. Cyberfreud's screen freezes, and his patient mistakes the delay for her doctor's having diverted attention from their session. Such misunderstandings are common on the Internet. To lessen the negative impact of similar scenarios, providers can warn patients about system crashes, network failures, and other technological issues likely to cause misunderstandings. Clinicians and patients can put into place a contingency plan to address clinical needs when technological difficulties interfere. When clinicians are unavailable, they might send a recipient-blind e-mail to advise patients that they will be away for specified dates and to provide information about clinical backup (e.g., contact information, whether the covering therapist will be able to provide e-therapy or exchange e-mails). Therapists may also provide e-patients with information about expected response times for e-mails and hours during which patients may call if they need more direct help, such as a face-to-face appointment. If a website is part of an e-therapist's practice, it may be useful to post phone numbers for crisis hotlines and links or phone numbers to other resources or referrals for visitors who need immediate help.

The Therapeutic Alliance in E-Therapy

Unlike face-to-face psychotherapy, electronic communication introduces distance into the relationship between the therapist and the patient. Transference and countertransference issues in e-therapy may differ from those in the face-to-face setting. When exchanging e-mails or instant messages, nonverbal cues are absent, the conversation may take on a quality of anonymity

and depersonalization, and misunderstandings may be common. While researchers have not yet fully explored this issue, related research suggests that the therapist-patient relationship may suffer somewhat in e-therapy interactions. In a study comparing differences in early stages of relationships in those who met online versus in person, Mallen et al. found that college students who first met in person experienced greater satisfaction and closeness than did those who first met online.¹⁰ As the bond between a clinician and a patient is important to a successful course of psychotherapy, providers offering e-therapy should be aware of the modality's potential shortcomings with respect to the therapeutic alliance.

Standard of Care

Professionals who begin the practice of e-therapy embark upon a voyage through poorly charted waters. The current e-therapy landscape is populated by diverse professions, including alternative medicine practitioners, psychiatrists, psychologists, social workers, marriage and family therapists, Christian counselors, and life skills "coaches." As Gunter et al. noted, "... unlicensed or lightly regulated counselors are responsible for most of the growth in e-therapy." (p.10)¹¹ To ensure that one upholds an adequate standard of care for one's patients, it is important to stay abreast of the medical and psychological literature that evaluates e-therapy services and pay close attention to the standards and practices of one's peers in the field. Because Internet therapy is a new medium, it may be prudent to maintain a file of peer-reviewed literature that supports the effectiveness and efficacy of e-therapy interventions. Developing a web practice based on the example of an alternative medicine e-counselor may not be appropriate, as one should conform to the standard of care expected of one's peers. One does not cease being a psychiatrist or psychologist when one provides therapy online. It is important that licensed clinicians set a responsible example by maintaining a high ethical standard of care for their patients.

Pre-Therapy Evaluations and Diagnosis

The decision to involve a patient in a course of e-therapy deserves the same amount of care and caution as decisions to prescribe pharmacological and other treatments. While many doctors would never prescribe medicines online, conducting psychotherapy or proffering advice is also "prescribing" and providing medical treatment. Before involving a patient in a course of e-thera-

py, the clinician should consider variables that can affect outcomes from this type of treatment. For example, if Anna were suffering from paranoid schizophrenia and believed that televisions and computers inserted thoughts into her mind, Dr. Cyberfreud might decide not to treat her through e-therapy, as the medium could exacerbate her symptoms. A pre-therapy evaluation and diagnosis may aid the therapist in identifying risk factors and protective factors for a particular patient. E-therapy may not be suitable for all patients and for all situations.

Maintaining Ethical Boundaries Online

Establishing a strong therapeutic alliance and providing ethical treatment can serve protective functions against adverse outcomes and ensuing malpractice claims. In e-therapy, because the medium enables a perception of anonymity and informality, the risk of mishandling countertransference and of minor boundary violations (e.g., excessive self-disclosure, corresponding outside agreed upon times) may in some cases be greater than in the face-to-face setting. Keeping these risks in mind, clinicians need to continually assess whether e-therapy is upholding an acceptable standard of care for their practice. Warning signs that e-therapy may be inappropriate because of boundary concerns are similar to warning signs that other therapies or practices are inappropriate. If a patient seems dehumanized, anonymous, or “too close,” or if one finds oneself making exceptions to one’s usual practices and standard of care “because it’s online,” the risk of a boundary violation or malpractice may increase.

CONFIDENTIALITY

Dr. Cyberfreud receives an e-mail from Anna in which she confesses that she has been date-raped by a classmate at school. Dr. Cyberfreud counsels her about the incident, and she reports the complaint to the school authorities. Police arrest the young man who committed the rape, and Dr. Cyberfreud receives a subpoena from the court for all e-mail records of his communications with Anna since the date of the incident. Objecting that the records are privileged, Dr. Cyberfreud refuses. He then receives a notice from an attorney warning him that the records may not, in fact, enjoy therapist-patient privilege, as e-therapy is not traditional psychotherapy and may be analogous to self-help therapy, which does not enjoy therapist-patient privilege.¹² Furthermore, she warns him, if he

refuses to disclose the records, the court may subpoena the records through Anna’s Internet Service Provider (ISP), which retains records of communications transmitted through its server.

Therapist-Patient Privilege Online

An important distinction between e-therapy and traditional psychotherapy is the verbatim record of a client’s words often created and preserved in e-therapy. Even if neither therapist nor patient retains copies of transcripts, ISPs often automatically archive conversations. There are numerous legal risks associated with verbatim records of therapy sessions. A plaintiff’s attorney might request such records during discovery in a malpractice action, or courts might order disclosure for criminal proceedings. Guidelines for determining how therapist-patient privilege applies to e-therapy communications have yet to be established, although traditional rules regarding therapist-patient privilege for face-to-face or phone communication might apply.¹³

Patient Data (In)Security

Risks to the security of patient data are numerous and realistic. For example, when Senator Ted Stevens asked his staff to attempt to steal his identity, members of his staff went online and successfully obtained highly personal information, including apparent access to his social security number.¹⁴ Even when therapist and patient both employ sophisticated technological measures to increase the security of their communications, there is no ultimate guarantee of privacy or data security. Hackers, viruses, Trojan horses, spyware, curious family members, ISPs, and lawful monitoring of computer activity by an employer all contribute to the risk to patient data security.

COMPLICATIONS OF INTERSTATE PRACTICE

Despite Dr. Cyberfreud’s efforts, Anna’s condition worsens following the rape, and she stops eating altogether. Anna’s parents and Dr. Cyberfreud agree that she needs more intensive treatment, so she consents to a voluntary hospitalization. While in the hospital, Anna tells a psychiatry resident that she has been receiving e-therapy from Dr. Cyberfreud. Lacking all of the facts of the case, the well-meaning resident files a complaint with the medical licensing board, concerned that Dr. Cyberfreud’s e-therapy is

responsible for Anna's worsening condition. The board learns that Dr. Cyberfreud is not licensed to practice in their state, and they send a letter enjoining him from further treating Anna by e-therapy. They send a copy of this letter to the medical board in Dr. Cyberfreud's home state, prompting an investigation into his practice and curiosity among media outlets in his hometown.

Licensure Concerns

Some states have passed legislation to regulate interstate medical practice and telemedicine; some of this legislation may apply to e-therapy as well. Even when telemedicine or cybermedicine (such as e-therapy) is not conducted across state borders, additional regulations may apply within a particular state's borders. It is prudent for clinicians to stay informed about telemedicine laws and related court decisions in jurisdictions in which they provide services. If Dr. Cyberfreud in State A provides e-therapy to Anna in State B, he may need to follow not only the laws of State A but also of those of State B. In addition, depending upon the particulars of his situation, it may be necessary for him to obtain licensure for State B. Until the government federalizes such medical regulation, however, licensure and jurisdiction issues for e-therapy providers will remain complicated and somewhat unpredictable. Therapists should inform patients of risks associated with interstate practice (e.g., termination of care, lessened regulatory oversight). Concerns may vary depending upon whether e-therapy is ongoing or involves only intermittent sessions analogous to phone calls when a patient or therapist travels.

Compensation and Reimbursement

Further concerns may arise with respect to insurance. Because e-therapy is a relatively new form of treatment and has not yet received significant empirical validation in the medical literature, public and private insurance resources, including Medicare and Medicaid, may not reimburse patients for e-therapy services. Support for online clinical consultation reimbursement may grow in the future; physicians at New Hampshire's Dartmouth-Hitchcock Medical Center currently receive \$30 for an online clinical consultation.¹⁵ Providers can encourage patients to contact their insurance companies prior to receiving treatment in order to determine whether e-therapy services are covered. As e-therapy fees vary and may not be billable to insurance companies, providers

should be clear with patients regarding the cost of e-therapy services and payment arrangements.

Malpractice Coverage

Psychiatrists should also ask their malpractice insurance carriers for information about whether or not e-therapy is a covered service. If e-therapy is not covered, it may be appropriate to mention to patients that one has no malpractice insurance for this particular type of service. In addition, if e-therapy is covered, the coverage may be limited to states in which one is licensed to practice or in which the carrier is allowed to do business.

MANAGING RISK

When the medical board in Dr. Cyberfreud's state begins their investigation, they request that he provide copies of his chat transcripts if Anna will give permission. Anna agrees, and the board obtains a full transcript, including several discussions between Dr. Cyberfreud and Anna regarding the risks of e-therapy and Anna's decision to continue e-therapy rather than see a clinician in a face-to-face setting. The board learns that Anna was unwilling to seek treatment elsewhere and that Dr. Cyberfreud has provided care as ethically as possible under the circumstances. They decide not to censure him.

Informed Consent

In many situations, it may be appropriate to conduct ongoing informed consent discussions with patients to review risks, benefits, safeguards, and alternatives associated with this new treatment modality. HIPAA presumably applies to e-therapy services if one is otherwise covered by HIPAA. Therefore, psychiatrists must take care to warn patients of confidentiality risks, in particular when proffering e-therapy services. Patients should be told which measures have or have not been taken to increase the security of their data, and they should understand risks and limitations to their privacy and confidentiality prior to beginning a course of e-therapy. In the example above, the informed consent discussions that Dr. Cyberfreud had with Anna appear to have served a protective function. Readers are cautioned, however, to remember that an informed consent discussion may not preclude liability or disciplinary action. It is not clear how medical boards will treat the issue of e-therapy in the future, and outcomes will likely depend upon individual circumstances.

Variable Risk Factors

The medico-legal implications of e-therapy depend upon several variables in the delivery of services. For example, if one uses a website, numerous additional legal and ethical concerns may arise, including advertising laws and issues related to the site's content. If one provides chat-based e-therapy, the therapist should decide how to store and destroy chat logs. Any form of e-therapy warrants discussion with patients about technological measures to increase security (e.g., encryption, secure server, authentication). These and other factors, such as the patient's diagnosis or condition, licensure, location of the provider and the patient, and therapeutic method (e.g., cognitive-behavioral therapy versus rational-emotive therapy), can affect the degree of risk associated with the provision of e-therapy.

Disclaimers

To reduce risk, some e-therapists use disclaimers. Those who treat out-of-state patients might state in their disclaimers that clients are considered to be traveling to the therapist's state when receiving e-therapy services. Others have disclaimed that they are practicing medicine or therapy at all, categorizing the service, instead, as educational or informational. Whatever information or language one decides to include in a disclaimer, one should note that courts and licensing boards may not agree. A disclaimer is no guarantee against liability, but it may help to clarify patient expectations.

Records and Documentation

Documenting the steps one has taken to reduce and mitigate risk is often beneficial in protecting oneself in the event of a lawsuit or disciplinary proceeding. While documentation carries its own risks and cannot be said to insure against liability, it nonetheless affords the ethical therapist a record of disclosures and a transcript of the informed consent process. This opportunity may increase or reduce risk depending upon the individual situation and the ways in which the clinician deals with documentation concerns.

CONCLUDING POINTS

Therapists who decide to provide e-therapy services to their patients should be aware that they are embarking upon poorly charted waters. As both a new form and a

new vehicle of treatment whose effectiveness has not yet been fully established in the medical literature, e-therapy warrants the exercise of extra care and caution by its practitioners. By remaining attentive to forensic aspects of e-therapy, clinicians can help establish a standard of care in the field and set a positive example for their colleagues as well as for patients. As with any new or uncommon form of therapy, sensitivity to pertinent legal and ethical risks is an important step toward upholding an acceptable standard of care for one's patients.

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