Videotaping / Risks

written by Richard Leslie | May 24, 2016

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… Perhaps the most common component of an informed consent mentioned in state laws, ethical provisions and other sources of authority is the requirement to disclose the potential risks and benefits of the proposed treatment. As discussed in prior issues of the Avoiding Liability Bulletin, the necessity for an informed consent document may be specified in state law for limited and specific purposes (e.g., for e-therapy/telemedicine) or may be more generally required by law or recommended in ethical standards under a variety of circumstances. Rarely does the law specify what the actual risks or benefits are, but rather, the law more generally mandates that the practitioner must inform the patient of the risks and benefits, leaving it to the judgment of the practitioner to determine the actual disclosures.

In the case of telemedicine, for example, what are the potential risks? Or, if a therapist or counselor were to ask permission of the patient to videotape sessions for use in supervision and training, what are the potential risks? These kinds of questions are not easy to answer and they require considerable thought. Depending upon circumstances, the answers may vary. With respect to e-therapy or "telemedicine," review the Mental Health Avoiding Liability Bulletin for some additional ideas / perspectives about the potential risks that one may want to disclose and discuss with prospective e-therapy clients.

With respect to the videotaping of sessions (which may be helpful with supervision, training and quality of patient care), one must exercise care in how and with whom the subject is broached. Patients who say "no" might later feel that they have disappointed their therapists or counselors and this may negatively affect their future relationships. Thus, practitioners would certainly want to make abundantly clear in an informed consent document that there is no obligation to consent and that the patient is encouraged to make his or her wishes known, without penalty or consequence. Such attempt to obtain informed consent should, where possible, be pursued at the outset of therapy rather than after therapy has begun.

One of the risks of videotaping is that the tape may be lost or may otherwise get into the hands of those who should not have access. Thus, therapists should be clear (in the informed consent document) about how the tapes will be maintained, who will have access to them, and how and when will they be destroyed. Patients should also be informed in the document that they have the right to withdraw their consent at any time. The method by which the consent may be withdrawn should also be delineated.

Another concern about videotapes is their availability to be subpoenaed. Patients who are involved in litigation, or who are likely or expecting to be involved, may not want the tapes to become discoverable evidence because of the extent of the content, and thus, may want to say "no" to the videotaping

request. Careful judgment must be exercised in such cases as to whether or not the request by the therapist should even be initiated. A thorough informed consent disclosure might therefore include, among other things, the fact that the tapes may be subpoenaed and may have to be released (assuming that the privilege doesn't apply and that the tapes have not yet been destroyed).

For those who have consented to videotaping, it is important that the destruction of the tapes takes place not only at the earliest time appropriate, but on a regular schedule as well. The schedule of tape destruction should be carefully delineated in the informed consent document. Thus, if a subpoena unexpectedly arrives a few days after destruction of the tapes, the practitioner will have a reasonable explanation for the destruction and will hopefully have the informed consent document to help prove that the destruction was both legitimate and appropriate. Otherwise, it may look as though the practitioner has intentionally destroyed evidence – a rather serious charge.