

LEGAL BRIEFS: IS ONLINE COUNSELING LEGAL?

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Is online counseling legal? Unfortunately, there's no simple yes/no answer, any more than, "Is driving legal?" or "Is counseling legal?" The fact is, it depends on where it's being done, who is doing it, and what exactly is being done. Add to that the fact that (1) you can do something specifically illegal in the course of doing something generally legal, and (2) an activity might be legal but still expose you to civil liability or other negative consequences. Ultimately, as in any other complex human endeavor, when it comes to online counseling you must consider the context and use your judgment to decide whether the level of risk weighs in favor of undertaking the activity. You'll need to consider several factors, outlined below:

Where

When it comes to legality, the best place to start is "Where" because geography determines what governing body has jurisdiction over what you're doing and that governing body (or bodies, to the extent more than one applies) makes the laws that you need to consider. As much as we can imagine an abstract internet where things happen everywhere and nowhere, you and your client are still people who will be sitting or standing or lying down or moving around while they are engaged in the online counseling process (to say nothing of courtrooms or prisons). Just think about which jurisdiction's police officers or judge would have the power to affect your life. States are generally pretty cooperative in helping to track down criminals from sister states, and nations vary depending on their relationship.

If the counselor and client reside in the same legal jurisdiction, then the analysis is simple, but less so where the parties are in different states. The point: figure out what jurisdictions might apply and become familiar with those laws. Consider not only the jurisdictions where the parties reside, but also the location where the activity is occurring. Consider both the laws of the state

(e.g., practice laws) and the country containing it (e.g., privacy and other healthcare-related laws, especially with interstate or international transactions). Act in accordance with the more restrictive jurisdiction where possible.

Who

The most obvious way that online counseling might be illegal is if someone unlicensed is doing it. Indeed, the unlicensed practice of psychology, or social work or any other licensed profession is illegal in most states. If it's illegal to do something offline, a judge will probably say it's illegal online too and a number of states have explicitly added language like, "by any means" to their practice definitions. Some states have also explicitly prohibited the delivery of medical services to residents from outside the state by providers who are not licensed within the state. That said, many states also have temporary practice provisions allowing licensed professionals from other states to work for a short period of time within the state. States (and prosecutors) vary in how vigorously they enforce practice laws. Note also that many countries outside the United States have no formal license requirement for professional mental health counseling.

What

Assuming you're comfortable with the legality of the practice of online counseling in the applicable jurisdictions generally, then the primary consideration will remain making sure you comply with any laws applicable to conducting professional mental health counseling by any modality. Some of those laws may be more or less difficult to follow by virtue of the online modality. Specifically, the counselor must comply with any state regulations re. privacy, consent, note-keeping, crisis management and reporting (e.g., suicidality, abuse).

You Can Do This

Ignorance of the law is no excuse, but there is a general principle that criminal statutes should be easily understandable to the public. Although statutes are interpreted by case law in the U.S., and courts flesh out vague language, you shouldn't need a lawyer to figure out the basics of what you can and can't do. The good news is that nearly every state and the federal government makes its laws freely available to the public via the World Wide Web. Before you start online counseling, take some time to skim the mental health laws of your state (which you should already know) and the laws of your client's state, if different. Just enter the state name and "codes" or "statutes" in your favorite search engine--they're often found on the website for the state legislature. Most states make it very easy to search their laws by keyword or a detailed table of contents. It's also a good idea to visit the website for the state board of psychology (or social work or mental health counseling), as they generally collect all of the relevant mental health laws in one place along with links to any potentially applicable regulations for counselors in that state.

Beyond Criminality

A final consideration is that, even if online counseling is conducted in a manner that is perfectly legal (or not enforced by the governing body), considering each of the factors above, there may still be legal consequences in the form of civil lawsuits based on contractual disputes, fraud, negligence, etc. I've written elsewhere about these considerations. If not careful, online counselors may also run the risk of having to answer to regulatory agencies like state Boards of Psychology that mandate compliance with ethical codes and other rules.

Conclusion

In sum, it is impossible to say whether online counseling is illegal or legal as a general matter, but with some careful consideration to several key factors--including where the parties are

located, who is involved and what is being done--there are myriad ways to practice online counseling in ways that would be considered legal or illegal. Finally, it is important to stress that just because an activity is not a crime, that activity may still carry consequences for the participant.

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References

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