

4-1-2011

# Oh No! Avoiding Suits and Malpractice

Rodger K. Bufford

George Fox University, [rbufford@georgefox.edu](mailto:rbufford@georgefox.edu)

Follow this and additional works at: [http://digitalcommons.georgefox.edu/gscp\\_fac](http://digitalcommons.georgefox.edu/gscp_fac)



Part of the [Clinical Psychology Commons](#)

---

## Recommended Citation

Bufford, Rodger K., "Oh No! Avoiding Suits and Malpractice" (2011). *Faculty Publications - Graduate School of Clinical Psychology*. Paper 19.

[http://digitalcommons.georgefox.edu/gscp\\_fac/19](http://digitalcommons.georgefox.edu/gscp_fac/19)

This Conference Proceeding is brought to you for free and open access by the Graduate School of Clinical Psychology at Digital Commons @ George Fox University. It has been accepted for inclusion in Faculty Publications - Graduate School of Clinical Psychology by an authorized administrator of Digital Commons @ George Fox University.

# Oh No: Avoiding Suits & Malpractice

Bennett et al, 2006

Woody, 1988

# Oh No: Avoiding Malpractice

- Goals

- Risk management model
- Risk Management Formula
- Risk Management context and statistics
- Risk management strategies
- Apply Risk Management Formula to case examples
- Risk management strategies

# Oh No: Avoiding Malpractice

- Early models of risk management focused on:
  - Confronting denial
  - Describing the disciplinary system
  - Risk management strategies
    - Informed consent
    - Documentation
    - Consultation

# Oh No: Oh No: Avoiding Malpractice

- Newer models of risk management focus on:
  - **Forethought** (anticipating problems)
  - **Thought** (mindful of relevant concerns when resolving concerns)
  - **Afterthought** (learning from experience)

(Bennett, Bricklin, Harris, Knapp, Vandecreek, Younggren (2006) – APAIT)

# Oh No: Avoiding Malpractice

- Newer models of risk management parallel Bloom's taxonomy:
  - **Knowledge**: know code and laws
  - **Comprehension**: able to describe for others
  - **Application**: can apply for self
  - **Analysis**: can identify principles and compare their application
  - **Synthesis**: incorporate principles in practice and apply to novel situations
  - **Evaluation**: able to compare strategies and justify decisions

# Oh No: Avoiding Malpractice

- Risk Management Formula (Bennett et al, 2006)

- Clinical risk = 
$$\frac{(P \times C \times D)}{TF}$$

P = patient risk

C = context

D = disciplinary consequences

TF = therapist factors

# Oh No: Avoiding Malpractice

- Broadly speaking, complaints against mental health providers can be directed to:
  - The practitioner
  - The practitioner's employer (if any) or company
  - The ethics committee
  - The licensing board
  - The courts



# Understanding Patient/Client Risk

- For clients, participating in psychotherapy poses risks.
- ***What are the risks to clients?***

# Understanding Patient/Client Risk

- For clients, participating in psychotherapy poses risks.
- ***What are the risks to clients?***
  - Personal/private information revealed
  - Shame & embarrassment
  - Breach of confidentiality
  - Prosecution or lawsuit
  - Adverse job consequences
  - Costs: time and money
  - Get worse personally
  - Relationships get worse

# Oh No: Avoiding Malpractice

- Malpractice involves “the failure to fulfill the requisite standard of care” whether by omission or commission (Woody, 1988; p. 2).
- Legal action is normally based on **negligence**:
  1. Breach of duty
  2. Injury or harm occurred to a person to whom a duty was owed
  3. “Damages” can remedy

# Oh No: Avoiding Malpractice

- Malpractice involves four “Ds” (Bennett et al, 2006)
  - Duty
  - Damage
  - Deviation
  - Direct link

# Oh No: Avoiding Malpractice

- Subjective elements play an important role in malpractice because there is no objective standard of care.
- Malpractice involves patients, doctors, lawyers, and insurers.
- Beware of greed on any side of this.

# Oh No: Avoiding Malpractice

- The practicing professional should **adopt a two-fold pragmatic stance**:
  - “**Assessing risks** that are associated with malpractice
  - Implementing and maintaining preventive and protective **risk management** (managing risk) to avoid malpractice actions” (p. 19).
- Mental health care has become a business in the US. We need to practice accordingly.

# Oh No: Disciplinary Action

## Malpractice Complaints (APAIT; Bennett et al 2006)

- Ineffective treatment, failure to consult or refer (29%)
- Failure to diagnose/improper diagnosis (16%)
- Child custody disputes (10%)
- Sexual intimacy, harassment or misconduct (9%)
- Breach of confidentiality (8%)
- Suicide (4%)
- Supervision (3%)

# Oh No: Disciplinary Action

## Malpractice Context (APAIT; Bennett et al 2006)

- Ethics complaints stable for 10 years
- Board complaints are “up substantially” in this period
- About 1% of psychologists are subject to complaints or Board action each year
- Board complaints about 4 times more common than suits
- Some Boards aggressively pursue complaints, including bringing other charges once file is open
- Board context is administrative, not legal



# Introduction to legal system (pp. 33-38).

- The possibility of malpractice charges cannot be completely avoided.
- Woody proposed that we need to consider the cost of preventive and defensive measures a part of the cost of doing business.
- Bennett et al recommend the Risk Management formula as a way to implement management of risk

# Malpractice



- Most malpractice cases involve **negligence** or unintended harm. Negligence includes:
  - A duty
  - Breach of that duty
  - Causation
  - Harm (p. 48 f)
- **Punitive** damages are rare in malpractice cases (generally harm was unintentional).
- Damages are mostly **compensatory** for harm or loss (e.g., consortium).

# Oh No: Disciplinary Action

## Response if Charged

- Inform insurance company immediately
- Seek an attorney immediately
- All communication is by attorney or with his/her permission
- Do NOT alter records (amendment may be fine)
- Be *patient*

# Malpractice



## ● Defenses

- No breach of duty
- Absence of harm or injury
- Assumption of risk, for example by consent
- Contributory negligence
- Standard of care was met, based on claimed competencies and specializations (Note: specializations carry a higher standard)

# Oh No: Disciplinary Action

## Risk Management Strategies: 3 domains

- Practice management
- Career Management
- Self Care
- ***What are some of the strategies you can use in each area?***

# Risk Management: *Some strategies*

- Practice management
  - Consent
  - Documentation
  - Record protection/security (copy machines)
- Career Management
  - Colleagues
  - Consult/seek supervision
  - Do not see high risk patients when alone in office/building
  - Ongoing CE
- Self Care
  - Rest, diet, etc.
  - Recreation – exercise, vacations, etc
  - Social support—give and receive

# Oh No: Avoiding Malpractice Case Examples

- Clinical risk = 
$$\frac{(P \times C \times D)}{TF}$$

A psychologist was approached to provide therapy for the children by parents undergoing a difficult, painful, and contentious divorce. The mother was a banker and the father an attorney (Bennet et al, 2006; p. 25)

***Use the RM formula to help her decide whether to take this case***

# Oh No: Avoiding Malpractice Case Examples

- Clinical risk = 
$$\frac{(P \times C \times D)}{TF}$$

The client is an Asian woman, married with two elementary children. She reports dissociative personality disorder and PTSD secondary to sexual abuse as a child. After several years of successful progress her Female therapist moved away and referred her to a Male therapist. It went badly. Now, four years later a crisis has occurred due to sexualized response to her son's teacher and she is seeking to return to treatment with a Male therapist.

***Use the RM formula to help her decide whether to take this case***



# Oh No: Avoiding Malpractice: Case Examples

● Clinical risk = 
$$\frac{(P \times C \times D)}{TF}$$

- ❖ Dr. X has been seeing a female client in her late 30s for several years.
- ❖ She had a severe TBI at age 8 after which she learned to walk, talk, and feed herself.
- ❖ Significant recovery has occurred, but recent VIQ is about 80 and PIQ about 100.
- ❖ She presents with PTSD secondary to sexual and emotional abuse, Sx suggestive of bipolar disorder, and paranoid Sx.
- ❖ She formerly took antipsychotic RX, but discontinued a year ago.
- ❖ Recently she has alleged that her therapist colludes with police to tap her phone, monitor her calls, and test her.
- ❖ Should treatment be continued or terminated and referral made?

# Oh No: Avoiding Malpractice: Case Examples

● Clinical risk = 
$$\frac{(P \times C \times D)}{TF}$$

- ❖ I am seeing a young child (age 5) and his mother, with treatment focused on child's impulsive behaviors and difficulty following directions at home and school.
- ❖ The mother has full custody of the child and was never married to the father. Mother has some contact with the father but prefers that the father is not involved with treatment, and describes him as "manipulative" and "unpredictable."
- ❖ The father recently expressed interest in the child being in therapy and I'm wondering about the legal and ethical issues involved. My understanding is that since father has parental rights, he has the right to access his child's treatment records.
- ❖ I would love some guidance on how to proceed to honor father's legal rights (What information do I have to give him if he requests any?) and maintain confidentiality and a good therapeutic alliance with the mother and her son.

# Oh No: Avoiding Malpractice: Case Examples

- Professional self concept
- The company you keep
- Framing your clinical practice
- Client management
- Healthy defensiveness

# Strategies for Avoiding Risk:

## Chapter 4 The Professional Self-Concept

- *Seek to maintain a personal self-concept that is:*
  - *“consonant with public policy, law, disciplinary ethics and standards, and client needs” (p. 69).*
  - *Personal psychological health will promote this*
  - *Personality-based doubt about adequacy or competency will hinder this strategy.*
  - *Be what you are trained to be.*

# Strategies for Avoiding Risk :

## Chapter 4 The Professional Self-Concept

- Guideline 1: Do not accept a position for which you are not fully qualified.
- Guideline 2: Do not use vanity credentials--doubtful credentials raise the standard of care without enhancing competence; they may also lead a court to doubt your character.

# Strategies for Avoiding Risk :

## Chapter 4 The Professional Self-Concept

- Guideline 3: Affiliate with standards-setting professional associations—following their guidelines provides a cloak of protection (they provide a standard for acceptable practice).
- Guideline 4: Claim no special expertise outside of national standards.
- Guideline 5: Avoid an isolated practice.

# Strategies for Avoiding Risk :

## Chapter 4 The Professional Self-Concept

- Guideline 6: Maintain a supervisory relationship—think of this as an ongoing professional cost with many benefits. Purchasing supervision from a highly-trained professional provides a hedge of protection from malpractice.
- Guideline 7: Seek continuing education—preferably in a focused way.

# Strategies for Avoiding Risk :

## Chapter 4 The Professional Self-Concept

- Guideline 8: Conceptualize your services as a business—in a business-like way use an attorney when ethical or legal charges are brought.
- Guideline 9: Keep your career in a long-term perspective—if complaints are brought, time may be your ally; don't be in a rush to resolve these complex issues.
- Guideline 10: Follow a career-investment strategy. [e.g., have a 5 year plan]



# Strategies for Avoiding Risk :

## Chapter 4 The Professional Self-Concept

- Guideline 11: Invest in allies—get business, accounting, tax, and legal assistance.
- Guideline 12: Carry malpractice insurance and understand the policy limits—especially when working for an agency, know what the policy covers since **your concerns may conflict with those of the agency—so have your own attorney.**

# Strategies for Avoiding Risk:

## Chapter 5: The Company that You Keep

- Guideline 13: Know your colleagues—steer clear of those who engage in risky activities; carefully choose and supervise all employees.
- Guideline 14: Provide supervision—for employees and colleagues, preferably external party as supervisor so objectivity is maximized.

# Strategies for Avoiding Risk:

## Chapter 5: The Company that You Keep

- Guideline 15: File **written** objections—to policies or directions that can compromise standards of care—e.g., nominal supervision.
- Guideline 16: Require a detailed job description from your employer.
- Guideline 17: Have a contract that specifies your employer's legal liability—ask to review malpractice policy; consider indemnification contract that protects you.

# Strategies for Avoiding Risk :

## Chapter 6: Framing a Clinical Practice

- Guideline 18: Know your disciplinary ethics—and follow them.
- Guideline 19: Know your discipline's guidelines for delivery of services—and follow them.
- Guideline 20: Know legal prescriptions and proscriptions.
- Guideline 21: Know public policy and community standards.

# Strategies for Avoiding Risk :

## Chapter 6: Framing a Clinical Practice

- Guideline 22: Cultivate community and professional support—be collegial; avoid alienating powerful colleagues.
- Guideline 23: Present your practice modestly.
- Guideline 24: Select an appropriate form of business—know your state’s laws and consider how best to structure your business in light of them.

# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 25: Operate according to a risk-management system.
  - *Sensitivity to client needs and practice within acceptable standards of care greatly diminishes risk of complaints.*
  - *Inform clients/patients about standards and practices as a condition of entry into care (= informed consent).*

# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 26: Formulate a restrictive scope of service—work to your strengths
- Guideline 27: Know your standard of care and communicate it.
- Guideline 28: Enter a service contract with clients, with **no guaranteed outcome**—and **avoid accumulated bills**.

# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 29: Specify the limits of confidentiality and privileged communication—consider motion to quash if you get a subpoena and clients objects to disclosure.
- Guideline 30: **Have the client pre-review all communications**—let client mail insurance billings, ideally (but do electronic under HIPAA and to verify insurance companies have received the billing).
- Guideline 31: Have a standardized **recording system**—that describes what you knew, what you did, and addresses standards of care, not just what client said/did.



# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 32: Record your responses in as much detail as client responses.
- Guideline 33: Keep an accurate log of the services and their purposes—**log every interaction**, especially unscheduled phone contacts; note on statement of account even if no charge—organized, secure (two locks), and accessible.
- Guideline 34: Have a safe record storage and an effective retrieval system.

# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 35: Base all interventions on a well-established theory.
- Guideline 36: Have innovative techniques reviewed by others—always!
- Guideline 37: Inform clients of reservations about effectiveness—limitations of standardized test results, possible adverse outcomes, uncertainty of favorable outcomes.
- Guideline 38: Establish a diagnostic system—imperfect **assessment of dangerousness** will make errors, but “best judgment” is required—**document facts, rationale, actions**.

# Strategies for Avoiding Risk:

## Chapter 7: Client Management

- Guideline 39: Detect and report signs of dangerousness.
- Guideline 40: Have arrangements for emergency services.
- Guideline 41: Have a policy for termination and follow-up—continuing to provide care to non-compliant clients is a major source of risk; inform about need for compliance to continue in practice and carry through.
- Guideline 42: Identify referral sources—document referrals and efforts to follow up on compliance.
- Guideline 43: Do not allow clients to accrue a deficit in payments.

# Strategies for Avoiding Risk:

## Chapter 8: Healthy Defensiveness

- Guideline 44: Function as a reasonable, ordinary, prudent practitioner.
- Guideline 45: When a complaint arises, revert to a defensive posture.
- Guideline 46: Avoid indignation or coyness with the legal system—when a client’s attorney contacts you, direct them to *your* attorney.

# Strategies for Avoiding Risk :

## Chapter 8: Healthy Defensiveness

- Guideline 47: Eliminate self-management of your legal case.
- Guideline 48: Avoid overexposure of personal qualities and opinions.
- Guideline 49: Serve strictly as a professional to your clients—maintain emotional distance so that client/patient welfare can remain uppermost.
- Guideline 50: Guard against the **seven deadly sins**—pride, covetousness, lust, anger, gluttony, envy, and sloth.

# Therapist/trainee Self-protection

- **Supervision Records: document all supervision or consultation received**
- Date
- Time/duration
- Contents of supervisory sessions and topics discussed
- Directions given—
  - What were you told to do
  - What were you forbidden to do
  - Deadlines, schedules, etc.

# Therapist/trainee Self-protection

## **Supervision Records: document all supervision received**

- Think of this record as your evidence of what happened in the supervision process.
  - In the absence of a record, whatever the supervisor says about you is true.
  - Preliminary research suggests that adverse supervisory experiences are common (Gray, Ladany, Walker, and Ancis, 2001; Nelson and Friedlander, 2001; Ramos-Sanchez et al., 2002).
  - By report, some supervisees have been harmed by inaccurate or false reports of their functioning by their supervisors.
  - Ellis (2001) distinguished ineffective and harmful supervision. Ineffective supervision is troubling, but harmful supervision is much more serious.
  - Keeping a record will protect you from being an (easy) victim of an unethical supervisor and minimize risks for other adverse outcomes

# Oh No: Avoiding Malpractice

- Broadly speaking, complaints against mental health providers can be directed to:
  - The practitioner
  - The practitioner's employer (if any) or company
  - The ethics committee
  - The licensing board
  - The courts



# Oh No: Avoiding Malpractice

- Malpractice involves “the failure to fulfill the requisite standard of care” whether by omission or commission (p. 2).
- Legal action is based on **negligence**:
  1. Breach of duty
  2. Injury or harm occurred to a person to whom a duty was owed
  3. “Damages” can remedy

# Oh No: Avoiding Malpractice

- The practicing professional should **adopt a two-fold pragmatic stance**:
  - “**Assessing risks** that are associated with malpractice
  - Implementing and maintaining preventive and protective **risk management** (managing risk) to avoid malpractice actions” (p. 19).
- Mental health care has become a business in the US. We need to practice accordingly.

# Oh No: Avoiding Malpractice

## Contact information

- [rbufford@georgefox.edu](mailto:rbufford@georgefox.edu)
- Rodger K. Bufford
- Graduate Department of Clinical Psychology
- George Fox University
- 414 N Meridian V104
- Newberg, OR 97132
- Phone: 503-554-2374
- Fax: 503-554-2371