2014 ACA Code of Ethics Webinar
Fees, Fee-Splitting, Gifts, Bartering, & Other Billing/Financial Issues

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Disclaimer
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Who are you?

- Standard participant poll

Ethical Decision-Making

“What if there are psychological forces - aspects about our human nature – that complicate our ethical decision-making ability?”

Wheeler & Bertram, 2012

Business ethicists Max Bazerman (Harvard Business School) and Ann Tenburnsel (Notre Dame College of Business) suggest there are psychological and cognitive forces that invite times “when we unwittingly behave unethically.” (Bazerman & Tenburnsel, 2011)
Bounded Ethicality
– Occurs when we limit our analysis of a situation to the data (opinion/perspective) in the room.
– Occurs more easily where we don’t Consult – beware of consulting only with colleagues who will reflexively agree with you
– Example: Group Think

Ethical Fading
– Occurs when we reclassify a problematic situation
– Example: When an ethical decision is reclassified as a “business decision”

(Bazerman & Tenbrunsel, 2011)

“It’s just a business decision.”
We all need it!
Money can challenge Ethical Decisions
Fees & Business Practices
2014 ACA Code of Ethics, Section A.10.

- Self Referrals
- Unacceptable Business Practices
- Establishing Fees
- Nonpayment of Fees
- Bartering
- Receiving Gifts

Self Referrals
ACA Code of Ethics, A.10.

“Counselors working in an organization (e.g., school, agency, institution) that provides counseling services do not refer clients to their private practice unless the policies of a particular organization make explicit provisions for self referrals. In such instances, the clients must be informed of other options open to them should they seek private professional services.”
Practice Practice Arrangement - Poll

Full-time Private Practice
- Solo Practitioner
- Partnership/Group Practice
- Fee Sharing Independent Contractor
  (in lieu of and/or in addition to rent, administrative services and/or supervision)
- Owner – Employs other counselors
- Owner – Rents space/services to others

Part-time Private Practice
- Monthly rent from another counselor
- Fee sharing arrangement
  (in lieu of and/or in addition to rent, administrative services and/or supervision)

Unacceptable Business Practices

ACA Code of Ethics, A.10.b

“Counselors do not participate in fee splitting, nor do they give or receive commissions, rebates, or any other form of remuneration when referring clients for professional services.”
What is fee-splitting?

“Unfortunately, there is not just one definition – in statutes or codes of ethics – that applies in all states. Typically, health care professional licensure statutes or regulations that contain fee-splitting prohibitions forbid a professional from sharing fees with another professional or entity that renders no professional services. That ban may include any type of rebate, commission or other payment.” Wheeler, 2014

Why no fee-splitting…it’s done all the time!

Fee-splitting for referrals - including payment for referrals, commissions, or other compensations/considerations are common practice in many business sectors.

You may even know counselors and other mental health professionals who engage in fee-splitting for referrals arrangements.

However, for counselors it is unethical and may be illegal! For counselors and other health professionals, fee-splitting as compensation for referrals is unethical and may be illegal because of the fiduciary duty counselors have to their clients.

The fundamental ethical issue with fee-splitting is that involves placing the needs of the counselor ahead of the best interests of the client.
What is a fiduciary duty?

Fiduciary duty - is a legal duty to act solely in another party's interests.

ACA Code of Ethics, A.1.a. “The primary responsibility of counselors is to respect the dignity and promote the welfare of clients.”

Applicable Ethical Behavior Principles
Nonmaleficence
Beneficence
Veracity

Legal Implications
Federal Statutes: When the fee-splitting occurs in the context of a Federal program (Tricare, Medicaid, Medicare, Others), the legal consequences can be very serious.

The federal Anti-Kickback Statute (42 U.S.C. § 1320a-7(b) is a criminal statute that prohibits the exchange (or offer to exchange), of anything of value, in a effort to induce (or reward) the referral of federal health care programs business.

Conviction of this federal offense can result in $25,000 fine (per offense), civil damages and imprisonment up to 5 years.

State Statutes: Additionally there are “fraud and abuse” state statutes that prohibit fee-splitting and/or kick-back” arrangements.
Does this mean that all arrangements to share or split income and office expenses are illegal. Not necessarily.

- Under certain very specific circumstances, sharing fees as payment for legitimate expenses (e.g. office rent, administrative services, clinical supervision, etc.) can be acceptable.
- When counselors are employed or when there is a legitimate personal services contract, the fee-sharing arrangement may qualify as a “Safe Harbor” (an exception from the legal prohibition).
- A primary issue is whether the money paid exceeds the fair market value of the services received – if that is the case there can be the presumption that the counselor is paying for referrals.

The terms fee-splitting and fee-sharing are widely utilized – without a common definition. Therefore, your current arrangement, what you are have in mind or what you are being offered may or may not be ethical or legal.

Before entering into any agreement that involves the splitting or sharing of fees – it is essential that the details of the agreement are reviewed by a knowledgeable health care attorney in your state.

You may also consult with the ACA Ethics representatives to ensure ethical compliance.
Establishing Fees  
ACA Code of Ethics, A.10.c.

“In establishing fees for professional counseling services, counselors consider the financial status of clients and locality. If a counselor’s usual fees create undue hardship for the client, the counselor may adjust fees, when legally permissible, or assist the client in locating comparable, affordable services.”

Fees Polling  
How much do you charge per hour?

Usual and customary “self pay” hourly rate, for counseling fees varies across the country based on client population, practice location, practitioner credentials and experience, and other idiosyncratic variables.

What is your rate?
- Less than $35
- Between $36 – 75
- Between $76 – 100
- Between $101 – 125
- Between $126 – 175
- More than $175
Usual & Customary Fees

- Under most circumstances, practitioners are legally entitled to establish any fee they choose for their time and expertise.
  - Exception: If the counselor entered into a contractual agreement with a 3rd party payer – the counselor could not charge more or less than what was agreed up
- Establish and publish in the Informed Consent Statement a list of the Usual & Customary Fees charged for all services.
  - Fees for Counseling: Individual, Couple, Family, Group
  - Additional Time: if the session runs long
  - Telephone/Internet Consultation
  - Correspondence: Reports, letters, emails, text, etc.
  - Judicial Involvement: Deposition, court appearance, consultation w/ attorney
  - No Show / Late Cancellation
  - Billings & Interest
  - Other Services: Unique to the specifics of client population

- Counselors can “adjust” the Usual & Customary Fee on a case by case basis to accommodate the financial ability of a client
  - Different than a Sliding Fee Scale – adjusting the Usual & Customary Fee does not alter the stated value of the service; however it does allow the counselor at his/her discretion to respond to the financial ability of a given client.
- Be mindful of waiving “co-payments” – consult the 3rd party payer contract to ensure this action is permissible
- Failure to clearly communicate expectations about fees and charges can lead to misunderstandings that can negatively impact the treatment relationship.
  - The underlying issue/tension embedded in some licensure board complaints and lawsuits can be traced to conflicts about fees and costs
**Nonpayment of Fees**  
ACA Code of Ethics, A.10.d

“If counselors intend to use collection agencies or take legal measures to collect fees from clients who do not pay for services as agreed upon, they include such information in their informed consent documents and also inform clients in a timely fashion of intended actions and offer clients the opportunity to make payment.”

- Do not allow a client to amass a large unpaid balance. Address the outstanding balance before it becomes the “elephant in the room.” Arrange a payment plan or take other steps to reduce the distraction of an unpaid balance.
- Counselors are entitled to pursue legal action (collection agency) in the event of non-payment, but it should be the last resort.
**Bartering**
ACA Code of Ethics, A.10.e.

“Counselors may barter only if the bartering does not result in exploitation or harm, if the client requests it, and if such arrangements are an accepted practice among professionals in the community. Counselors consider the cultural implications of bartering and discuss relevant concerns with clients and document such agreements in a clear written contract.”

**Gifts**
ACA Code of Ethics, A.10.f

“Counselors understand the challenges of accepting gifts from clients and recognize that in some cultures, small gifts are a token of respect and gratitude. When determining whether to accept gift from clients, counselors take into account the therapeutic relationship, the monetary value of the gift, the client’s motivation for giving the gift, and the counselor’s motivation for want to accept or decline the gift.”
The tension surrounding the acceptance of a gift involves protecting the counseling relationship. 
- Will accepting the gift somehow obligate or distort the counseling relationship?
- Will accepting the gift create a conflict of interest, (e.g. accepting a gift from one partner when providing family or couples/marriage counseling)
- Will declining the gift offend the client and negatively affect the counseling relationship?

Agency policy: Is there a policy within the agency or work setting that prohibits the acceptance of a gift?

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**Billing & Fraud**

While not specifically addressed in the Code of Ethics, allegations of Billing Fraud occur when counselors improperly bill 3rd party payers for work that was not performed or intentionally misrepresents the services provided. Serious legal consequences can follow (licensing board complaints, lawsuits, and criminal charges).

**Example:** Most 3rd party payers will not pay providers for No Show or Late Cancellations – payment is the responsibility of the client.

Providers can be tempted to list the missed session as a regular session and accept payment from the 3rd party provider.

**Example:** Submitting billing as Individual Psychotherapy (90834) when the service provided was Couples Therapy (because Couples counseling is not covered)

Counselors who provide services to Federal programs can expect audits – irregularities found during these audits can have very serious legal consequences.
Questions

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Reference List

- U.S. Criminal Penalties for Acts Involving Federal Health Care Programs. Anti-Kickback Statute (42 U.S.C. § 1320a-7(b)