FOCUS:
MENTAL HEALTH LAW

Impact of COVID-19 on the Mental Health Legal and Clinical Systems

Carolyn Reinach Wolf and Jamie A. Rosen

The COVID-19 pandemic posed unprecedented challenges for the field of psychiatry, disrupting the clinical services available to those individuals suffering from mental illness and their loved ones who often seek assistance on their behalf. Under normal circumstances, it is extremely difficult to watch a loved one suffer, refuse or discontinue treatment, disconnect from their support system, and relapse or deteriorate. The COVID-19 pandemic has only exacerbated these struggles, affecting access to inpatient treatment and outpatient mental health resources and, at times, impeding the ability to simply visit a loved one to provide support or necessary intervention.

Moreover, the rapid spread of this highly contagious disease, the resulting economic recession, and the death of close friends or family has resulted in a host of mental health consequences for even the healthiest of individuals: feelings of uncertainty, sleep disturbances, anxiety, distress, depression, and increased levels of alcohol or drug use. The restrictive measures such as quarantining, isolation, and social distancing have caused psychological distress for everyone.

Over the past year, psychiatrists and other mental health professionals have faced unique challenges including caring for patients who suffer from serious mental illnesses and test positive for COVID-19, as well as taking measures to prevent the spread of infection. In the outpatient world, the practice of psychiatry has transformed as many clinics, healthcare offices, and therapists closed their doors to in-person treatment. Telehealth and telepsychiatry, which previously accounted for a very small portion of mental health services, has become the new norm.

Inpatient Hospitalization

Hospitals offer a safe setting for mental health treatment including observation, diagnosis, therapy, and medication management.[1] However, the COVID-19 pandemic significantly impacted the provision of clinical services and required major legal, regulatory, and procedural changes.

In early 2020, especially by the time Governor Andrew Cuomo had declared a State of Emergency,[2] most hospitals were overwhelmed with patients in need of emergency care due to COVID-19. Some hospitals closed their psychiatric units to convert them into COVID units, significantly reducing the availability of psychiatric beds in New York. Staff and physicians from many units, including psychiatry, were redeployed to treat the massive influx of COVID-19 patients. Staffing shortages due to illness, caring for loved ones, or observing quarantine protocols, only exacerbated these issues.

Hospitals immediately implemented new safety protocols and procedures, including on their psychiatric units, if they remained open. Emergency departments began to require rapid testing to determine COVID-19 status before admission. Requirements of facial masks and other personal protective equipment, practicing social distancing, and changing visitation policies became the new normal in hospitals, including on psychiatric units. Group activities, group therapy, and congregate meals were limited or eliminated. Many of these protocols still exist to date.

The legal system, which is so closely intertwined with the provision of inpatient psychiatric services, also worked tirelessly to adjust court operations and implement safety protocols in the first few days and weeks of the State of Emergency. Mental hygiene legal matters in New York that affect the rights of patients on inpatient psychiatric units have been considered essential.[3]

The Mental Hygiene Parts were some of the first in the State to transition to virtual hearings even before Governor Cuomo issued an Executive Order mandating telecommuting or "work from home" procedures.[4] The courts and the hospitals made immediate and significant operational changes when judges, court staff, lawyers, doctors, and patients could no longer attend in-person court proceedings. Hearings for the retention of psychiatric patients, treatment over objection and Kendra's Law applications for Assisted Outpatient Treatment, among others, transitioned somewhat seamlessly to our new virtual world, with everyone participating from remote locations.

In some cases, where a psychiatric patient tests positive for COVID-19, the hospital might not have the staff or space to accommodate the patient and must transfer him/her to a medical unit or even to another psychiatric facility. This requires diligent record keeping and the execution of certain legal documents to effectuate such a transfer and limit any potential liability. Further, court orders obtained by a hospital for the administration of psychiatric medication over a patient's objection[5] do not follow that patient when he/she is transferred to another facility. This means that the accepting hospital will have to re-evaluate the patient's compliance with treatment and apply to the court again for continued treatment over the patient's objection. Unfortunately, this process disrupts the therapeutic alliance between the patient and the psychiatric treatment team and interrupts the patient's treatment.

Last, but certainly not least, COVID-19 impacted the treatment team's ability to plan for a safe discharge from the hospital. Social workers, staff, and physicians generally rely upon referrals to outpatient clinics and psychiatrists for follow up appointments in the community after discharge, but many closed or significantly reduced their services during the pandemic. This posed a very serious problem for individuals requiring follow up appointments for therapy and the administration of medication in the community.

Psychiatric Care in the Community

COVID-19 has required unprecedented changes in the provision of psychiatric care in the community. Without clear guidelines, mental health and healthcare professionals had to adapt their practices to provide quality care to the already vulnerable population of people with serious mental illness.

Unfortunately, as mentioned earlier, many facilities, medical or professional offices and clinics were forced to close at the height of the pandemic. Staffing shortages, insufficient funding to implement safety protocols, and a host of other reasons prevented many outpatient mental health providers from safely offering services. Some patients may have been unable to obtain medication or visit providers, leading to an increase in non-compliance and emergency room visits.[6]

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Carolyn Reinach Wolf is an Executive Partner in the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf, & Carone, LLP and Director of the firm's unique Mental Health Law practice. She serves on the Lawyer Assistance Committee of the NCBA. She may be reached via email at cwolf@abramslaw.com.

Jamie A. Rosen is a Partner at Abrams, Fensterman, LLP where she practices Mental Health Law. She serves on the Board of Directors of the NCBA and was the founding Co-Chair of the NCBA Mental Health Law Committee. She may be reached via e-mail at jrosen@abramslaw.com.

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The outpatient mental health programs and offices that remained open throughout the pandemic were forced to adjust their enrollment criteria, denying or delaying admission to those with potential COVID-19 symptoms. Medical offices and outpatient facilities implemented COVID-19 response protocols such as screening questionnaires, taking a patient's temperature before entry, requiring a facial mask, and following social distancing guidelines. Mental health and healthcare professionals had to significantly reduce their patient loads to avoid crowded waiting rooms and often resorted to appointment-only policies rather than permitting walk-ins, even in an urgent-care setting.

Court-Ordered Outpatient Treatment Services

In New York, Assisted Outpatient Treatment (AOT) programs in each county heavily rely on in-person, outreach-based practices.[7] AOT is a valuable tool for mentally ill individuals who refuse mental health services in the community and are frequently hospitalized. The program has proven to reduce hospitalization by providing support in the community and monitoring medication compliance.[8]

AOT providers in the "new normal" have had to adopt new service modalities in the community, relying upon virtual communications by video conference or telephone call. The AOT program provides for community-based case management services, medication management, alcohol and/or substance use testing and counseling, and individual and/or group therapy.[9] Case managers or social workers who are generally required to make in-person visits anywhere from four to six times per month have been unable to safely make these visits in the past year. Assertive Community Treatment (ACT) Teams that normally provide court-mandated individual and/or group therapy, were forced to reduce or eliminate in-person services and implement telehealth options.[10] ACT Teams are encouraged to prioritize essential services such as medication assessment and administration as well as acute crisis intervention.[11]

Unfortunately, some counties in New York have delayed acceptance or processing of community referrals for AOT.[12] COVID-19 has hindered the AOT investigation process to determine eligibility for the program such as the need to obtain medical records and conduct an in-person psychiatric evaluation of the individual. In some counties, the only way to gain acceptance into the AOT program is through an inpatient admission wherein the treatment team applies for AOT as part of the discharge plan from the hospital. Throughout the pandemic, however, renewal applications for existing AOT clients are still being processed when the Court Order expires.

Use of Telepsychiatry During COVID-19

The COVID-19 pandemic forced many physicians and mental health professionals to adjust the way they deliver care and embrace the use of telehealth services. Even our very own Lawyer Assistance Program adapted and almost immediately began offering confidential professional counseling sessions via doxy.me, a HIPAA compliant telehealth video platform.[13]

Before the pandemic, telehealth services were generally underutilized by providers and patients due to regulatory and reimbursement issues. Unprecedented temporary waivers of federal and state regulations have allowed for the widespread use of telehealth services to safely provide medical and mental health care during the pandemic. For example, waiving penalties for certain HIPAA violations enabled medical and mental health professionals to use virtual platforms such as FaceTime or Skype.[14] The loosening of state licensure regulations allowed for telehealth services to be offered across state lines.[15]

Additionally, many providers have been able to bill for telehealth services as if they were provided in person, significantly expanding access to essential mental health services.[16] Even patients without a smartphone, computer, or access to high-speed internet have been able to access services with telephone-based, audio-only, treatment.[17] These necessary waivers expanded a provider's ability to initiate or continue mental health treatment during this unprecedented time.

Conclusion

The COVID-19 pandemic triggered drastic changes to the provision of mental health services in both the inpatient and outpatient settings. The healthcare system quickly adjusted to new ways of delivering mental health and related healthcare services. Many of these temporary changes, such as the reliance on telehealth, may be here to stay long after the pandemic ends.[18] Currently, only time will tell.

1. *Psychiatric Hospitalization*, National Alliance on Mental Illness, https://bit.ly/2R92Xmf.
2. N.Y. Exec. Order 202 (Mar. 7, 2020), https://on.ny.gov/3t4nlCQ.
3. In New York, Article 9 of the Mental Hygiene Law sets forth the legal requirements for voluntary, involuntary, and emergency admission to a hospital, as well as the retention of patients pursuant to a court order.
4. N.Y. Exec. Order No. 202.6 (March 20, 2020), https://on.ny.gov/3up5BT2.
5. *See Rivers v. Katz*, 67 N.Y.2d 485 (1986).
6. Bojdani E, Rajagopalan A, Chen A, et al., *COVID-19 Pandemic: Impact on psychiatric care in the United States*, 289 Psychiatry Res. (July 2020), https://bit.ly/3upbzUc.
7. Known as "Kendra's Law" in New York, AOT is court-ordered treatment for the person's mental illness and supervision in the community with the goal of preventing "a relapse or deterioration." Mental Hyg. Law § 9.60 (a). To be eligible for AOT, the individual must be at least eighteen years old, suffering from a mental illness, unlikely to survive safely in the community without supervision, and have a history of non-compliance with treatment for mental illness. Mental Hyg. Law § 9.60 (c).
8. Kendra's Law: New York's Law for Assisted Outpatient Treatment (AOT), Mental Illness Policy Org, https://bit.ly/39FL6JN.
9. Mental Hyg. Law § 9.60 (a). There is no punitive remedy for a patient's failure to comply with AOT; however, the individual can be brought to a hospital for evaluation for involuntary hospitalization. Mental Hyg. Law § 9.60 (n).
10. *COVID-19 Program & Billing guidance for ACT Programs*, (April 13, 2020), https://on.ny.gov/2PW4jA6.
11. *Id.*
12. A family member, or other concerned individual, can make a referral to the AOT program in the county where the individual resides by filling out an application with the Office of Mental Health. *See Assisted Outpatient Treatment*, https://my.omh.ny.gov/analytics/saw.dll?dashboard.
13. *Lawyer Assistance Program*, Nassau County Bar Association, https://bit.ly/3cODIhq.
14. *Notification of Enforcement Discretion*, HHS, https://bit.ly/2RdUaPV. The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) stated it "will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency."*Id*.
15. NY Exec. Order No. 202.5, https://on.ny.gov/31TUghv.
16. *See, e.g., Medicare Telemedicine Healthcare Provider Fact Sheet*, Centers for Medicare and Medicaid Services, (Mar. 17, 2020), https://go.cms.gov/3miskgW; *see also Telehealth: Delivering Care Safely During COVID-19*, HHS, https://bit.ly/2PYYVwc.
17. *Telemedicine Coverage Expands in NY Under Bill Signed by Cuomo*, Bloomberg Law, (June 17, 2020), https://bit.ly/3wzaP0D.
18. New York Governor Andrew Cuomo continues to push for regulatory and statutory changes to permanently adopt these waivers and allow for continued flexibility in the use of telehealth. *Governor Cuomo Announces Proposal to Expand Access to Telehealth for All as Part of 2021 State of the State*, (Jan. 10, 2021), https://on.ny.gov/3dBiOBz.

Mock Trial…

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*** Attorney-advisor, Stella K. Abraham*