

Risky Business

*Case Studies
on
Legal & Ethical Issues*

*Anne Marie "Nancy" Wheeler, J.D.
&
Burt Bertram, Ed.D., LMFT, LMHC*

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC

Case #1

Counselor David Rogers is in his office opening his mail...

He has received a subpoena from the attorney for the Husband of a couple he is currently working with. The subpoena states that he is to testify at a temporary custody hearing next week and to produce *"any and all records concerning the treatment or counseling of James and Denise Jones"*.

Just then, the phone rings...

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #2

Confidentiality, Privilege, Privacy and More...

Case #1

Clients: James & Denise Jones / Counselor: David Rogers, LPC

- Presenting Problem: Marital and parenting problems
- Treatment Modality: Combination of individual and couple counseling
- Wife's Disclosure: Heavy alcohol use – blacked out several times
- Husband's Action: Files for divorce and custody of son
- Subpoena: Counselor receives subpoena from husband's attorney
- Attorney Calls: Counselor receives call from husband's attorney verifying receipt of subpoena and requests confirmation of wife's substance abuse history
- Custody Opinion: Attorney tells counselor to be prepared to offer opinion regarding the "more fit" parent

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #3

Ethical Decision- Making Model

Inspired by

*Corey, Corey, &
Callanan, 2007*

*Remley & Herlihy,
2005*

Welfel, 2002

1. Define the Problem/Dilemma: What are the core concerns (legal, ethical, clinical, or a combination)?
2. Relevant Variables: Who are the people? What are the issues, dynamics, and multicultural considerations?
3. Law/Codes/Policy: What federal/state laws, ACA Ethics Code, and institutional policy (if applicable) might apply?
4. Personal Influences: What personal values, bias/prejudice, or counter-transference may be affecting perception?
5. Outside Perspective: Whenever possible, engage in colleague consultation and/or supervision.
6. Options & Consequences: What are the possible courses of action and intended consequences? Also consider the unintended consequences.
7. Decide - Take Action: Implement the decision and be prepared to reconsider options.
8. Document Decision-Making & Follow-up: Provide written evidence of clinical/ethical decision-making and results of implementation.

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #4

Points to Ponder

1) Define the Problem/Dilemma: What are the core concerns (legal, ethical, clinical, or a combination)?

- Privilege (legal)
- Privacy (legal)
- Confidentiality (ethical & legal)
- Duty – to whom is a duty owed? (both legal and fiduciary)
- Treatment relationship (clinical)
- Other...

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #5

Points to Ponder

2) Relevant Variables: Who are the people? What are the issues, dynamics, and multicultural considerations?

- Clinical history, disclosures, and dynamics
- Informed Consent: What was agreement re/ confidentiality and individual sessions?
- Confidentiality / Privilege / Privacy – Was there a waiver?
 - Speaking with one side's attorney w/o proper authorization may be breach of confidentiality
 - Improper "waiver" if testimony is provided
- Child Abuse Reporting: Was there sufficient cause (wife's disclosure of drinking/black out) to trigger abuse report?
- Multicultural Considerations: Could they influence this case?
- Moral Issues: veracity, justice, fidelity, nonmaleficence, beneficence
- Others relevant variables...

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #6

Points to Ponder

3) Law/Codes/Policy: What federal/state laws, ACA Ethics Code, and institutional policies (if applicable) might apply?

Federal Laws

- HIPAA – preempts unless state law is more protective of client privacy
Is the counselor a “covered entity”? Has she received “satisfactory assurances” that client has notice of subpoena and opportunity to take action?
- 42 CFR Part 2: May apply if counselor is doing substance abuse treatment and is considered a “federal program” (*i.e.*, receives federal funds) (likely not substance abuse treatment in current scenario)

State Laws

- Confidentiality and privilege
- Child abuse reporting

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #7

Points to Ponder

ACA Ethics Code

- A.2.a. and A.2.b. - informed consent
- B.1.a., B.1.b., B.1.c., and B.1.d. - confidentiality and privacy
- B.2.a., B.2.b., and B.2.d. – privileged communication and legal requirements which provide possible exceptions to confidentiality
- B.4.a. and B.4.b. – confidentiality in groups, couples, and families
- C.2.a. – boundaries of competence
- C.2.e. – consultation on ethical issues
- H.1.a. and H.1.b. (possibly) – knowledge of Code and conflicts between law and ethics

Institutional Policy

- If applicable, know and follow

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #8

Points to Ponder

4) **Personal Influences:** What personal values, biases/prejudices, or counter-transference may be affecting perception?

- All of this is subject to the uniqueness of this particular counselor which is why an **Outside Perspective** is so important

5) **Outside Perspective:** Whenever possible, engage in colleague consultation and/or supervision

- Obtain fresh/objective perspective
- Obtain guidance on ethical and legal requirements
- Provide a double-check on personal influences and/or counter-transference
- Obtain assistance on possible course of action

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #9

Points to Ponder

6) **Options & Consequences:** What are the possible courses of action and intended consequences? Also, consider the unintended consequences.

Discussion

***Please take five (5) minutes to consider the
Options & Consequences
in the case***

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #10

Points to Ponder

7) Decide and Take Action: Implement the decision and be prepared to reconsider options

- Before speaking at all, counselor should tell attorney he will have to call back. Counselor should seek both legal and colleague consultation.
- Assuming consultants agree, counselor should call attorney and state that he cannot respond to questions outside court or testify without written authorization of both clients or receipt of a court order (unless HIPAA “satisfactory assurances” have been received or if state law requires other action that is more protective of privacy). There are variations among state laws.
- Counselor cannot ignore subpoena. He can request client authorization to speak with Wife’s attorney and ask whether her attorney will file a motion to quash or motion for a protective order, which would lead to a court (judicial) order.

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #11

Points to Ponder

- Remember: Counselor cannot discuss treatment with Wife’s attorney without authorization from Husband. It works both ways!
- Ascertain whether Counselor has a reasonable suspicion of child neglect or abuse based on Wife’s drinking and blackouts. Was she driving with child in the car when intoxicated? Was she otherwise in charge of him? Should this have been reported earlier?
- Counselor should not opine about who is the “more fit” parent. He did not perform a custody evaluation and should not take on that role when he is the treating counselor.

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #12

Points to Ponder

8) Document Decision-Making & Follow-up:

Provide written evidence of clinical/ethical decision-making and results of implementation.

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #13

Case #2

Dan Brown, MA, LMHC is employed by The Community Counseling Center and is counseling with Sonia, 45. In session today, Sonia tells Dan that she told her husband she wants a divorce – things have been loud and ugly at home. She is concerned about exposing her children (Karen, 21 and Sammy, 18) to this behavior and is looking for a place for both of them to live while she and her husband sort through the decision to divorce.

Client says: *“It’s just no place for children – even for legally adult children. Sammy can live with a friend, but I can’t afford apartment rent for Karen.”*

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #14

Case #2 ***Boundary Issues / Counter-transference***

Client: Sonia, 45 / Counselor: Don Brown, MA, LMHC

- Presenting Problem: Stuck in rut; depressed; “marriage is dead”
- Treatment Modality: Individual counseling, 3 months (10 sessions)
- Client Disclosure: *“It’s just no place for children – even for legally adult children. Sammy can live with a friend, but I can’t afford apartment rent for Karen.”*
- Counselor: Offers to rent cottage on his property to client’s daughter (Karen, 21) for reduced fee
- Events:
Karen moves into cottage. Over six weeks, Don and Karen begin a casual and platonic friendship. Don enjoys her company but is careful not to disclose confidential information. In the middle of the night Karen is distraught, knocks on Don’s door and he comforts her. She requests permission to sleep on his couch... something else is implied ... and they both know it.

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #15

Points to Ponder

1) Define the Problem/Dilemma: What are the core concerns (legal, ethical, clinical, or a combination) of the situation?

- Multiple Relationships: One blurred boundary (renting cottage to client’s daughter) has placed the counselor on a “slippery slope.” He has lost his footing – a boundary violation may be imminent. (ethical)
- Potential Impairment and/or Counter-transference: by offering to rent the cottage to the client, the counselor either took advantage of the client or over-indulged his need to be helpful. Something is driving that lack of professional awareness. (ethical and legal)
- Boundary Violation: If the counselor succumbs to the client’s daughter’s request to sleep on his couch, there is a high likelihood that a serious violation will occur. (ethical, legal, clinical)

© 2009 Anne Marie “Nancy” Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #16

Points to Ponder

2) Relevant Variables: Who are the people? What are the clinical issues/dynamics, and multicultural considerations?

- People: Client, her daughter, and likely the client's husband (although legal "duty" is owed to just the client)
- Clinical Issues/Dynamics
 - Treatment relationship with client is already compromised because of counselor's growing relationship with daughter
 - Treatment relationship with client will be distorted and/or destroyed if counselor commits a boundary violation
- Multicultural Considerations: could they influence this case?
- Moral Issues: nonmaleficence, beneficence
- Others relevant variables...

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #17

Points to Ponder

3) Law/Codes/Policy: What federal/state laws, ACA Ethics Code, and institutional policies (if applicable) might apply?

Federal Laws

- None

State Laws

- Counselor licensing –
 - How might the client define complaint to licensing board?
 - What constitutes exploitation of client?
 - How are dual relationships defined?
 - What constitutes sexual misconduct?

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #18

Points to Ponder

ACA Ethics Code

- A.1a. Primary Responsibility – welfare of client
- A.4.a. Avoiding Harm to Client – minimize unavoidable harm
- A.5.c. Nonprofessional Interactions or Relationships – should be avoided except with interaction is clearly beneficial to client
- A.5.a. Current Clients – Code prohibits sexual and romantic relationship with family members
- C.2.e. Consultation on Ethical Obligations
- C.2.g. Impairment

Institutional Policy

- What policies are in effect at The Community Counseling Center regarding multiple relationships with clients and/or client family members?
- What policies at The Community Counseling Center cover professional consultation and impairment?

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #19

Points to Ponder

4) **Personal Influences:** What personal values, bias/prejudices, or counter-transference may be affecting perception?

- Intentional desire to take financial advantage?
- Distorted sense of trying to "help" by offering his cottage?
- Unresolved issue surrounding divorce or a vulnerable young adult?
- Lack of social life – vulnerable to inappropriate involvement?

5) **Outside Perspective:** Whenever possible, engage in colleague consultation and/or supervision

This case is almost completely about the lack of an objective outside perspective. The counselor operated in isolation and therefore did not have the opportunity to reflect on his thinking before initiating the original boundary blurring (offering to rent the cottage).

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #20

Points to Ponder

6) Options & Consequences: What are the possible courses of action and intended consequences? Also, consider the unintended consequences.

Discussion

***Please take five (5) minutes to consider the
Options & Consequences
in the case***

Points to Ponder

7) Decide and Take Action: Implement the decision and be prepared to reconsider options

- Immediately decline the request.
- Ensure safety of Karen – get support for her.
- Phone supervisor – describe situation.
- Document events of the evening.
- Deconstruct circumstances and make full disclosure to supervisor.
- Have honest conversation Client – apologize as appropriate.
- Consider whether referral is necessary (based on outcome of client conversation/apology and based on level of professional impairment).
- Get into therapy.

Points to Ponder

8) Document Decision-Making & Follow-up:

Provide written evidence of clinical/ethical decision-making and results of implementation.

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #23

Red Flags Rule

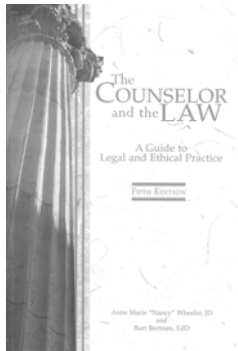


- FTC has issued regulations which require that *creditors* implement policies and procedures to protect against identity theft
 - Broad definition of creditor; FTC interprets regulations to apply to physicians, counselors, lawyers and other professionals who allow deferred payment (*e.g.*, until end of month or until insurance is collected)
- Effective date of *August 1, 2009* and penalties of up to \$2,500 per *knowing violation*
- **Resources:** See <http://www.ama-assn.org> (enter "Red Flags Rule" in the search box). Retrieved June 30, 2009; <http://www.ftc.gov/redflagsrule>. Retrieved June 30, 2009.

© 2009 Anne Marie "Nancy" Wheeler, J.D. & Burt Bertram, Ed.D, LMFT, LMHC / Slide #24

To order the book or CEU,
contact ACA Publications

Thank you!



*PowerPoint Slides
available at*

www.burtbertram.com

Click on

