Risky Business
Case Studies
Ethics and Legal Issues from the Real World

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The information presented has been designed for educational purposes. Counselors should seek legal advice from a local attorney regarding specific legal issues.

Introduction

- Background
- Ethical/legal decision-making model
- Case Studies to explore:
  1) issues of confidentiality, privilege, and privacy in the custody context (including subpoenas);
  2) boundary violations
- How HIPAA has grown new “teeth” through the federal HITECH Rules
- Social media and other “cyber” activities
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, ethics codes (especially ACA Code of Ethics), and relevant institutional policy apply to the facts?

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 and/or obtain legal advice.

6. **Options & Consequences**: What are the possible courses of action and intended or unintended consequences? Remember to involve the client in the decision-making unless clinically inappropriate (e.g., where client involvement would likely trigger violence against a third party).

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.

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**Case Study #1**

Counselor Carla Rogers is in her office opening her mail…

She has received a subpoena from the attorney for the husband of a couple currently working. The subpoena states that she 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…

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Case Study #1

Clients: James & Denise Jones  Counselor: Carla Rogers, LPC

- **Presenting Problem:** Marital and parenting problems
- **Treatment Modality:** Combination of individual and couples therapy
- **Wife’s Disclosure:** Heavy alcohol use – blacked out several times
- **Husband’s Action:** Files for divorce and custody of son
- **Subpoena:** LPC receives subpoena from husband’s attorney
- **Attorney Calls:** LPC receives call from husband’s attorney, seeking to verify receipt of subpoena and requesting confirmation of wife’s substance abuse history
- **Custody Opinion:** Attorney tells counselor to be prepared to offer opinion regarding the “more fit” parent

In small groups, use the Legal/Ethical Decision-Making Model to work through this dilemma.

10 Minutes
Case Study: Points to Ponder

1) Define the Problem/Dilemma
What are the core concerns (legal, ethical, clinical, or a combination)?
- Privilege (legal) (TX – applies in context of civil, not criminal, proceedings)
- Privacy (legal)
- Confidentiality (ethical & legal)
- Duty – to whom is a duty owed? (both legal and fiduciary)
- Treatment relationship (clinical)
- Other...

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
- Other relevant variables?
3) **Law/Codes/Policy**

What federal/state laws, ethics codes, and relevant institutional policies might apply?

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

**State Laws**
- Confidentiality and privilege (TX Health & Safety Code)
- Child abuse reporting

**Ethics Codes (ACA and others)**
- informed consent
- confidentiality and privacy
  - exceptions to confidentiality
  - confidentiality in groups, couples, and families
- boundaries of competence
- consultation on ethical issues
- knowledge of code and conflicts between law and ethics

**Institutional Policy**
- If applicable, know and follow
Case Study: 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 the particular therapist, which is why an *outside perspective* is so important

5) **Outside Perspective**
   Whenever possible, engage in colleague consultation and/or supervision and/or obtain legal advice.
   - Consultation and/or supervision provides a helpful double-check on counter-transference,
   - Local attorney; ACAIT Risk Management Helpline

Case Study: Points to Ponder

6) **Options & Consequences**
   What are the possible course of actions and intended or unintended consequences?
   - Involve the client?
Case Study: Points to Ponder

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

- Before speaking at all, LPC should tell attorney she will have to call back. LPC should seek both legal and colleague consultation.
- Assuming consultants agree, LPC should call husband’s attorney and state that she 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. If both clients don’t authorize release of information, she can request authorization from wife to speak with her attorney about filing a motion to quash or motion for a protective order, which would lead to a court (judicial) order.

- Remember State Variations
Remember: Counselor cannot discuss treatment with wife’s attorney without authorization from husband. It works both ways! Both husband and wife are clients.

Ascertain whether therapist has a reasonable suspicion of child neglect or abuse based on wife’s drinking and blackouts.
- Was wife driving with child in the car when intoxicated?
- Was she otherwise in charge of him?
- Should this have been reported earlier?

Therapist should not opine about who is the “more fit” parent. She did not perform a custody evaluation and should not take on that role when she is the treating therapist.
Subtitle D, Health Information Technology for Economic and Clinical Health Act (HITECH Act), enacted as part of the American Recovery and Reinvestment Act of 2009, addresses privacy and security concerns re/ electronic transmission of health information
- Key provisions are also applicable to paper records and oral communications

“Breach Notification” Interim Final Rule now in effect (“Final Rule” expected soon)
- Applies to “covered entities” and “business associates” if breach of unsecured protected health information occurs
- Examples of breaches requiring notice:
  - Laptop with client records is lost/stolen
  - Paper medical records dumped (MA example involving hospitals, pathologists, medical billing companies)
Breach Notification (cont’d)
- If approved encryption or destruction is utilized, notification is not required
- Risk assessment is required when breach occurs
- Notice to affected individuals (e.g., clients)
  - brief explanation of what happened
  - description of types of information involved
  - steps to take to minimize harm
  - what you’re doing to investigate, mitigate loss and protect against further breaches
  - contact procedures, including toll-free #, etc.

Breach notification must be made to clients “without unreasonable delay” but no later than 60 calendar days after discovery of breach

Breaches involving 500 or more individuals require same prompt notice to HHS and media notification; smaller breaches require report to HHS within 60 days of end of calendar year

http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/breachnotificationifr.html
July 14, 2010 NPRM calls for other new “business associate” requirements, expanded access rights, and limitations on sale/marketing of protected health information

Extends HIPAA Security Provisions to “business associates” of covered entities, including penalties! (B.A.s also have new HIPAA Privacy responsibilities regarding breach notification)

Revised business associate contracts should also require that business associate give covered entity counselor notice of breach well within required 60 calendar days from date of discovery, or counselor will not have time to notify all affected clients in time!

May be agency requirements for breach notification within shorter time period, such as 24 hours

E.g., TX Department of Aging and Disability Services (DADS)
http://www.dads.state.tx.us/providers/hipaa/hipaaBreachNotification.pdf

HITECH Act updates civil and criminal penalties for C.E.s and B.A.s

- Up to $50,000 per violation, $250,000 for “willful neglect” and up to $1.5 million for repeated violations!

Problems for counselors are real!

- Do you use a laptop, cell/smart phone, digital copier and/or flash drive with PHI?
- Helpline call re/ stolen records
- Many counselors who are “covered entities” have HIPAA “Notice of Privacy Practice” but no policies and procedures for privacy and security
Case Study #2

Don Brown, MA, LMHC is employed by The Community Counseling Center and is counseling with Sonia, 45. In session today, Sonia tells Don 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.”

Case Study #2

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.
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)

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
  Legal "duty" is owed to the client and possibly family members (if extended by statute)
  Ethical responsibility to client’s family members (ACA Code of Ethics)
- 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
- Other relevant variables?
Case Study: 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?
  - Does sexual misconduct include relationships with a family member of the designated client?
  - Does the state licensure law adopt the ACA Code of Ethics?

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 when interaction is clearly beneficial to client
- 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?
Case Study: 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?

Case Study: Points to Ponder

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).
Case Study: Points to Ponder

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

Case Study: 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 with 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.
8) Document Decision-Making & Follow-up
Provide written evidence of clinical/ethical decision-making and results of implementation.

Case Study: Points to Ponder

Understand and Manage Social Media & Networking Risks
- Think before you tweet!
- Social Networking
  While often positive, it is creating new legal/ethical issues which are likely to lead to more lawsuits and licensure board complaints
- Private & Professional Personas
  Separate professional from private persona and learn to use appropriate privacy settings
Social Media

- If you employ others who may use online social networking sites or supervise other therapists or graduate students, consider addressing these issues in your contracts and privacy policies, personnel policies and HIPAA workforce training.

- Carefully consider potential confidentiality and privacy breaches and discuss with clients as part of informed consent (e.g., group member interactions).

Social Media

- Problems in “friending” or “liking” clients or being “friended” by clients:
  - Depending on your client population, you may wish to address use of social networking through informed consent.
  - Inform clients that it is your policy to refrain from “friending” clients or accepting friend invitations from clients. Explain that this policy was established to protect the counseling relationship and preserve confidentiality.
Social Media

- Inappropriate Pictures/Info
  - Avoid posting inappropriate pictures or other information on your own social media site that may be seen by clients.
  - Psychologist example

- Think before you “click”!
  Avoid defamatory statements about clients, colleagues or others.

Social Media

- Client Information
  - Consider the ethical implications of looking at a client’s online information or “Googling” a client without being invited.

- Documentation Implications
  - Be careful with documentation. Don’t document information from the client’s online profile or postings without consent from the client.

- Remember
  - When posting information to a social networking site, the information should be considered PERMANENT (and may be contractually permanent) …don’t assume you will be able to retrieve or delete everything.
References


