

## CHAPTER 75

### Confidentiality and Electronic Records

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#### Getting Started

Of all the fields of contemporary practice, school-based practitioners face some of the more challenging ethical dilemmas encountered by mental health professionals today. The sheer range of psychosocial problems presented by school-aged children and the growing severity of diagnosed and undiagnosed mental health problems require school practitioners to provide a wide range of services and manage competing obligations and loyalties to multiple parties. As members of an educational community, parents, teachers, administrators, and other related community agencies such as law enforcement compete for access to confidential information shared by student clients.

Upholding parental rights while maintaining legal and ethical obligations to be a student advocate involves a delicate balancing act. School counselors and social workers must balance the obligation to students to protect the confidential relationship not only against the parents' legal access to the confidential information shared by their minor child but also against teachers' and others' access to information about students. The practitioner's job is further complicated by the fact that state laws are uneven and offer differing opinions concerning who owns a child's confidential information. The strain inherent in meeting multiple loyalties to a variety of interested parties obligates the practitioner to meet conflicting, often competing, needs.

#### What We Know

##### Confidentiality

Professional ethics and guidelines have been established to assist practitioners when faced with the competing demands for confidential student information. The 2001 NASW practice update provides guidance in steps to be taken and purposes to be considered when deciding to release or withhold confidential student information (NASW, 2001). One of the first things is to become knowledgeable about federal and state laws and school district policy. Knowing what governs release of information, before you are faced with a difficult situation, is essential to making the critical decision about what information to release and to whom it can be released. If written guidelines are not available, work with colleagues to develop these and include written consent forms and a method of tracking to whom information has been released, what was released, and the purpose of the release. Always consult with your supervisor when in doubt about releasing information. Finally, be sure students and their parents are aware of and understand the limits of confidentiality very early in the working relationship.

When considering a request for release of information, consider why it may be important for the information to be shared. Ask how the student and the student's family will be affected if the information is released—will it be beneficial or possibly harmful? How will releasing the information or not releasing the information affect the student's learning?

### Written Documentation

Maintaining written documentation such as a psychosocial assessment and progress notes is essential to professional services. Without written documentation, there is no method to knowing who has received services, why they received services, or what services they received.

Written documentation generally contains a range of information, including identifying information, dates of service, people involved, information given about policies, and client progress. It serves as the central repository for all information

about a client. Documentation may be in the form of a physical file containing copies of relevant information or may be computer records. Regardless of the form they take, they must be protected from unauthorized access in order to maintain client confidentiality. This can be through the use of locked storage using a lock and key or password-protected computer patient information files.

Progress notes can take various formats. Many of the formats used are problem or issue focused. Care must be taken to include only as much information as is necessary to follow a client's treatment plan, progress, and services received. Progress notes should be clear, organized, and not contain personal opinions regarding the client.

### Training for Ethical Decision Making

When practitioners complete graduate education, they often become quickly immersed in the demands of practice. Social workers are often asked to make quick decisions without adequate time to fully consider the situation and to consult with others (Walden, Wolock, & Demone, 1990). There may be a perception on the part of the social worker that organizational demands require quick decisions and a fear of making the wrong decision (Congress, 2000).

Providing a systematic way to consider decisions regarding ethics can provide the practitioner with a tool that will allow for time to consider the situation and a method for considering the many angles of such a decision. Congress (2000) discusses the need for using a systematic method and proposed a method for applying decision-making to complex ethical dilemmas and as a way "to improve ethical practice and decision-making among practitioners and educators" (p. 1). This chapter sets out a stage model for making these ethical decisions that is systematic and inclusive.

### Standards for Ethical Practice

In an effort to meet one's professional obligations competently and to circumscribe charges of ethical misconduct, school mental health staff are responsible for performing their duties in accordance with the highest standards of practice established by their discipline. For school social workers this would require acting in compliance with the duties and obligations to clients, employers, and society as described in the NASW *Code of Ethics* (2011). "The NASW Code of Ethics sets forth specific ethical standards with which the public can expect social workers to comply and to which the public can hold social workers accountable" (Reamer, 2006, p. 16). This *Code* and the codes of allied disciplines, the ASCA's *Ethical Standards of School Counselors* (American School Counselor Association, 2011) and the ACA's *Code of Ethics* (American Counseling Association, 2011), are viewed as the highest authorities and reference points to which the courts and state boards of inquiry investigating ethics complaints against practitioners will turn to determine how "an ordinary, reasonable, and prudent professional would act under the same or similar circumstances" (Reamer, 2006, p. 17).

Applying the provisions of any professional code necessarily involves degrees of interpretation, the exercise of judgment, and decisions about the applicability of given standards to individual case circumstances. "Ethical decision making in a given situation must apply the informed judgment of the individual social worker and should also consider how the issues would be judged in a peer review process where the ethical standards of the profession would be applied" (NASW *Code of Ethics*, "Purpose of the NASW Code of Ethics," 2011). Outcomes will differ because "weighing the best interests of the student may result in different courses of action depending on the student, the counselor, and the community" (Davis & Ritchie, 2003, p. 203).

## What We Can Do

### Ethical Dilemmas

Ethical dilemmas are those problems in which the practitioner is challenged to select a course of action when each possible alternative may result in an undesirable outcome for one or more of the interested parties. When confronted with an ethical dilemma, the practitioner must decide which competing values or obligations to meet foremost and which action to choose over the many possible courses of action under consideration. Questions such as “To whom does the practitioner owe primary loyalty” and “Whose interests should be considered foremost?” involve ethical questions of “right” versus “wrong.”

### Systematic Ethical Decision Making

While there is no one universal analytic model for application to cases of ethical conflict, there is consensus that skillfully reasoning through ethical dilemmas can best be accomplished by following a systematic approach, assuring that all facets of the dilemma are considered. Research suggests that “the process of ethical decision making can be taught in a rational, systematic manner” (Linzer, 1999, p. xvi).

Becoming familiar with the steps associated with skillful decision making anchors ethical judgments in systematic thinking and is likely to result in decisions that account for the multitude of competing factors and a consideration of the interests of stakeholders in the case. The goal of instruction in ethical reasoning focuses on the process of making decisions (as opposed to strictly the outcome or choice of action) because “if we teach practitioners and students how to think about ethics, they will know what to do” (Linzer, 1999, p. xvi).

### Stages of Ethical Decision Making

When school practitioners are faced with competing values, duties, and obligations, a set of steps can be applied to *think through* the dilemma before taking action.

Deliberate thinking and documenting the process of the decision making leaves the practitioner prepared to justify the decision and defend their action if called upon to do so. Referencing a decision-making model such as the one that follows will

ultimately deepen the practitioner's thinking about an ethical dilemma and will assist in reaching a thoughtfully reasoned solution.

For purposes of illustrating the steps involved in the analysis and resolution of an ethical dilemma, let us use the following case example:

Mark, a 16-year-old high school student, discloses his HIV positive status to the school social worker. Mark proudly tells the practitioner that not only is he sexually active with his girlfriend of 4 months, but with two other female students at the school. Mark is not using safe sex practices and refuses to disclose his HIV status to his sexual partners.

### Step One: Gather Additional Background Information and Assess the Case Details

The analysis of the ethical dilemma begins as the school counselor gathers and assesses the details of the client's situation, asks questions, and obtains a complete picture of others who, in addition to the student client, have a vested interest in any outcome that might result. The "stakeholders" are those individuals who will possibly benefit or lose as a result of the choice of action ultimately selected. In this initial phase of information gathering, the school-based practitioner attempts to determine as much of the relevant information as possible and to assess the degree to which the client is willing to disclose for the safety of others. Some examples of important questions are offered below:

- "Can the client be 'encouraged' to disclose the potential risk to his sexual partners?"
- "Can the student be 'influenced' to practice safer sex?"
- "Are the identities of the third parties known to the school-based practitioner?"
- "Is the diagnosis medically verifiable?"
- "What are the actual/potential risks to third parties?"

## Step Two: Separate Practice Considerations From the Ethical Aspects of the Case

In order to determine if the case under consideration is truly an ethical dilemma, one must be certain that the decision to select one action over others involves conflicting or competing values rather than questions answerable by the application of practice standards. If there is no ambiguity about the right or wrong action to take or principle to apply, it is likely that the decision to act can be made by applying best practice standards. If the case presents a true ethical dilemma, there will be gray areas and differences of opinion about what is the “right” course of action to take. There will be questions about whose interests should be considered foremost and uncertainty about which values should take precedent over others when each cannot be met simultaneously.

Reaching professional judgments is guided by the provisions in professional codes of ethics as well as by the laws and legal imperatives established on a state-by-state basis. The practitioner must be clear about the legal obligations regulating the standards for professional behavior in one’s discipline and recognize that moral responsibilities will often run contrary to legal obligations. Be aware that state laws regulating professional practice may differ for school social workers, social workers, and other mental health professionals. Here the school counselor must be aware of any legal duties to protect client confidence or a duty/obligation to warn third parties (under the interpretations and application of the *Tarasoff* decision).<sup>1</sup> Moreover, “all states do not treat the confidentiality of children’s communication to counselors in a uniform way” (Isaacs, 2003, p. 118), and the social worker must determine state mandates regarding the student client’s rights to a confidential relationship.

Clarity regarding the circumstances under which client confidentiality can be breached according to applicable laws and regulations regarding minors and HIV

status is a practice consideration while the ethical considerations involve questions such as:

- “Does the duty to warn apply to cases of HIV/AIDS?”
- “Is the school social worker’s obligation solely to the infected student client or does it extend to the protection of other members of the school community?”
- “Does the social worker feel a paternalistic/moral obligation to disclose, even if this necessitates overriding one’s legal obligation to protect the infected student?”

Note that the answers to the ethical questions are less clear and more open to individual interpretation. As practitioners, it is important to discern personal values and to not allow personal values to influence professional judgment.

### Step Three: Explicitly Identify the Value Tensions

An ethical dilemma arises when a social worker faces two or more competing values. In this case the client’s right to privacy competes with protecting third parties. The practitioner is left to decide to which value he/she is more committed when both values cannot be acted upon simultaneously.

An additional conflict is between the values of autonomy and paternalism. Practitioners will often disagree over the extent to which clients have the right to engage in self-destructive behaviors. While practitioners promote and encourage client autonomy, occasions do arise when the practitioner judges that clients’ right to pursue their own goals must be overridden to protect clients from harming themselves or others. Social workers may justify the use of professional paternalism in order to protect those clients who fail to exercise sound judgment and who present risks deemed to be potentially harmful to self or others. “Can the counselor justify the duty to warn/protect based on beneficence, the obligation to promote good for both the client and society?”



From a societal perspective, this case raises questions about individual rights (confidentiality) versus the public's interests (safety and protection). One could argue that not only are the client's current sexual partners at risk but also are a broader array of citizens who have the potential to become infected into the future. While it is clear that confidentiality laws were designed to reassure infected parties that they would be protected, there are justifiable circumstances to violate that confidentiality.

### Step Four: Consult Relevant Codes of Ethics, Supervisors, and Colleagues

One of the challenges faced by school practitioners addressing ethical dilemmas is the variety and range of ethical codes that set standards for practitioners in school settings. A broad spectrum of mental health professionals work in schools, and each is responsible to competing and potentially contradictory professional responsibilities as delineated by professional codes of ethics.

#### Discipline-Specific Ethical Standards

Consulting relevant codes of ethics is important at many levels. First, it informs practitioners regarding the ethical practices expected of their discipline. Second, acting in compliance with code standards can help adjudicate allegations of misconduct, should they arise. While the conceptual guidelines put forth in codes cannot always be met in practice, practitioners must be prepared to explain their reasoning should they choose to act outside a given standard. *What is ethically acceptable may be at odds with what is legally correct, and vice versa.*

Understanding professional norms is further advanced through consultation and discussion with colleagues and supervisors. Most codes will require practitioners to “seek the advice and counsel of colleagues whenever such consultation is in the best interests of clients” (NASW *Code of Ethics*, Standard 2.05 a, 2011) and expect organizations to have “the necessary competencies and resources for giving the kind of consulting services needed” to its practitioners (ACA, Standard D.2.b, 2011).

## Step Five: Identify Alternative Intervention Strategies and Targets for Intervention

A next step in the decision-making process is to identify the possible courses of action available and the ethical implications of each. Here, the practitioner would likely be deciding between protecting the student client's confidence versus disclosing the information against client wishes. The decision maker might consider whether to act on one of these alternatives in the immediate present or possibly adopting a "wait and see" attitude with a plan to act at some predetermined point into the future. The practitioner may also be considering gradations of these choices in determining to whom they would disclose and the specificity of the information shared. Each of the alternatives should be explicitly identified and given ample consideration.

## Step Six: Weigh the Costs and Benefits to Various Stakeholders

For each choice of action, the impact on those who stand to benefit or to suffer harmful consequences brought about by the action selected needs to be anticipated. Practitioners should, as best they can, project anticipated consequences for each individual who has a vested interest in the outcome. While the consequences of one's action and how others will respond are not entirely predictable, consideration should be given to the interested parties that have legitimate interests at stake.

An individual practitioner may judge, for example, that a greater good would result by disclosing information to those at risk because these individuals would benefit from knowledge of the potential health threat. On the other hand, disclosure of the student client's HIV status may result in harm to the client-counselor relationship, result in social isolation and discrimination for the student client, and threaten the counselor's position because, based on state law, he/she may be legally bound to protect the rights and confidentiality of the HIV individual. The disclosure, against

the client's expressed wishes, may be legally challenged by the client or school system, thereby threatening the practitioner's livelihood and reputation.

### Step Seven: Clarify and Make Explicit Personal Values

Being aware of one's values and preferences throughout the process of decision making cannot be emphasized enough. Practitioners who openly acknowledge their value positions are less likely to unwittingly bias the decision-making process (Lowenberg, Dolgoff, & Harington, 2000). For example, practitioners should question whether personal/family experiences with persons with AIDS create bias or whether a caring relationship with a young daughter/niece/friend influences the decision to protect those at risk.

It is wise to examine one's own decision-making style. Do I typically favor strict adherence to the policies and laws applicable to a given situation, or do I tend to act based on maximizing the good that will result? "Those whose moral development is on a rule or legalistic oriented level may well find this dilemma differently solved than those whose development is oriented more toward principled decisions and behavior" (Isaacs, 2003, p. 121).

### Step Eight: Determine Which Priority or Obligation to Meet Foremost and Justify One's Choice of Action

After completing the assessment, the practitioner must ultimately determine which of the competing obligations or values to honor foremost. The decision maker will draw conclusions and justify a decision based on professional standards, ethical principles, and professional judgment. The individual counselor may conclude that the decision to protect client confidence was based on the prevailing legal mandate, or that acting paternalistically to protect at-risk third parties was the moral imperative and served the greater good, or perhaps that school policy dictated the disclosure of the information to school administrators. (Practitioners relying on a set of guidelines for

decision making may not arrive at the same conclusions or select the same course of action.)

### Step Nine: Document the Process of Decision Making

In much the same manner that clinical decisions are documented as part of a case record, the process followed by the practitioner in addressing and resolving the ethical dilemma should be recorded. Documenting that one adhered to ethical standards or one's "professional interpretation of the standards" (Davis & Ritchie, 2003, p. 203) can serve to defend one's action and minimize the risk of litigation. To protect the practitioner from charges of misconduct, the record should reflect the careful step-by-step process followed, indicate where consultation was sought, and demonstrate that thoughtful decision making occurred. The practitioner must exercise discretion when deciding the extent of the detail to include in the client record.

### Key Points to Remember

While a case-specific example was used to illustrate a stage approach to ethical decision making, it is hoped that the reader has an expanded appreciation for the range of considerations that warrant attention when thinking through ethical dilemmas. The process described can be generalized and applied to a variety of ethical dilemmas encountered in one's practice and will become more habitual with repeated uses. While it should be clear that the decision maker must be contemplative in musing about the various possibilities for action and the potential impacts on those affected by the decision, the reader is cautioned not to get mired in the complexities of the steps and stages but rather to appreciate that lucid and reasoned thinking will greatly improve the merits of one's decision making.

### Resources

For the reader interested in additional learning on the subject of ethical challenges confronted by school counselors, *Ethical & Legal Issues in School Counseling* by Remley, Hermann, and Huey (2003) is strongly recommended. The text is a

compilation of 30 articles addressing a range of issues, questions, and concerns specific to the interests of school counselors from a variety of disciplines.

Another excellent resource is *What Social Workers Should Know about Ethics: Understanding and Resolving Practice Dilemmas* by Elaine P. Congress (2000). This article outlines one method of ethical decision making using an easy-to-remember acronym of ETHIC.

For questions about confidentiality among various agencies involved with schools, Melissa Jonson-Reid provides an in-depth look with case examples.

Another excellent resource is the following journal article:

- Mattison, M. (in press). Social work practice in the digital age: Therapeutic email as a direct practice methodology. *Social Work*.

## Note

1. Against specified criteria, the *Tarasoff* decision releases practitioners from the bonds of confidentiality and establishes a duty to warn an intended known victim in cases of impending harm.

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