

DUTY TO WARN/DUTY **TO PROTECT**

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A 1.5 CEU Clock Hour Home Study Workshop

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This workshop has been approved by the State of Ohio Counselor, Social Worker and Marriage and Family Therapist Board for Counselors, Social Workers and Marriage and Family Therapists (Provider #'s RSXX-058716, RCXX-048709 and RTX-110501) for 1.5 CEU Clock Hours, by the State of Ohio Chemical Dependency Professionals Board (PID #07-0709-42PVN) for 1.5 RCH hours, and by the Ohio Psychological Association (Provider #311456289) for 1.5 CEU hours. This workshop has also been approved by the Kentucky Board of Social Work, the Kentucky Board of Licensed Professional Counselors, the Kentucky Board of Licensure of Marriage and Family Therapists, and the Kentucky Board of Certification of Alcohol and Drug Counselors for 1.5 CEU hours.

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Providing benefit to the client is the ethical justification for Duty to Warn/Duty to Protect. We must also, however, ensure that in our efforts to benefit our clients we do not unknowingly or unwittingly do harm.

“The physician (therapist) must be able to tell the antecedents, know the present, and foretell the future – must mediate these things, and have two special objects in view with regard to diseases (or disorders), mainly, to do good or to do no harm.” Hippocrates

This becomes the strong basis for consultation. On our own we can overlook, misjudge, fail to act, act in error, fail to focus on the right thing, choose to focus on the wrong thing, misstep, misdirect, even deny. Only when we are open to the scrutiny of others and willing to admit we are unsure of how to proceed are we safe in what we choose to do.

Law has developed over time with the specific purposes of protecting society from harm and doing good (beneficence). “Both the Tarasoff and Morgan Courts quote Dean Keeton who wrote, “duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection” (Tarasoff v. Regents of University of California) The Tarasoff Court considered “foreseeability” the most important of those considerations. The Ohio Supreme Court regarded even a danger “closely related” to the plaintiff’s conduct as within the scope of a “foreseeable risk.” (Waller, T./University of Akron,2006)

Our ethical guidelines establish high standards of conduct by focusing on rational processes and ideal practices. Law states that the clinician who assumes care of a person must possess and provide at least the minimum common skill of all other members of the same profession and if the professional holds themselves out to be a specialist, they must demonstrate the attributes of a reasonable specialist.

Tarasoff and Morgan courts speak not of mere mistakes of judgment but of performing professional obligations according to one’s ability and judgment. In other words, in a dispute, the decision making process is more closely scrutinized than the decision itself.

Littleton and Ohio's Professional Judgment Rule

"In *Littleton v. Good Samaritan Hospital and Health Center*, the Ohio Supreme Court enunciated a "new standard," the *Professional judgment Rule*, in regards to the "violent acts of a voluntarily hospitalized mental patient subsequent to the patient's discharge." In predicting whether a patient has violent propensities, "a psychiatrist must exercise (a) *good faith judgment* based on a thorough evaluation of all relevant factors. Professional standards will be used to determine which factors are relevant and whether an evaluation was thorough." If the psychotherapist meets these criteria, he will not be liable for *good faith judgments*, including "premature discharge" and "failure to warn" (a patient's victims)." (Waller, T./University of Akron, 2006)

Professional judgment must be based on sound practice and established principles which govern as a standard of care.

The Five Ethical Principles established for providing care to the public are:

Autonomy	(right of self-rule)
Beneficence	(benefit to others)
Nonmaleficence	(do no harm)
Fidelity	(be faithful)
Justice	(be fair)

Sometimes they are in conflict with each other. When this happens, a counselor may have to choose one over the others in order to take to higher ground morally. All therapists need to be ready to show the rationale clinically for choosing one over the other.

I. FIRST DO NO HARM

All counselors working ethically have this at the heart of all they do. The desire to do good for their clients and do no harm is behind the common wish to help people in their lives to better adjust and function at optimal levels. They also must work with the rights and safety of others in mind. The most common issues involving doing no harm have to do with confidentiality and protecting the client. Ethical dilemmas do come up, however, that challenge this principle if the counselor is to do the right thing for everyone involved. "The plan for care must then do the least amount of harm possible. It should also maximize the remaining ethical principles. If it is not possible to maximize all remaining principles, then those most crucial to the case must be maximized, but have good ethical reasons for emphasizing these principles over the others." (Yaeger, C. 2004)

In the process of planning care that does no harm or does the least amount of harm, the therapist must consider:

- Their personal feelings about the situation
- Informing the client of the law
- Informing the client of the therapist's choices or obligations
- Helping the client think through the consequences
- Adherence to agency policy
- Clinical/legal/ethical issues
- Documentation

A balanced approach to doing no harm to the client and protecting others will involve a thorough examination of the above and also address the true risk implicated to potential victims.

“Both the Tarasoff and Morgan courts have used a balancing approach and stressed the importance of the “foreseeability of harm” in order to create legal obligations between parties. According to the Ohio Supreme Court, the factors to be weighed include the (1) “ability to control” the patient with violent propensities; (2) public safety interest; (3) difficulty of predicting violent behavior; (4) placing the patient in the least restrictive environment and avoiding unnecessary confinement; and (5) keeping confidences as important as social policy concerns (and successful treatment.” (Waller, T./University of Akron, 2006)

II. SELF-DETERMINATION

Clients have a right to decide for themselves, presuming they are competent to do so and presuming their choices bring no harm to others. It is the responsibility of the therapist to perform an accurate assessment of the client's capacity to determine for them selves and decide about treatment issues. The plan of care must include providing adequate information to the client to make reasonably informed choices, especially regarding the limits of confidentiality. It is not enough to simply provide the information to clients. Therapists are required to determine clients' understanding of information provided.

The plan for care must then be:

1. Client-centered
2. Understanding of gender and cultural issues that may have an impact on the outcome
3. Based on open, honest information
4. Non-threatening
5. Trust-building

Without the assurance of confidentiality, even with its legally imposed limits, trust cannot be established between therapist and client. Since the Tarasoff ruling, however, protecting confidentiality can be a challenging and complex task.

“Confidentiality falls under the competing ethical principles of fidelity and beneficence.” (Pamela Turlove. *Ethics 3 htm*)

Consultation should be listed as a limit to confidentiality in the Professional Services Agreement between counselor and client. This allows immediate consultation without providing information that would identify the client. Clinical Supervisors, Risk Management Team Members, Legal Department Advisors of Licensing Boards or Professional Organizations, and other peers in the community can provide suggestions based on the information given before the therapist must truly break confidence with the client.

III. BENEFITING THE CLIENT

The ultimate goal for therapy is to do good to clients. To accomplish this the therapist must work with the client in establishing goals for therapy that are meaningful and achievable. Goals should be SMART:

S - small (client will increase physical exercise to 5 minutes a day)

M - measurable (client will exercise 3 out of 7 days)

A - action-oriented (client will walk around the block)

R - realistic (does not represent too great a change)

T - time-factored (client will do this consistently for one month)

The plan of care must be continuously evaluated for its ability to make improvements in the client's life and toward the client's goals. It must also include consultation with other professionals (peers) to reflect the standard of care in the area.

IV. BEING FAITHFUL TO THE CLIENT(S)

As we come together with clients we commit to a promise to hold confident all their information with the legal exceptions discussed and understood. Even so, It feels like betrayal to the client when we must share information in order to warn or protect them or others. Any plan made must address how it will do no harm to the client's ability to trust therapists in the future and how it will limit the damage to the current therapeutic process.

One important first step is to review the original contract with the client and remind them of the agreement that was discussed, agreed upon and signed by both the therapist and the client.

Also important is including the client in the decision making process in the search for the right things to do. Clients respond best to plans that are inclusive of their input and their acceptance (buying into). Also important is

their understanding of what must occur according to law or ethical guidelines that govern practice.

V. BEING FAIR AND JUST

Impartiality on the part of the therapist is crucial in all phases of the therapeutic process but it is never more important than when faced with an ethical dilemma involving the safety of client(s) or others. Being willing to look at personal beliefs or issues that can interfere with true justice for the client is key to success in resolving problems that arise.

Once again, gender and cultural issues must be considered in being fair and just. The therapist cannot assume understanding of such variables, especially in an ethical dilemma. These factors must be addressed before a plan for resolving the problem can be established.

VI. A STEP-WISE PLAN

1. Consult
2. Talk it over with the client
3. Make a plan that does the least amount of harm
4. Consider the ethical principles
5. Consider legal issues and address them
6. Choose a course of action and share it with your client
7. Take the necessary actions and monitor and discuss outcomes

1. Consultation:

- Gathering additional information and facts relevant to the ethical dilemma from professional guidelines, state and federal laws, and organizational policies is an important initial step.
 - Identifying professional peers whose body of work is known and trusted is demonstrative of taking into consideration the current standard of care in your community.
 - Increases the likelihood of an ethical decision
 - Should be integrated and documented throughout the decision making process.
- Yaeger, C., 2004

2. Talk it over with the client:

- Clients are free agents with the freedom to think and choose for themselves.
- The response to the therapist's plan is better when inclusion occurs.
- Provides a format for providing information.

3. Make a plan that does the least amount of harm:
 - Consider mentally, emotionally, physically, and spiritually.
 - Don't cave into anxiety and decide quickly.
 - Know there is a systematic approach that supports you in making a decision
 - If confidence must be broken to protect, minimize to the fullest extent possible the amount of information that must be shared.
4. Inform the client of the legal and ethical obligations of the therapist

VII. Legal Aspects of Counseling

Civil and Criminal liability

Liability - Concerned with whether counselors have caused harm to clients. Directly related to malpractice.

Malpractice - harm to a client resulting from professional negligence.

Negligence - departure from acceptable professional standards.

The Law of Counseling

Legal refers to: law or state of being lawful

Law – body of rules recognized by a state or community as binding on its members.

- There is no general body of law covering the helping professions.
- There are a number of cant decisions and statutes that influence legal opinion in regard to counseling
- General supportive and neutral to counselors professional codes of ethics
- Law supports licensure or certification of counselors as a means of ensuring that those who enter the profession attain at least minimal standards.
- Supports general confidentiality of statements and records provided by clients during therapy
- Law overrides a professional code of ethics when it is necessary to protect the public health safety and welfare – Duty to warn. umes.edu/kjpoole/educ601_602/ethics.htm

Section 2305.51(F) Duty to Protect – Ohio Revised Code

(F) "**KNOWLEDGEABLE PERSON**" means an individual who has reason to believe that a mental health client or patient has the intent and ability to carry out an explicit threat of inflicting imminent and serious physical harm to or causing the death of a clearly identifiable potential victim or victims and who is either an immediate family member of the client or patient or an individual who otherwise personally knows the client or patient.

(2) for the purpose of this section, in the case of a threat to a readily identifiable structure, "**CLEARLY IDENTIFIABLE POTENTIAL VICTIM**" includes any potential occupant of the structure.

(B) A mental health professional or mental health organization may be held liable in damages in a civil action, or may be made subject to disciplinary action by an entity with licensing or other regulatory authority over the professional or organization, for serious physical harm or death resulting from

failing to predict, warn of, or take precautions to provide protection from the violent behavior of a mental health client or patient, only if the client or patient or a knowledgeable person has communicated to the professional or organization an explicit threat of inflicting imminent and serious physical harm to or causing the death of one or more clearly identifiable potential victims, the professional or organization has reason to believe that the client or patient has the intent and ability to carry out the threat, and the professional or organization fails to take one or more of the following actions in a timely manner:

- (1) Exercise any authority the professional or organization possesses to hospitalize the client or patient on an emergency basis pursuant to section 5122.10 of the revised code;
 - (2) Exercise any authority the professional or organization possesses to have the client or patient involuntarily or voluntarily hospitalized under chapter 5122. of the revised code;
 - (3) Establish and undertake a documented treatment plan that is reasonably calculated, according to appropriate standards of professional practice, to eliminate the possibility that the client or patient will carry out the threat, and, concurrent with establishing and undertaking the treatment plan, initiate arrangements for a second opinion risk assessment through a management consultation about the treatment plan with, in the case of a mental health organization, the clinical director of the organization, or, in the case of a mental health professional who is not acting as part of a mental health organization, any mental health professional who is licensed to engage in independent practice;
 - (4) Communicate to a law enforcement agency with jurisdiction in the area where each potential victim resides, where a structure threatened by a mental health client or patient is located, or where the mental health client or patient resides, and if feasible, communicate to each potential victim or a potential victim's parent or guardian if the potential victim is a minor or has been adjudicated incompetent, all of the following information:
 - (a) The nature of the threat;
 - (b) The identity of the mental health client or patient making the threat;
 - (c) The identity of each potential victim of the threat.
- (c) All of the following apply when a mental health professional or organization takes one or more of the actions set forth in divisions (b)(1) to (4) of this section:
- (1) The mental health professional or organization shall consider each of the alternatives set forth and shall document the reasons for choosing or rejecting each alternative.
 - (2) The mental health professional or organization may give special consideration to those alternatives which, consistent with public safety, would least abridge the rights of the mental health client or patient established under the revised code, including the rights specified in sections 5122.27 to 5122.31 of the revised code.
 - (3) The mental health professional or organization is not required to take an action that, in the exercise of reasonable professional judgment, would physically endanger the professional or organization, increase the danger to a potential victim, or increase the danger to the mental health client or patient.
 - (4) The mental health professional or organization is not liable in damages in a civil action, and shall not be made subject to disciplinary action by any entity with licensing or other regulatory authority over the professional or organization, for disclosing any confidential information about a mental health client or patient that is disclosed for the purpose of taking any of the actions.
- (d) The immunities from civil liability and disciplinary action conferred by this section are in addition to and not in limitation of any immunity conferred on a mental health professional or organization by any other section of the revised code or by judicial precedent.
- (e) This section does not affect the civil rights of a mental health client or patient under Ohio or federal law.

VIII. SCENARIOS OF CASES

The following are scenarios of ethical dilemmas involving the principles discussed herein. Review each one and think about the steps to be taken in each case.

Scenario #1

You are counseling an adolescent female (age 16) that you have been seeing for behavioral problems at home. Her parents say she sneaks out sometimes and they catch her in lies. You have been working with her for some time when she discloses to you she is writing on the internet and text messaging to a man she knows is 29. She says they have met at Burger King once and now he wants to date her. She tells you she had to meet him without her parents knowing and she plans to again.

Scenario #2

You have been working with a young mother for whom the Axis I Diagnosis is Major Depressive Disorder, Recurrent, Moderate to Severe without psychotic features, the Axis II Diagnosis is Histrionic Personality Disorder. She has three small children. She is divorced from their father. The only help she has outside of daycare is her mother and father who occasionally baby-sit so that she can go out. Money is so tight she seldom gets to go anywhere but to work or grocery shopping. Recently, she says she is having thoughts of hurting the children and herself but she does not have a specific plan for how she would do it. She insists it is just troubling thoughts that she would probably never act on.

Scenario #3

A client you have seen for awhile for chronic and unrelenting depression tells you she is afraid to tell you something. She eventually says she is having thoughts of killing her husband in various ways. She professes to love her husband and says she would probably never act on these thoughts. She has previously talked of nothing but how thoughtless and cruel he can be.

Scenario #4

A married couple comes in because the wife is ready to leave the marriage. She complains of her husband being emotionally unavailable for the past 16 years. He states he loves her and has no issues with her. During an individual session with each one, she tells you she has been sexually involved with another man in an affair that started out as just an emotional affair. This affair occurred with a man who works with her husband. She says her husband doesn't know about the sex part. In his session, he tells you if he ever found out it was physical, he would kill the man.

In each of these cases the therapist is present with an ethical and/or legal dilemma. Going back to the step-wise process of how to manage these types of situations and others that will arise, the counselor must;

- ✓ Assess their own beliefs, feelings, and thoughts about the case
- ✓ Consult with their peers
- ✓ Talk it over with their client
- ✓ Make a plan that does the least amount of harm and most amount of good
- ✓ Consider all the ethical principles
- ✓ Reflect on legal and ethical issues and address them
- ✓ Choose a course of action and share it with your client
- ✓ Implement the plan and monitor and discuss outcomes

Duty to Warn – Ohio Revised Code. Effective September 9, 1999. Amended H (PDF)

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POST TEST

DUTY WARN/DUTY TO PROTECT

By Sandy Morgenthal, PCC, CCFC, RN

1. Applying the words of Hippocrates to counseling, the therapist must be able to:

- a. tell the past and know the future.
- b. know how to manage the client's past and present.
- c. tell the antecedents, know the present, and foretell the future
- d. none of the above

2. Only when _____ are we safe to proceed in an ethical dilemma regarding safety of clients and others.

- a. we are open to the scrutiny of others and willing to admit we are unsure of how to proceed.
- b. the law and ethical guidelines are in agreement with our actions.
- c. our own good judgment convinces us we are on the right course
- d. all of the above

3. Match the following Five Ethical Principles with the statement that is most accurate:

- | | | |
|-------------------|---|-------|
| a. Autonomy | Providing good to the client | _____ |
| b. Justice | Clients have the right to self-determine | _____ |
| c. Nonmaleficence | Impartiality on the part of the therapist | _____ |
| d. Fidelity | Law has developed to protect society | _____ |
| e. Beneficence | A promise to hold confident | _____ |

TRUE OR FALSE

4. ___ True ___ False The focus of ethical guidelines is ideal practices and rational processes in order to establish high standards.

5. ___ True ___ False A client has the right to self-determine whether or not they are competent.

6. ___ True ___ False A Step-Wise Plan for dealing with cases where Duty to Warn/Duty to Protect may be a clinical issue is consult, talk it over with the client, make a plan that doe the least amount of harm, consider the ethical principles, consider legal issues and address them, choose a course of action and share it with your client, and take the necessary actions to monitor and discuss outcomes.

I, _____ (name of participant) affirm that I am the person who completed this home study and am responsible for this post test.

Signature: _____

