

# Treating the Child of Divorced or Separated Parents—Ethical, Legal, and Risk Management Considerations

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Joe Scroppo, Ph.D., JD, is a licensed psychologist and attorney in New York. Dr. Scroppo has written, consulted and lectured extensively on risk management, legal issues, forensic matters, and the treatment of children. Joe maintains private practices in both law and clinical/forensic psychology. He is a Risk Management Consultant for the American Insurance Trust and currently a Clinical Assistant Professor at the Hofstra University School of Medicine. Joe received a BA (cum laude) from the University of Chicago, an MA and PhD from the Adelphi University Institute for Advanced Psychological Studies, and a JD (magna cum laude) from St. John's University School of Law.

# Disclosures/Conflicts of Interest

The presenter does not have any conflicts of interest to disclose.

NOTE: The information presented in this webinar is not intended to provide legal advice or to substitute for the advice of an attorney, but rather to provide information about considerations when dealing with records and requests for information.

# Learning Objectives

- Identify legal concepts that govern parental responsibilities and rights, children's rights, and society's rights in the context of the mental health treatment of minors.
- Demonstrate risk management techniques when working with children of separated or divorced parents.
- Utilize methods to balance the parents' desire to know about the minor's communications with the child's need for confidentiality.

# Areas of Concern

Who Makes Decisions About Minors' Healthcare?

Who is the patient?

Who can authorize treatment for the child?

Informed Consent

Establishing Boundaries with the Parents

Sharing Information with the Parents

# Parental Rights to Make Healthcare Decisions for Their Children

Long legal tradition of parents having the fundamental and compelling right and responsibility to provide care, including healthcare, to their children

- Parham v. J.R. (442 USC 584) (1979)

# Minors' Rights To Make Healthcare Decisions for Themselves

- All 50 states and the District of Columbia permit minors to consent to testing and treatment for STDs, including HIV.
- Forty-four states and the District of Columbia have laws or policies that allow a minor who abuses drugs or alcohol to consent to confidential counseling and treatment.
- 20 states and the District of Columbia give minors the explicit authority to consent to outpatient mental health services

# Your State's Law on Minor's Right to Consent To Mental Health Treatment

Each state has its own laws about at what age, to what procedures, for how long, a minor may consent to MH treatment—KNOW YOUR LAW!

Statutory Law versus “Mature Minor” Doctrine

Examples

Risks (nonpayment; parents angry anyway)



# Who Is The Patient?

Is it the individual child?

Is it the minor(s) and one or more parents?

reunification therapy  
family therapy

Is it the parents with the minor as a collateral?

parent training  
co-parenting counseling

Beware of multiple relationships with family members

# Who Is The Patient?

## APA Ethics Code Provisions

### 3.05 Multiple Relationships

### 10.02 Therapy Involving Couples or Families

# Legal Custody to Authorize Treatment for A Minor of Separated/Divorced Parents

- Custody Decree And Subsequent Court Orders
- Notification to the Non-Presenting Parent
- Minors' Right To Consent To Their Own Treatment (Know Your State Law!)
- Non-Parental Legal Guardian/GAL
- Decision to Exclude/Limit A Parent's Role

# First Steps

- Explicitly Identify the Modality of Treatment
- Immediately Address How Individual Parental Communications Will Be Documented
- Be Aware of “Mission Creep”
- Establish Payment Arrangements
- Establish Format for How/When Information Will Be Shared with the Parents

# Informed Consent

## SAMPLE INFORMED CONSENT FORM

### INFORMATION ABOUT THE SAMPLE PSYCHOTHERAPIST-ADULT PATIENT CONTRACT (WITH ADDENDUM FOR CHILD/ADOLESCENT PATIENT)

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*Note to clinicians:* This sample psychotherapist-patient contract has been prepared for two reasons. First, it allows you to comply with the requirement that informed consent must be obtained from your patients (Ethical Principles of Psychologists and Code of Conduct, 2017, Standards 10.02, 4.02). Second, it allows you to establish a potentially legally enforceable business agreement with the patient and helps minimize the risk that business issues may become the bases for malpractice suits and ethics or licensing board complaints. Most commentators suggest that full informed consent is both ethically necessary and a good risk management strategy.

This model contract is not a substitute for the HIPAA Notice of Privacy Practices or other required HIPAA documentation. If you are a HIPAA covered entity, you must obtain a HIPAA Notice of Privacy Practices form and give it to your clients/patients. Various organizations, including the APA Practice Organization, have developed comprehensive HIPAA compliance training packages, and we recommend that you seek and use such compliance packages, as well as familiarize yourself with HIPAA and its proper implementation in your practice. The major areas of difference between this document and HIPAA and state laws relate to: (a) patient access to personal records, and (b) the laws and regulations governing therapeutic confidentiality, testimonial privilege, and their exceptions.

This model form was designed for psychotherapy practices. It can and should be modified to include other practice areas such as psychological evaluations, testing, neuropsychological assessment, family therapy, group psychotherapy, and so on, if these are a part of your work.

There is a great diversity of business practices among psychologists. You should revise this

# Informed Consent (Cont'd)

## Key Elements

All of the basic information about treatment that is provided to individual clients

Parent Authorization for Minor's Mental Health Treatment

Individual Parent/Guardian Communications with Me

# Informed Consent (Cont'd)

## Key Elements (Cont'd)

Mandatory Disclosures of Treatment Information

Disclosure of Minor's Treatment Information to Parents

Disclosure of Minor's Treatment Records to Parents

# Informed Consent (Cont'd)

## Key Elements (Cont'd)

Parent/Guardian Agreement Not to Use Minor's Therapy Information/Records in Custody Litigation



# Informed Consent (Cont'd)

## Key Elements (Cont'd)

Child/Adolescent Patient:

By signing below, you show that you have read and understood the policies described above. If you have any questions as we progress with therapy, you can ask me at any time.

Minor's Signature\*

\_\_\_\_\_

Date \_\_\_\_\_

# Informed Consent (Cont'd)

## Key Elements (Cont'd)

Parent/Guardian of Minor Patient:

Please initial after each line and sign below, indicating your agreement to respect your child's privacy:

I will refrain from requesting detailed information about individual therapy sessions with my child. I understand that I will be provided with periodic updates about general progress, and/or may be asked to participate in therapy sessions as needed.

# Informed Consent (Cont'd)

## Key Elements (Cont'd)

Although I may have the legal right to request written records/session notes since my child is a minor, I agree NOT to request these records in order to respect the confidentiality of my child's/adolescent's treatment.

I understand that I will be informed about situations that could endanger my child. I know this decision to breach confidentiality in these circumstances is up to the therapist's professional judgment, unless otherwise noted above.

Parent/Guardian Signature \_\_\_\_\_ Date \_\_\_\_\_

# Establishing Boundaries with the Parents

## Clinical risk management with divorcing parents

- Involve both parents
- The elusive goal of neutrality
- Limit setting
- Dealing with GALs
- Licensing board perspective

# Disclosing Treatment Information with the Parents

The general rule is that parents have a right to access their child's medical and psychological records

- But there are exceptions to this rule depending on the laws and court decisions of the state and the interaction of those laws with HIPAA.

Children also have confidentiality rights or at least good treatment often depends on some privacy

Where these two principles are in conflict, as in acrimonious divorce or contested custody situation, psychologist's responsibility may not be clear.

- If psychologist refuses, even with good grounds, parents will be angry, may file complaint.

# Disclosing Treatment Information with the Parents (Cont'd)

Considerable variance in state laws, so be sure to check.

Most state laws provide equal access to records to both parents, even if one is non-custodial, unless a court has officially indicated otherwise

Some states have created a clinical exception that allows therapist to assert confidentiality if they believe that release of information is damaging to a child.

If there is a GAL, a psychologist may request that he/she protect the child's confidentiality.

The law favors access by either parent

# Disclosing Treatment Information with the Parents (Cont'd)

## Risk Management with Records Requests

If the law does not permit waiver of access or the access would not likely be harmful to the child or adolescent or the treatment...

Providing equal access to parents is a prudent approach (a summary can be offered, if the parents agree)

Inform both, when a request is made, that both will have access and that when a request for records is made, the other parent will be informed and offered the same access

# Disclosing Treatment Information with the Parents (Cont'd)

## HIPAA

Defers to state law for parental access exceptions, unless state law is silent, in which case, the following provision applies:

- Psychologist may elect to not treat parent as a legal representative if they have reasonable belief that:
  - Child may be/has been subject to abuse or...
  - Doing so would endanger child and...
- Psychologist decides, through exercise of professional judgment, it is not in child's best interest to do so.



# Disclosing Treatment Information with Courts/Attorneys

"You should be aware that once we start treatment, it is unethical of me to give any opinion about custody or visitation arrangements, even if I am compelled to be a witness."

"I want your permission to provide information to anyone who the court appoints to perform a custody evaluation or to represent the legal interests of your children. I will not make any recommendation about the final decision."

Separation or divorce are hard on everyone, especially kids.

# Disclosing Treatment Information with Courts/Attorneys (Cont'd)

With parent's relationship in turmoil, even more important for therapy to be a safe therapeutic environment.

This environment is undermined when children worry that what they say in therapy will be revealed in court, & used against a parent.

To protect that environment, I want us all to agree that the therapist will not be called as a witness by either party.

A judge, though, may decide not to honor this agreement and I may be required to be a witness, although I will try to prevent that from happening.

It is unethical of me to give any opinion about custody or visitation arrangements, even if I am compelled to be a witness.

# Disclosing Treatment Information with Courts/Attorneys (Cont'd)

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A judge, though, may decide not to honor this agreement and I may be required to be a witness, although I will try to prevent that from happening.

# Disclosing Treatment Information with Courts/Attorneys (Cont'd)

It is unethical of me to give any opinion about custody or visitation arrangements, even if I am compelled to be a witness.

I request your permission to give information to any court appointed custody evaluator or person representing the legal interests of your children (unless your permission is not legally required; for example, when there is a court appointed GAL or minor's counsel).

I will not make any recommendation about the final decision.

# References

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# Q&A



- Dr. Sammons will select questions that were submitted via the Q&A feature throughout the presentation.
- Due to time constraints, we will not be able to address every question asked.