

Counseling Minors

Minors, as a group, are legally disabled, since it is presumed that they lack the necessary skills for making capable decisions (Hartman, 2002). In *Parham v. J.R.* (1979) the Supreme Court observed that inexperience limits minors' legal autonomy "for making life's difficult decisions." This is the underlying law and belief system that is presently governing adolescents (Hartman, 2002). The Tennessee Code Annotated, Title 37, Chapter 10, Part 302, (Tenn. Code Ann., 2003) defines minors as all individuals younger than 18 years, who are not married or emancipated. Presently, the law governing minors is in the spirit of the doctrine *parens patriae*, (Hartman, 2002). *Parens patriae* embraces the notion of the government protecting adolescents from themselves, by creating legislation that limits their rights. This is directly relevant and correlates to adolescents' rights concerning reproduction. Common law presently views adolescents as vulnerable and in need of protection from their immaturity (Lawrence & Kirpius, 2000).

This is a dramatic paradigm shift from the early perspective of minors' rights and the role the government assumed. Historically minors have had extremely limited rights. Initially they were considered the legal property of their parents (Lawrence & Kirpius, 2000). The colonial belief, in regard to children's rights were governed by the doctrine *patriae potesta* (Lawrence & Kirpius, 2000). The father was given absolute power over his children and therefore could treat them any way he deemed appropriate (Lawrence & Kirpius, 2000). The Stubborn Child Act of 1693, passed by the state of Massachusetts, clearly illustrates exactly how far one could exert this right, by allowing parents to put their children to death for disobeying them (Lawrence & Kirpius, 2000). This belief system of children's rights lends itself to the present legal contention that parents have

the right to be informed of all thoughts and actions that their children have. And that it is in the best interest of society to support the family unity, by requiring adolescents to gain permission from their parents before they make any legally invested decisions (Borstein, 2000).

The historical belief of our jurisprudence that minors are incapable of making appropriate decisions (Hartman, 2002) coupled with the emphasis on the family as a viable unit and the importance of the rights of the parents to raise children who are members of their household (Tenn. Code Ann. § 37-10-301(a1, a2), are troubling for counselors, who work with minors. It raises the questions: Who is the counselor's client? Whose best interest should the counselor be thinking of? The parent who the counselor is legally responsible to or the minor who the counselor is working with? Counselors who work specifically with minors encounter numerous ambiguities and limited guidance from the American Counseling Association (ACA, 1995) on how to ethically work with minors.

This paper will explore ethical and legal issues that are pertinent to counselors who work with minors in non-school settings. First, it will look at the three common ethical dilemmas that are relevant to counseling minors: counselor competence, informed consent, and confidentiality. Then, it will delve into how these areas are outlined in the American Counseling Association and how they have been interpreted for minors by state and federal laws. Finally, the paper will conclude with legal or ethical suggestions for counselors to implement in their practices in order to safeguard themselves from reproach.

Counselor Competence

The American Counseling Association Code of Ethics and Standards of Practice establishes principles to ensure that counselors are aware of their duties to their client and to their profession (American Counseling Association, 1995). In Section C, Professional Responsibility, C.2. explains Professional Competence and part a., states, “Counselors practice only within the boundaries of their competence, based on their education, training, supervised experience, state and national professional credentials and appropriate professional experience.” Myers (1982) states that simply because a counselor is effective with an adult, does not necessarily mean that they will be effective with a minor. Lawrence & Kirpius, (2000) assert that minors are not little adults, but unique individuals with special needs, that can transfer into ethical concerns or issues. This belief of minors as a special interest group directly relates to C.2.b of the American Counseling Association (ACA, 1995) Code of Ethics and Standards of Practice, which states,

“Counselors practice in specialty areas new to them only after appropriate education, training and supervised experience. While developing skills in new specialty areas, counselors take steps to ensure the competence of their work and to protect others from possible harm.”

The Tennessee Code Annotated (Tenn. Code Ann., 2003), distinguishes between sub-specialties and licensure requirements in Tennessee, however there are none for counselors working with minors, because it is not considered a specialty, although many counselors feel that maybe it should be. Darden, Gazda, and Ginter, (1996) stress the importance of a counselor using a developmental

approach and the importance of understanding their client's psychosocial development. Children need to be understood and interventions need to be designed to match their level of development and cognition (Lawrence & Kurpius, 2000).

Although there wasn't any case law related to counselors working outside their scope of practice, by working with minors without any specific training in that area, there could be. Minors are a special population with diverse needs, and only counselors who are aware of those needs, and aware of interventions to use with this special population should accept minors as clients. Otherwise, counselors are in danger of behaving unethically, for lack of adequate knowledge regarding their minor clients (Lawrence & Kirpius, 2000).

Informed Consent

Lawrence and Kirpius, (2000) assert that the American Counseling Association (ACA, 1995) Code of Ethics and Standards of Practice consistently fails to distinguish between clients who are adults and those who are minors. There seems to be an inherent assumption that counselors can apply the same standards to minors that are applied to adults, as long as clients are not discriminated against due to their age, with exception to two areas, informed consent and confidentiality. In Section A: The Counseling Relationship, minors needs are addressed in part 3: Client Rights for the first time. A.3.c. Inability to Give Consent, states, "When counseling minors or persons unable to give voluntary informed consent, counselors act in these clients' best interests." Many practitioners question why all minors would be considered unable to give informed

consent. The Tennessee Code Annotated (Tenn. Code Ann., 2003) 37-10-302, defines who in Tennessee is considered capable of giving informed consent by the following definitions:

Minor: any person under eighteen years of age.

Emancipated Minor: any minor who is or has been married or has by court order or otherwise been freed from the care, custody and control of the minor's parents and is under 18 years of age.

In many other states an emancipated minor is called a mature minor and a mature minor status is given to minors in some states at the age sixteen years old. Myers (1982) asserts that because in most circumstances the counselor-client relationship is fiduciary, it falls under contract law that only individuals who are not minors, or who are emancipated minors can engage in. Thus, typically minors can enter into a contract for treatment in one of three ways: with parental consent, involuntarily at a parent's insistence, by court order. Yet, there is an exception, reproductive counseling. Family planning clinics that receive federal funds under Title X of the Public Health Service Act, are required to provide services without regard to age or marital status. During the 1970s and 1980s there were several court decisions that affirmed that no clinic receiving such funds may require parental consent or notification before providing birth control services to unmarried minors (Zavodny, 2004). The phrase "birth control services" is key, because that enables workers in these facilities to counsel minors in their options and reproductive rights. In the Tennessee Code Annotated (Tenn. Code Ann., 2003) reproductive rights and services are discussed at length, especially when it comes to sterilization,

contraception, and abortion. The rights of minors to receive a medical procedure that will sterilize them is outlined by 68-34-108, which states:

It is lawful for any physician or surgeon licensed in this state, when so requested by any person eighteen years of age or over, or less than eighteen years of age if legally married, to perform upon such person a surgical interruption of the vas deferens or fallopian tubes, as the case may be, provided, that a request in writing is made by such person prior to the performance of such surgical operation and provided further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequence of such operation.

It is hard to imagine a minor client coming into one's office and disclosing that they are going to get an illegal sterilization that might place a counselor in an ethical dilemma.

However, it may become an area of greater ambiguity in the future. Yet, presently this law is surprisingly clear and perhaps that is why there wasn't any pertinent case law.

The rights of minors to attain contraceptives and to receive counseling on contraceptives is addressed in Tennessee Annotated Code 68-34-107, which states:

Contraceptive supplies and information may be furnished by physicians to any minor who is pregnant, or a parent, or married, or who has the consent of such minor's parent or legal guardian, or who has been referred for such service by another physician, a clergy member, a family planning clinic, a school or institution of higher learning, or any agency or instrumentality of this state or any subdivision thereof, or who requests and is in need of birth control procedures, supplies or information.

Isn't it ironic how the Tennessee Annotated Code states last, "or who requests and is in need of birth control procedures, supplies or information." This placement hints at the fact that although minors have the right to access this information and service Tennessee

would prefer that parents or an older more experienced individual guided a minor down this path. This is not an atypical belief across the states. In the Supreme Court case *Carey v. Population Services International*, the Court considered the state ban on the sale or distribution of contraceptives to minors under sixteen years of age in Pennsylvania. The plurality opinion explicitly extended the right of privacy to minor seeking contraception, asserting that if the State may not require a parental consent on the choice of a minor to terminate her pregnancy, “the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed” (Ramos, 1996). This is an interesting avenue of ethical concern because if you are a counselor working in a private practice versus a federally funded clinic, do you have the right to counsel a minor on birth control and condoms, perhaps even supply them? Considering that there wasn’t any case law on this topic, one may assume that either counselors who already have parental consent to work with their children are safe in discussing reproductive choices, that they avoid these topics, or that parents who might object to this topic being discussed aren’t aware that their child’s counselor might be discussing sex with them. This is a clear-cut example of the importance of knowing who your client is and serving their best interest even if their parent is paying the tab.

Title 37, chapter 10, part 3 (37-10-301) outlines the states position on a minors right to abortion.

- (a) The general assembly enacted a parental consent provision to further the important and compelling state interests of:
1. Protecting minors against their own immaturity
 2. Fostering the family structure and preserving it as a viable social unit
 3. Protecting the rights of parents to rear children who are members of their household.

- b. The general assembly finds as fact that:
1. Immature minors often lack the ability to make fully informed choices that take into account of both immediate and long-range consequences;
 2. The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature;
 3. The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;
 4. Parents ordinarily possess information essential to a physician's exercise of the physician's best medical judgment concerning the child
 5. Parents who are aware that their minor daughter has had an abortion may better ensure that their daughter receives adequate medical attention after the abortion.
 6. The general assembly further finds that parental consultation is usually desirable and in *the best interest of the minor*.

So, in Tennessee the code outlines that parents should be informed and that no abortion should be performed unless a physician has consent from one parent or guardian or that the minor has gone through the judicial bypass system to waive the requirement for consent of a parent or guardian. So, how do these requirements impact a counselor counseling a female minor who wants to get an abortion, but is scared to tell her parents?

It seems that the last line of the code in part (b) covers this, Tennessee believes that it is in the best interest of the minor for their parents to be informed about an abortion.

Therefore, it seems that as a counselor of a minor in Tennessee that you would want to encourage your client to tell their parent. Ethically, this can become a problem if your belief system holds that a fetus is a living being and that your client is imposing an imminent threat to another, which would require you to report your clients planned action. However, this brings one back to counselor competence and the importance of knowing what issues your clients might face and the importance of being able to handle these issues in a developmentally sensitive and appropriate way. Also, it alerts us to the

importance of having a disclosure statement that addresses such strongly held and controversial beliefs that may impact ones client. There are numerous cases that relate to the constant struggle between parental consent to abortion and minor's rights to privacy, but none that address the counseling aspect. *Planned Parenthood v. Danforth* was the first Supreme Court case to recognize that minors were entitled to a constitutionally protected right to privacy. The Court struck down the Missouri abortion statute which, required parental consent before any unmarried female under eighteen years of age could terminate her pregnancy. "The State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physicians and his patient to terminate the patient's pregnancy." However, this finding was disputed in the *Bellotti v. Baird (1979)* case. Here the Supreme Court adjusted the prohibiting of parental consent to abortion to, "if a State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." (hence, the judicial bypass in Tennessee).

So, it seems that even though minors reproductive rights have been limited in recent years, they are not prevented from discussing their options with a counselor. A counselor just needs to be aware of how the state views minors and their rights. A counselor also needs to be aware that in some states like Tennessee there is a definite opinion of what is in the best interest of a minor.

One other area where consent may be relevant to a counselor working with a minor (and where there was some case law) is with committing a minor to a mental

institution or drug and alcohol abuse counseling program or facility. Chiafullo (1994) asserts, “ a parent’s right to commit her child to a psychiatric hospital is bound up in the inherent right of the parent to raise her child.” However, in *Parham v. J.R. (1979)*, the Supreme Court found that the commitment of a child to a mental institution implicated the child’s right to due process. The Court found that a mental health professional should review a parent’s decision to commit their child and trump such a decision when warranted. In Tennessee minors who are 16 with seriously emotional disturbance or mental illness have the same rights as an adult with respect out outpatient and inpatient mental health treatment, medication decision, confidential information and participation in conflict resolution procedures (Tenn. Ann. Code 33-8-202). However, in Tennessee minors with alcohol or drug dependence, will only receive mental health service or support from the mental health service division “if the condition is concurrent with another serious emotional disturbance or mental illness” (Tenn. Ann. Code, 33-8-201). The code does not specify if a minor would need to get a parent’s permission to receive drug and alcohol counseling, but other states do. California is unique in that it, “seeks to encourage adolescent access to medical care and counseling for drug dependency and alcohol related problems by affording adolescents legal consent at age twelve or older” (Hartman, 2002). Similarly, Hawaii does not require minors to get permission to seek drug or alcohol dependency or abuse counseling and accepts their informed consent (§577-26 gen. ch.1993). It seems like the bottom line is always get informed consent when possible when working with minors. However, if you choose to work with minors,

without getting informed consent be aware of the risk involved and the possibility of being sued for battery failure to gain consent and child enticement (Myers, 1982).

Confidentiality

Lawrence and Kirpius, (2000) succinctly state, “the basic dilemma with respect to confidentiality is, who is the client the parent or the child?” With very few exceptions parents have a legal right to all records obtained as a result of examination, evaluation and treatment of a minor (Lawrence and Kirpius, 2000). These exceptions include reproductive counseling at federally funded Title X clinics and drug and alcohol counseling and treatment in some states. A key component to ethically counseling minors is to have a specific disclosure statement that expressly states ones view about confidentiality. Henedrix (1991) identified four positions on confidentiality. *Complete confidentiality* the counselor informs the parent that the child is their client and that they would not disclose any information with the exception of duty to warn. *Limited confidentiality* requires the minor to waive in advance the right to know what the counselor will reveal to the parent or guardian. *Informed forced consent* where the child is informed before disclosure is made to the parent or guardian, but has no say in what is disclosed. *No confidentiality* where there is no guarantee of confidentiality given to a minor.

A minor’s right to confidentiality communication has been such a source of controversy that it is the only other section of The American Counseling Association Code of Ethics and Standards of Practice (American Counseling Association, 1995) that specifically address minors. B.3 Minor or Incompetent Clients states:

When counseling clients who are minors or individuals who are unable to give voluntary informed consent, parents or guardians may be included in the counseling process as appropriate. *Counselors act in the best interests of clients* and take measure to safeguard confidentiality.

Once again the statement, “*act in the best interest of clients,*” is stated, but when the minor is not paying and a counselor has to attain informed consent from the parent, who is the counselor really providing a service for, the parent who is paying or the minor who is confiding? This is an ethical burden on the counselor. However, the Tennessee

Annotated Code 63-22-114 states:

The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed.

This code supports the ethical decision of maintaining a minor client’s disclosures confidential.

Historically, it is the idealized belief of our society that parents make every decision in their child’s best interest. Therefore, forsaking the confidential communication of a minor is acceptable, because parents are going to use any information they receive from a counselor in their child’s best interest. However, it seems that the Court and our society has gotten more skeptical of the motivation of some parents, in regard to the decisions they make, or in these cases attempt to make for their children when confidential information is disclosed to them. In *Duane McCormack, as parent and next of friend of Ryan McCormack, et al. v. Board of Education of Baltimore County* Ryan McCormack’s parents were suing the Board of Education for medical expenses they accrued, due to a school bus accident that Ryan was in. However, the

Board argued that the McCormacks' own claim for medical expenses created a conflict of interest with their son's patient-psychologist privilege. So, the court gave the McCormack's a choice to either agree to a postponement of the trial in order for an unbiased guardian to be appointed, to assert or waive the privilege or face a court order, prohibiting the introduction of the testimony and records at issue. The parents due to money constraints (presumably) did not postpone the trial and therefore the court did not admit the tapes, securing the child's confidentiality. Since the tapes weren't allowed to enter, the parents could not testify as to how traumatic the accident was for Ryan. So, the court's ruling was for the school board, because the burden of proof was not met. However, the court case is being appealed and the former judgement was vacated, because the court believes that the parents' interests are in the best interest of Ryan, so they need to have the opportunity to testify and introduce the psychologist's tapes.

Another area where there is some concern over decisions made in the "best interest of minors" relates to parents' desire to breach their child's counselor-client privilege during divorce proceedings. In *District Court of Appeal of Florida, Fourth District, Attorney ad litem for D.K., a minor, Petitioner, v. The Parents of D.k., Respondents* the court found, "it questionable that either or both parents were acting solely on their daughter's behalf in attempting to waive privilege and obtain the records of confidential communication, when each has his or her own interests at stake in this lawsuit." So, the District Court of Appeal, Warner, C.J. held that:

(1)the child had a statutory privilege in the confidentiality of her communications with her psychotherapist, (2) parents were not entitled to either assert or waive psychotherapist-patient privilege on their minor child's behalf, (3) child did not waive her right to maintain dissolution action and (4) trial court's authority to determine all matters

pertaining to child custody according to child's "best interest" did not prevail over child's assertion of privilege.

The standard of, "in the best interest of the client" is an incredibly powerful statement for granting or dismissing the right of privileged communication for minors. Case law suggests that when there is a question as to the intent of parents' desire for disclosure the law does protect the minor's rights. To reiterate, it seems like it is in the best interest of a counselor to have a very precise disclosure statement that outlines ones beliefs about confidentiality and the rights of minors. However, ones belief system will need to be in check with state and federal law or even though one might feel ethically covered, legally they may not be.

Conclusion

Lawrence and Kirpius (2000) assert that working with minors can be a "field of legal and ethical landmines" a misstep in any direction can result in legal or ethical dilemmas. Even though the landscape may be treacherous, it is manageable. Counselors need to "serve the best interests of their client" whom they should view as the person who entered the counseling relationship with them by confiding in them. However, it seems reasonable that a counselor working with minors would encourage a working relationship with parents, because research suggests that when the parent has the best interests of their child in mind a therapeutic alliance between parent, child and counselor provides the minor client with the most success.

Protection for Counselors Working with Minors (Lawrence and Kirpius, 2000)

1. Practice within the limits of your abilities as defined by education, training and supervised practice.
2. Be thoroughly familiar with state statutes regarding privilege. Privileged communication cannot be assumed unless the state specifically allows it.
3. Clarify your policies concerning confidentiality with both the child and parents at the initiation of the therapeutic relationship and ask for their cooperation. Provide a written statement of these policies that everyone signs.
4. If you choose to work with a minor without the parent's informed consent, minimally ask the minor to provide informed assent in writing. Be aware of the potential legal risks of doing this.
5. Keep accurate and objective records of all interaction and counseling sessions.
6. Maintain adequate professional liability coverage.
7. Confer with colleagues and have legal help available when you are concerned about how to proceed.

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