

Confidentiality & Record Keeping in Counselling & Psychotherapy

Second Edition

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Recording Confidences

I am a reasonably good therapist with many years' experience. My clients are well satisfied with what I offer ... but I do feel nervous about whether what I do concerning confidentiality is legally correct.

I provide counselling in two places. My employer's policy on confidentiality is so different from what I do in my private practice that I cannot see how they can both be right.

I know what I am doing when I am counselling or coaching ... I feel confident about when I need to get extra support. When the law is mentioned I feel exactly the opposite. The law seems so big and I feel so small in comparison that I feel uncertain, anxious and watch myself becoming defensive.

To make things simple, I have decided to treat everything my clients tell me as absolutely confidential. It's worked so far but I know that one day it may get me into trouble. I have had a few awkward moments and think that I ought to get clearer about what the law requires.

I don't keep any records – am I wrong?

I usually keep client records. One client says she won't work with me if I keep records – can I agree to this or should I refuse to work with her?

When we ask therapists how they approach confidentiality and record keeping in their practice, these are some of the typical comments we receive. We understand therapists' concern about making and keeping boundaries in confidentiality and records and it seems to us that few issues raise greater anxiety for counsellors and psychotherapists than the appropriate management of their clients' confidences, particularly where a client's trust is at risk.

Well-managed good practice concerning confidentiality and record keeping can strengthen the therapeutic relationship as trust is deepened and clients feel increasingly secure and respected. This is critically important in counselling and psychotherapy, where clients need to feel able to discuss sensitive thoughts and issues without worrying that their confidences might be communicated to others in ways that could harm the client by damaging their reputation or upsetting others. Therapy is usually possible only where there is a high degree of respect for clients' confidences and privacy.

On the other hand, badly managed confidentiality and record keeping can have the completely opposite effect, destroying ways of working together and leaving

the client feeling betrayed, hurt and misunderstood and the therapist's reputation or integrity undermined. It is therefore not surprising that confidentiality is one of the issues most frequently raised by therapists. This indicates both its importance to everyday practice and the level of difficulty involved in managing it well.

On an issue of such importance to therapists and their clients, it is both reasonable and professionally responsible to turn first to the law for guidance. For many therapists, this is where the problems begin. Those who hope for clear and unequivocal guidance leading to certainty will be disappointed in most legal systems based on English and Scottish law or other legal systems closely related. Instead of precise rules that can be automatically applied, the law operates as a framework in which professionals, including therapists, are required to exercise a degree of judgement in how they apply the law to the specific circumstances of their work. It is also an area of law where therapists may receive contradictory advice from different sources. Our aim in writing this book is to provide information for therapists so that they can base their judgement on a reasonable degree of knowledge about the essential points of law involved, spot the 'hidden traps', and develop an understanding of some of the complexities and points of tension in the existing law.

Confidentiality and record keeping have been combined in a single book because the two issues are often experienced as increasingly linked and existing in tension with each other. One therapist memorably likened recording her clients' confidence to 'walking a tightrope ... wearing a blindfold'. She worked in a service for young people and their parents which had seen a steadily increasing number of requests for copies of clients' records from lawyers for use as evidence in court cases and growing pressures on therapists to co-operate more closely with other professionals. As she reflected on these pressures in her work, she observed:

I feel that I am walking a tightrope. So long as I stay on the rope I am OK but keeping my balance can be difficult. If I wobble too much towards either side I will fall off. If I lean too far in one direction, by keeping the briefest possible records to protect my client's confidences, I reduce my competence to help my client because my records become too skimpy to help me deliver the therapy. If I lean too far towards on the other side by keeping over-detailed records, I may compromise my client's privacy when I am required to reveal those records. It feels like a balancing act. Sometimes I feel that I am walking the tightrope wearing a blindfold because I cannot always identify what is legally expected of me.

In this book, we hope to be able to remove the 'blindfold' by adequately explaining the relevant law. We set out the legal frameworks that apply to confidentiality and record keeping in order to help therapists develop and review their practice in ways that are compatible with the law. Because the law needs to be flexible and so cannot always provide absolute certainty, and because client and therapist circumstances vary widely, we may not be able to eliminate the difficulty of balancing competing legal responsibilities and conflicting legal opinions. We intend that well-informed

therapists will be able to use the law to support their work and to resist unjustified intrusions into their clients' confidentiality and privacy. Knowledge of the law is no substitute for being a competent therapist. However, competent therapists who are knowledgeable about the law are best placed to establish some of the essential conditions from which to deliver the highest quality therapy.

1.1 Using this book

Throughout the book we include extracts and quotations at the start of chapters from comments made to us by therapists, clients and service managers. These illustrate a wide range of views on confidentiality and record keeping, and they have influenced the way we present the legal information and analysis which we have designed to be easily applied by therapists. We have deliberately avoided the traditional style of legal textbooks written for lawyers, but will include references to them where they provide useful sources of further information. We are particularly interested in understanding how the law works in the context of therapy practice. It is seldom more complex than when therapists are working in large organisations with multiple responsibilities to their service users and the community as a whole.

We have developed the structure of the second edition of this book for busy therapists. Some may read the book from cover to cover, but we imagine that most will pick topics of particular relevance to whatever issue is causing concern or is of interest. To meet most needs, we have attempted to ensure that each chapter is complete in itself, even if this sometimes means some repetition between chapters or including cross-references to other sources in the book. The best way of navigating around the book will be to use the Contents page or Index. There are inevitably technical terms in any area of law. We have attempted to keep these to a minimum and have provided a glossary to briefly explain the important ones.

We have included in this new edition a range of short practice scenarios for reflection and discussion, and checklists to help practitioners think through issues and dilemmas and for discussion in supervision. We hope that these may prove useful to understand and implement the law, ethics and guidance in the context of practice.

1.2 The importance of obtaining legal advice

Breaches of confidence and poor record keeping may incur legal liabilities or penalties. There is no substitute for obtaining good up-to-date legal advice on any issues that are of importance to you or your service. The law is constantly developing and legal opinion frequently depends on the precise circumstances of a particular case. Many professional bodies and insurance services provide access to legal advice or can guide you on where to find the best available legal resources.

This book should not be used as substitute for obtaining advice from a lawyer who is qualified and experienced in the relevant field. The book is intended to

help readers understand the broader legal issues concerning confidentiality and record keeping. It may also help managers, practitioners and clients to recognise when there are significant issues at stake that require specific legal advice or to understand the advice that has been given to them.

1.3 Defining key terms

There are many technical terms used in the law concerning professional confidentiality and record keeping. We have provided explanations of these terms in the Glossary at the end of the book, but three terms are so fundamental to understanding this topic that they merit consideration here. These key terms are 'confidentiality', 'privacy' and 'records'. Each of these terms takes on technical meanings in law that differ from their use in everyday life or their routine practice by counsellors and psychotherapists. In this section, we consider their legal meaning and applications.

1.3.1 Confidentiality

To confide in someone is to put your trust in that person. The word's origin lies in Latin, with *con* acting as an intensifier of *fidere*, meaning to trust or put one's faith in, and is probably best translated as 'to strongly trust someone'. Confidentiality presupposes trust between two people in a community of at least three people. For example, confidentiality occurs when two people decide to restrict the communication of information, keeping it between themselves in order to prevent it being communicated to a third person or to more people. In a professional relationship, 'confidentiality' means protecting information that could only be disclosed at some cost to another's privacy in order to protect that privacy from being compromised any further. In her extended consideration of *The Law of Professional – Client Confidentiality* (2003), Rosemary Pattenden observed that recent developments in the law have removed the need for a relationship of trust as a prior condition to create legally binding confidentiality. All that is necessary is that the professional was aware, or a reasonable person in her position would have been aware, that the information is private to the subject of that information (Pattenden, 2003: 13).

1.3.2 Privacy

The *Shorter Oxford Dictionary* defines 'privacy' as the 'state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion' (Trumble and Stevenson, 2002). The ordinary meaning of the word closely matches its legal use. In contrast to confidentiality (which requires at least three people), privacy only requires that one person be able to keep information to him or herself. It can exist in a world without trust and may take on its greatest significance in circumstances of mistrust. It is a more fundamental condition than confidentiality, in that privacy does not require

confidentiality but confidentiality requires privacy. For such a core concept in the relationship between people and the relationship between the public and private spheres of life, it is surprisingly hard to be more precise than the dictionary definition in either everyday life or in law. The right to privacy has gained significance with the growth of cities and urbanisation, where it is possible to live anonymously and with sufficient independence from others. Discussion of the legal origins of privacy goes back a hundred years in the USA in the case of *Boyd v US* [1885] (see Pattenden, 2003: 7). 'Breach of confidence' has long been a concept in English law, but notions of privacy became particularly significant when the Human Rights Act 1998 bound the courts to apply the law in compliance with the Human Rights Act 1998 and the European Convention on Human Rights (ECHR), which includes Article 8, the right to privacy. Accordingly, the courts are currently endeavouring to apply the common law provisions of the law of confidence in a way which protects the Article 8 right to privacy: see, for example, the speech of Lord Nicholls in *Campbell v Mirror Group Newspapers* [2004], and the decision in *Douglas v Hello!* [2007].

1.3.3 Records

When therapists refer to 'records' they are typically thinking of any notes they keep about their work with their clients, but as we will see below, legally, client records may include more than notes.

There are many possible options for record keeping, and their respective advantages and disadvantages are considered in the chapters that follow. Here are just a few examples of the record keeping systems that we have seen in practice:

- *Single file system*: All records concerning a single client are kept together in one file, i.e. name, contact details, correspondence, session notes and finances.
- *Two file systems*: The client's name and contact information, with details of any financial transactions may be kept together in one file; correspondence and session notes may be kept separately.
- Another two file system is to keep the client's name with details of any financial transactions may be kept together in one file; and contact information, correspondence and session notes may be kept in a separate file.
- An alternative approach to keeping two files is to store client names and contact details with correspondence and notes of sessions in one file, and to keep financial information in a different file for accounting and taxation purposes.
- *Multiple file systems*: Client names and contact details in one place; finances kept in another for accounting and taxation purposes; correspondence and notes of sessions kept separately to maximise client privacy. Additional files may be used for other records such as audio recordings, items created by the therapist or client during the session, or notes to be presented in supervision.

The legal meaning of the term 'records' encompasses all these different approaches to records but stretches further than what is usually thought of as the formal client

record. The legal meaning of records may include a diary in which appointments have been made; any surviving jottings on scrap paper made before writing the case notes; the client's drawing or writing made in a therapy session; records of assessment and psychological measurements, reviews and reports, emails about the work with the client; and notes prepared for discussion in supervision, research or training. A record is any form of document, whether paper-based or electronic, and therefore could include audio or video recordings, recorded telephone messages, handwritten or computerised charts and photographs. Verbal or text messages on a mobile phone if still existing, or notes of the content of texts or verbal messages may also form part of a client record.

In relation to written records, the courts require the best evidence possible, and so the greatest legal weight is given to records which are made closest in time to the event to which they relate. The extent to which the law will be interested in records beyond those contained in a therapist's file about a specific client will depend on the circumstances.

Should lawyers request a copy of the client records, the file of case notes will usually be adequate for providing evidence to the courts about therapy where the legal issues concern matters between the client and a third party, for example where the client is suing someone following an accident, or where an employer is blamed for an industrial injury. If a client is suing the therapist, the quest for notes may be more wide-ranging and could reasonably include any separately recorded process notes that reveal the therapist's subjective responses as well as any supervision notes. A criminal inquiry might wish to explore all possible documentary sources both for their content as well as for any potential forensic evidence, such as fingerprints and DNA, that might be gathered from those documents or indeed any other sources. Further information about disclosure of records can be found in volume one of the BACP's Legal Resource Series, *Therapists in Court: Providing Evidence and Supporting Witnesses* (Bond and Sandhu, 2005).

If records are requested by a lawyer or a court, the imprecise and inclusive way that lawyers refer to records means that therapists are well advised to clarify with lawyers what is being referred to and whether the records requested are confined to the client's case file.

Information is the currency of everyday life. In *Commissioner of Police v. Ombudsman* [1998] it was defined as 'that which informs, instructs, tells or makes aware'. However, it is the nature of the information that is shared in counselling and psychotherapy that makes the practices of record keeping, confidentiality and privacy so critical and interlocked. The information that clients disclose in therapy is typically both intimate and personal to the client. For this reason we start with the client's perspective in the next chapter.