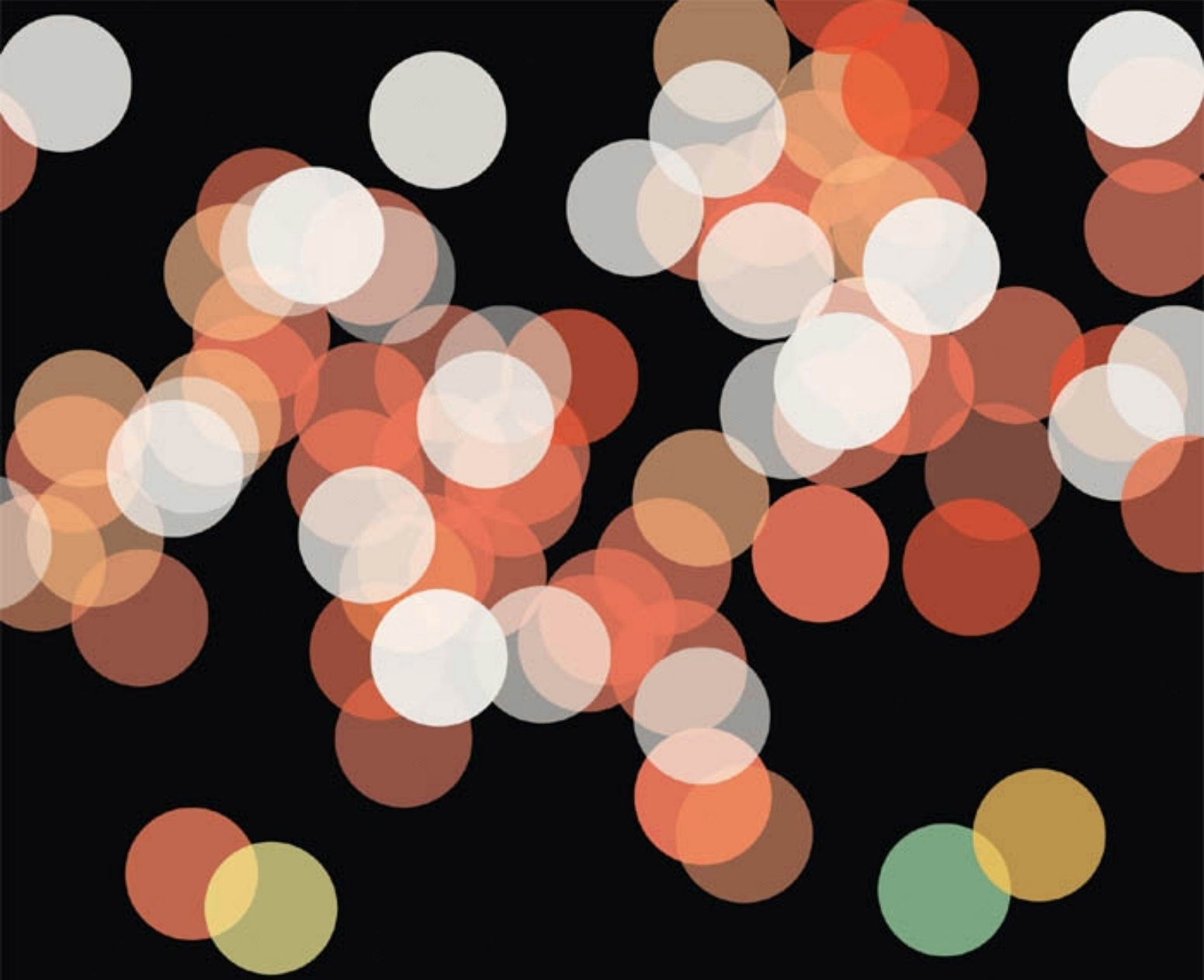

PEARSON NEW INTERNATIONAL EDITION

Ethical, Legal, and Professional Issues in Counseling

Theodore P. Remley Barbara P. Herlihy

Fourth Edition

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them to compensate them financially for their damages. If clients believe they have been harmed by their counselors, they can file a malpractice lawsuit against the counselors. Counselors who are sued must then defend themselves against the lawsuit before a judge or jury. Although there is widespread belief that juries favor plaintiffs in professional malpractice suits against health professionals, evidence from a study of physicians has demonstrated that juries' findings follow what physicians themselves consider to be negligence, and probably even favor the professionals (Vidmar, 1995).

In order for a client plaintiff to prevail in a malpractice lawsuit against a counselor, the plaintiff must prove the following elements (Prosser, Wade, Schwartz, Kelly, & Partlett, 2005):

- The counselor had a duty to the client to use reasonable care in providing counseling services.
- The counselor failed to conform to the required duty of care.
- The client was injured.
- There was a reasonably close causal connection between the conduct of the counselor and the resulting injury (known as *proximate cause*).
- The client suffered an actual loss or was damaged.

Proximate cause is a difficult legal concept to understand. *Actual cause* means that a person actually caused the injury of another person. *Proximate cause* has to do with whether the individual would have been injured had it not been for the action or inaction of the other person. Cohen and Mariano (1982) explained that "an intervening cause which is independent of the negligence absolves the defending negligent actor of liability" (p. 121). In other words, just because professionals are negligent does not make them responsible for an injury. It must be proven that some other intervening event did not, in fact, cause the injury. Foreseeability is important in determinations of proximate cause (Cohen & Mariano, 1982). *Foreseeability* has to do with whether the professional knew or should have known that the professional's actions would result in a specific outcome.

Counselors have become increasingly concerned about being sued for malpractice. Although malpractice lawsuits against mental health professionals have increased dramatically over the past decade, the total number of these lawsuits is relatively small. Hogan (1979) concluded that few malpractice lawsuits are filed against counselors because it is difficult for plaintiffs to establish an adequate case. It is not easy to prove that a counselor deviated from accepted practices and that the counselor's act or negligence caused the harm that a client suffered.

It appears that mental health professionals continue to be sued most often because of sexual relationships with their clients. However, it is likely that the next leading cause of malpractice lawsuits against counselors revolves around situations in which clients attempt or complete suicide (McAdams & Foster, 2000; Roberts, Monferrari, & Yeager, 2008). Whether to have sex with clients is certainly under the control of a mental health professional. Predicting whether a client will attempt suicide, however, is scientifically impossible. Yet, counselors will be held accountable in courts if they fail to follow procedures endorsed by the profession when a client is as risk. Suicidal clients, potentially violent clients, and the duty to warn intended victims of client violence are discussed in the following sections, and guidelines for practice in these areas are offered.

Note: Go to MyHelpingLab and select the Ethical, Legal, and Professional Issues module from the Video Lab. Then select Module 6 and view the video clip entitled "The Aftermath of a Client Suicide." This situation demonstrates what a counselor might face in court if family members sue after a client has committed suicide.

Suicidal Clients

When a client threatens to commit suicide, an ethical duty arises to protect the client from harm to self. The ethical standard that applies to clients who pose a danger to others applies to suicidal clients as well: Confidentiality requirements are waived when disclosure is necessary to protect clients or others from *serious and foreseeable harm* (Standard B.2.a.). Evaluating and managing suicide risk is one of the most stressful situations that you will encounter in your work (Corey et al., 2011). You must be prepared to take measures to prevent suicide attempts (Slaby, 1999), and a recent study by Ting, Sullivan, Boudreaux, Miller, and Camargo (2012) has shown that hospital emergency department admissions of suicidal patients is increasing, particularly among those who are ages 15–19. These prevention measures begin with a thorough risk assessment and then, depending on the level of danger, might include involving the client's family or significant others, working with the client to arrange for voluntary hospitalization, or even initiating the process that leads to an involuntary commitment of the client. All of these interventions are disruptive and compromise the client's confidentiality. Ethically (Standard B.2.d.), and legally under HIPAA (United States Department of Health and Human Services, 2008b), it is important to disclose only information you consider essential in order for someone else to help prevent a suicide attempt.

Similar to situations in which clients threaten harm to others, the counselor's first responsibility is to determine that a particular client is in danger of attempting suicide. There is no sure way to determine this, but experts agree that individuals who commit suicide generally give cues to those around them (Capuzzi, 1994; Capuzzi & Golden, 1988; Curran, 1987; Davis, 1983; Hafen & Frandsen, 1986; Hussain & Vandiver, 1984; Jacobs, Brewer, & Klein-Benheim, 1999; Johnson & Maile, 1987; Laux, 2002; Myer, 2001; Rogers, 2001; Rogers, Lewis, & Subich, 2002; Schwartz, 2000; Schwartz & Cohen, 2001; Stanard, 2000). Day-Vines (2007) has alerted counselors to the soaring rates of suicide among African Americans in the United States, and information such as this must guide the day-to-day work of counselors when they assess clients for suicide potential. In most circumstances, a counselor's determination of a client's level of risk must be based on clinical observations, not on test results. If counselors were not prepared in their graduate programs to handle crises (Allen et al., 2002), they must overcome this deficit through independent reading, workshop attendance, post–master's-degree course completion, and supervised practice (McGlothlin, Rainey, & Kindsvatter, 2005).

As noted earlier, determining that a client is at risk of committing suicide leads to actions that can be exceptionally disruptive to the client's life. Just as counselors can be accused of malpractice for neglecting to take action to prevent harm when a client is determined to be suicidal, counselors also can be accused of wrongdoing if they overreact and precipitously take actions that violate a client's privacy or freedom when there is no basis for doing so (Remley, Hermann, & Huey, 2003). As a result, counselors have a legal duty to evaluate accurately a client's potential for suicide. Counselors can be held liable for overreacting and for underreacting. So, how should a determination be made as to whether a client is suicidal?

First, no matter where you work as a counselor, you are likely to provide services to individuals who might express suicidal thoughts (Hermann, 2001; O'Dwyer, 2012). Therefore, it is necessary for all counselors to know the warning signs that indicate that a particular person is at risk for committing suicide. An old legal case (*Bogust v. Iverson*, 1960) held that a college counselor was not a mental health professional and therefore had no duty to assess a client's risk of suicide. Since then, however, counselors have established themselves as mental health professionals, and the law imposes on counselors practicing in all settings the responsibility of knowing how to accurately determine a client's risk of suicide (Bursztajn, Gutheil, Hamm, & Brodsky, 1983; Drukteinis, 1985; Howell, 1988; Knuth, 1979; Perr, 1985). Courts generally have been reluctant to hold counselors

accountable for harm that results from clients who attempt or complete suicide, because the act is done by the client without the counselor being a party to it. Lake and Tribbensee (2002), however, in their discussion of liability of colleges and universities for the suicides of adult students, cautioned that current legal trends suggest that mental health professionals on college and university campuses may be held accountable more often in the future for adult student suicides.

There is much help available in the professional literature, including research studies and articles that provide information about warning signs of future suicidal behavior (Berman & Cohen-Sandler, 1982; Cantor, 1976; Daniel & Goldston, 2012; Meneese & Yutrzenka, 1990; Sapyta et al. (2012); Sudak, Ford, & Rushforth, 1984). Today's counselors must know how to make assessments of a client's risk for suicide and must be able to defend their decisions at a later time (Linehan, Comtois, & Ward-Ciesielski, 2012).

The law does not require that counselors always be correct in making their assessments of suicide risk, but it is legally necessary that counselors make those assessments from an informed position, and that they fulfill their professional obligations to a client in a manner comparable to what other reasonable counselors operating in a similar situation would have done. Because of this standard of care to which counselors are held, the very best action you can take if you are unsure whether a client is at risk for a suicide attempt is to consult with other mental health professionals who are similar to you (Sommers-Flanagan, Sommers-Flanagan, & Lynch, 2001). The ACA *Code of Ethics* (Standard C.2.e.) advises counselors to consult when they have questions regarding their ethical obligations or professional practice. It also is important to look for consensus among your consultants and certainly to follow their advice in making your final decision about what to do in a particular case. Documenting your steps is essential (Boughner & Logan, 1999; Gutheil, 1999). In situations in which you have assessed a client's potential risk for suicide, it is essential that you document carefully, whether you determine that the client is currently not at risk for suicide or that the client may be at risk. Essential items to include in your documentation notes include the following:

- What precipitated your concern about the client (such as referral by another person, or something the client said or did)
- Questions you asked the client and his or her responses
- Individuals you consulted regarding the situation, what you said to them, and how they responded
- Interactions you had with any other persons regarding the situation, from the time you became concerned until you completed your work for the time being regarding the situation

When you make a decision that a client is a danger to self, you must take whatever steps are necessary to prevent the harm, and your actions must be the least intrusive to accomplish that result. Again, consulting with colleagues could be very helpful. Many counselors who have determined that a client may be at risk for suicide require that the client submit to an evaluation by a mental health professional who has expertise in suicide as a condition for continuing to provide counseling services for that individual. For example, you might demand that your client see a psychiatrist on the staff at the facility where you work, if that is an option. Or you might require your client to submit to a mental evaluation at a local hospital where psychiatric services are available. Of course there are other, less intrusive, options available, such as referring the client to a primary care physician if the client is in a health plan that requires that step before gaining access to a specialist, such as a psychiatrist. But you should choose a less intrusive option only if you are sure the client is not at imminent risk.

Because it is so difficult to decide what steps to take in a crisis situation, especially one in which a suicidal client's life may be in danger, we have provided an action plan to follow if you determine that an adult client may be at risk for suicide (see Figure 2). If your client is a minor,

If you determine that an adult client has exhibited some behaviors that are related to suicide, but currently does not appear to be at risk for committing suicide . . .

1. If you believe that an adult client may be thinking about suicide or if you have observed or have information that an adult client has exhibited some behaviors that might be interpreted as suicidal, but you do not consider the situation to be an emergency, summarize in your case notes the client's behavior that supports your concern. Do not write that you believe the client may be at risk for suicide. Instead, write that although you do not believe the client may be at risk for suicide, you believe a significant person in his or her life needs to be informed of the behaviors that concern you.
2. If you have consulted with colleagues, experts, or supervisors in reaching your position, document the consultations in your case notes.
3. Tell your client your concerns and, if appropriate, obtain an agreement from the client to inform a significant person in his or her life of your concerns. Tell the client to have that person contact you after being told.
4. If your client is not capable of telling the significant person, or for some other reason asking the client to inform the significant person does not seem like an appropriate course of action, explain to the client that you will be contacting a significant person to share your concern. If you are not in independent private practice, inform your supervisor of the actions you will be taking and follow any directives given.
5. Choose a significant person and inform him or her of the situation. A significant person might be your client's spouse, parent, adult child, other relative, domestic partner, dating partner, or close friend. Choose a person who lives with the client or who is in frequent contact with the client.
6. Document in your case notes all conversations with your client, client's significant person, and your supervisors.

If you determine that an adult client MAY BE seriously at risk for committing suicide …

1. You are dealing with a very serious matter that requires immediate and decisive action. Make the determination that an adult client may be at risk for committing suicide only if the client has made a suicide gesture or attempt, has told you or someone else in a believable fashion that he or she plans to commit suicide, or has engaged in a pattern of behavior that the professional literature suggests is characteristic of a suicidal adult. Follow any agency policies that exist regarding managing suicidal adults. If you are not in an independent private practice, notify your supervisor of the situation and follow any directives given. If policies dictate or if your supervisor directs you to proceed differently from the following steps, follow the policies or the orders of your supervisor.
2. If you have consulted with colleagues, experts, or supervisors in reaching your position, document the consultations in your case notes.
3. Explain to your client that you will have to notify a significant person in his or her life so that the person can help.
4. Assure your client that you will continue to help and that you will disclose only the minimum information necessary to get assistance for the client. Try to calm the client, but do not minimize the seriousness of the situation. Explain what may happen in the next few hours, next few days, and long term.
5. Ensure that your client is not left alone and does not have any opportunity to harm self before turning the client over to the significant person.
6. Contact a significant person in your client's life and explain that you believe his or her relative, partner, or friend may be at risk for suicide. Give specific details that led to your concern. Insist that the significant person come to pick up the client immediately.
7. If a significant person cannot be found, make sure your client is under the supervision of a responsible person until a significant person is located.

FIGURE 2 Steps to follow if you determine that your client may be at risk for suicide

8. If you cannot contact a significant person and if it is impossible to keep your adult client safe for an extended period of time, call an ambulance and have the client transported to a hospital that has psychiatric services. If you are not in an independent private practice, be sure to inform your supervisor and obtain permission and support for taking this action. If your supervisor directs you to take a different course of action, do so and document in your case notes what you were told and did. Give the ambulance attendant your contact information and offer to speak with the person at the hospital who will be conducting the evaluation, if requested to do so. Continue to attempt to contact the client's significant person.
9. When you talk to the significant person, ask that person to take possession and responsibility immediately for your client.
10. When the significant person arrives, explain that you believe that your client may be at risk for suicide, give specific details that led to your concern, instruct the significant person what to do next, and ask that a document be signed that acknowledges that the significant person has been informed of your concerns, has been given directions of steps to take next, and has agreed to take responsibility for your client.
11. Also, have the client sign a form giving you permission to disclose any information you have to mental health professionals who may evaluate or treat the client in the future. If the client refuses or is not capable of signing the form, ask the family member or significant person to sign on your client's behalf.
12. Explain to the significant person that he or she must ensure that your client is not left alone, does not have any opportunities to harm self, and is taken for an evaluation as soon as possible to determine whether the client is at risk for suicide.
13. If a significant person refuses to sign the document or communicates to you in some way that he or she will not take the situation seriously, call an ambulance and follow the steps in item 8.
14. As events occur, document in detail in your case notes all the events that transpired in relation to this situation. Be sure to date each entry and indicate the time you wrote it. Make several entries if necessary, and do not delay in writing details in your case notes.
15. When your client returns to you or your agency for services, obtain written permission from your client to contact the professional who determined that your client was not at risk for suicide, or was no longer at risk for suicide.
16. Contact your client's treating physician, psychologist, or mental health provider and explain that the client has returned to you or your agency for services. Ask the treating provider to summarize his or her evaluation and treatment of the client. Inquire as to whether the provider will continue to treat the client, and if so, the details of the planned treatment. Also ask the treating provider the types of counseling services he or she would like for you to provide to the client. Do not agree to provide any counseling services that your position does not allow you to provide. Ask the provider to tell you the circumstances in which you should return the client to him or her for further evaluation or treatment.
17. As soon as possible after you have talked to the provider, document in your case notes details of your conversation. Be sure to date the entry and indicate the time you wrote it.

FIGURE 2 (*continued*)

you must always notify the parents or guardians (Capuzzi, 2002). The steps we have suggested are not the only options that counselors have. We are providing one possible way to manage potentially suicidal clients that hopefully will yield positive results.

If you work in an agency, school, hospital, or other setting, you must always follow procedures established by your employer. In many cases, counselors find that their employer does not have guidelines for how to manage potentially suicidal clients. If that is the case, you should consider following the guidelines in Figure 2 until such policies are adopted. In addition, you should

ask that guidelines be established for the welfare of clients and to protect the counselors who have to make decisions in difficult situations. If your administrative supervisor is present, you must follow his or her directives. The guidelines presented in Figure 2 could be adopted by your agency, or you could follow these, in the absence of any agency policies or directives from superiors.

As you can see from Figure 2, it is assumed that a client you refer for an evaluation will return to you for services. Even if a client is hospitalized, the hospitalization usually is only a few days in duration. Contacting and documenting your consultation with the mental health professional who determined that your client was not at risk for suicide, or was no longer at risk, are vital. You probably will counsel clients who have recently been at risk for suicide. In an interesting study, Paulson and Worth (2002) found that previously suicidal clients described these key therapeutic processes that helped them to overcome suicidal ideation and behaviors: (a) experiencing an affirming and validating relationship as a means of reconnection with others, (b) dealing with the intense emotions surrounding suicidal behavior, and (c) confronting and discarding negative patterns while establishing new, more positive behaviors.

Clients Who May Be at Risk for Harming Others

Counselors are often responsible for violence prevention education (D'Andrea, 2004; Gintner, 2004; Smith & Sandhu, 2004). In addition, there will be situations in your counseling career when you must decide whether a particular client has the potential of harming another person, or perhaps even an individual's property. Making this decision is difficult, as there is no scientific basis for such decisions. If you do determine that a client is a danger to another person, then you must take the steps necessary to prevent harm (Gilbert, 2002; Hermann & Finn, 2002). This may include warning intended victims, whether or not their identity is known. In making these difficult decisions, it is essential to consult with other mental health professionals and to include supervisors to the extent possible.

What began as a legal requirement has now evolved into an ethical duty as well. Standard B.2.a. of the ACA *Code of Ethics* states that the counselor's confidentiality requirement "does not apply when disclosure is required to protect clients or identified others from serious and foreseeable harm." This particular exception to confidentiality has caused considerable confusion and consternation among helping professionals, not only because it involves breaching confidentiality but also because it demands that counselors be able to predict dangerousness. Human behavior is not always predictable, and counselors may find themselves caught on the horns of a dilemma, both ethically and legally, in determining whether to breach a client's confidentiality in order to prevent harm to the client or to others.

3 The Case of Todd

Todd is a counselor in a community mental health center. For the last 2 weeks he has been seeing a client named Bill, who is a junior in high school. Bill comes to center 1 day a week, walking from school to his sessions and then walking home afterward. This afternoon, Bill tells Todd that, after thinking about it for quite some time, he has decided to shoot the assistant principal at his school. Bill says that his father has a rifle collection in their home, and he has access to the guns and to ammunition. Bill explains that he plans to wait outside the assistant principal's home until he walks out in the morning and shoot him as he walks to his car. Because Bill is so calm as he relates all of this information, Todd asks Bill if he is serious. Bill smiles, laughs, and then says, "No, I was only kidding. I would never do anything like that." Because Todd doesn't know Bill very well, he is not