

## Article 83

### The Case of Liam: Ethical Counseling of Minors

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#### Abstract

Ethical dilemmas can prove to be a regular challenge for counselors. Utilizing a decision making model to resolve these dilemmas is beneficial to counselors. The authors apply an ethical decision making model to the case study of Liam. Liam is a counselor for two minor male children who are experiencing difficulties as a result of their parents' divorce. The ethical and legal concerns of counseling the minors and completing custody evaluations are discussed.

Counselors will encounter ethical dilemmas throughout their careers that may test their personal moral beliefs. They are complex and their resolutions are rarely easy. A combination of knowledge, problem solving skills and strategies, an understanding of philosophical principles, and a virtuous character is necessary for one to be an ethical professional. The use of a decision making model standardizes the resolution process to the conduct that has been accepted by the professional group of counselors (Remley & Herlihy, 2010).

This team will explore the case of Liam, who is a counselor working with two brothers whose parents are divorcing. The boys are being seen because their behavior and grades are reportedly being negatively affected by the situation. Their parents have joint custody, each retaining their parental rights, and their mother has physical custody. Liam has never met the boys' father. It is during a counseling session that the boys reveal that their father has punished them by hitting them and locking them in the closet for extended periods. Liam chose not to report this since the boys have requested that he not tell anyone. Several weeks after this disclosure, their mother informs Liam that she wants him to give his opinion to the court regarding which parent should gain custody of the children. Additionally, the boys' father has requested to have access to the children's records.

### **Choosing an Ethical Decision Making Model**

While the American Counseling Association (ACA) provides a decision making model in "Practitioner's Guide to Ethical Decision Making" (Forester-Miller & Davis, 1996), this team chose to use Barnett and Johnson's guidelines in the *Ethics Desk Reference for Counselors* (2010). This model allows for addressing legal concerns that the ACA model does not. The Barnett and Johnson model (2010) does address the underlying ethical principles of counseling (beneficence, nonmaleficence, autonomy, fidelity, fairness, and privacy) as well as the use of the ACA *Code of Ethics*.

#### **Step 1: Define the Situation Clearly**

At this point, the counselor has realized that there is a potential ethical concern and begins the decision making process. The goal of this first step is to clearly articulate the problem while gathering as many relevant facts and details as possible (Barnett & Johnson, 2010, Forester-Miller & Davis, 1996). The counselor should consider whether this dilemma involves actions he or she has taken or should have taken or actions that someone else has taken.

In this case this team has determined three issues must be resolved: first, the need to report the boys' allegation of physical abuse and neglect; second, whether Liam should release his records to the boys' father; and third, whether Liam should testify in the custody hearing as the children's mother has requested. A fundamental concern with this case regards serving minor clients and protecting the confidentiality of minors while maintaining a working relationship with the parent. The children are not officially the clients: they have not reached the age of majority and cannot legally consent to counseling services. Their parents or legal guardian serve as the client (ACA, 2005a). However, as ethical counselors, it is our duty to do our best to protect the privacy and confidentiality of all of our clients, including minors (ACA, 2005a).

#### **Step 2: Determine Who Will Be Affected**

At this point of the decision making process, the counselor must identify the primary clients and those who may be affected by the outcome of the decision; this may happen concurrently with the first step (Barnett & Johnson, 2010; Forester-Miller & Davis, 1996). With regard to the scenario provided, the people who are of primary

concern are the young boys who are receiving counseling services. The counselor must also consider the parents in the situation as well since they are the clients in the situation. Liam must also be aware of how his next actions will affect himself.

### **Step 3: Refer to Both Underlying Ethical Principles and the Standards of the ACA Code of Ethics**

This step involves applying the standards and principles that are most specific to the situation (Barnett & Johnson, 2010). First, the counselor should refer to the ACA *Code of Ethics* to determine if the situation is specifically addressed within the code. If the situation is addressed, then the counselor should follow the course of action indicated (Forester-Miller & Davis, 1996). If the *Code of Ethics* does not clearly identify the scope of the problem or lacks a resolution, the counselor should utilize the ethical principles of beneficence, nonmaleficence, autonomy, fidelity, fairness, and privacy (Barnett & Johnson, 2010).

Liam must first consider breaching confidentiality of the children by reporting to their custodial parent and the Children's Services Board their allegation of abuse and neglect. Despite the fact that the children do not want their counselor to share this information, it is ethically clear that confidentiality should be breached and that the mother, who has physical custody, should be informed (ACA, 2005a, B.5.a, B.2.a). As a factor of informed consent, Liam should have disclosed to the boys that there are limitations to confidentiality and, in certain situations, he may have to break this in order to protect them from future harm (ACA, 2005a, B.1.c, B.1.d.). The father's behavior must also be reported to proper authorities due to the legal and ethical requirements of mandated reporting of suspected child abuse or neglect (ACA, B.2.a). Yet it is equally important to consider the rigors of confidentiality, informed consent, and minimal disclosures as to not only protect the safety of the children, but to also protect the children's trusting relationship with their counselor.

With regard to release of the records to the father, the ACA code is silent to specific considerations regarding minor clients' records. Ethically, releasing records that may cause harm to the clients is to be avoided. The counselor would need to document the reasoning to support his or her refusal of release (ACA, 2005a, B.6.d). In this case, Liam needs to consider the ramifications to the children should their father see their records indicating that they have alleged abuse. In the absence of the report of the alleged abuse, there is not a safety net set up to prevent the boys from further abuse.

Liam's third concern is regarding whether he should testify regarding custody. Mental health counselors are different from custody evaluators and forensic evaluators. Only custody or forensic evaluators should make placement recommendations, as they have a specific job to gather information and form an opinion (ACA, 2005a, E.13.a.; Moore & Simpson, 2012). Liam is treating the boys as a mental health counselor and not a custody or forensic evaluator. Therefore, he should not give his opinion on the matter (ACA, 2005a, E.13.c.). If he does testify, or is subpoenaed, his testimony should be short and limited to pertinent facts of the case, such as counseling goals, progress, and prognosis (Moore & Simpson, 2012).

#### **Step 4: Refer to Relevant Laws/Regulations and Professional Guidelines**

After the ACA *Code of Ethics* has been applied, the counselor needs to consider the legal regulations that apply to the dilemma. The counselor can achieve this through review of legal statutes and consultation with a lawyer regarding legal obligations and consequences. The counselor must also consider the potential conflicts between the legal requirements and ethical obligations (Barnett & Johnson, 2010).

Liam is a mandated reporter of suspected child abuse or neglect by Ohio law. According to Ohio Revised Code (ORC) 2151.421 (A)(1)(a),

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.

The report is to be made to the public children services agency of the county in which the children reside (ORC 2151.421). Failure to report suspected child abuse in the state of Ohio is considered a fourth degree misdemeanor. In addition, if the child is harmed by suspected but unreported abuse or neglect, the mandated reporter who fails to report is guilty of a first degree misdemeanor. According to the ORC 2929.22 code, the amount and severity of penalties that result from these adjudicated misdemeanors vary depending on five criteria to be considered by the court:

- (a) The nature and circumstances of the offense or offenses;
- (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;
- (c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;
- (d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;
- (e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section.

Definitive penalties for a fourth degree misdemeanor resulting from failure to report child abuse or neglect that does not result in harm to the child consists of no more than 30 days in jail, a fine of no more than \$250, and reimbursement of court costs. In the case of the first degree misdemeanor resulting from failure to report suspected abuse or neglect that

leads to harm to the child, the penalties include a jail sentence of 180 days, a fine of no more than \$1,000, and reimbursement of court costs (ORC 2929.24; ORC 2929.28).

In addition to legally applied penalties, counselors who fail to report suspected child abuse or neglect in the state of Ohio face sanctions imposed by the Ohio Counselor, Social Worker, Marriage and Family Therapy Board. According to the published Laws and Rules of the Board, failure to report abuse or neglect that results in a misdemeanor conviction is considered to be a failure to maintain professional standards of the board and may result in penalties ranging from the refusal of the board to renew or issue licensure or certification; suspend, revoke, or otherwise restrict a license or certification; reprimand the individual holding the license or certification; or impose fines determined by the laws and rules of the board and 4757.10 of the Ohio Revised Code (Ohio CSWMFT Board, 2012)

The second legal concern is with regard to the father's request for records. The Ohio Revised Code (ORC) refers to both parents as legal guardians responsible for their care, welfare, and management of estates with equal power and responsibility (ORC 2111.08). Additionally, if the parents reside apart, the court may award custody to one parent or the other. Until the court has awarded custody, both parents are considered legal guardians. In this case, legal custody has not been awarded, so it is within the father's legal rights to receive requested records.

While the *ACA Code of Ethics* is silent on the issue of the rights of the noncustodial parent, the American School Counseling Association (ASCA) code of ethics states that school counselors are to recognize the right of all parents, both custodial and noncustodial, in the welfare of their children by the virtue of their position and according to the law (ASCA, 2005a; Wilcoxon & Mangnuson, 1999). Taken to the logical conclusion, such consideration could be bestowed upon the parents of this particular ethical dilemma. Essentially, as Wilcoxon and Magnuson argued, "a parent is a parent" and, unless legal authorities have terminated parental rights of the noncustodial parent, he/she should be given access to the records of his/her child regardless of whether or not the child resides with the parent in question.

It is important to consider two distinctions in terms of custody as it is presented in the case study. It is stated that the mother of the two boys has physical custody, but that the parents together share joint custody. By virtue of the fact that it is reported that the father has joint custody with the mother, he still has equal legal rights to the status of his children regardless of the fact that the mother is the primary physical custodian of the children (Wilcoxon & Mangnuson, 1999). Ohio Revised Code also states that noncustodial parents have the right to access their child's records regarding any health service provided to their child unless their parental rights have been terminated (ORC 3109.051). Thus, statutory precedent is clear: the father of the two boys should be allowed access to the records of his children unless proof can be shown that his parental rights have been terminated by the court.

However, it is also important to be sensitive to the best interests of the children when releasing these records to their father. As Wilcoxon and Mangnuson (1999) suggested, the counselor should examine the potential impact of decisions upon the children involved. From here, the *ACA Code of Ethics* does address issues related to limiting impacts of disclosure in the concept of minimal disclosure (ACA, 2005a, B.2.d) and directs the counselor to behave in a certain way when releasing records (ACA,

2005a, B. 6. e., B.6.F). The counselor should hold a separate meeting with the children's father and evaluate the need for release of records. If the need is legitimate, release of records should be done in a manner that is non-damaging to the children. Minimal disclosure of the case facts would balance the children's confidentiality while complying with the father's request.

#### **Step 5: Reflect Honestly on Personal Feelings and Competence**

This step allows the counselor to reflect on personal reaction to the situation. The counselor needs to consider how his or her feelings affect his or her decision making. Additionally, this step allows the counselor to determine whether he or she has the requisite competence to handle the situation effectively and appropriately (Barnett & Johnson, 2010). In the case of Liam, he needs to consider whether he values the legal and ethical ramifications of confidentiality concerns as highly as the counseling relationship. His actions in delaying the report of alleged abuse and neglect may be causing the children further harm at home. Liam should be considering whether he is competent to decide when the benefits of counseling outweigh the ethical and legal concerns.

#### **Step 6: Consult With Trusted Colleagues**

At this stage of the process, the counselor will identify colleagues who have experience in the area of concern, have shown good judgment, are familiar with the legal and ethical issues that are of concern, and are respectful of confidentiality (Barnett & Johnson, 2010). With regard to Liam's case, he should consider consultation with a colleague or potentially a supervisor to work through his ethical concerns. Additionally it may be beneficial for him to consult with his liability insurance or an attorney for addressing legal issues. If Liam is working for an agency, he would also consult the legal staff at the agency. In the state of Ohio, Liam can also contact the Ohio Counselor, Social Worker and Marriage & Family Therapist Board for consultation.

#### **Step 7: Formulate Alternative Courses of Action**

This step allows the counselor to consider all courses of action that can be taken and possible responses to the situation. The counselor also needs to consider the feasibility of each course of action (Barnett & Johnson, 2010). This case's first dilemma, reporting alleged child abuse and neglect, has two choices: Liam can report or he can choose not to report. The second dilemma with regard to release of information to the children's father has three potential courses of action: Liam can determine he will not disclose the records; he can disclose the records in full; or he can release the records redacted to minimize harm to the children. The final dilemma of testifying in court as requested by the mother also has three potential courses of action: Liam can choose to accommodate the mother's request; he can decline the mother's request; or he can be subpoenaed.

#### **Step 8: Consider Possible Outcomes for All Parties Involved**

The counselor must examine the impact of each course of action for all identified parties. This step may happen concurrently with the previous step. Evaluating and documenting the risks of each outcome is important (Barnett & Johnson, 2010). There are a number of different outcomes to consider for this particular case; the first possible

outcome being that the children could be harmed and Liam could have prevented this by reporting their allegations. The second possible outcome is the previously outlined legal penalties that Liam may face for failing to report the alleged abuse. In addition to legal penalties, Liam faces sanctions from his licensure board for failing to report suspected child abuse, ranging from reprimands, fines, the refusal of his board to renew a license or certification, and suspension or revocation of his license or certification (Ohio CSWMFT Board, 2012).

Another outcome to look at in this case is what might happen to the father of the boys if Liam does report the alleged abuse. In the state of Ohio the father might face an investigation from the local Children's Services Board, which could affect his future custody of the children. It also might strain the relationship between the boys and their father, who could be upset that the boys alleged he abused them. It would then be at the discretion of the investigator to decide if the boys are at risk for harm if the joint custody plan stays in place.

The last outcome to discuss is what might happen to Liam if he agrees to testify in court about custody. It has already been documented that as the boys' mental health counselor, Liam is in no position to make a recommendation about custody (ACA, 2005a, E.13.c.). The determination of custody should be left to the custody or forensic evaluator(s) assigned to the case (Moore & Simpson, 2012). If Liam steps outside his role as a mental health counselor and testifies with a recommendation for custody, he may face sanctions from the ACA regarding his membership, including probation, suspension, or expulsion (ACA, 2005b; ORC 4757-5-01). In addition to the consequences from the ACA, Liam may also face sanctions from his state licensure board. The Ohio Counselor, Social Worker, and Marriage and Family Therapist Board could fine, reprimand or suspend, or revoke or restrict his license for testifying outside his scope as a mental health counselor (Ohio CSWMFT Board, 2012).

### **Step 9: Make a Decision and Monitor the Outcome**

Based on all the relevant information, the counselor will select the best option and implement it. If possible, the counselor will discuss and process his or her decision with the affected individuals and take full responsibility for the consequences of the decision. Conscientious documentation must be kept for each of these conversations and steps taken to decide, implement, and monitor the outcome of the decision (Barnett & Johnson, 2010).

Based upon the above discussion, the following course of action was determined: Liam, as a mandated reporter in Ohio, must report to both the children's parents and the local county Children's Services Board. Before making the report, Liam will need to discuss with the children his responsibility to report their allegations and the concept of informed consent. Liam should be prepared to process with the children what to expect from the report to children's services and the course that a potential investigation may take. Liam is ethically and legally bound to release records to the father until a custody decision has been reached. He does have the option of redacting information from the records that may cause harm to the children such as specifics regarding the allegations of abuse. With regard to testifying in court, Liam will need to explain his role to the mother as a mental health counselor as opposed to a forensic counselor and the limitations that this entails.

Since this case gave no information that Liam set a clear standard for how the boys' privacy or confidentiality would be handled prior to disclosure of information in the case provided, Liam could benefit from education regarding confidentiality when working with minors. For example, Hendrix (1991) discussed identifying four positions to consider in regards to confidentiality. First, a counselor could employ complete confidentiality and allow no disclosure with parents or outside sources. Second, one could use limited confidentiality in which the minor waives the right to know what is disclosed in advance of sessions. Third, a counselor could let the client know that information shared will be revealed to parents/guardians. Lastly, the counselor can make no guarantees about what will be shared. The important issue here is to explain to a client what guarantees are made about confidentiality prior to the onset of therapy.

Koocher (2008) presented a decision making model to use when making the decision to breach confidentiality of a minor. His 4-C model suggests considering four specific aspects--competence, consent, confidentiality, and competing factors and directs the therapist in question to consider all four aspects in the process of determining whether to breach or not breach confidentiality (Koocher, 2008).

Competence in regard to minors in the 4-C model is looked at in terms of two specific areas: *de facto*, or actual ability to comprehend and make decisions, and *de jure*, or legal precedent for the determination of competence (Koocher, 2008). Koocher noted that, while some minors may have developed their cognitive and emotional abilities to a degree that they are capable of self-determination, it is the legal *de jure* competency that has the most impact. As legal statutes and the ACA *Code of Ethics* view minors as incapable of making decisions for them, one could argue that any minor is not competent enough to make decisions for themselves (ACA, 2005a; Koocher, 2008). However, it is also important to consider the developmental state of the children and their ability to be involved in the decision making process at a developmentally appropriate level (Koocher, 2008). Given the age of the two boys, it is likely that neither has developed the cognitive ability to self-determine, yet their perception of power to make meaning of decisions made on their behalf could be therapeutically advantageous.

The second C, consent, requires the counselor to consider what is best for the vulnerable client and obtain approval for those actions if possible. Though the children do not want their father's abusive behavior reported, they are not competent to decide that this information should not be reported (Koocher, 2008). Yet, in this model it is also important to consider the motivation of the children in their refusal to give consent to report these behaviors. For example, are they behaving this way to protect their father, or have they been threatened to behave in this way?

Confidentiality, the third C in Koocher's model, states that clarification about the role of confidentiality to all parties must be made prior to the breaching of confidentiality. As the ACA *Code of Ethics* notes, informed consent and confidentiality is an issue that should be revisited throughout the counseling relationship (ACA, 2005a) and, ideally, the discussion about what confidentiality means and its limits is done at the beginning of the counseling relationship between all stakeholder parties in the counseling relationship (Koocher, 2008). It must also be a carefully balanced act between the legal right of the parent to have access to information about his/her minor child and the right of the child to have a confidential helping relationship with his/her counselor (Koocher, 2008). Both child and parent must be informed and collaborate on a plan for maintaining



confidentiality that recognizes the need for a trusting relationship for all parties, but also recognizes that there are some issues that must be disclosed (Koocher, 2008).

The final C in Koocher's model directs the therapist to consider the competing interests in the child between the counselor, the child's parents, and the child himself and asks the therapist to consider to whom duties are owed. It is the counselor's ethical and legal duty to the child to protect his/her safety in any situation that may lead to harm, but duties exist to the parent who enrolled the children in counseling and to the profession itself in terms of upholding the ethical standard of fidelity and nonmaleficence. Furthermore, the counselor has a duty to be in compliance with legal statutes and, as failure to fulfill mandated reporting requirements can result in legal penalties and professional sanctions, it is important to secure legal protection and document the nature of reports and when they were made in order to be protected from legal and professional penalties.

Ethical decision making is at the core of the counseling profession. Counselors must be steadfast and determined in their resolve to always make the best effort to follow the ethical codes and laws set out before them, including the *ACA Code of Ethics* and state and federal laws. In this case, Liam represented a counselor who endangered the welfare of his clients and violated professional standards because he did not follow the ethical code and legal precedent in securing the safety of the boys. The integrity of the counseling profession depends on each person to faithfully adhere to these codes, and when situations present themselves that are not well-defined, it is the responsibility of each professional to seek out the best path forward for the client and the counselor.

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