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CONFIDENTIALITY OR PRIVILEGE ARE NOT THE SAME: DUTIES AND ETHICS IN ORGANIZATIONS (ADVANCED)

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I. How many professional lens' do you work with?

- ▶ Multidisciplinary draws on knowledge from different disciplines but stays within their boundaries.
- ▶ Interdisciplinarity analyzes, synthesizes and harmonizes links between disciplines into a coordinated and coherent whole.
- ▶ Transdisciplinary integrates the natural, social and health sciences in a humanities context, and transcends their traditional boundaries.
- ▶ Why does this matter at all?

SHARING KNOWLEDGE AND VALUES BUT NOT ALWAYS ETHICAL CODES


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**II. THE RISK FOR MHPS:
STAYING IN THE LANE
OF LICENSURE UNDER
STATE LAW**


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YOUR VALUES AND ORGANIZATIONAL ETHICS

- The various beliefs and attitudes that determine how a person or group behaves.
- Values identify what should be judged as good or ideal in an organizational culture.
- A well-defined value system is a moral code...But is it an ethical code?
- Does the organization have an ethical code?
- Does that ethical code (written or unwritten) protect the organization or your licensure?



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FOR EXAMPLE: YOUNG, D. S. (2015). LIVED CHALLENGES TO ETHICAL SOCIAL WORK PRACTICE IN CRIMINAL JUSTICE SETTINGS. *JOURNAL OF FORENSIC SOCIAL WORK*, 5(1-3), 98-115.

- The principal area of conflict results from having responsibility to multiple parties and the interests they represent.
- The organization sees itself as the social worker's primary responsibility, whether a juvenile justice setting, prosecutor's office, treatment court, or adult prison.
- The social worker is expected to conduct work in a way that always supports the organizational goals and requirements.
- From the criminal justice system's perspective, the social worker's priority must be in concert with the organization's interests.
- Within an organizational perspective, what is important to the individual prisoner, delinquent, defendant, or victim-client is secondary, and more often totally disregarded if it does not line up with organizational values.

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YOUR NASW CODE OF ETHICS

- The Code articulates mission, values, ethical principles and standards.
- By its articulation of core values and binding ethics, the Code provides guidance and rules for conduct.
- The Code describes best practices for and the way such activities should be properly undertaken.
- The Code is a full disclosure statement that describes and proscribes the ethical deployment of professional social worker responsibilities.
- The Code travels with you always.

Adapted from Marsh, J.C. (2003). Editorial: To Thine Own Ethics Code Be True. *Social Work*, 48(1), 5-7.

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CORE ETHICAL PRINCIPLES

Social Justice: *Social workers challenge social injustice.*

Service: *Social workers' primary goal is to help people in need and to address social problems.*


Dignity and Worth of Person: *Social workers respect the inherent dignity and worth of the person.*

Importance of Human Relationships: *Social workers recognize the central importance of human relationships.*

Integrity: *Social workers behave in a trustworthy manner.*

Competence: *Social workers practice within their areas of competence and develop and enhance their professional expertise.*

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THE 2017 NASW CODE OF ETHICS AMENDMENTS AND SOCIAL MEDIA

- <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Highlighted-Revisions-to-the-Code-of-Ethics>
- Impact on you....and confidentiality?
- When are you free from your licensure to do what you want?
- What are school polices on communications with students and parents?

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TELEHEALTH: HERE TO STAY?

- ▶ The practice of using video or on-line platforms to offer psychosocial, evaluation, and treatment by organizations or clinicians.
- ▶ You can meet with clients anywhere in the country, but should you?
- ▶ When you expand your practice to include digital service, potential ethical challenges and liabilities:
 - ▶ HIPAA and HITECH violations
 - ▶ Other federal and state confidentiality laws
 - ▶ Violations of state license laws or rules
 - ▶ Fail to meet (evolving) standards for Professional Codes of Ethics
 - ▶ According to HIPAA and HITECH, telehealth software must keep patient data encrypted. Many common platforms may fail to meet this requirement.

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HITECH Act:
ONC | Office of
the National
Coordinator for
Health
Information
Technology
(healthit.gov)

HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH (HITECH) ACT OF 2009 PROVIDES HHS WITH THE AUTHORITY TO ESTABLISH PROGRAMS TO IMPROVE HEALTH CARE QUALITY, SAFETY, AND EFFICIENCY THROUGH THE PROMOTION OF HEALTH IT, INCLUDING ELECTRONIC HEALTH RECORDS AND PRIVATE AND SECURE ELECTRONIC HEALTH INFORMATION EXCHANGE.

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III. THE PRIVILEGE AND SOCIAL WORK

“In 1965 the New York State legislature extended to the social worker a privilege long accorded the attorney, physician, and clergyman—that of privileged communication. Problems this presents are discussed, especially with respect to the profession's broad scope of practice, its service to groups as well as individuals, conflicting values, and court enforcement. Suggested as a possible solution is self-regulation by means of standing committees to make nonpartisan decision.”

Arnold, S. (1970). Confidential communication and the social worker. *Social Work, 15*(1), 61-67.

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THE A-C PRIVILEGE

Jensen v. S.D. Warren Co., 2009 ME 35, 968 A.2d 528:

- The attorney-client privilege extends only to "confidential communications" between an attorney and client.
- An attorney-client communication that is disclosed to advance a claim for benefits is not a confidential communication.
- The attorney-client privilege of M.R. Evid. 502 does not protect such a published communication from discovery and inquiry when it relates to an essential fact in a proceeding.
- Any privilege is waived "if the person ... voluntarily discloses or consents to disclosure of any significant part of the privileged matter" or a "key element" of the privileged communication has been disclosed.

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PRIVILEGE V. CONFIDENTIALITY

• *State v. Olah*, 2018 ME 56, 184 A.3d 360

- A court may order the disclosure of otherwise confidential health care information if that disclosure is required as a matter of law. See 22 M.R.S. § 1711-C(6)(F-1) (allowing the disclosure of otherwise confidential health care information "[a]s directed by order of a court").
- As set forth in the Rules of Evidence, a confidential communication is "cloaked" when made in the context of a special relationship with the intent that it not be disclosed to any third parties except in strictly limited circumstances. See, e.g., M.R. Evid. 502(a)(5) (lawyer-client communications), 503(a)(5) (health professional-patient communications), 505(a)(2) (communications to clergy).

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FEDERAL RULES EVIDENCE PRIVILEGE

Rule 501:

- The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
 - the United States Constitution;
 - a federal statute; or
 - rules prescribed by the Supreme Court.
- But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.
- In criminal law, privileges implicate other constitutional rights like self-incrimination, counsel, and due process.

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DEFINITION OF A-C PRIVILEGE

- (1) A "client" is: (A) A person; (B) A public officer; (C) A corporation; (D) An association; or (E) Any other organization or entity, public or private;
- (2) A "representative of the client" is a person who has authority on behalf of the client to: (A) Obtain professional legal services; or (B) Act on advice rendered as part of professional legal services.
- (4) A "representative of the lawyer" is a person who is employed by the lawyer to assist the lawyer in the rendition of professional legal services.
- (5) A communication is "confidential" if it is made to facilitate the provision of legal services to the client and is not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining professional legal services.

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WHO "OWNS" THE PRIVILEGE? NOT THE LAWYER OR THE SW

- General rule. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of any confidential communication:
 - (1) Between the client or client's representative and the client's lawyer or lawyer's representative;
 - (2) Between the lawyer and the lawyer's representative;
 - (3) By the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in that pending action concerning a matter of common interest in a pending action;
 - (4) Between the client's representatives, or between the client and his or her representative; or
 - (5) Among the client's lawyers and those lawyers' representatives.

The privilege may be claimed by the client; guardian or conservator; personal representative, if the client is deceased; or (D) An officer, manager, trustee, or other agent authorized to act on behalf of a legal entity.

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WORK-PRODUCT PROTECTIONS (NOT PRIVILEGE): ORGANIZATIONAL POLICY?

- The work product doctrine prevents discovery of materials prepared "in anticipation of litigation."
- The work product doctrine is designed to preserve the proper functioning of the adversarial system—to allow attorneys to prepare their cases without fear that material prepared in anticipation of litigation will be available to the opposing side.
- The work product doctrine is broader than the attorney-client privilege.
- The doctrine does not apply, however, to materials submitted to expert witnesses on which those witnesses base their opinions. When do you become a witness in your office?

See *United States v. Stewart*, 287 F. Supp.2d 461 (S.D.N.Y. 2003) (Martha Stewart had written an e-mail to her attorney about the facts of her prosecution for insider trading. While the e-mail would have been protected by attorney-client privilege, Stewart waived the privilege by forwarding a copy of the e-mail to her daughter. However, even though the privilege had been lost, the Court found that the e-mail was subject to work product protection because it was prepared in anticipation of litigation.)

Crystal, N. M. (2013). Confidentiality, privilege, and work product: Some important differences. *South Carolina Lawyer*, 9-10.

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**INADVERTENT DISCLOSURES AND ETHICAL DUTIES WITH ELECTRONICS:
THE ETHICS OF WAIVER: A GAP IN ORGANIZATIONAL POLICY?**

Northrop Grumman Systems Corp. v. United States, 120 Fed.Cl. 436 (2015):

Federal Rule of Evidence 502(b), provides that a disclosure does not waive the work product or attorney client privilege:

- if it was inadvertent, if the holder of the privilege took reasonable steps to prevent disclosure,
- and if it promptly took steps to rectify the error once discovered.

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**PRESERVATION OF EVIDENCE AND SPOILIATION: BROADER
THAN YOU THINK**

➤ **Genon Mid-Atlantic, LLC v. Stone & Webster, Inc., 282 F.R.D. 346 (S.D.N.Y. 2012)**

- Spoliation traces its roots to the Latin legal maxim *omnia praesumuntur contra spoliatores* ("all things are presumed against a wrongdoer").
- To secure spoliation sanctions based on the destruction or delayed production of evidence, a moving party must prove that (1) the party having control over the evidence had an obligation to preserve or timely produce it; (2) the party that destroyed or failed to produce the evidence in a timely manner had a "culpable state of mind"; and (3) the missing evidence is "relevant" to the moving party's claim or defense, "such that a reasonable trier of fact could find that it would support that claim or defense."

➤ **State v. Wai Chan, 2020 ME 91, 236 A.3d 471 ("Chan did not request an instruction on spoliation of evidence related to the unpreserved video recording.")**


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IV. CONFIDENTIALITY LAWS 21

SWs shall have knowledge of and comply with:

- **Local, state, and federal mandates related to informed consent, privacy and confidentiality, and access to records within the context of legal and ethical rights of minors and clients.**
- **Professionals and clients shall be informed of the limits of confidentiality when services are initiated.**
- **Organizations should be informed of the ethical responsibilities of the SW profession.**
- **If conflicts arise, SWs are directed to the NASW Code as a tool in their decision making.**

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FOR EXAMPLE?

- Who has authority to make you waive a child's confidentiality by signing releases and or obtaining records?
- Is the client mandated or voluntary (however loosely that term may be used)?
- Do federal and state laws coincide or conflict?
- Do you have records you keep in your own files or are all records maintained by the organization?
- Who do you share confidential information with and does that person have legal or ethical privileges or confidentiality duties under state licensure?
- What kind of written or verbal informed consent do clients sign for you or for the organization (consistent??)?

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HIPAA AND MINORS

- Important provisions allow minors as "individuals" to request special privacy protections:
 - Minors may request that health care providers and health plans communicate with them in a confidential manner: by e-mail rather than by phone, or at a place other than their home, for example.
 - Minors may request limitations on disclosure of information for treatment, payment or health care operations that could ordinarily occur without their authorization.
 - The privacy rule allows a provider not to treat a parent as a minor's personal representative, given a reasonable belief that the parent has subjected or may subject the minor to domestic violence, abuse or neglect.
 - Every state allows minors to give their own consent for some kinds of health care-including emergency, general health, contraceptive, pregnancy-related, HIV or other STD, substance abuse and mental health care.

English, A., & Ford, C. A. (2004). The HIPAA privacy rule and adolescents: Legal questions and clinical challenges. *Perspectives on Sexual and Reproductive Health, 36*(2), 80-86.

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SUBSTANCE ABUSE IS DIFFERENT

- Federal Regulations are binding
- Does it matter that you are part of a service contract or employed by school district? Hint: Whose license?
- What is extent of disclosure for any service plan?
- How do you apply the long list of federal and state laws to this area of confidentiality?

• Raines, J. C., & Dibble, N. (2017). *Ethical and legal foundations for school social work practice*. School Social Work: National Perspectives on Practice in Schools. New York: Oxford University Press.

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- 42 CFR Part 2 requires additional protections for those seeking substance abuse treatment
- Federal law governing confidentiality for people seeking treatment for substance use disorders
- Originally adopted in 1972 because of the growing realization that stigma and fear of prosecution was preventing people from seeking treatment for their substance use disorders
- CFR essentially adds an 'extra layer of protection' for treatment records and outlines under what limited circumstances information can be disclosed (with and without consent). The updated final rules were published in January 2017
- HIPAA is usually the minimum standard and 42 CFR Part 2 maximum standard

42 CFR PART 2


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- Federal confidentiality laws (42 CFR Part 2) protects information about the adolescent's substance use treatment, including assessment, diagnoses, individual treatment and group sessions.
- Overarching this law is the understanding that it restricts disclosure of any information that would indicate that the youth has a substance use disorder and applies from the beginning of treatment to after treatment has ended.
- This law also applies whether the person requesting the information already has it, has other ways of obtaining it, and is authorized by state law or court order to have the information.

42 CFR PART 2: SPECIFICS


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- Federal statute indicates (in Section § 2.14) that in states where parental consent is not required for obtaining treatment, a minor has the legal capacity to apply for and obtain substance use disorder treatment without parental consent.
- In states requiring parental/guardian consent for obtaining treatment, this Federal Law provides that *both the youth and the parent/guardian* must give consent.
- If an adolescent decline parental notification in this type of state, the program (or individual) can refuse to admit the minor for treatment. If the program believes the family circumstances are a threat to the minor's well-being, they could (and should) then make a mandated report to child welfare authorities.

42 CFR PART 2

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This one is the most straightforward:

- 42 CFR Part 2 is clear that after a youth enters treatment, they hold the authority to decide what information is shared and with whom, although sometimes their parent/guardian must also sign for the disclosure
- Unless they are mandated into treatment due to involvement in the juvenile justice system then there may be required authorizations in place for JJS personnel

42 CFR PART 2: WHO PROVIDES INFORMED CONSENT AFTER TREATMENT IS INITIATED?


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AND WITH ALL THAT: WHAT IS A SUBPOENA AND WHAT TO DO?

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A subpoena is not a court order but a form process anyone over 18 years of age can purchase for a few dollars and serve.	Immediately provide the subpoena to your supervisor or attorney.	If you have concerns about safety of client if records are revealed, you should obtain supervision or legal opinion.	Have a polite letter sent to the court objecting as to confidential and private information concerning a minor-do not ignore.
Request a court order to deliver documents <i>in camera</i> , which means judge reviews (as in child protection)	Remember all the federal or state laws and Codes of Ethics are binding as to confidentiality and privacy.	The organization may have its own interests, but your license is personal and travels with you.	Protect yourself and the client by acting ethically and under law.

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IV. MANDATED REPORTING: AN EXCEPTION TO EXCEPTIONS

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“The following adult persons shall immediately report or cause a report to be made to the department when the person knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected or that a suspicious child death has occurred:

A. When acting in a professional capacity:....



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DOES DUTY AS MANDATED REPORTER TRUMP THE A-C PRIVILEGE?

- In the California Court of Appeals case of *Elijah W. v. Superior Court* (2013), the court addressed whether retained mental health professionals must report suspected child abuse and threatened harm to others as required by law or if they do not need to report because they fall under the umbrella of the attorney work product privilege.
- Court ultimately concluded that retained psychologists and psychiatrists work under the attorney work product privilege and are not required to comply with mandated reporting laws and "Tarasoff" duties.
- **Holding:** California law mandates reports of child abuse or neglect from mental health professions yet omits attorneys from the ranks of mandated reporters and leaves intact the lawyer-client privilege, which extends to psychotherapists when acting as forensic consultants for the defense team.

Larreau, C. R. (2015). Attorney work product privilege trumps mandated child abuse reporting law: The case of *Elijah W. v. Superior Court*. *International Journal of Law and Psychiatry*, 42, 43-48.

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A SHORT LIST OF NEVERS AND KNOWS

- Know your professional licensure lane and stay in your lane.
- Know what you know and learn to say "I don't know" because no data or outside competence.
- Never say or write anything "off the record."
- Never make a copy of records without a proper release or signed court order.
- Never delete, redact, or edit records or files on your own.
- Never be bullied into an ethical violation. Always be safe.
- Never share information outside the organization without supervision or legal advice, when possible.
- Never confuse your own values with ethical duties.
- Be respectful to clients and professionals-even if not reciprocated.

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V. DISCUSSION AND QUESTIONS



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