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Introduction

John Goodman describes himself as a dedicated psychotherapist who considers his clients' interests to be paramount. He always begins his initial intake interviews by gently eliciting information from prospective clients, avoiding any "anxiety-provoking" discussion of the fact that the information they are about to share might not remain confidential. Yesterday, during an intake session, a prospective client asked him, "If I tell you what is really in my heart, do you promise to keep it a secret?" Reassured by Goodman's response about the importance of confidentiality in psychotherapy and taking this as a promise to protect her secrets, she talked at length about her fears and hopes, her past actions and future plans. By the end of the intake session, she had described two things Goodman later discovered he was legally required to report, and she had mentioned a pending court case in which he feared he might be ordered to testify. He knew this new client would feel betrayed if he disclosed the information she

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had shared with him, but he was also aware of the potential risks to her—and also to himself—if he did not.

Goodman slowly realized that by avoiding the initial discussion of "limits of confidentiality," he had not been protecting his clients; instead, he had been protecting himself from the discomfort of not knowing exactly what those limits might be. In the process, he had been depriving prospective clients of their right to be informed about the potential risks in advance—before they shared their secrets with him.[1]

This manual uses a checklist format and a step-by-step approach that is designed to help psychotherapists prepare to avoid the predictable pitfalls, handle practical challenges, and resolve ethical–legal dilemmas involving confidentiality. Most important, it is designed to ensure that the confidentiality rights of mental health clients will be respected, even when their confidences are not protectable.

We can be prepared to inform prospective clients accurately and honestly about how we intend to behave about confidentiality only if we have first carefully informed ourselves about our ethical and legal obligations and have decided what we really intend to do.

DECIDING HOW TO PROTECT CLIENTS' CONFIDENTIALITY RIGHTS

Only two ethical options are available for protecting the confidentiality rights of therapy clients. Option 1 provides clients with absolute protection of their confidential information, but it is "illegal" in the sense that it would sometimes require civil disobedience. That is why almost all psychotherapists choose Option 2 instead. Option 2 protects psychotherapists from the risks involved in disobeying the law, but it leaves clients at risk of having their confidences disclosed. Option 2 therefore requires psychotherapists to take on the ethical responsibilities that are outlined in the following chapters of this manual.

[1] The vignettes in this manual are hypothetical. Although they contain some details that are drawn from actual cases, the specifics have been changed to disguise them.

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Option 1: Providing Absolute Confidentiality

This option exceeds the Ethical Standards[2] of every mental health profession (none of which ethically requires the unconditional protection of clients' confidences). This may make it an extremely "ethical" option, but it is definitely not a "legal" model of practice. Adopting Option 1 requires a willingness to break all laws that can require psychotherapists to disclose information and a willingness to accept the consequences of that action. The legal, financial, and personal consequences of promising absolute confidentiality can therefore be severe, which is why few psychotherapists choose Option 1 and why no mental health profession requires it. (For a detailed discussion of the potential risks, see Bollas & Sundelson, 1995.)

Those who advocate Option 1 nevertheless believe that its clinical advantages make it the only appropriate stance for those who take seriously the concept of the unconscious (see, e.g., Bollas & Langs, 1999; Bollas & Sundelson, 1995; Kipnis, 2003; Langs, 1998, 2008). In fact, some psychotherapists do promise their clients absolute confidentiality and actually keep that promise despite the risks to themselves. This includes "confidentiality heroes" such as Karen Beyer (2000), whose willingness to risk jail rather than breach client confidentiality led to a U.S. Supreme Court decision that expanded confidentiality protections in federal court cases (see *Jaffee v. Redmond*, 1996).

Option 2: Providing Conditional Confidentiality and Protecting the Client's Right to Know the Conditions in Advance

This option meets the current Ethical Standards of every mental health profession, and most psychotherapists choose it to avoid the consequences of Option 1. However, this decision simply transfers the risks to their clients. Therefore, psychotherapists who choose Option 2 are ethically required to decide in advance when and in what respects they will limit their protection of clients' confidences. In other words, therapists

[2] In this manual, the term *Ethical Standards*, when capitalized, refers specifically to the enforceable standards contained in the ethics codes of mental health professionals. For a list of such ethics codes, see Appendix A. For definitions and clarifications of ethical and legal terms, see Appendix B.

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must decide what limits of confidentiality will apply in their own practice and inform prospective clients about those limits in advance, before they share information that might later be disclosed without their consent. Otherwise, clients will enter the therapy relationship uninformed about those limits and will be unprotected.

Ethics codes give therapists the ethical freedom to disclose information without client consent when they are required by law to do so, as well as the ethical freedom to limit confidentiality by policy in certain other circumstances. But this ethical freedom to limit confidentiality is not "free." Therapists must "purchase" it by informing prospective clients about exactly when their confidences will not be protected and by obtaining their consent at intake to accept the risks (i.e., to accept the limits that will be imposed on confidentiality) as a condition of receiving services.

- *Psychotherapists who choose Option 1 will all behave the same way about confidentiality, whereas those who choose Option 2 may each have slightly different policies.* With Option 2, the list of limits of confidentiality—the circumstances in which the psychotherapist might later disclose information without obtaining the client's consent at the time—will vary across therapists and across settings. For clients, this means that the level of confidentiality offered by a previous therapist may be different from the next therapist. Therefore, therapists who choose Option 2 are responsible for devising a personalized description of how they will practice—a set of policies that can be described in terms simple enough for clients to understand, but presented in enough detail to allow them to predict foreseeable risks.
- *Psychotherapists who choose Option 1 must behave the same way in all circumstances, whereas therapists who choose Option 2 must make personal decisions about how they intend to behave in a wide range of "reasonably foreseeable" circumstances.* Option 2 involves making clear decisions and making them in advance, so the policies about confidentiality can be described to prospective clients at intake, before they give consent to receive services. Therapists are therefore not ethically free to "wing it" in the initial interview or to rely on ad hoc decision making about confidentiality because this would leave clients unwarned and unprotected. Unless

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a specific limit of confidentiality has been explained to clients in advance, therapists are not ethically free to decide later to breach confidentiality simply because doing so would be personally or financially convenient at the time, or even because they deem it to be in the client's interest to do so.

- *Psychotherapists who choose Option 2 are not ethically free to use silence about confidentiality to imply a promise they do not intend to keep while eliciting information they might later decide they must disclose.* Clinicians who protect confidentiality unconditionally (Option 1) retain full clinical freedom to explore and interpret clients' concerns and fantasies about confidentiality while remaining silent indefinitely (if they so choose) about their real intentions, because the client's confidentiality is never actually at risk. However, clinicians who want to be free to make exceptions to confidentiality (Option 2) must provide prospective clients with an intelligible description of the exceptions "up front," and must provide accurate informational answers to clients' questions whenever they arise. That is because, for these clients, confidentiality is not "hypothetically" at risk but is actually at risk.
- *Psychotherapists who choose Option 2 must therefore be clear in advance, both with themselves and with their clients, about what their intentions really are.* This means they must not only decide what they should do in a variety of foreseeable situations—a difficult enough task—but they must also be prepared to give prospective clients an honest description of what they actually will do, which may be different.

In short, psychotherapists are ethically free to place conditions on confidentiality only if they protect the client's right to be informed in advance about what those conditions will be. This confidentiality right creates the ethical responsibilities described in this manual, especially the responsibilities about informed consent.

WHY USE ETHICS-BASED CHECKLISTS?

First, the checklists in this book can serve as a reminder that there is no "Option 3." Psychotherapists are not ethically free to remain silent about the issue while postponing their policy decisions about confidentiality,

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nor are they ethically free to "ad lib" the discussion of limits of confidentiality because they have not decided what limits they might actually impose. Most psychotherapists do end up placing conditions on confidentiality, even if they wish they did not have to. Regrettably, many promise absolute confidentiality—or imply that promise by their silence—but then end up breaking their promise if they find themselves faced with legal consequences. However, it is unethical to promise more confidentiality than we would be willing to actually provide if it turned out that doing so placed us at risk. According to the ethics codes of our professions, it is also unethical to allow our silence on the matter to imply such a promise. We must therefore be prepared to inform prospective clients in advance about the conditions we actually intend to place on confidentiality, because failing to do so places them at risk.

Second, although the checklists in this manual can be helpful regardless of whether the psychotherapist chooses Option 1 or Option 2, they are especially important for those who choose Option 2, because of the many confidentiality decisions that must be made in advance. This includes most of today's mental health professionals. The decision to place limiting "conditions" on confidentiality brings some difficult and complicated ethical responsibilities. Those are noted in the first chapter and are outlined in detail in the checklists and discussions in the remaining six chapters of this manual. In the absence of a structure such as the checklists provide, it can be difficult for psychotherapists to be prepared to protect their clients' confidentiality rights.

Third, although this manual does not advocate civil disobedience, it does encourage psychotherapists to "reach for the ethical ceiling" by protecting confidentiality to the extent legally possible, even if their profession's ethics code would allow them to do less. "Ethics Codes create the 'ethical floor'—the minimum standards of behavior. But if we do no more than follow the minimum rules, we are missing the major point about confidentiality" (Fisher, 2013, p. 121). The ethical checklists require us to become clear about how much confidentiality protection we will actually be willing to provide. This involves clarity about the ethical and legal requirements, as well as personal soul-searching about how to translate

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those into clinical practice. The first checklist is the most difficult but also the most important because this preparation is essential to the protection of clients' rights.

Finally, and perhaps most important, this manual is written from an ethical perspective. At times, it necessarily refers to legal issues and sometimes it does reflect risk-management concerns, but the primary focus is on professional ethics—on protecting clients and their rights—not on legal obedience or therapist self-protection. Hopefully, this will help to reduce the unfortunate confusion between ethics and laws.

I believe that, regrettably, the ability of psychotherapists to protect the confidentiality rights of their clients has been progressively undermined by ethical–legal confusion. Ethical Standards about confidentiality and legal requirements about confidentiality are two different things, but mental health professionals easily confuse the two, and this places clients' rights at risk. Although some laws echo and support therapists' professional Ethical Standards, other laws can conflict with them, and this complicates matters. It further complicates ethical decision making if laws are taught in isolation in a manner that ignores their ethical implications.

In an attempt to cut through the resulting ethical–legal confusion, the six checklist chapters of this manual follow the six steps of an ethical practice model that takes an "ethics first" perspective. This model was constructed not from laws but from the confidentiality duties in psychotherapists' own ethics codes and professional guidelines. It therefore outlines ethical responsibilities about confidentiality in a manner that places laws into ethical perspective.

The complete ethical practice model is presented in the next chapter of this manual. The outline itself summarizes ethical obligations about confidentiality, as described in ethics codes for mental health professionals. To practice ethically about confidentiality, however, one must also consider how to respond to possible legal requirements—including state and federal laws that either protect confidentiality or require disclosure. The annotated version of the model in Appendix G (Center for Ethical Practice, 2010) integrates these ethical and legal obligations by beginning with an ethical context, then using italics to indicate how laws fit into this ethical picture.

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In a 2008 article in *American Psychologist*, I advocated the use of such a model. I later elaborated on the model in an invited chapter entitled "Confidentiality and Record Keeping" in the *APA Handbook of Ethics in Psychology* (Fisher, 2012). Oxford University Press then published *The Ethics of Conditional Confidentiality*, a book based on that model (Fisher, 2013). This manual simplifies matters by using that six-step model to create six "checklists" that can be used first for advance planning, and then as a structure for following through with those plans and monitoring one's own practices. It is intended both as a handy desktop resource for practicing clinicians and as a teaching tool for professors, supervisors, and workshop leaders.

The model can be adapted for use in any setting and with any population (see examples of such adaptations at Center for Ethical Practice, 2014a). The following are the six steps listed in abbreviated form:

Step 1. Prepare to protect confidentiality rights.
Step 2. Tell clients the truth.
Step 3. Obtain consent before disclosing voluntarily.
Step 4. Respond ethically to legal demands.
Step 5. Avoid "avoidable" disclosures.
Step 6. Talk about confidentiality.

The first step is the only one not drawn directly from professional ethics codes, simply because this preparation is not emphasized there. Step 1 includes extensive preparation for the initial informed consent discussion with the client. It requires clarifying one's policies and preparing to inform prospective clients about the potential limits of confidentiality. It is therefore the most complex and time consuming of the six steps. It is nevertheless well worth the investment of time because of the ethically essential protection it provides to prospective therapy clients. Otherwise, we leave clients unable to protect themselves, unable to make an informed decision about whether to trust us with their secrets.

For each of the six steps in the model, this manual provides a separate chapter consisting of a checklist for you to work through and a discussion of the ethical issues involved at that step. Each chapter ends with

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a vignette that requires "Taking the Client's Perspective." This helps to maintain a focus on avoiding practices that place the client's confidences at risk, rather than focusing on our own convenience.

The ethical practice model on which this manual is based applies to all mental health professionals, regardless of their profession, practice setting, or theoretical orientation. It applies to all the therapeutic services provided by mental health professionals, regardless of whether they are described as counseling, therapy, psychotherapy, or psychoanalysis. At each step along the way, psychotherapists can encounter complications and dilemmas that require careful decision making. Formal decision-making models can provide a structure for the process of considering options and weighing potential consequences of possible actions. For using general ethical decision-making models at any step of the ethical practice model, readers can consult those provided elsewhere (see, e.g., Fisher, 2005; Forester-Miller & Davis, 1996; Haas & Malouf, 2005; Knapp & VandeCreek, 2012; Koocher & Keith-Spiegel, 2008; Mattison, 2000; Pope & Vasquez, 2011).

SUGGESTIONS FOR USING THIS MANUAL

The first task, preparation, outlined in Step 1, involves some research about your profession's ethics code and your state's laws. For most states, the American Psychological Association has published reference books about relevant laws in its *Law & Mental Health Professionals Series* (e.g., *Law & Mental Health Professionals* for Virginia [Porfiri & Resnick, 2000] and Ohio [VandeCreek & Kapp, 2005]), but it is also important to obtain further legal information, as well as annual legal updates, from your state professional association.

The checklists make this appear to be a simple desk manual, but it contains much to consider, internalize, and implement. Although many busy therapists will use this manual independently, you are encouraged to consider working your way through it along with others, as a group, if you are able. If you do not already have a peer consultation group that could join you in implementing this project, this might be a good time to form a group of trusted colleagues for this purpose. Tackling the manual as a

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group project can also make it possible to review each other's personalized confidentiality forms, practice aloud what you want to say during the initial informed consent conversations about confidentiality, and provide ongoing consultation to each other when confidentiality dilemmas later arise.

Such a collaborative approach can also help mental health professionals avoid the hazards of becoming too isolated from colleagues and resources, which is an occupational hazard for psychotherapists. "Creating ways to stay in connection with others seems to be one of the most basic, important, and helpful self-care strategies" (Pope & Vasquez, 2005, p. 16). Creating such a group for ethical planning and support also brings other advantages, as discussed in the last chapter of this manual, "Step 6: Talk About Confidentiality."

This manual is appropriate for use in classrooms as a supplemental ethics text for clinical graduate students or as a desk manual in practicum and internship settings. It is equally useful as the basis for continuing education training in workshop or seminar settings for experienced psychotherapists.

As you proceed through these six checklists and review the materials in the appendices, you may discover that some of the ways you have practiced in the past have left the confidentiality rights of your psychotherapy clients unprotected. Perhaps your information sheets or informed consent forms created problems. Perhaps there are exceptions to confidentiality that are required in your setting but that you have failed to explain to clients in advance. Perhaps you will discover that the laws in your state have changed and that promises you previously made (or implied) can no longer be kept. As you consider making changes to your intake forms and client handouts, remember that informed consent is not a one-time event. It is never too late to reopen the conversation about confidentiality and its limits, to revise your intake forms to be sure they are consistent with your policies and with your state's laws, and to review your revised forms with current clients.