

## **INFORMED CONSENT AND RECOMMENDATIONS FOR DISCLOSURE IN MENTAL HEALTH PRACTICE**

Informed consent is an ethical doctrine of mental health practice as well as a legal requirement in Colorado. Informed consent is based on self-determination, a primary value of the mental health practice profession. In the context of mental health care, self-determination means that every competent adult has the freedom to consent or refuse a mental health intervention/treatment. Informed consent is derived from the principle of autonomy. Three conditions are necessary for autonomy: 1) a person chooses and acts freely, 2) deliberates rationally, and, 3) does so according to his/her own authenticity.

Practice with clients based on informed consent implies a partnership with clients - working together to make the best decisions possible, according to the wishes/values of the client and using the mental health practitioner's expert information.

Based on the above conditions, there are four agreed-upon elements of informed consent: disclosure of information, voluntariness, competency, and comprehension of the information.

### **Disclosure of Information**

Disclosure of information includes presenting to the client a description of the proposed procedures or interventions, any possible alternatives (including doing nothing), the risks and benefits of the above, the probability of success, and the implications of no treatment. Disclosure is based on the "reasonable person" standard - what an ordinary, reasonable person would need and want to know about what is being proposed in order to make a decision.

The disclosure can be written or verbal. The Colorado Mental Health Practice Act requires a written disclosure, as do the HIPAA Privacy Regulations. Usually both written and verbal disclosures are necessary for informed consent. The written form provides legal evidence that the disclosure took place. The verbal "conversation" helps clarify and provides more information as circumstances change. Consent is a process, not a static event that takes place at one point in time. Any changes in procedures, interventions, or additional information necessitate informing the client and getting consent.

Consent should be documented in the record, including the plan for intervention and changes in that plan. It is safest to obtain written consent for controversial interventions. A separate consent is required for participation in any research projects or experiments. In the case of children, consent is obtained from the legal custodian. In the case of required or court ordered treatment, as in domestic violence treatment, child protective services or probation, consent is obtained by the court or legal system, and any changes in procedures must be consented to by the legal authority.

Adequate information can only be supplied in a language and terminology that is familiar and comprehensible to the client. Information should be presented in a clear and readable format, using lay language. Research shows that most disclosure statements are written at a level that is not comprehensible to the client. The disclosure should be reviewed regularly and revised when necessary. Visual methods help clarify and explain the procedure when presenting information about complex or special techniques (e.g. Eye Movement Desensitization Reprocessing).

### **Voluntariness**

The consent must be voluntary. This means that the person chooses freely, without overt or covert pressures from others or from the setting. Excessive rewards or incentives, irrationally persuasive techniques, threats, or manipulations are examples of coercion that interfere with voluntary choice. Presenting only the intervention that the mental health practitioner feels is appropriate, without reviewing other alternatives is not adequate. Clients who are vulnerable mentally and physically are especially affected by the power of the mental health practitioner.

### **Competency**

The client must be competent to decide. The determination of competence is the critical issue in relation to freedom of choice. Competence means that the person has the capacity to understand and appreciate the nature and consequences of her/his actions (Annas and Densberger, 1984).

The functional approach to assessing competency evaluates the person's actual functioning in the decision-making situation. There are four tests. The person can demonstrate a choice; can demonstrate an understanding of the relevant issues; has an ability to rationally manipulate the relevant information; and, can demonstrate an appreciation of the nature of the situation. The functional approach does not assume that conditions often associated with incompetency (e.g. developmental disabilities, mental illness, organic brain injury, etc) necessarily mean a person is not competent to decide at a particular point in time. Competency is assessed at the time the decision needs to be made.

When a person is not competent to decide, then consent must be made by proxy. Usually a family member, friend, partner, or sometimes the physician or mental health practitioner makes the decision. When the decision is made by proxy, the decision should reflect the person's values, beliefs, and life plan as much as possible; the decision would be what the person would have

decided for himself/herself. The issue of authenticity or congruence of the decision with the person it effects, prevails in this situation.

### **Comprehension of the Information**

The person must comprehend or realize the meaning of the information in regard to the impact on her/his wellbeing. This understanding of relevant information enhances the person's self-determination and rational decision-making.

There are some exceptions to consent - emergency situations, the incompetency of the client to decide, a waiver of consent, and therapeutic privilege. A waiver of consent means that the client voluntarily relinquishes the right to decide or give consent. The client must still be informed of the right to know and decide.

Therapeutic privilege is the basis of paternalism, or parentalism. The mental health practitioner withholds information because, in her/his judgment, the information would be harmful to the client. To disclose would violate the "primary duty" to do what is good or in the client's best interest. The legal and ethical debate about parentalism has resulted in agreement that disclosure can be withheld only when to disclose would be so traumatic to the client that he/she would be unable to engage in rational decision-making (Lidz et al., 1984).

# PROFESSIONAL NOTES

FOR MENTAL HEALTH PROFESSIONALS

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## RECOMMENDATIONS FOR DISCLOSURE

There are a number of reasons for written disclosures, including meeting Federal and State legal requirements, protecting the mental health practitioner from liability, and meeting professional ethical mandates for informed consent.

Informed consent is obtained through verbal and written disclosures and may occur during the process of a therapy. How they are made and what is disclosed should be designed for the population served and the service requested. Since written disclosures are a documentable form of informed consent, it is recommended that mental health practitioners in outpatient and private practice settings have 4 documents to be signed at the first session or as soon as feasible.

First, the Colorado Mental Health Practice Act requires written disclosures to be made at the first session. The intent of the Mandatory Disclosures is to serve as a consumer warning and the language and format should conform closely with the statute requirements. See the attached Model Disclosure Statement.

Second, beginning in April 2003 the Regulations of the Health Insurance Portability and Accountability Act (HIPAA) require a written Notice of Privacy Practices (NPP) to be given to all clients at their initial visit. The NPP advises clients of the uses and disclosures of their protected health information and of their rights in regard to their protected health information.

Third, a fee agreement should be made and signed by the client. It should include the agreed upon fee and the means for payment, as well as your policies about missed appointments, late cancellations, charges for phone consultations, and use of collection agencies. It is essential that the client be informed of these practices before they are employed.

Fourth, all of your practice policies and procedures, informing clients of the ways in which you conduct your practice should be presented in writing as well as discussed. Subjects to cover are:

1. **Confidentiality, and the limits of confidentiality.** Although Colorado Statute does not require exceptions to confidentiality to be listed at disclosure time, but rather only as the exceptions emerge (C.R.S. 12-43-214), we recommend listing a few. You could be sued for malpractice if you lead clients to believe that confidentiality extends further than it really does.
  - a. Because of current interpretations of the indemnity available to mental health practitioners making child abuse reports, we recommend that you inform your clients that it is your policy and legal responsibility to report suspected child abuse, without an

investigation, to the proper authorities who may then investigate.

b. We also recommend that you inform your client of your supervisor's name, or that you may seek consultation, and that any employees or associates, clerical or professional, are also bound by the same obligation to maintain the confidentiality of client communications. It is then important that you train your employees about confidentiality, and document the training.

c. You may choose to state: "Under C.R.S. 27-10-101, I may seek an order for your emergency or involuntary commitment if I feel that you are either gravely disabled or may cause serious harm to yourself or another person." or a more general statement that you may take some action without their consent if you deem the client to be a serious harm to him/herself or another.

2. A statement about **Health Care Benefit Utilization** should educate the client about the implications of their decision to use their health care benefits. (See *Ethical Dilemmas in Managed Care* for recommended disclosures.) The client must consent for the mental health practitioner to disclose information otherwise confidential by law and ethics to a managed care organization, and in some cases the client may have already signed a blanket consent for the Managed Care Organization to talk to the treating provider. The client should be informed if the mental health practitioner has a contract with the managed care company and the coverage afforded by the plan. If the therapist recommends a different approach than covered by the benefit, this should be discussed with the client.
3. **Availability** should be described including the handling of phone calls, emergencies and coverage for vacations. Expected promptness should be described for response to phone calls, and charges for these services.
4. **Grievance Procedures.** Information regarding the client's right and the procedure for filing a grievance should be provided.
5. **Access to records** and the handling of requests for records should be discussed. See the *Record Keeping Guidelines*. HIPAA distinguishes between a formal mental health record and psychotherapy notes. Access to psychotherapy notes is more limited than access to the mental health record. Ethical standards grant a client "reasonable access" to their records.
6. **Termination** policies should be discussed. A statement should be made that the therapist reserves the right to terminate the relationship for any reason, including but not limited to whenever, in the therapist's opinion, an effective therapeutic relationship cannot be established or maintained. Colorado Statute prohibits failure to terminate in a timely fashion, but damages can be asserted in a malpractice suit for abandoning clients. (See *Guidelines for Termination*.)
7. **Special Techniques.** A description of your therapy and in particular any special techniques, such as Eye Movement Desensitization Reprocessing or hypnotherapy should be discussed.