

Confidentiality and record keeping within the counselling professions

Good Practice in Action 065
Clinical Reflections for Practice

Updated September 2020

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Contents

Context	3
Purpose	4
Using Clinical Reflections for Practice resources	4
<hr/>	
1 Introduction	5
<hr/>	
2 Therapeutic setting for vignettes	6
<hr/>	
3 Vignettes	8
<hr/>	
4 Observations from Nicky's practice	13
<hr/>	
Summary	21
<hr/>	
Conclusion	21
<hr/>	
About the author	22
<hr/>	
References	22

Context

This resource is one of a suite prepared by BACP to enable members to engage with the BACP *Ethical Framework for the Counselling Professions* in respect of confidentiality and record keeping.

Purpose

The purpose of this resource is to stimulate ethical thinking in respect of record keeping.

Using Clinical Reflections for Practice resources

BACP members have a contractual commitment to work in accordance with the current *Ethical Framework for the Counselling Professions*. The Clinical Reflections for Practice resources are not contractually binding on members, but are intended to support practitioners by providing information, and offering questions and observations practitioners may need to ask themselves as they make ethical decisions within their practice in the context of the core ethical principles, values and personal moral qualities of BACP. Specific issues in practice will vary depending on clients, particular models of working, the context of the work and the kind of therapeutic intervention provided. As specific issues arising from work with clients are often complex, BACP always recommends discussion of practice dilemmas with a supervisor and/or consultation with a suitably qualified and experienced legal or other relevant practitioner.

In this resource, the terms 'practitioner' and 'counselling related services' are used generically in a wider sense, to include the practice of counselling, psychotherapy, coaching and pastoral care. The terms 'therapist' or 'counsellor' are used to refer to those trained specifically as psychotherapists and counsellors.

1 Introduction

The *Ethical Framework for the Counselling Professions* states:

Clients need to be able to participate freely as they work with practitioners of the counselling professions towards their desired goals. This requires clients to be able to trust their practitioner with their wellbeing and sensitive personal information (BACP, 2018a).

BACP members and registrants, make a commitment to provide 'an appropriate standard of service to our clients' (*Ethical Framework*, Commitment, 1b) which includes 'keeping accurate and appropriate records' (Commitment, 2e).

But in our work, what counts as a 'record'? A record is any form of document, whether paper-based or electronic (Bond and Mitchels, 2015) and includes alternative language forms e.g. Braille. The most obvious record is a case-note written after a session. However, records also include entries of past and future appointments, communications to, from and about a client e.g. text messages, answer-phone messages, emails, letters, contracts and agreements made, reviews, receipts, assessments, psychological measurements, video and audio recordings of client sessions (BACP 2018c). Clients' drawings, poetry, photographs, models etc. are all potentially part of your record and should be kept as such. Even a practitioner's personal reflections about a client that are scribbled down on a scrap of paper could be regarded as a record. Notes made in preparation for, during and after supervision, where a client is discussed, are also records.

To help you explore what can sometimes seem a complex and confusing subject, this resource introduces you to 'Nicky' (a fictitious character) and provides a glimpse into how she runs her counselling practice, *NDJ Counselling*. You will read about working practices that illustrate her varying degrees of ethical awareness and to what degree she fulfils her ethical commitment to work 'with careful consideration of how we fulfil our legal obligations' (*Ethical Framework*, Commitment, 5c). Then, four vignettes describe very different scenarios that arise from her work.

Questions follow that you may wish to reflect upon or discuss with your supervisor or colleagues. Later, Observations for practice are offered to stimulate further creative and ethical thinking in which links are made to the *Ethical Framework for the Counselling Professions*. It will help to have the *Ethical Framework* with you as you read this resource, as the relevant sections are contained within brackets following each section. Whilst this resource focuses on ethical thinking around record keeping and confidentiality, you may notice other ethical, legal or therapeutic issues that could usefully form the basis of supplementary thinking and discussion.

As legal matters around record-keeping can be complex, you will find Good Practice in Action 105 (2018, updated 2020) *The General Data Protection Regulation (GDPR) legal principles and practice notes for the counselling professions* particularly helpful. Please be alert for any changes that may affect your practice, as organisations and agencies may change their practice and policies.

2 Therapeutic setting for vignettes

NDJ Counselling is a small, private practice founded 10 months ago, by Nicky when she qualified as a counsellor. She is BACP registered.

Nicky lives with her seven-year old daughter Daisy, recently diagnosed with a learning difficulty, who requires extra support both at school and home.

Usually, Nicky sees clients between 9am-3pm, Monday to Friday to fit in with the school-run. Sometimes, she has a client on Saturday if she can find someone to look after Daisy. When not working, or looking after her child, she catches up with domestic chores, shopping and walks the family dog, Barney. Nicky always seems to have a long 'to-do' list.

As a private practitioner, Nicky feels quite isolated in her work and whilst she would like to meet other local counsellors, it's difficult to find the time. She attends individual supervision for 1.5 hours per month with the supervisor she has had since she began training.

Nicky sees individuals and occasionally couples. She is thinking about having specialist relationship training but wants to see if couples work suits her before investing time and money. Online counselling also appeals as this would help balance work and family commitments (although Nicky does not feel particularly confident when using computer technology).

She has made an office-space in a spare bedroom in her home and here she carries out administrative tasks, sometimes using her PC. Nicky stores current client case-notes in a small lockable expanding box file. Each client has their own folder of handwritten notes of sessions filed in date order along with any word-processed letters to GPs, clients etc. This system works well for Nicky as she can easily locate information for each client. Case-notes for clients who have finished therapy are transferred to a lockable filing cabinet; Nicky has not yet decided how long she will keep these notes. Nicky handwrites extensive case-notes, although she finds this the least interesting part of her job. She has been thinking for some time about making a 'clinical will'.

Counselling takes place in a dedicated downstairs room below her office. Several clients have commented how comfortable they find the room and Nicky is pleased because she has put a lot of thought into its layout and furnishing.

At the end of each session, clients pay cash or cheque in exchange for a receipt from a receipt book. This system provides Nicky with a carbon copy of each payment, helping her keep track of her income. As a self-employed person, she is registered with the HM Revenue and Customs (HMRC) but has decided not to register with the Information Commissioner's Office (ICO) because she hand-writes her case-notes.

Clients contact Nicky via her home phone (with built in answer-machine) or by email to her PC. She records client appointments and those for her own supervision in a five-year paper diary. She has divided each day into four columns; '*Client and My Supervision Appointments*', '*Things to remember for work*', '*Dates about Daisy*' and a fourth column titled '*Other*'.

She records a client's appointment by writing the initial of their first name and their last name in full. Previously, she used only their first name but changed this system when she opened the door to one 'Peter' fully expecting to see another! She prefers to record all important dates in one diary as she used to have a work diary and a personal diary but changed this system when not checking both, missed a client because she had taken Barney for his annual check-up at the vets.

Although slow to build up client numbers, Nicky feels proud of *NDJ Counselling*.

We move now to four vignettes that illustrate Nicky's use of records i.e. email, audiotape, case-notes and diary.

Before reading further ask yourself:

- What are the similarities and differences between how Nicky and I work?
- Are there any arrangements or decisions made by Nicky that I consider are inadequate or could cause her ethical or legal problems?
- How might these apply to my work?
- Nicky has long been considering making a clinical will, but what will happen to her clients and their records if something happens to her in the meantime?
- Have you made a clinical will? If not, what has stopped you?

3 Vignettes

Vignette One: Dora (email)

Dora has been having counselling for several months to help manage emotional difficulties arising from an incorrectly carried out hip operation. She has been in almost constant pain and has felt very helpless. Sometimes, Nicky has experienced similar feelings of helplessness when with Dora.

Today, Dora tells Nicky she has consulted a solicitor in the hope she may receive compensation. The solicitor has suggested she include in her claim, the money paid for counselling.

However, he has told Dora that the receipts she has are 'too informal' and she will need to provide information on *NDJ Counselling* headed paper. Furthermore, Dora 'must proceed quickly' to increase her chances of success. Dora has often spoken about how 'coming into money' would make 'life more bearable'. She would install a stair-lift, get some domestic help and perhaps go on holiday – 'somewhere where the sun shines all day'. Nicky is pleased that after what has felt a long haul, Dora may now get the chance of a better life.

Dora is Nicky's last client of the day (and what has seemed a long week). She has some time before she needs to pick Daisy up from school so writes up all her case-notes for the week. She logs on to her PC, pays her gas bill then goes back through her receipt book to find the dates of Dora's sessions. Having completed the document for the solicitor, she emails it to him (with a cc. to Dora). Pleased to have helped Dora in this simple, practical way, she dashes out to the car.

Later that evening, having fed Daisy, helped her with her homework and (finally) got her to bed, Nicky again logs on to her PC. In amongst the list of emails received, she notices one from a person whose name she does not immediately recognise. Opening the email, she is horrified to read "Hi Nicky, Lovely to hear from you but I don't think this was meant for me. Regards, Dori". In a split second, Nicky realises that in sending the email to Dora's solicitor, she copied it not to Dora but Dori. Dori is an ex-client whose name directly follows Dora's in Nicky's email address book. Nicky begins to panic.

Suggestions for reflection and discussion:

- What factors in Nicky's life may have contributed to her making this error?
- If you were Nicky, what would you do next in terms of: a) your current relationship with Dora and the communication of personally sensitive information to the wrong person; and b) your mistaken communication to Dori as a former client?
- How could Nicky's supervisor help? Would any other types of professional support be helpful?

- What are Nicky's legal and ethical responsibilities in this situation?
- What does Nicky need to bear in mind when receiving 3rd party information requests? (See Good Practice in Action 014 *Managing confidentiality* for more information)
- What changes could Nicky make to help avoid a similar mistake happening again?
- Are there any changes you might make to how you work as a result of reading this scenario?

Vignette Two: Ratana (audio-tape)

Six weeks ago, Ratana came to counselling to discuss concerns about relationships with female friends; 'We get close as friends then I trash it'. From her history, you know that tragically, Ratana's mother died giving birth to her. Her father disowned his new baby saying "It killed my beloved wife". Growing up, Ratana was looked after by a succession of elderly aunts and as each died, another took her place. Ratana had many 'mothers', all loved but lost. Slowly but surely, Ratana began to believe that in some strange way, her father was right – whoever she got close to, died.

The session following Nicky's return from a scheduled break, proved unusual. Normally so punctual, Ratana arrived late, slammed the door, threw her coat down and glared at Nicky. Shocked, Nicky finally managed to encourage Ratana to speak about what was upsetting her. As she suspected, her absence had stirred difficult memories. Over the next two sessions, Ratana became increasingly angry, accusing Nicky of 'saying unhelpful things' and making her feel 'worse than ever'. Nicky was struggling to know what to do and sometimes found it hard to remember what she had said to Ratana in sessions.

Feeling confused, she took her work to supervision, scheduled for the next day.

Following a discussion about the client-counsellor dynamic, Nicky's supervisor suggested she ask Ratana if she could audio-tape the next few sessions. Nicky and her supervisor could then listen to the recordings together.

At the next session, Ratana seemed much calmer and even apologised for her behaviour. Nicky decided still to go ahead with her request to tape sessions and felt relieved when Ratana quickly agreed.

Today, four sessions later, Ratana says it would help her understand herself more if she could listen to the tapes at home. She adds that she feels ashamed about the 'unkind names' she had called her father and says "I'd hate to think of anyone else hearing what I said about him". Nicky feels her stomach sink. Yesterday, she and her supervisor listened to extracts from several tapes.

Suggestions for reflection and discussion:

- What ethical issues are important to consider when making audio (or video) recordings of sessions?
- What contract issues might have been helpful for Nicky to have considered before the recording of sessions?
- Given that Nicky has already shared the contents of the tapes with her supervisor, what might be the next ethical step for her to take?
- How does the ethical duty of candour apply here – see *Ethical Framework*, Commitments 6b and Good practice 52. What are Nicky's legal obligations arising from the contract with her client? What data protection requirements apply in this situation?
- What could be some of the therapeutic issues raised for continuing to work with Ratana?
- Are there any changes you might make to how you work as a result of reading this scenario?

Vignette Three: Mark and Christian (case-notes)

Mark and Christian have been married for eleven months and came to counselling because their relationship wasn't working. At the third session, they arrived late.

Christian flung his bag down on the floor as Mark fell into the chair and sobbed. Before Nicky had a chance to speak, Christian banged his clenched fists on the arms of the chair and bellowed "Tell Nicky then ... tell her what you did. There's no point in coming here unless you tell her everything".

Mark raised his head slowly and told Nicky how, six months ago, he had begun a sexual relationship with a man he met in a bar. This relationship continued until last Tuesday when Christian found a video on Mark's phone of his husband and the other man having sex. Christian felt hurt and betrayed. Mark described himself as 'dirty' and felt 'wracked with guilt'. Neither man knew how, or even if, they wanted to save their marriage. At the next session, Christian had decided that to 'move on', he needed to know all the details of the affair – "all the lurid facts" as he put it. Hoping to save their marriage, Mark agreed but was only prepared to do this in the counselling room. Over the next two sessions, Mark revealed the intimate details of his relationship with Alexandros, a Greek chef.

It is the start of session 10 and Nicky is surprised when Christian reaches into his pocket and brings out the counselling contract he and Mark signed at the beginning of the work. Pointing to the clause that states Nicky keeps notes of the sessions, Christian says "The internet says I can see these notes. It'll be interesting to see it all in black and white and what you make of it all Nicky. Can I see them next week please?" Nicky is shocked but before she has time to think, Mark jumps to his feet and shouts "No Christian! It'll only open up old wounds. Please don't show him Nicky!" Nicky feels caught between the demands of the two men. She remembers she has written in these notes some intimate details of Mark's sexual relationship with Alexandros. Also, there are a few personal reflections on similarities between Mark and Christian's marriage and her own difficult relationship with Daisy's father. She begins to wish she had not written such personal information about herself in these notes nor such intimate details of Mark's sexual relationship with Alexandros.

She wonders whether to quickly re-write these notes before next week and destroy the original version.

Suggestions for reflection and discussion:

- What contractual issues would it be advisable for Nicky to think about in terms of record-keeping?
- Must Nicky agree to Christian's request and if she does, what would be an ethical way to manage this?
- In the case-notes, Nicky has recorded details of Mark and Alexandros' sexual relationship and has included material from her personal life. What are your thoughts on recording either of these types of material in case-notes?
- Nicky wonders whether she should re-write her notes and destroy the original. What are the ethical implications of re-writing notes and destroying the originals?
- What legal or ethical responsibilities might be important for Nicky to bear in mind?

Vignette Four: Ben (diary)

Just after 7pm, Nicky answers a knock at her front door and is surprised to find a police officer there. Carrying out enquiries following a series of minor thefts, the officer asks to come in. Ushering the officer into her living room, Nicky tells Daisy to go upstairs and get ready for bed. After collecting some details about Nicky, the officer asks where she was on October 13, last year, around 1pm. Quite alarmed by this enquiry, Nicky grabs her diary from the coffee table nearby. The officer tells her a man named 'Ben' is currently being questioned at the police station on suspicion of theft. He has told police he was attending counselling with Nicky at the time the crime took place. Nicky remembers she did once have a client called Ben and as his face became clearer in her memory, so does his story. The Ben that Nicky knew came to counselling because he was long-term unemployed and his mood had dropped. She remembers he spoke about trauma encountered when he was sexually abused by his primary school teacher. The work had been challenging and at one stage, Ben was having thoughts of killing himself. However, Nicky and Ben worked closely together to help him manage his emotional pain.

As an adult, it had been difficult for Ben to trust others, particularly those in a position of authority but by the end of the counselling work, Ben had a job he enjoyed and a boss he got on with. Nicky finds it hard to imagine that the Ben she knew could ever be suspected of criminal activity. Her mind races as the officer says, "He's so young, this lad and he's pretty cut up about it all. If you can vouch for him, we'll let him go home". Nicky feels pressurised and doesn't know what to do for the best.

Suggestions for reflection and discussion:

- What are some of the potential risks to the security of client information in this domestic scene?
- What are Nicky's ethical commitments to Ben?
- What would you advise Nicky to do next in relation to the police officer's request?
- What ethical and legal responsibilities and requirements does Nicky need to bear in mind here?

4 Observations from Nicky's practice

Ethical Framework

When thinking how to provide the best service to clients, members are committed to working in accordance with the *Ethical Framework*. As you read the observations in the following section, look up the references to the *Ethical Framework*, and consider how well Nicky meets these responsibilities and reflect further on your own practice.

Equipped with some details about Nicky, how she manages *NDJ Counselling*, and her client work – what stands out for you?

- ***What do we know about Nicky's life and the impact it has on her practice?***

Nicky gained a counselling qualification before beginning work and is a registered member of BACP. She cares for her clients, tries to do her best for them and has created a counselling room that is comfortable. She juggles work with being the sole carer of her young daughter who has a learning difficulty and there seem to be many competing priorities in her life. She attempts to multitask and for most of the time, does this effectively although sometimes, not so well. Might she consult Good Practice in Action 099 *Workloads in the counselling professions* (BACP 2020b) to help monitor how her days are balanced? If the balance is off, is she still ethically fit to practise (See BACP 2019c).

- ***Does she look after herself well enough?***

We have no indication that Nicky has much social contact apart from that with her daughter (and fleetingly with others in her rural community). How might this personal isolation impact on her work as a practitioner and do her clients account for most of her social contact? (see BACP 2019b).

Nicky seems quite isolated from other counselling/psychotherapy professionals too (except for her supervisor who she sees once a month). Perhaps connecting with peers could help? (See *Ethical Framework*, Good practice, points 17, 18, 91.) Working in private practice and particularly from home has its benefits but can be challenging (BACP, 2016b).

• **How does Nicky manage her time?**

We can wonder whether she factors in enough time to carry out the many administrative tasks that accompany clinical work such as writing up accurate and appropriate records (*Ethical Framework*, Good practice, point 15) and taking time to carefully consider communications with clients etc. As well as her feelings towards Dora, did time-pressures contribute to Nicky's haste in sending that fateful email? We note that, Nicky is considering making a 'clinical will' (Byfield, 2016; BACP, 2018 Good practice, point 42) but this is probably still on her 'to-do list'. Nicky might be advised to reflect on her workload, and its impact on her ability to remain ethical and effective, as well as her own self-care (BACP 2019b, 2020b and c).

• **Has Nicky developed enough competence to work in private practice?**

Nicky has established herself as an independent practitioner early in her career. Has she developed sufficient independence and gained enough knowledge and experience to do so? (See *Ethical Framework*, Good practice, point 13.)

Did she discuss the move from being trainee to independent practitioner with her supervisor? We note she has no extra qualification or specialist training in a complex specialism in which she works – couple therapy. Is she working within her competence? (*Ethical Framework*, Commitment, 2.)

Does the supervisor have relevant expertise to support her in this development of her practice? We cannot tell from the information provided but additional expert mentoring or specialised training might have helped in her work with Mark and Christian. (See also Good practice, points 13 and 14.)

She appreciates that her knowledge of Information Technology is basic but rushing and not paying enough attention also caused problems. (See *Ethical Framework*, Commitment, 1b, 2b; Good practice, points, 20, 21 and 55.)

• **Has she taken reasonable steps to ensure adequate levels of security for her PC, email and telecommunication systems?**

The use of passwords, encryption and email address book management are relevant here. Does she destroy computer records when she no longer needs them? (Ethics 5 (Principle of Being trustworthy), Good practice, point 14f; Mills, 2010). Has she protection against cyber-security threats? (BACP, 2015; BACP 2018-20 section 6). See also <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/personal-data-breaches>).

Nicky receives calls via her home phone. Apart from a nightmare scenario where Daisy answers the phone to a client, we can feel concerned about messages left on this answerphone. Who might access these records, either innocently or maliciously? (See *Ethical Framework*, Commitment, 3b and Good practice, point 55.) What are the practical alternatives to using a family answerphone for clients to leave messages?

- ***Has Nicky thought through how best to write her notes and how long she should keep them?***

Nicky makes extensive case-notes, sometimes writing them all up at the end of the week. How accurately does she remember? (See *Ethical Framework*, Good practice, point 15.) Making notes in a different format, possibly briefer, more factual notes, written close to the time of the session, may all help it to be less of a chore. Suggestions do exist for this (Bond, 2015). Both the GDPR and the *Ethical Framework* require that the notes are 'adequate, relevant and limited to what is necessary for the service being provided'. It is important to identify the minimum amount of personal data you need to fulfil your purpose and hold that much information but no more (data minimisation). (For more see <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation>.) Nicky has yet to decide how long to store her notes before destroying them. (See *Ethical Framework*, Good practice, point 14; Bond, 2015; Bond and Mitchels, 2015, and 7.2 Practice Note BACP, 2018-20 and c for more information.) Nicky's lack of clarity about how long records will be kept undermines her legal and ethical obligations concerning contracting with clients. This difficulty would still exist if Nicky had taken an alternative approach by basing her lawful processing on consent – see BACP, 2018-20b, section 8 Consent in the context of data protection). Nicky should give her clients a clear indication of how long records will be held before she processes the data.

Nicky has also failed to act on her intentions of making a clinical will, leaving her clients and their records unprotected in the event of her death or incapacitation (see BACP 2019a).

- ***She considers re-writing her notes and keeping two sets – is this ethical?***

Nicky could benefit from clarification about what information is inadvisable or inappropriate to include in case-notes. She may have avoided some of her difficulties if she had thought through in advance of writing them the possible consequences of her clients' right to see records that contain personal data about them (BACP 2018-20 Section 7 The Rights of the data subject – especially Table 7A). It is an offence to make any amendment with the intention of preventing disclosure.

Re-writing records to change or remove information about a client that has been lawfully requested by them will create additional legal difficulties and penalties for Nicky.

A legal advisor may help Nicky to redact, that is obscure the parts of the original records that do not need to be disclosed, for example information about third parties like Alexandros and her own relationship difficulties in scenario 3.

For guidance on effective and ineffective redaction of documents like Nicky's records see ICO, 2018a Points 55-65. In the complex situation she has created for herself and her clients, she should seek legal advice promptly before taking any actions.

If the notes are linked to an identifiable client then that client is lawfully entitled to seek their disclosure whether or not they are in the client file or stored separately. Where the therapy depends on the reflexivity of the practitioner and/or careful consideration of the relationship or processes, there are good professional grounds for including these reflections in the notes in so far as they are relevant to the work being undertaken.

- ***There are concerns about the security of Nicky's notes and diary***

She stores current client notes in a portable file which is locked but easily removed if her house were broken into (see *Ethical Framework*, Commitment, 3b; Good practice, points 21 and 25, BACP 2018c).

Having a five-year diary means that at the end of five years, it is likely to contain lots of entries. We note that to avoid confusion, she records clients' names by using their first initial and full second name. The diary was left on a coffee table.

Who else might look in Nicky's diary? Could a client be identified by someone who looked in her diary? In the case of Ben, Nicky's diary might become evidence in a legal case and may need to be redacted in a way that protects other client names. Where does Nicky put her diary overnight?

Using it for both work and domestic/personal reasons means it is likely to be taken out of the house. Could it be accidentally left somewhere?

- ***What kind of contract does Nicky make with clients?***

We know very little about the contract Nicky makes with clients but there appear to be important omissions (see *Ethical Framework*, Commitments, 3c, 4a, 5b, and Good practice, points 31, 32a-f; see also BACP 2016d and f). For example, Christian and Mark were not informed about their right of access to case-notes and Ratana agreed to her sessions being taped without knowing what might happen to these tapes. If Nicky's clients were not happy with the service received, would her contract contain information about what they could do about this, to whom they could talk e.g. BACP's Ask Kathleen service, or to whom they could formally complain? Has Nicky discussed her contract with her supervisor?

Nicky would be in a much better position legally and ethically if she offers all clients a short and clearly worded contract setting out for example, arrangements for making and changing appointments, cancellations, payments of fees, record keeping and confidentiality. This contract would contain a short privacy statement, which informs the client about how their data will be processed, including who they will be shared with. The Information Commissioner's Office provides more details on what to include in a privacy notice, see <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/the-right-to-be-informed/what-privacy-information-should-we-provide>. Communication of personally identifiable information is restricted to within a 'circle of confidentiality', which in Nicky's circumstances would include her supervisor and a potential trustee who will implement her living will should this ever become necessary. This statement affirms that all records are kept in accordance with current data protection requirements, including the GDPR (see <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/the-right-to-be-informed/what-privacy-information-should-we-provide>). Clients would usually sign this contract during the first session – typically at the beginning or end of that session. A few clients might like to re-read it or think a little more before signing it and so could bring it to their second session.

Working with clients without any records exposes the practitioner to additional risks in the event of a complaint or misunderstanding, as there may be no satisfactory way of resolving the issues raised – see BACP, 2018-20.

- ***What about her financial record keeping?***

Nicky provides receipts for fees paid but these include the full name of each client. If her tax affairs were investigated by HMRC, these names would be disclosed. How would this fit with the commitment to protecting the clients' confidentiality and privacy (see *Ethical Framework*, Commitment, 3b; Good practice, points 25a and b). She could use a client reference number or other way of referring to individual clients without providing full details of their name.

It is not an ethical breach of confidentiality to disclose lawfully required information (*Ethical Framework*, point 55f) nor is it a legal breach of data protection as one of the six lawful bases of processing personal data arises where processing is 'necessary for compliance with a legal obligation' BACP, 2018-20 Section 1). Disclosures for the purpose of taxation will normally only be about monetary payments without any therapeutic details of the work undertaken. The tax authorities receiving this information are bound to strict confidentiality – see HMRC, 2011 and HMRC, 2018 Privacy Notice, Section - How we use particularly sensitive personal information.

- **Was there informed consent for the recording of sessions?**

Making an audio (or video) recording of a client session can be very helpful and sometimes forms part of an assessment process. Ratana very quickly agreed to her sessions being taped (perhaps to repair what she feared was a damaged relationship). Whilst the recording is a 'record', did she give 'informed consent'? (See *Ethical Framework*, Good practice, points 26, 27a and 28.)

Were the issues surrounding recording discussed, such as why Nicky wanted to tape sessions, for whose benefit, who might listen to them, storage and disposal of tapes etc.? (See *Ethical Framework*, Good practice, Commitments, 3c, 5b.)

She does not seem to have considered that the tapes form part of the client's record and as such will be stored for an allotted time (see BACP 2018-20). However, Ratana might also request them. A client's right of access to tapes and videos has implications for both client and practitioner. Today, technology can be used to change what is recorded, post and pass on via social media etc. (See the *Ethical Framework*, Commitments 5a, and Good practice, points 14, 40, 55, 59; see also, BACP, 2016g). Information about storage, sharing and data protection issues concerning audio and video recordings can be found on the Information Commissioner's Office website at: <https://ico.org.uk/for-organisations/guide-to-data-protection/encryption/scenarios/audio-recordings>.

- **What about requests for information from third parties?**

Requests for information from third parties can be very challenging for a practitioner (Bond and Sandhu, 2005; GPiA 069 *Sharing records with clients, legal professionals and the court* and GPiA 014 *Managing confidentiality*). Requests can be legitimate whilst others, inappropriate or unlawful (point 9). Nicky felt put on the spot when asked to confirm Ben's alibi. If she had known that police cannot usually access information from client records without the client's explicit consent, a warrant from a circuit judge or when acting under statutory authority, she may have felt less anxious (Bond and Mitchels 2015; BACP 2016c). Might Nicky have felt pressurised by people and organisations she sees as having authority over her e.g. the solicitor and police? Can she find her own sense of authority? Perhaps supervision could help? Ben is the data subject and with regards to this particular case, Nicky could ask him for his consent to make the disclosure.

• What about legal requirements in respect of record keeping?

Nicky has made an ethical commitment to keep up to date with legal requirements and to give careful and conscientious consideration to the law (see *Ethical Framework, Commitment, 5c; Good practice, points 14f, 42*). It is important that she works by the principles of the General Data Protection Regulation and understands best practice for managing information.

She could find comprehensive guidance in Good Practice in Action 105: *The General Data Protection Regulation (GDPR) legal principles and practice notes for the counselling professions* (BACP 2018, updated 2020). She stores information about clients on her PC and word-processes letters and sends emails to, and about clients. In data protection terms, Nicky is the data 'controller' and is required to register with the ICO (see <https://ico.org.uk/for-organisations/data-protection-fee/self-assessment>).

• Mistakes, dilemmas and duty of candour

Like any practitioner, Nicky is engaged in a process of lifelong professional and personal development and will make mistakes along the way. Practitioners have an ethical obligation duty of candour to address mistakes (*Ethical Framework, Commitments, 5c, 6b and Good practice, point 52; BACP, 2016g, 2020, 2020d*). Good practice, point 52 sets out a series of actions that need to be undertaken promptly. Where the mistake involves a data breach that could result in risk to a person's rights and freedoms, there is also an obligation to notify the ICO within 72 hours of becoming aware of the breach. Not every breach needs to be reported to the ICO, which has a very useful self-assessment tool for reporting breaches (see <https://ico.org.uk/for-organisations/report-a-breach/personal-data-breach-assessment>). In the case of Nicky's supervisor having listened to the tapes, if Nicky used the self-assessment tool, she would be able to assess the likely impact of the incident and whether the client is likely to suffer any risk.

You will need to be prepared to provide information about:

- The nature of the breach (what, when and how it happened, how the breach was discovered, who was involved etc.)
- The name and contact details of the person responsible for data protection i.e. as a sole trader this will be Nicky who acts as controller
- The likely consequences of the data breach
- The measures taken or proposed to address and remediate the data breach.

For further information see BACP (2018-20) Section 6 and ICO (2018c) <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/personal-data-breaches>.

In the case of the misdirected email Nicky could ask the recipient to treat the information as strictly confidential and to delete it from both her computer's inbox and deleted items store. A statement to Nicky from the unintended recipient confirming that the information has been deleted may help to reassure the client that the damage is likely to have been contained. However, this relies upon the understanding and willingness of Nicky's ex-client. The process should be carried out in such a way that it protects the identity of the ex-client. A statement of what Nicky intends to do differently to avoid any repetition will help to mitigate any consequences imposed by the ICO. It is useful to think through what the best action would be if the recipient refused to respond to a request to delete the email or (being an ex-client) is so outraged that she posts it (or a report of the incident) on social media. She may choose to report the mistake to the ICO or Nicky's professional body. All of these possibilities indicate the dangers of hastily sent emails. The information could have been provided to the client so that they could pass it on to the solicitor. This may be preferable to the client giving Nicky their solicitor's email address which, if given to her incorrectly, could result in Nicky unknowingly sending an email to the wrong recipient.

Sole traders have been prosecuted or fined for failing to fulfil their data protection responsibilities.

Prompt action to prevent harm or minimise the harm caused is the best way of responding and demonstrating a commitment to being ethical and legal.

The tapes of sessions with Ratana were recorded with the client's consent but it is not clear whether that consent included that they will be shared with Nicky's supervisor. That consent should also have been gained. As the supervisor has heard the tapes, it is not possible to wind back time but Ratana's withdrawal of consent would affect any future recordings and their use.

If Nicky were unable to bring to a satisfactory ending what has occurred with Ratana, this is where records detailing the process for obtaining consent can be so helpful in resolving any ethical or legal consequences. Good contracting, record-keeping and supervision can all help to anticipate and settle situations of this kind.

Problems and dilemmas are an unavoidable part of therapeutic work and we can't anticipate every possible situation that may happen.

However, to support herself, Nicky could begin by imagining scenarios she could reasonably encounter and what might be the most ethical (and/or legal) course of action to take (BACP 2016e; Dale, 2016; BACP 2016i). Finding accurate information about what is required in respect of confidentiality and records (including thinking about data minimisation), planning ahead and developing policies and procedures for NDJ Counselling would have been helpful (Bond and Mitchels, 2015). Discussions with other practitioners, and her supervisor would undoubtedly help Nicky in her work (see *Ethical Framework*, Good practice, points 76, 77, 78).

Summary

In common with many practitioners, Nicky has a busy life with complex responsibilities. Whilst she aims to offer a good service to her clients, she would benefit from spending time attending to her self-care. Considering more closely how she receives, records, stores and destroys client information would help her work. As she uses a computer, instruction in cyber-security and information management would be useful.

Nicky seems unclear about the law but must 'give conscientious consideration to the law and any legal requirements' (Good practice, point 42). Discussions with her supervisor and engaging with CPD in areas including contracting, confidentiality, third party requests would be invaluable. More information can be found by accessing the Good Practice in Action suite of resources (see www.bacp.co.uk/gpia) and the Private Practice Toolkit (see www.bacp.co.uk/bacp-divisions/bacp-private-practice/private-practice-toolkit).

The development of relevant policies and procedures, probably assisted by her supervisor (and peers if she found them), could certainly help strengthen the work of *NDJ Counselling*. Finally, making herself more familiar with the *Ethical Framework for the Counselling Professions* is an essential part of Nicky's growing competence and ethical practice.

Conclusion

Keeping records that are appropriate, accurate, relevant, lawful and secure is part of the commitment we make to ethical practice. The nature of the work we do means that the information we record about our clients and their lives is often deeply intimate. In this privileged position, practitioners can be supported by ensuring an understanding of the broad nature, complexities, ethical and legal issues involved in 'keeping a record'. The overall aim is to provide the client with as much control of their data as possible whilst being open about the limitations, and manage legal, ethical and therapeutic responsibilities. When combined, these aims will contribute to providing a secure base for working with clients.

About the author

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