

Guidelines: Privacy, Confidentiality and Consent in the Use of Exemplars of Practice, Case Studies, and Journaling, 2016

Purpose

The purpose of this document is to provide guidance to nurses, midwives, students and others who may use exemplars, case studies or journaling as part of their practice (including use for professional development and recognition programmes).

Introduction

The use of exemplars of practice, case studies and journaling of practice experience has become common place within nursing and midwifery over the last 20 years. These three strategies for aiding reflection on practice and demonstrating competence are useful in analysing strengths and weaknesses and identifying growth or change potential; they are professional development and quality improvement strategies.

Exemplars, case studies and journals are used for many purposes including:

- > education programme requirements;
- > professional learning and development;
- > professional development and recognition programmes (PDRP);
- > credentialing systems;
- > recognition of prior learning;
- > competence assessment;
- > describing and exploring clinical practice;
- > evidence of a level of practice development;
- > presentations in various contexts; and
- > publications.

The use of exemplars for these legitimate reasons is not without risk. This guideline will provide information on how to manage privacy, confidentiality and consent in order to ensure the safety of the patient and clinician.

The legislative and regulatory framework

The Code of Health and Disability Services Consumers' Rights ("the Code") issued under the Health and Disability Commissioner Act 1994, the Health Information Privacy Code ("HIPC") issued under the Privacy Act 1993, the Code of Conduct for Nurses (Nursing Council of New Zealand, 2012), and the Code of Conduct for Midwives (Midwifery Council of New Zealand, 2010) are important documents to guide nurses in their use of exemplars, case studies and journals.

Nursing Council and Midwifery Council Codes of Conduct

The Nursing Council of New Zealand's Code of Conduct (2012) outlines eight principles that nurses should adhere to in their professional practice. The one relevant to this discussion is Principle 5: respect health consumers' privacy and confidentiality.

The sections of Principle 5 are as follows:

- 5.1 Protect the privacy of health consumers' personal information.
- 5.2 Treat as confidential information gained in the course of the nurse-health consumer relationship and use it for professional purposes only.
- 5.3 Use your professional judgment so that concerns about privacy do not compromise the information you give to health consumers or their involvement in care planning.
- 5.4 Inform health consumers that it will be necessary to disclose information to others in the health care team.
- 5.5 Gain consent from the health consumer to disclose information. In the absence of consent a judgement about risk to the health consumer or public safety considerations must be made.
- 5.6 Health records are stored securely and only accessed or removed for the purpose of providing care.
- 5.7 Health consumers' personal or health information is accessed and disclosed only as necessary for providing care.
- 5.8 Maintain health consumers' confidentiality and privacy by not discussing health consumers, or practice issues in public places including social media. Even when no names are used a health consumer could be identified.

The Midwifery Code of Conduct section 1.1 states: that personal information is obtained and used in a professional way that ensures privacy and confidentiality for clients.

To uphold the principles of their respective codes of conduct, nurses, midwives and students of nursing or midwifery must ensure patient

confidentiality and privacy are not breached at any time while writing an exemplar, case study or journal. Neither must they access patient notes to assist in writing an exemplar, case study or journal without consent of the patient (or the patient's family if the patient is unable to give consent), and of their manager. Consent may be written or verbal but if it is verbal this should be documented and, ideally, signed by the patient or patient's family. Appendix one has a template for consent.

The Code of Health and Disability Services Consumers' Rights

The Code of Health and Disability Services Consumers' Rights (1996), or "The Code of Rights" or "the Code", as it is known, sets out the 10 rights consumers can expect from their health or disability service providers. Providers and individual health practitioners are obliged to uphold the 10 rights by law. Further information on the Code can be found in the NZNO document of the same name or on the Health and Disability Commission website: www.hdc.org.nz.

Most of the 10 rights apply to the use of exemplars and case studies. Specific rights to be aware of include:

Right 1 – Right to be treated with respect.

Right 2 – Right to freedom from discrimination, coercion, harassment, and exploitation.

Right 5 – Right to effective communication.

Right 6 – Right to be fully informed.

Right 7 – Right to make an informed choice and give informed consent.

Right 9 – Rights in respect of teaching or research.

Right 10 – Right to complain.

In summary, if writing exemplars or case studies, the patient involved must be fully informed, give informed consent and be made aware of what the exemplar or case study will be used for. The patient has the right to complain about any exemplar or case study and the exemplar or case study must be written in a manner that respects the patient.

Health Information Privacy Code

The Health Information Privacy Code 1994 (HIPC) provides guidance around the collection, storage, access and use of health information, whether stored electronically or in paper form. The code outlines a set of 12 rules health agencies and their agents must adhere to. The rules are as follows:

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- > Rule 1 – Purpose of the collection of health information
- > Rule 2 – Source of health information
- > Rule 3 – Collection of health information from the individual
- > Rule 4 – Manner of collection of health information
- > Rule 5 – Storage and security of health information
- > Rule 6 – Access to personal health information
- > Rule 7 – Correction of health information
- > Rule 8 – Accuracy etc of health information to be checked before use
- > Rule 9 – Retention of health information
- > Rule 10 – Limits on use of health information
- > Rule 11 – Limits on disclosure of health information
- > Rule 12 – Unique identifiers.

The HIPC can be found here:

<https://www.privacy.org.nz/assets/Files/Codes-of-Practice-materials/Consolidated-HIPC-current-15-Oct-2015-inc-amdmts-2-8.pdf>

Of particular relevance to writing exemplars, case studies or journaling, is rule 11 and the limits on disclosure of health information. Rule 11 (1) (b) states:

A health agency that holds information must not disclose the information unless the agency believes, on reasonable grounds, that the disclosure is authorised by:

- (i) The individual concerned; or*
- (ii) The individual's representative where the individual is dead or is unable to give his or her authority under this rule.*

However, Rule 11 (2)(c) states that:

Compliance with paragraph (1)(b) is not necessary if the health agency believes on reasonable grounds that it is either not desirable or not practicable to obtain authorisation from the individual concerned and that:

(c) the information:

- i) is to be used in a form in which the individual concerned is not identified; or*
- ii) is to be used for statistical purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or*
- iii) is to be used for research purposes (for which approval by an ethics committee, if required, has been given) and will not be published in a form that could reasonably be expected to identify the individual concerned."*

If information from patient records, regardless of whether these are electronic or handwritten, is to be used for writing case studies, exemplars or journals, and Rule 11(1)(c) (i), (ii) or (iii) applies, then the health practitioner may not need to seek consent of the patient. However, access to patient records for the purposes of writing exemplars, case studies or journals must adhere to the Code of Health and Disability Services Consumers' Rights, the Health Information Privacy Code and the Nursing

and Midwifery Councils Codes of Conduct. To adhere to the requirements of all four codes, NZNO recommends seeking informed consent from the patient or their authorised representative in all situations. Where informed consent cannot be obtained, the health practitioner should avoid using the situation.

Disclosure

Health practitioners have both a legal and ethical obligation to uphold confidentiality. Health practitioners are often in a position where they hold information that should be kept confidential. Writing a journal, exemplar or case study is no different, and the obligation to maintain confidentiality must be upheld. Breaches of confidentiality can result in professional disciplinary action against the practitioner or legal action against the practitioner by the patient or the patient's family in a civil law suit, or as a result of an investigation. The following case study outlines the implications for nurses if they access patient records inappropriately.

Case study – Inappropriate access for a professional development and recognition programme (PDRP)

In 2014, a registered nurse was charged by a professional conduct committee (PCC) of the Nursing Council of New Zealand (NCNZ) with misconduct under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act). The charge related to inappropriate access or viewing of electronic records of patients or colleagues on an electronic reporting system, when the nurse knew or ought to have known they had no authority to do so. The charge referred to 22 different persons and 66 different dates of access to records, in many cases on more than one occasion. The nurse claimed six of the different people for whom records were accessed were persons whose records the nurse accessed as part of a nursing follow-up or for a PDRP. The Health Practitioner Disciplinary Tribunal hearing the charge did not accept the evidence given by the nurse, particularly as to the reasons behind access to records. The Tribunal ordered: that the nurse be censured; that after the nurse recommences practice, for a period of three years they practise on condition that they satisfy the NCNZ that they have already undertaken, or will, a course of training and education on questions of patient privacy and confidentiality and the appropriate statutory, regulatory and ethics provisions of the Privacy Act 1993 and the Health Information Privacy Code 1994; and that the nurse contribute the sum of \$26,400 towards the costs of the PCC and the Tribunal in respect of the charge.

Full details of the case can be found here:
<http://www.hpdt.org.nz/portals/0/nur14302pdecisionweb.pdf>

Risk

In some situations, a practitioner or student may disclose incompetent, unethical or unsafe practice in the course of writing an exemplar. Any disclosure has the potential to influence the reader positively or negatively, and there is a risk that students will fail assessments or practitioners may be over looked for promotion as a result of disclosure. While students and practitioners are encouraged to be honest in their reflective accounts, they should also be aware of the risks.

Although rare, journals, diaries, case studies and exemplars of health practitioners can be requested as evidence in investigations or court proceedings. If a practitioner is asked to write a reflection or exemplar as part of an investigation, then NZNO strongly recommend you contact the NZNO Member Support Centre for advice before writing it.

There is some protection for the nurse within the Health Practitioners Competence Assurance Act 2003. The Minister of Health can approve quality assurance activities, and participation in such approved activities has wide protection from disclosure in other forums (such as professional misconduct hearings). This protection extends to documents created solely for the purposes of the quality assurance activity. Note, however, there are limited exceptions to the non-disclosure rule here, such as where there is evidence of a serious criminal offence.

Guidelines for the use of exemplars, case studies and journals (including within PDRP and student assignments)

Privacy, confidentiality and consent are essential in the use of exemplars, case studies and journaling. Exemplars and journals (and to some extent case studies) use narratives about nurses, colleagues, patients, relationships, care and context. It is very easy to breach privacy and confidentiality inadvertently even if pseudonyms are used. Even a description of the context of a situation can result in those involved being identifiable. New Zealand is a small country and contextual descriptions, along with the author's location, can result in identification of those involved in the exemplar. Nurses and midwives care for the whole person and their family in particular practice contexts and locations; that is what makes our practice complex and significant, but it is also these details which often build an identifying picture.

Recommendations

- > Nurses, midwives and students of nursing or midwifery need to comply with the HIPC, the Code of Health and Disability Services Consumers' Rights, and their ethical obligation of confidentiality as per Principle 5 of the Nursing Council Code of Conduct and Section 1.1 of the Midwifery Council Code of Conduct when they are writing exemplars, case studies or journals.
- > Recommended best practice for nurses, midwives, educators and students of nursing or midwifery is, before writing an exemplar or case study, to talk with patients about what is involved in reflective practice and seek written or verbal consent from the patient, the patient's family or whānau, or the patient's legally appointed guardian if the patient is unable to give consent. Consent should be documented in the patient notes and a copy of the consent form attached. A template for written and verbal consent is found in Appendix One.
- > Discretion should be used when seeking consent. If a patient or patient's family expresses or demonstrates any concern or duress during the consent process, then it is recommended to stop the consent process or delay it until a more appropriate time. Students may want their educator or another staff member to be with them while they seek consent.
- > Unless the patient has consented to identifiable material about them being disclosed, then no information that could identify the patient should be put in an exemplar or case study;
- > To protect the privacy of patients and practitioners, information that may identify them should be removed or changed. Such information may include name, geographical location, occupation, job title, and/or context. It is important the practitioner or student review the exemplar, case study or journal note with a critical eye, taking into consideration all contextual factors that may identify the client. When making such changes, the health practitioner may draw on information from patients with similar problems to make the changes relevant to the experiences of the patient group as a whole.
- > A statement describing any changes that have been made should accompany the exemplar or case study.
- > Patient notes should only be accessed to support writing the exemplar or case study with consent from the patient (or patient's family or legally appointed guardian if the patient is unable to give consent) and the practitioner's manager, and only if the patient is, or has been, cared for by the nurse, midwife or student.
- > Written consent should be obtained where possible. Where this is not possible, verbal consent should be documented with the date, time and any witnesses.
- > It is never acceptable to download or print off patient notes for the purposes of learning.
- > Rule 11 (2)(c) (iii) of the HIPC may be enacted, if the exemplar or case study is being written for the purposes of research and ethical approval has been given. However, NZNO recommends that the consent of the

- patient (or patient's family or legally appointed guardian if the patient is unable to give consent) is sought in all cases.
- > Where informed consent cannot be obtained, the health practitioner should avoid using the situation.
 - > If an exemplar is solely for private reflective practice and will not, in theory, be disclosed to anyone else, we still recommend the same processes outlined above are followed. Journals may be inadvertently left where others can read them, resulting in a breach of privacy.
 - > It is never acceptable to put excerpts from exemplars, case studies or journals on Facebook, or any other social media site regardless of privacy settings.
 - > The nurse, midwife or student should be aware that, if a formal investigation involving the nurse, midwife or their patient(s) occurs, any private journal or exemplar may be required as evidence.
 - > Organisations should review their policies and procedures around access to patient notes for the purposes of professional development, and ensure a robust structure that outlines the required consents and procedures for access is in place. Part of this review could be consideration of a blanket patient request and consent process for the use of anonymised notes for teaching and learning processes.

Despite the potential risks associated with writing exemplars, case studies or journals, NZNO recommends nurses, midwives and students of nursing and midwifery continue to use writing as a tool for reflection and learning. Our guidelines identify a number of risks but also a number of approaches for managing these risks. NZNO hopes practitioners will use the guidelines to develop safe practice in the writing of exemplars, case studies and journals.

Further information and examples of reflective writing can be found in NZNO's guideline on Reflective Writing (Clendon, Cook, Blair, Kelly, 2015).

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Mission statement

NZNO is committed to the representation of members and the promotion of nursing and midwifery. NZNO embraces te Tiriti o Waitangi and works to improve the health status of all peoples of Aotearoa/ New Zealand through participation in health and social policy development.

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Appendix 1. Template for consent

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[YOUR INSTITUTIONAL LETTER HEAD]

Informed Consent Form for patients/clients/consumers and their family or whānau who are invited to give their consent for a health practitioner or student to access their notes, and/or use any information gained in the course of providing care to the patient/client/consumer and their family or whānau, for the purposes of writing an exemplar, case study or reflection.

[Name of nurse/midwife/student/health practitioner]
[Name of Organisation/University/Institute]

Purpose

One of the most important learning tools for nurses, midwives and students of nursing or midwifery is to reflect on practice. Often this takes the form of writing an exemplar, case study or journal. In order to gain the most from this practice, it is sometimes helpful to review patient or client notes. This form is to seek your permission to review your notes, and/or use any information gained in the course of providing care to you, for the purposes of writing an exemplar, case study or journal note. This consent form may contain words that you do not understand. Please ask me to stop as we go through the information and I will take time to explain. If you have questions later, you can ask them of me, my clinical teacher or the unit manager.

What reviewing your notes, and/or using information gained in the course of caring for you, will involve

Reviewing your notes will involve me accessing and reviewing these at the nurse's desk. I may need to review the notes several times to obtain all the information I need but I will never remove your notes from this area. Any information you have shared while I have been providing care to you may also help inform an exemplar, case study or journal note.

Voluntary Participation

Giving your consent for me to review your notes and/or use your information is entirely voluntary. You do not have to say yes. Whether you choose to say yes or no, all the services you receive will continue and nothing will change.

Anonymity

Information obtained from your notes, and/or in discussions with you, and used in any exemplar, case study or journal will be completely anonymized. This means anyone who is reading the exemplar, case study or journal note will not know that it is you. Any details that may identify you will be changed – this includes your name and any specific details that may identify you such as where you are from.

Sharing the exemplar, case study or journal note

Once any details that may identify you have been removed, the exemplar, case study or journal note may be shared with others including (but not limited to) my teachers, other colleagues and/or other students. In some cases, the exemplar or case study may be published in an academic or industry journal in order to help others learn. You will be given or shown a copy of the exemplar, case study or journal note if you wish.

Right to Refuse or Withdraw

If, after reading the exemplar, case study or journal note you would prefer for it not to be shared, you have the right to say no to this.

Who to Contact

If you have any questions, please contact me [name] on [phone number], my teacher [name] on [phone number] or the unit manager [name] on [phone number].

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Part II: Certificate of Consent

I have read the foregoing information, or it has been read to me. I have had the opportunity to ask questions about it and any questions I have been asked have been answered to my satisfaction. I consent voluntarily to:

	Yes	No
1. Allowing [name of person seeking consent] to access my notes for the purposes of writing an exemplar, case study or journal note.		
2. Allowing [name of person seeking consent] to use any information gained in the course of providing care to me for the purposes of writing an exemplar, case study or journal note.		
3. Allowing [name of person seeking consent] to share an anonymized exemplar, case study or journal note with their teacher/colleagues/students for the purposes of learning.		
4. Allowing publication of the anonymized exemplar, case study or journal note in an academic or industry journal.		
5. I would like to read or have read to me the anonymized exemplar, case study or journal note.		

Any other comments or notes:

Print Name of Patient _____

Signature of Patient _____

Date _____
Day/month/year

Time _____

Witness in the case of verbal consent:

I have witnessed the accurate reading of the consent form to the potential participant, and the individual has had the opportunity to ask questions. I confirm that the individual has given consent freely.

Print name of witness _____

Signature of witness _____

Position of Witness _____

Date _____ Time _____