

Legal Issues in the Professional Practice of Psychology

Committee on Professional Practice and Standards
American Psychological Association

The professional practice of psychology has become more complex, giving rise to frequently asked questions of a legal nature. This article consists of a list of the most commonly asked questions that the Practice Directorate of the American Psychological Association has received over the past 10 years. This article is meant for professional, health service clinicians who run into legal questions in the course of their everyday practice and not necessarily for those who routinely practice in such areas as forensic psychology. Because the article is intended for use by APA members throughout the country and Canada, many answers cannot be specific because individual state laws vary significantly. This article does not replace the advice of a licensed attorney.

The professional practice of psychology has become more complex, giving rise to frequently asked questions of a legal nature. This article provides psychologists with answers to commonly asked questions about professional practice that involves legal issues. This article is meant for professional, health service clinicians who run into legal questions in the course of their everyday practice. Psychologists practicing in other areas, such as forensic psychologists, employment psychologists, and industrial/organizational psychologists, may have different sets of legal issues than those addressed in this article.

In general, this article consists of a list of the most common questions that practicing psychologists have asked the Practice Directorate of the American Psychological Association (APA). Thus, it is not meant to be an exhaustive list of all possible questions with legal implications. Because the article is intended for use by all APA members, many answers cannot be specific because individual state laws vary significantly. The answers are intended to provide the psychologist with a general context, and readers are advised when they should determine specific state laws and regulations that govern that area of practice.

The issues in this article have been discussed in many other publications, often in much greater detail and depth. Therefore, many answers provide references to other APA sources, books, and articles for further elaboration and clarification. In addition,

references are frequently made to the APA's "Ethical Principles of Psychologists and Code of Conduct" (hereinafter referred to as the Ethics Code). This article is intended to apply the Ethics Code to specific questions. In the Appendix, references pertaining to each section's topic are provided so that readers may find additional information.

Specifically, Section 1 deals with the differences between ethics and law. Section 2 deals with common practice issues, including questions about professional relationships, confidentiality/privilege, requests for information, record keeping, and termination of services. Section 3 deals with business issues, including questions concerning the opening and closing of a professional practice and fees/billing. Section 4 deals with issues pertaining to legal settings, including questions about subpoenas, depositions, and expert as opposed to fact witnesses. Section 5 addresses the impact of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) on professional practice.

This article does not provide legal advice, nor is it intended to be a substitute for the advice of an attorney. Relevant law varies substantially from state to state and from context to context. When appropriate, psychologists are encouraged to consult legal counsel who can review the pertinent law and facts and provide legal assistance as needed.

Section 1: Basic Legal Concepts

Q: What is the difference between ethics and law?

A: Ethics is defined as the rules or standards governing the conduct of members of a profession. In psychology, APA's (2002) Ethics Code is intended to provide standards of professional conduct that are applied by the APA and by other bodies that choose to adopt them, such as state and provincial psychological associations. In fact, many states have adopted the Ethics Code as part of their licensing law or policies of their state. In such cases, the Ethics Code has the force of law and can be used by the licensing board for disciplinary action if the Ethics Code is violated. The difference between a violation of the Ethics Code and a violation of a state licensing regulation is that the latter can serve as a basis for action against the psychologist's license, whereas violations of the Ethics Code may be a basis for action against the psycholo-

THIS ARTICLE WAS DRAFTED BY the Committee on Professional Practice and Standards (COPPS), a committee of the American Psychological Association's (APA) Board of Professional Affairs (BPA). COPPS is responsible for developing and recommending to BPA standards and guidelines for providers of psychological services. The authors of the current article are COPPS members Lisa Grossman (Chair, 1998); Steven Bisbing (Chair, 1999); Jean Lau Chin; Michael Gottlieb; Marlene M. Maheu; Steven Sparta; Erica H. Wise; and APA staff member Billie Hinnefeld. Contributors to earlier drafts are COPPS members Catherine Acuff (Chair, 1997); Jody Porter; Richard Reichbart; Eugene Walker; and Philip H. Witt (Chair, 1996). COPPS also acknowledges and appreciates the support of APA staff members Cherie Jones and Rochelle Jennings.

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gist's membership in APA or in a state or provincial psychological association.

Law is defined as the body of rules governing the affairs of persons within a community, state, or country. A violation of the Ethics Code does not necessarily mean a violation of the law and vice versa.

Q: What should I do if the law and the Ethics Code contradict one another?

A: There are a variety of circumstances in which psychologists may experience confusion between the dictates of law and ethics. The following is stated in the introduction to the Ethics Code:

In the process of making decisions regarding their professional behavior, psychologists must consider this Ethics Code in addition to applicable laws and psychology board regulations. . . . If this Ethics Code establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing authority in keeping with basic principles of human rights. (APA, 2002, p. 1062)

In addition, if obeying the Ethics Code would result in disobeying the law, then legal advice is critical. A psychologist may also wish to contact his or her state licensing board for consultation.

Section 2: Common Practice Issues

Professional Relationships

Q: What is informed consent?

A: In general, informed consent is the concept of gaining a patient's consent to treatment or release of records after the patient has been given necessary and appropriate information.

Q: Must I accept as a client every individual who requires my services?

A: Generally no. Psychologists are free to choose to whom they wish to provide services. However, one exception might be if there is a contractual obligation to accept all applicable clients. For example, with institutions such as hospitals or schools, there may be a contractual requirement to accept all persons seeking services through their organization.

The following are examples of situations in which it would be unlikely for a psychologist to be required to accept a prospective client without a contractual obligation to do so:

- A prospective client presents with a problem that is outside the psychologist's area of competence (see APA Ethics Code, 2002, Standard 2.01).
- A prospective client is a close friend or family member of a current client.

Q: Following an appropriate termination, a former client returns to me for services. Am I required to reestablish a professional relationship?

A: Generally no unless contractually obligated to do so (e.g., hospital emergency room or walk-in clinic that "accepts all clients" in the community).

Q: As a supervisor, could I be liable for the services provided by my supervisee?

A: Generally yes. Supervisors are generally required to be "reasonable" in their professional contacts with supervisees (see APA Ethics Code, 2002, Standard 2.05) and "meet the usual standard of care for these activities" (APA Ethics Code, 2002, Standard 4.06; see also Standards 2.05, 7.06).

Further guidance may also be found in a state's psychology licensing laws, because some specify requirements and responsibilities for supervisors of unlicensed providers of professional services.

Q: What are some issues that should concern me as a consultant?

A: Presently, the nature and extent of duties associated with consultation are not entirely clear ethically and legally. For example, psychologists who consult with colleagues have an ethical responsibility to not disclose confidential information "unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided" (see APA, 2002, Standard 4.06) and only to disclose that which is minimally necessary to fulfill the purpose of the consultation. However, if a psychologist has been contacted to provide consultative services, it is not entirely settled in the law to whom the consultant owes a duty—the referral source or the treatment client. Checking state law for precedent in this area would be helpful in understanding liability issues.

Confidentiality and Privilege

Q: What is privilege?

A: It is a legal concept that generally bars the disclosure of confidential communications in a legal proceeding (e.g., lawsuit, state disciplinary proceeding). The right to assert privilege belongs solely to the client (Stromberg et al., 1988, p. 472).

Q: What is confidentiality?

A: Confidentiality is the ethical, and in most states, the legal duty of psychologists to not disclose information about a client (see APA, 2002, Standards 4.01, 4.02). Generally, confidentiality and any applicable exceptions should be discussed at the onset of the professional relationship.

Q: Can I breach confidentiality when my client threatens to harm someone?

A: This depends on the facts of the situation and any applicable law. Commonly characterized as duty to warn or protect, the issue of breaching confidentiality is addressed narrowly by some states (threat of imminent danger to identifiable victims) and broadly by other states (threats of danger to the general public or property); some states have not addressed the issue (Simon & Sadoff, 1992).

Q: Can I breach confidentiality if my client threatens to harm him- or herself?

A: There is presently no clear answer to this question in most states (see APA, 2002, Sections 4.01, 4.02). Courts that have examined it have often assessed whether the psychologist took reasonable efforts to protect the client before breaching confidentiality and whether the extent of the disclosure of information was limited to only that which was minimally necessary to safeguard him or her (Stromberg et al., 1988, pp. 466–471). Psychologists should be mindful that there may be other situations in which it is lawful to breach confidentiality when a client threatens to harm him- or herself (e.g., civil commitment).

Q: Am I violating client confidentiality simply by acknowledging that someone is a client?

A: Likely yes (see APA, 2002, Standard 4.05).

Requests for Information

Q: Is it ever permissible for me to keep the records of a client who is a minor confidential from his or her parents or guardians?

A: There is no uniform answer to this question; it depends on a number of factors. The rights of minors regarding health care services are generally defined by state law (see APA, 2002, Standards 4.01, 4.02, 4.05). If a state has a law that addresses this question, it must be followed. However, a state law may require the professional to weigh various factors. These factors commonly include the age of the child involved, the possible risk to the child's health, whether the professional relationship would be adversely affected by disclosure, and the extent to which the client would be subjected to adverse reactions from the parents (Stromberg et al., 1988, p. 410).

Typically, when a minor enters treatment it is at the request of the parents. To reduce the problems associated with providing services to clients at the request of a third party, it is clinically sound and ethically required to "clarify at the outset of the service the nature of the relationship with all individuals or organizations involved" (e.g., the psychologist's role, probable use of services to be provided or information obtained, and any limits on confidentiality; see APA, 2002, Standard 3.07).

The new HIPAA (1996) privacy regulations may also affect this, depending on the law in your state (see Section 5 for more information).

Q: If my client dies, must I continue to treat the records as confidential?

A: Generally yes. Commonly, there are state laws that delineate the duration that information about a deceased client must be kept confidential (Stromberg et al., 1988, p. 402). Within that period, disclosure of information that is confidential (e.g., for insurance purposes) or privileged (e.g., for probate proceedings) will often require the authorization of the legal representative of the deceased client's estate unless court ordered (Stromberg et al., 1988, p. 402). The new HIPAA (1996) privacy regulations may also affect this, depending on the law in your state (see Section 5 for more information).

Record Keeping

Q: Am I obligated to keep records?

A: Ethically,

psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (APA, 2002, Standard 6.01)

In many cases, state and federal laws require the maintenance of appropriate records for certain kinds of psychological services. Moreover, insurance companies will frequently condition fee re-

imbursement on general or specific documentation of the services for which they are being billed. Lastly, it is generally considered "consistent with the standard of care" for some form of documentation of professional services to be conducted (APA, Committee on Professional Practice and Standards, 1993; see also APA, 2002, Standards 4.05, 6.01, 6.02).

Q: For how long must I keep records?

A: Depending on where you practice and the type of records you are keeping, federal, state, and/or local laws and regulations may govern record retention (Bennett, Bryant, VandenBos, & Greenwood, 1990, pp. 76–78). Such laws and regulations supersede the requirements of the APA (1993) "Record Keeping Guidelines," which suggest maintaining records for a minimum of 3 years after the last contact with the client. Records, or a summary, are then maintained for an additional 12 years before disposal (APA, Committee on Professional Practice and Standards, 1993, pp. 984–986; see also APA, 2002, Standards 6.01, 6.02). If the client is a minor, a record period is extended until 3 years after the age of majority. If there is not a state statute, the psychologist may be held to what is determined to be "customary practice" in his or her area. The Record Keeping Guidelines further state that

these time limits follow the APA's specialty guidelines. If the specialty guidelines should be revised, a simple 7 year requirement for the retention of the complete record is preferred, which would be a more stringent requirement than any existing state statute. (APA, 1993, p. 985)

Termination of Services

Q: What does abandonment mean?

A: Abandonment generally refers to the psychologist's inappropriately ending services in a way that is detrimental to a client's welfare. The duty to not abandon a client does not mean that the professional relationship becomes a permanent one. Psychologists are advised to be aware of case law in their state to know what will constitute abandonment. It may include inappropriate termination or lack of referral.

Section 3: Common Business Issues

Closing a Professional Practice

Q: I want to close a professional practice—What are some common legal considerations?

A: Probably the two major concerns on closing a practice are appropriate termination or referral of current caseload and appropriate maintenance of records.

If the psychologist has an active caseload when the practice is closed, advance preparation will likely be necessary so that clients can be appropriately referred or can appropriately terminate. Also, records must still be kept the required amount of time, even when the practice is closed. This would include provisions for clients to be able to access their records. Therefore, if the psychologist is leaving the area, there may be legal requirements for notice to be given so that clients know where they can contact the psychologist to get their records.

Particularly difficult can be an unexpected closing of one's practice due to illness or death. Many psychologists find it helpful to have an agreement with another psychologist such that in the

event of death or disability, the other psychologist will provide appropriate referrals to current clients and for storage of client records.

Fees and Billing

Q: What are some options on collecting overdue bills?

A: The Ethics Code states the following:

If the recipient of services does not pay for services as agreed, and if psychologists intend to use collection agencies or legal measures to collect the fees, psychologists first inform the person that such measures will be taken and provide that person an opportunity to make prompt payment. (APA, 2002, Standard 6.04[e])

The psychologist should also be aware that laws of “agency” may make the psychologist liable for the collection agency’s acts if they are illegal.

Q: Can I “excuse” the difference between my fee and what the insurance pays?

A: This may be seen as fraud by the insurance companies.

Q: I am treating a client for whom someone else is paying the bill. Does the paying party have any legal rights?

A: This is best discussed and agreed to at the outset. According to the APA Ethics Code:

When psychologists agree to provide services to a person or entity at the request of a third party, psychologists attempt to clarify at the outset of the service the nature of the relationship with all individuals or organizations involved. This clarification includes the role of the psychologist (e.g., therapist, consultant, diagnostician, or expert witness), an identification of who is the client, the probable uses of the services provided or the information obtained, and the fact that there may be limits to confidentiality. (APA, 2002, Standard 3.07)

The new HIPAA (1996) privacy regulations may also affect this, depending on the law in your state (see Section 5 for more information).

Section 4: Psychologists in Legal Settings

Q: What is the difference between a subpoena and a court order?

A: A subpoena is a legal document, usually issued by the clerk of a court, which requests that a party (e.g., a psychologist) do one of two things: provide documents or appear and give testimony. Subpoenas are routinely used by attorneys for purposes of gathering information that they believe is relevant to their case. Subpoenas can be and often are challenged or modified on a number of grounds.

A subpoena does not necessarily do away with the client’s privilege and the psychologist’s responsibility to maintain that privilege. The psychologist is the custodian of privilege for the client and, in the absence of a written release from the client, must assume that privilege is to be maintained. Therefore, receipt of a subpoena in a situation in which the client has not explicitly waived privilege may still require the psychologist to assert privilege on behalf of the client. This responsibility continues until the client provides written waiver or the court orders the psychologist to turn over records and/or to testify.

A court order is a legal document issued by a judge that compels some action, such as a person’s appearance in court or the pro-

duction of specific documents. Because a court order is issued by a judge, the failure to comply with one can result in significant penalties, including incarceration. However, one may appeal a court order.

Q: What are some of my options if I receive a court order?

A: One can comply or appeal, which would optimally be done with legal assistance.

Q: What is a deposition?

A: A deposition is a pretrial proceeding to discover relevant information in which witnesses are questioned by an attorney on record.

Q: What is the difference between testifying as an “expert” and testifying as someone who acts as a “fact witness”?

A: An expert witness is hired for the purpose of litigation—to give an opinion or do an assessment concerning “legal issues” such as competence to stand trial or causation of psychological damages. A therapist may be called as a fact witness when she or he has treated or is treating a client who also happens to be in litigation. This person would typically only testify to the “facts” of the therapy (i.e., what is in the records). A psychologist may want to examine whether there is potential for a dual relationship to develop if he or she combines these roles as a fact witness and as an expert witness.

Q: Can I make as a condition of treatment a requirement that my clients will not solicit my involvement in any type of legal proceeding?

A: Such a condition probably could not be enforced.

Q: Can I ever be paid for my time complying with a subpoena?

A: This varies, depending on the court and the nature of the testimony. A psychologist would need to check with the courts in his or her jurisdiction.

Section 5: Health Insurance Portability and Accountability Act of 1996

Q: How will HIPAA affect my practice?

A: The regulations created to implement HIPAA are likely to affect your practice with regard to confidentiality and records. Because of the scope and complexity of HIPAA, we cannot fully address these issues in this article (see www.apapractice.org for more information about HIPAA and how it applies to you).

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Appendix

Additional Reading and Resources

Section 1: Basic Legal Concepts

- Bersoff, D. N. (1999). *Ethical conflicts in psychology* (2nd ed.). Washington, DC: American Psychological Association.
- Canter, M. B., Bennett, B. E., Jones, S. E., & Nagy, T. F. (1994). *Ethics for psychologists: A commentary on the APA ethics code*. Washington, DC: American Psychological Association.
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- Nagy, T. F. (1999). *Ethics in plain English: An illustrative casebook for psychologists*. Washington, DC: American Psychological Association.

*Section 2: Common Practice Issues**General*

- American Psychological Association, Committee on Professional Standards. (1987). *General guidelines for providers of psychological services*. Washington, DC: Author.
- Appelbaum, P. S., & Gutheil, T. G. (1989). *Clinical handbook of psychiatry and the law*. Baltimore: Williams & Wilkins.
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Health Care Records

- American Psychological Association. (1996). *Organizing your practice through automation: Managing information and data*. Washington, DC: Author.
- Computer-Based Patient Record Institute. (1999). *CPRI toolkit: Managing information security in health care*. Bethesda, MD: Author.
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Resources

- Civil law and liability*: www.abanet.org; www.findlaw.com; www.law.indiana.edu/v-lib
- General legal issues*: biotech.law.lsu.edu

*Section 3: Common Business Issues**Opening, Managing, and Closing a Practice*

- American Medical Association. (1996). *Buying, selling, and owning the medical practice*. Chicago: Author.
- American Medical Association. (1996). *Starting a medical practice*. Chicago: Author.
- American Medical Association. (1997). *Closing your practice*. Chicago: Author.
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Fees, Collection, and Payment

- American Medical Association. (1999). *Mastering the reimbursement process* (2nd ed.). Chicago: Author.
- American Psychological Association. (1996). *Managing your practice*

finances: Strategies for budgeting, funding, and business. Washington, DC: Author.

Liability and Risk Management

- American Medical Association. (1997). *Medicolegal forms with legal analysis*. Chicago: Author.
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Section 4: Psychologists in Legal Settings

- Lubet, S. (1998). *Expert testimony: A guide for expert witnesses and the lawyers who examine them*. Notre Dame, IN: National Institute for Trial Advocacy.
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Call for Nominations: *JPSP:Attitudes*

The Publications and Communications (P&C) Board has opened nominations for the editorship of the ***Journal of Personality and Social Psychology: Attitudes and Social Cognition*** section for the years 2006–2011. Patricia G. Devine, PhD, is the incumbent editor.

Candidates should be members of APA and should be available to start receiving manuscripts in early 2005 to prepare for issues published in 2006. Please note that the P&C Board encourages participation by members of underrepresented groups in the publication process and would particularly welcome such nominees. Self-nominations also are encouraged.

David C. Funder, PhD, has been appointed to chair the search.

Candidates should be nominated by accessing APA's EditorQuest site on the Web. Using your Web browser, go to <http://editorquest.apa.org>. On the Home menu on the left, find Guests. Next, click on the link "Submit a Nomination," enter your nominee's information, and click "Submit."

Prepared statements of one page or less in support of a nominee can also be submitted by e-mail to Karen Sellman, P&C Board Search Liaison, at ksellman@apa.org.

The first review of nominations will begin December 8, 2003. The deadline for accepting nominations is **December 15, 2003**.