

**Law and Ethics for Clinicians:
Burdens, Dilemmas, Possibilities**

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**Law & Ethics requirement for
Psychologists**

- Training and/or experience
- No specific number of hours
- Must cover
 - recent updates/changes in laws, regulations, and APA Ethics Code
 - accepted standards of practice
 - “any other applications of laws and ethics as they may affect a licensee’s ability to practice psychology with safety to the public”

**California Code of Regulations 1887.3(d)
(Law and Ethics Course Requirement for MFT’s &
LCSW’s)**

“Any person renewing his or her license on and after January 1, 2004 shall have completed not less than six (6) hours of continuing education in the subject of law and ethics for each renewal period. The six (6) hours shall be considered part of the thirty-six (36) hour continuing education requirement.”

Relevant Ethics Codes

- AAMFT 2001 Code of Ethics
- CAMFT 2008 Ethical Standards
- NASW 1999 Code of Ethics
- APA 2002 Ethical Principles of Psychologists and Code of Conduct

Adjudicative Processes

Oversight settings

- Board complaints
- Professional associations (APA, CAMFT, NASW)
- Malpractice lawsuits
- Employers
- Institute ethics committees

Board complaint process

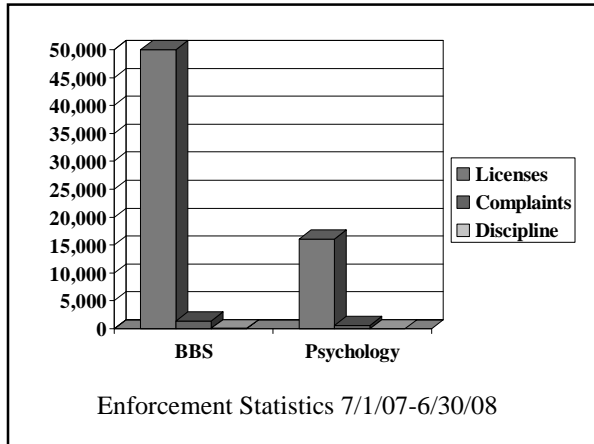
1. Complaint filed
2. Analyst reviews and either
 - closes,
 - sends for preliminary expert review, or
 - initiates investigation
3. Attorney General's office decides whether to file Accusation, which lays out charges and standards they would violate

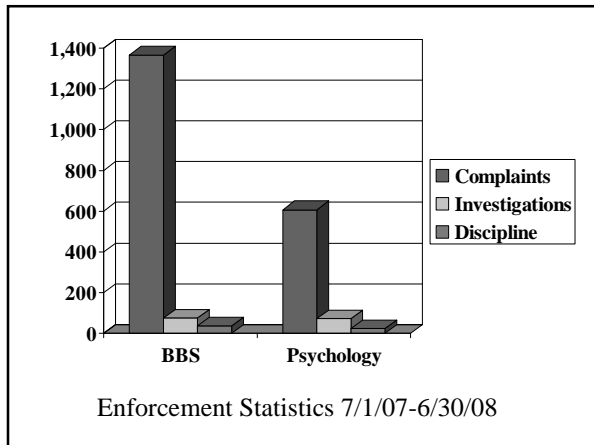
Board complaint process, cont'd

4. After Accusation, Deputy Attorney General may reach stipulated settlement with Respondent
5. After hearing, judge decides on guilt and penalty (within guidelines)
6. Board adopts or substitutes own decision

Common causes of discipline

- Sexual misconduct
- Conviction of certain crimes (e.g., DUI)
- Billing fraud
- Gross negligence
 - Extreme departure from standard
 - Two or more simple departures





Hypothetical cases

The “Standard Of Care:”
Theory and Practice

Standard of care

- Poor definition: "Things you need to do to avoid getting in trouble."
- Better definition: "How professionals in the relevant community work when they are functioning adequately."

The standards of care

- Top-Down:
 - Law
 - Ethics Codes
- Bottom-Up: Professional Community
- Conclusion: If the professional community loses its independence, the standard of care can no longer be properly defined.

Determining the standard of care

- Sometimes defined in “black letter law,” e.g., clear statute, binding precedent, APA Ethics Code after adoption by BoP
- Otherwise, experts give opinions (during Board consideration of complaint and in dueling court testimony). Judge settles it.

Confidentiality, Privilege, and Disclosure

Confidentiality

- Sources of confidentiality in mental health professions
- Reasons for confidentiality
 - Betrayal is wrong
 - Psychotherapy only works if confidential

What governs?

- Ethics codes
- Law: HIPAA, Confidentiality of Medical Information Act
- Community standard of care

Privilege

- Primarily relevant to legal contexts
- Must be invoked by therapist
- May be waived by patient
- Children have it (?)

Major Exceptions to Privilege

No privilege exists in various circumstances, including:

- pt sues for emotional distress
- most court-ordered evaluations
- pt is judged by therapist danger to self or person or property (!) of others and disclosure is necessary to prevent danger
- mandated abuse reporting (*but...* Stritzinger; Penal Code 11167.5)

Confidentiality and consultation

- Must not give information that would foreseeably identify the patient
- This means more restriction in group settings than with a single consultant
- Alternatively, may get specific patient consent

New law on record security

- California Civil Code 56.36 amended to require providers to “safeguard patient medical information from unauthorized or unlawful access, use, or disclosure, using appropriate administrative, technical, and physical barriers.”

Leatherberry, M. (March/April 2009).
Psychologists and the laws against snooping.
Calif. Psychologist, 42:2, 23-24.

Third party information

- Can release info from another “medical” professional only with a specific authorization from patient, Civil Code 56.13
- Info provided by non-professional (e.g., family member) in confidence may be withheld from patient requesting record, H&S Code 123105(d)

Subpoenas

- ## Responding to Subpoenas
- Don't run, you'll look dumb
 - Subpoena is invalid without "Notice to Consumer"
 - Release is invalid if not specific to *you* and to *information requested*
 - Contact patient

- ## Responding to Subpoenas, cont'd
- May disclose with
 - Valid release from patient
 - Court order (i.e., from judge)
 - Exception to privilege (get legal advice from attorney *not* in case)
 - Patient can ask judge to review for relevance prior to disclosure
 - Get your own lawyer if threatened

Responding to Subpoenas, cont'd

- Keep paper trail (e.g., letter to issuing attorney, notes from phone calls)
- It's not as bad as it sounds—they usually seek patient's release or give up

Options for protection of attorney-requested information

- Work with patient's attorney to quash subpoena
- State that expert testimony on a patient seen for treatment is misleading and therefore unethical (Greenberg & Shuman)
- Request that judge review notes for relevance, that disclosure be limited, and that they be returned after matter is concluded
- Argue that disclosure damages treatment for all (Lifschutz, Garvey)

Therapeutic vs. Forensic Knowledge

What do we *know* as therapists?

- Objective truth vs. narrative
- Filtered through patient's perspective
- Lack of investigation (collateral interviews and documentary evidence)
- Greenberg, S.A. & Shuman, D.W. (1997). Irreconcilable conflict between therapeutic and forensic roles. Professional Psychology, 28, 50-57.

Record Keeping

Record Keeping

Purposes cited:

- Own review to improve treatment
- Other clinicians (present and future)
- 3rd party payment
- Legal review
- Administrative (e.g., employer) review

Content of records: Psychologists

(Information) such as the nature, delivery, progress, and results of psychological services, and related fees...in order to (a) provide good care; (b) assist collaborating professionals in delivery of care; (c) ensure continuity of professional services in case of the psychologist's injury, disability, or death or with a change of provider; (d) provide for supervision or training if relevant; ...

American Psychological Association. (Approved 2007). Record keeping guidelines.

Content of records: Psychologists

...(e) provide documentation required for reimbursement or required administratively under contracts or laws; (f) effectively document any decision-making, especially in high risk situations; and (g) allow the psychologist to effectively answer a legal or regulatory complaint.

Additionally, Ethics Code *requires* documentation of informed consent.

Content of records: MFT's

- Unprofessional conduct includes "Failure to keep records consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered." Bus. & Prof. Code §4982(v).
- CAMFT Ethics Code requires records "consistent with sound clinical practice." Also, "encouraged to carefully document in their records when significant decisions are made".

Content of records: LCSW's

- Unprofessional conduct includes "Failure to keep records consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered." Bus. & Prof. Code §4992.3(s).

Content of records: LCSW's (NASW Code of Ethics (3.04))

- (a) Social workers should take reasonable steps to ensure that documentation in records is accurate and reflects the services provided.
- (b) Social workers should include sufficient and timely documentation in records to facilitate the delivery of services and to ensure continuity of services provided to clients in the future.
- (c) Social workers' documentation should protect clients' privacy to the extent that is possible and appropriate and should include only information that is directly relevant to the delivery of services.

What should a patient record include? One approach:

- a reasonable summary of the information upon which care is based, with formulation and conclusions
- a dated note indicating the nature of each contact and a reference to content
- assessments and follow-up of possible emergencies
- regular notes by supervisor, if the treating clinician is not independently licensed

How long should the record be kept?

- Psychologists
 - Health service: 7 years or until minor reaches 25
 - Other records: 7 years and until minor patients reach 21 years old, whichever later (although I suggest keeping until 25)
- MFT's: Riemersma suggests 7-10 years and until minor patients reach 25
- LCSW's: No guidelines that I know of
- Everyone: Remember that statute of limitations for Board complaints is 7 years (10 years for sexual misconduct), and can be extended by various factors

Sexual Boundary Violations

All mental health profession ethics codes:

- Prohibit sex with current therapy patients and former patients until at least two years after termination
- Prohibit sex with imm. family of patients
- Strongly warn against sex even long after termination

Note: In NASW Ethics, the only absolute prohibition is current patient, and there is no two-year distinction.

License revoked for sex with patient:

- Psychologists: Current or within two years of termination
- MFT, LCSW: Current or former patient if therapy terminated primarily for sexual relationship

Therapist-patient criminal penalties

- One victim: Up to six months jail, \$1,000 fine
- Previous offence or two victims: 16 months to three years jail, up to \$10,000 fine

Calif. Bus. and Prof. Code 729

Cases

- "Forbidden Zone" case
- Ralph K. Engle
- BoP case described by Jacqueline Horn, PhD
- Local case

- Proposed response
 - Prevention is focus
 - All therapists vulnerable
 - There is no excuse and sanctions should be severe
 - Rehabilitation possible in some cases
- Danger situations
- Preventive measures

Multiple Relationships

- Multiple Relationships in 2002
APA Code (3.05, 3.06)**
- Prohibited if “could reasonably be expected to impair the psychologist’s objectivity, competence, or effectiveness...or otherwise risks exploitation or harm”
 - “Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.”

**Dual relationships in CAMFT
2008 Code (Sections 1.2, 1.2.1,
1.14)**

- "...reasonably likely to impair professional judgment or lead to exploitation."
- "Not all dual relationships are unethical..."
- Examples: borrowing money, hiring...
- "carefully consider potential conflicts when providing concurrent or sequential individual, couple, family, and group treatment ..."
- See also 1.16, 8.3, 8.4, 8.9

**Dual relationships in NASW
1999 Code (1.06(c))**

- "...with clients or former clients in which there is a risk of exploitation or potential harm..."
- "...services to two or more people who have a relationship with each other (for example, couples, family members), social workers should clarify with all parties which individuals will be considered clients..."
- No mention of ethical dual relationships

Informed Consent

Informed Consent

- Where are we?
- Legal and ethical foundations
- Another model

APA Ethics Code, Sec. 10.01

Informed Consent to Therapy:
Psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers.

CAMFT Code Section 1.5

- "...adequate information to patients in clear and understandable language so that patients can make meaningful decisions about their therapy."
- inform of risks and benefits for "novel or experimental techniques or when there is a risk of physical harm"
- Availability for emergencies and other contacts between sessions
- 1.4: "When clinically appropriate, advise their patients that decisions on the status of their personal relationships, including dissolution, are the responsibilities of the patient(s)."

CAMFT Code Section 1.5, cont'd

- 1.5.4: "...encouraged to inform patients as to the certain exceptions to confidentiality..."
- 1.5.5: "...encouraged to inform patients at an appropriate time and within the context of the psychotherapeutic relationship of their experience, education, specialties, theoretical and professional orientation and any other information deemed appropriate by the therapist."

CAMFT Code Sections, cont'd

- 1.4.1: "When therapy occurs by electronic means...potential risks and benefits, limitations, transmission difficulties, and ability to respond in emergencies...informed consent per California Telemedicine Act."

NASW Code Section 1.03

- Should use clear and understandable language
- Should include
 - risks
 - limits related to 3rd party payers
 - costs
 - alternatives
 - right to refuse and to withdraw consent
 - "time frame covered by the consent"
- Should provide opportunity to ask questions

NASW Code Section 1.03

- Other issues addressed:
 - clients who are illiterate or have difficulty understanding
 - clients without capacity
 - clients receiving services involuntarily
 - services provided electronically
 - taping

Calif. Statutory requirements

- MFT/LCSW: Disclose fee or basis for computing it
- MFT: Encouraged “at appropriate time” to describe therapist’s education, experience, etc.
- All: Disclose if therapist is trainee, with name of responsible supervisor

Source: Griffin, M. (Sept./Oct. 2006).

APsaA Principles and Standards

- Principle III: “...At the outset of treatment, the patient should be made aware of the nature of psychoanalysis and relevant alternative therapies.”
- Standard III.1: “Psychoanalytic treatment exists by virtue of an informed choice leading to a mutually accepted agreement...”

APsaA Principles and Standards

- Standard IV.4: "All aspects of the treatment contract which are applicable should be discussed with the patient during the initial consultation process"
 - charging for missed sessions
 - applications to 3rd party payers
- Standard V.2: "The analyst should speak candidly with prospective patients...about the benefits and burdens of psychoanalytic treatment."

Problems with some current approaches

- Legalistic; Defensive Practice
- Lengthy forms are questionable
 - Often are not discussed with patient
 - Sometimes contain material the therapist doesn't fully understand

An alternative approach

- Uncontroversial requirements
 - Ethics Codes
 - Case law principles (included in some Ethics Codes)
 - risks, benefits, alternatives
 - voluntary

An alternative approach

- Lidz et al.: The patient makes an actual decision
- Implications
 - Provide information this *specific* patient might want or need
 - Written statements are useful if they help the specific patient make decisions. Otherwise, they are useless for informed consent.

An alternative approach

- Implications, continued
 - Signed agreements/contracts may be destructive to informed consent
 - “Hyperinforming” is not necessary and probably destructive
 - “Law of No Surprises” shouldn’t guide initial *event* of consent

An alternative approach

- Informed consent is a *process* as well as an *event*

Risk management issues

- This alternative approach is probably riskier for the provider
- A contract might help with risk management. (In my opinion, if a contract is used, it should be separated from informed consent, and patients should be informed about the effects.)

A special topic in informed consent

- "I don't get involved in legal cases."
- "I won't share information with attorneys or judges, even if you instruct me to."

Minors' consent to treatment (now)

- Minors 12 years old and older can already consent to drug treatment and to any treatment if they are emancipated.
- They can also consent to psychotherapy if they have been abused or are a danger to self or others.

Minors' consent to treatment (1/1/11)

- Minors 12 years old and older will be able to consent to psychotherapy. The only requirement is that they are "mature enough to participate intelligently."



Minor Consent, Confidentiality, and Child Abuse Reporting in California



National Center for Youth Law

Related issues

- Parents can't be required to pay for treatment that they didn't consent to.
- Therapists are required to attempt to involve parents of minors unless they believe it would be harmful.

Release of information re minors

- Minors who consent to their own treatment control release of their information.
- When parents have consented, they control release of minor's information,
- However, the therapist can refuse to disclose information to *the parents* if she or he believes the disclosure would harm the minor or the therapeutic alliance.

"Telemedicine" and Related Issues

Issues with telephone and email

- Informed consent re security (privacy)
- Informed consent re effectiveness
- Do these modalities call for special skills and training?
- Licensure: Can you practice where the client is located?
- Third-party bills must indicate not in-person

Other technologies (e.g., Skype)

The informed consent procedure shall ensure that at least all of the following information is given to the patient or the patient's legal representative verbally and in writing:

- (1) The patient or the patient's legal representative retains the option to withhold or withdraw consent at any time without affecting the right to future care or treatment nor risking the loss or withdrawal of any program benefits to which the patient or the patient's legal representative would otherwise be entitled.
- (2) A description of the potential risks, consequences, and benefits of telemedicine.

Other technologies (e.g., Skype)

- (3) All existing confidentiality protections apply.
- (4) All existing laws regarding patient access to medical information and copies of medical records apply.
- (5) Dissemination of any patient identifiable images or information from the telemedicine interaction to researchers or other entities shall not occur without the consent of the patient.

California Bus. And Prof. Code 2290.5

**Tarasoff and Abuse Reporting
Review and Update**

Ewing v. Goldstein

- Appellate decision that Tarasoff duty applies even if information comes from a family member. Became law (or persuasive authority) when Calif. Supreme Court declined review.
- Questionable clinical impact
 - Must still assess dangerousness
 - Must consider intent of communication

True or false?

A mental health professional in California whose patient has made credible threats of imminently severely physically harming another person is legally required to report this to the police and to make reasonable efforts to inform the potential victim.

(Yes, this is a trick question.)

“Tarasoff” update

- Civil Code 43.92 clarified as “safe harbor”
- Immunity for good faith warnings
- Not permitted to warn partners of HIV-positive patients

Source: Leslie, R. (Sept./Oct. 2008). The dangerous patient and confidentiality revisited. *The Therapist*, v. 20, no. 5, 24-30.

Child Abuse Reports (2005)

- sexual abuse
- neglect
- non-accidental physical injury
- willful harming or injuring of a child or the endangering of the person or health of a child
- unlawful corporal punishment or injury
- *permitted* to report serious emotional damage or substantial risk of suffering serious emotional damage

Voluntary sexual activity of children

- Case law has established that this frequently does not require a report, *if* activity is fully voluntary, in clinician's judgment
- Some conflicting interpretations exist.
- See Michael Donner and Expertise T.F. table in handout

Elder and Dependent Adult Abuse

- physical abuse
- abandonment
- abduction
- isolation
- financial abuse
- neglect
- *permitted* to report other abuse or endangerment of emotional well-being

Permitted to provide add'l info to abuse investigators

AB 2028 will amend Civil Code 51.04 to permit mandated reporters of abuse to respond to follow-up inquiries from abuse investigators. Effective 1/1/11.

Revised Tarasoff statute (Civil Code 43.92)

- (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.
- (b) There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

Clarification: May break confidentiality

As of 1/1/10, Civil Code 56.10 (c) (19) specifically allows a psychotherapist to disclose otherwise confidential information if she or he "believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat."
