Ethics, Law and Risk Management: Navigating the Complexities of Practice

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EDITOR’S NOTE: The CPA Ethics Committee with Dr. Fridhandler and Drs. Elizabeth Jenks, Stephen C. Phillips and Ellen Stein are presenting an all-day pre-Convention Advanced Institute. Ethics, Law, and the Board of Psychology: Navigating the Complexities of Practice will be Thursday, April 23.

It ought to be simple. We should be able to straightforwardly define the domains of ethics, law (including licensing board discipline), risk management, and clinical theory and technique. We should also be able to say which domains trump which other domains in a given circumstance, or at least quantify the risk of prioritizing ethical or clinical considerations over legal ones. We would like it if professional dilemmas could readily be classified as ethical, legal, or clinical, so that we would know clearly where to go for help. Would that it were so.

For example, a psychologist posted the following on a CPA chapter listserv (reprinted with permission):

I have a client who requested that I write a letter stating the dates she attended therapy, and her presenting problem (relationship issues that led to divorce) to help build a case that her marriage wasn’t feigned, in order to assure that her immigration status won’t be affected. Has anyone ever dealt with this before? If so, can you speak to the legal issues that may arise, what my potential involvement could be if I agree to write the letter, etc.?

Applying Behnke’s “four bin” analysis (Behnke, 2014a; Rosenberg & Sheets, 2014), we can ask, is this primarily a legal question, as the writer says? Probably not. For example, confidentiality law isn’t an issue for a letter that is given only to the client. Risk management may be more her concern, judging from her references to “issues that may arise” and “potential involvement.” Ethical concerns are almost certainly involved, too. A psychologist in this situation is likely to experience a conflict between the wish to help the client with her immigration case and the possibility of being drawn into an advocacy role, not to mention anxiety-provoking entanglement with the courts. Clinical challenges, too, are likely, as the psychologist works to maintain the alliance without being pulled into an advocacy role.

To take another example, a court’s decision in a Board of Psychology complaint illustrates complexity of practice arising from the sometimes conflicting domains of law and ethics. The psychologist, during the therapy, collaborated with the patient in working with an advocacy group for the mentally ill. The collaboration led to their spending significant time together outside of therapy sessions. One component of the complaint was that this constituted a prohibited multiple relationship. Ofer Zur, author of an APA-published book on boundaries (Zur, 2013) testified, as paraphrased by the judge (Office of Administrative Hearings, 2009):

In deciding whether to enter into a multiple relationship, a psychologist does a risk and benefit analysis. He or she asks: What are the risks and what are the potential benefits? It is not unethical for a therapist to become involved in professional organizations with a client if the purpose is to enhance the cause of the organization. (p. 14)

Stephen Behnke, Director of the APA Ethics office, recently said the same (Behnke, 2014b):

The psychologist must assess whether a multiple relationship interferes with the psychologist’s objectivity, competence or effectiveness, or otherwise risks exploitation or harm...When the psychologist determines that the likelihood of harm is greater than the likelihood of benefit, the psychologist refrains from entering into the multiple relationship. (p. 64)

The judge, however, as judges do, applied the letter of the law, or in this case, the ethics code (Office of Administrative Hearings, 2009):

The Ethics Code does not provide for a comparison of the risk of a loss of objectivity, competence, or effectiveness with the potential benefits of a multiple relationship...With regard to objectivity, competence, or effectiveness, for example, the
focus is entirely on whether a proposed multiple relationship could reasonably be expected to impair the psychologist’s objectivity, competence, or effectiveness...If it could reasonably be expected to impair, the psychologist must not enter into the relationship. (p. 22)

Given that the Director of APA’s Ethics office and an APA-published writer on ethics believe that a risk/benefit analysis is part of an ethical psychologist’s decision-making about multiple relationships but a judge ruled that such analysis is irrelevant under the current Code and provides no defense if there is later a complaint, should a psychologist weigh risk vs. benefit of a potential multiple relationship? If a psychologist prioritizes risk management, the answer is no, unless and until the Code explicitly includes consideration of possible benefit of a multiple relationship. However, if a psychologist’s integration of our ethics, based perhaps in part on the views of Behnke, Zur, and the present writer, includes possible benefit as a consideration in nonsexual multiple relationships, he or she can consider it, with good reason to believe he or she is acting consistently with the ethics of his or her colleagues, which is, after all, where the Code originates. (The anxiety this may generate for the psychologist and his or her malpractice carrier may be mitigated by the fact that the case discussed here also included an allegation of sex with the patient. Perhaps the nonsexual multiple relationship would have been pursued less vigorously if not for the alleged sexual one.)

To take another example, consider the following from four

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**CPA Ethics Committee Seeks New Members**

*Deadline: February 1, 2015*

The CPA Ethics Committee is a thoughtful, collegial group working to enhance the professional activities of CPA members. Committee members have found it to be enjoyable, mutually supportive, and gratifying.

Appointment is for a three-year term with possible reappointment for a second term. The core responsibility is to provide ethics consultations to CPA members, and therefore we seek candidates who have a background such as teaching ethics, providing chapter ethics committee consultation, or publishing in ethics or related areas. Representation of diverse communities is a primary goal of recruitment.

**Students:** We are also recruiting for a graduate student member interested in ethics.

**Deadline:** All applications received by February 1, 2015 will be considered during the current recruitment round. If positions remain unfilled, applications received after that date will be considered.

For more information, contact Debra Chase, dchase@cpapsych.org. To apply, send your cv and a cover letter describing your background in ethics to Bram Fridhandler, PhD, Chair, at bf@drfridhandler.com.
prominent writers on ethics, in their discussion of ways psychologists fall short (Knapp et al., 2013):

A psychologist was treating a patient who made a serious threat to harm an identifiable third party. Knowing that this met the threshold for a “duty to warn” in his state, the psychologist quickly contacted the intended victim. Although the actions of the psychologist met the letter of the law, the question arises whether the psychologist had other options available to diffuse the danger, such as seeking a voluntary hospitalization (if appropriate), or asking the patient for input on other ways to control the situation. (p. 375)

What do you find yourself thinking as you read this? Perhaps some or all of the following: “Is it legal not to inform a potential victim of an explicit threat? Is voluntary hospitalization ever enough? I’ve never heard of anyone asking a patient for input in such a situation – is that really an option? How much risk would there be to me if I didn’t notify the police and the potential victim? Would it be ethical to prioritize the patient’s confidentiality and the therapeutic alliance over the risk to this potential victim? Whom should I consult the next time a patient expresses a serious threat?”

Here is my perspective: There is no statute in California that requires notification of the potential victim (Fridhandler & Lareau, 2012; Jensen, 2012). In this sense, Knapp et al.’s recommendations are legal in California. However, under California law, a therapist who notifies both the potential victim and police receives immunity from lawsuit and, it is reasonable to predict, greatly reduces her or his risk in the event of a licensing board complaint. As to ethics, one is challenged to say. To the extent that the “Tarasoff warning” has become the expectation among psychologists, is it evolution in our ethics, reasoned deference to the Tarasoff decision, or fear of liability? For myself, I agree with Knapp and his coauthors that our ethics accommodate a consideration of alternatives that maintain confidentiality after a threat by a patient, if undertaken with recognition of the enormity of the stakes.

There are good tools available to cope with these complexities. Behnke’s “four bin” model brings order to confusing situations, clarifying what questions to ask and whom to ask them of. Consultation is available without charge to CPA members with the CPA Ethics Committee on ethical questions (916-286-7979, ext. 114) and the CPA Director of Professional Affairs, Chuck Faltz, on practice questions. Malpractice carriers may provide free legal and risk management consultation. Division I members have access to a free attorney consultation and to the Expertise Series, a rich and underutilized source of ethical and legal information. Last but not least, you can join us at Convention for the CPA Ethics Committee’s Preconference Institute, “Ethics, Law, and the Board of Psychology: Navigating the Complexities of Practice.” (And please join CPA President-Elect Jorge Wong, Division VII Chair Rut Gubkin, and myself for “Individualism and Confidentiality Across Diverse Cultures: Clinical and Ethical Dilemmas.”) See you in San Diego.

REFERENCES