

Freedom of Social Work

How the First Amendment Supports Safe Spaces

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2022 NASW-TX Hybrid Conference
Friday, October 14th, 2022

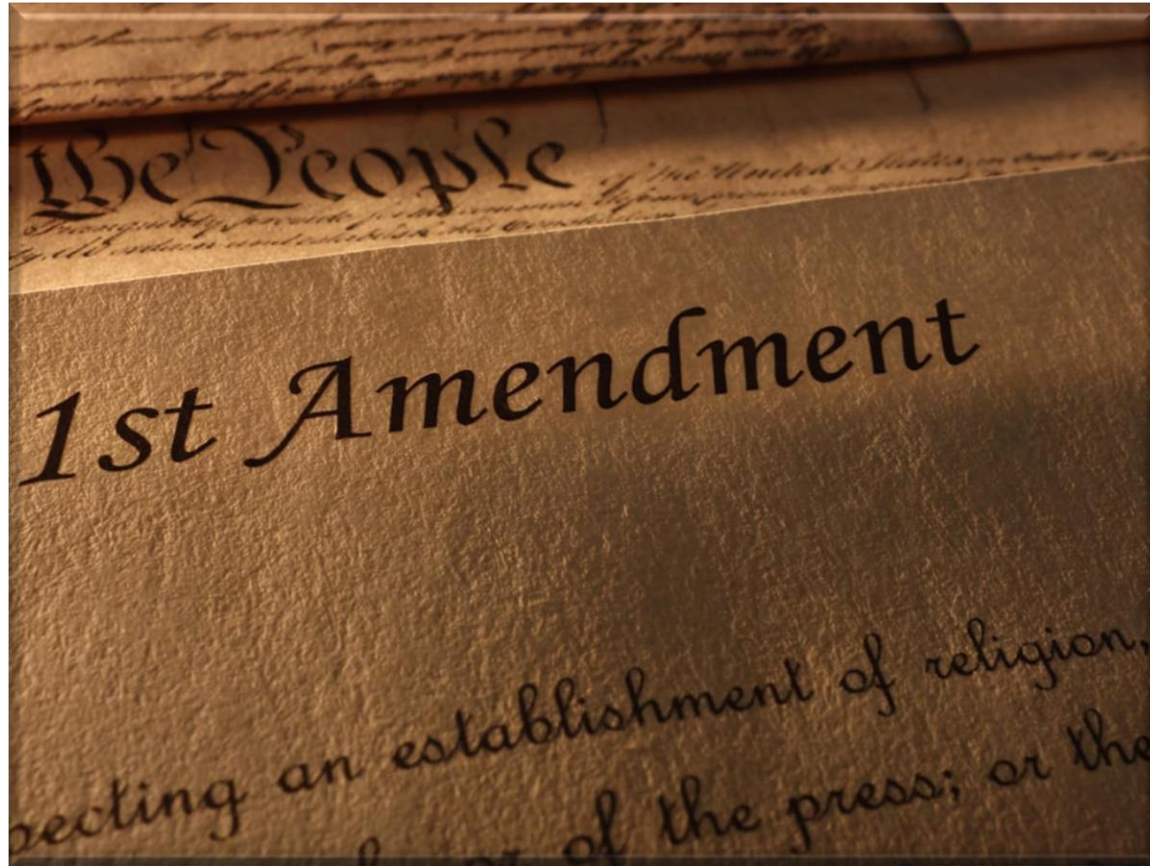
Learning Objectives

1. Attendees will learn foundational concepts of ethical practice.
2. How state and federal laws and rules shape client engagement.
3. How to prepare for future changes to laws or rules that could impact the profession.

WHAT DOES IT MEAN WHEN WE TALK ABOUT THE CRIMINALIZATION OF SOCIAL WORK?

Areas That Impact Practice

- First Amendment
- Code of Ethics
- HIPAA



First Amendment

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Professional Speech

Professional speech is any speech based on an individual's expert knowledge or judgment who is typically under a state's licensing and regulatory regime.

History of Professional Speech

- At least three U.S. Courts of Appeal created a legal category of speech called “professional speech.”
- These courts ruled that when licensed professionals provide information in the course of a professional relationship, their speech does not receive heightened protection under the First Amendment.



Supreme Court

National Institute of Family and Life Advocates v. Becerra

California passed a law to force licensed “crisis pregnancy centers” to provide information about the availability of state-provided health services, including abortions and that they were not a medical facility.

NIFLA v. Becerra Cont.

The U.S. Ninth Circuit Court of Appeals ruled that the state law was constitutional since it governed “professional speech” and speech by “professionals” should be accorded less First Amendment protection than other speech.

NIFLA v. Becerra Cont.

- In 2018 the Supreme Court rejected this decision.
- Speaking for the majority, Justice Clarence Thomas wrote:

“[T]his Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’ This Court has ‘been reluctant to mark off new categories of speech for diminished constitutional protection.’”

NIFLA v. Becerra Cont.

- States could take away First Amendment rights “by simply imposing a licensing requirement.
- Didn’t limit a state’s ability to impose informed consent requirements and other regulations on professional conduct.

NIFLA v. Becerra Cont.

“Becerra may be viewed as an abortion case, but I see it as a factual disclosure requirement case, akin to those concerning tobacco warning labels or nutrition labels.”

Jennifer L. Pomeranz, assistant professor of public health policy and management at NYU College of Global Public Health

Tingley v. Ferguson

- In 2018, the State of Washington passed a law prohibiting state-licensed therapists from trying to change the sexual orientation or gender identity of a patient under 18 years old.
- Every leading medical and mental health organization has warned that these practices put young people at risk of serious harm, including depression, substance abuse, and suicide.

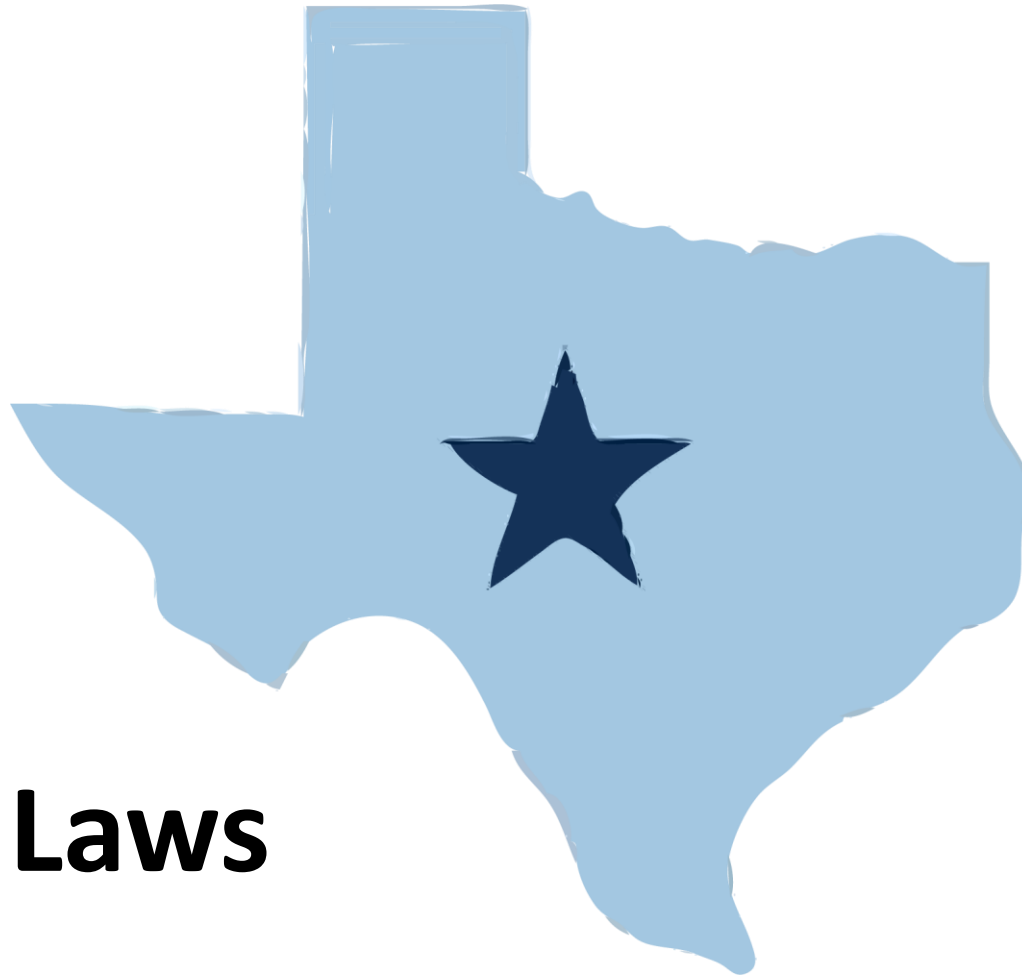
Tingley v. Ferguson Cont.

- In 2021 Brian Tingley, a therapist and advocate of conversion therapy challenged the law.
- In August 2021, the federal district court for the Western District of Washington upheld the law and rejected Tingley's challenge.
- In October of 2022 a group representing Tingley filed a petition with the U.S. Court of Appeals for the 9th Circuit.

Tingley v. Ferguson Cont.

Alliance Defending Freedom: Arguments

- A counselor shouldn't be used as a tool to impose the government's views on their clients.
- The government has no business dictating what personal goals a client can or can't pursue in counseling.
- Courts have consistently kept the government from prying into conversations between individuals and the professionals from which they seek help.



Texas Laws

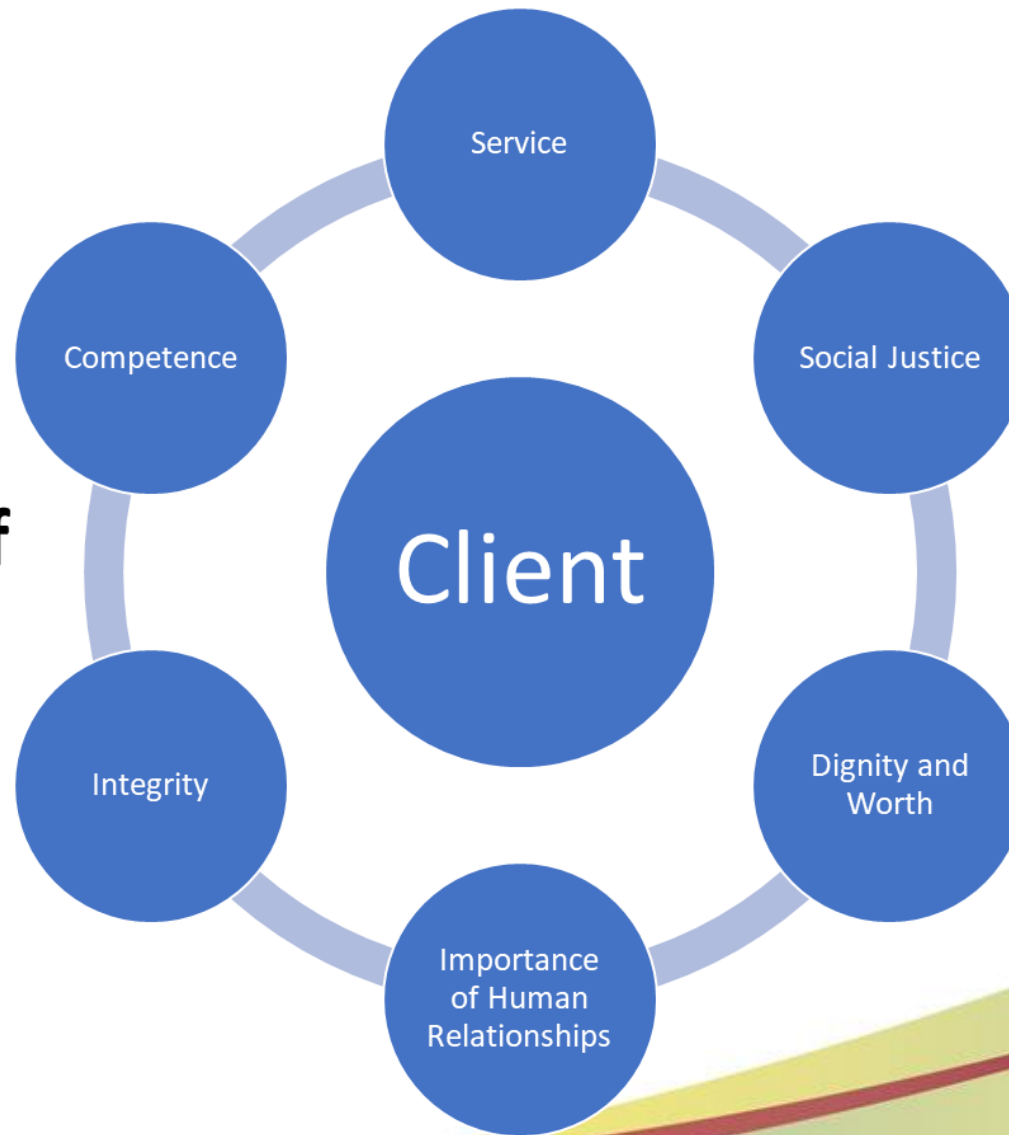
What's at Risk Now and In Session?

- Body Autonomy
 - SB 8 and Abortion Ban
 - Gender Affirming Care
 - Don't Say Gay
- Critical Race theory and Academic Discourse
- Religious Refusal in Licensure



NASW Code of Ethics

Values in the NASW Code of Ethics



How Important is the CoE?

- Integral part of social work in every state – whole or in part of all statutes
- Accepted as a universal foundation of the profession - relevant to all social workers, including students
- Designed to help social workers identify relevant considerations when professional obligations conflict or ethical uncertainties arise



Health Insurance Portability and Accountability Act (HIPAA)

HIPAA

- Protects patients' confidential health information.
- Allows workers and their families to continue or transfer their health insurance coverage when they change jobs.
- Reduces healthcare fraud and abuse.
- Creates an industry-wide standard for healthcare billing and other processes.

HIPAA Privacy Rule

- Protected health information (PHI)
 - The individual's past, present, or future physical or mental health or condition;
 - The provision of healthcare to the individual; or
 - The past, present, or future payment of health care to the individual.

HIPAA Privacy Rule

- Permitted PHI disclosures:
 - Prevent imminent harm.
 - Facilitate treatment, payment, and healthcare operations.
 - Required by law (i.e.- mandatory reporting).

Client (Youth) Says Don't Tell My Parents

Generally, HIPAA offers no protection to minors and requires healthcare providers to release a minor patient's medical records to the child's parent or guardian upon request.

There are exceptions to this rule.

HIPAA Exceptions for Youth

- Minor is emancipated or lives on their own.
- The parent or guardian consents to patient-provider confidentiality.
- Abuse, domestic violence, or neglect.
- Court discretion.

HIPAA Documentation

Medical Record

Not Protected

- Consultation notes
- Discharge summaries
- Histories and physicals
- Procedure notes
- Progress notes

Therapy Notes

Protected


- Psychotherapy notes that are kept separate from the patient's medical record
- Analyze the contents of a conversation during a session
- Subjective impressions, not treatment information

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Risk & Policy



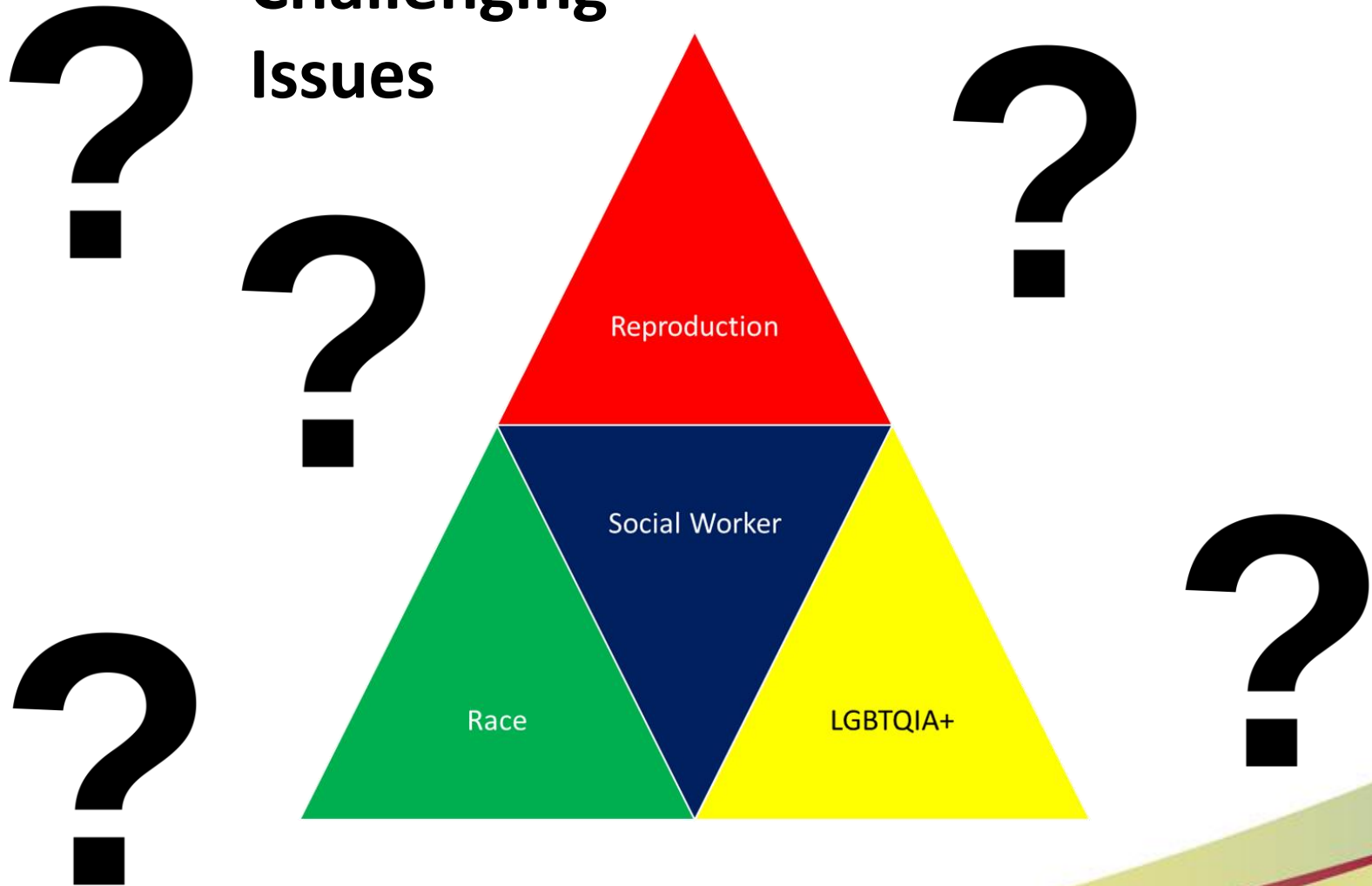
How do we develop policies that balance our knowledge of the law, best practices, willingness to support clients and awareness of our community's culture?

Risk appetite vs. risk tolerance

If risk appetite represents the official speed limit of 70, risk tolerance is how much faster you can go before likely getting a ticket.



Challenging Issues



Developing Policy

- Collaborate with staff on your definition of a “safe space”
 - Know the rules and laws
 - Federal laws
 - State laws
 - Local ordinances
 - District policy
- Know your rights (i.e. – stickers, flags)

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Developing Policy

- Legal protections exist for what a client has experienced vs what they hope to achieve
 - Example: pre and post reproductive choices
- Cite the Code of Ethics and other best practice resources explicitly in policies
- Explore the differences with staff between advocacy and discussion

Developing Policy

- Documentation
 - Consider impact of gender (all notes in they/them/their etc.)
 - Considerations of funding or funders?
 - Neutral terms and broad subjects (discussed health, life choices, social activities, etc.)
 - Will what you document place another person at risk?
 - Knowledge possessed vs knowledge documented

Developing Policy

- Speak with your Insurance Provider
 - Discussion with NASW ASI revolved around the gray areas of supporting youth/families in the face of oppositional laws and whether a person/group would still retain coverage
- Build allies with community groups

Case Study



Case Study: U of Idaho

In September of 2022, the University of Idaho shared a memo based on their legal assessment of the state's near-total abortion ban.

[Source](#)

Case Study: U of Idaho

- Employees are barred from a variety of activities (including but not limited to):
 - Promoting abortion
 - Counseling in favor of abortion
 - Referring for abortion

Case Study: U of Idaho

- Employees are allowed to engage in these activities:
 - Directing students to sources of information outside the university
 - Having classroom discussions on topics related to abortion when limited to discussions and topics relevant to the class subject and instructor neutrality in the discussion.

Case Study: U of Idaho

Counseling or interacting with students.

“Those university employees who counsel, or otherwise regularly interact with students in any fashion as part of their employment, should be aware of these prohibitions and proceed cautiously at any time that a discussion moves in the direction of reproductive health, including abortion. If a discussion moves into this area, students should be clearly informed that Idaho law prohibits the university and its employees from counseling in favor of abortion, referring for abortion or promoting abortion. The earlier this occurs in a conversation that is moving into the subject, the less the risk to the employee.”

Case Study: U of Idaho

Non-counseling context.

“These prohibitions apply to the activities of university employees while ‘on the job’ even outside the context of counselling students. Employees who wish to counsel, promote or advocate in favor of abortion must do so outside of the performance of their job duties and without use of any university resources. In addition, there can be no statements or inferences that the university supports any such activities or positions. This is similar to the university’s policy on political activities which, while recognizing the rights of individuals to engage in political activities, requires that this be done on the employee’s personal time and without any use of university resources.”

Case Study: U of Idaho

Information outside university.

“Directing students to private groups or agencies of another state, where students can receive a discussion of all aspects of the topic and be presented with all alternatives legally available to them, is not barred, however, in doing so, university employees must remain neutral on the subject of abortion and simply reference the ability of the outside sources to have a broader discussion of all aspects of the topic.”



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