My Roles as A Mental Health Professional: Where Do They Start and Where Do They Stop?

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One Grand Mantra

Good Clinical Care
IS
Good Legal and Ethical Risk Management
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Which Also Means:

Except in Rare Circumstances:
You cannot be providing good clinical care if you are violating law and/or ethics

You cannot be adhering to legal and/or ethical practice if you are providing clinical care below the professional standard of care

Overview

- Origins of professional ethics and relationship to law
- The crucial professional "special relationship"
- Identifying the "client" of the MHP
- Legal and ethical duties owed to the "client"
- Clinical distinguished from forensic MH roles
- Potential conflicts of roles and boundaries
- "Scope of practice" and "role in practice" issues
- Potential organizational tensions or conflicts
- Emerging issues in forensic mental health ethics

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The Emergence of Professional Ethics in the Healing Professions

What a long, strange trip it's been….

Who Is This?

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Emergence of Professional Ethics

- Professional conduct in common law
- Early emergence of regulated professions
- Professional ethics in human rights law
- Post-WWII emergence of professions
- Applied ethics movement
- Emergence of mental health professions
- Emergence of specialized MH professionals
- Emergence of specialized ethics codes

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Experiments Included:

"Freezing" Studies

Twin Studies

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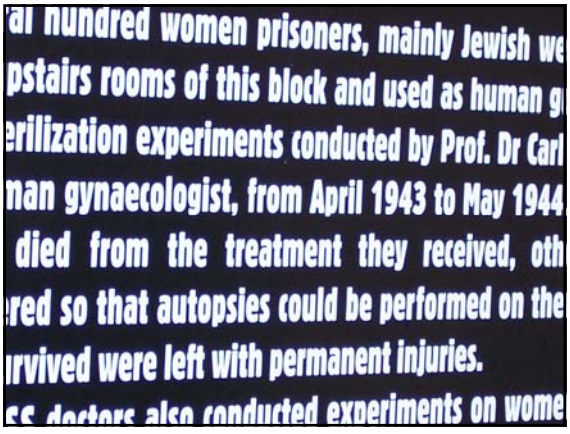

Basis for Prosecution?

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1932 – 1972

Tuskegee Syphilis Study

Some 600 African American men enrolled in a study of treatment of syphilis with antibiotics with men in the untreated sample never treated once antibiotics found effective

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1939 – 1945

Nazi War Crime Experiments

Nazi leadership photographed here . Policies included medical experimentation on "subhuman" populations. Forty-four percent of German physicians were Nazi party members

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1944 – 1974

Cold War Radiation Experiments

American soldiers unknowingly exposed to experiments intended to determine "acceptable" levels of radiation exposure on "tactical nuclear battlefield"

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1946-1948

Guatemalan STD Experiments

Prostitutes or direct injection to face or penis used to inflect 696 men with syphilis, 772 with gonorrhea, 142 with chancres without informed consent to test antibiotics for STD treatment. Subjects were prison inmates, patients in a mental hospital and army soldiers. Study collaborators included US Public Health Service and was funded by US NIH. US apologizes in 2010.

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Mid-1950's

Birth control experiments with Puerto Rican women

Drug manufacturer G.D. Searle provides high dose Enovid for clinical trials of oral contraception. Subjects were recruited from housing projects and were told that the drug prevented pregnancy but not that they were in an experimental clinical trial including study of potentially dangerous side-effects. Two deaths during the trials never investigated.

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1963

Jewish Chronic Disease Hospital Studies

Injection of live cancer cells into debilitated patients

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1963-1966

Willowbrook State School Studies

Injection of live hepatitis into developmentally delayed children as a condition of admission

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1999

Death of Jesse Gelsinger

Death of patient subject enrolled in gene replacement therapy experiment

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Some Steps Along the Way

- 1947 Nuremburg Code
- 1947 APA Ethics Code
- 1948 UN Declaration of Human Rights
- 1954 First federal human research policy
- 1964 Helsinki Declaration
- 1980's FDA regulations and revisions
- 1995 Human Bioethics Advisory Committee
- 1996 HIPAA Privacy Rules
- 2000 Office of Human Research Protection

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Origins of Professional Ethics

- **1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority (APA Ethics Code revision, 2010)**
- If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. *Under no circumstances may this standard be used to justify or defend violating human rights.* [Emphasis added]

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Ethics and Relationship to Law

- Ethics as a ***process of reasoning***
- Incorporating ***principles and values***
- Seeking to ***support/achieve a good***
- Or to ***minimize or avoid a harm***
- Professional ethics applies to our decisions and actions as MH professionals with those to whom we owe duties arising from the professional relationship
- Most difficult situation: A ***dilemma***

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Ethics and Relationship to Law

- Ethical standards have interplay with law:
  - When reflected in professional regulations such as when incorporated by licensing boards for MHPs
  - When a finding of violation by a professional association has "collateral" consequences
  - When used to establish the "standard of care" for a civil lawsuit alleging professional malpractice
  - When relied upon in organizational proceedings to scrutinize the work of a MHP in that setting
  - Other?

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The crucial "special relationship"

- Distinguishing between professional relationships and personal, private relationships
- Considerations in the "special relationship" incl:
  - When the "special relationship" begins
  - Ethical and legal duties owed to the "client"
  - "Fiduciary duties" owed to the client
  - Informed consent and the professional "contract"
  - Making adjustments within the prof relationship
  - Avoiding conflicts of interest, multiple relationships
  - Terminating the professional relationship

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Got Client?

- Critical that your client(s) be clearly identified
  - Key ethical and legal duties flow to your client(s)
  - The client generally controls the onset, authorization, goals, modification, and termination of professional services as well as information about it
  - Consider ethical and legal duties to others (often defined in terms of who your client is) that arise through ethics or law…..Examples?
  - Distinguishing organizational clients (e.g., correctional or other agencies, employers) or those clients defined by their role (e.g., judge, attorney) in a situation

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Got Client?

- Legal and ethical duties owed to client include:
  - Informed consent (distinguished from assent)
  - Clarity regarding professional role, methods, goals
  - Adherence to rules regarding privacy
    - Confidentiality and its exceptions
    - Testimonial privilege and its exceptions
  - Relevant professional competence
  - Avoiding conflicts of interest, dual/mult relationships
  - Identify and seek to resolve ethical/legal tensions
  - Reasonable provision and termination of services
  - Fiduciary duty (protecting interests of client)

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Got Role?

- What is your ***specific professional*** role in relationship to your identified client(s)? Given that role, what will you be doing and what will happen to the information generated and the work product outcomes from your work?

- Clinical versus Forensic MHP roles
- Assessment and evaluation
- Framing and providing clinical care/services
- Supervision, consultation
- Administration
- Other

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Clinical v. Forensic MH Roles

- To Assist Person To Reduce Suffering And Disability, To Maximize Functioning
- To Produce Forensically Defensible Evidence For Legal Proceedings; To Achieve a Legally Relevant Outcome (e.g., restore to competence)
- Client is Usually The Person Referred or Their Legal Guardian
- Client Is Court (if Court ordered), Attorney (if retained), or Organization But Rarely Person Being Assessed or Treated

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Clinical and Forensic MH Roles

- Driven By Needs of Person Referred for Evaluation or Treatment
- Driven By Legal Issues Or Other Needs In the Specific Case, Rarely ***Only*** By Needs of Person Referred
- Professional Services Proceed Usually Only After Proper Informed Consent By Person Receiving Services (Or Legal Guardian)
- Professional Services Can Usually Proceed Without Informed Consent. Assent is Preferred But Often Not Required.

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Clinical and Forensic MH Roles

- Professional Services are Driven By Needs of Person Served
- Professional Services are Driven By Legal Issues, Legal Goals Or Other Needs Aside From Need of Person Receiving Services
- Generally Relies Heavily Upon Information Provided By Person Being Evaluated
- More Likely To Have Multiple Sources, Multiple Collaterals

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Clinical and Forensic MH Roles

- Clinical Stance is Empathic and Intended to be Helpful
- Clinical Stance Is "Skeptical" and Intended To Investigate and/or to Safeguard Against Manipulation or Malingering
- Pacing and Timeline Is Driven by Clinical Needs of Person Presenting for Help
- Pacing and Timeline is Driven By Trajectory Of the Legal Case, Needs of Agency/Organization or Other Externalities

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Clinical and Forensic MH Roles

- Frame: Information Provided By Person Is "Narrative" From Perspective of Person
- Adjustments of Approach Made In Light Of New Needs or Changes in Assessment of Needs to Clinically Serve
- Frame: Critical That Information be "Real" and "Accurate" From Perspective of Law
- Adjustments of Approach Made In Light Of New Concerns about Integrity of Information (e.g., Malingering) or Legal Issues

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Clinical and Forensic MH Roles

- Formulation of Case Can Change On Basis of New Information—Diagnosis as Working Hypothesis For Treatment
- Involvement Ends When Person (or Guardian) Decides, Can Always Re-engage If Chooses, and Case Formulation Reconsidered
- Formulation of Case Can Change On Basis of New Information—But Diagnosis Is Often Irrelevant, Legal Implication Often Guides
- Involvement Ends When Case Ends or Organizational Contact or Control Ends, Often Cannot Revisit Information or Opinions

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Ethical Issues: Checklist

- Who is the identified client of the MHP?
  - Court-ordered
  - Retained by attorney
  - Employee of agency providing forensic services
  - Retained by agency to provide forensic services
  - Court-involved person or family
  - Other

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Ethical Issues: Checklist

- What is the role of the MHP in the case?
  - "Pure" expert testimony for general education
  - Case-specific expert testimony based upon forensic evaluation in the specific case
  - Treating clinician for court-involved person(s)
    - Court-ordered treatment
    - Privately obtained treatment
  - Other
    - Litigation consultant
    - Probation officer or other professional also licensed MHP

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Ethical Issues: Checklist

- What methods/procedures are relied upon?
  - Have the relevant clinical and/or forensic issue(s) been clearly and accurately articulated, and any interplay identified and considered?
  - Are the methods or procedures tailored to address the forensic issue (are they relevant)?
  - Are they sufficiently based in behavioral science to serve as a foundation for expert inference or opinion (are they scientifically reliable?)
  - Has the MHP remained within the role of the kind of witness that they are in this case?
  - Has the MHP remained within the scope of the scientifically reliable information obtained?

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Ethical Issues: Checklist

- Have "privacy issues" been properly handled?
  - Clarification of who is "client" in this case and proper warnings if the court-involved person is not the identified client
  - Confidentiality
    - Warnings/Waiver if person is not the identified client
    - Obtaining proper releases/orders for protected client information
  - Privilege
    - What information is privileged, who owns the privilege?
    - No privilege, psychotherapist privilege, attorney-client
  - Mandated reporting issues

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Ethical Issues: Checklist

- Have improper dual roles been avoided?
  - Forensic versus clinical roles
  - Neutral, educative role versus advocacy role
  - Remaining within scope of witness role (e.g., "clinical opinion" witness v. expert witness)
  - If court-ordered, remaining within the scope of the court's order for forensic services (e.g., GAL moving beyond court-ordered assessment to attempt to mediate a case settlement)
  - Conflicts arising from personal experience, personal political, religious, moral or other views that could compromise neutrality

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Ethical Issues: Checklist

- Has the MHP remained within proper boundaries of professional competence?
  - General clinical training alone is generally insufficient for providing forensic mental health services
  - Knowledge of relevant law, legal procedures
  - Knowledge of specialized rules governing provision mental health services in forensic context
  - Knowledge of specialized forensic assessment procedures, empirically-validated tools, empirically based treatments and interventions

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Ethical Issues: Checklist

- Has the MHP properly disclosed any limitations in the available information, or plausible alternative ways of understanding that information?
  - Limitations of scientific research on the topic
  - Limitations of available forensic methods
  - Limitations in available information in the case
  - Disclosure of what, if any, differences the above limitations may make in an individual case

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Ethical Issues: Checklist

- Has the MHP avoided usurping the role of the trier of fact by making overt or covert determinations of credibility, or by insinuating personal views or opinions are based in reliable science?
  - Credibility determinations
  - Strongly held personal views, positions
  - Especially where the trier of fact may not be able to detect the bias interjected by the clinical or expert witness

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Scope of Practice and Role in Practice

- "Scope of Practice" refers to services rendered under a specific license type or with particular training and experience supporting competence
  - Use of assessment tools requiring specific licensure
  - Use of specialized assessment tools (e.g., SO)
  - Assessment of particular clinical populations
    - MR/DD/Autism spectrum; juveniles; cultural or linguistic minorities; TBI; gang culture;
  - Selection, treatment matching, implementation of clinical treatment/interventions
  - Issues about medication, herbal treatments, etc.

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Scope of Practice and Role in Practice

- "Role in Practice" refers to services rendered in a specific professional role or over time
  - Adequate informed consent
  - Clarity and transparency especially about:
    - Identified client(s), role, methods, goals
    - Limitations on confidentiality, privilege
    - Control of work products of professional services
    - Disclosure of foreseeable dual roles, conflicts of interest
  - Managing professional boundaries
    - Sexual and non-sexual boundaries
    - Personal and professional boundaries
  - Initiation, course and termination of professional role

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Potential Organizational Tensions or Conflicts in Forensic MH Practice

- Key: Identifying the client for providing services
- Managing organizational demands, esp. where:
  - Subject not see MHP as aligned with own interests
  - Institutional security v. individual interests/needs
  - MH services provide basis for discipline/punishment through disclosures of information or "preparing" subject
  - Available resources are clinically inadequate and/or where following established practice may be below the standard of care
  - Structural organizational flaws beyond impact of individual MHP which reflect societal biases, discrimination, fears and which may rise to violations of civil or human rights

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Model for Ethical Problem-Solving

(adapted from Bush, Connell, Denny, 2006)

- Consider significance of the context/setting
- Identify and use legal/ethical resources
- Consider one's own personal beliefs/values
- Frame the core issue(s) or dilemma(s) and articulate values/interests at stake in the situation
- Develop possible approaches or solutions
- Consider the potential consequences of option
- Choose and implement a course of action
- Assess outcome, change/adjust as needed

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Emerging Issues in FMH Practice

- MHP embedded in national security activities or military "human assets and terrain" activities
- Commercial development of forensic assessment tools with data sets, algorhythms, logic models or other research or test construction elements protected by "proprietary interests" so that others are unable to independently verify reliability or validity, or explain scientific basis of the assessment tools in courtroom testimony

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Emerging Issues

- Use of electronic communications to remotely provide forensic assessments or consultations
- Use of social media in research related to litigation (e.g., jury selection, determination of need for change of venue, community attitude surveys regarding issues or parties involved
- Challenges to professional competency of persons in quasi-forensic roles if they have minimal forensic training (e.g., Parenting Coordinators, appointed guardians for persons with high risk behaviors, therapists with general training providing interventions to special forensic populations)

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Emerging Issues

- Navigating forensic assessment and expert opinion in light of incremental changes in laws of evidence (Frye => Daubert) and resulting tension between "expert" standard and "clinical practice" standard for rendering opinions in court
- Distinguishing between "testifying" versus "consulting" experts where the MHP works closely with retaining attorney to shape and strategize regarding the case
- Professional role and standard of care issues when asked to participate on decision-making bodies on the basis of relevant expertise (e.g., Sex Offender Registration Boards, Psychiatric Review Boards, Parole Boards)

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Emerging Issues

- Establishing and enforcing professional standards for forensic and "higher stakes" clinical practices (e.g., suicidality, serious self-injury, dangerousness, sexual offender, risk assessments, discharge of higher risk inpatients) as each practice area becomes more refined, the research more extensive and complex yet more available to practitioners, and more standardized tools with a purported empirical basis become available

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Emerging Issues

- Related to the prior issue, advances in tools for Structured Professional Judgment. Have we reached a consensus that unaided clinical judgment is now substandard for risk estimates? Is it now a duty of professional competence to be familiar with these tools, their research basis, issues in their case-specific application, and their psychometrics (including predictive validity)?

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Emerging Issues

- Treatment or intervention "matching" between mentally disordered persons with high risk behaviors as more empirically-based or validated treatments/interventions are established, especially given significant "lag time" between identification of "best practices" or validation of treatments/interventions in research centers and broad implementation among the relevant professional community

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Emerging Issues

- Increased emphasis on community-based rather than institutional care of mentally disordered persons with high risk behaviors and development of different professional (clinical and forensic) competencies and roles, models for care and risk management over time, and integration of a continuum of responses to risk behaviors. Empirically-based recommendations about site and modality of interventions consistent with less restrictive level of care required.

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Emerging Issues

- Grappling with the policy and clinical/forensic implications of the Adverse Childhood Experiences Study (CDC) and emerging neuroscience about impact of trauma and/or chronic distress in childhood, adolescent brain development
- Grappling with the implications of increasing diversity of the population of the US for clinical and forensic cultural competence, "globalization" of clinical and forensic research and practice development

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Emerging Issues

- Grappling with training, standard of care and professional role/practice issues in environment of functional care rationing, increasingly scarce resources, insertion of clinical and forensic MHPs in "gate keeping" roles triaging access to levels, types and intensities of care or containment. These issues are particularly challenging when available professionals cannot meet need (e.g., child/adolescent psychiatry, specialty areas of FMH practice)

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Emerging Issues

- Grappling with the implications of data that continues to persistently show disproportionate criminalization of youth and adults with significant mental disorder, persons of color, and/or persons of lower socioeconomic status. Particularly in added context of conditions of imprisonment in US compared to other developed countries, failure of rehabilitative ideal.

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Resources

- Professional ethics codes promulgated by the major professional associations of mental health professionals (e.g., AMHCA, NASW, AAPL, APA, AP-LS)
- Specialty ethics guidelines promulgated by professional organizations with a forensic mental health focus (e.g., APA Division 41)
- Practice Guidelines promulgated by major professional organizations focusing upon specific diagnoses or clinical presentations

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Resources

- SS Bush, MA Connell, RL Denny. Ethical Practice in Forensic Psychology: A Systematic Model for Decision-Making. Washington, DC: APA Press, 2006
- PJ Candilis, R Weinstock, R Martinez. Forensic Ethics and the Expert Witness. NY: Springer Science, 2007
- Martinez R, Candilis PJ: Commentary: toward a unified theory of personal and professional ethics. J Am Acad Psychiatry Law 33:382–5, 2005

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Resources

- Kirk Heilbrun, Thomas Grisso, Alan M. Goldstein. Foundations of Forensic Mental Health Assessment. Oxford University Press, 2008

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