



Introduction

Psychologists' early contact with the legal system can be traced back to the early 20th century when Hugo Munsterberg, in *On the Witness Stand: Essays on Psychology and Crime* (1908), made many proposals about what psychology had to offer the law. Around this same time, other psychologists began evaluating wayward youth and testifying about their specific needs in the newly developed juvenile courts (Otto & Heilbrun, 2002; Travis, 1908). But it has only been within the past half century that forensic psychology has come into its own as a specialty. In 1969, the American Psychology-Law Society—an interdisciplinary group of professionals who shared an interest in the intersection of psychology and law—was formed (Crocker & Kovera, 2010). In 1978, with a \$1000 grant from that society, the American Board of Forensic Psychology was established (Kaslow, 1989). The mission of the American Board of Forensic Psychology was and remains to certify psychologists who are competent to provide forensic services. In 1991, the Specialty Guidelines for Forensic Psychologists were published by the American Psychology-Law Society (Committee on Ethical Guidelines for Forensic Psychology, 1991); they were revised and approved by the Council of Representatives of the American Psychological Association (APA) in 2012 (APA, 2013b). In 2001, the APA recognized forensic psychology as an applied specialty.

OVERVIEW AND CONTEXT

Forensic psychology has long been dominated by the evaluation of litigants in civil and criminal proceedings. Considerably less attention has been paid to specialized treatment of forensic populations. Nonetheless, the primary activities of forensic psychologists involve assessment and treatment—much like their counterparts in more traditional therapeutic settings, such as

hospitals, clinics, community mental health centers, and private offices. But the differences between practicing in forensic and therapeutic settings are considerable and have been documented by many (see, e.g., Appelbaum & Gutheil, 2007; Greenberg & Shuman, 1997; Heilbrun, Grisso, & Goldstein, 2009; Heilbrun, DeMatteo, Marczyk, & Goldstein, 2008; Lipsitt, 2007; Martindale & Gould, 2013; Melton, Petrila, Poythress, Slobogin, Lyons, & Otto, 2007; Weissman & DeBow, 2003). As summarized in Table 1.1, there are a number of dimensions on which therapeutic, forensic examination, and forensic treatment roles can be compared. These include the identified client and service recipient, the decision maker on aspects of service provision, the goals of service, the psychologist's role as it affects interactions with the service recipient, the nature of privacy matters such as confidentiality and privilege, the kinds of information that are typically accessed and relied on, and the value of diagnosis and psychological testing.¹

Most sources of authority that impact the work of psychologists focus on the provision of services in therapeutic settings. There are a few exceptions (e.g., the Specialty Guidelines for Forensic Psychology, APA, 2013b; the Guidelines for Psychological Evaluation in Child Protection Matters, APA, 2013c), but most of the influences on psychological practice (e.g., state practice acts, federal laws such as the 1996 Health Insurance Portability and Accountability Act [HIPAA], and ethical principles and practice guidelines promulgated by professional organizations) focus on the activities of psychologists when providing therapeutic services. This emphasis and the resulting neglect of the differences between forensic and therapeutic activities in these documents pose a challenge for psychologists practicing in forensic settings. This challenge is the basis for this book.

SOME PRELIMINARY MATTERS

As we begin, we think it important to address a number of overarching and foundational issues. These will recur in discussion throughout the remaining chapters.

¹We are aware that some commentators, when addressing this issue, distinguish between forensic pursuits and clinical pursuits. We consider this distinction to be inaccurate, however. Because all forensic activities—at least those that involve treatment or assessment of persons—are clinical activities, a more accurate distinction is between therapeutic and forensic activities, while recognizing that forensic treatment involves both.

TABLE 1.1

THERAPEUTIC, FORENSIC EXAMINATION, AND FORENSIC TREATMENT ROLES IN PROFESSIONAL PSYCHOLOGY: COMPARING RELEVANT DIMENSIONS

	Therapeutic Role	Forensic Examination Role	Forensic Treatment Role
Client	Service recipient	Referral source	Service recipient (and sometimes referral source)
Decision maker	Service recipient	Examiner and referral source	Service recipient (and sometimes referral source)
Goals of service	Improve client's functioning	Provide information to referral source about examinee's functioning as it relates to a legal issue	Improve service recipient's functioning as it relates to a legally relevant capacity, issue or mandate
Psychologist's role	Aligned as advocate	Neutral	Aligned as advocate
Psychologist's obligation	Assist therapy client	Provide information to referral source about examinee's functioning as it relates to a legal issue	Assist service recipient and provide information to referral source
Confidentiality	Traditional psychologist–client confidentiality	None if court ordered; Limited under some circumstances in a retained case	More limited than traditional psychologist–client confidentiality
Privilege	Traditional psychotherapist–patient privilege	Attorney-client privilege in some retained cases	More limited than traditional psychotherapist–patient privilege
Sources of information	Client (with perhaps limited reliance on collateral data and informants)	Examinee (with considerable reliance on collateral data and informants)	Service recipient (with considerable reliance on collateral data and informants)
Importance of diagnosis	Significant insofar as it directs treatment decision making	Limited (depending on legal question)	Significant insofar as it directs treatment decision making
Utility of traditional psychological assessment tools	Significant insofar as it informs diagnostic formulation	Limited, with greater reliance on assessment tools designed for forensic assessment contexts	Significant insofar as it informs diagnostic formulation

Challenging Forensic Psychology’s Historical Emphasis on Assessment and Neglect of Treatment

Forensic psychology’s identity began with assessment in legal settings. A quick review of the table of contents of mainstream interdisciplinary journals such as *Law and Human Behavior*, *Behavioral Sciences & the Law*, and *Criminal Justice and Behavior* makes it clear that this is still true. But there appears to have been a general shift in thinking about this matter over the last two decades. Perhaps most reflective of this change are differences between the 1991 version of the Specialty Guidelines for Forensic Psychologists (Committee on Specialty Guidelines, 1991) and the revised Specialty Guidelines for Forensic Psychology (APA, 2013b). Whereas the 1991 forensic practice guidelines do not address treatment in any meaningful way, guideline 4.02.03 of the revised guidelines explicitly discuss “forensic treatment” and how it can be distinguished from treatment of a client whose involvement in litigation bears no relationship to the treatment itself.

Although some therapeutic services can be considered forensic in nature, the fact that therapeutic services are ordered by the court does not necessarily make them forensic.

In determining whether a therapeutic service should be considered the practice of forensic psychology, psychologists are encouraged to consider the potential impact of the legal context on treatment, the potential for treatment to impact the psycholegal issues involved in the case, and whether another reasonable psychologist in a similar position would consider the service to be forensic and these Guidelines to be applicable.

Although most of our discussion in this book addresses ethical matters encountered when conducting forensic psychological evaluations, we will, at times, consider treatment issues as well.

Distinguishing Ethics from Good Practice and from the Law

This is not a book about how to conduct forensic psychological evaluations or provide treatment to different forensic populations. There are other resources for that (e.g., Melton et al., 2007; Weiner & Otto, 2014; also see the many titles in the Oxford University Press series *Best Practices in Forensic Mental Health Assessment*). The focus of this book is ethics—the ethical practice of psychology when providing forensic services. Nonetheless, we sometimes incorporate good forensic practice when considering

ethical issues. Ethical guidelines contribute in important ways to decisions and behavior in professional practice. Law, standards of practice, science, and one's own values also contribute. Even though these areas can overlap, we focus on ethics in this book—but with the caveat that ethics is only a part of what should shape professional behavior.

It can be particularly difficult to discuss ethical obligations without considering legal obligations. Thus, throughout this book, we discuss how the law can interact and sometimes conflict with ethical obligations. Similarly, it can be challenging to talk about ethical forensic practice without considering good forensic practice.

Importance of Knowing the Law and Rules of the Local Jurisdiction

Although ethical and other professional obligations are generally consistent across settings,² the laws and rules that affect the practice of psychology can and often do vary. Because we cannot reference the relevant laws and rules for all jurisdictions, we emphasize that the reader must be familiar with applicable laws and rules in the states in which he or she practices. Although we sometimes cite particular state or federal statutes or rules as examples in making a point, we do not apply them beyond that specific discussion. When we incorporate rules of evidence, we typically reference the Federal Rules of Evidence, versions of which have been adopted in many states.

Distinguishing Between What Is Required, Prohibited, and Permitted

We are sometimes taken aback at how cavalierly some psychologists describe the actions of other psychologists as “unethical” or in violation of the law. Some courses of action are required by the Ethical Principles of Psychologists and Code of Conduct (APA, 2010a; hereinafter Ethics Code) and some are prohibited. It is only when doing something that is

²We acknowledge that this is not always the case. The Pennsylvania Board of Psychology (downloaded from www.pacode.com/secure/data/049/chapter41/s41.61.html) and the South Carolina Board of Examiners in Psychology (downloaded from www.llr.state.sc.us/pol/psychology/index.asp?file=PsyEthics.htm), for example, have put in place their own ethics codes that vary from the APA's Ethics Code in some important ways.

prohibited by the Ethics Code, or failing to do something that is required, that the psychologist acts unethically. In reality, most courses of action that psychologists would reasonably contemplate are permitted by the Ethics Code. The courses of action are neither prohibited nor required. However, among the universe of permissible courses of action, some are ill advised and others constitute better practice. We spend some time discussing these matters as well in the chapters that follow.

Recognizing That There Are Not Always Clear Answers and That Reasonable People Sometimes Disagree

We expected that there would be many matters about which we would agree when writing this book. This has been the case. But each of us has enough experience to know that the Ethics Code (APA, 2010a) and practice guidelines typically provide *general* guidance—and must be applied to the *specific* case at hand. Therefore, we also assumed that we would struggle to reach a consensus on certain challenging ethical dilemmas. Indeed, for some questions, we conclude that there *is* no clear “right answer” and that experienced, informed, well-intentioned psychologists could disagree. In these cases, we describe what we think are reasonable courses of action and our basis for drawing these conclusions. Our expectations that we would simply disagree about the appropriate course of action in other matters were realized as well. Here too we describe our various opinions and the underlying reasoning.

CHALLENGES IN ORGANIZING THIS VOLUME

As we contemplated writing this book, we spent considerable time discussing the best approach and format. We briefly considered organization by topical areas, so chapters would concern various assessment and treatment pursuits (e.g., with specific chapters devoted to the ethics of child custody, personal injury, disability, guardianship, civil commitment, civil competence, criminal competence, criminal responsibility, and criminal sentencing evaluations and other chapters devoted to treatment in various forensic contexts). However, we quickly realized that this would result in considerable redundancy, as there are more similarities than differences in the key ethical precepts in these various forensic pursuits. We concluded that it made most sense to organize our discussion around key

ethical concepts and challenges present in various forensic evaluation and treatment contexts and, when necessary, devote extra time to discussing unique challenges that may be encountered in a specific forensic evaluation or treatment context.

But this strategy has its own problems. We often struggled with where in this book to place the discussion of a particular matter. For example, does it make most sense to discuss the appropriateness of psychologists making public comments about cases in which they have been involved in the chapter devoted to privacy—or in the chapter on communicating opinions? Is it better to discuss the appropriateness of audio and video recording of forensic psychological examinations in the chapter on forensic psychological assessment or in the documentation chapter? In some cases, we agreed on the best place for the topic. In others, we address the topic, albeit in different ways and at varying levels of specificity, in more than one place.

We also deliberated about how best to demonstrate the challenges we wanted to identify and points we were trying to make. We ultimately decided to provide case examples that were loosely based on our experiences (included in “boxes” throughout the chapters).

STRUCTURE AND LAYOUT OF THIS VOLUME

In Chapter 2, we begin with a general discussion of various sources of authority that impose obligations on psychologists when engaged in forensic pursuits, including law, ethics, and professional practice guidelines and standards. In Chapter 3, we address the overarching issue of competence in forensic practice, while in Chapter 4 we discuss one of the most ubiquitous challenges in forensic practice: the issue of roles. The focus of Chapter 5 is interacting with attorneys and other referral sources and navigating some of the complex matters that arise during these interactions. Chapter 6 is devoted to informed consent and related concepts, and Chapter 7 is concerned with the privacy, confidentiality, and privilege of information gathered during forensic activities. Chapter 8 is devoted to forensic psychological assessment, and Chapter 9 focuses on ethical challenges associated with accessing, relying on, documenting, and testifying about collateral data—the use of which is a hallmark of good forensic practice. Chapters 10 and 11 are concerned with two particularly

important issues in forensic practice: documenting and communicating one's work and opinions.

A MODEL FOR ETHICAL DECISION MAKING

In forensic psychology practice, often what is “right,” ethical, and consistent with the law and good practice is clear, and there is no conflict. However, there are occasions when these sources of authority do not provide direction, are too general, may not apply to a specific forensic case, or are in conflict. These circumstances are the most challenging. In some cases, the law might demand one course of action whereas the Ethics Code (APA, 2010a) or practice guidelines suggest an alternative approach. In other cases, a careful reading of the Ethics Code or relevant practice guidelines suggests different obligations and actions. The forensic practitioner is most challenged when there is conflict between or within these sources of authority.

Many commentators have proposed models for psychologists to employ when faced with ethical dilemmas (see, e.g., Fisher, 2003; Knapp & Van-deCreek, 2012; Koocher & Keith Spiegel, 2016). Their models converge around their recommendations to:

1. Consider the ethical principles relevant to the case at hand
2. Identify persons whose interests should be considered
3. Search for and consider relevant sources of authority
4. Consult with colleagues
5. Develop various courses of actions and consider likely outcomes
6. Implement the best course of action
7. Evaluate the outcome.

We suggest a specific nine-step model adapted from the *Canadian Code of Ethics for Psychologists* (Canadian Psychological Association, 2000) that we believe ensures comprehensive consideration of relevant issues. It includes these nine steps:

1. Identify the individuals and groups who may be affected by any course of action (with particular attention to individuals and groups to whom one owes a duty or duties), their rights, and interests
2. Identify the ethical issues and principles at hand
3. Consider how personal biases, stresses, or self-interest might influence decision making in this matter

4. Seek various sources of authority that address or provide guidance with respect to the issue at hand
5. Consult with colleagues
6. Identify various courses of action and likely outcomes of each, along with associated risks and benefits to the relevant individuals and groups
7. Choose a course of action after careful consideration of relevant principles, values, standards, and guidelines
8. Evaluate and assume responsibility for the outcome, and take steps to remedy any negative outcomes that occurred
9. Take appropriate action, if indicated and possible, to prevent future occurrences of the dilemma (e.g., communication and problem solving with colleagues; changes in procedures and practices).

This model applies reasonably well to the ethical considerations we discuss in this book. The first step in responding to an ethical dilemma is to identify the individuals who are affected. This means considering the consequences of various alternative actions. It may also involve appraising how different individuals are affected by competent, ethical practice of forensic assessment or treatment and how they are affected by practice that is more problematic. As part of this consideration, we discuss the duty owed when conducting forensic assessments—and to whom.

The next step is to identify the ethical principles involved. This helps clarify one's thinking and ensures that the decision is driven by ethics and associated reasoning. This is particularly important in an adversarial legal context, where stress is high, competitive feelings may arise, and the adversarial process may impact the psychologist's perspective and decision making.

Ethics is one source of authority among several that should shape practice. Law, science, and standards of practice are others. It is sometimes difficult to separate these authorities, as there can be considerable overlap. But we attempt such separation in this book, as this yields what we consider to be a clear-headed and reasonable approach to decision making. By identifying ethical obligations, legal authorities, standards of practice, and scientific authority, it is possible to consider how well they converge—and, if they identify differing courses of action, to indicate that as part of the larger decision-making process.

Consultation with colleagues is not always necessary. But it can be particularly useful for identifying relevant substantive information (such as the sources of authority just noted). At other times, speaking with colleagues may offer a fresh perspective when considering what course of action to take. It can also be helpful in disentangling these sources and helping the practitioner weigh them, particularly when personal reactions make it hard to be impartial.

After taking these steps, one should identify different courses of action, consider each in light of relevant sources of authority and consultation, and decide which course of action is the best to take. This highlights the *process* of ethical decision making and behavior: identifying, considering, weighing, deciding, then taking action. At a minimum, this will guarantee a decision that is prudently considered, and quite likely a good one. Assuming responsibility for the outcome and dealing with any remaining problems, the next step in this model, becomes more straightforward when one has confidence in the decision. If there are remaining steps to be taken to reduce the likelihood of a recurring problem, then such a decision should also provide guidance in taking these steps.

SUMMARY

This chapter distinguished between therapeutic and forensic roles. In making this distinction, we do not discuss forensic practice that is limited to assessment. Indeed, we consider forensic treatment to be an important domain for a discussion of forensic ethics. Having described the different topics we address in this book, we turned to the nine-step process that we find useful in ethical decision making—and which we will apply in the chapters that follow. The use of these concepts, drawn from the *Canadian Code of Ethics for Psychologists* (Canadian Psychological Association, 2000), can prove valuable to psychologists as they consider how to handle various ethical dilemmas.