Ethical and Legal Issues in Counseling
Ethical Standards and Laws

- Each professional counselor has an enormous responsibility to uphold the public trust and must seek high levels of training, education, and supervision in the ethical application of counseling practices, in particular because counselors often practice behind closed doors with little oversight.

- There are a number of resources and sources of information that can help guide professional counselors as they strive to assist clients in an ethical and legal manner:
  - Ethical standards created by professional associations
  - Federal and state laws and regulations
  - Policies, guidelines, and procedures created by state boards of education and local school systems

**Ethical standards** are normally developed by professional associations to guide the behavior of a specific group of professionals.
- Ethical standards help to:
  - Educate members about sound ethical conduct
  - Provide a mechanism of accountability
  - Improve professional practice

- The ACA’s *Code of Ethics* is based on Kitchener’s five moral principles: autonomy, justice, beneficence, nonmaleficence, and fidelity.
- **Autonomy** refers to the concept of independence and the ability to make one’s own decisions.
- **Justice** means treating each person fairly, but it does not mean treating each person the same way.
- **Beneficence** refers to doing good or what is in the best interests of the client.
- **Nonmaleficence** means doing no harm to others.
- **Fidelity** involves the concepts of loyalty, faithfulness, and honoring commitments.

- **Laws** are more prescriptive than ethical standards, have been incorporated into code, and carry greater sanctions or penalties for failure to comply.
- When ethics and laws appear to be in conflict with each other, the professional counselor must attempt to resolve the conflict in a responsible manner.
- Because there are greater penalties associated with laws, the counselor will often follow the legal course of action if there is no harm to the client.

- Some professional associations have their own ethical standards or best practice guidelines.
- These codes of ethics and guidelines parallel ACA’s *Code of Ethics* but speak more directly to the specialty area

- **Best practice guidelines** are not ethics, per se, but do recommend practice standards that professional counselors should strive to uphold.

- When determining which code of ethics to follow, consider:
  - What is the setting in which one is practicing, and is there a particular code that applies specifically to that setting?
In what capacity (e.g., licensed professional counselor, marriage and family therapist, certified school counselor) is the professional operating?

**ACA Code of Ethics**
- The most recent edition of the ACA *Code of Ethics* was published in 2005.
- The *Code* addresses the responsibilities of professional counselors toward their clients, colleagues, workplace, and themselves by delineating the ideal standards for conducting one’s behavior.
- All ACA members must abide by the *Code*.
- Highlights from each of these areas will be summarized, but students should locate the actual ACA *Code of Ethics* on the ACA web site and peruse it in great detail.

**Section A: The Counseling Relationship**
- Counselors must wait five years after the counselor-client relationship has ended before engaging in any romantic or sexual relations with a client, a client’s family members, or a client’s romantic partner.

- Avoidance of nonprofessional relationships with clients is not always possible, and may even be beneficial (e.g., attending formal ceremonies, hospital visits, membership in community organizations, commerce), albeit when conducted with caution.

- Informed consent includes, but is not limited to:
  - Purposes, goals, techniques, procedures, limitations, potential risks, and benefits of services; the counselor’s qualifications, credentials, and relevant experience; the intended use of tests and reports, fees, and billing arrangements; the right to confidentiality and limitations; continuation of services should the counselor become incapacitated; obtain clear information about their records; participate in ongoing treatment planning; and right to refuse treatment at any time and the potential consequences for doing so.

- Balance assent from minors and those incapable of giving consent with those of parents and family members who hold the legal rights of consent, protection, and decision making on their behalf.

**Section B: Confidentiality, Privileged Communication, and Privacy**
- Be respectful of differing views and inform clients with whom, when, and how information will be shared.

- Take precautions to ensure confidentiality when using technologies such as computers, electronic mail, or voicemail.

- Maintain the confidentiality of deceased clients as is consistent with legal requirements and policies.
Inform parents and legal guardians of the confidential nature of the counseling relationship as well as establish a working relationship with them in order to better serve clients.

Section C: Professional Responsibility

- Be alert to signs of personal impairment and refrain from providing or offering services if the impairment could potentially harm a client.

- Assist supervisors or colleagues in recognizing impairment and if necessary, provide assistance, intervention, or consultation.

- Designate a specific colleague or “records custodian” and create a proper plan for file and client transfer in the case of incapacitation, termination of practice, or death.

- Use techniques, modalities, or procedures that have a scientific or empirical foundation and are grounded in theory. Otherwise, techniques must be labeled as “unproven” or “developing.”

Section D: Relationships with Other Professionals

- Become knowledgeable about colleagues and develop positive working relationships and communication systems.

- Be respectful of differing approaches to counseling services as well as the traditions and practices of other professional groups.

- Work to develop and strengthen relations with interdisciplinary colleagues.

Section E: Evaluation, Assessment, and Interpretation

- Take into account cultural, social and personal factors when making assessments.

- Be aware of social and historical prejudices in the pathologizing and misdiagnosis of specific individuals and groups, and be cognizant of the role of mental health professionals in the continuation of these problems.

- Generate objective findings that are supported by appropriate techniques and information when conducting forensic evaluations.

Section F: Supervision, Training, and Teaching

- Foster professional relationships and create appropriate boundaries with students.

- Be accurate, honest, and fair during the training and assessment of students.

Section G: Research and Publication

- Take the appropriate steps to destroy any documents or records that contain confidential data or may identify research participants within a reasonable period of time after the completion of a research study or project.

- Do not plagiarize or present another person’s work as your own.
When reviewing documents in a professional capacity, counselors should make valid publication decisions, review materials in a timely manner, avoid biases, and only evaluate documents that fall within one’s field of competency.

**Section H: Resolving Ethical Issues**

- If there is a conflict between ethical responsibilities and laws, professional counselors should make known their commitment to the *Code of Ethics* and work to alleviate the conflict.

- Counselors may follow legal requirements or regulations if the ethical conflict cannot be resolved in this manner.

- Seek out further action such as referring to voluntary national certification bodies, state or national ethics committees, state licensing boards, or any suitable institutional authorities when informal resolution is not appropriate or the issue is not properly resolved.

- Do not deny a person’s advancement, admission to academic programs, employment, promotion, or tenure based only upon their having made an ethics complaint nor their being the subject of an ethics complaint.

**Ethical Decision Making**

1. Identify the problem.
2. Apply the ACA *Code of Ethics*.
3. Determine the nature and dimensions of the dilemma.
4. Generate potential courses of action.
5. Consider the potential consequences of all options.
6. Choose a course of action.
7. Evaluate the selected course of action.
8. Implement the course of action.

Four steps to consider when a decision has been made:

1. Would you treat others this same way if they were in a similar situation?
2. Would you suggest to other counselors this same course of action?
3. Would you be willing to have others know how you acted?
4. Do you have any lingering feelings of doubt or uncertainty about what you did?

**The Court System**

- **Statutory law**: created by legislatures.

- **Constitutional law**: results from court decisions regarding constitutional issues.

- **Common law**: results from other court decisions.

- There are 51 U.S. court systems (the courts for the 50 states and the federal court).
- Both state and federal courts can enact decisions affecting counselors.
- Decisions from state courts are binding only on persons living within that state but may serve as precedent for a similar case in another state.
**Statutory Law**
- Statutory law is the body of mandates created through legislation passed by the U.S. Congress and state legislatures.
- Much of the structure of health, mental health, and education, and many of the policies that govern their implementation are found within these mandates.
- The majority of legislation influencing counselors is passed by state legislatures and concerns two types of legislation: creating state legislation to implement federal legislation, and enacting new, state-specific legislation.

**State and Local Agencies**
- Most state departments of mental health, which ordinarily house licensing boards, can enact regulations that are binding upon the practice of counseling within the state.
- Most state departments of education have the ability to enact regulations that are binding on the school districts within the state.
- The regulations often encompass areas not addressed through other state legislation or add detail to state legislation.
- State agencies also develop policies, which are often detailed explanations of how to implement a specific law.
- State agencies may also issue guidelines, which are suggestions about how to address a specific issue.

**Making Decisions**
- Failure to understand the law, and by extension policies, procedures, and guidelines, is not an acceptable legal defense.
- When making decisions:
  - Use common sense.
  - Follow the logical course of action.
  - Document all actions.
  - Consult with manuals, supervisors, and other professionals.
  - Be aware of how personal beliefs and values impact the way you think about issues, the clients and their needs, and the options that you perceive to be available.
  - Try to do what is in the best interest of the client.

**Professional Competence**
- Counselors should:
  - Maintain professional growth through continuing education
  - Maintain accurate knowledge and expertise in areas of responsibility
  - Accurately represent credentials
  - Provide only those services for which qualified and trained

**Liability, Negligence, and Malpractice**
- If professional counselors fail to exercise “due care” in fulfilling their professional responsibilities, they can be found guilty of civil liability; that is, the counselor committed a wrong against an individual.
Negligence may be found if the wrong committed results in an injury or damages. Malpractice is the area of tort law that concerns professional conduct.

For a counselor to be held liable in tort for malpractice, four conditions have to be met:
§ A duty was owed to the client by the counselor.
§ The counselor breached that duty.
§ There is a causal link between the breach and the client’s injury.
§ The client suffered a damage or injury.

Standard of Practice
The standard of practice will be used in any liability proceeding to determine if the professional counselor’s performance was within accepted practice. Established through the testimony of peers (i.e., expert witnesses) The standard is variable: It will be much higher for a professional counselor who has practiced for a number of years and pursued advanced graduate training or professional development than it will be for a counselor in the first year of practice immediately following graduate school.

When a professional counselor is faced with any legal action, the first thing the counselor should do is call a lawyer and then let the counselor supervisor, if there is one, know.

Subpoenas
A subpoena is a legal document. In most cases, the client an attorney is representing believes that the counselor may have some information that will be helpful to the case. Do not automatically comply with the subpoena without discussing it first with the client, the client’s attorney, or both, or consulting the agency’s or school system’s attorney. Obtain signed informed consent from the client if he or she wishes information to be released. If he or she does not, request that the attorney file a motion to quash, which allows the counselor not to comply with the subpoena. Maintain a record of everything.

If both a subpoena and a court order are received, the counselor must release the information with or without the client’s consent. Failure to do so may result in the counselor being held in contempt of court.

Confidentiality
Confidentiality is a sense of trust and privacy that is essential for counseling to be successful. The cornerstone of counseling Separates the counseling relationship from other relationships where information is shared Confidentiality belongs to the client Students under 18 years have an ethical right to confidentiality, but the legal rights belong to their parent or guardian Most states protect counselor-client confidentiality

Limits to Confidentiality
Limitations to confidentiality include:
Duty to warn
Subordinates
Treatment teams
Consultation
Group and families
Third-party payers
Minors
Contagious, life-threatening diseases
Court-ordered disclosure

Privileged Communication
Privileged communication is a legal term.
Describes the privacy of the counselor-client communication
Exists by statute and applies only to testifying in a court of law
Belongs to the client
Not all counselor-client communications are protected (varies by state)

Minor Consent Laws
Minor consent laws allow certain minors to seek treatment for certain conditions without parental consent or notification, usually involving substance abuse, mental health, and some reproductive health areas.
Based on federal regulation
Vary by state

Records
Educational records are all the records of a student’s achievement, attendance, behavior, testing and assessment, school activities, and other such information that the school collects and maintains.

The inspection, dissemination, and access to student educational records must be in accordance with the Family Educational Rights and Privacy Act (FERPA) of 1974.

Personal Notes
Personal notes are those notes written by professional counselors to serve as an extension of their memories.

Are not a part of the educational record if they are kept separate and not shared with anyone else

Serve as an impression of the client or session

Must remain in the sole possession of the maker and cannot be shared with anyone except a “substitute maker”, which is someone who takes over for the counselor in the counselor’s position

HIPAA
The Health Insurance Portability and Accountability Act (HIPAA) of 1996 required that the U.S. Department of Health and Human Services (HHS) adopt national standards for
the privacy of individually identifiable health information, outlined patients’ rights, and established criteria for access to health records.

- Health records in schools that are under FERPA are specifically excluded from HIPAA

**Child Abuse**

- The *Keeping Children and Families Safe Act* of 2003 is the federal law pertaining to child abuse.

  - The law defined **child abuse** as physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 years or the age specified by the child-protection law of the state in question, by a person who is responsible for the child’s welfare, under circumstances that indicate that the child’s health or welfare is harmed or threatened (42 USCS 5101).

  - Every health practitioner, educator, human services worker, and law enforcement officer must report suspected abuse or neglect, generally within 24 to 72 hours of first “having reason to suspect.”

  - The person who first suspects the abuse or neglect is required to call Child Protective Services to report.

  - The oral report must be followed up by a written report in most cases.

  - There is no liability for reporting child abuse, even if a subsequent investigation determines no evidence that abuse or neglect occurred, unless the report is made with malice.

  - There are serious penalties for failure to report.

**Suicide**

- When dealing with a potentially suicidal client, the professional counselor should:
  - Conduct a lethality assessment
  - Determine the seriousness of the threat
  - Based on the seriousness of the threat, decide whether the duty to warn is applicable.