

# A Matter of Law: Q & As for Practitioners

by APApractice.org

February 15, 2005 -- When do practitioners have immunity from being sued? How might a disciplinary hearing differ from a criminal or civil trial? What's the difference between serving as an "expert witness" and a "fact witness" in a legal proceeding? These questions reflect the wide variety of legal issues that have an impact on practicing psychologists.

This question-and-answer article briefly introduces several legal matters that practitioners often raise with staff for the APA Practice Organization. It provides the foundation for a series of articles about the practical impact of various laws and regulations, as well as legal decisions, on licensed psychologists. The monthly series appears in the *PracticeUpdate* E-Newsletter and on APApractice.org.

## **What are the major areas of law that affect psychologists?**

Psychologists may be involved with several areas of law. The three most common are administrative, civil and criminal law.

- Licensing and disciplinary board processes and worker's compensation hearings are examples of administrative law.
- Civil law typically involves one person or entity suing another for damages. Examples include malpractice or personal injury lawsuits.
- Criminal law involves the government prosecuting an individual for illegal behavior. Psychologists might become involved in criminal cases by testifying about a defendant's mental capacity to stand trial, or by testifying at a sentencing hearing about the defendant's mental health.

## **How might a mental health professional become the subject of a lawsuit?**

Many lawsuits filed against mental health professionals fall under "tort" law, which are civil law cases involving negligent behavior or intentional wrongdoing. The basic rule of tort law is that the plaintiff may recover monetary damages from an individual if: that individual owes the plaintiff a duty; he or she breaches (violates) the duty; and the breach injures the plaintiff.

By taking on someone as a client, a psychologist automatically meets the first criterion – having a duty. Deciding what constitutes a breach is more complicated. Usually the court applies a standard of "reasonable care" and assesses whether the psychologist has used the same care and skill normally exercised by other practitioners.

## **How may a disciplinary hearing differ from a criminal or civil trial?**

Psychologists who are involved in disciplinary hearings at times mistakenly expect a trial with the same kinds of protections given in criminal or civil proceedings. Practitioners sometimes say they feel that their "rights" are being violated in disciplinary hearings.

However, not all of the same rights exist in administrative proceedings such as disciplinary hearings as they do in criminal and civil cases. These rights include "due

process” rights, such as having the right to an attorney, not allowing hearsay evidence, and giving the accused a right to see the evidence against him or her.

Due process rights are found primarily in criminal law and to some degree in civil law. Administrative law generally provides fewer due process protections.

For example, defendants in a criminal trial cannot be forced to take the stand to defend themselves, and a jury cannot use the refusal to testify as evidence of guilt or innocence. By contrast, in an administrative hearing, refusing to testify may be used as evidence of violation of an administrative rule, often compelling the hearing panel to find that the defending party in fact did violate the rule.

### **Do practitioners ever have “immunity” from being sued?**

There are certain circumstances in which psychologists may have “immunity” from being sued. One common example involves child abuse reporting statutes. Most states have laws that require psychologists to report child abuse when they learn of it in the course of their work. Usually these laws give the psychologists “immunity” -- meaning that if they comply with the law properly, psychologists cannot be sued for breaching confidentiality in reporting this abuse.

You might find it helpful to check with a knowledgeable attorney or your state psychological association for information about laws that may grant immunity to practicing psychologists.

### **What is the difference between serving as an “expert witness” and a “fact witness” in a legal proceeding?**

Psychologists sometimes find it confusing when they serve as witnesses in legal proceedings. One important distinction that is important for practitioners to understand is the difference between being an “expert witness” and a “fact witness.”

An “expert witness” is hired by the court or an individual to provide testimony or expert advice in a legal proceeding. For example, psychologists may be asked to do a child custody evaluation or an assessment of someone’s injury for a personal injury lawsuit. In such situations, the psychologist provides an objective and comprehensive evaluation for the legal proceeding.

By contrast, a psychologist is a “fact witness” in the following scenario. He or she has been treating a client and the individual happens to be involved, or becomes involved, in a lawsuit. The psychologist’s initial relationship with the client was for therapy, not for forensic purposes. But in light of the lawsuit, the practitioner may be subpoenaed to testify about some aspect of therapy. (Subpoenas will be discussed in the next article in this series.). In this situation the psychologist will be treated as a “fact witness.”

When they serve as fact witnesses, psychologists often want to know how they will be compensated for their time. This is a matter that the court typically decides. It is also will be the court’s decision what information the psychologist must divulge when he or she participates as a fact witness.

### **How does a statute differ from case law and common law?**

A statute is a law that has been enacted by the federal or state government. Psychologists should know about relevant statutes in their states, such as child abuse reporting or “duty to protect/duty to warn.”

Even in situations where no statute exists, psychologists may have a legal duty stemming from “case law” or “common law.” Case law results from a court making a decision about a case without a statute to guide the decision-making. If rendered by an appellate court, case law can set precedent, meaning that the law must be followed in the state where the decision was rendered (or in the applicable district if the case was decided in federal district court. These courts have authority over several states.).

As an example, some states have “duty to warn/duty to protect” statutes (the subject of a later article in this series), while others do not. Even absent a statute, however, there may be case law in the state that pertains to a duty to warn. It may be helpful to check with an attorney or your state psychological association for such information.

Further, when no case law exists in a state, a court may still impose a duty on practitioners. One thing a court may consider is “common law,” which refers to legal theory originating centuries ago in England that was never codified. The seminal case from 1976 involving “duty to warn” (the subject of a later article in this series) was *Tarasoff vs. Regents of the University of California*. In this case, the California court looked at common law and other general legal principles and decided to impose a duty on mental health professionals.

*What happens if a legal requirement appears to conflict with APA’s ethical principles?* In addition to statutes and case law, psychologists must also be aware of professional ethical principles. Many states incorporate the APA Ethical Principles and/or the Association of State and Provincial Psychology Boards (ASPPB) Code of Conduct into their psychology licensing law, which in effect gives these principles and/or codes the force of law.

The APA Ethical Principles address how to handle situations where ethics and the law conflict: “If psychologists’ ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.” (APA Ethical Standards, Section 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority).

This set of questions and answers begins to illustrate the extensive and often complex interface between law and psychology. Future articles planned for this series will address in greater detail a variety of important legal issues for practicing psychologists -- including minors’ rights to confidentiality, licensing, patient recordkeeping, and prompt payment laws, among other topics.

***PLEASE NOTE: Legal issues are complex and highly fact-specific and require legal expertise that cannot be provided by any single article. In addition, laws change over time. The information in this article should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions regarding individual circumstances.***

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