

Seventh Edition

The
Counselor
and the
LAW

A Guide to Legal and
Ethical Practice

**Anne Marie “Nancy” Wheeler, JD
and Burt Bertram, EdD**



AMERICAN COUNSELING
ASSOCIATION

WILEY

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6101 Stevenson Avenue, Suite 600 | Alexandria, VA 22304 | www.counseling.org

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To our readers—

Whether you are reading this book voluntarily (e.g., a practicing counselor thirsty for new knowledge) or involuntarily (e.g., a graduate student taking the required ethics and legal issues course), may you incorporate some new ideas into your professional practices that will benefit both you and the many clients you will serve.



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Preface

As we send this 7th edition to press, the world of the professional counselor continues to evolve. However, the imperative to serve our clients' best interests never changes even though the complexities of modern life continue to create new legal and ethical dilemmas. Underscoring this point, the 2014 *ACA Code of Ethics* (American Counseling Association, 2014a) added an entire new section (Section H) specifically devoted to technology. The widespread use of technology by practicing counselors continues to create new opportunities and new challenges. In this edition of *The Counselor and the Law*, we have updated every chapter to reflect changes brought by the 2014 *ACA Code of Ethics*, recent court cases, and new legislation. We remain committed to identifying and thoughtfully addressing the timeless legal and ethical challenges associated with the practice of counseling, as well as peeking behind the curtain to anticipate future legal and ethical implications of such changes. To that end, we anticipate that by the time we are ready to begin work on the 8th edition, it is quite likely we will need to address new legal and ethical issues arising from the implementation of the Patient Protection and Affordable Care Act (2012) or other sweeping health care policies. Remaining current requires mindful awareness of the evolution of legal and ethical practices. We are honored to assist our readers in meeting this worthy professional standard.

This book has an interesting collaborative heritage. Originally written by attorneys Thomas Burgum and Scott Anderson and published in 1975, *The Counselor and the Law* reflected the counseling profession

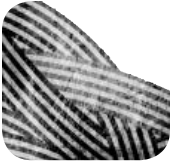
before state licensure—and before the proliferation of state and federal laws that have shaped the conduct of the practice of counseling. Since the first publication there have been six updates. In 1985, attorneys Bruce Hopkins and Barbara S. Anderson collaborated to update the original manuscript; then in 1990, Hopkins and Anderson released the 3rd edition; and in 1996, Barbara Anderson (without Hopkins) completed the 4th edition. In 2007 we were asked to take over the authorship and charged with the responsibility of completing a major update of the book.

The 5th and 6th editions—published in 2008 and 2012, respectively—marked the first time that the authorship reflected a collaborative perspective of an attorney and a practicing counselor. We believe that our perspectives provided a unique understanding of the law as it relates to the day-to-day practice of counseling. As you read this book, you are likely to hear two distinct voices and perspectives. Nancy Wheeler will offer the lawyer’s perspective: She will tell you about the law and how it affects counseling practice. Burt Bertram’s voice will reflect an insider’s perspective: He will talk about the gray areas of practice that don’t always fit neatly in a black-and-white world. Together we offer advice and suggestions designed to help practicing counselors and students understand and navigate the complexities of real-world practice.

In this, the 7th edition of *The Counselor and the Law*, we continue our commitment to connect the realities of the practice of counseling with state and federal laws and with the *ACA Code of Ethics*. It is our hope that this book will serve to provide real answers to practicing counselors who are challenged daily to act in the best interests of their clients and at the same time to be mindful of the legal and ethical duties and responsibilities that govern the profession of counseling. We also hope this book will be a window of understanding for students as they attempt to imagine and prepare for professional practice. Of course, we did not, nor could we, address every situation. Laws vary from state to state, and the specifics of any particular situation can influence how state or federal laws or the *ACA Code of Ethics* will apply. In addition, this book is not intended as a substitute for the considered opinion and advice of your personal lawyer concerning the particular circumstances of a case in the context of local laws and customs.

We are grateful to all the past authors for providing a solid foundation upon which we have built our collaborative effort. We thank our colleagues in the ACA Ethics and Professional Standards Department for their helpful collaboration. Finally, we want to express our heartfelt appreciation to Carolyn Baker, associate publisher.

—Anne Marie “Nancy” Wheeler and Burt Bertram



About the Authors

Anne Marie “Nancy” Wheeler, JD, is an attorney licensed in Maryland and the District of Columbia; she has extensive experience with counselors and the broader field of mental health. For over 25 years, she has managed the American Counseling Association Sponsored Insurance Program’s Risk Management Helpline. On a daily basis, she helps practicing counselors think through and understand challenging legal and ethical issues. For more than 30 years, she has worked with psychiatrists, facilities, and physician associations. This background gives her a unique window of understanding about the multifaceted issues that often confront practicing counselors. She is also an affiliate faculty member of the Graduate Pastoral Counseling Program of Loyola University Maryland, which is accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP). Since the early 1990s, she and coauthor Bertram have jointly developed and copresented more than 150 seminars and workshops nationwide on legal and ethical issues. They have also produced several tapes, CDs, and podcasts on risk management strategies and legal and ethical issues.

Burt Bertram, EdD, is a Florida licensed mental health counselor and licensed marriage and family therapist. He has been in private practice in the Orlando area for more than 35 years. He practices from an interpersonal perspective; his professional counseling

is primarily focused on the resolution of sensitive and complex relationship issues in every aspect of life—personal, workplace, and community. In addition to his private practice, Dr. Bertram provides personal development, coaching, and counseling to practicing physicians associated with the Florida Hospital System in Orlando, Florida. He is also an adjunct faculty member in the CACREP-accredited Graduate Studies in Counseling Program at Rollins College in Winter Park, Florida, where he teaches ethics as well as practicum; internship; and family, couples, and group counseling. Since the early 1990s, he and coauthor Wheeler have together developed and copresented more than 150 seminars and workshops on legal and ethical issues across the country. They have also produced several tapes, CDs, and podcasts on risk management strategies and legal and ethical issues.



Chapter 1

The Counseling Profession

The practice of counseling and the profession of counseling have evolved into maturity. In this chapter we provide an introduction to some of the legal responsibilities and accountabilities that have come with the maturing of the profession. Most notably we focus on the influence of state counselor licensing laws that have dramatically affected the activities of both licensed and unlicensed professional counselors.

Our Perspective

We understand that, for many practicing mental health professionals and most graduate students, the legal system is a foreign and sometimes frightening place. It is filled with adversarial relationships and governed by rules that are unfamiliar and unfriendly. We want to begin with a word of encouragement. No one knows how often counselors actually engage in unprofessional, unethical, or illegal practice-related behaviors. According to U.S. government data (U.S. Department of Labor, Bureau of Labor Statistics, 2014), nearly 1.5 million counselors (a number that includes licensed and unlicensed educational, vocational, school, rehabilitation, mental health, substance abuse, and marriage and family counselors) were working in America in 2012. Data compiled by the American Counseling Association (ACA; 2014b) indicate that there are 140,000 licensed counselors. The relative infrequency of licensing board discipline, lawsuits, criminal arrest, or censure by ethics committees compared

with the number of counselors suggests that formal accusations of questionable behaviors are rare. In our experience, even when there is an accusation against a mental health professional, the resolution often favors the professional.

We would be remiss, however, in not stating the obvious: Counselors and other mental health professionals sometimes do engage in behaviors that result in harm to the very people we are in practice to serve: our clients.

Counselors who are mindful and respectful of ethics and the law can develop practices that are creative, thoughtful, passionate, and always in the best interests of the client.

Many of these harmful behaviors come down to the counselor's failure to know, understand, or abide by the various state and federal laws that govern the practice of counseling. In this book, we are not recommending a rule-bound defensive practice wherein practitioners are fearful and innovation and creativity are stifled. On the contrary, the core message of this book is simple: We believe that counselors who are mindful and respectful of ethics and the law can develop practices that are creative, thoughtful, passionate, and always in the best interest of the client.

For nearly 30 years, we have worked with or followed legal cases in which the behavior of a counselor has resulted in harm to a client, and we have concluded that offending practitioners seem to fall into one of three broad categories:

- *Intentional disregard*: A small percentage of offending practitioners are intentionally opportunistic, abusive, exploitive, and self-serving in their dealings with their clients. These individuals are not interested in knowing, understanding, or abiding by the law. The best interest of the client is not their primary concern. Such harmful practitioners are not likely to read this book unless it is required in a graduate course or perhaps as part of a licensing board disciplinary process. We can only hope that all such practitioners either withdraw from the profession or have a life-altering transformational experience that induces them to abandon their abusive, self-serving values and behaviors.
- *Careless disregard*: There are offending practitioners who operate along a continuum ranging from innocently unaware to lazy or careless. In their hearts, these practitioners may want to

do what is best for their clients. However, because they have not taken the time to study and understand the law and our evolving ethics, their interactions with their clients might easily cross legal and ethical boundaries that would have sounded an alarm to a more knowledgeable and mindful practitioner. For these practitioners, the harm done to a client is unintentional but real. Reading this book can be an important step toward becoming actively mindful (no longer innocently unaware, lazy, or careless) of the implications to clients of the laws and the ethics that govern our profession.

- *Wrong place, wrong time:* Some offending practitioners know and understand legal and ethical mandates and are actively committed to abiding by them, yet they still become involved in situations in which a client is harmed (or alleges harm). As mental health professionals, we sometimes tell our clients that bad things can happen to good people. The same is true for good counselors. Sometimes bad things happen to good counselors—harmful things that simply could not have been foreseen or prevented. It is our hope that this book can help fortify the vast majority of practicing counselors so that if, in the unlikely event you are in the wrong place at the wrong time, you will have a depth of knowledge and understanding about the law that will empower you to get help for your client and for yourself before things spin out of control.

It is our hope that this book will serve as a guide to practitioners who are committed to the development of counseling practices that are ethical, legal, and always in the best interest of the client.

The title of this book, *The Counselor and the Law: A Guide to Legal and Ethical Practice*, seems straightforward, but actually the definitions of *counselor* and *law* can be fraught with confusion. Before we move into the specifics, we define these essential terms so that we all know who and what we are talking about.

The Counselor

It seems obvious: Counselors provide counseling. And although that's true, it's not that simple. The label *counselor* in our culture is so generic that it almost defies an objective definition in terms of identifying a specific professional endeavor. There are insurance counselors, camp counselors, funeral counselors, and numerous other roles that are created simply by placing a descriptive noun in

front of the word *counselor*. As used in this book, the term *counselor* denotes a practitioner, educated and trained at the graduate level, who is a member of the counseling profession.

History and Highlights of the Profession

What is the profession of counseling? Counseling as a profession, separate and distinct from its sibling and first-cousin professions, is relatively new. The genealogy of counseling is well documented. Gladding (2013), Kottler (2011), Neukrug (2012), and others have ably documented the story of how counseling as a profession has struggled during the past six decades to emerge separate and distinct from psychiatry, psychology, social work, philosophy, education, and career guidance. Today the counseling field has developed all the characteristics necessary to qualify as a full and mature profession. More than 60 years ago, the American Personnel and Guidance Association (the original name of ACA) was established. During the past 60+ years, ACA has provided the leadership and the energy to create the profession of counseling. It has made notable accomplishments in the following areas:

- *ethics*—creating the *ACA Code of Ethics* (most recently revised in 2014), a process for obtaining opinions on ethical issues and a process for filing a complaint against a professional member alleging ethical misconduct;
- *interest divisions*—creating and supporting specialized interest areas (divisions) within ACA in which professional members can affiliate, learn, and share ideas with others of similar professional interest;
- *professional development*—convening an annual national professional development conference as well as a host of other regional and state professional development meetings, conferences, publications, and activities;
- *training standards*—sponsoring efforts that resulted in the establishment of the Council for Accreditation of Counseling and Related Educational Programs (CACREP), the organization that defines the standards for training of graduate-level counselors and monitors the implementation of these standards;
- *national certification*—initially sponsoring and advocating the National Board of Certified Counselors (NBCC), the organization that has established a nationally recognized certification credential that attests to a baseline of general counselor knowl-

edge as well as to specialty credentials in school counseling, mental health counseling, and addictions counseling; and

- *state licensing*—working together with other professional associations and groups to lead the state-by-state struggle to license professional counselors.

Professional Counselors

The efforts and activities outlined in the preceding section form the basis of what we now know as the professional counselor. State licensing is required for independent private practice. Professional counselor positions in agencies, schools, government, and nonprofit organizations may or may not require state licensure. Some professional counselors, such as school counselors or addictions counselors, may require specialty certification. Most of the information in this book is relevant to all professional counselors (licensed, certified, and unlicensed), including mental health, school, child, couple and family, substance abuse, and rehabilitation counselors; to graduate students in master's- and doctoral-level counseling and related programs; and to the broader field of counseling-related professionals, including counseling psychologists, psychologists, social workers, pastoral counselors, career counselors, and psychiatrists. All of these professionals share a common activity: They all engage in the practice of counseling.

Licensed Professional Counselors

In 1976, Virginia became the first state to license and regulate professional counselors. Thirty-four years later, in 2010, California became the last state to enact state licensing of professional counselors. Today all 50 states plus the District of Columbia and Puerto Rico have licensed the title or practice activities (or both) of professional counselors.

The Law

The purpose of this book is to empower professional counselors (licensed and unlicensed) to understand and thereby respond in a thoughtful and ethical manner to the laws that affect the day-in and day-out practice of counseling. To do this, two things are necessary. First, we want to be clear about what we mean by law; second, we want to provide some detail regarding how state laws and statutes have influenced the legal definition of the practice of professional counseling, regardless of the practice setting.

The word *law*, like the word *counselor*, is also confusing, especially to nonlawyers (and who could be less lawyerlike than many counselors?). For the purposes of this book, we define *law* as a set of rules, enacted by a legislative body, that governs a particular activity within society. Laws are everywhere, governing nearly everything. Laws, also called *statutes*, derive from elected officials who are members of federal or state (lawmaking) bodies. Municipal (city, town, and county) councils and commissions also promulgate ordinances.

As professional counselors and as citizens or residents of the United States, we are all affected by laws that address every aspect of our lives, from whom we can marry, to how we drive our cars, to the proper treatment of children, to the taxes we pay. It's probably safe to say that no one really knows all the laws that affect our every waking moment. However, for counselors, some laws are critical to our functioning. The following list identifies some of those that directly affect the practice of counseling:

- federal laws that have a direct bearing on counselors and the practice of counseling, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Health Information Technology for Economic and Clinical Health (HITECH) Act, the Americans With Disabilities Act of 1990 (ADA), and the Family Educational Rights and Privacy Act of 1974 (FERPA, or the Buckley Amendment);
- state laws and statutes, such as counselor licensure laws, the rules developed by state licensing boards to implement the law and regulate the day-to-day practice activities of licensed and nonlicensed professional counselors, and state abuse reporting laws (child and vulnerable adult); and
- local laws, including municipal laws that affect when and where counseling can occur, such as zoning and occupational licensing laws.

In addition, there is a body of law that derives from the common law that began in England and has developed over hundreds of years. Common law emphasizes precedent set by cases in which judges make decisions. Common law is distinct from statutory law, which is created by a legislature, not a judge (see Chapter 3 for a complete discussion). The *Tarasoff* case (*Tarasoff v. Regents of the University of California*, 1976, discussed in Chapter 6) is an example of how common law changed clinical counseling and mental health practices