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Forensic Ethics and Indirect Practice for the Rehabilitation Counselor

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For nearly 50 years, the specialty area of forensics has emerged as an established practice setting in rehabilitation counseling, and it is predicted to be the fastest-growing area of practice in the profession. Reflecting the increased number of practitioners in the specialty, the revised *Code for Professional Ethics of Rehabilitation Counselors* names Section F (Forensics and Indirect Services) as a guide to the ethical practice for rehabilitation counselors in this specialty. The section includes 17 standards specific to clients' and evaluees' rights, rehabilitation counselors' forensic competency and conduct, forensic practices, and forensic business practices. Furthermore, the unique relationship of the forensic rehabilitation counselor with the person receiving services is clarified through the introduction of the definition of *evaluee*, a term that has gained unilateral agreement throughout the field of forensic rehabilitation.

Keywords: ethics, forensic, vocational expert, indirect service, rehabilitation, counseling

Forensics in rehabilitation counseling has continued to grow as a specialty area of practice (Berens & Weed, 2001), and it is predicted to be the fastest area of growth in professional practice (Barros-Bailey, Benshoff, & Fischer, 2009). Codes of ethics of professional and credentialing organizations have been, with increasing regularity, addressing issues inherent to this practice specialty that involve face-to-face consultation and indirect service provision. The first code to address these issues was that by the American Board of Vocational Experts. In review of this organization's first code, it became apparent that it derived mostly from the Commission on Rehabilitation Counselor Certification's (CRCC's) 1987 *Code of Professional Ethics for Rehabilitation Counselors* (hereafter, the *Code*), with the exclusion of the advocacy rules that constituted the *Code* and with the change of *rehabilitation counselors* to *vocational experts* (Barros-Bailey, 1999). In 2006, the International Association of Rehabilitation Professionals conducted the first effort to independently study issues specific to forensics among a variety of professions and to integrate those into a code consistent with all forensic practice, not just that within rehabilitation counseling (Barros-Bailey, Holloman, Berens, Taylor, & Lockhart, 2005). The CRCC's 2010 *Code of Professional Ethics for Rehabilitation Counselors* benefits from the recent focus and research in forensic ethics. It has a new section—Section F—dedicated entirely to the practice of forensics and indirect service provision by rehabilitation counselors, and it expands on the efforts of the last decade to guide certificants practicing in these specialties. Section F constitutes one of the greatest changes to the 2010 *Code*. The 2001 *Code*, for example, only had one standard specific to forensics (F.12) and two standards specific to or mentioning indirect services (A.3.c and D.7.c). Indeed, Section F in the 2010 *Code* includes 17 standards, and the overall *Code* mentions forensic and indirect services in 4 other standards and throughout the preamble. The purpose of this article is (a) to explore ethics as it pertains to rehabilitation counselors delivering forensic and indirect services to evaluees and clients and (b) to describe and explain the expanded or new standards within the revised 2010 *Code*.

History and Practice of Forensics and Indirect Services in Rehabilitation Counseling

It is not entirely clear when and in what public or private disability system the first rehabilitation counselor was used for forensic or indirect services. However, the Social Security Administration's use of vocational experts in disability determination and adjudication, starting in the 1960s, significantly contributed to the development and growth of forensic rehabilitation counseling. For about five decades, the use of forensic rehabilitation counselors has continued to grow for expert witness work and in indirect service provision. Indeed, research (Barros-Bailey, 2010) suggests that forensic practice by rehabilitation counselors has expanded into many private and public systems where the skill set descriptive of the profession's scope of practice is important in assisting decision makers where issues of disability and/or work are important. In the private sector, these systems include workers' compensation, short- and long-term disability (including credit disability), Railroad Retirement Board Act, Longshore Act, Jones Act, no-fault auto insurance, life insurance, tort (disability, age, employment, gender, and racial discrimination; product, malpractice, or other liability; harassment; student loan default employability; bankruptcy; wrongful birth/life; wrongful death; wrongful termination), family law (marital dissolution and child custody), and trust fund management. In the public sector, forensic or indirect services are provided to the Social Security Administration, the state/federal vocational rehabilitation system (service appeals), Department of Veterans Affairs (service appeals), state pension funds, and K–12 Individuals with Disability Education Act services. The expertise of rehabilitation counselors thus became recognized as being important in a variety of public and private sector disability or legal systems requiring the use of these skills in a forensic capacity. As this happened, ethical complaints against those providing these services increased (Saunders, Barros-Bailey, Rudman, Dew, & Garcia, 2007), as did the request for advisory opinions to the CRCC Ethics Committee (Shaw & Lane, 2008), thereby demonstrating the risk to rehabilitation counselors in this adversarial practice setting to ethical dilemmas (Manoogian, 2007). Section F in the 2010 *Code* attempts to give guidance to rehabilitation counselors providing services in this established area of practice that continues to grow and evolve.

Difference Between Primary Care and Forensic Practice

What is the difference between providing services in a primary care capacity and doing so in a forensic or indirect service capacity? The answer is simple: expectations in the relationship between the counselor and the client or evaluee. In the provision of rehabilitation counseling services to a client, there is a client–counselor relationship established, with all the provisions of such a relationship that ethical codes contain. In a forensic capacity, there is no relationship established. However, in either instance, the primary obligation of the rehabilitation counselor remains with the client or evaluee. Specifically, *forensics* is defined in the *Code* as providing "expertise involving the application of professional knowledge and the use of scientific, technical, or other specific knowledge for the resolution of legal or administrative issues, proceedings, or decisions" (glossary).

Methodology of the Inclusion of Forensic Ethics in the 2010 *Code*

The taskforce created by the CRCC in 2007 to review and recommend revisions to the 2002 *Code*, brought together individuals from a variety of practice settings in rehabilitation counseling and in academia. Workgroups of three members were formed and assigned specific areas of the *Code* for study, analysis, research, and debate regarding recommended changes and enhancements. Each member of the Forensic Ethics workgroup possessed forensic experience; two members served on the CRCC and had been chairs of the Ethics Committee within the last half decade; and, all members had published and presented on forensic-related practice issues in rehabilitation counseling over the last two decades.

The 2002 *Code* was largely silent regarding the area of forensic ethics. One mention is found in Section F: Evaluation, Assessment, and Interpretation—specifically, Standard F.12:

When providing forensic evaluations, the primary obligation of rehabilitation counselors will be to produce objective findings that can be substantiated based on information and techniques appropriate to the evaluation, which may include examination of the individual with a disability and/or review of records. Rehabilitation counselors will define the limits of their reports or testimony, especially when an examination of the individual with a disability has not been conducted.

Given the use of forensic rehabilitation counselors in a variety of public and private disability and legal systems, one standard addressing ethics in the *Code* was insufficient guidance to practice. Clearly, a more comprehensive concentration was needed to provide rehabilitation counselors with guidance in the discharge of their professional duties and their conduct when faced with ethical dilemmas.

To that end, the Forensic Ethics workgroup undertook a detailed review of the codes of ethics of other certifi-

cation and professional bodies, as well as the codes of certifying bodies concerning themselves with the regulation of practice within their respective disciplines. The codes consulted were as follows:

- the American Board of Vocational Experts' *Code of Ethics* (2006),
- the American Counseling Association's *Code of Ethics* (2005),
- the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct*, (2002),
- the American Psychological Association and American Board of Forensic Psychology's *Specialty Guidelines for Forensic Psychology* (2006),
- the American Rehabilitation Economics Association's *Code of Standards and Ethics* (1998),
- the British Association for Counselling and Psychotherapy's *Ethical Framework for Good Practice in Counseling and Psychotherapy* (2007),
- the Certification of Disability Management Specialists Commission's *Code of Professional Conduct* (2007),
- the Commission for Case Manager Certification's *Code of Professional Conduct for Case Managers*, (2004),
- the International Association of Rehabilitation Professionals' *Code of Ethics, Standards of Practice, and Competencies* (2006),
- the National Board for Certified Counselors' *Code of Ethics* (2005), and
- the Rehabilitation Counselling Association of Australia's *Code of Professional Ethics for Rehabilitation Counsellors* (2005).

Also reviewed were ethical dilemmas from the 2006 CRCC Ethics Survey (Tarvydas & Barros-Bailey, 2010) and CRCC Ethics Committee advisory opinions (Shaw & Lane, 2008), along with literature in the field. A critical component of the Forensic Ethics workgroup was the sharing of practice experiences among subject matter members in areas pertaining to unique situations and ethical dilemmas not adequately addressed by the *Code* or where it was altogether silent. The potential contribution of standards from other codes was studied and consensus was developed among the workgroup members regarding recommendations to be made to the Code Revision Taskforce at large for treatment of forensic ethics in the revision of the *Code*.

Discussion and debate regarding the changes and additions recommended by the Forensic Ethics workgroup was held at the taskforce level before the development of a draft *Code*, which underwent further review by the Ethics Committee before being released for public comment from April through November 2008. Comments received from the public were reviewed and integrated into the final workgroup and taskforce recommendations for Section F. The Ethics Committee reviewed and enhanced the final draft before coming to final review and approval by the full Commission in June 2009. What emerged was a Forensic and Indirect Services section that is thorough and instructive to the forensic rehabilitation counselor when she or he is faced with a particularly challenging situation or an ethical dilemma. The section includes areas of primary obligations, informed consent, dual roles, indirect service provision, confidentiality, objectivity, qualification to provide expert testimony, conflict of interest, validity of resources consulted, foundation of knowledge, duty to confirm information, critique of opposing work product, case acceptance and independent opinion, termination and assignment transfer, payments and outcome, and fee disputes.

Definition Differences: Who Is the Client in Forensics?

Who is the client in forensics? The question must be answered before the new *Code* section is reviewed because understanding the definition orients the reader to this specialized area of practice. Historically, this simple question has proven to generate anything but a simple answer. It has been the source of much disagreement and debate among professionals who work as practitioners and expert witnesses. Adding to the confusion was that various professional organizations and professional bodies did not ascribe to the same definition. The profession was left with a different definition of *client*, depending on certifications, practice settings, scope of practice, and type of case (Barros-Bailey et al., 2008). For example, the client was often considered to be either the individual with disabilities who received services from rehabilitation counselors (CRCC, 2002) or the referral source (American Board of Vocational Experts, 2007). Such a dichotomy of opinion and operational definition was controversial among the forensic rehabilitation specialty and among those retaining the services of rehabilitation counselors or vocational experts. Within the forensic specialty, the practice of expert witness testimony is not restricted to members of any specific organization. Without belonging to any regional, state, or national organization, one can be retained by an attorney or other referral source to testify in court (Barros-Bailey et al., 2008). After many years of impasse on the subject, leaders from the American Board of Vocational Experts, CRCC, and International Association of Rehabilitation Professionals engaged in a historic meeting during the November 2007 conference of the association in an effort to develop a unified definition. The goal was also to provide the professional with a concise explanation of how to treat this topic. Barros-Bailey et al. (2008) provided a blueprint of conduct and authored a white paper that was unan-

imously ratified by the boards of the participating professional and credentialing entities and, at this writing, has since been republished in seven peer-reviewed journals within the rehabilitation profession.[1]

What is the definition? The person who is the subject of an objective and unbiased evaluation is called the *evaluee*. Coincidentally, forensic psychiatrists use the same term in their profession (Candilis, Weinstock, & Martinez, 2007). The *referral source* is the individual who referred the case to the expert witness; this person can also be the evaluee, in the case of a self-referral. Finally, the *payer* is the individual paying for the services rendered by the forensic rehabilitation counselor; this person may also be the evaluee or another person or entity. The new definition of the client in forensics has become integrated into the 2010 *Code*, starting with the preamble, which states, "Rehabilitation counselors do not have clients in a forensic setting. The subjects of the objective and unbiased evaluations are evaluees." Reference to the new definition is also found in Standard F.1.c (Forensic and Indirect Services): "In a forensic setting, rehabilitation counselors who are engaged as expert witnesses have no clients. The persons who are the subject of objective and unbiased evaluations are considered to be evaluees." Finally, the nomenclature is included in the glossary to the 2010 *Code* and throughout Section F.

It is anticipated that forensic rehabilitation counselors will become conversant with the changes in the revised *Code* (2010) regarding the treatment of the client/evaluee in a forensic setting. It is incumbent on the forensic rehabilitation counselor to become educated in this area quickly, to better educate those who retain their services, as well as those who are the subject of the objective and unbiased evaluation performed by the expert—their evaluees.

Forensic Ethics in the 2010 *Code*: Standards Related to Forensic and Indirect Services

Section F of the 2010 *Code* offers guidance specifically on forensic issues. The 17 standards and four categories of this section alert rehabilitation counselors to questions to consider to avoid ethical pitfalls when providing services in forensics. Key areas of Section F are highlighted below.

Standard F.1 (Client or Evaluee Rights) identifies the rehabilitation counselor's primary obligation to "produce unbiased, objective opinions and findings that can be substantiated by information and methodologies appropriate to the evaluation, which may include examination of individuals, research, and/or review of records" (F.1.a). Furthermore, Standard F.2 (Rehabilitation Counselor Forensic Competency and Conduct) directs rehabilitation counselors to restrict their services to areas of competence, as evidenced within the parameters of "knowledge, skill, experience, training, and education" (F.2.b). Standard F.2 further obligates rehabilitation counselors to "maintain current knowledge of scientific, professional, and legal developments within their area of claimed competence" (F.2.f) and, where circumstances reasonably permit, "to seek to obtain independent and personal verification of data relied upon as part of their professional services to the court or to parties to the legal proceedings" (F.2.g).

Conversely, Standard F.2.h (Critique of Opposing Work Product) directs,

> *When evaluating or commenting upon the professional work products or qualifications of other experts or parties to legal proceedings, rehabilitation counselors represent their professional disagreements with reference to a fair and accurate evaluation of the data, theories, standards, and opinions of other experts or parties.*

Section F of the new *Code* makes the distinction between counselor and forensic evaluator and argues for avoidance of dual roles. As a general practice, the *Code* directs that rehabilitation counselors

> do not evaluate current or former clients for forensic purposes except under the conditions noted in A.5.f [Role Changes in the Professional Relationship] or government statute. Likewise, rehabilitation counselors do not provide direct services to evaluees whom they have previously provided services in the past except under the conditions noted in A.5.f. or government statute. (F.1.c)

The *Code* recognizes that although dual roles should be avoided, there may be circumstances where dual roles are inherent in the jurisdiction in which rehabilitation counselors practice, or there may be situations where those dual roles are beneficial to the evaluee; therefore, the *Code* refers the rehabilitation counselor to appropriate behavior and procedure in these circumstances. Standard F.2.d (Conflict of Interest) further requires rehabilitation counselors providing forensic services to be mindful of potential conflicts of interest that may "interfere with their ability to practice competently."

Drawing from the role distinction set out in the preamble and the earlier discussion about the role of the client in forensics, Section F emphasizes that "rehabilitation counselors do not have clients in a forensic setting." Instead, the "persons who are the subject of objective and unbiased evaluations are considered to be evaluees" (F.1.c); thus, the rehabilitation counselor's primary obligation is to "provide unbiased, objective opinions and findings that can be substantiated by information and methodologies appropriate to the eval-

uation" (F.1.a). This is consistent with the literature in the field regarding the primary role of the forensic rehabilitation counselor as expert witness (Woodrich & Patterson, 2003). This distinction carries forth the concept introduced by Blackwell, Martin, and Scalia (1994) that the only advocates in the courtroom are the attorneys representing each side of the case. The forensic rehabilitation counselor's role is only to advocate for the truth of the opinion based on the facts of the case coupled by the expert's professional experience.

As in the counseling relationship, rehabilitation counselors who provide forensic services are responsible to protect the welfare of the evaluees. Standard F.2.c (Avoid Potentially Harmful Relationships) requires "rehabilitation counselors who provide forensic evaluations avoid potentially harmful professional and personal relationships with individuals being evaluated." In addition, Standard F.4.b (Fee Disputes) establishes that "rehabilitation counselors have the ability to discontinue their involvement in cases as long as no harm comes to evaluees," further translating into the duty to protect the welfare of the evaluees.

Although the principle of confidentiality, as defined in the counseling relationship, is not offered the same protections under the forensic relationship, Section F of the *Code* requires rehabilitation counselors to clarify in advance the nature of the evaluative relationship and how the information from this process will be shared (F.1.b, F.1.e). This provision is consistent with the disclosure and informed consent literature in the profession (Blackwell & Patterson, 2003; Shaw, Chan, Lam, & McDougall, 2004; Shaw & Tarvydas, 2001) and with other sections of the 2010 *Code* guiding rehabilitation counseling practice. However, "when there is no in-person meeting or other communication, disclosure by rehabilitation counselors is not required" (F.1.d). When feasible, rehabilitation counselors are obligated to obtain a written informed consent from the individual being evaluated or the individual's legal representative/guardian. In cases where a written consent cannot be obtained, the rehabilitation counselor is directed to "document verbal consent and the reasons why obtaining written consent was not possible" (F.1.b).

The requirements in Standard F.3.a (Case Acceptance and Independent Opinion) delineate reasons for declining involvement in a case. Similarly, Standard F.3.b (Termination and Assignment Transfer) directs rehabilitation counselors to "make reasonable efforts to assist evaluees and/or referral sources in locating another rehabilitation counselor to take over the assignment" should they withdraw from the case after being retained.

Finally, Standard F.4 (Forensic Business Practices) emphasizes that rehabilitation counselors "do not enter into financial commitments that may compromise the quality of their services or otherwise raise questions as to their credibility" (F.4.a). Furthermore, the *Code* asserts that payment is not linked in any way to case outcome or award.

Conclusions

In the decade between the last revisions of the *Code of Professionals Ethics for Rehabilitation Counselors*, the specialty of forensic rehabilitation counseling and indirect service provision has come into its own within the scope of practice of rehabilitation counseling. The development of a stand-alone section within the *Code*, Section F, crystallizes a recognition—namely, that this specialty area, which has been evolving for about four decades within rehabilitation counseling, holds idiosyncratic characteristics that leave certified rehabilitation counselors vulnerable to ethics risks; as such, the *Code* provides guidelines in terms of ethical behaviors and expectations. As with the related disciplines of psychology, psychiatry, and social work, which have likewise established independent guidelines or codes to guide forensics (Candilis et al., 2007), the field of rehabilitation counseling now has the enhanced ability to guide and enforce ethical behavior within this specialty area of practice at the credentialing level.

Although forensics has existed in practice for a generation of certified rehabilitation counselors, the treatment of ethical codes specific to the kind of services, relationships, and behaviors typical of the practice is relatively new. Therefore, there are many areas for potential research. The field is open. By the time of the next revision, the literature will tell what the development of Section F stimulates to help further evolve the living document called the *Code of Professional Ethics for Rehabilitation Counselors*.

Endnote

[1] Barros-Bailey, M., Carlisle, J., Graham, M., Neulicht, A. T., Taylor, R., & Wallace, A. (2008, 2009). Who is the client in forensics? [White paper]. Published in: (2008). *Estimating Earning Capacity, 1*(2), 132-138; (2009). *Journal of Forensic Vocational Analysis,* 12(1), 31-33; (2009). *Journal of Life Care Planning, 7*(3), 125-132; (2009). *Journal of Rehabilitation Administration, 33*(1), 59-64; (2008).*The Rehabilitation Professional, 16*(4), 253-256; (2008). *Rehabilitation Counselors & Educators Journal, 2*(2), 2-6; (2009).*Vocational Evaluation and Career Assessment Professionals Journal, 5*(1), 8-14.

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