

# Ethics For Forensic Clinicians (Part II)

**Bob Stinson, Psy.D., J.D., LICDC-CS, ABPP**

Board Certified Forensic Psychologist

Attorney at Law

Licensed Independent Chemical Dependency Counselor

# Disclaimer: Not Giving Legal Advice

- Information presented in this seminar is intended for general informational purposes only, and is not legal advice. Legal advice depends on the specific facts and circumstances of each individual's situation. Information provided should not be construed as legal advice.



# Goals & Objectives

1. Be better prepared to evaluate potentially ethically difficult situations in forensic practice before they occur.
2. Be better prepared to respond to potentially ethically difficult situations in forensic practice after they have occurred.
3. Apply case law to forensic assessment and treatment practice.

# Clients, Ourselves, Others



## Laws, Rules, Ethics





# Decision Making Model 1

1. Determine whether the matter truly involves ethics (or a legal or regulatory rule).
2. Consult guidelines already available that might apply as a possible mechanism for resolution.
3. Pause to consider, as best as is possible, all factors that might influence the decision you will make.
4. Consult with a trusted colleague.

# Decision Making Model 1

5. Evaluate the rights, responsibilities, and vulnerabilities of all affected parties.
6. Generate alternative decisions.
7. Enumerate the consequences of making each decision.
8. Make the decision.
  - Pause to consider ways to minimize harm to others (e.g., involve client in reporting)

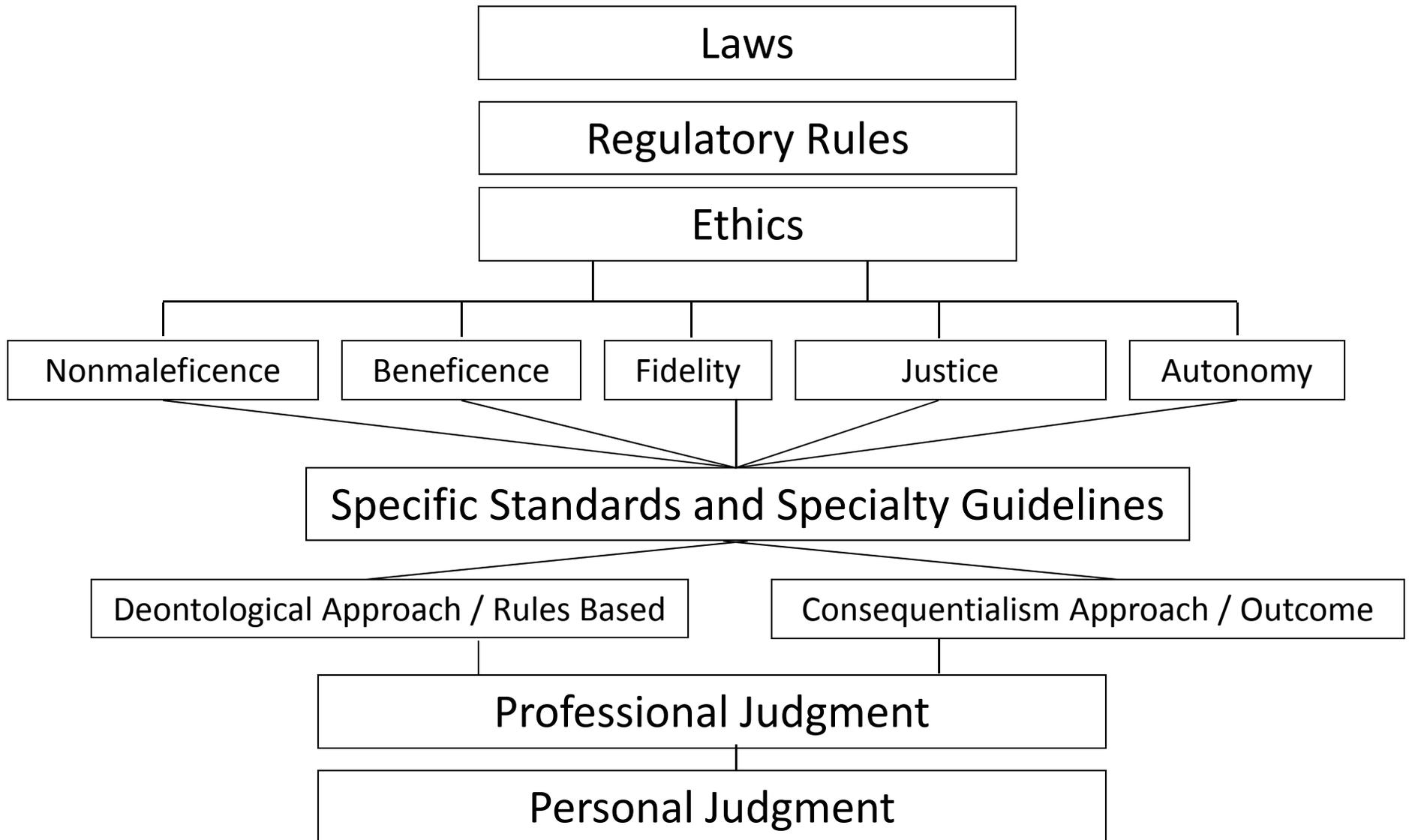
# Decision Making Model 2

1. State the question, dilemma, or concern as clearly as possible.
2. Anticipate who will be affected by the decision.
3. Figure out who, if anyone, is the client.
4. Assess your areas of competence.
5. Review formal ethical standards.
6. Review legal standards.
7. Review research and theory.

# Decision Making Model 2

8. Consider personal feelings, biases, & self-interest.
9. Consider social, cultural, religious factors.
10. Consider consultation.
11. Develop alternative courses of action.
12. Think through the alternative courses.
13. Adopt the perspective of each person affected.
14. Decide what to do, then reconsider it.
15. Document the process & assess the results.

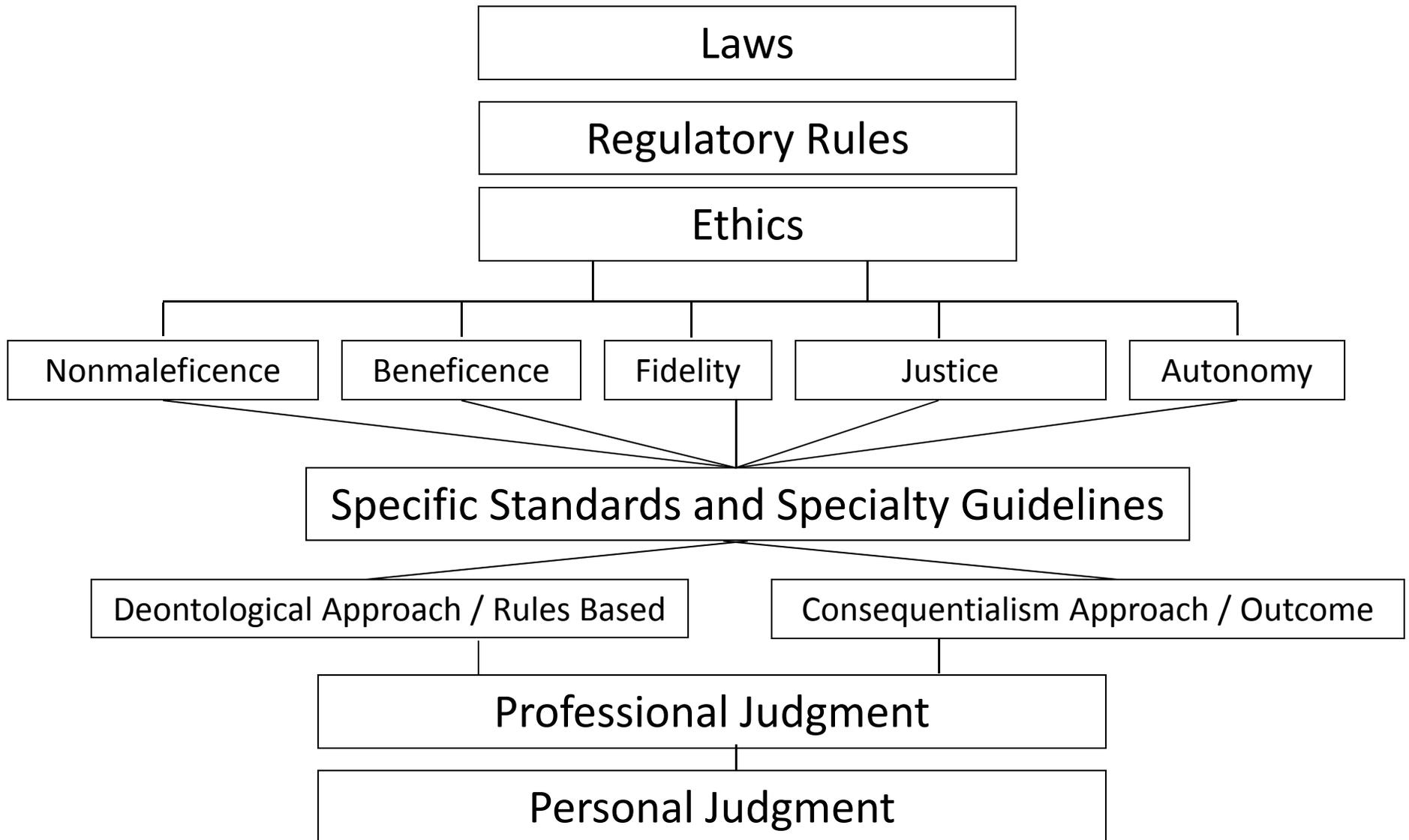
# Integrative Decision Making Model



# Application to Case Examples



# Case Vignette



# Statutes and Case Law

- Felony Reporting Statute
  - Do we have any requirements to report prior felonies?

# Felony Reporting Statute

- ORC 2921.22(A)(1):
  - Except as provided in division (A)(2) of this section, no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.

# Felony Reporting Statute

- ORC 2921.22(G):
  - This section does not require disclosure of information, when any of the following applies: The information is privileged by reason of the relationship between attorney and client; doctor and patient; licensed psychologist or licensed school psychologist and client; licensed professional clinical counselor, licensed professional counselor, independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist and client; member of the clergy... husband and wife; or a communications assistant...

# Felony Reporting Statute

- ORC 2921.22(H):
  - No disclosure of information pursuant to this section gives rise to any liability or recrimination for a breach of privilege or confidence.

# Felony Reporting Statute

- OAG No. 80-022 (1980)
  - An individual examiner who performs a psychiatric evaluation of a criminal defendant pursuant to R.C. 2945.39 or R.C. 2945.37.1 has a duty to report to law enforcement authorities any information obtained during the evaluation concerning criminal offenses that are felonies. The duty to report also extends to the private organization employing the examiner and to any other employee of the organization who has knowledge of such information.

# Statutes and Case Law

1. Right to Counsel / 5<sup>th</sup> Amendment Rights

1. Felony Reporting Statute

1. “Substantial Probability”

# Statutes and Case Law

- Right to Counsel / 5<sup>th</sup> Amendment Rights
  - Can statements in a competency to stand trial evaluation be used against the defendant?
  - Are we required to give 5<sup>th</sup> Amendment warnings?
  - What if an attorney insists on sitting in on an evaluation?

# Right to Counsel / 5<sup>th</sup> Amendment Rights

- Ohio Rev. Code Ann. § 2945.371(J) permits a defendant's statements during a court-ordered mental evaluation to be used against him on the issue of the defendant's mental condition (e.g., insanity), but prohibits their use to prove the defendant's factual guilt.
- It is presumed that a jury obeys the instructions of a trial court

# Right to Counsel / 5<sup>th</sup> Amendment Rights

- Estelle v. Smith, 451 U.S. 454 (1981)
- Weaver v. Gill, 20 Ohio Op. 3d 297, 633 F.2d 737 (6th Cir. 1980)
  - State v. Brooks, Cuyahoga County Court of Appeals, 2000
  - State v. Jennings Pike County Court of Appeals, 2001

# Right to Counsel / 5<sup>th</sup> Amendment Rights

- A defendant is not entitled to the assistance of counsel or to Miranda warnings at a psychiatric examination into his competency to stand trial where the results of the examination are not used against him at trial
- The giving of the Miranda warnings prior to a psychiatric examination may be highly inappropriate. The full and free disclosure of information and the patient's thinking processes, so essential to a meaningful psychiatric examination, would be frustrated if the patient were advised of his right to counsel and his right to remain silent and informed that his statements could be used against him in a criminal trial to prove his guilt

# Statutes and Case Law

- What do we mean by “substantial probability” (as in there is or is not a “substantial probability” that someone can be restored to competency to stand trial)?

# Substantial Probability

- The phrase "substantial probability," in this context, means more than a mere possibility. *State v. Washington* (2001), 142 Ohio App.3d 268, 271, 755 N.E.2d 422.
- If a defendant has a fair chance of being restored to competency within the time allowable, that can qualify as a "substantial probability": *City of Youngstown v. Ortiz*, 153 Ohio App. 3d 271, 793 N.E.2d 498, 2003 Ohio App. LEXIS 2085, 2003 Ohio 2238, (2003).
- "Substantial probability" of being restored to competence does not mean (as Appellant apparently believes) an overwhelming likelihood that the defendant will be restored to competency. If a defendant has a fair chance of being restored to competency, this can qualify as a "substantial probability." *Jackson*, 406 U.S. at 733, 92 S. Ct. 1845, 32 L. Ed. 2d 435.

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