

Ethics Committee

Public Comment Solicitation Website

Response to Ethics Committee June 2009 Recommendation to Council, Standards 1.02 and 1.03

Call June 2009

Deadline 8/31/09

Ethics Committee June 2009 Recommendation to Council

Posted by: Frank Summers

Representing: Individual

Date Edited: 07/28/2009

Comments:

Ethics Committee Report on of rule 1.02 Frank Summers, Ph.D., ABPP In August of 2005, the Council of Representatives (COR) voted to ask the APA Ethics Committee (EC) to review the discrepancy between Rule 1.02, which is in the enforceable section of the Code, and the language found in the non-enforceable Introduction. According to the latter, in cases of unresolvable conflict between the law and the Ethics Code, the psychologist “may adhere to the requirements of the law, regulations, or other governing authority in keeping with the basic principles of human rights.” Rule 1.02 contains the same language except that it does not contain the phrase “in keeping with basic principles of human rights.” It is this difference that motivated the request by the COR. After four years, the EC has just issued its report to be voted on by COR at the August convention. Crucial to the context of the report is the release of a public statement by the EC that it is unethical for a psychologist to participate in torture, and there are no exceptional circumstances that would justify participation in torture. With regard to Rule 1.02, the EC report proposes no change in Rule 1.02, that is, the Committee decided neither to add the phrase “in keeping with the basic principles of human rights” to the enforceable section of the Ethics Code, nor change it in any other way. The purpose of this open letter to APA is to examine the reasons given by the EC for its decision. The first reason offered is that to add the phrase in question “has implications across a broad range of psychologists’ work that have yet to be fully explored” and that to accomplish this task “a careful review of the entire Code will be necessary” requiring the assistance of psychologists across the profession. Therefore, the Committee concluded, it is not advisable to add the phrase “in keeping with basic human rights” because its implications have not been “explored.” If it is not a good idea to change the Code without exploring its implications for psychologists’ activities and the Code as a whole, one wonders why the Committee did not undertake this exploration. It is difficult to see how the Committee can have executed its responsibility in good faith without looking at the implications of the change it was supposed to be evaluating. The membership has waited for four years for the EC to act, ample time for the Committee to investigate the implications of the proposed change. Basically, the EC failed to consider the ramifications of changing Rule 1.02 and then gave its own inaction as a reason for not making the change. It would be as though a Congressional committee were charged with investigating whether a law should be changed and then after not considering the implications of the change, used that lack of knowledge as a reason to not change the law. Additionally, the claim that Rule 1.02

cannot be changed without a “careful review of the entire code” is blatantly hypocritical. Seven years ago the EC added Rule 1.02-- an entirely new ethical standard with potential implications for every single element of the Code-- without either reviewing the entire Code or considering the implications for the rest of the Code. It strains credulity to believe that a new rule that provides a potential loophole for every provision of the Code could be inserted without a review of the Code as a whole, but a modification of that rule requires a review of the entire Code. The second reason specified for maintaining 1.02 in its present form is that the current Code is “highly consistent with how other associations’ ethics codes address conflicts between ethics and the law.” The EC concluded that the “vast majority” of these codes fell into 3 categories: those requiring following the law; codes that allow member discretion (into which the APA Code is placed); and codes that do not address the issue. Of the 50 professional ethics codes the EC reviewed, 25 (50%) do not address the issue. The APA categorized 9 (18%) as requiring compliance with the law, however only 5 actually state this requirement, 2 others include provisions for ethics trumping the law, and 2 others are ambiguous on the issue. Of the 16 codes (32%) that the APA placed in the “discretionary” camp, there is provision for ethics trumping the law in 7, and in the other 9, most require the psychologist to speak up to uphold ethical principles and exhort the psychologist to act in accordance with the Ethics Code. Some simply require trying to resolve the conflict. But, only one has the stipulation found in the APA Code that the psychologist may follow a “regulation or other governing legal authority” rather than its Ethics Code. Adding the 5 “coercive” codes that require compliance with the law, only 6 of the 50 codes reviewed, or 12%, contained provisions for following the law over the professional ethics code. Contrary to its claim of being “highly consistent” with other professional ethics codes, the APA Ethics Code is one of only two codes out of 50 professional organizations with a provision for following “regulations or other governing legal authority” and 1 of only 6, or 12%, that gives precedence to the law over the professional ethics code. If the APA wanted to codify the conflict between the law and ethics in accord with what most similar professional organizations do, it would rescind rule 1.02 because fully 50% of the professional codes reviewed make no mention of a conflict between law and ethics. Before 1.02 was inserted, the APA code was much more consistent with that of similar professional organization than it is now.

Ethics Committee June 2009 Recommendation to Council (continued)

Posted by: Frank Summers

Representing: Individual

Date Edited: 07/29/2009

Comments:

Third, the EC expressed concern that the phrase “in keeping with basic human rights” “potentially mandates civil disobedience. The problem here is that if the EC takes seriously its statement that engagement in torture is unethical and cannot be justified by any exceptional circumstances, then any psychologist ordered to participate in torture would be mandated to engage in civil disobedience without any change in 1.02, unless of

course the torture statement is impotent. The EC position either “mandates civil disobedience” or is proposing that its anti-torture statement is to be ignored. But, the EC does not tell us which it is. This fact raises two more critical questions: Does the EC believe in its own torture statement? And more deeply, why did the EC not raise the issue of conflict between the torture statement and Rule 1.02 which allows for circumventing the Ethics Code? The most obvious problem with the EC leaving Rule 1.02 intact while adopting its supposedly unequivocal opposition to participation in torture is the conflict between the two when a “governing authority” orders the psychologist to engage in torture. Which principle takes precedence? The EC report is astonishingly silent on that critical point. And without a clear statement on this issue the “torture statement” is meaningless. The fact that the report makes no mention of this conflict tempts the conclusion that the EC does not take its torture statement seriously. Not being in the Ethics Code, the EC anti-torture statement is purely aspirational and not enforceable. If the statement were taken seriously, it would be in the Ethics Code, or, at a minimum, the EC report would state with the utmost clarity that the torture statement supersedes law and Rule 1.02. The fourth rationale for leaving Rule 1.02 unchanged is that adding the phrase “in keeping with basic human rights” could potentially require psychologists to break the law and, therefore, could affect the use of the Ethics Code by state licensing boards. The EC wants jurisdictions to use the code, but because the proposed change would mean the Ethics Code would trump the law, licensing boards may not use the APA Code. This rationale means that the EC would rather have an ethics code used by state authorities that permits any of its principles to be violated in favor of following “a regulation or governing legal authority” rather than a code that must be followed but might not be used by licensing boards. While it is not known whether licensing boards would stop using an APA Ethics Code without loopholes, such a code would require ethical behavior and disallow unethical behavior conducted according to a regulation or authority. To sacrifice ethics for “usability” is to compromise the Ethics Code in favor of influence. Ethics trumped by pragmatism is not ethics at all. In short, there is no indication in the EC report that the Committee made any serious effort to review the possibility of amending Rule 1.02 in accordance with “basic human rights.” If it had, it would have explored the implications for the profession and the Code as a whole of such a change during the four years it had to prepare the report. If it had any genuine interest in changing 1.02, it would not raise the specious argument that the “whole code must be reviewed,” when it required no such review to establish 1.02 in the first place. If it had any interest in changing 1.02, it would not have distorted data on other codes to make the APA Code appear to be in the mainstream of professional ethics codes, instead of on the periphery where it is. (Of the 14 page report, barely two pages were devoted to the EC’s “analysis.”) The shame that belongs to the EC for this report derives not simply from what it has done, but equally from what it did not do. There is no evidence that the EC contacted or consulted with a single human rights group, such as Human Rights Watch, Physicians for Human Rights, or the Center for Constitutional Rights. Any of these groups would have been glad to work with the EC to make “in accordance with basic human rights” workable within the context of the Ethics Code. A simple phone call to any human rights group would have led to suggestions such as using the International Covenant on Civil and Political Rights. Indeed, the use of that document to define “basic human rights” was proposed to the EC, and it ignored that suggestion. The evidence is

overwhelming that the EC saw its task as providing rationalizations to keep Rule 1.02 as it is, rather than discharging its duty to review how it could be changed in "keeping with basic human rights." The deceptions, manipulations, and distortions replete in this report all serve to provide transparent rationalizations to maintain the Nuremberg defense in the Ethics Code of the APA. And that is why the COR should reject its recommendation.

Addendum: It is definitely a source of great shame to the APA that the AMA has taken a more ethical stance than the APA on potential conflict between law and ethics. The AMA includes a clause in their 1.02 which states that "ethical obligations typically exceed legal duties" and further on "In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal obligations." BUT, EVEN MORE EGREGIOUS is the grouping of the APA ethics code with that of the AMA in the Ethics Committee report. The APA shamelessly classifies both the AMA and APA codes as "discretionary," thus conveying the impression that the two codes share the same principles on conflict between law and ethics. And the AMA is not the only code that is distorted in the Ethics Committee report. As I said in my letter, the APA puts 16 codes of professional organizations in the "discretionary" group, but there is provision for ethics trumping the law in 7 of the 16, and of the other 9, most require the psychologist to do something to uphold the ethical principles of the organization's Ethics Code. For example, the American Psychoanalytic Association ethics code is labelled "discretionary," but includes this: "These principles recognize that there are times when conscientious refusal to obey a law or policy constitutes the most ethical action" whereas the APA of course allows for following "regulations or legal governing authority." Similarly, the Canadian Psychological Association ethics code is lumped into the "discretionary" group, but states explicitly that if laws or regulations "seriously conflict with the ethical principles herein psychologists would do whatever they could to uphold the ethical principles ." By lumping all these codes as "discretionary," the APA cleverly tries to avoid the stark reality that in only 1 of these 16 codes is the Nuremberg defense written into the code. By categorizing codes that provide for upholding ethical principles over law or regulations as "discretionary" the APA quite consciously iattempting to hide the fact that of the 50 ethics codes it reviewed, only one other has the Nuremberg defense written into it.

Posted by: William MacGillivray

Representing: Individual

Date Edited: 07/29/2009

Comments:

The Ethics Committee was charged four years ago to come up with a resolution of the discrepancy between the aspirational and the enforceable sections of the Ethics Code. The charge was based on what seems to be glaringly apparent that under the current Ethics Code, psychologists are allowed to "follow valid orders" even if the actions required violate basic human rights. You were not required to reinsert the phrase "in keeping with basic human rights;" but you were to consider this and other wording that would resolve the discrepancy. Instead, after four years, you suggest doing nothing. It would have been more honest had you recommended removing the phrase "in keeping with basic human rights" from the aspirational section of the Ethics Code. This would allow for a resolution in keeping with the spirit of APA's continued defiance of its

membership and the other major mental health organizations. The more stinging upshot is your only substantial recommendation to forbid psychologists from participating in torture. This recommendation is surely meant as a slap in the face of APA members who have worked tirelessly within and outside our organization to save it from the folly of its leadership. Their work culminated in a referendum that stated that psychologists could not engage in interrogations under conditions that hold at Guantánamo and other “black hole” sites. It has never been about whether or not psychologists engage in torture, and making this suggestion appears to be a further effort to evade enforcement of the policy implemented by the passage of the referendum and the acceptance of the results by the Council of Representatives in February. I believe APA Council should reject these recommendations and arrange to have an Ethics Committee that will actually discharge its appointed function. I am sure it would not take four years.

Posted by: Manfred Greiffenstein

Representing: Individual

Date Edited: 08/18/2009

Comments:

The recommendation to eliminate the phrase “in keeping with basic principles of human rights” from 1.02, is a good one. First, it reduces confusion as to what body of law is being referred to. The UN Charter? European Criminal Court in Belgium? Religious doctrine? Second, the deletion eliminates prospects for manipulation of the ethics code by schemers. Any illegal or dishonest behavior can be justified by appeal to some higher authority. Third, it requires expert witnesses to better conform their behavior to local or federal evidentiary law, rather than making up rationalizations to control the process.

Disclosure: A large part of my practice is forensic consulting. I regularly encounter efforts to withhold raw neuropsychology test data from me or the courts, based on moral/ethical arguments that are based on the “human rights” language. Psychologists should not be allowed to dictate evidentiary law. In some cases, when the data is revealed, it is poorly scored, or tests were not actually given, although they were listed as given in the interpretive report. Manfred Greiffenstein, Ph.D., ABPP-CN Fellow, The American Psychological Association

Posted by: bernice lott

Representing: Individual

Date Edited: 08/21/2009

Comments:

The issue of adherence to standards of “human rights” as an enforceable principle within the APA Ethics Code is of great importance. I urge that this be done at the recommendation of the Ethics Committee. Those who maintain that it is difficult to define human rights are, in effect, against its inclusion in our ethics principles. I call your attention to The Universal Declaration of Human Rights, adopted by the General Assembly of the UN in December, 1948. It presents a definition that is clear and simple and elegant and one that has been signed on to by countries around the world. For a full

copy of the Declaration, go to [The Universal Declaration of Human Rights](#) It is relatively brief, and the Committee needs to read, study, and use it.