

PEAPA Memorandum on Revision of Ethics Code 1.02 submitted March 7, 2009

1. Should there be modification of Ethics Code 1.02?

We thank the APA Ethics Committee for ensuring the transparency of the review process by making 1.02 documents and the comments of governance groups and members available for study on their webpage. We trust that our feedback is important for the resolution of this controversy. However, we are concerned that, as framed, the Call for Comments appears to limit recommendations to either supporting no change or adding phrases that qualify 1.02. There are at least two other choices regarding 1.02: *deleting* the phrase, "*If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority*" OR reversing it to state that the Ethics Code (EC) should supercede law/regulations/ governing authority in a conflict. The August 2008 Council Resolution directed the Ethics Committee to resolve discrepancies and problems with Codes 1.02 and 1.03, and take measures to insure that 1.02 and 1.03 can "never be interpreted to justify violations of basic human rights." The Resolution does not rule out deleting clauses from 1.02 and 1.03 or adding clauses elsewhere in the EC.

We agree with the many governance groups (1.02 webpage #7 documents) that urge modification of Code 1.02. But we feel that the changes commonly discussed do not adequately correct the problems. One proposal adds the following phrases to 1.02: "provided that psychologists do not violate Ethical Standard 3.04, Avoiding Harm" and "Standard 1.02 can never be used to justify violations of basic human rights." This is far better than no change, but it still keeps the most problematic part of 1.02, "...may adhere to the requirements of the law, regulations, or other governing legal authority." It would be better to delete this phrase from the Ethics Code (in both enforceable and aspirational sections) and add a new standard on protecting human rights and Avoiding Harm that stands alone and would apply to all Codes.

Some commentators argue that inserting references to "human rights" as defined by international instruments is too ambiguous and problematic. For example, the Committee on Legal Issues (COLI, Dec 12 letter on the #7 webpage list, p. 3) states "if the law determines that, in order to 'secur[e]...respect for the freedoms of others,' someone should be subjected to harsh interrogation techniques or even tortured, the [Universal Declaration of Human Rights] would seem to allow it." This argument is seriously in error. The Declaration's prohibition, as interpreted by the UN Convention Against Torture (UNCAT) and its extensive jurisprudence, is absolute (as are the APA Resolutions Against Torture of 2006, 2007 and the amendment of 2008). Without intending to do so, COLI has pointed out precisely why 1.02 must be changed to align with US ratified international laws such as UNCAT. Otherwise psychologists remain susceptible to violating ethics by obeying unethical laws, regulations or orders or by following tortured domestic interpretations of international law. If U.S. government officials (military, intelligence, law enforcement) determine that trying to secure the freedom and safety of Americans requires harsh interrogation methods, then according to 1.02 the psychologist working for them may follow orders to assist such measures.

We support adding the human rights and 3.04 clauses to the Ethics Code but in a different way. We do not believe adding them to 1.02, as it reads now, would be a sufficient check against its misuse. For example, where interrogators might use stress-inducing or deception techniques that do not violate international law, these methods do violate the APA Ethics code (cf “False Flag” and “Fear Up” procedures, U.S. Army Field Manual). Similarly, while the standard operating procedures for interrogations and confinement at Guantánamo Bay may not have violated military law in force at the time, these were in violation of the APA ethics code.

On the surface Code 1.02 seems clear and practical, but in reality it is a dangerously blunt instrument that exacerbates rather than clarifies conduct questions as we will discuss in parts 2 and 3. Qualifying 1.02 with the proposed human rights and 3.04 phrases is not enough to correct its ambiguities and prevent its misuse. Therefore, we urge *deletion* of "If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority" from all parts of the EC and will propose alternative ways of addressing law/ethics conflicts in parts 3 and 4.

2. Can psychologists provide specific examples of instances in which the current language of Standard 1.02 has proven inadequate or problematic?

On its 1.02 webpage, the Ethics Committee frames the issue in terms of conflicts between Ethics and Law, but recent objections to 1.02 do not concentrate on situations in which there is a conflict between the EC and the Law, if by law is meant federal or state laws unrelated to national security. Code 1.02 reads that in a conflict, "...psychologists may adhere to the requirements of the law, ***regulations, or other governing legal authority.***" (bold italics added). Judging from their adoption dates and wording, a few organizations have adopted APA's 1.02 verbatim. Apart from these, however, the professional Ethics Guidelines reviewed in webpage section #8 refer only to “law,” and not “regulation or other governing legal authority.” These words increase the scope of 1.02 tremendously, and the accusation that 1.02 is a version of the “Nuremburg defense” stems from these additional terms, e.g., you may follow orders [of a law enforcement officer, military commander, CIA agent, governor, mayor, indeed any government official] in a conflict.

The Table in webpage document #8 categorizes APA 1.02 under psychologist’s discretion because it says the psychologist *may* follow law over the EC in a conflict, not *should* or *must*. This groups it with the guidelines that advise the psychologist to attempt a resolution, but do not specify what to do if the conflict cannot be resolved (which is what APA Ethics Code 1.02 said before it was amended in 2002). Apparently, “*may adhere*” implies it is also ok to not adhere to orders, so Standard 1.02 is categorized as leaving the decision to the discretion of the psychologist. However, if both options were equally acceptable, there would have been no need for the 2002 revision. Adding only the "may adhere" clause to the enforceable section of the EC

signals a bias in favor of following law, regulations and other governing legal authority over EC in a conflict.

COLI asserts that “although concerns have been expressed recently about psychologists working in extra-legal detention settings, we have seen little evidence of a profound problem and are not aware of situations in which psychologists have been ordered to engage in unethical behavior.” (p. 5). We take strong exception to such a statement. The 2005 investigations of the Office of Inspector General and the Army Surgeon General describe how psychologists routinely have been ordered to use their clinical training to devise coercive ways to “press detainee buttons” and oversee incarceration punishments of recalcitrant prisoners. In televised hearings in June 2008, the Senate Armed Services Committee chairman specifically documented the role of psychologists in systematic abuse, and in November the formal report on its torture investigation received nationwide attention. The Senate Armed Services Committee has determined that psychologists played a significant role in the implementation of orders to apply “reverse-engineer” SERE (Survive, Evade, Resist, Escape) techniques meant to steel captured US soldiers against torture and apply them to “enhanced” interrogation of detainees. Credible accounts and rigorous government studies show that under orders psychologists and psychiatrists have devised, assisted, and trained army and contract interrogators in coercive and abusive methods of interrogation and incarceration at Guantanamo, Abu Ghraib, Bagram and other detention sites.

COLI continues: “Assuming, *arguendo*, that there is a profound problem, there is no evidence that this problem is widespread.” (p. 5) Although part of top secret operations, there is now credible evidence from government investigations that a disturbing number of psychologists have abetted detainee abuse in what is an established program. For example, two are currently under Senate subcommittee investigation for involvement in torture. A third, the psychologist accused of abusing a teenage prisoner at Guantanamo Bay, refused on Fifth Amendment grounds to testify at the detainee's military commission trial. Complaints against a fourth psychologist were submitted to the Ethics Committee over two years ago, but have produced no action despite serious documentation on his involvement in detainee abuse. A fifth psychologist cited in the Senate Armed Services Committee hearing for abetting “enhanced” interrogation methods is one of the highest ranking psychologists in the U.S. Army and a key member of the Psychological Ethics and National Security (PENS) Task Force that led to APA support for psychologist involvement in detainee interrogations.

These psychologists are not rare lone wolves. Investigations indicate that others have been involved in abusive detainee interrogations as well. Nor can they be marginalized as ‘bad apples.’ Indeed they have executed a program that was legal according to Presidential findings and memoranda by the Secretary of Defense. The Department of Defense and CIA continue to use psychiatrists and psychologists this way, despite vigorous protest from organizations such as the American Psychiatric Association and World Medical Association.

To our knowledge, the five psychologists are still employed by the CIA or U.S. Army, and none has been investigated by the APA or their state ethics committees or licensing boards. The APA has yet to condemn the abusive standard operating procedures devised and implemented by psychologists. Code 1.02 has proved useless for oversight, professional guidance or legal defense. On the contrary, it permits the following of regulations that might otherwise be deemed unethical, and practices that harm prisoner, soldier, and public trust in military health care in general and the psychology profession in particular.

The problem spreads well beyond detention centers. Code 1.02 can be used to permit work by psychologists in secret intelligence operations and research that involves deception without debriefing, stress procedures, violations of confidentiality, lack of informed consent, and other forms of serious harm to prisoners, patients and research participants that are prohibited by the EC. We do not know the extent of such practices or whether Code 1.02 or the PENS policy can provide them cover in fact. However, there are reports (e.g. *American Journal of Bioethics*, May 2007) that psychologists have been conducting highly controversial and potentially harmful neuroscience experiments for national security applications, and it is not clear that the APA Ethics Committee, civilian Institutional Review Boards, or state licensing boards provide adequate oversight for this and are addressing the problems.

3. If the discrepancy has or is very likely to lead to specific ethical or legal problems, what options exist for addressing the discrepancy?

Code 1.02 was amended in 2002 to address problems emerging within forensic psychology practice in the U.S., and arguments against changing 1.02 are usually made by forensic psychologists. But in 2005, it was applied to psychologist involvement in military interrogations of detainees. The Psychological Ethics and National Security (PENS) Task Force maintained that this work was ethical in part because it was comparable to ethical forensic psychology practices in the U.S. However, forensic psychologists do not supervise criminal interrogations, and there are profound differences between national security psychology and psychological services to domestic law enforcement and U.S. judicial and correctional systems. The forensic psychologists who consult with the intelligence community are working under very different rules. The law/ethics problems facing civilian psychologists seem manageable; the authority/ethics problems facing psychologists working for the military or intelligence community are of another order altogether.

Given the transparency, options for redress, and safeguards of the U.S legal system, many civilian law/ethics conflicts can be reconciled without violating either the Law or Ethics Code. Also, the APA Ethics Code and the Speciality Guidelines for Forensic Psychologists (SGFP) outline in detail how psychologists are to balance the rights and well-being of the person treated or evaluated against the safety and needs of the court, public agency, prison, school, etc., without resorting to Code 1.02. For the difficult cases that remain, Code 1.02 is far too blunt and vulnerable to misuse. An

extensive review process is needed to develop more refined and constructive guidelines for the difficult law/ethics conflicts, most of which appear to involve immediate danger or criminal prosecution situations (cf the hostage scenario in COLI memo of web list #7).

Should psychologists be hostage negotiators or should they only contribute to police training? Should they consult with investigators on how to interrogate a specific suspect or should they only do research and training that helps authorized investigators do it better? Should they act as criminal profilers on actual cases or stay with doing research and training on the efficacy of criminal profiling? Psychologists do research on a wide range of topics of value to investigators. They also have recognized authority in psychodiagnostics, crisis intervention, clinical interviewing skills, assessments of dangerousness to self or others, cognitive processes, and more that are invaluable to the legal system. A few psychologists are recognized experts in assessing cues to deception and other special skills of value to investigators. When psychologists are expert witnesses in court, the data they cite must be sufficiently reliable and valid (cf Daubert hearings), their expertise formally vetted, and their opinions subject to cross examination. When they share their knowledge with law enforcement through teaching, their input is valued and uncontroversial (unless it explicitly fosters abusive practices).

Legitimate research and training must be protected. But Code 1.02 supports military psychologists advising detainee interrogations, a practice that has set a terrible precedent. Fear of restricting practice cannot overwhelm our obligation to address the serious negative consequences of “deputizing” psychologists to intervene in, investigate or help prosecute actual cases like this. When there were concerns that the Referendum would jeopardize ethical psychologists working in hospitals, correctional facilities and rehabilitation programs (see Report of the APA Presidential Advisory Group on the Implementation of the Petition Resolution, Dec 2008), the boundaries of what the referendum covered were made clear enough that the referendum was ratified by Council. Any such concerns about changing Standard 1.02 can be allayed as successfully. Fortunately, for cases in which a psychologist’s practice, assessment, consulting or research interfaces with the U.S. judicial, law enforcement or correctional systems, there is a timely way to work on difficult law/ethics conflicts. Revision of the APA Div. 41 Speciality Guidelines for Forensic Psychologists (SGFP) is now in progress.

Which brings us to domains where existing guidelines are inadequate and the judicial and security system has little transparency, options for redress, or robust protections for the individual: e.g., military operations and top secret research serving national security concerns. Standard 1.02 and the PENS 2005 decision have proven totally inadequate as guidelines or protections for psychologists in these contexts. No way has been established to provide ethics counsel and communication between civilian Ethics officials and psychologists working in a top secret military operation or intelligence research project. Given the power of the Commanding Officer, the psychologist who refuses an order can be forced to take an undesirable reassignment or resign his or her commission immediately, and the APA has no power to prevent this. Because security rules bar the officer or researcher from communicating with civilians about what is happening, he or she cannot get outside moral support or advice. The

only true support that the APA can offer these psychologists resides in the influence the APA has on state licensing given its role as definer of good practice standards, because the U.S. Department of Defense requires that psychologists maintain their licenses in good standing. Code 1.02 effectively deprives the military psychologist of a powerful pushback: "With respect, sir, I can't do that as it violates my Ethics Code and jeopardizes my psychology license."

We agree there are challenges to using "law as the arbiter of what is right," (COLI, web list #7, p. 3), but these are nothing as compared to the problems of using the military justice system and the orders of military commanders or intelligence officers as the arbiter of what is right for a psychologist. The addition of human rights phrases to the Ethics Code would not "*require* psychologists to violate the law in certain circumstances" (as COLI asserts on p. 4), but U.S. military and intelligence officers can now require it by claiming national security priorities. APA adoption of the 2005 PENS policy meant embracing a national security priority rule -- trying to help prevent possible harm to unidentified Americans supercedes actually harming specific individual(s) -- and 1.02 reinforces this principle. We count at least 13 Ethics Standards that are violated by the US Army program in which clinicians are assigned to assist detainee interrogations. Code 1.02 exempts these psychologists from adhering to 1.05 Reporting Ethics Violations (security prohibits communication); 2.01 on working outside own's area of competence (no training in interrogations, the emergency exception pertains only to mental health services); 3.04 Avoiding Harm, 3.05 Multiple Relationships (supposedly protecting detainees while helping interrogators be effective), 3.7 on necessity to define one's role; 3.10 (a) on obtaining informed consent, 3.10 (c) and 4.02 on informing about the limits of confidentiality; 9.01 on adequate bases for assessments; 9.01 on adapting assessments to appropriate purposes in light of research; 9.02 on validity and reliability of assessment for this population; 9.03 (a) Informed Consent in Assessments; and 9.03 (c) on informed consent to use interpreter. All of this before counting what the 2008 referendum prohibits: working for authorities in a setting that violates human rights. In addition, Code 1.02 exempts research and consulting psychologists working for a "governing legal authority" like the CIA or Department of Defense from adhering to five other Ethics Standards (8.02, 8.03, 8.05, 8.07, 8.08).

Code 1.02 has proved disastrous and must be deleted. There have to be more specific and refined ethics rules that guide and provide oversight for psychological consulting, research and training applicable to national security. Only a wide range of experts and the multiple stages of the Standard Revision process can produce workable Standards and procedures for psychologists working in these contexts.

4. If a modification of the current Ethics Code is the best option for addressing these problems, how should the code be modified?

Because it has been four years since a modification of 1.02 was mandated by the APA Council of Representatives, the question is not whether to modify 1.02 but how to do it well as soon as possible. We recommend the following:

a) *Delete "if the conflicts are unresolvable through these means, then the psychologist may follow the law, regulations, or other governing authority."*

This clause should be stricken immediately from both the aspirational and enforceable sections of the EC no matter what other changes are made. The addition "provided adherence does not violate basic human rights" in the Introduction would be deleted as it no longer has a clause to qualify. The new 1.02 would read:

"If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner."

We believe this is enough and puts the emphasis back where it belongs, working on resolution of the conflict.

b) *For consideration during the next Standard Revision: addition of a clause that privileges Ethics over Law in a conflict.*

If a more definitive Standard is needed, then add the following to the new 1.02:

"If the conflict is unresolvable via such means, psychologists adhere to the Ethics Code."

According to the web #7 COFI memo and the web document #8 Table there is no precedent for this Standard, but we find errors in the Table. For example, the National Association of School Psychologists is listed as privileging Law over Ethics in a conflict, but in the clauses quoted from it, Ethics supercedes Law. In the #8 Table, we see two organizations that explicitly privilege Ethics over Law and four that implicitly support it. It would be instructive to know if this Standard has proven feasible and useful to these professionals. Because more research is needed, we propose this Standard be considered in the next EC Standard Revision.

c) *Immediately delete the 1.03 qualifier: "to the extent feasible."*

This clause is too vague and conducive to serious misuse. If it is not feasible to delete it, then the entire 1.03 should be deleted immediately and whatever problems it was designed to address should be referred to a Standard Revision of the Ethics Code.

d) *Immediately add an omnibus protection Standard to the Ethics Code.*

We propose that the Council immediately act on inclusion of a new Standard placed in both the aspirational and enforceable sections like the following:

"No Standard of the Ethics Code can be used to justify violations of human rights or Standard 3.04, Avoiding Harm."

This would require criteria for defining human rights and for this we recommend the International Covenant on Civil and Political Rights (ICCPR). Ratified by the U.S., ICCPR is a very clear, comprehensive treaty that has been well developed and given meaning by many courts and experts. We understand that “basic” as in “basic human rights” is unnecessary and not useful, so we have omitted it. The proposed protection Standard would help close loopholes and prevent misuse of any Ethics Standard, and would bring the Ethics Code in line with the referendum passed in Fall 2008. It would also be a guide to resolving difficult conflicts by specifying that the psychologist should not chose to follow law, regulations, and governing legal authority if doing so violates the new protections Standard and the ICCPR.

e) Address the ethical challenges of psychological research and consulting that serves national security in the next Standard Revision of the Ethics Code.

The PENS Task Force recommendations failed in part because they were hastily made by a very limited group. The ethical problems of the burgeoning area of “national security psychology” warrant the full revision process and consideration of additional Standards such as Canadian Psychological Association Ethics Code 1.6: “Refuse to advise, train, or supply information to anyone who, in the psychologist’s judgement, will use the knowledge or skills to infringe on human rights.”

In conclusion, these proposed changes would fulfill the directives of the Council of Representatives and correct discrepancies and problems with 1.02 and 1.03 by August 2009 as per the Council Resolution. Separating domestic forensic psychology concerns from those of psychologists serving the military and intelligence community makes it possible to address remaining questions appropriate for the Specialty Guidelines for Forensic Psychologists during its current revision process, while leaving new and difficult ethical questions of national security psychology for the next Ethics Code Standard Revision process. In total these changes, combined with implementation of the referendum, could go a long way to restoring the damage to trust in our profession that has followed application of Code 1.02 and the PENS policy.

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