

October 24, 2016

To the APA Commission on Ethics Processes:

We write as former chairs of the APA Ethics Committee in response to the Commission's "Call for Comments" as posted on the APA Website. (<http://www.apa.org/ethics/>) We support the Commission's review of the APA Ethics program as "one of the first steps in a series of recommendations" by the Board and Council in response to the Independent Report authored by attorney David Hoffman (hereafter abbreviated as the "IR"). We submit these comments based on our experiences with the Ethics program and, in some cases, our personal knowledge of events described in the IR with the hope that the Commission's activities will support an Ethics Office that continually improves its ability to meet the needs of the APA membership and the public.

The IR addresses the ethics adjudication program in two sections, the Executive Summary (pages 58-63) and the section "APA's handling of Disciplinary Cases against National Security Psychologists" (pages 464-522).

### **Criticism of the handling of ethics complaints related to national security activities**

The IR was highly critical of how the Ethics Committee and Office handled four ethics matters over a period of 12 years. The IR characterized the handling of these four matters as "improper," (e.g., "we found that the handling of ethics complaints against prominent national security psychologists was handled in an improper fashion," page 10, and "Conclusions regarding improper application of APA Ethics Disciplinary System," page 58).

The ethics adjudication program is governed by the APA Bylaws, the Association Rules, the Ethics Committee *Rules and Procedures*, and Ethics Committee policies regarding confidentiality. Despite extensive discussion regarding the handling of ethics matters, the IR failed to cite a single instance in which the Ethics Committee or Office staff violated any specific provision of these governing documents (with the sole exception that a letter may not have been placed in the appropriate file after a matter was closed, page 492). In fact, an informed review of the IR reflects close attention to policies and procedures by the members of the Ethics Committee and the Ethics Office staff. These four disciplinary cases were not handled in an "improper" fashion. The IR's description of Ethics Office staff review of ethics complaints as "a backwards-process wherein the preliminary determination of an ethical violation is made before any specific ethical standards are even considered" (pages 471, 515) is a mischaracterization of how the Ethics Office staff operate. In our experience, Ethics Office staff are professionals with an intimate working knowledge of the Ethics Code and relevant procedures.

Additionally, the IR's failure to include important information reviewed by the Ethics Office in the four matters (e.g., pages 494-520) also hampers a reader's ability to make an informed judgement about how the Ethics Office operates and recognize that these four matters were handled in a manner consistent with how other ethics complaints were handled. The IR's failure to compare how these four matters were handled with how other cases were handled risks

leaving the inaccurate impression—especially for readers without detailed familiarity with Ethics policies and procedures--that these four cases received differential and improper treatment.

The Commission may take this opportunity to clarify whether the Ethics Committee *Rules and Procedures* are to be applied in a manner consistently across all ethics complaints or, as is implied by the IR, whether certain classes of complaints will be treated differently than others. Differential treatment risks cutting against the very notion of due process.

### **The disclosure of confidential information in the Independent Report**

The extensive disclosure of information related to these four ethics matters in the IR may well have violated the Ethics Committee *Rules and Procedures* regarding the confidentiality of ethics complaints (<http://apa.org/ethics/code/committee-2016.aspx>, see especially Part II, sections 3.1 and 3.2). This disclosure has the potential to undermine confidence that APA will respect the confidentiality of ethics-related matters and thus undermine the work of the Ethics Committee and Office. Release of ethics case information in the IR raises legitimate concern about whether information coming to the APA Ethics Office will be kept confidential.

It is essential that the Commission directly address the contours of confidentiality for matters before the Ethics program so that complainants and respondents are fully informed regarding whether information related to an ethics matter will remain confidential or under what circumstances that confidentiality can or must be breached.

### **Conflicts of interest in the Ethics adjudication program**

The Ethics Commission should address conflicts of interest in the adjudication program. Clear rules on recusal will protect APA staff and the adjudication process.

Current procedures require the Director of the Ethics Office and the Chair of the Ethics Committee to conduct an initial review of an ethics complaint, including on occasion review of complaints against members serving in governance roles. Many governance groups are peripheral to the ethics process and Ethics staff have little interaction with those groups. Other governance groups are central to the functioning of APA, and ethics staff have regular contact with group members. It is untenable that an Ethics Office staff member would review a complaint against a member of the Board of Directors. Senior staff have ongoing contact with the Board and often have longstanding relationships with them. Responsibility for personnel decisions rests with the CEO rather than the Board but there are myriad ways in which members of the Board can exercise influence over staff which at times can include staff recognition and even compensation. We strongly encourage the Commission to review the letter of resignation recently submitted by the public member of the Ethics Committee for additional thoughts on the subject of conflicts of interest in the adjudication process.

## **The role of adjudication in the Ethics Committee and Ethics Office**

The IR stated (page 465), “[The Ethics Office Director] made education and consultation the primary focus of the Ethics Office; adjudication was relegated to a ‘tertiary focus.’” The Board of Directors, not staff, sets priorities for APA offices. During our respective tenures as Chair of the Ethics Committee, the Director of the Ethics Office followed and applied the priorities established by the Board of Directors in a manner that was consistent with the policies, rules, and procedures governing the adjudication program. If the Commission believes those priorities should be re-aligned, the correct body to do so is the Board of Directors and not the Director of the Ethics Office.

Second, the Hoffman report stated (page 475), “During his interview, [the Ethics Office Director] told Sidley that the role of the Ethics Office is not protection of the public and that protection of the public is a function for state licensing boards.” During our respective tenures, the Ethics Office, led by the Office Director, actively sought to collaborate with the Association of State and Provincial Licensing Boards (ASPPB) and individual state, territorial, and provincial licensing boards. He envisioned *complementary* roles for the Ethics Committee and licensing boards in enhancing the competent and ethical practice of psychology.

The Commission could make a valuable contribution by describing what it views as the appropriate relationship between the APA Ethics program and licensing entities. This would be particularly helpful since the IR failed to report that multiple licensing boards had investigated complaints against one military psychologist named in the IR yet took no action against him. (pages 520-522)

## **Access to information by the Ethics Committee**

The IR correctly indicated that there are times when the Ethics Committee and Office are not able to obtain information necessary to adjudicate an ethics complaint because of limitations on APA’s ability to conduct an investigation. These limitations include the lack of subpoena power and in rare cases, the inability to obtain classified information. Ironically, the IR indicated that its own ability to investigate APA was hampered by these same limitations (e.g., “as non-government investigators, we do not have a security clearance,” page 5) yet criticized APA for making this point, “there was...an accurate (albeit strategically convenient) claim that gathering full information would have been extremely difficult in light of the classified nature of the underlying activities.” (page 67). But it is incorrect to conclude that a lack of access to classified information is the only, or even primary, reason why ethics investigations cannot go forward. There are many reasons why the ethics program may not have access to information necessary to adjudicate an ethics complaint but no analysis of these reasons was offered in the IR.

The Commission can make a valuable contribution by addressing the challenges facing a private association in accessing information in investigating or adjudicating ethics complaints but risks missing the mark if the inquiry focuses upon the rare situation in which the challenge is due to classified information.

We offer our thanks to the Commission for reviewing our comments. We look forward to reading the Commission's recommendations for the Ethics program and commend the Commission for its work on this challenging task.

Sincerely,

Robert T. Kinscherff, Ph.D., J.D., Chair 2000, 2001

Steven Sparta, Ph.D., ABPP, Chair 2002

Michael D. Roberts, Ph.D., Chair 2003

Katherine Di Francisca, Ph.D., Chair, 2005

Robin M. Deutsch, Ph.D., ABPP, Chair 2007

W. Brad Johnson, Ph.D., Chair 2008

Nancy McGarrah, Ph.D., Chair 2010

Nadya A. Fouad, Ph.D., Chair, 2012

James N. Bow, Ph.D., ABPP, Chair, 2013