

Commentary: Medical Subspecialty Enforcement?

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From its inception, the American Academy of Psychiatry and the Law (AAPL) has decided not to investigate and adjudicate complaints of unethical conduct of its members or others, but rather refers the complainant to other organizations, such as the “local district branch of the American Psychiatric Association (APA), the state licensing board, and/or the appropriate national psychiatric organization of foreign members” (AAPL Ethics Guidelines). Loss of APA membership, however, terminates one’s AAPL membership upon AAPL notification. Further, the AAPL Ethics Committee “may issue opinions on general or hypothetical questions but will not issue opinions on the ethical conduct of specific forensic psychiatrists or about actual cases” (AAPL Ethics Guidelines). This referral policy has been criticized at times with various proposals for change. Candilis and colleagues have thoughtfully considered several alternative courses of action. Extending those considerations, this Commentary considers the practices of other health care professional organizations and some implications of the proposal offered by Candilis *et al.*

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As trained forensic psychiatrists, along with other mental health professionals who practice in the field, we have continually struggled with a plethora of ethics challenges in forensic mental health work. Such struggles originate in the complex nature of our work at the intersection of the law and psychiatry. As a group, we represent many diverse cultures, ethnicities, religious traditions, and philosophies. Our views on complex legal, social, and criminal justice policies and practices diverge widely, as might be expected. Our values may differ, and we may balance conflicting duties differently. Accordingly, one should not expect easy or simple resolution of complex forensic ethics challenges, or even a consensus on process and procedure.

In their article, Candilis and colleagues¹ note that the American Psychiatric Association (APA) *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*² (APA *Principles*) may be insufficient for investigating and adjudicating complaints of unprofessional or unethical behavior of forensic mental health practitioners. This results from the lack of specificity of the *Principles* for forensic practice. They also indicate that state boards of medicine

typically do not include a forensic psychiatrist, or even a general psychiatrist, who is familiar with the standards of practice in the field, to assist the board in properly adjudicating complaints of unethical forensic mental health conduct.

The uncertainty of forensic ethics enforcement is not necessarily resolved, even if a state board of medicine or the APA wholly adopts the American Academy of Psychiatry and the Law (AAPL) Ethics Guidelines (AAPL *Guidelines*).³ With some limited exceptions, the AAPL *Guidelines* are aspirational rather than regulatory rules or black-letter standards of forensic practice; they are not mandatory standards of practice readily enforceable by the APA or other organizations, even if those organizations adopt them. Similarly, state boards of medicine sometimes adopt professional ethics codes or provisions for their own use in disciplining licensed practitioners in that jurisdiction, but may have difficulty operationalizing them in a given case.

We should consider modifying the APA *Principles* and the accompanying enforcement procedures if we conclude that the document fails to speak adequately for all psychiatrists, whether generalists or specialists, and fails to provide adequate coverage of the needs of the latter as well as the former. Of course, other psychiatric subspecialty groups may seek a similar accommodation.

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Candilis *et al.*¹ propose that APA district branch ethics committees consult with subspecialty-trained colleagues when conducting ethics hearings. They also encourage that district branch ethics committees be permitted to review relevant policy documents from subspecialty mental health organizations, by modification of the APA Procedures for Handling Complaints of Unethical Conduct (APA Procedures).⁴

Motivation for Changing the APA Principles

We might initially reflect about our reasons for wanting to incorporate statements about forensic practice into the APA *Principles*, raising the bar so to speak. It is true that standards of professional ethics are a moving target, subject to change, context dependent, and evolving over the years. Clinical and forensic practices that were once common and accepted may no longer be so regarded. Thus, it should not be alarming to seek to modify professional codes of ethics as viewed by a professional society.

In the present context, it is worth considering whether we forensic psychiatrists believe that we are more virtuous, self-righteous, or ethical or are superior in our work or lives compared with the generalists for whom the APA ethics code is primarily written. Forensic evaluators can often be heard protesting the expert opinions and methods of the opposing expert evaluator and may wish to suppress such opinions for a variety of reasons. Some forensic examiners too readily attribute disagreement among colleagues to unprofessional conduct and bias, rather than a difference of opinion or competition and rivalry between them. Often, due to limited financial and time resources, attorneys fail to cross-examine expert witnesses adequately, leaving unexposed the expert's credentials, methods, and opinions. This failure can be distressing to the other experts and prompt them to take on an advocacy role.

Alternatively, from the aspirational perspective, we want to encourage the highest level of professional practice and quality work among our nonforensic colleagues, and adopting enhanced ethics standards may facilitate that quality, although the question is open to argument.

Many forensic psychiatrists and AAPL members have sat in on APA district branch ethics committee proceedings and helped to adjudicate complaints of

unethical conduct by nonforensic members, struggling to do so without the benefit of the AAPL Ethics *Guidelines*, as Candilis *et al.* suggest.¹ We might wonder whether we are contented with the current AAPL referral policy or even ashamed of it. Should we consider it to be a success or a failure? Has the current AAPL procedure caused us to abandon our moral and ethics-based responsibility to self-regulate our profession and the individuals for whom, and with whom, we work?

If AAPL enforced its aspirational *Guidelines* as standards or rules, or if the APA integrated and enforced them through their existing mechanism, what result would obtain, if any? In the world of business, ethics codes have mixed value and effectiveness (*i.e.*, impact) despite their popularity.⁵ In the health care setting, reporting colleagues who are allegedly impaired, negligent, unethical, or unprofessional is a challenging and unpopular task.^{6,7} Even being asked about a colleague's reputation during one's testimony can be problematic.⁸ Self-regulation in the health care professions has been challenged as inadequate by itself, but it remains essential to our roles and function.^{7,9}

Magnitude of the Debate

Empirical data do not resolve ethics dilemmas, but they can inform the debate and provide a context. To this end, we might wonder about the frequency or magnitude of the adjudication of forensic mental health ethics complaints in the real world.

First, what about AAPL? AAPL does not tabulate the frequency of telephone or written allegations or complaints regarding its members or other psychiatrists, or its referrals to APA district branches or state boards of medicine for adjudication (Coleman J, personal communication, January 23, 2014). Similarly, the APA does not publish its ethics complaint or adjudication case data, but it should.

Some organizations annually publish the types and frequency of processed ethics complaints. Outsiders can thus glimpse the work of the organization's ethics enforcement efforts, at least to a limited degree. The American Psychological Association (ApA) publishes an annual ethics committee report in its publication, *The American Psychologist*. Many details of the committee's work are not presented, but the committee annually publishes case data grouped by category of case, case source, status of case, and case

outcome. In 2012, for instance, the committee formally reviewed five cases, although many more were carried forward from previous years, as well as ethics committee review of membership applications.¹⁰ There were 13 new cases opened in 2012, 2 of which were categorized as inappropriate child custody professional practice, without further explanation. It is unclear whether these involved forensic mental health evaluations, but no other case category refers to forensic mental health practice. In 2011, nine new cases were opened, and none apparently was related to forensic mental health work, including child custody practice.¹¹ In 2010, 21 new cases were opened, and 2 involved inappropriate child custody professional practice.¹² In 2009, two new cases involved child custody practice.¹³ In summary, it does not appear that complaints about unethical forensic mental health evaluations or practice are prevalent among psychologist members of the American Psychological Association, especially in areas other than child custody practice.

The National Association of Forensic Social Workers (NOFSW), a 261-member organization, has adopted a Code of Ethics.¹⁴ Their ethics committee is responsible for developing guidelines for the organization. In the past 10 years, only one ethics complaint has been submitted to the organization, and it was rejected by the committee (Brady PW, personal communication, February 11, 2014).

The Federation of State Medical Boards maintains disciplinary histories for physicians that are available to the general public, contracting agencies, and state medical boards. These comprise postenforcement data rather than complaints or allegations of misconduct. The disciplinary data are not categorized or summarized in a way that would readily provide information regarding alleged or determined misconduct with regard to forensic work by the physician. Individual state medical boards compile their own data, and it is possible that a state board would provide such information on request.

The AMA's Council on Ethical and Judicial Affairs (CEJA) publishes an annual report containing the year's judicial activities in screening, evaluating, and adjudicating the complaints that come before them.¹⁵ These typically exclude complaints by one physician against another, however. For the reporting period of April 1, 2012 through March 31, 2013, CEJA determined that there was no probable cause in 7 cases, had a final determination without a ple-

nary hearing in 25 cases, and had a final determination following a plenary hearing in 33 cases. It is difficult, however, to interpret these data.

In contrast, the American Association of Neurological Surgeons (AANS) received considerable attention, publicity, and subsequent litigation after disciplining member neurosurgeons for their expert reports and testimony as plaintiff's experts in professional liability litigation in several states.¹⁶ The AANS Professional Conduct Committee was initiated more than 25 years ago and regularly reviews expert testimony brought to the committee by complainants who are typically treating neurosurgeon defendants. From 2004 to 2009, AANS investigated 22 complaints of alleged improper expert witness testimony of its members.¹⁷ As of 2006, 80 complaints had been filed with the Professional Conduct Committee, and 65 of these involved expert witness testimony: 60 hearings were held resulting in 5 expulsions, 22 suspensions, and 9 letters of censure.¹⁸ As of August 2011, the organization had taken 68 disciplinary actions, including 45 related to expert witness testimony.¹⁷

The American Academy of Orthopedic Surgeons (AAOS) has disciplined its members for improper expert witness work in professional liability cases.¹⁹ The AAOS, too, has been sued for disciplining its members. Data regarding the frequency of disciplinary actions reveal that as of January 2013, of the 136 grievances that had been submitted, hearings were conducted in 53 cases, resulting in 9 censures and 22 suspensions. Between 2005 and 2012, the frequency of annual grievances ranged from 5 to 25.

The American Academy of Dermatology publishes a code of ethics and a policy for adjudicating members and nonmembers.²⁰ Greenberg²¹ reported that complaints against members for their expert testimony has been one of the most common types of complaints received by the ethics committee.

The bottom line, according to the limited data, is that we do not know the frequency of allegations of unprofessional or unethical forensic mental health conduct among practitioners of any profession, but such complaints do not appear to be prevalent.

Enforcement and Adjudication of Ethics Complaints

American Medical Association

Medical ethics complaints in the United States are investigated and adjudicated in a complex manner by

the American Medical Association (AMA) through the CEJA, state medical societies, and county medical societies. This process is quite different from the analogous one in the APA. Adjudication is based on the AMA Principles of Medical Ethics, Code of Medical Ethics, other sources of what is considered professionalism in medicine, but not specifically on medical specialty society policy.^{22,23} The CEJA does not investigate or adjudicate complaints filed by one member physician against another when the complaint arises as a result of expert testimony in a medical malpractice case (*i.e.*, plaintiff's expert and defendant physician), unless a court or medical board has already ruled against the accused.¹⁵

Subspecialty medical organizations typically do not have ethics guidelines or codes of conduct and do not investigate or adjudicate complaints of unethical behavior by their members, although data are not readily available concerning actions that have been undertaken.

American Psychological Association

The American Psychological Association (ApA) revised its Ethical Principles of Psychologists and Code of Conduct in 2002,²⁴ as a single document. The General Principles are aspirational but are not enforceable rules. The subsequent Ethical Standards are enforceable rules but are still written broadly, to permit the use of judgment and discretion and are applicable to specific situations. Other organizations besides the ApA can decide to adopt them as standards of professional conduct. The ApA Principles are written with the assumption that they apply to all psychologists, whether generalists or subspecialists, but whether they in fact adequately do so has been debated.²⁵

Of critical significance to the present context is that psychologists, in applying the Ethics Standards to their work, "may consider other materials and guidelines that have been adopted or endorsed by scientific and professional psychological organizations and the dictates of their own conscience" (Ref. 24, p 3).

The American Psychology-Law Society (APLS), Division 41 of the ApA, is a formal component of that organization, in contrast to the separate organizations of AAPL and the APA. APLS published the Specialty Guidelines for Forensic Psychology in a revised edition in 2013²⁶ with an earlier edition in 1991. These Specialty Guidelines were approved by

the Council of Representatives of the ApA and are explicitly aspirational in nature, with the goal of improving the quality of forensic psychological services, and "encourag[ing] forensic practitioners to acknowledge and respect the rights of those they serve." The Guidelines are national in scope, are not standards that are mandatory, and are "not definitive" (Ref. 26, p 8). They are "not intended to serve as a basis for disciplinary action or civil or criminal liability." They read: "No ethical, licensure, or other administrative action or remedy, nor any other cause of action, should be taken solely on the basis of a forensic practitioner acting in a manner consistent or inconsistent with these Guidelines" (Ref. 26, p 8).

Analogous to the AAPL referral policy, the APLS does not investigate or adjudicate complaints of unethical conduct by its members, as these functions are performed by the ApA.

Other Subspecialty Psychiatric Organizations

Should AAPL consider the practices of other subspecialty psychiatric organizations with regard to the existence of an enforceable ethics code or standards of practice and an adjudicatory process? Does that matter or have any significance to AAPL?

The American Psychoanalytic Association (APsaA) has published an ethics code that comprises aspirational principles and enforceable standards of ethics for psychoanalysts of all types.²⁷ There are published provisions for implementation of the principles and standards that require that local groups, such as psychoanalytic training institutes or affiliated psychoanalytic societies, adjudicate such complaints.

The American Academy of Child and Adolescent Psychiatrists (AACAP) has published a code of ethics²⁸ that focuses on clinical practice and does not address matters involving unprofessional conduct; the organization is not involved in investigating and adjudicating complaints of unethical conduct against its members). Similarly, organizations of geriatric psychiatrists or consultation-liaison psychiatrists are not involved in adjudicating ethics complaints against their members.

The American Association for Geriatric Psychiatry (AAGP) refers ethics complaints against its members to the APA if the accused physician is an APA member (McDuffie K, personal communication, February 17, 2014). If the accused physician is not an APA

member, then the board of directors of the AAGP considers the case.

Conclusion

In most areas of medicine and health care in general, treating clinicians as well as evaluators have been reluctant to confront opposing professionals or initiate formal complaints against them. Others have written about the many reasons for this hesitation, including those that are emotional, economic, and legal.^{6,7,8,29,30} Even patient safety reform efforts such as adopting a systems view of medical error rather than blaming the individual clinician have been challenging to implement. As forensic mental health professionals, we routinely have treating or other evaluating professionals disagree with our expert opinions and, sometimes, our methods for conducting the evaluation. On the other hand, neurosurgeons through the AANS appear to have a culture of confronting plaintiff's expert witnesses in professional liability cases and bringing formal complaints to the AANS Professional Conduct Committee. That organization has adopted a Code of Ethics, Expert Witness Guidelines, and Position Statement on Testimony in Professional Liability Cases.^{16,18} No doubt these policy pronouncements have facilitated the initiation of formal complaints, but it is likely that the culture and regularity of filing such complaints reflects the acceptability of doing so, which in turn generates more complaints. Such a culture of formal protest is largely lacking among mental health professionals. Arguably, an organization's written policies, guidelines, and standards, standing alone, will not necessarily change expert witness practice, or instigate formal complaints against those who allegedly violate them. Those who are responsible for creating and revising written ethics guidelines and standards should certainly be aware of this contextual consideration.

A broader consideration goes to whether the field of forensic mental health professionals should adopt a unified code or guidelines of professional conduct. Is the work of forensic social workers, psychologists, psychiatrists, and other groups sufficiently different to justify separate formal written ethics codes, professional guidelines, and standards of conduct? Are the differences in orientation, training, and experience sufficient to require separate professional guidelines³¹? Is forensic professionalism or lack thereof a

definable and consistent quality across professions? A May 2013 workshop sponsored by the Institute of Medicine on Innovation in Health Professional Education proposed a single code of professional health care ethics across medical and other health care organizations.³² Although the context for that recommendation (*i.e.*, the need for community input into an organization's ethics) differs from that of the present concern regarding forensic mental health ethics, the idea of a single, transdisciplinary ethics code across different mental health organizations is an intriguing one. Review of forensic mental health ethics codes reveals far more commonalities than differences. Adoption of such a unified code of conduct is likely to conflict with the current practice of having the ethics code for the larger or parent organizations (*i.e.*, both the APA and ApA) speak for both members and nonmembers of those fields.²⁵ Component organizations would have to relinquish some of their territoriality to be able to participate in such a process, however.

In short, professional ethics enforcement in general and in forensic psychiatric practice remains complex and challenging, as in the rest of medicine. We can continue with the *status quo*, leaving the APA *Principles* and AAPL *Guidelines* as currently published, each of them containing some aspirational language, as well as some more specific regulatory language, with much need and opportunity for interpretation by those who must apply both of them to a given case. That leaves us in good company among subspecialty mental health organizations, since only the psychoanalysts independently adjudicate ethics complaints against their members. We should not forget that professional ethics guidelines and standards have educational and didactic value for a field beyond self-regulation. Even self-regulation itself is a misnomer as a description of the process, given that ethics enforcement using ethics guidelines and codes is just one of the ways in which physician conduct is assessed and modified; coregulation is perhaps a more precise description.⁹ Weinstock encourages our ethics discussions to emphasize "the most ethical course of action" rather than the "minimally acceptable standards" (Ref. 33, p 373).

Empirical study of the psychiatric ethics adjudication process and outcome is sorely needed. Deidentified publication of such information could have a positive impact on training and education in the field, as well as on forensic practice. At present, in

considering changes to our ethics guidelines and codes, we are largely operating on a theoretical or speculative level with some anecdotal case data available to committee members. We are familiar with the law of unintended consequences when change occurs and want to minimize that event.

Making substantial changes to the APA *Principles* is not readily accomplished or a guarantee of satisfactory results from the perspective of AAPL. Candilis *et al.*¹ did not even reach the question of whether subspecialty guidelines such as those of AAPL should apply to nonmembers; some groups, such as the general dermatologists, have decided that matter in the affirmative. Their proposal that APA district branch ethics committees should consult with subspecialty-trained members during ethics adjudication proceedings makes good sense, whether the case involves forensic, child, or geriatric psychiatry. Seeking to modify the APA Procedures to integrate subspecialty resources into the district branch ethics process is more ambitious. An easier course is to follow the lead of the ApA in its current Ethics Code and add an identical, one-sentence, statement to the APA *Principles* providing that APA district branch ethics committees and their psychiatrist members can “consider other materials and guidelines that have been adopted or endorsed by scientific and professional” organizations (Ref. 24, p 3), which would include those of AAPL or other subspecialty psychiatric organizations. That addition would provide considerable discretion to adjudicating ethics committee members seeking to use non-APA-endorsed sources, including those from AAPL.

References

- Candilis PJ, Dike CC, Meyer DJ, *et al*: Should AAPL enforce its ethics? Challenges and solutions. *J Am Acad Psychiatry Law* 42: 322–30, 2014
- American Psychiatric Association: *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*. American Psychiatric Association, Arlington, VA, 2013
- American Academy of Psychiatry and the Law: *Ethics guidelines for the practice of forensic psychiatry*. Adopted May, 2005. Available at: <http://aapl.org/ethics.htm>
- American Psychiatric Association: *Procedures for Handling Complaints of Unethical Conduct*, 2013 edition. American Psychiatric Association, Arlington, VA, 2013
- Kaptein M, Schwartz MS: The effectiveness of business codes: a critical examination of existing studies and the development of an integrated research model. *J Business Ethics* 77:111–27, 2008
- DesRoches CM, Rao SR, Fromson JA, *et al*: Physicians' perceptions, preparedness for reporting, and experiences related to impaired and incompetent colleagues. *JAMA* 304:187–93, 2010
- Wynia MK: The role of professionalism and self-regulation in detecting impaired or incompetent physicians. *JAMA* 304:210–12, 2010
- Gutheil TG, Schetky DH, Simon RI: Pejorative testimony about opposing experts and colleagues: “fouling one’s own nest.” *J Am Acad Psychiatry Law* 34:26–30, 2006
- Zacharias FC: The myth of self-regulation. *Minn L Rev* 93:1147–90, 2009
- American Psychological Association: Report of the Ethics Committee, 2012. *Am Psychol* 68:370–9, 2013
- American Psychological Association: Report of the Ethics Committee, 2011. *Am Psychol* 67:398–408, 2012
- American Psychological Association: Report of the Ethics Committee, 2010. *Am Psychol* 66:393–403, 2011
- American Psychological Association: Report of the Ethics Committee, 2009. *Am Psychol* 65:483–92, 2010
- National Organization of Forensic Social Work. *Code of Ethics, 2011 revision*. Middletown, CT: National Organization of Forensic Social Work, 2011
- Council on Ethical and Judicial Affairs, American Medical Association. Chicago, IL: CEJA Rep. 5-A-13, 2013
- Cohen FL: The expert medical witness in legal perspective. *J Legal Med* 25:185–209, 2004
- Gallegos A: Expert witnesses on trial. *Amednews*, August 1, 2011. Available at: <http://www.amednews.com/article/20110801/profession/308019938/4/>. Accessed July 31, 2014
- Quest DO: Professional conduct-witness testimony. *Am Acad Neurol Surg Bull* 15: 3–4, 2006. Available at www.aans.org/aans@20and@20jnspg%20publications/aans%20neurosurgeon. Accessed March 16, 2014
- American Academy of Orthopaedic Surgeons. *Professional compliance program*. Rosemont, IL: American Academy of Orthopaedic Surgeons, 2013
- American Academy of Dermatology: *Code of Ethics for Dermatologists*, revised November 5, 2011. Schaumburg, IL: American Academy of Dermatology, 2011
- Greenberg RD: The American Academy of Dermatology Ethics Committee: how it works and what you need to know. *Am Acad Dermatol* 27:331–5, 2009
- American Medical Association: *The Principles of Medical Ethics*, 2001. Chicago, IL: American Medical Association, 2001
- American Medical Association: *Code of Medical Ethics of the American Medical Association*, Council on Ethical and Judicial Affairs. Chicago, IL: American Medical Association, 2012–2013
- American Psychological Association: *Ethical Principles of Psychologists and Code of Conduct*. Washington, DC: American Psychological Association, 2002
- ApA’s Ethical Principles of Psychologists and Code of Conduct: an ethics code for all psychologists? *Monitor on Psychology* 37: 66–7, September 2006
- American Psychological Association: *Specialty guidelines for forensic psychology*. *Am Psychol* 68:7–19, 2013
- American Psychoanalytic Association: *Principles and Standards of Ethics for Psychoanalysts*. New York: American Psychoanalytic Association, 2001
- American Academy of Child and Adolescent Psychiatry: *Code of Ethics*. Washington, DC: American Academy of Child and Adolescent Psychiatry, Washington, DC. Adopted January 30, 2009
- Gallagher TH, Mello MM, Levinson W, *et al*: Talking with patients about other clinicians’ errors. *N Engl J Med* 369:1752–7, 2013

Wettstein

30. Biaggio M, Duffy R, Staffelbach DF: Obstacles to addressing professional misconduct. *Clin Psychol Rev* 18:273–85, 1998
31. Hadjistavropoulos T, Malloy DC, Sharpe D *et al*: The ethical ideologies of psychologists and physicians: a preliminary comparison. *Ethics Behav* 13:97–104, 2003
32. Wynia MK, Kishore SP, Belar CD: A unified code of ethics for health care professionals: insights from an IOM workshop. *JAMA* 311:799–800, 2014
33. Weinstock R: Commentary: The forensic report: an inevitable nexus for resolving ethics dilemmas. *J Am Acad Psychiatry Law* 41:366–73, 2013