Opinions by AAPL Forensic Psychiatrists on Controversial Ethical Guidelines: A Survey

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A survey was conducted of a sample of AAPL members to determine their opinions on the inclusion of controversial ethical guidelines for forensic psychiatry. Members appear to appreciate the need to consider traditional Hippocratic values as at least one consideration in their functioning as forensic psychiatrists. They appear to balance their duties to an evaluee with duties to society and the legal system and to appreciate the responsibilities of multiple agency. Support was shown for interpreting ambiguities in AAPL's current guidelines in the directions indicated by most of this survey's proposed guidelines.

Ethical problems in forensic psychiatry can occur as a result of the inability to resolve conflicting values of the medical and legal professions. Medicine emphasizes helping individuals and society, while the law focuses upon the resolution of disputes, justice, retribution, containment, and deterrence. Because of their differing goals, balancing of conflicting values can become a difficult task with resultant ethical dilemmas.¹⁻³

Controversies have surrounded the

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role that traditional Hippocratic medical values should play in the practice of forensic psychiatry.^{4,5} The American Medical Association's (AMA's) Current Opinions of the Council on Ethical and Judicial Affairs (hereafter, Opinions)⁶ states, "Ethical standards of professional conduct and responsibility may exceed but are never less than nor contrary to those required by law.... In the ethical tradition of Hippocrates and continually affirmed thereafter, the role of the physician has been a healer.... A physician's responsibilities to his patient are not limited to the actual practice of medicine." The *Opinions* further state that in a preemployment physical examination by a physician hired by the employer—although no physicianpatient relationship exists—the physician should release information only with the patient's consent and "only that information which is reasonably relevant to the employer's decision regarding that individual's ability to perform the work required by the job." Since aspects of medical ethics apply to this situation in which evaluees are not patients, the implication would be that the same is true for forensic psychiatry. Psychiatrist Bernard Diamond proposed that the forensic psychiatrist should see himself as being a fiduciary to the legal system.⁷ According to Diamond's view, psychiatrists should not violate medical or personal ethics for a patient to whom they have fiduciary duties; and they should similarly not do so for the legal system. They should endeavor to participate only in ways they agree are beneficial. On the other hand, psychiatrist Paul Appelbaum believes the traditional medical values of beneficence and nonmaleficence lose their primacy to the value of justice in the forensic setting. He states, "Psychiatrists operate outside the medical framework when they enter the forensic realm, and the ethical principles by which their behavior is justified are simply not the same."8

The current definition of forensic psychiatry as adopted by the American Board of Forensic Psychiatry⁹ and the American Academy of Psychiatry and the Law (AAPL)¹⁰ clarifies that forensic psychiatry "should be practiced in accordance with guidelines and ethical principles enunciated by the profession of psychiatry." This definition holds that the development of ethical guidelines for forensic psychiatry is the responsibility of the psychiatric profession. Courts can determine only what is legal. Profes-

sional ethical requirements can exceed those required by the courts.

AAPL's ethical guidelines have been a significant contribution. 10 In the guidelines' development, AAPL members were invited to communicate their opinions.11 However, no systematic survey was undertaken of the membership as a whole—only interested and motivated members were given an opportunity for input. Ethical guidelines are especially important because of the tendency to blame forensic psychiatrists for the problems of the adversary process and the resulting "battle of the experts." Unpopular judicial decisions historically often have been blamed on psychiatrists or psychiatric-legal defenses. Since AAPL does not have the mechanism to enforce its own ethical guidelines, ethics complaints are referred to the local district branch of the American Psychiatric Association (APA) for APA members. Not all APA members who practice forensic psychiatry belong to AAPL. The APA currently has more than 35,000 members as compared with about 1,300 for AAPL. Ethical violations occur when The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry (hereafter Annotations)^{12, 13} are not followed. Many of the AMA's guidelines applied to psychiatry in the Annotations are relevant to forensic psychiatry, and AAPL is working with the APA to encourage inclusion of additional parts of AAPL's guidelines. Forensic psychiatrists who belong to the American Academy of Forensic Sciences (AAFS) can face sanction for violations of their Code of Ethics and Conduct.¹⁴ A finding of an ethics violation resulting in expulsion, or possibly suspension, by either group would result in a report to the National Data Bank and to state licensing boards.

Previous surveys of controversial ethical problems have been conducted of members of the Psychiatry and Behavioral Science section of AAFS, which is composed primarily of forensic psychiatrists who also are AAPL members. 15, 16 The AAFS ethics surveys showed that all but 6.2 percent had encountered ethical problems in their work countering the assertion that forensic psychiatrists are insensitive to ethical dilemmas. In these surveys, the "hired gun" problem was found to be the problem of most concern to respondents. 15, 16 Differences of opinion existed on most death penalty matters including the issues of contributing in any way to a death penalty verdict and treating a person found incompetent to be executed in order to make him competent. A slight majority believed that evaluating competency to be executed presented no ethical problem. There was clear support, however, for considering both the expression of an opinion on a death penalty matter without a personal examination as well as the direct recommendation of a death penalty verdict to be ethical problems. There also was agreement that the death penalty should be treated differently because of its special significance. Weaker support was shown for the existing AMA and APA guideline of "not being a participant in a legally authorized execution."

Results of tri-state (New York area)

AAPL survey showed results similar to those in the second AAFS survey, although the response rate was low.¹⁷ The best interpretation of these survey results is that most respondents did wish to retain traditional Hippocratic medical values as at least a salient consideration when they function as forensic psychiatrists.

Because of uncertainty remaining regarding the opinions of AAPL members on these issues, and controversy over some ethical issues unresolved by the current AAPL guidelines, and the absence of any systematic survey of the AAPL membership on their views of ethical matters, a survey was undertaken to assess the opinions of the AAPL membership. New controversial guidelines were included, most of which previous AAFS surveys showed to address issues representing ethical problems. 15, 16 Also included were some existing controversial guidelines. We also attempted to evaluate whether AAPL members were in favor of retaining medical ethics and values when they function as forensic psychiatrists.

Method

A sample of AAPL members was chosen by selecting every tenth name from the 1989 AAPL Membership Directory. A total of 125 names were thus selected. For postage purposes, only addresses in the United States were used. If the address was outside the United States, the next name was selected. In those few instances in which the survey was returned because of an unknown address or a deceased member, the next name

in the directory was selected. A stamped addressed return envelope was enclosed with each survey. Surveys were collected over a two-month period.

We constructed a five-point Likert scale for respondents to indicate their agreement (1 = strong agreement, 5 = strong disagreement) with each proposed guideline and whether each proposed guideline addressed an ethical problem. Respondents could thus agree with the proposed guideline while at the same time disagree that it is an ethical problem, or disagree with the specific ethical guideline but still believe it poses an ethical problem.

Results

A total of 95 surveys were returned for a response rate of 76.0 percent. The return rate for a single mailing was unusually high considering that the average return rate for such studies is 46 percent. Means and standard deviations were calculated. Results are summarized in Table 1.

The unusually high response rate may relate to the fact that each member who received the questionnaire was informed that he was part of a group randomly chosen to represent the views of AAPL members. The high response rate also may reflect the strong interest of AAPL members in the issues surveyed and/or their appreciation of its importance. A stamped return envelope probably also facilitated a response.

The following survey ethical "guidelines" were supported for inclusion (numbered in order of decreasing support):

- 1. Medical and psychiatric ethics remain a consideration when performing a forensic evaluation. The strong support for including a guideline on this matter as well as for considering this problem an ethical one indicates that most respondents agree that medical and psychiatric ethics are relevant considerations in performing forensic evaluations. Most forensic psychiatrists do not believe that forensic psychiatry has an ethics totally its own. They do not consider medical ethics as irrelevant, or only legal or forensic ethics relevant.
- 2. The forensic psychiatrist should not distort data. Although specifically stated only in the AAFS Code of Ethics, ¹⁴ this requirement may be implied under the AAPL section requiring honesty ¹⁰ and the AMA and APA section 1 requiring competent medical service. ¹²
- 3. Sex between a forensic psychiatrist and an evaluee is unethical so long as the case remains in litigation. Most respondents supported the inclusion of this ethical guideline and nearly everyone who responded believed it addressed an ethical problem. Of those who objected to the guideline, most agreed it addressed an ethical problem but commented that sex with an evaluee should always be considered unethical with no time limitation.

This guideline is important because of the frequent assertion that a doctor-patient relationship does not apply in a forensic evaluation which could render the ordinary sexual prohibitions in a doctor-patient treatment relationship inapplicable. Some aspects of transference relevant to a long-term psychotherapeu-

Table 1
Results of Survey

Item No.	Guideline*	Ethical Problem*	
Medical and psychiatric ethics a consideration	1.45 (1.14)	1.23 (0.69)	
2. No distortion of data	1.46 (1.06)	1.35 (0.86)	
3. No sex with evaluee during litigation	1.59 (1.34)	1.15 (0.65)	
 Clarify legal issues if opinion ex- pressed 	1.70 (1.12)	2.95 (1.36)	
No prearraignment examination	1.77 (1.04)	1.90 (1.19)	
Personal evaluation if capital case opinion	1.84 (1.26)	1.81 (1.21)	
7. Responsibility to evaluee and society	1.97 (1.27)	1.83 (1.11)	
Honest advocacy permissible	2.13 (1.33)	1.93 (1.05)	
Evaluation only if honest opinion allowed	2.13 (1.33)	2.03 (1.18)	
10. Inclusion of reasoning on legal issue	2.14 (1.31)	2.49 (1.38)	
No participation in legally authorized execution	2.52 (1.43)	1.91 (1.21)	
 No forensic evaluation on former patient 	3.05 (1.34)	2.94 (1.32)	

^{1 =} Definitely yes; 2 = probably yes; 3 = uncertain; 4 = probably no; 5 = definitely no.

tic relationship also do not apply to a relatively brief forensic evaluation. Attorneys currently have no prohibition against sexual relationships with clients despite potential complications. However, the guideline was included because of the serious potential ethical problems that could be caused by the subtle coercive aspects of a forensic evaluation. These coercive aspects, even if unintended, could continue at least as long as the case remained in litigation.

4. The psychiatrist should strive to clarify the legal issues before expressing an opinion on them. This guideline is important since psychiatrists with little experience, education, or training in forensic psychiatry should be discouraged from concluding that expertise in psychiatry is sufficient to express an opinion on a legal issue without at least trying to clarify the legal issue. All psychiatrists

should obtain such clarification if they are unfamiliar with the relevant legal criteria. Moreover, support for considering it an ethical issue is found in section 1 of the AMA medical principles, "A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity."12 However, the meaning of "competent medical service" is not defined. Section 2, Annotation 3 states, "A physician who regularly practices outside his area of professional competence should be considered unethical."12 Although most respondents agreed with inclusion of this guideline, there was a difference of opinion regarding whether this is an ethical issue.

5. With regard to any person charged with a crime, ethical considerations preclude forensic evaluation prior to access to or availability of legal counsel (except

^{*} Number in parenthesis is standard deviation.

for emergency care or treatment). This guideline already is part of AAPL's ethical guidelines; 10 and, except for the substitution of the word "adult" for "person," is part of the APA's Annotations. 12 The APA Ethics Committee, however, recently voted to recommend adoption of AAPL's word "person." This item was included because it had led to controversy at the ethics panel presentation at the 1989 AAPL meeting.²⁰ The strong support for this guideline's inclusion suggests that only a small minority of members oppose its retention. At the AAPL meeting, panel members favoring the guideline were of the opinion that its rationale was based on such prearraignment evaluations being markedly inconsistent with a traditional medical role. In their opinion, psychiatrists should not be so unconcerned about protecting an evaluee that they would attempt to obtain incriminating evidence for the prosecution before an attorney has been able to inform a defendant of his rights or to give advice. It is not sufficient for the prosecution-retained psychiatrist to inform a defendant of his rights since his primary goal under these circumstances is not to protect the defendant and he may not be sufficiently sensitive to slippage. His warnings therefore would not substitute for the availability of an attorney. It should be noted that availability as well as access to the attorney is required according to this existing guideline. Since this guideline already is part of the APA framework, it currently is subject to enforcement.

6. Because of the seriousness of the matter, an opinion should not be given

in a death penalty case without a personal examination regardless of whether court decisions hold such testimony permissible. The support for this guideline implies a desire to go beyond AAPL's current guideline on honesty and striving for objectivity (section IV).10 This guideline states, "While there are authorities who would bar an expert opinion in regard to an individual who has not been personally examined, it is the position of the Academy that if, after earnest effort, it is not possible to conduct a personal examination, an opinion may be rendered on the basis of other information. However, under such circumstances, it is the responsibility of the forensic psychiatrist to assure that the statement of his opinion and any reports or testimony based on this opinion clearly indicate that there was no personal examination and that the opinion expressed is thereby limited."

The guideline also is important because the U.S. Supreme Court in Barefoot v. Estelle²¹ ruled that psychiatric testimony in a death penalty case can be given without a personal examination of the defendant and can be based solely upon the consideration of hypothetical questions. This guideline would prohibit "Dr. Death"-type testimony. The AAPL respondents differentiated between the courts determining what is legal and the profession determining what is ethical. Most respondents favored a guideline forbidding testimony in death penalty cases without a prior personal examination. Respondents appear to believe that special caution is needed in regard to testimony regarding matters as serious and irreversible as the death penalty.

7. As a physician, a forensic psychiatrist owes some responsibility both to an evaluee and to society regardless of who pays the fee. The support for this guideline indicates a recognition that a forensic psychiatrist inevitably runs into some of the problems of multiple agency²² regardless of who pays the fee. The forensic psychiatrist has to balance conflicting values and duties.^{1, 2, 4}

The following survey ethical "guidelines" received less support (numbered in order of decreasing support):

- 8. Once a forensic psychiatrist has reached as objective an opinion as possible, honest advocacy is permissible so long as the psychiatrist does not knowingly permit use of his testimony for misleading purposes. This guideline would permit honest advocacy and is a reflection of Diamond's view of the proper role of the forensic psychiatrist.⁷ It is consistent with the impossibility of "impartiality," which has been removed as a requirement from AAPL's ethical guidelines. Although this guideline was supported, the relatively weak support suggests that a substantial minority of forensic psychiatrists still believe it is both possible and necessary to remain impartial and not become an advocate. The U.S. Supreme Court in Ake v. Oklahoma²³ gave added judicial support for the concept of the forensic psychiatrist as an advocate.
- 9. A psychiatrist should not perform an evaluation or render an opinion at a hearing if regulations or policies dictate a specific opinion thereby prohibiting the

rendering of an honest opinion. Although weakly supported as both an ethical guideline and an ethical issue, those opposed to this guideline generally called the situation impossible. However, this item was included in response to a question to the AAPL Ethics Committee by an AAPL member confronted with this situation. The member wanted support not to participate. If they were aware of this additional fact, it is difficult to know whether more respondents would have supported this guideline or whether many still would believe the situation sufficiently unusual that a guideline is not needed. Even if it were unusual, it is difficult to interpret what those respondents had in mind who indicated that this was not an ethical issue. Perhaps they believed its perceived impossibility precluded its becoming an ethical issue. The APA Ethics Committee in opinion 2-Z recently has clarified that submitting to pressure to alter an opinion to give an expected opinion that was contrary to professional judgment would be unethical by not dealing "honestly with patients and colleagues."24

10. If an expert in a forensic report expresses an opinion on a legal issue, honesty generally requires an explanation of his or her reasoning, and how he or she has interpreted the legal issue. This guideline was weakly supported though many did not see it as an ethical issue. Its importance is that omission of the reasoning can obscure the expert's thinking as well as obscure the distinction between psychiatric opinions about mental illness and the psychiatrist's interpretation of the legal issue. The psy-

chiatrist also could function as an arbiter of a moral issue disguised as an expert opinion. Reasoning is important to allow the court to distinguish between psychiatric knowledge and a misrepresentation or an idiosyncratic interpretation of a legal issue or an interpretation of a legal issue and can be perceived as most consistent with honesty.

Differences of opinion existed for the subsequent suggested ethical "guidelines" (numbered in order of decreasing support):

11. A psychiatrist should not be a participant in a legally authorized execution. This guideline already is included in the AMA-APA framework.¹² However, it generally has been narrowly interpreted to mean solely a prohibition against giving a lethal injection. An exception has been a recent resolution by the Medical Society of the State of New York that gave this guideline a broader interpretation.²⁵ They defined participation in an execution as including inter alia the determination of mental and physical fitness for execution. However, in an earlier survey of AAFS members, 16 a slight majority believed performing an evaluation for fitness for execution presented no ethical problem, so support for this part of the definition would seem to be divided at best.

Everyone who indicated in the questionnaire that they knew the present existence of the AMA and APA guideline prohibiting participation in a legally authorized execution supported its inclusion. Therefore, it is likely that opposition generally came from those who interpreted the terminology more broadly.

Such divisions are similar to the previous AAFS survey question regarding contributing in any way to a death penalty verdict.

Such division of views indicates that many forensic psychiatrists see obiections to participation that brings about a death penalty verdict on the basis either of personal ethics, or of a subjective perspective of professional ethics, though others disagree. Philosophy professor Philippa Foot believes honest participation of those opposed to the death penalty is ethical even if the opposite result occasionally is achieved.²⁶ Participation thus should not be relegated solely to those who support the death penalty. It is possible to be against the death penalty yet participate and testify honestly only under circumstances in which it is believed that an execution might be prevented. Attempts could be made to avoid participation under other circumstances. Honest participation does not require impartiality. Diamond distinguished between an advocate and a "hired gun" by clarifying that the hired gun is not honest, but that there is no problem in participating honestly in matters about which bias is held such as the death penalty.²⁷ Other practitioners apparently see no ethical problem in contributing to a death penalty if such a contribution is indirect and the psychiatrist is not the executioner. Foot believes the death penalty is a relevant ethical issue for forensic psychiatry to address since practitioners belong to a profession that regularly is asked to participate in aspects of the death penalty process.26

12. The psychiatrist generally should avoid performing a forensic evaluation on a former patient even with the patient's consent. AAPL's current guidelines state, "A treating psychiatrist should generally avoid agreeing to be an expert witness or to perform an evaluation of his patient for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship." The divided response suggests a lack of support for extending this cautionary guideline to former patients. AAFS surveys have shown opposition to any guideline categorically forbidding a forensic evaluation for a current patient. 16, 17 in recognition of the dual treater-evaluator role sometimes being both necessary and appropriate.28

Discussion

AAPL members clearly consider medical ethics relevant in their functioning as forensic psychiatrists. This finding is similar to that found in previous surveys of AAFS members. Forensic psychiatrists have multiple duties and obligations. On occasion they may act as "double agents"^{29, 30} or even "multiple agents" with multiple allegiances. In treatment as well as forensic situations. allegiances should be made clear. Forensic psychiatrists appear in practice to follow the balancing method proposed by psychiatrist Edward Hundert^{1,2} to cope with conflicting obligations by weighing opposing values (even if not consciously), or utilizing a method similar to ethicist Baruch Brody's model of conflicting appeals. In general, they do not follow any single rule or allegiance absolutely.

Traditional Hippocratic ethics appears to play some role in the balancing process judging from the survey responses.4 Rather than blindly following legal values³¹ or exhibiting naive therapeutic bias.³² forensic psychiatrists appear to remain concerned about how their participation will be used, thereby supporting Diamond's formulation of the forensic psychiatrist as having a fiducial responsibility to the legal system. much as the treating psychiatrist does to his patient.⁷ This fiducial responsibility to the legal system, as formulated by Diamond, requires the psychiatrist to do what he agrees is best for the legal system consistent with medical ethics and personal values and not merely do whatever the legal system asks. Although psychiatrist Alan Stone asserted ethical boundaries become unclear once the treatment situation no longer applies,⁵ lack of clarity exists at times even in the therapeutic context.

Treating psychiatrists can no longer be just a single agent only to their patients. In some states, required child abuse reports can be used to prosecute a patient. In "duty to protect" situations, multiple agency exists. A recent California Supreme Court decision, in upholding a death penalty verdict, even permits threats told to a psychotherapist to be used as evidence to prove premeditation and deliberation in order to convict a patient of first degree murder. If the threats necessitated that the therapist breach confidentiality, psychother-

apist privilege, otherwise applicable in criminal cases, is considered absent for all information triggering a warning. Lack of privilege applies even for the separate purpose of proving premeditation and even at the penalty phase when called by the prosecution to obtain a death penalty verdict. This decision undoubtedly will create ethical dilemmas for many psychiatrists who believe it against medical ethics even indirectly to help facilitate their patient's death. Other situations also can lead to conflict between responsibilities. In many ethical dilemmas, the dearth of guidelines on how to prioritize conflicting values produces confusion. Unfortunately, there is no clear-cut hierarchical predominance or simple solution. In the survey, forensic psychiatrists saw a responsibility both to the individual evaluated and to society regardless of who pays the fee in recognition of the unavoidable multiple responsibilities of physicians.

The relevance of medical ethics makes the current policy by which AAPL refers ethics complaints to the APA acceptable even if not ideal, and is consistent with subspecialty status. Many practitioners of forensic psychiatry belong to the APA and not AAPL. There remain parts of AAPL's ethical guidelines, however, that have not been incorporated by the APA. Some of AAPL's ethical guidelines currently remain solely guidelines for good practice and are not enforceable. Moreover, the balancing concept and instructions regarding how to prioritize values in any specific way are not specifically stated in any guidelines. It therefore does allow for practitioners to place differing

weights on competing values (especially when considering individual situations), and recognizes the lack of consensus with regard to the prioritization process. It is reflective of current practice although it does not necessarily give specific guidance on how to resolve specific ethical dilemmas. Instead, the individual practitioner must perform the balancing process him or herself and probably needs education on how to do so. In many instances, differing resolutions will be acceptable. The needs of the law probably should be given greater importance than the needs of an individual evaluee, however, by the forensic psychiatrist in contrast to the general psychiatrist. However, that does not mean that the forensic psychiatrist should do whatever the legal system asks without considering the legal system's goals or the psychiatrist's own professional and personal values.

Results from this survey suggest that AAPL forensic psychiatrists generally retain currently prevailing psychiatricmedical ethics and support traditional Hippocratic medical values as relevant in guidelines for the practice of forensic psychiatry.4 They may, however, be given less weight than in treatment situations. These results are similar to those found in previous AAFS surveys. There is no reason to dismiss these opinions as "therapeutic bias" since multiple agency and a balancing of values have become a necessary part of all current psychiatric practice, not only for forensic psychiatry. Retention of medical values gives a rationale for guidelines such as not performing an evaluation on an

arrested individual prior to retention of counsel—currently both an AAPL and APA guideline—and not doing covert forensic interviews in which the nature and purpose of an evaluation is not explained to the evaluee.

The strong support for most of the guidelines proposed in this survey suggests that they should be added to AAPL's ethical guidelines. There is every reason to believe the sample survev is representative of the majority of AAPL members. Large majorities are especially persuasive, but it remains important in developing ethical guidelines not to neglect the views of legitimate minorities and not to allow ethics to be determined solely by majority vote. However, the supported guidelines appear consistent with other guidelines in psychiatry and forensic psychiatry. They maintain a balance between traditional medical values and the needs of the legal system.

Although not enforced directly, those AAPL Ethical Guidelines not included by the APA can be perceived as ideals giving guidance regarding what an ethical forensic psychiatrist should do. Guidelines and opinions can assist the practitioner trying to cope with an ethical dilemma. They operate in what psychiatrist Allen Dyer³⁴ calls an "upward perspective" or "ego-ideal" manner as contrasted to a "downward perspective" or "superego" manner. Dilemmas are produced when there are conflicting values and responsibilities and no clear way to resolve the conflict. Although guidelines hopefully can help, they cannot possibly foresee all conflicts and situations. Practitioners will still be forced to struggle with ethical dilemmas. In unclear situations, ethics committees should permit differing resolutions of a problem.

If the surveyed guidelines are not specifically added, this survey's results give support for AAPL's Ethics Committee interpreting ambiguities in the directions revealed by this survey. While core values of medical ethics that have descended from the time of Hippocrates continue to provide an important part of our value system. 4 specific guidelines may be needed, as well as deleted, with the passage of time and changing perspectives. A forensic psychiatrist, and sometimes even a therapist, has the added burden of balancing medical ethics with the needs and requests of the legal system with no simple solutions.

This survey represents the first systematic attempt to assess the views of the general AAPL membership on ethical problems and dilemmas. The response and results show both a strong interest and sensitivity to ethical matters and indicate support by the AAPL membership for the inclusion of many guidelines previously considered controversial.

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