



## Legally speaking

This is the final interview in a series focused on new aspects of the revised *ACA Code of Ethics*.

The entire code is available on the ACA website at [counseling.org/ethics](http://counseling.org/ethics).

This month, ACA Director of Ethics Erin Martz and ACA Chief Professional Officer David Kaplan interviewed Mary Hermann, a member of the Ethics Revision Task Force.

**Erin Martz & David Kaplan:** Thanks for joining us, Mary. Would you mind giving us a little background about yourself, your area of expertise and why you are assisting us with this portion of the interviews?

**Mary Hermann:** I served on the ACA Ethics Revisions Task Force for the new revision of the code, and one of my areas of expertise is legal and ethical issues in counseling. Prior to being a counselor educator, I was an attorney, so that gave me some unique insight into what we were doing with the code of ethics.

**Q:** So tell us, does the *ACA Code of Ethics* have any legal weight?

**MH:** It's not a legal document per se, so it doesn't have the force of law, but it is used in court proceedings to illustrate a counselor's professional responsibility.

**Q:** Are there any particular court cases you would like to refer to?

**MH:** I've seen cases about gatekeeping where the code of ethics was included. Also, the issue of whether or not it is ethical to refer on the basis of the counselor's personal values — specifically, the *Ward v. Wilbanks* case.

**Q:** As a follow-up to that, the revised ethics code features a new statement in the Purpose section that reminds everyone reading it that "a breach of the standards and principles provided herein does not necessarily constitute legal liability or a violation of the law; such

action is established in legal and judicial proceedings." Why was that added?

**MH:** The task force felt strongly that we needed to clarify the difference between law and ethics. The code of ethics is intended to give guidance to the profession. A breach of the code has certain consequences, while a violation of law has other consequences. If a professional counselor does something unethical, we might remove them from ACA membership, but if that counselor breaks a law, they can actually go to jail or pay a significant fine. So there's really a difference between law and ethics, and that is why we always encourage members to have a good understanding of local, federal and state laws.

**Q:** For the first time, the 2014 *ACA Code of Ethics*, in Standard A.10.b., prohibits fee splitting. Many counselors are not aware of fee splitting. Can you talk about what it is, why it's prohibited and how to avoid it?

**MH:** Fee splitting is paying or accepting fees for client referrals and is typically illegal.

**Q:** Private practitioners often pay rent to the owner of a group practice based on a percentage of what they take in from their clients. Is that considered fee splitting?

**MH:** It typically is. It is not necessarily as intuitive a problem as the direct payment of a referral fee, but paying rent as a percentage of client fees encourages the renting counselor to refer to you because they stand to make money off of the referral. A referral should only be made because the counselor can provide the best service.

**Q:** What would the Ethics Revision Task Force recommend as an alternative to paying a percentage of gross fees?

**MH:** We would suggest that a counselor pay a set amount per week or month for the use of an office. That eliminates all of the ambiguity.

**Q:** If counselors do pay a percentage of what they take in as rent, would it pay for them to see a lawyer to make sure that it doesn't conflict with state or federal laws on fee splitting?

**MH:** Absolutely.

**Q:** There seems to be an increased focus in the revised code on reminding counselors to familiarize themselves with all the applicable local, state and federal laws. Why was it necessary to really emphasize this for the 2014 version?

**MH:** I think there's still some confusion about the difference between ethics and law, so we wanted to make it clear that following a code of ethics doesn't necessarily mean you're following the law. They are two separate things, and laws are going to vary from state to state.

**Q:** The code now expects counselors to use a carefully considered ethical decision-making process for ethical dilemmas. It talks about that on the third page of the code and also in Standard I.1.b., but it doesn't recommend a specific model. From a legal perspective, why might that be?

**MH:** The task force didn't feel the need to provide a specific model because there are many great models out there, and we wanted to give counselors the opportunity to use models that they were comfortable with. We also consulted with the ACA lawyer, and he noted that from a legal perspective, putting a specific model in the code might result in someone being held accountable in legal proceedings for not using that model even if they were using another equally valid model.

**Q:** Let's talk about technology. Standard H.1.b. states that counselors who do distance counseling understand they may be subject to laws and regulations in the client's place of residence. One of the questions this brings up is whether it is legal to counsel a client if you're not licensed in that client's home state.

**MH:** The law varies by state, which is why it gets very complicated when you are doing distance counseling. Counselors need to be aware of the laws of the client's home state because, from a legal perspective, you are practicing in the state in which someone has a legal interest in receiving services. As such, it is very important that you uphold all of the laws of the state that the client lives in.

**Q:** Do you have any specific recommendation on how counselors can make sure that they're in compliance with the law when their client lives in a different state?

**MH:** One of the things that comes to mind is to contact the counselor licensure board of that state and check its regulations. A list of all licensure boards

is available from ACA at [counseling.org/knowledge-center/licensure-requirements](http://counseling.org/knowledge-center/licensure-requirements).

**Q:** Let's look at Standard B.2.c., which is the "confidentiality regarding contagious, life-threatening diseases" portion. The mandate that counselors confirm diagnosis prior to disclosure was removed in the 2014 version. What was the reason for that change?

**MH:** We decided it would be very difficult in some circumstances to confirm a diagnosis, and we didn't want to place a burden on counselors that they might not be able to meet.

**Q:** Let's talk a little bit about sliding scales. For many years, counselors have used sliding scales, but the ACA code never indicated whether this practice was ethical. With the 2014 revision, the code now supports the use of a sliding scale if a counselor wishes to utilize it. Are there any legal aspects counselors need to consider?

**MH:** It should also be noted that the revised code adds in A.10.c. that the counselor may adjust fees if the counselor's usual charge creates an undue hardship for the client. First, we need

to make sure that a sliding scale or fee adjustment does not violate any state law. Another challenge comes when insurance companies are involved because they are expecting counselors to charge their customary fee. So professional counselors need to make sure that a sliding scale or fee adjustment does not violate the contract signed with the client's insurance company.



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