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Research Ethics and Private Harms

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Gerald P. Koocher¹

Abstract

This commentary addresses the emotionally powerful account of Nicole Taus Kluemper from the perspective of a psychologist familiar with the administrative operation of the American Psychological Association (APA) and the ethics of the profession. The application of the APA's Ethical Principles of Psychologists and Code of Conduct to the case is discussed, and alternative methods of response that researchers who have concerns about case studies might use are offered. The author concludes that existing ethical principles—the aspirational standards in particular—do bear upon the matter in question. However, the enforceable code of conduct is not sufficiently clear about obligations to those whom psychologists publicly discuss when the psychologist does not have a specific duty of care to an individual.

Keywords

case studies, ethics, *Taus v. Loftus*

Having carefully read the emotionally powerful account by Nicole Taus Kluemper (**IN PRESS**), and having agreed to comment from the perspective of a psychologist familiar with the ethical obligations that bind our profession, I must choose a frame of reference. As Ms. Kluemper movingly described, the matter at hand has involved considerable contention and civil

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litigation. For purposes of my analysis, I will take her account of events and facts as accurate. In so doing, I act as any competent psychologist would in working with a client. That is to say, I address the client's perception of reality as my starting point and acknowledge her distress. I will not seek to provide an expert opinion because doing so would require a thorough review of evidence offered by all sides. The real issues at hand here involve whether research pursuits should ethically proceed even if doing so causes harm to others and also what methods or bounds of integrity apply in conducting such research.

Consider whether Loftus and Guyer might have proceeded as responsible researchers in a very different way. As an example, they could have chosen to write an article arguing that the original presentation featuring Kluemper as a patient in a clinical report, purportedly supported recovered memories, does not pass scientific muster. Such an approach would have kept a safe distance from Kluemper and would have critiqued the presenter's methodology. For many reasons related to potential conflicts of interest, this option may have seemed undesirable to Loftus and Guyer. However, they could indeed have proceeded to support their positions in an ethically appropriate manner without risking harm to Kluemper—this situation did not require an all-or-nothing approach, not a choice between investigative response of the form they chose and silence.

I have known Elizabeth Loftus as a professional acquaintance since the 1980s, having served on some professional committees with her and having read and admired some of her writings. I also served on the Board of Directors of the American Psychological Association (APA) from 1995 to 2007 (10 years as treasurer and 3 years in the presidential cycle) and have a vivid recollection of the circumstances under which she resigned from the APA during my term of service. I have communicated with Dr. Loftus and others about the curious circumstances of her resignation and will integrate a discussion of those events and my personal role in them later in this commentary.

Understanding Application of APA Ethics Code

What many psychologists refer to as the "ethics code" is formally known as the *Ethical Principles of Psychologists and Code of Conduct* (APA, 1992, 2010). I have cited both the 1992 version which was in force at the time many of the events described by Kluemper occurred and the current version. The 1992 version was in force until June 2003, and the revisions that occurred in 2010 do not relate to matters of concern in this commentary. The code is divided into an aspirational set of *Ethical Principles* designated

by English letters and an enforceable *Code of Conduct* designated by Arabic numerals. The APA Ethics Committee will accept and adjudicate complaints against its members for violations of the *Code of Conduct* according to its rules and procedures (APA, 2001). Some state psychological associations also adjudicate complaints against their members and state licensing boards will also investigate complaints against their licensees with reference to the APA code and their own rules or policies. Psychologists who do not belong to a professional association and who do not hold a government issued license generally fall outside the penumbra of ethics enforcement because no enforcing body has any jurisdiction over them. Psychologists who lack a practice degree and do not treat patients or provide services to the public (e.g., academics or researchers, such as Dr. Loftus) are generally not required to obtain a license and generally do not meet jurisdictional criteria for receiving one.

Readers should keep in mind that the code focuses chiefly on the patients, students, or research participants to whom the psychologist owes a duty of care, that is, groups who are considered vulnerable and in need of protection. Kluemper was never offered professional services or invited to participate in research by Loftus. Rather, Loftus engaged in investigatory behavior and publishing about Kluemper after becoming acquainted with details of her case through published details and other public sources. The APA ethics code generally does not address the rare situation in which psychologists seek to investigate and publish on such matters.

When scholars seek to publish on topics of “What ever happened to?” “Where are they now?” “Look at the stupid or fraudulent things done by colleagues,” the targets are often deceased. Examples include books and articles or the personalities, character flaws, shortcomings, or otherwise bad behaviors of Bruno Bettelheim (e.g., Bernstein, 1990; Sutton, 1995), Cyril Burt (Kamin, 1974), Wilhelm Reich (e.g., Barrett, 2002) and many others. When investigating living individuals identified or identifiable from celebrated or controversial published accounts in the news or scholarly literature (i.e., a scholarly public figure of sorts), the researcher may have some standing as a health or mental health professional with membership in a professional association, or simply undertake the investigation in a journalistic vein hoping to write a popular article or trade book. When psychologists take on the role of investigative reporter or journalist, they do not leave their ethical obligations behind because they continue in the role of a psychologist. Even so, the duty that psychologists have in such circumstances is not identical to the duty they have to those with whom they contract directly (i.e., their patients or consenting participants in the research projects). The psychologist who undertakes such works can be held accountable for certain standards of integrity, but the

nature of the ethical obligations in such a role differs from the obligations that flow from a directly contracted professional relationship.

The Ethical Context: Then and Now

Between 1992 and June, 2003 two of the aspirational (i.e., unenforceable) elements of the APA *Ethical Principles* read as follows:

Principle B: Integrity

Psychologists seek to promote integrity in the science, teaching, and practice of psychology. In these activities psychologists are honest, fair, and respectful of others. In describing or reporting their qualifications, services, products, fees, research, or teaching, they do not make statements that are false, misleading, or deceptive. Psychologists strive to be aware of their own belief systems, values, needs, and limitations and the effect of these on their work. To the extent feasible, they attempt to clarify for relevant parties the roles they are performing and to function appropriately in accordance with those roles. Psychologists avoid improper and potentially harmful dual relationships.

Principle D: Respect for people's rights and dignity

Psychologists accord appropriate respect to the fundamental rights, dignity, and worth of all people. They respect the rights of individuals to privacy, confidentiality, self-determination, and autonomy, mindful that legal and other obligations may lead to inconsistency and conflict with the exercise of these rights . . .

Two elements of the enforceable *Code of Conduct* from 1992 to 2003 read as follows:

1.14 Avoiding harm

Psychologists take reasonable steps to avoid harming their patients or clients, research participants, students, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

1.15 Misuse of psychologists' influence

Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence.

After June 2003, the relevant aspirational principles of the APA *Ethical Principles* (with some relettering) read as follows:

Principle C: Integrity

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact.

Principle E: Respect for People's Rights and Dignity

Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination. Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision making.

Rewritten aspects of the enforceable *Code of Conduct* now read as follows:

3.04 Avoiding Harm

Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

3.10 Informed Consent

(a) When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code.

Some of the changes are interesting in the sense that concepts of fairness, awareness of biases, and sensitivity to potential harms became less prominent in the revision. The obligation to guard against misuse of influence also disappeared from the revised section.

What Duties Did Loftus Owe Kluemper?

Clearly, Kluemper was not in any way a client or solicited research participant of Loftus. Still, Loftus owed her a duty of fairness, honesty, and respect. An important distinction exists here between ethical standards, as the “floor,” the “least expectation,” and ethical duties that represent the highest aspirational ideals of the profession. True, Loftus and colleagues became caught up in what came to be known as the “memory wars” (Conway, 1997; Davies & Dalgeish, 2001; Lynn & McConkey, 1998; Pezdek & Banks, 1996; Read & Lindsay, 1997; Williams & Banyard, 1999). In becoming a partisan in those wars, she lost the ethical high ground we aspire to, even while laying claim to the lowest acceptable standard.

Loftus had an obligation to represent her credential to others without making false, misleading, or deceptive statements. She had an obligation to clarify for relevant parties the roles she sought to perform and to function appropriately in accordance with those roles. Loftus also had the obligation to take reasonable steps to minimize harm where it is foreseeable and to guard against personal, financial, social, organizational, or political factors that might lead to misuse of her influence. Kluemper reports that Loftus misrepresented herself to Dr. Corwin and others, made false and misleading statements, disregarded Kluemper’s requests for privacy, and otherwise misused her influence in ways that caused foreseeable emotional and financial harms to Kluemper. These events also took place in a context that gave rise to significant personal, financial, social, organizational, and political issues for Loftus in a manner that clearly placed her objectivity as a psychological scientist in question. In many ways, Loftus had a conflict of interest (e.g., her credibility as a well-compensated expert witness in many court cases) that led her to overlook alternative ways of proceeding as an ethical researcher (e.g., writing a critique of the original presentation as an example of poor methodology) that would have minimized potential of harm to Kluemper.

Even under the current version of the *Ethical Principles*, Loftus had accountability for deceptive behavior and harm to the privacy and dignity of another. Unfortunately, those aspirational provisions of *Ethical Principles* are unenforceable, and the enforceable *Code of Conduct* provisions would not apply because Kluemper did not fall into any of the specific categories to whom a psychologist would owe an ethical duty under the current rules. Standard 5.01(b) says that psychologists do not make false statements, but that standard does not specify to whom the duty is owed. Loftus would be exempt from enforcement, in any case, because she is not a member of the APA, nor is she licensed. As an academic and researcher, Loftus has no

obligation to seek a license, and because she never trained as a practitioner could not qualify for a license in any case.

The Mysterious Resignation of Elizabeth Loftus From APA

Unrelated to events in the Kluemper case, Elizabeth Loftus became the first member of the APA to resign via faxed message on Tuesday, January 16, 1996. The matter came to the attention of the APA Board of Directors because of the very unusual circumstances involved. Because I served as a member of the Board at the time, I have an ethical obligation not to describe events that took place in executive sessions. However, I can report on issues from public web sites (see, for example, <http://fmsf.com/apa-complaint.html>) and from personal conversations.

In late December 1995, two ethics complaints were lodged against Loftus. The *Rules and Procedures* of the APA ethics committee at the time included the following provision, “. . . no one under the scrutiny of the Committee will be allowed to resign from the Association either by letter of resignation, by nonpayment of dues, or otherwise.” The APA ethics committee’s staff officer, Dr. Stanley E. Jones, then wrote to the complainants providing a written form for each of them to sign and return before the complaint could be opened and before Loftus could be formally placed “under scrutiny of the committee.” All of the initial correspondence was supposed to occur under strict confidentiality on the part of APA staff. Once the signed forms arrived back at APA’s ethics office, Loftus’s membership would have been frozen and she would not have been able to escape adjudication by resigning. Due to the busy holiday postal mail season, the signed forms did not reach the complainants until early January and were not returned to the ethics office before Loftus sent her fax message resigning from APA. As her reason for resigning, Loftus cited concerns about APA’s general direction. By the time the forms were returned, Loftus had resigned and no longer fell under jurisdiction of the APA ethics committee.

The Board of Directors was asked to rule on accepting a resignation by fax, as opposed to a signed original document. I voted against accepting the faxed resignation to allow the Ethics Committee to take jurisdiction and investigate, but the motion did not prevail. The Board not only accepted the resignation but also expressed significant concern about the unusual and seemingly urgent timing of the resignation to the then ethics officer, Dr. Jones, and to the APA Executive Officer, Dr. Raymond D. Fowler. Both professed no knowledge of any advance communication to Loftus that might have alerted her to the benefits of avoiding an ethics inquiry by resigning.

The Board instructed Fowler to conduct an investigation and he assigned his deputy, Dr. Michael Honaker to do so. In a subsequent report to the Board by Dr. Honaker no “leaks” were revealed.

In 2002, Fowler acknowledged to the former APA President Norine G. Johnson and me in a private conversation that he had “gotten word” to Loftus about the potential ethics complaint prior to her resignation. He expressed the personal belief that an ethics investigation of a high profile psychological scientist at that time in APA’s history would have severely damaged the organization. In 2012, I did correspond with Loftus by e-mail to inquire about whether her resignation was submitted to avoid facing the ethical complaints. She denied that such was her purpose, or that she had been advised by others to do so, citing instead general concerns about the direction of the organization from a science perspective (see <http://www.psychologytoday.com/articles/199605/dispatch-the-memory-war>). When asked why she used electronic transmission as opposed to postal mail or an overnight-delivery service, Loftus cited “convenience,” rather than a rush to resign before the return of original signed complaint documents. Still, I cannot help but wonder if she has repressed that memory.

Having observed organizational governance of the APA for many years, the disclosure by Dr. Fowler, long after the issue had become moot, did not surprise me. As in any large corporation, senior employees often take protective stances and seek to avoid public controversy. Many psychologists think of APA primarily as a membership organization. However, less than 15% of APA’s annual revenues come from member dues. The bulk of APA’s wealth flows from its publishing empire and investments (including substantial equity in two office buildings in the District of Columbia). In this context, it is not uncommon for paid-management to spin or withhold information provided to members, volunteer leaders, and even from the officers and directors (who are paid a stipend for their service on the APA Board). The majority of volunteer leaders in APA turn over at the rate of about one third per year, and a significant degree of familiarity with the organization is required before most would feel comfortable in challenging or pressing a senior staff member for more detailed data on controversial points. I suspect that Dr. Fowler, and possibly other members of his management team, made a decision to take action encouraging Dr. Loftus to take herself out of APA’s ethical jurisdiction, which would make a potential organizational controversy go away. I think it unfortunate that the APA Ethics Committee never had the opportunity to evaluate the case.

APA (2001) has since changed its policies on resignation while under scrutiny to read as follows:

5.4 Resignation Barred

5.4.1 Except as provided in Subsection 5.4.2 and 11.4 of this part of these Rules, no one under the scrutiny of the Committee will be allowed to resign from the Association either by letter of resignation, by nonpayment of dues, or otherwise.

5.4.2 Resignation under Ethics Investigation. A respondent may in the alternative accept the opportunity to resign from membership with the understanding that such resignation will be deemed for all purposes a resignation “under ethics investigation . . .”

All members of the APA and the public are notified when a member resigns “under scrutiny.” However, it would still be possible to resign invisibly in the period before a formal complaint form has been recorded in the APA ethics office.

The Final Analysis

In our society, police are legally allowed to lie to interrogation suspects, and journalists occasionally go deceptively under cover to get a story. Psychologists are not supposed to make false, misleading, or deceptive statements about their identity and credentials in their professional work. We are not ethically permitted to use the defense that “I was not acting as a psychologist when I did that professional work.” However, our existing ethical standards put no enforcement teeth in those obligations of integrity when the psychologist in question does not have a specific duty of care to the party in question. If the party (person or organization) is not a client, student, employee, employer, or research participant of the psychologist, it seems possible to lie or deceive with impunity. As Ms. Kluemper so articulately and poignantly illustrated for us, such unaccountable misconduct can have far reaching and harmful consequences.

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