

Open Letter from Former Chairs of the APA Ethics Committee to the Board of Directors
Perceived, Potential or Actual Conflicts of Interest in Attorney Hoffman Self-Review

May 15, 2016

The Board of Directors again retained Attorney David Hoffman in April 2016. He is to review his previously released and once amended report (referred to as the *Independent Review*). On May 10, 2016 a communication was released to the Council listserv by APA President Susan McDaniel noting that Mr. Hoffman had been “engaged for the limited purpose of analyzing certain Department of Defense (“DoD”) policies recently brought to the Board’s attention in reports by the Association’s Division 19 and several psychologists discussed in the *Independent Review*.” Mr. Hoffman is to specifically “review the relevant policies and assess the extent to which they bear upon the issues, findings, and/or conclusions reflected in the *Independent Review*.” He reportedly “also intends to indicate in his report whether any modifications or clarifications to the *Independent Review* are appropriate in light of these policies.”

President McDaniel characterizes Mr. Hoffman’s current activities as a “supplemental review” that “is a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” Mr. Hoffman is described as “shar[ing] APA’s interest in ensuring that his *Independent Review* is fair and accurate.” President McDaniel relies upon these in concluding that new review of his prior work does not constitute a conflict of interest on his part or that of the Board.

A conflict of interest arises when an individual has real or reasonably perceived duties to more than one person or organization which may or does compromise their ability to address potential or actual adverse interests. This includes circumstances in which an individual’s own personal or professional concerns or interests may be or are inconsistent or even adverse to those of a client and/or an organization with whom that individual has a relationship (e.g., employee, an ownership stake, another client). Conflicts of interest may be stark and actions taken clearly self-serving or self-protecting at the cost of the interests of clients or organizations with whom the individual has a relationship. Conflicts of interest may also be more insidious by leading the individual to ignore or discount information in a less conscious process of confirmatory bias or less conscious adoption of self-serving or self-protection rationalizations for decisions or actions which have the result of being self-serving or self-protective at the expense of other parties.

The message from President McDaniel holds that Mr. Hoffman is not being asked to conduct “an investigation of [his] initial investigation” and is instead “a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” As a result, Dr. McDaniel asserts that Mr. Hoffman’s re-engagement, to evaluate his prior work, cannot constitute a conflict of interest.

This assertion is problematic in several respects. First, it assumes that a person cannot be in a conflict of interest when being asked to review their own previous work. This not a correct assumption. For example, an attorney being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of possible legal malpractice. A

physician being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of injurious medical error. An attorney or physician in these circumstances may intentionally choose to ignore or mischaracterize that evidence, or perhaps even more problematically, engage in well-described processes of confirmatory bias, minimization or rationalization that compromise their ability to identify or to appreciate their earlier missteps.

Second, President McDaniel reports that Mr. Hoffman's review of his own work is prompted, at least in part, "on the existence of factual information that has recently been called to our attention." This "factual information" may have been "recently" called to the attention of the Board but the challenge this information poses is that it was reportedly readily available at the time of the investigation through means as easy as a simple internet search. If so, possibilities are raised about Mr. Hoffman and his investigation that include: (a) the investigation did not attempt to access this readily available information; (b) the information was accessed and Mr. Hoffman failed to recognize the potential relevance of that information and so did not incorporate it into his investigation or even report that he had accessed it; or, (c) decisions were made to ignore the potential implications of this information for his analysis and conclusions and to not report that it had been accessed during the course of the investigation.

Each of these raises potential issues such as a failure of due diligence given the focus and context of the report (a, above), the possibility of significant confirmatory bias that led him to not identify or appreciate the relevance of the information or a need to report that he had reviewed it (b, above), or deliberate exclusion and failure to report accessing information which would have undermined the inferences and conclusions of his report (c, above).

We want to make it clear that we have no idea whether any of these processes were involved and are not alleging that any of them were involved. However, asking Mr. Hoffman to review his own work for potential evidence of any of these and to report this evidence to the Board clearly places him in at least a perceived conflict of interest and perhaps an actual one.

Third, the potential consequences for Mr. Hoffman and the Sidley Austin law firm with whom he is affiliated would be significant if he were to acknowledge witting or unwitting missteps which will now substantively alter the conclusions and recommendations of the *Independent Review*. Under the circumstances, there are factors which could reasonably be expected to contribute to confirmatory bias, unwitting self-protection (minimization, rationalization), or intentional (self-protective advocacy) efforts to affirm the quality, independence and conclusions of the *Independent Review*. Acknowledging serious missteps that would substantively challenge the investigation itself or the conclusions and recommendations it generated could have potentially grave professional and legal implications for both Mr. Hoffman and Sidley Austin. It cannot be simply be assumed that Mr. Hoffman and Sidley Austin now share any interest on the part of the APA that the *Independent Review* is "fair and accurate."

Again, we want to clearly state that we do not know whether any of the potentially problematic processes were involved in the original investigation or the *Independent Review*, and we are not alleging any intentional misconduct or unwitting missteps on the part of Mr. Hoffman, his

investigation team, or Sidley Austin. However, it is naïve to not recognize the potential or real conflicts of interest arising from retaining Mr. Hoffman to assess his *Independent Review* in light of “factual information” which was reportedly readily available during the original investigation. This is particularly the case since there are potentially significant professional, legal and other consequences for him and Sidley Austin should he now acknowledge that failure to identify, appreciate or incorporate this “factual information” will now substantively alter the conclusions and recommendations in the *Independent Review*.

Additionally, any acknowledgement on his part that the *Independent Review* is flawed in any substantive way would also have implications for APA. This report was relied upon to terminate the employment of APA staff, encourage the transitions of others, limit the involvement of psychologists in national security and/or military settings, direct revision of the Ethics Code, and take other steps which have had or could have substantial organizational, professional and legal consequences. The *Independent Review* has resulted in the personal and professional integrity of APA staff, members and others to be directly or indirectly called into question in ways that have had significant consequences for those individuals.

Under these circumstances, an observer could reasonably wonder whether the interests of the recent past-President the current President and the Board are aligned with the interests of Mr. Hoffman and Sidley Austin in determining that the “factual information” he is now asked to consider would have had minimal or no impact upon his investigation or the conclusions of the *Independent Report*.

This potential alignment of interests among APA senior governance, Mr. Hoffman, and Sidley Austin has already created a perception of conflict of interest among some APA members and may constitute a potential or actual conflict of interest between these elements of senior governance and the broad APA membership and APA’s internal constituencies. The interests of APA members and of APA as an organization may diverge—by perception and/or reality—from those of the recent past-President, Dr. McDaniel, and the Board. This potential divergence of interests would be magnified should there ever be (which still could occur) lawsuits against APA or filing of ethics and/or licensure complaints against individuals in APA governance arising from steps taken in reliance upon the *Independent Review*. Yet, APA Presidents and the APA Board of Directors have a prevailing duty to serve the best interests of the membership and the organization and not their own professional, organizational or personal interests.

It is always professionally and organizationally prudent to avoid perceived, potential or actual conflicts of interest whenever possible. Retaining Mr. Hoffman to review his own work raises difficult and potentially unresolvable potential or actual conflicts of interest.

As past Ethics Chairs, we have previously called for an independent assessment of the investigation conducted by Attorney Hoffman and the subsequent *Independent Review* report. We again call for timely initiation of this independent assessment as in the best interests of the Association. Under the current circumstances, simply the perceived potential or actual conflicts of interest arising from the Board retaining Mr. Hoffman to review his own investigation and

report are unlikely to yield an outcome viewed as credible among many APA members or constituencies, or by many external parties.

Respectfully,

Robert 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

Jeffrey Barnett, Ph.D., Chair 2009

Nancy McGarrah, Ph.D., Chair 2010

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

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