

**Suggested APA style reference:**

Hall, S. E., Flaum, M. E., & Russo, C. J. (2008, March). *Legal and ethical implications for refusing to counsel homosexual clients: A rebuttal*. Based on a program presented at the ACA Annual Conference & Exhibition, Honolulu, HI. Retrieved June 27, 2008, from <http://counselingoutfitters.com/vistas/vistas08/Hall-Flaum-Russo.htm>

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# **Legal and Ethical Implications for Refusing to Counsel Homosexual Clients: A Rebuttal**

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*Based on a program presented at the ACA Annual Conference & Exhibition, March 26-*

Hermann and Herlihy's (2006) *Journal of Counseling and Development* article, "Legal and ethical implications of counseling homosexual clients," raises significant legal and ethical questions about guidelines for counselors. The authors use and interpret the law and ethical code in a way that makes hard-sweeping assumptions about implications for counseling, and it is with those assumptions that we have cause for debate.

In the spirit of professional discussion, we offer a rebuttal to selected points by applying the ACA's ethical and moral framework (ACA Code of Ethics, 2005; Kitchener, 1984) and case law. In this article we hope to increase awareness of a disturbing discrepancy between the professional values we try to uphold and how differently they can be viewed, as well as to challenge the expectation that all counselors need to be able to work in therapeutic relationships with all people.

### **Legal Consequences of Refusing to Counsel Homosexual Clients**

To begin, we agree with the main spirit behind Hermann and Herlihy (2006) that counselors should not discriminate against clients who are homosexual. Even so, we believe that they err in their interpretation of the case *Bruff v. North Mississippi Health Services, Inc* (2001) on two major legal points. More specifically, we disagree with the authors' discussions of malpractice and Bruff's alleged discrimination under Title VII (2006), because neither issue was before the court.

Hermann and Herlihy correctly recite the facts in *Bruff* in acknowledging that Jane Doe (client), a pseudonym to protect her anonymity, and Bruff (counselor) had a therapeutic relationship when the issue of the client's sexual orientation arose. When Doe asked that Bruff counsel her regarding her homosexual relationship, Bruff refused on religious grounds, but offered to continue counseling Doe on other issues. Doe lodged a complaint with the employer, and Bruff countered by asking to be excused from duties that conflict with her religious beliefs. Bruff's employer refused.

A federal trial court in Mississippi entered a jury verdict in favor of Bruff that hospital officials committed employment discrimination based on religion under Title VII. On further review, the Fifth Circuit reversed in favor of the hospital, holding that Title VII did not require officials to accommodate Bruff's religious objections (*Bruff*, 2001).

Our first point of contention involves Hermann and Herlihy's discussion of malpractice. They maintain that in order to have grounds for a malpractice suit, "a client must show that there was a duty owed to the client, that the counselor breached that duty, and that the client was injured (physically or emotionally) because the counselor breached his or her duty" (Hermann & Herlihy, 2006, p. 416). Unfortunately, they omit the fourth

element, causation, which requires that a defendant play role in causing a plaintiff's injury (Russo, 2006, pp. 392-393). The authors next suggest that Bruff breached her duty to the client by refusing to counsel her on relationship issues.

We disagree with Hermann and Herlihy's application of the law in *Bruff* because insofar as the court did not review the issue of malpractice, it is inaccurate to claim that she breached her duty absent a finding of fact that she engaged in such behavior. Even though the Fifth Circuit commented that Bruff might have faced liability in such a situation, this was mere dicta (just talk) that is of no binding precedential effect. Indeed, had Doe sued for malpractice, the Fifth Circuit's gratuitous comments would have been irrelevant. Consequently, relying on dicta in a discussion of *Bruff's* implications is a stretch because the court did not address the issue of liability. In sum, because the court did not rule on the issue of malpractice, we believe that the authors should not have raised the issue in reference to the case of *Bruff*.

We also disagree with Hermann and Herlihy about what Bruff should have done differently. Knowing that her values were so strong with respect to homosexual clients, Bruff should have made this position clear both to her employer and in her informed consent so as to avoid beginning a counseling relationship with a homosexual client.

Our second point of disagreement relates to Hermann and Herlihy's interpretation of Title VII. First, they assert that in *Bruff* the court ruled that "both refusing to counsel homosexual clients and refusing to counsel homosexual clients on relationship issues constitute illegal discrimination" (p.416). The Fifth Circuit did not, and could not have written such a statement since the issue of whether Bruff's refusal to counsel homosexual clients constituted discrimination was not at issue.

We have two related concerns in Hermann and Herlihy's legal analysis. First, they completely overlooked a series of Supreme Court cases involving Title VII that might have offered a legal defense to *Bruff*. The leading one, *Employment Division of Human Resources of Oregon v. Smith* (*Smith*) (1990) rejected the claims of Native American drug counselors that they should not have been dismissed for the sacramental use of peyote. The *Smith* Court enacted a governmentally deferential standard: "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest (p. 886, n. 3, 1990)."

As such, federal constitutional claims against states, as in *Bruff*, are judged by the *Smith* standard. However, when applied to states and local governments, Title VII controls in employment situations. In applying Title VII in *Bruff*, the Fifth Circuit agreed with hospital officials that making the requested accommodations were unnecessary because they would have imposed an undue burden on the facility's daily operations.

Our second disagreement is over Hermann and Herlihy's reading of *Romer v. Evans* (*Romer*, 1996) and *Lawrence v. Texas* (*Lawrence*, 2003). In *Romer* the Supreme Court

invalidated a constitutional provision from Colorado that restricted the power of state and local governments to enact ordinances on the rights of homosexuals. The Court never suggested that homosexual discrimination was the equivalent of sexual discrimination. In *Lawrence*, the Court struck down a statute from Texas that banned sodomy between consenting same-sex couples but did not establish a broad right to engage in sexual activities. Accordingly, it is inaccurate to state that “*Lawrence* and *Romer* further illustrate that the U.S. Supreme Court has taken a stand condemning discrimination against lesbians, gay men, and bisexual women or men” (p. 416). *Romer* and *Lawrence* do not establish a broad constitutional prohibition against homosexual discrimination. Neither do *Romer* and *Lawrence* elevate homosexuality to a heightened level of judicial protection. Instead, *Romer* and *Lawrence* maintain that governmental actions impacting on homosexuals can be upheld as long as public officials demonstrate that their actions are rationally related to legitimate governmental purposes.

Hermann and Herlihy’s interpretation of *Bruff* notwithstanding, ACA (2005) standards arguably contradict their position. A4b - Personal Values state that “counselors are aware of their own attitudes, values, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients.” We contend that counselors who hold values that are not aligned with a homosexual lifestyle, and therefore avoid counseling homosexuals, would be practicing in accordance with the *Code*. Counselors would be respecting their clients’ diversity and right to receive the best care enough as to not assume professional competence and falsely enter in to a therapeutic relationship.

A more specific, but no less controversial, aspect of the article is that Hermann and Herlihy misinterpreted *Bruff* in declaring that “counselors cannot use religious beliefs to justify discrimination based on sexual orientation” (2006, p.416). Nothing in *Bruff* or the *ACA Code* supports this interpretation because the question of discrimination was simply not before the court.

Religious beliefs, for many, represent deeply held convictions about choice and approaches to life that go beyond simple preferences. These beliefs reflect value sets that are at the core of one’s being. Are we to be valueless as counselors at the same time we try to empower clients to develop and practice values of their choice (as long as there is no harm to self or others)?

The second sentence in the introduction of the *Code* reads: “Counselors actively attempt to understand the diverse cultural backgrounds of the clients they serve.” Of course, counselors can, and should, seek to understand all forms of diversity. However, there is a difference between understanding and agreeing with something or someone. If counselors’ convictions leave them disagreeing with the basic beliefs of their clients to the point where being therapeutic is in question, then they should avoid these relationships. To disregard one’s religious influences would be demonstrating a lack of

self respect – the very thing counselors try to help clients maintain and build upon.

### **Ethical Implications for Counselors**

Hermann and Herlihy begin their discussion of *Bruff's* ethical implications by reminding the readers that the 2005 *ACA Code of Ethics* is constructed on a foundation of moral principles including justice, beneficence, nonmaleficence, and autonomy (Kitchener, 1984).

#### **Justice**

Hermann and Herlihy (2006) begin *Bruff's* ethical implications by discussing the principle of justice in relation to diversity. They cite the standard that counselors be “aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with the counseling goals” (ACA, 2005, A.4.b). This standard continues by stating that counselors should “respect the diversity of clients, trainees, and research participants” (ACA, 2005, A.4.b). Hermann and Herlihy suggest that to respect diversity means to “gain the knowledge, personal awareness, sensitivity and skills pertinent to working with a diverse client population” (ACA, 2005, C.2.a).

Another way for counselors to both avoid imposing values and to respect client diversity is to make appropriate referrals if necessary. The *Code* addresses this by stating that “if counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing professional relationships” (ACA, 2005, A.11.b).

Ideally, counselors should articulate their values or limitations in the informed consent phase and should provide appropriate referrals to clients with whom they are unable to work thereby avoiding therapeutic relationships that may be harmful. If counselors discover conflicts in values that are likely to cause harm to clients or hinder their therapeutic effectiveness, then they should “terminate the counseling relationship when it becomes reasonably apparent that the client no longer needs assistance, is not likely to benefit, or is being harmed by continued counseling” (ACA, 2005, A.11.c).

#### **Beneficence and Nonmaleficence**

The 2005 *ACA Code of Ethics* begins with the following standard: “The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients” (ACA, 2005, A.1.a). We consider this standard to be the foundation on which the entire *Code* rests. We agree with Hermann and Herlihy’s contention that Bruff did not act in the best interest of her client when she refused to counsel her on relationship issues. At the same time, we disagree on the interpretation of “respect the dignity and promote the welfare.” We respect the dignity and promote the welfare of clients when we are aware of our own limitations not when we eliminate our own values. Additionally, the authors, in discussing beneficence, find it “difficult to understand Bruff’s rationale for her assertion

that she could counsel clients who are homosexuals or who are engaged in sexual relationships outside the bounds of marriage, but not on issues of homosexual or extramarital relationships” (p. 417). *Respect for clients does not necessarily mean to work with them.* In fact, one show of respect is to refer clients to other professionals who are better suited to work with them *just as Bruff sought to do.* As such, we are troubled that Hermann and Herlihy would impose their values on Bruff while suggesting that she should have been non-judgmental with regard to her client(s) despite her misgivings.

What is truly important is that we treat everyone with respect and understanding, even those with whom we may not agree. That is the spirit behind the *Code*. However, to “treat with respect” by counseling clients with whom our values conflict would increase the likelihood of our doing harm. Yet, Hermann and Herlihy cite Remley and Herlihy (2005) when stating that “if a counselor’s values were so strong that he or she could not counsel clients with differing beliefs, we would be concerned that the counselor is not well-suited for the counseling profession” (p. 20). One interpretation is that counselors who hold beliefs that would hinder their ability to work with a *specific* population are not well-suited with *any* population, thus they would be ill-suited for the counseling profession as a whole.

The danger in making a generalization such as this is that it is likely to scare many counselors from the profession who could otherwise be competent with many populations. This would be unfortunate. Moreover, such an approach raises troubling implications for people of faith, potentially relegating them to the status of outsiders if they are expected to suppress their religious beliefs lest they be accused of being judgmental. While we agree that counselors cannot, and should not, impose their values on clients, neither should they be made to feel that they cannot express their values if they conflict with those of clients.

With respect to avoiding nonmaleficence, one might argue that counselors should seek additional training, knowledge, and supervision to aid them in working with these clients before hastily making a referral. However, while in the process of self-exploration and skill/knowledge acquisition, harm could be done. Furthermore, without a genuine interest counselors are unlikely to seek the necessary training and supervision to work with these clients. Hermann and Herlihy ask whether these counselors are well-suited for the profession. A more specific question would be to ask whether counselors with strong values that hinder their ability to be therapeutic with specific populations are well-suited to work with those selected groups. We believe the answer is No. Even so, it is important to remember that these counselors could be competent and highly skilled in working with *other* populations, so to globalize the issue is to do a disservice to counselors and the clients they help.

### **Autonomy**

According to the ethical principle of Autonomy, our clients should be the active agents in

their own counseling and in their own lives. Hermann and Herlihy cite Welfel (2002) when asserting that counselors [should] believe their clients are capable of making their own decisions with respect to their lives and their goals for counseling. However, Hermann and Herlihy (2006) also suggest that Bruff's actions reflect the belief that it is the counselor who should decide what topics can and cannot be addressed in-session.

We believe that clients are capable of not only directing the course of their own counseling, but also of choosing counselors who will best suit their individual needs. This also includes clients who have been harmed in past therapeutic relationships or who have been marginalized in society.

In order to ensure that clients and counselors are aware of key factors before entering into therapeutic relationships, counselors should be prepared to communicate their limitations in a caring, respectful manner while providing appropriate referrals if necessary.

### **Recommendations**

To discuss and clarify is critical to our profession. Whether with clients or colleagues the process toward understanding is a foundation for better decision-making. To this end, we suggest that whether dealing with the law or the *ACA Code*, it is of utmost importance that counselors base their judgments on accurate information. That is, and with all due respect, we believe that our differences with Hermann and Herlihy stem from the fact that we interpreted the law differently, especially with regard to negligence and Title VII liability. We believe that since they misinterpreted what the Fifth Circuit ruled, some of their conclusions miss the mark.

Respecting the diversity of people includes respecting differences among counselors. Part of what makes us unique as counselors is the value set that guides our beliefs and behaviors. Our values influence interests, and interests influence our desire to gain additional training and knowledge, beyond prescribed coursework to develop areas of expertise. Still, the freedom to develop areas of expertise brings with it the responsibility that counselors communicate their limitations to clients in a way that respectfully honors individual differences. The vehicle through which we communicate these limitations is open to debate and individual choice: Counselors can craft informed consent to address these issues and choose to work only in settings in which they will unlikely encounter specific clientele. Ideally, counselors continually strive to be self-aware, and to communicate with honesty their values to prospective employers, colleagues, and clients in an effort to avoid a situation like that encountered by Bruff.

With respect to the *ACA Code of Ethics*, we hope that we have shown that many of the standards are broad and open to interpretation. We believe that the *Code's* broadness is a strength that allows for and celebrates differences between and among counselors and their values. However, if, as Hermann and Herlihy (2006) suggest, there is only one interpretation of the *Code*, then its subjectivity can only be viewed as a limitation to

counselors and the clients they serve.

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