

Ethical Implications of a Critical Legal Case for the Counseling Profession: *Ward v. Wilbanks*

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This article presents the official position of the American Counseling Association on a seminal legal case for professional counseling: *Ward v. Wilbanks*. The focus is on three key questions: Is it permissible to deny counseling services to a homosexual client on the basis of a counselor's values? Can referrals be made at any time a counselor wishes to do so? When is a client a client?

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Ward v. Wilbanks is one of the most important legal cases to have an impact on the counseling profession in the past quarter century. The lawsuit, filed by the Alliance Defense Fund (ADF) on behalf of former graduate student Julea Ward and against the counselor education program at Eastern Michigan University (EMU), has threatened to undermine the ability of the counseling profession to promote nondiscrimination against clients based on sexual orientation. (Note: After this article was accepted for publication, the Alliance Defense Fund changed its name to Alliance Defending Freedom.) *Ward v. Wilbanks* has broad implications regarding whether it is constitutional for the counseling profession to designate protected classes, such as race, ethnicity, gender, disability, age, and the aforementioned sexual orientation, through the nondiscrimination section (Standard C.5.) of the *ACA Code of Ethics* (American Counseling Association [ACA], 2005, p. 10). In addition, the case has significant implications for professional counselors who state that religious beliefs prohibit them from counseling clients with particular characteristics. Although *Ward v. Wilbanks* has not yet reached its final conclusion, because it is still under appeal, the district court ruling provides significant insight into these issues. In this article, we explore the ethical implications of *Ward v. Wilbanks* and present the positions of ACA. (Note. *Homosexual* is used throughout this article because it is the term used in all legal documents relating to *Ward v. Wilbanks*.) Three questions are addressed:

- Is it permissible to deny counseling services to a homosexual client on the basis of a counselor's values?
- Can counselors make referrals at any time they wish to do so?
- When is a client a client?

Background

Julea Ward entered the graduate counseling program at EMU in May 2006, with the goal of becoming a school counselor. In

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the spring term of 2009, Ms. Ward enrolled in a practicum at the in-house clinic that was operated by the EMU counseling program. She was subsequently assigned a client who stated on the intake form that he wanted help with feelings of depression and issues related to a same-sex relationship. Instead of conducting an initial session, Ms. Ward sought to refer the client to another practicum student. She did so because

Based on Biblical teachings, Ms. Ward believes that God ordained sexual relationships between men and women, not between persons of the same sex. As such, Ms. Ward believes that homosexual conduct is immoral sexual behavior. Ms. Ward also believes, based on her sincere religious beliefs, that individuals are capable of refraining from engaging in homosexual conduct. (*Ward v. Wilbanks*, 2009, Compl. at 3-4)

The EMU counseling program informed Ms. Ward that refusing to see a client on the basis of sexual orientation was a violation of the ethics code for the counseling profession (the *ACA Code of Ethics*; ACA, 2005) and was therefore not acceptable. Ms. Ward was offered remediation to help her counsel clients whose values differed from her own, but she refused because she was "unwilling to violate her beliefs by affirming homosexual conduct within the context of a counseling relationship." (*Ward v. Wilbanks*, 2009, Compl. at 8)

After due process hearings, EMU dismissed Julea Ward from the counseling program. ADF subsequently filed a lawsuit in U.S. district court on her behalf claiming that the EMU counseling program "violate[ed] Ms. Ward's constitutional rights to free speech, free exercise of religion, freedom from retaliation for exercising First Amendment Rights, equal protection of the laws, due process, and freedom from establishment of religion" (*Ward v. Wilbanks*, 2009, Compl. at 9).

ACA provided expert testimony for the district court (Ex. at Sep. 30, 2009) and an amicus brief for the Sixth Circuit

Court of Appeals. (*Ward v. Wilbanks*, 2011). The amicus brief is available on the ACA website (<http://www.counseling.org/resources/pdfs/EMUamicusbrief.pdf>). ACA became involved for two reasons. The first was to support a counselor education program accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP) as well as the CACREP accreditation standards (CACREP, 2009), which require adherence to the *ACA Code of Ethics* (ACA, 2005). The second reason focused on the fact that *Ward v. Wilbanks* directly challenged the validity and enforceability of the nondiscrimination section (Standard C.5.) of the *ACA Code of Ethics* (ACA, 2005, p. 10). Ms. Ward's complaint argued that ACA's statement of nondiscrimination is "vague, overbroad, and allows for unbridled discretion in determining what protected expression and conduct fall under [its] prohibition . . . [and] thereby limits constitutionally-protected speech and conduct" (*Ward v. Wilbanks*, 2009, Compl. at 195-196). If Ms. Ward prevailed, courts could use the case as precedence for preventing the *ACA Code of Ethics* from prohibiting nondiscrimination on the basis of sexual orientation (and perhaps other areas).

In July 2010, Judge George Steeh from the Eastern District Court of Michigan ruled on the case (*Ward v. Wilbanks*). Judge Steeh found in favor of the defendant (EMU) and against the plaintiff (Julea Ward). As stated earlier, the case is being appealed and is currently being reviewed by the Sixth Circuit Court. (Note: After this article was accepted for publication, *Ward v. Wilbanks* was settled out of court.)

■ Is It Permissible to Deny Counseling Services to a Homosexual on the Basis of a Counselor's Values?

The unequivocal answer to this question is no. Refusing to counsel someone based on his or her sexual orientation is a clear and major violation of the 2005 *ACA Code of Ethics*.

Sexual Orientation as a Protected Class in the *ACA Code of Ethics*

The nondiscrimination section of the *ACA Code of Ethics* (ACA, 2005) makes it clear that the counseling profession identifies sexual orientation as a protected class. Standard C.5. states, "Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law" (p. 10). As such, Julea Ward did not have the prerogative to refuse to counsel an assigned client on the basis of her discomfort with—or objections to—homosexuality. This was a clear and major violation of the *ACA Code of Ethics* as it also would have been if Ms. Ward had refused to counsel an assigned African American client who wanted help with a multiracial relationship on the basis that her values did not allow her to accept mixed-race couples.

Refusing to provide services to a protected class listed in the nondiscrimination section of the *ACA Code of Ethics* (ACA,

2005) on the basis of the counselor's religious beliefs also constitutes a major violation of the *ACA Code of Ethics* section focusing on avoiding harm by the nonimposition of personal values. Standard A.4.b. states, "Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants" (pp. 4–5). As a practicum student, Ms. Ward's refusal to provide counseling services to an assigned client who wanted help with same-sex relationship issues is a clear imposition of values, which is inconsistent with the counseling goal of nondiscrimination on the basis of sexual orientation.

Ms. Ward's refusal to counsel a homosexual client who wanted assistance with a same-sex relationship is also a clear violation of the *ACA Code of Ethics* (Standard A.4.b.; ACA, 2005) mandate that counseling students and professional counselors value the diversity of clients across sexual orientation, age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, marital status/partnership, language preference, and socioeconomic status. Standard A.4.b. of the *ACA Code of Ethics* prohibits professional counselors and counselors-in-training from refusing to counsel a client on the basis of negative values that the counselor possesses about homosexuality.

In a seminal article focusing on the legal implications of refusing to counsel homosexual clients published in the ACA flagship journal, *Journal of Counseling & Development*, Mary Hermann and Barbara Herlihy (both of whom have served on the ACA Ethics Committee and are considered leading authorities on counselor ethics) stated that refusing to counsel clients on the basis of issues related to sexual orientation can result in ethical sanctions, licensing sanctions, and lawsuits accusing the student or counselor of malpractice (Hermann & Herlihy, 2006). Hermann and Herlihy concluded that, "Counselors need to remain cognizant that they are ethically obligated to seek the knowledge, skills, and sensitivity to effectively counsel a diverse client population. Counselors who engage in discrimination based on sexual orientation are violating ethical mandates" (p. 418).

Because Ms. Ward was in training to be a school counselor, it should also be pointed out that the ACA division focusing on school counseling, the American School Counselor Association (ASCA), has adopted a position very much in keeping with Standard A.4.b. of the *ACA Code of Ethics*. The ASCA position states, "The professional school counselor is committed to the inclusion and affirmation of youths of all sexual orientation" (Stone, 2005, p. 275).

Diversity as a Core Value of the Counseling Profession

Expert testimony provided by Julea Ward's defense team (Ex. at Sep. 1, 2009) supported Ms. Ward, in part, by noting that the initial ethics code of ACA promulgated in 1961 (American Personnel and Guidance Association, 1961) included a statement that counselors may decline to initiate counseling on the

basis of personal limitations. What the expert testimony did not note is that, over the past 5 decades since the publication of that initial ethics code, the counseling profession has evolved and shifted from a focus on the counselor to a focus on the client, with an emphasis on attending to multiculturalism and diversity. As such, the current 2005 edition of the *ACA Code of Ethics* contains a very different imperative than the outdated one provided by the plaintiff's expert testimony. The current statement is so central to the values of the counseling profession that it is written in the preamble:

Professional values are an important way of living out an ethical commitment. Values inform principles. Inherently held values that guide our behaviors or exceed prescribed behaviors are deeply ingrained in the counselor and developed out of personal dedication, rather than the mandatory requirement of an external organization. (p. 3)

The preamble to the *ACA Code of Ethics* (ACA, 2005) provides a focus of these inherently held professional values for counselors: multiculturalism and diversity. The preamble states, "Association members recognize diversity and embrace a cross-cultural approach in support of the worth, dignity, potential and uniqueness of people within their social and cultural contexts" (p. 3). These statements in the preamble of the current *ACA Code of Ethics* make it clear that it is contrary to the core values of professional counseling to refuse to see clients with same-sex issues on the basis of personal values about homosexuality and that professional counselors and counselors-in-training are obligated to work within the sexual orientation framework of their clients because that is a major component of diversity.

The District Court Ruling on Counseling Values and Sexual Orientation

In his summary judgment, Judge Steeh agreed with the ACA stance on counseling values and homosexuality. Specifically, Judge Steeh wrote:

The ACA Code of Ethics is the industry standard in the field of counseling. . . . A counselor who cannot keep their [sic] personal values out of the interaction has great potential to harm her client. . . . The ACA Chief Professional Officer, Dr. Kaplan, explained in his expert report that plaintiff's request to refer clients based on their protected status (sexual orientation) "was a clear and major violation of the ACA Code of ethics as it would have been if she had refused to counsel an assigned African American on the basis that her values would not allow her to provide services to people of color." (*Ward v. Wilbanks* at 22-26)

Can Counselors Make Referrals at Any Time They Wish to Do So?

Ms. Ward claimed in her lawsuit that referral is "an accepted practice within the counseling profession, including, but not

limited to, those circumstances where there is a clash between a counselor's values and a client's values/goals" (*Ward v. Wilbanks*, 2009, Compl. at 7). Because Ms. Ward felt strongly that homosexuality is immoral, her counsel argued that it was perfectly appropriate for her to make a referral after reviewing the intake information, which stated that the client wanted to talk about same-sex issues.

The plaintiff also referenced the first sentence of the *ACA Code of Ethics* (Standard A.11.b.; ACA, 2005) in support of her decision to refer: "If counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships" (ACA, 2005, p. 6). Ms. Ward claimed that she was not able to be of professional assistance to this client because of "the irreconcilable differences between her religious views regarding homosexual behavior and [the client's] desire for counseling regarding his homosexual relationship" (*Ward v. Wilbanks*, 2009, Compl. at 139). Therefore, she also claimed that Standard A.11.b. of the *ACA Code of Ethics* obligated her to ask the clinic staff to reassign the client to a different practicum counselor-in-training.

Finally, Ms. Ward argued that her action was acceptable because the *ACA Code of Ethics* (ACA, 2005) permits the use of personal and moral values when deciding whether to refer clients (*Ward v. Wilbanks*, 2009, Compl. at 135). Specifically, Ms. Ward's complaint referenced Standard A.9.b., End of Life Care for Terminally Ill Clients (ACA, 2005, p. 5). This section allows personal and moral values to be a factor in deciding whether a counselor will choose to work with terminally ill clients who wish to explore end-of-life options such as physician-assisted suicide.

Referral Criterion in the *ACA Code of Ethics*

Competency. Ms. Ward implied that counselors may make a referral on the simple basis that a counselor is uncomfortable with a client's values. Other than the one instance noted in the Values Exception section later in this article, there is no statement in the *ACA Code of Ethics* (ACA, 2005) indicating that referral can be made on the basis of counselor values. The section that speaks to both termination and referral (Standard A.11.) focuses on the "inability" rather than the "unwillingness" of a counselor as the criteria for referral (ACA, 2005, p. 6). As such, the focus of appropriate referral revolves around skills. Counselors should refer if they do not have specific expertise needed by a client (e.g., treatment for an eating disorder), not when they are uncomfortable with a client's characteristics. In other words, the focus of referral is on the needs of the client, not the values of the counselor. Counselors and counselors-in-training who experience a clash between their personal values and client characteristics, such as Ms. Ward, should obtain the appropriate supervision that will allow them to continue with the client (and similar clients in the future) and provide quality services.

Referral as a last resort. The *ACA Code of Ethics* (ACA, 2005) does not treat referral lightly because it can lead to

perceived abandonment. Standard A.11.a., Abandonment Prohibited, clearly states, “Counselors do not abandon or neglect clients in counseling” (ACA, 2005, p. 6). The ACA amicus brief filed with the Sixth Circuit Court of Appeals stated,

A counselor who drops a client whenever potential values-based conflicts arise . . . violates [the prohibition against abandonment]. The Code recognizes that a client may suffer harm if the counselor turns away at the very moment that the client’s most sensitive issues arise. Because of this risk, termination and/or referral are matters of last resort, to be handled on a case-by-case basis with sensitivity to the facts specific to the client in question. (*Ward v. Wilbanks*, 2011, Ex. at 15-16)

The *ACA Code of Ethics* (ACA, 2005) permits counselors to terminate a counseling relationship under three conditions: “When it becomes reasonably apparent that the client no longer needs assistance, is not likely to benefit, or is being harmed by continued counseling” (Section A.11.c.). Ms. Ward did not provide evidence that any of these three conditions had occurred. Therefore, her refusal to see her client solely on the basis of the client’s sexual orientation issues was a major violation of the Termination and Referral section of the *ACA Code of Ethics* (p. 6) and constituted abandonment.

The values exception. The complaint filed by ADF accurately summarized the *ACA Code of Ethics* (ACA, 2005) section on end-of-life care for terminally ill clients (Standard A.9.b.):

Provision A.9.b. of the ACA Code of Ethics recognizes that personal and moral beliefs may prevent a counselor from being able to provide services to a client who is interested in evaluating his end of life options, and states that if such a conflict arises an “appropriate referral” should be made. (*Ward v. Wilbanks*, 2009, Compl. at 135)

Section A.9.b. does indeed give permission for counselors to refrain from working with terminally ill clients who wish to explore options for hastening their death if doing so would violate the personal values of the counselor.

It should be noted that this is the exception that proves the rule. The ACA Ethics Revision Task Force, which promulgated the 2005 *ACA Code of Ethics*, was very much aware of the code’s prohibition on using personal values as a criterion for referral or termination. The task force was also aware that the new section of the Code, giving counselors permission to assist terminally ill clients in thinking through the hastening of their death, would likely violate deeply held personal and moral tenets of some counselors. Therefore, this section was written in such a way as to give counselors the option, on the basis of their values, of working or not working with terminally ill clients who wish to explore the hastening of their death. The ACA Ethics Revision Task Force gave permission in this one specific situation because

using the counselor’s personal values as the basis for refraining from assisting a terminally ill client to explore options for hastening death would otherwise be prohibited by the *ACA Code of Ethics*.

The District Court Ruling on Referral

As with his ruling on counseling values and sexual orientation, Judge Steeh agreed with the ACA position on referrals. The summary judgment stated,

Regarding referrals, the ACA recommends that “[i]f counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships.” This excerpt is consistent with the opinion of Chief Professional Officer David Kaplan that “[t]here is no statement in the *ACA Code of Ethics* that referral can be made on the basis of counselor values” unless they are counseling ‘terminally ill’ clients who wish to explore options for hastening their death.” Additionally, Dr. Kaplan explained that the provision in the *ACA Code of Ethics* allowing referrals of clients seeking end-of-life counseling is “the exception that proves the rule” that values-base referrals based on a client’s protected status are not appropriate. That is because the Code of Ethics permits *all* counselors, regardless of religious faith, to refer clients seeking counseling for end-of-life issues. (*Ward v. Wilbanks*, at 7 & 31).

When Is a Client a Client?

One of the more unique claims made in Ms. Ward’s legal documents was that an ethical violation did not occur in her situation because the individual assigned to her was not yet a client. Her complaint stated, “Ms. Ward did not in fact impose her religious views regarding homosexual behavior on the client because she never met with him” (*Ward v. Wilbanks*, 2009, Compl. at 118). A subsequent filing by Ms. Ward’s legal team expanded on this idea.

Ms. Ward never met the potential Practicum client. Thus, she could not have imposed her values on the client. In fact, the individual assigned to her was not even her client, since at EMU’s clinic the counselor–client relationship begins “[a]t the first meeting,” not before. (Br. At 10, Feb. 26, 2010)

ACA responded by pointing out that the book *The Counselor and the Law* (Wheeler & Bertram, 2008), published by ACA, makes it clear that the definition of a client begins at the moment an individual requests assistance. (*Note.* A subsequent edition of *The Counselor and the Law* has been published since the filing of ACA’s expert testimony.)

The simple and safe answer to this question [of who is a client] is, “Anyone who seeks advice or counseling.” Therefore, it is prudent, whenever you are in your professional role, to meet the standards and fulfill your duty whenever you are interacting with a person who may become a client. (p. 13)

The fact that we have ethical responsibilities to those who have requested assistance obligates professional counselors to respect the dignity and promote the welfare of those who contact us, even if a session has not yet occurred. For example, the office of a counselor in private practice may receive a telephone call requesting an appointment from an individual who wants to use insurance that is not accepted by the counselor. Because the individual is now defined as a client, due to initial contact, the counselor has an obligation to assist the individual to find an appropriate mental health professional who does accept the insurance. It is, therefore, clear that the individual assigned to Ms. Ward was her client and that all statements and imperatives in the *ACA Code of Ethics* (ACA, 2005) pertaining to clients applied in her case.

Conclusion

It was the unequivocal position of ACA that Ms. Julea Ward committed major and serious violations of the *ACA Code of Ethics* (ACA, 2005) during her counseling practicum at EMU. The ensuing legal case allowed ACA to successfully present its official position on a number of important ethical issues:

- Professional counselors may not deny counseling services to a homosexual person (or an individual belonging to any other protected class of clients) on the basis of the counselor's values.
- Referrals are to be made on the basis of skill-based competency, not values.

- To avoid abandonment, referral is an option of last resort.
- The counselor's ethical obligations to an individual starts at first contact or assignment, not at the first session.

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