THE INTERACTION BETWEEN ETHICAL STANDARDS OF COUNSELLORS AND THEIR LEGAL RESPONSIBILITY

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Abstract

This paper seeks to investigate an area of potential conflict concerning the counselling profession. Specifically, (1) the professional ethics recognized by counsellors, and (2) the differing legal responsibilities imposed by law on members of the profession with respect to clients and to members of society at large (to the profession itself). It is the writer's thesis that in the implied contract between counsellor and counsellee there must be maintained a standard of conduct which is determined in part by professional ethics and in part by judicial decision. The author surveyed the English language literature on ethical standards, confidentiality and professional responsibility along with the American and Canadian reported decisions on legal liability. The author favors legislative recognition of the profession and provincial licensing of entry into the profession as a means of lessening the risk of conflict between the guidelines incorporated in informal codes of ethics and the objective standards set by the courts. The author does not attempt to answer the questions raised in this investigation but rather hopes to reveal by these questions the conflicts which arise in the areas of ethical standards and legal responsibility.

Résumé

La présente cherche à étudier la question des conflicts potentiels de la profession de l'orientation professionnelle. En particulier, (1) l'éthique professionnelle telle qu'acceptée par les orienteurs, et (2) les variations en responsibilité légale qu'impose la loi aux membres de la profession par rapport aux clients et par rapport à la société en général (vis-à-vis la profession elle-même). La position de l'auteur, en ce qui concerne l'entente entre l'orienteur et le sujet, est qu'il doit y exister un standard de comportement conforme, en partie, à l'éthique professionnelle, et, en partie aux décisions juridiques. L'auteur à fait une étude de la documentation anglaise sur les normes de l'éthique, les consultations confidentielles et la responsabilité professionnelle ainsi que des décisions américaines et canadiennes sur la responsabilité légale. L'auteur est en faveur que la loi reconnaisse le besoin d'exiger une license professionnelle et provinciale pour ceux voulant s'adjoindre à la profession afin de réduire les risques de conflicts entre les normes incluses dans les codes de l'éthique et les normes objectives identifiées par la cours. L'auteur ne tente pas de répondre aux questions soulever par l'étude mais elle souhaite plutôt que ces questions révèlent les conflicts provoqués dans le domaine des normes de l'éthique et de la responsabilité légale.

"The standard of conduct required of a counselor may be indicated by the general word 'responsibility'; what is involved is indicated by what he is responsible for: . . . the counselling relationship, confidentiality, . . . intra-professional relations" (Blackman, 1974, p. 13).

Codes of ethical standards have been prepared by all the helping professions and seek to determine for its members where their responsibility(ies) is primarily due. The American Personnel and Guidance Association (APGA) has compiled for its members 56 canons of ethics covering problem cases common to counsellor/counsellee relationships with suggested resolutions. First prepared in 1961, the *Ethical Standards Casebook* was most recently revised in 1976. Section A, clause 2 of the APGA code reads: "The member has a responsibility both to the individual who is served and to the institution within which the service is performed" (p. 7). This provision exemplifies two of the conflicting duties which are ever present in the profession. Section B, clause 1 of the Canadian Guidance and Counselling Association (CGCA) guidelines similarly states: "A counsellor or practitioner's *primary* obligation is to respect the integrity and promote the welfare of the counsellee or client with whom he is working" (p. 4).

The duties relating to the individual, the institution, and the profession must of necessity conflict, particularly in situations in which one is elevated in importance over the others. It is important therefore, to identify situations where conflict may arise.

In an unofficial survey of members of the National Vocational Guidance Association (NVGA),

Schmidt (1965) compiled nine "rules" in school counselling involving ethical decisions which, like the guidelines of the APGA, CGCA, and other helping professions, advocate a supreme duty to the individual. Such codes of behaviour, incorporating widely held value systems, are necessary supports for the daily operation of the counsellor. Five justifications for ethical codes which prevail in all professional standards are stated in Schmidt (1965):

1. They provide a position on standards of practice to assist each member of the profession in deciding what he should do when situations of conflict arise in his work.
2. They help clarify the counsellor's responsibilities to the client and protect the client from the counsellor's violation of, or his failure to fulfill, these responsibilities.
3. They give the profession some assurance that the practices of members will not be detrimental to its general functions and purposes.
4. They give society some guarantee that the services of the counsellor will demonstrate a sensible regard for the social codes and moral expectations of the community in which he works.
5. They offer the counsellor some grounds for safeguarding his own privacy and integrity. (pp. 380-381)

In other words, "without a code of carefully conceived ethical principles a counsellor may unwittingly injure himself in the eyes of both his client and his professional colleagues" (Wrenn, 1952, p. 164).

There is a real question as to whom the counsellor's duty or responsibility is primarily due. Is it due to the client rather than the employer, the client rather than the colleague, the client rather than the state/province? The answers depend on the counsellor's judgement based upon his professional code of ethics, and for this reason, the ethical codes of all helping professions must be firm and concise without being unduly rigid.

Confidentiality

One of the key words in the codes of ethics of the APGA, the NVGA, and the American Psychological Association (APA), is confidentiality. Joling (1974) writes "*Confidentiality* arises out of ethical traditions . . . because of the need for privacy in communication" (p. 107). The recently proposed revision of Principle 5 on confidentiality of the APA reads:

> Psychologists have a primary obligation to respect the confidentiality of information obtained from a person in the course of teaching, practice and research. They reveal such information to others only with the consent of the person or the person's legal representative, except in those unusual circumstances in which not to do so would violate the law or would result in clear and imminent danger to the person or others (*APA Monitor*, 1979, p. 17).

Sometimes the terms confidentiality and privileged communication are used interchangeably. There are, however, distinctions between them. "*Privileged communications* . . . exist by virtue of statutes enacted by the various legislative bodies of the several states" (Joling, 1974, p. 107). The privilege is, in fact, the client's. It is he who is protected by law, not the person to whom he discloses information (Eberlein, 1977; Goldman, 1969; Christiansen, 1975). In other words, confidentiality is an ethical issue and privileged communication is a legal protection granted in the United States to the disclosing person in the lawyer/client, doctor/patient, psychiatrist/patient, husband/wife, and informer/government relationships, and in these, both parties are protected. In Canada, the protection for persons receiving confidences is not as wide-ranging and includes only a limited privilege in lawyer/client and husband/wife relationships. There is some precedent for judicial discretion in matters involving confidentiality.[1] Volz (1964) has defined a confidential relationship as one which exists "whenever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest" (p. 12).[2]

This definition appears to be based on Wigmore's (1961) four criteria for the establishment of privileged communication which include:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. (p. 527)

So far, the rights of privilege have been granted to few professions, and those by specific legislation. Those states[3] which have granted such privilege protect only the school counsellor and make no mention of the counsellor in private practice.

Three conditions must be met in order for a communication to be deemed privileged by certain statutes: (1) the communication must be made to

1. *Carter v. Carter*, (1974), 53 D.L.R. (3d) 491 (Ontario).
2. As in *Peoples First National Bank & Co. v. Ratajski*, 399 Pa 419, 160 A(2d) 451 (1960).
3. Michigan—Statute (1972) Sec. 27A. 2165; Indiana—Statute (1965) Sec. 2, Act 1309; Oklahoma—Statute (1971) Tit. 70, Art. 6-115; Montana—Statute (1971) Tit. 70, Art. 6-115; Montana—Statute (1971) Sec. 93-801-1; North Dakota—Statute (1969) S.L. 1969, ch. 309. Sec 1.

a public officer (which may not include all counsellors); (2) it must be made to him in official confidence; and (3) the court must determine that the public interest would suffer by disclosure.

The major obstacle to gaining protection under these statutes is the lack of licensing requirements for practising counsellors in all Canadian provinces and some jurisdictions of the United States. Psychologists are now certified (i.e., possess the academic qualifications) and licensed (i.e., have received legal recognition based on intellectual capacity and moral fitness) and have, in addition to their codes of ethics, more legal protection than do counsellors, because a profession can more easily substantiate standards of conduct. Notwithstanding, legislative protection would serve to enhance the image of the profession in the eyes of the community and the self-image of members of the profession, both in Canada and the United States. There have been few reported cases involving counsellors and disclosure of confidential information. Schmidt (1962) observed that it was becoming less and less unusual for counsellors to be confronted with legal difficulties. He then predicted that we would be hearing more about lawsuits and other legal incidents. His view has been vindicated by the decision of the California Supreme Court in *Tarasoff v. Regents of the University of California*[4] (1976) and by implication by the High Court of Ontario in *Haines v. Bellissimo et al.*[5] (1978), both to be discussed later.

The central question is: To whom does the counsellor owe a duty when asked to reveal information received in confidence? For example, when the client is a student under 18 years of age, the parents, guardians, or those *in loco parentis* must assume for the minor the right normally given to an adult client in the same counselling situation. This includes the right to know about the general nature of the counselling relationship and perhaps even matters discussed therein. The parents are primarily responsible for the health and welfare of their child(ren) and schools and counsellors cannot intrude without a legal right to do so (Eberlein, 1977).

It is problematic for a counsellor to promise confidentiality to his client and later to reveal such confidential information to a court or agency. The proposed revision of Principle 5 on confidentiality of the APA ethical code indicates that "psychologists inform their clients of the limits of confidentiality" (p. 17). This may ameliorate the problem to some extent for psychologists.

Sadoff (1974) observes that when court action threatens a confidential relationship, (i.e., when the court requires a psychiatrist to testify), the privilege statute comes into play. This means that the psychiatrist "must be aware of what he puts into records, of what records he keeps, and of occasions when he may disclose information about his patient, with or without his patient's consent" (p. 102).

As the counselling profession gains greater recognition by the community and by the courts in the United States and Canada, there is an increasing possibility of legal actions being brought against the professional counsellor. Ironically, the more able the counsellor is to provide better professional services to his clients, the greater are his chances of becoming legally liable for any injury done to any person. That is to say, increasing competence and professionalism increase client expectations and legal liabilities.

Although confidentiality is both an ethical and a legal issue, the counselling profession still seeks inclusion into the privileged professions which, in the United States, comprise the clergyman/penitent, doctor/patient, and psychologist/client relationships. Nine American states have granted the privilege to teacher/student and counsellor/student relationships by legislation and have done so in the belief that certain social relationships must be protected. Those other American states, and Canadian Provinces, who would see to extend legal confidentiality to include counsellor/counsellee relationships must look to their respective state and Provincial legislatures. As models, the statutes of Michigan and North Dakota are recommended. Their respective legislation provides that the teacher or counsellor may testify only with the consent of the student or counsellee. This is also the theme of the proposed revisions to Principle 5 of the APA ethics code.

Professional Responsibility

If one takes the premise that the essence of professional responsibility must be approached on the grounds of how best can the interests of counsellees be protected, then how can the counsellor satisfy simultaneously his professional codes, society's codes, and his own codes? For example, *APGA Ethical Standards* is only a set of guidelines and as such is not intended to provide legal direction. This can only come from the courts or the legislative assemblies as a result of pressure from counselling associations.

A paradigm example of the conflict between professional responsibility and legal liability is that of the *Tarasoff* (1976) decision (see Footnote 4).

4. *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 131 Cal. Reptr. 14 (1976).

5. *Haines v. Bellissimo et al.* 18 Ontario Reports (2d), 4, (1977).

Facts

On August 20, 1969, Prosenjit Poddar, a 26 year old graduate student at the University of California at Berkeley, confided his intention to kill Tatiana Tarasoff to his therapist, Dr. L. Moore, a psychotherapist employed by the university. Dr. Moore reported this to the campus police orally then sent a letter to the campus police chief requesting assistance of the police in detaining Poddar. The police took Poddar into custody but soon released him after he promised to stay away from his intended victim. Dr. Moore's superior at the university hospital then asked the police to return Moore's letter, demanded that all records of Poddar's therapy be destroyed, and ordered that no action be taken against Poddar to place him in emergency 72-hour commitment. At no time was Tatiana Tarasoff, or her parents, warned of the threat against her life. The patient then discontinued therapy. On October 27, 1969, Poddar stabbed Tatiana Tarasoff to death on her family's front porch.

Legal Action

Mr. and Mrs. Tarasoff brought suit against the state of California for Dr. Moore's, the policemen's, and the University of California's alleged negligence in releasing Poddar and for the therapists' alleged negligence in failing to warn Tarasoff of Poddar's threat. The California Supreme Court rejected the claims grounded on negligent release because of protection under California statutes, but upheld the cause of action based on the therapists' negligent failure to warn. The court noted that the therapist stood in a special relationship with Poddar which means a special duty to take care, in this instance, to warn the potential victim.

Duty as a Counsellor

The court admitted that:

> Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) and under similar circumstances. (Olsen, 1977, p. 284)[6]

Judgement

The former law regarding duty of care was that an individual was under no obligation to come to the aid of another in danger. That law has been altered to represent the Biblical "Good Samaritan" rule. The *Tarasoff* court established:

> a duty for the psychotherapist to use reasonable care to protect another if he determines, or pursuant to the standards of his profession should determine, that his patient presents serious danger of violence to another. (Seligman, 1977, p. 205).[7]

Or as Fleming and Maximov (1974) conclude:

> There seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third party whom the doctor knows to be threatened by the patient. (pp. 1030-1031)

From the aforementioned precedent it is clear that Dr. Moore should have warned Tatiana Tarasoff, and/or her parents. Dr. Moore, et al. were liable for the death of Tatiana Tarasoff measured by the loss of her, as a member of the family, to her parents.

Problems

Encumbent with the *Tarasoff* duty to warn are many practical problems associated in the working out of the new responsibility: (a) Should psychologists be asked to face this dilemma at all, that is, claim privilege or warn the public? (b) Will this restrain or restrict full disclosure by the client? (c) Will the psychologists commit clients more readily than before in order to avoid legal liability? that is, committing the questionably sane and the proven non-dangerous? (d) Can a psychologist really foresee or predict a patient's future behaviour? that is, must the patient be proven dangerous before there is a duty on the psychologist? (e) What of group therapy sessions? To whom does the duty to warn belong? The article by Fleming and Maximov (1974) attempts to clarify these questions.

Olsen (1977) lists other problems: (a) How should the therapist give warning and to whom should he give it? (b) Is the therapist required to use reasonable care to prevent retaliation by the victim and his family against the patient? (c) Should the therapist report these events to the police? (d) Is the therapist allowed or compelled to admit to the patient the nature of his public disclosure? (e) Will the therapist be liable if he ignores the threats of the patient and that crime (or another) is committed some time later? (f) California statutes impose a duty not to disclose on psychologists. There is no such duty in Canada.

In addition, California psychiatrists face a disturbing problem from the victim who receives a warning of danger. If the warning proves a false alarm, an action can be brought against the therapist for emotional distress suffered by the person advised.

Two other problems arise in California with respect to *Tarasoff*: Firstly, there is legislation

6. 551 P.2d at 345, 131 Cal. Reptr. at 25.

7. Tarasoff v. Regents of the University of California, 17 Cal. 3d P.2d at 340, 131 Cal Reptr. at 20.

which recognizes the privilege between psychologist and patient; and secondly, the codes of professional ethics of the APA and the APGA discourage disclosure of information. The response to these two problems lies in a balance between the competing interests encompassed in the ideas of protective privilege and public peril.

The APGA *Ethical Standards* touch on several issues that are of importance in the *Tarasoff* case, particularly Section A clause 2 and Section B clauses 2, 4, and 11:

Section A

Clause 2:

> The member has a responsibility both to the individual who is served and the institution within which the service is performed.

Section B

Clause 2:

> The counseling relationship and information resulting therefrom must be kept confidential, consistent with the obligations of the member as a professional person.

Clause 4:

> When the counselee's condition indicates that there is clear and imminent danger to the counselee or others, the member is expected to take direct personal action or to inform responsible authorities.

Clause 11:

> When the member learns from counseling relationships of conditions that are likely to harm others, the member should report *the condition* to the responsible authority. This should be done in such a manner as to conceal the identity of the counselee. (1976, p. 8)

Yet, to whom do counsellors owe professional responsibility? Based on *Tarasoff,* their duty is to warn the intended victim(s) of a potential danger, but at the same time to attempt to provide for the best interests of the client. Therefore, in the absence of any extrinsic circumstances such as a threat to the client or to third parties, the duty is to the client.

Legal Liability

Legal liability means that a person can be sued for doing wrong to another. A significant recent case concerning counsellor liability in Canada, one in which a counsellor has been sued, is that of *Haines v. Bellissimo et al.* (see Footnote 5). This case might have helped to resolve the conflict between professional responsibility and legal liability, however, the trial judge did not take that opportunity to discuss the competing policies implicit in the facts of this case. Nevertheless, the case is important in that the decision not to impose liability suggests a willingness to permit counsellors to "test a theory" in the best interests of the client even where injury to the client's family may have occurred.

Facts

Robert Haines was diagnosed as schizophrenic in 1954, during his last year at university. Immediately prior to his graduation he was admitted to the London Psychiatric Hospital with a diagnosis of catatonic schizophrenia, and was later transferred to Homewood Sanitarium where he remained a patient until May, 1955. After his discharge, he obtained a high school teaching certificate. In 1958 he met and married the plaintiff. Mr. Haines worked as a high school teacher for several years until the late 1960's, when symptoms of his earlier illness re-emerged.

From November 1971-1974 Haines was under the care of Dr. John M. Cleghorn, psychiatrist and head of the Department of Psychiatry at McMaster University Medical Hospital, and Dr. Anthony Bellissimo, a psychologist at the same medical facility. Dr. Cleghorn delegated the responsibility of diagnosing and treating Mr. Haines to Dr. Bellissimo. The beginning of 1974 evidenced dramatic deterioration of Mr. Haines' mental state, but Dr. Bellissimo felt that to confine him to an institution would be more detrimental than not. Therefore, Haines was treated on an outpatient basis.

In June 1974, Haines purchased a shotgun and killed himself.

Legal Action

Mrs. Haines brought an action on behalf of herself and her three children against Drs. Cleghorn and Bellissimo for wrongful death of her husband brought about through the negligence of Dr. Cleghorn in delegating the responsibility of assessing and treating of Haines to Dr. Bellissimo, as well as the negligence of Dr. Bellissimo in deciding not to hospitalize Haines in order to protect him from himself.

Duty as a Psychologist/Counsellor

If the mental condition and actions of the patient obviously pointed toward attempted suicide, the perceptive psychiatrist or psychologist would take "reasonable care" in his treatment including hospitilization, if necessary, for the safety of the patient against himself.

Judgement

It became evident in the court that Drs. Cleghorn and Bellissimo did possess the skills and experience to diagnose suicidal tendencies, and Dr. Bellissimo did take reasonable care when deciding not to have Haines hospitalized, but rather treated as an outpatient.

The action was dismissed. The court found no negligence on the part of Dr. Cleghorn or Dr. Bellissimo. The *Haines* court concluded as did the *Tarasoff* court.

One might extrapolate from reading the *Haines* case that if the patient had injured persons other than himself, then the psychologist might have been found to be liable. This is so because the establishing of standards of care is achieved with the benefit of hindsight (i.e., what the therapist should have foreseen would happen if he did not hospitalize the patient determines his responsibility) (Kretzmer, 1973). This concept of foreseeability is often a "legal fiction" to achieve the goal of compensating persons, such as dependents, who have suffered from the professional's "legal negligence."

The courts have attempted to arrive at a balance between encouraging the well-being of the client and protecting the counsellor from unreasonable restrictions in completing his duties. A review of the American cases reveals that if a counsellor is to be held liable for negligence, three additional legal conditions must be met: A duty must be owed the plaintiff by the defendant; the duty must be breached; and there must be a causal link between the breach of the duty and the plaintiff's injury. There is a fourth condition, which can be assumed in most cases, that some kind of harm must have occurred to the plaintiff before the injury will be compensated (Note 1).

Both of the cases discussed underline the first condition, but only *Tarasoff* satisfies the remaining conditions for imposing liability.

One further question must be asked: If a counsellor is found guilty of negligence, what damages could he be expected to pay? Although the *Haines* court found for the defendant, the trial judge, by Ontario practice, assessed the value of the loss of the husband to the wife and children at $100,000. However, because of Haines' chronic illness which affected his employment, and the risk of suicide, the judge would have assessed general damages to the plaintiff at $50,000.

The negligent act of a counsellor which results in loss of life can, in Ontario, result in damages of from $40,000 for a laborer or housewife, to $100,000 for a middle class worker or housewife, to a maximum of $500,000 for the loss of life of a professional (doctor, lawyer) man or woman. These figures are based on actual cases. For serious personal injury to an individual resulting in quadraplegia, the award can be as high as $900,000.

For counsellors employed in an agency, the employer should have malpractice insurance. However, a counsellor in private practice would have to carry personal insurance against such suits which, as seen by Ontarion experience, can be heavy.

Several major issues regarding legal problems presented to guidance/counselling and other closely allied occupations were observed by Shevlin (1967) but these must be updated in light of recent judicial decisions and include:

1. Liabilities to third parties as a result of things learned in counselling sessions.

2. If the counsellor warns third parties, must he warn the patient of potential retaliation by them? *(Tarasoff)*

3. Should the counsellor warn the patient that he cannot keep complete confidentiality? (*Tarasoff;* APA rev. Ethics Code)

4. How serious must the patients' threat be before he tells the police or the potential victim? *(Tarasoff)*

5. Can a counsellor inform an M.D. of the patients' condition without falling foul of the law of libel?

6. Can a counsellor inform a spouse of the others' condition or desires? *(Haines)*

7. Should the counsellor warn his aids of a particularly dangerous patient? *(Tarasoff)*

8. Is a counsellor liable for failing to diagnose a potential suicide? *(Haines)*

Conclusion

Ethical standards are, at most, broad guidelines which are open to individual interpretation by each counsellor. Strict adherence to the guidelines as published could result in impersonal and often times uncaring decisions. It is the responsibility of the profession to provide guidelines that are clearly written as to legality but which offer room for varied interpretation within their boundaries. However, the ability of the professional to make a just and uncompromising decision may be wanting. The ethics of the professional counsellor (or other helping professional) could possibly be recognized as adequate by requiring examinations and references before being accepted into the professional organization. This would aid the legislators in determining the level of academic training of the organization as a whole, as well as the character of its members. With this information at hand, recognition and judicial protection should not be far off.

Confidentiality is essential in maintaining any counsellor/counsellee relationship. The question lies not only in when and to whom the counsellor can divulge confidences, but also should the counsellee be informed prior to the initiation of the relationship that the confidentiality may possibly not be maintained (See Principle 5, APA *Ethics Code*). According to the guidelines of the APA, APGA and CGCA, the duty of the counsellor—first and foremost—is to the client, to do whatever best serves the interest of the client.

Seligman (1977) suggests that legal liability need not put an insuperable burden on the counsellor. The responsibility is a recognition of an ethical duty and a social necessity. The competent counsellor need not make any significant changes in his methods. The *Tarasoff* case is important in that it set precedent in the area of legal duties for professionals as well as re-emphasizing that power has its responsibilities (p. 210). By way of comparison, the *Haines* decision makes it clear that we in Canada will soon have to decide these very same issues for ourselves. Counsellors may now be called upon to meet the public responsibilities they have fostered. Ultimately, responsibility may hasten the maturity of the profession in Canada.

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