

THE LAW AND THE COUNSELOR

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A recent conference* in Vancouver has triggered off serious speculation about the counselor's position with respect to the laws in British Columbia, a concern that might well be a major point for consideration by members of the Canadian Guidance and Counseling Association. It may be that we have been negligent in our efforts to define our position and have tended to drift on unwarranted assumptions based on the American situation.

As Counseling has developed in Canada there has been heavy reliance on training programs in American universities, on American textbooks, and on American professional associations. Ethical codes of the American Psychological Association and the American Personnel and Guidance Association have been accepted as reasonable and duly considered portable commodities for use in Canada.

We may indeed share moral codes with our American friends and thus find their ethical principles applicable but we have then tended to accept as fact relevant in our country the legal practices used to illustrate their cases of ethical situations - laws that are neither portable nor directly applicable to the Canadian scene. We must carefully consider our legal position in terms of the diversity of Canadian laws varying from province to province and based on civil law from two major cultures.

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In our preoccupation with self examination in our centennial year, it might be important to consider the questions of ethics and law and to define more thoroughly such vital aspects of a growing profession. We found the following questions relevant.

1. Can a counselor promise a client that information given in confidence will be kept confidential?

Ethical codes immediately place limitations on confidentiality in terms of the ultimate good for society - terms inferring that we take the necessary action to prevent serious harm to either the client or to others. The important question then to pursue is whether or not we can keep a confidence when harm is not implied but when the counselor is asked to testify in court.

Generally the American laws give privileged communication to physician and patient, priest and penitent, and to journalists, accountants and psychologists as well as to the traditionally accepted lawyer-client relationship, but some states have accepted the counselor as a professional whose effectiveness depends on a base of confidentiality with the client and thus grant him privileged communication. Canadian laws give such privileged communication only to lawyers. Courts may be hesitant to jail a priest for contempt of court if he refuses to divulge information but he is not legally protected. As far as we have discovered, no court in Canada allows a counselor to maintain confidentiality if court action is taken.

In British Columbia we have recently added a new dimension to this problem of confidential relationships by newly enacted legislation concerning the protection of children and the use of psychedelic drugs. Anyone who knows of a child being seriously mistreated or harmed (the beaten child syndrome) or anyone who knows of anyone taking LSD must report it to an appropriate official. In neither case would he be preferring charges, but his evidence could be used.

What does this do to the establishing of a relationship where a young person may discuss his problem and what he might do? Would it be safe for a child to say his parents beat him if he does not want to prefer charges? If the counselor reported, would he then possibly find himself in even a more difficult situation at home? Does a person

who worries about taking an LSD trip and who wishes to talk through his interpersonal relationships have the right to expect a confidential relationship? What degree of knowledge permits judgment on hearsay evidence? What big brother relationships are implied?

2. Can a counselor expect his written reports to be confidential?

It appears that both in Canada and in the United States all school records are available in court action. Counselors have tended to think that if they keep certain notes in portable form, they may readily carry them out of the school building as personal property and, therefore, they would not be available. May they do so? American courts are starting to maintain that all public institutions must keep records relevant to their work and that such records must be released to qualified and appropriately interested persons, especially parents. If a school counselor keeps records that he considers necessary to his effectiveness, are these not then part of the official school records?

3. Can a counselor's written reports be used as a basis for a libel suit?

If a counselor in good faith in filling out cumulative records, probation reports or employment references, makes personal judgments on character that later cannot be supported, could he be sued for libel? If these records cannot be kept confidential, what is seen as a legitimate function of the counselor, what acceptable bases for judgment - aside from all the implications involving the debatable question of counselors' functioning in administrative capacities?

American practices imply that the counselor has some degree of qualified privilege if the statements are directly relevant to the educational process and are true—but that statements especially detrimental to the client can be the basis for libel suits even if true, if not written for justifiable ends. Could a counselor include something in his cumulative records that might cause a teacher reading it to be influenced negatively? Could poor attendance be taken by the counselor to indicate irresponsibility, and the student's subsequent rating for dependability cause him not to obtain a job he wishes?

Could parents sue on the basis of unsupported statements about home conditions - when they obtain the right to inspect school records on their child? Are we operating on the assumption that good faith is sufficient?

4. As children turn to counselors for assistance on home problems, could the counselor be granted rights "in loco parentis"?

Courts in Canada have granted school officials the right to act as kind and judicious parents in administering punishment and appear to expect them to act to protect the child when in the school, but would courts grant the right to act to help a child against a parent's wish? Could an irate parent sue a counselor for arranging for a daughter to see a doctor to check on a possible pregnancy - especially if such action led to an illegal abortion? Would a parent resent a psychiatric session held in a school when a recommendation for psychiatric referral was ignored? Would a parent sue a counselor for wilfully withholding vital information if he knew where a missing son might be - even if the son is eighteen years old and staying in a suitable home?

5. What is the counselor's position when police ask to question a student?

Many school systems allow the police to talk to students if the principal or his representative (often the counselor) is present - and in Canadian law they might be charged with obstructing if they did not do so. However, does this action imply that students are being questioned by the police without really being given the right to have legal counsel? We may find ourselves acquiescing to an action that deprives an individual of basic right, for it is certainly debatable whether school officials are seen by the student to represent the protective action of his parents. To a student even the counselor might be seen as another authority figure to support the police. Would it be more ethical to make provision for a parent to be present when his child is being questioned - or at least give permission for the action? Is the counselor really the advocate of the young person?

6. What is the counselor legally qualified to do?

As problems of delinquency and emotional instability become more pressing, schools are being asked to assume more responsibility in areas that might be called therapeutic. Counselors have drifted from problems emphasizing educational - vocational planning to more personal problems to situations involving at least supportive therapy to troubled individuals. Is the counselor granted the legal right to function in so-called therapy areas as a responsible professional and not in consultation with medical practitioners?

Counselors when seen as competent in helping people find themselves working with someone who appears emotionally disturbed but who does not wish to seek psychiatric help. What is the borderline which defines the areas where the counselor's training permits him to function and the areas of mental illness? Is the counselor justified in continuing to see a person who has refused a referral and whose parents have agreed to the relationship or is the counselor seen as the only one in this case who can make the needed professional judgment? What might be the counselor's legal position if he sees an adolescent every week for almost a year without consultation with a medical doctor and the student then commits suicide? Could the counselor be charged with unlawfully engaging in the practice of medicine?

Even in less dramatic situations as in vocational counseling, may the counselor be charged for negligence? If a counselor places a student in a non-academic program because he is doing poorly in the university preparatory courses but does not clearly explain to the parents the full implications of this step in terms of future educational and vocational decisions, and if the student later shows academic promise and wishes to go into higher education, could the counselor be sued for making a serious error? Could a counselor be sued if he gives incorrect information about educational and vocational qualifications that later become important?

Defining our areas of competence and producing appropriate training programs are difficult for a developing profession - and especially so when the ground rules and the relevant knowledge keep changing. Delineating our legal status based on viable ethical concepts appears even more challenging for it involves either test court cases or legislation. Are these challenges we, both as individuals and as an association, are prepared to accept - or do we muddy the waters by loudly proclaiming our good intentions?

REFERENCE

Ware, Martha L. (Ed). Law of Guidance and Counseling, Cincinnati:
The W.H. Anderson Company, 1964.

Pour préciser notre statut légal en ce qui concerne nos pratiques professionnelles, il faut trouver des réponses aux questions suivantes:

1. Le conseiller, peut-il promettre à un client que les renseignements donnés à titre essentiellement confidentiel seront toujours gardés?
2. Est-ce que les rapports écrits sont confidentiels?
3. Peut-on se servir des rapports écrits du conseiller pendant un procès en diffamation?
4. Quand un enfant demande au conseiller de l'aide pour des problèmes de famille, est-ce que le conseiller peut agir "in loco parentis"?
5. Quelle est la position du conseiller quand la police veut questionner un élève?
6. Quelles sont les capacités du conseiller?