

THE COUNSELOR, PRIVILEGED COMMUNICATION, AND THE LAW

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Can the school counselor refuse to give confidential information when asked to do so by school authorities or when testifying in court? What are the legal rights of the school counselor in privileged communication?

THE word "confide" is usually defined as "trust by imparting secrets; to tell in the assurance of secrecy." It comes from the Latin *confidere* which means to trust absolutely. When given a secret by somebody else we have to fight a natural urge to share it with a third person. McNelis (6), suggests that keeping a secret requires a maturing of the ego, and inability to do so indicates a weakness of the ego boundary. He also stresses the sacredness of information divulged by counselees in the counseling situation:

It is well to remember that anyone sufficiently troubled to seek professional counseling already feels sensitive, vulnerable, and less than complete. It is not sufficient to do unto others as you would have them do unto you. A piece of information that at first seems perfectly neutral and innocuous, may in fact be of exquisitely painful importance to the client (p. 353).

The purpose here is to discuss the right of school counselors to refuse to relate confidential information when asked to do so by school authorities or when testifying in court and, more specifically, to deal with the legal

rights of the school counselor in the realm of privileged communication.

Confidentiality in Counseling

It is far better not to give a blanket promise of confidentiality to the counselee if the counselor feels that for some reason, depending on the nature of what the counselee tells him or her, there might be the need to communicate to others (3). Any conditions for confidence should be expressed in advance. Benjamin (1) points out that we should not promise confidentiality if we are not certain that we can provide it. The question, "If I tell you what happened, do you promise not to tell my teacher?" should not be answered positively unless the counselor intends to keep the promise. It need not be answered positively, however, for the interviewer may not be prepared to promise something about which he or she knows nothing. The counselor can reply, "I can't promise without knowing, but I do promise that if you tell me about it, I won't do anything without first letting you know what it is and discussing it with you."

Nebo (7) adds to this by stating:

Some workers find themselves boxed in with an over-confidential relationship. The child must know and accept the fact that certain

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kinds of information must be shared with parents, teachers, and other school personnel. Usually, children will accept the worker's assurance that only information which will help him will be shared, and that this will be done only with his full knowledge. Some interpretation of the worker's contacts with parents and teachers on a continuing basis must be made to the child (pp. 391-92).

Huckins (2) describes how the right of privacy of the counselee or client may be disregarded or impinged upon, as far as school counselors and guidance workers are concerned, in two different ways. First, they may be guilty of relating confidences from counseling relationships in an indiscriminate manner or they may be forced to testify to confidential disclosures when, and if, their knowledge of a counselee could be assumed to have some bearing on a court decision. Second, the implication of confidence may be nullified through the failure to properly safeguard student-personnel records. The effectiveness of counseling and guidance not only depends upon safeguarding privacy and maintaining confidentiality; it also depends upon the recording and using of information pertinent to counselees and students.

The concept of cumulative records presents an obvious dilemma. As Huckins notes,

While they (counselors) cannot counsel effectively without such records, neither can they do so when they cannot assure their counsees that the private and personal nature of the information included is respected as meriting protection. . . . Can counselors, working as a part of an educational team, limit direct access to student cumulative records to themselves or to the counseling and guidance staff without an unfavorable effect upon relationships with other school personnel? Second, can the examination of these records be denied to those outside the school, such as law enforcement officers, parents, and other interested citizens (p. 26)?

Without the assurance of confidentiality, students cannot be expected to confide in counselors, nor can counselors be expected to amass confidential and personal information about counselees and be forced to accept the responsibility for its unqualified interpretation by lay citizens.

Privileged Communication in Counseling

Despite methods used to safeguard records or efforts to maintain confidentiality, counselors still can be called as witnesses, put under oath, and forced to testify to personal and confidential information under threat of being cited for contempt of court if they refuse.

Oelrich (8) speaks to this dilemma:

School counselors are not included under the mantle of privileged communication and are therefore subject to litigation under the laws of libel and slander when they make information of a defamatory nature available. Some states have adopted laws extending the testimonial privilege to confidences entrusted in professional consultations with psychologists. The requirements are such that most counselors are eligible for certification as "psychologists," but whether or not a school counselor will fall under the protection of psychologists' privileges has not been tested (p. 25).

This is in contrast to doctors, lawyers, and ministers who generally are protected by law and thus are not required, or even allowed to abrogate the confidences of those who seek their assistance. This is "privileged communication" in that it refers to the right of clients to prevent professional persons from revealing in legal proceedings any information given in confidence as a result of the professional relationship. Three conditions must be fulfilled before the professional relationship arises: (a) there must be one who is legally a lawyer, doctor, or minister; (b) at the time the communication in question was made, the lawyer, doctor, or minister must have been acting in a professional capacity; (c) the person making the communication, if in possession of his or her faculties, must have regarded the professional person as *his or her* doctor, lawyer, or minister.

Two different alternatives are left to school counselors for securing the privilege of confidentiality for their counsees. First, they may test the attitude of the courts by claiming privileged communication status and refusing to testify to the personal, confidential information given them by coun-

sees if subpoenaed as witnesses. Second, they may press for legislation in their states to recognize the confidential nature of their work. This is already beginning to happen. Another possible route is via the registered psychologist title. However, most school counselors do not have a comparable amount of education.

Oelrich (8) seems to correctly summarize the current "state of the union" with respect to counselor confidentiality and privileged communication:

School administrators and counselors, in most states, are in a three-way dilemma with serious privileged information. They should reveal the information to protect themselves, they should remain silent to assist the student, and if they do reveal confidential information and it causes the student possible damage, they may be subject to damage litigation.

Generally, the courts have refrained from becoming involved in school business. Public sentiment would surely not favor the district attorney who prosecuted a school administrator or counselor for withholding information in a sincere attempt to help a student.

However, the law in most states does not protect the school administrator or counselor from being prosecuted for withholding information (p. 25).

Litwack (5) analyzes and describes the problem of testimonial privileged communication and school counselors. He concludes the following:

1. Eighteen of 47 reporting states studied (38%) currently provide full or partial coverage in the area of testimonial privileged communication.

2. Fourteen of 47 reporting states studied (30%) have attempted to pass legislation pro-

viding the principle of testimonial privileged communication to school counselors but have failed due to: (a) inability to gain committee approval (4 states); (b) approval in committee but failure to gain approval by state legislature (9 states); or (c) approval by state legislature but subsequent veto by the governor (1 state).

3. Fifteen of 47 reporting states (32%) do not have a privileged communication statute and have not initiated one to date.

Implications for Counselors

The facts as indicated here seem quite clear. Counselors in almost two-thirds of the reporting states do not legally enjoy the crucial elements of confidentiality and testimonial privileged communication which are so crucial to establishing and maintaining effective counseling relationships. Counselors should continue efforts, in liaison with other professional groups, toward the adoption of a nationally uniform standard statute which can be submitted in all states (5). Additionally, counselors should remember that judges and even some lawyers are reasonable individuals. If the counselor is in doubt over what to release in a judicial proceeding, he or she should not hesitate to arrange a conference with the judge (or the attorneys, if appropriate) to explain this dilemma and get advice on how to proceed (4).

The counselor should not give the counsellee a blanket promise of confidentiality, but should determine the current legal status of maintaining confidentiality and enjoying privileged communication in his or her state and act accordingly in the counseling endeavor.

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