



LEGAL AND ETHICAL ISSUES
IN CONSULTATION

Confidentiality: Competing Principles, Inevitable Dilemmas

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Matt told me in confidence that he is planning a wild weekend with his friends. Given his history of substance abuse and what I know about the friends he mentioned, I'm worried that things will get out of control. Should I warn his parents?

She thinks she's got AIDS, but she doesn't want anyone to know. She also asked about a pregnancy test. She seems so overwhelmed and so alone.

It is clear that an intervener must avoid undermining the right to privacy and the benefits to the intervention process of ensuring confidentiality and

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privileged communication. On the other hand, an intervener must give appropriate information to others who share concern and responsibility for a minor's welfare. This is a fundamental dilemma experienced every day by those who try to help youngsters. It is tempting to resolve the dilemma by reasserting that all counseling information must be confidential in order to protect the counseling alliance. Such a position, however, ignores the fact that failure to share germane information can seriously and unethically hamper efforts to help.¹

As ethical practitioners, we all value confidentiality. At the same time, we are aware that we have legal responsibilities to report endangering acts. Such reporting requirements naturally raise concerns about the negative impact on helping relationships. In reaction to what they see as an erosion of confidentiality, some interveners communicate only what the law demands. Others appear so overwhelmed by legal reporting requirements that they virtually give up on the concept of confidentiality. Take, for example, the following comment of a drug counselor:

I explained that, if he told me anything about the possibility of hurting himself or anyone else or about taking an illegal substance, I would have to tell others including his parents and the authorities.

Concern about reporting so dominated him that issues about protecting privacy and establishing trust were not addressed. The unspoken message was, "Don't tell me."

RIGHT TO PRIVACY

As Soler and Peters (1993) stressed, "The fundamental right 'to be let alone' is at the root of confidentiality protections. ... Confidentiality restrictions protect the privacy of individuals and insure that personal information is disclosed only when necessary" (p. 6). The intent is to protect a student's or family's right to privacy by ensuring that matters disclosed are relayed to others only with informed consent. By ensuring confidentiality, profes-

¹For more on this topic, you may want to request the introductory packet "Confidentiality and Informed Consent" from our Center for Mental Health in the Schools (funded in part by the U.S. Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Maternal and Child Health Bureau, Office of Adolescent Health). And, of course, all associations that represent professionals who work in schools have relevant information on these matters.

sionals hope to encourage open communication. Other positives that can accrue are

- Preventing improper dissemination of information about children and families that might increase the likelihood of prejudice, differential treatment, discrimination, or harm, as well as keeping embarrassing personal information from disclosure (e.g., histories of emotional instability, medical problems, physical or sexual abuse, drug use).
- Encouraging individuals to make use of services designed to help them (Soler & Peters, 1993, p. 6).

Neither privacy nor confidentiality, however, is an absolute right, especially in the case of minors. There are fundamental exceptions, some involving ethical considerations and some involving legalities. As English (1995) stressed, "Confidentiality protections are rarely, if ever, absolute, so it is important for practitioners to understand what *may* be disclosed (based on their discretion and professional judgement), what *must* be disclosed, and what *may not* be disclosed" (p. 5). States vary in the degree to which their laws specify limitations on privileged communication between counseling professionals and minor clients. Some protect only disclosures about problems related to alcohol and other drugs. Others give broad protection, specifying a few exceptions such as reporting child abuse and crime or potential criminal activity.

There are times when professionals would prefer to maintain confidences but cannot do so legally or ethically. Examples include instances when individuals being seen indicate an intention to harm themselves or someone else and when they have been abused. As a result of legislation, litigation, and ethical deliberations, professional guidelines call on interveners to breach the confidence and tell appropriate public authorities when there is a clear danger to the person or to others. Unfortunately, breaking confidentiality can interfere with the trust between intervener and youngster and make it difficult to help. Prevailing standards stress that this concern is outweighed by the responsibility to prevent dangerous physical harm.

In this vein, but perhaps going a step further, the ethical guidelines for counseling in schools call for reporting instances when the information conveyed by a youngster indicates circumstances likely to have a negative effect on others (Huey & Remley, 1989). That is, without revealing the identity of the client, the counselor is expected to report such circumstances to the appropriate responsible authority. However, it is left to individual counselors to decide which circumstances are likely and what constitutes a

negative effect that is serious enough to require reporting. For example, if a youngster indicates he or she is selling marijuana on campus, should authorities be alerted? If so, what should they be told? One result of all this is to make the processes of ensuring privacy and building trust almost paradoxical.

INFORMING MINORS ABOUT CONFIDENTIALITY

Informing youngsters about their right to privacy and the limitations related to this right are part of the process of informed consent (including the minor's assent). Young people's involvement in decision making is only beginning to be discussed seriously. For example, there is increasing discussion of the need to obtain the minor's assent in addition to parental consent. Interest in civil rights in the late 1960s, and related advocacy of minors' rights in education and mental health, has led to greater consideration of the rights of children and adolescents to be involved in making decisions that affect them (e.g., regarding psychological testing and treatment). Boards reviewing the research of various institutions insist on an assent procedure for all youngsters over 8 years of age. Concomitantly, long-standing controversies have reemerged about the risks and benefits of young people's involvement in decision making and their competence to make appropriate decisions.

In a society that values fairness, personal liberty, and autonomy, consent is a cornerstone concept. Children and individuals with problems often are treated in ways that diminish their autonomy. This occurs because of assumptions about their relative lack of competence and wisdom. Even when they are treated autonomously, their decisions may not be respected. The idea that autonomy should be respected has made consent not only a legal but also a major moral concern. The legal and moral mechanism for maintaining autonomy usually is designated informed consent. Six major functions served by the consent mechanism are the promotion of individual autonomy, the protection of clients, the avoidance of fraud and duress, the promotion of rational decisions, the encouragement of self-scrutiny by professionals, and the involvement of the public in promoting autonomy as a general social value and in controlling professional practices and research.

The problems and issues involved in appropriately eliciting consent have to do with matters such as, When is consent needed? When is it justified for one person to offer consent for another? Who decides when consent is needed and when one person can represent another? What information must be given in eliciting consent? How can anyone be certain

that consent has been voluntarily given? Each of these questions raises significant dilemmas for professionals.

Levine (1975) enumerated the basic information that should be communicated and understood when trying to obtain informed consent. These items include clarifying the purpose of the procedures (why the person is there; what the person will be doing), describing risks and benefits, spelling out alternative courses of action for achieving desired results, assuring the individual that participation is not required, and eliciting and answering all questions.

To make sure such information is understood, it may need to be presented in a variety of ways. Repeated verbal or written communications, translations, media presentations, question-and-answer follow-ups to evaluate whether information is understood, and feedback from other consumers all may be relevant at various times.

The emphasis on information, and the very term *informed consent*, may sometimes lead to greater emphasis on giving information than on ensuring true consent. As Biklen (1978) wrote:

Consent is a legal concept that has been referred to and implicitly defined in court cases and in legislation. It has three major aspects: capacity, information, and voluntariness. All three elements are equally relevant to any consent procedure or decision. Simply stated, one must have the ability to give consent in order to do so; one must have adequate information to do so in a knowledgeable way; and one must be free from coercion or any other threat to one's voluntariness. (p. 99)

TOWARD SOLVING THE DILEMMA

There are times when it is in the best interest of a student for others to know something that he or she has disclosed. Most ethical guidelines on confidentiality recognize this. In doing so, guidelines stress that such sharing should occur only with persons clearly concerned with the case. Given that teachers and parents are clearly connected and see themselves as also working in a student's best interests, some interveners feel it appropriate—even essential—to share information that is crucial for such individuals to become effective partners in problem solving. In other words, there are times when keeping a specific confidence shared by a student works against the youngster's best interests. At such times, an intervener may decide that the costs of not communicating the information to others outweigh the potential benefits of maintaining privacy. Obviously, the first step in such situations is to talk with the student and try to elicit consent

for sharing. When interveners decide they must proceed without consent, two difficult needs arise: the need to inform the student of why confidentiality will not be maintained and the need to work to repair any damage to the helping relationship.

In working with minors, concerns about the limits on confidentiality may be best approached by reframing the problem and focusing on how to facilitate appropriate sharing of information. From this perspective, we focus less on how to avoid breaching confidences and more on how to establish the type of working relationship in which youngsters take the lead in sharing information when appropriate. To these ends, we emphasize processes to enhance their motivation and empower them to decide when and with whom sharing information may help solve their problems. In addition, steps are taken to minimize the negative consequences of divulging confidences (Taylor & Adelman, 1989).

For example, in informing minors about confidentiality and exceptions to the promise of privacy, we usually stress the following:

Although most of what we talk about is private, there are three kinds of problems you might tell me about that we would have to talk about with other people. If I find out that someone has been seriously hurting or abusing you, I would have to tell the authorities about it. If you tell me you have made a plan to seriously hurt yourself, I would have to let your parents know. If you tell me you have made a plan to seriously hurt someone else, I would have to warn that person. I would not be able to keep these problems just between you and me because the law says I can't. Do you understand that it's okay to talk about everything and there are only three things we must talk about with other people?

Because youngsters may feel a bit overwhelmed about the exceptions to privacy and the serious problems described, they may simply nod their acquiescence or indicate that they are unsure about how to respond. To soften the impact, we add statements such as

Fortunately, most of what we talk over is private. If you want to talk about any of the three problems that must be shared with others, we'll also talk about the best way for us to talk about the problem with others. I want to be sure I'm doing the best I can to help you.

A NOTE ON CONFIDENTIALITY AND INTERAGENCY COLLABORATIONS

The trend toward school–community partnerships and interagency collaboration has resulted in major concerns about sharing confidential information (see Appendix). There are various barriers that arise in this context—some related to turf and some related to legalities. What seems to be emerging is a sense that in most cases it will be in everyone’s best interest if efforts are made to facilitate sharing of appropriate information. To this end, various efforts around the country are generating formats to overcome barriers to the type of within-agency and across-agency sharing that is essential in coordinating services (e.g., formats have been designed to meet the varying demands of federal and state laws and education codes).

CONCLUDING COMMENTS

Responsible practitioners want to avoid both surrendering the confidentiality surrounding helping relationships and overreacting to necessary limitations on confidences. In doing so, it is clear that assurances of confidentiality and legal privilege are meant to protect privacy and help establish an atmosphere of safety and trust. At the same time, it is important to keep in mind that such assurances are not meant to encourage youngsters to avoid sharing important information with significant others. Such sharing often is essential to the youngster’s personal growth. Indeed, it is by learning how to communicate with others about private and personal matters that individuals can increase their sense of competence, personal control, and interpersonal relatedness, as well as their motivation and ability to solve problems.

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APPENDIX

Confidentiality and Informed Consent: Other Selected References

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The Center for Mental Health in Schools at the University of California, Los Angeles, is one of two national centers funded by the U.S. Department of Health and Human Services (Public Health Service, Health Resources and Services Administration, Maternal and Child Health Bureau, Office of Adolescent Health). For an overview of resources available from the center, write in care of the Department of Psychology, University of California, Box 951563, Los Angeles, CA 90095-1563; call (310) 825-3634; or use the Internet to scan the center's website, <http://smhp.psych.ucla.edu>

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