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Privileged Communication and The Counsellor

A serious dilemma faces the professional who is called upon as a witness to make public, in a court of law, facts which have been revealed to him in the strictest confidence. On the one hand lies his duty to give the court all the information at his disposal so that justice can be done; on the other, there is his implied, or even explicit, undertaking to refrain from divulging communications confidentially made for the purpose of obtaining advice or assistance.

In a conflict between the interests of justice and other public or private interests, it is the former which normally carries the day. Any rule which withholds evidence of possible probative value from the courts involves serious drawbacks. Nonetheless, where absolute secrecy appears essential to the proper conduct of certain professional functions of great importance to society, the question arises whether there may not be involved a point of overriding public policy which should prevail over all other considerations. If so, the law itself must give it protection, and it can do so:

(a) by imposing upon members of certain professions a strict duty of secrecy, breach of which may be punishable as a criminal offence, and
(b) by restricting or even prohibiting disclosure of confidential information by the professional even if the information is required by a court of law.

Such immunity is called privileged communication.

The necessity to guard an individual's right to freedom appears to be a concept well entrenched in our recorded history. The Magna Carta, the American Declaration of Inde-

pendence and the Canadian Bill of Rights are only a few examples. At the outset, the concern was to protect man's physical property, but with the advent and growth of the psychological professions, man became more fully aware that mental anguish can be just as restricting.

Confidentiality is both an ethical and a legal issue. Professional ethics obligate the professional person to maintain the client's confidential communications. The legal doctrine of privileged communication is concerned only with guarding the client's confidences in the courtroom in the situation wherein the professional is called to testify. This article is concerned with one special aspect of that confidentiality: the matter of testimonial privileged communication.

Privileged communication is the legal right which exists either by statute or common law* that protects the client from having his confidences revealed publicly from the witness stand during legal proceedings. It means that certain persons cannot be compelled to testify as to the content of their professional relationship with a client. The privilege protects the client, and the right to exercise it belongs to the client, not to the professional. The immunities belong exclusively to the client and extend only to the practitioner he has engaged; the obligation of secrecy is on the professional person.[1] The confidentiality of the professional relationship maintained by clergy, lawyers and doctors generally is protected by law and these persons are not required, nor even permitted, to abrogate the confidence of those who seek their assistance. The privilege thus rests with the client, not with the counsellor. Baudouin stresses this point:

> Une analyse juridique du secret professionnel démontre que le client est véritablement le centre et la raison d'être de toute règle concernant le secret professionnel.[2]

Unless the client, penitent or patient specifically waives this privilege, lawyers, clergy and doctors are not permitted to divulge any information as testimony at the behest of government or legal officials. Questions of the ethics and professional standards involved in the release of information at least are partially resolved and the disparity between the professional

*"Common Law" is understood to mean that body of law and justice theory which derives its authority from long usage and custom, or from court judgments recognizing such customs, and refers in particular to the ancient unwritten law of England.

and ethical convictions of the practitioner and what might be expected by the courts is minimized. In addition of course, and most importantly, it allows the practitioner to assure his clients that their statements to him will be held strictly confidential.

This might suggest that the relationship of the school or university counsellor and his counsellee might be perceived by the courts and by legislatures in the same perspective if the question were raised to them.

professions allowed privileged communication

It is interesting to note the great disparity which exists with regard to the growth of the professional privilege. In California, for example, the clients of many occupational groups have been granted the privilege, whereas in England only the profession of Law has been accorded the privilege. And yet there appear to be some common reasons for the granting of the privilege, the most cogent one being that society itself would want to foster the relationship which might result if the privilege is extended. The birth and rapid growth of many of the helping professions, a fact which was unforeseen in the original granting of the privilege, also demands a re-evaluation of the standards for granting it.

Privileged communication can have two meanings within the law: (1) it may refer to oral or printed utterances which, although defamatory, are not actionable under the law, for example libel and slander; (2) discourse made in a confidential relationship that is recognized by law and not competent to be produced in court during trial.

The purpose of the privilege is to encourage the employment of professional assistance by an individual in need of such services and to promote absolute freedom of consultation by removing all fear on the client's part that his defender may be compelled to disclose in court the communications or the information acquired in the course of their professional relationship. The essential element is that the courts have recognized the needs of the client to have secrecy so that he can best grasp the issues and see his case through court. Further, it seems to suggest a manifestation of society's concurrence about permitting confidential information to remain inviolate.

The foundation for a legal concept of privilege is to be found in the explicitly recognized confidential relationship at com-

mon law between the lawyer and his client, dating to the late sixteenth century. It is from the lawyer's confidential relationship with his client, and the broad protection for privileged communications granted that relationship, that the privilege has been extended to the clients of other professionals. It has only been possible to make this extension, however, through legislation (statutory law), and perhaps jurisprudence (case law). Some of the specific methods by which this extension could be effected would be action by a pressure group, formal declarations at professional conferences, research studies or court decisions. Lawyers remain the only professional group whose clients clearly have the privilege from common law. It should also be noted here that the only other relationship privileged at common law are between jurors and the husband-wife relationship. In Canada, however, this latter right is guaranteed by the Canada Evidence Act:

> No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compelled to disclose any communication made to her by her husband during their marriage.[3]

Many other professional groups have also been accorded the immunity to varying degrees. Included in this group are social workers (for example, a 1958 case in Saskatchewan), dentists, psychologists, accountants, journalists, marriage counsellors and school and university counsellors.

Recently in Canada we are aware of an attempt to protect the individual's right to privacy against governmental invasion, namely the report submitted by Professor Edward Ryan of the University of Western Ontario Law Reform Commission, and it would appear that privileged communication is essential to the protection of an individual's freedom and privacy from infringement in certain professional human relationships.

To endeavour to answer with some degree of certainty whether the privilege should or should not exist, it seems necessary that some external criteria must be employed, for it does not serve a useful purpose to simply state, and support with quotations, that school or university counsellors should have this privilege. In readings and references of selected legal journals, it is apparent that Dean John Henry Wigmore is the "expert" on the subject of the laws of evidence, the general area wherein privileged communication lies. Several

United States courts have acknowledged this expertise in Wigmore, one of the few writers on this topic in the law of evidence.

Each of the fields of Law, Medicine, Religious Ministry and Journalism will be examined on his criteria and comment will be made whether it appears that each field qualifies for the privilege.

Wigmore defended the communication privilege for his own field — law — but generally deplored any extension of such privilege to other professions. At the same time, he established four conditions as essential to the establishment of a privilege. He writes:

> Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts enquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation.
> (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 the 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.
> These four conditions being met, a privilege should be recognized, but not otherwise.[4]

In the profession of law, then, have these four conditions been met? An examination of Wigmore's conditions may provide an answer.

It seems essential for a client, in order to benefit most from the advice and counsel of a lawyer, to know that his lawyer cannot be compelled to divulge the information revealed in their discussions.

In a democratic society like Canada, which maintains that an individual is innocent of any crime until proven guilty, there appears to be no justification for the community to question the obligations of the lawyer to his client when the lawyer is carrying out his professional duties.

There can be little doubt that the injury resulting from a lack of such a privilege would be greater than the present position generally in which a privilege exists. In fact, the presence

of the privilege may encourage anyone who has committed a crime to seek legal advice before it becomes mandatory and in this way the privilege acts as a preventive measure for possible injustice in society.

Baudouin summarizes the situation this way:

> Nous estimons, d'autre part, que le maintien du secret professionel est indispensable à l'exercice de confiance entre l'avocat et le client. La justice elle-même y gagne à y bien penser puisque le client, se sentant protégé des indiscrétions, sera peut-être moins tenté de mentir à son avocat.[5]

A specific example of this coverage can be seen in the provisions of the Province of Quebec. The Code of Civil Procedure on this point reads:

> 307. A witness cannot be compelled to divulge any communication made to him or her by his or her consort during their marriage.
> 308. Similarly the following persons cannot be obliged to divulge what has been revealed to them confidentially by reason of their status or profession:
> (1) Priests or other ministers of religion;
> (2) Advocates, notaries, physicians and dentists, unless in all cases, they are expressly or implicitly authorized by those who confided in them;
> (3) Government officials, provided that the judge is of the opinion, for reasons set out in the affidavit of the minister or deputy-minister to whom the witness is answerable, that the disclosure would be contrary to public order.[6]

There appears to be some question as to whether the medical profession meets the enunciated criteria. It is hard to conceive of a modern day situation in which an individual requiring medical attention would hesitate or fail to consult a physician solely because the background of the illness required confidential treatment. While this may be true in the case of a wanted criminal in need of immediate medical attention, this condition of itself would not appear to justify the establishment of a privilege. In law, the physician is required to reveal such an incident to the appropriate authorities, a fact well known to the public.

Thus despite some evidence suggesting that the medical profession as such does not merit inclusion in privileged communication coverage there have been instances when the psychiatrist-patient relationship was covered. For example, in a 1967 ruling of the Minnesota Supreme Court, the unani-

mous 8 man decision rendered by Justice William P. Murphy stated

> . . . The purpose behind the statute is to inspire confidence in patients to make full disclosure of symptoms and conditions . . . Such confidence is deemed necessary to the efficacity of treatment . . . complete confidence is a sine qua non to the cure.[7]

An earlier example occurred in the state of Illinois which at that time did not recognize the privilege for the medical profession. The trial judge ruled that a psychiatrist was not required to divulge matters revealed to him in confidence, even though there was no statute conferring this privilege. He ruled in part that the relationship ". . . is unique and not at all similar to the relationship between physician and patient".

With reference to the status of privileged communication for the religious ministry, it appears that only two Canadian Provinces (Quebec and Newfoundland) cover this profession.

The field of journalism is sometimes affected by statutory coverage, but the question here it seems is whether this field meets any of the criteria. In fact, it definitely appears to contravene the intent of the privilege in any case, as it is for monetary gain, not the confidence of their informants, that journalists believe they must be granted immunity. Such rationale hardly merits inclusion in the coverage. This particular viewpoint is supported in part by a 1969 decision against John Smith, a researcher and reporter for the C.B.C. television program "The Way It Is". He was found in contempt of court for refusing to testify against an alleged Front de Libération Québécois member, Pierre Catellier.

obtaining privileged communication for counsellors

The difficulty in obtaining the privilege for counsellors may stem in part from the fact that the degree of public recognition of an occupation has significant merit in determining the legal standard of care to which an individual practitioner may be accountable for actions directly or indirectly causing injury to others, the criteria for requiring licenses or permitting certificates of qualifications for the practice of certain occupations, and the degree to which an individual practitioner may be accorded the status of an expert witness and therefore entitled to offer opinion.

The focus, I suggest, should be the community's willing-

ness to recognize and accept the merits of counselling, and the necessary secrecy of the professional-client relationship as essential to the function and of non-disclosure.

Nevertheless two American states have specific provisions covering the counselling relationship in an academic setting.

It is interesting that this statute also covers persons other than those directly engaged in counselling:

> No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution including any clerical worker of such schools and institutions, who maintains record of students' behaviour or who has such records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records or transcript thereof, except that any such testimony may be given, with the consent of the person so confiding or to whom such records relate is 21 years of age or over, or if such person is a minor, with the consent of his or her parent or legal guardian.[8]

This statute thus makes a clear distinction in its coverage between those who are minors and those who have attained the age of majority. It raises the distinction between maintaining confidences for those who are legally still under their parents' or guardians' care, and those who are legally responsible for their own actions.

Another state has a statute covering the counsellor in an academic environment, one which does not make the same differentiation as does the Michigan provision. The Indiana statute stipulates that:

> Any counsellor duly appointed or designated a counsellor for the school system by its proper officers and for the purpose of counselling pupils in such school system, shall be immune from disclosing privileged or confidential communication made to such counsellor as such by any pupil herein referred to. Such matters so communicated shall be privileged and protected against disclosure.[9]

One may nevertheless question the distinction, if any, between counselling and psychotherapy. One authority states that:

> Counselling and psychotherapy are two terms for the same function; there is no essential difference in the nature of the relationship, the process, the methods and techniques, the purposes or goals, or the results.[10]

Additional authors state that these similarities are realistic. The point to be stressed is that if school and university counsellors perform the same kind of function as other mental health specialists, and the evidence suggests this is the case, and if other mental health specialists are granted immunity on the premise that the performance of their function requires it, then surely it can be argued that school and university counsellors merit the same consideration. This viewpoint is supported by Ralph Slovenko, the Senior Assistant District Attorney of New Orleans, Louisiana, in his book (1966).

survey of canadian counsellors' attitudes

To better understand the status of the concept in Canada, a questionnaire was mailed to each of the federal and provincial Attorneys General, as well as the Deans of the Law Faculties of Canadian law degree granting universities.

The results definitely indicated that only the legal profession clearly enjoyed the privilege in each jurisdiction and that the medical, theological and counselling professions were granted varying degrees of coverage; the journalistic profession was not covered in any district. Only one respondent stated that he thought counsellors should be granted privileged communication.

A further self-composed questionnaire was mailed to approximately 700 members of the Canadian Guidance and Counselling Association, soliciting members' views on various aspects of this topic. A 57% response rate was obtained, including those in a follow-up study. Respondents represented many types of employing institutions (formal education, social work, service institutions, vocational centres, penal institutions) as well as varied academic backgrounds.

Essentially, the respondents overwhelmingly (93%) favoured extension of the privilege to the counselling profession. About 90% were aware to some degree of their current legal status, an important factor to realize, for presumably an informed individual is in a more favourable position to comment on a situation in which he is involved.

Further, a majority stated that their clients would make greater use of their services if such privilege were extended. Finally three counsellors in four stated that they personally felt the need for privileged communication in their professional work, a strong basis from which to argue for extension of the privilege.

summary

At the present time, the counselling profession in general does not enjoy professional immunity with regard to information revealed in a client relationship, and information so learned can be subjected to court testimony.

(1) Only in Quebec and Newfoundland is the profession of Religious Ministry covered; in Quebec, Medicine is also protected by statute although the custom is not to call upon the physician as a witness.

(2) The professions of Law in all cases, Medicine and Religious Ministry in most instances, and Journalism in a few jurisdictions have been granted privileged communication in their relationships.

(3) The counsellor-counsellee relationship compares favourably with the therapist-client, priest-penitent and physician-patient relationship and as such merits the protection of privileged communication.

(4) In general, the legal authorities consulted did not favour the granting of the privilege to counselling professionals, whereas Canadian counsellors overwhelmingly desired this privilege. In fact, 93% of the returns from counsellors recorded a desire for the privilege. Of those who opposed the granting of the privilege, most respondents were not counsellors but Guidance Directors or other non-counselling personnel.

(5) The counselling profession qualifies for the privilege, based on the four-point criteria of one legal authority, John Henry Wigmore. The necessity to meet these criteria was reflected by several of the legal respondents.

(6) A vast majority of the counselling respondents (77%), claimed they have personally felt, to some degree, the need for the privilege.

(7) A large number of the counsellors (53%) believed they could be more effective with privileged communication in that students would avail themselves more often of counselling services.

(8) Most of the counsellor respondents (67%) had at least four years experience and thus would be better aware of privilege-demanding situations.

(9) Most of the counsellors (90%) had some degree of awareness of the laws in their province relating to potential litigation, and are therefore in a more knowledgeable position to comment.

(10) The rate of return of completed questionnaires, more than one half from all sources, is a representative national and provincial sample of members of the Canadian Guidance and Counselling Association.

references

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