

*The International Association of Marriage and Family Counselors (IAMFC) Ethics Committee responds to questions regarding real-life situations submitted by marriage and family practitioners, researchers, educators, and students.*

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## Confidentiality and the Duty to Report: A Case Study

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*In the course of counseling, marriage and family counselors may experience the dilemma of deciding between the necessity of keeping confidential what clients have shared versus the counselor's duty to report and protect individuals and society in general. In this article, the author presents a case study followed by discussion addressing the issue of confidentiality and the duty to report.*

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A counselor recently began working with a couple having difficulties in their marriage. The husband is a medical doctor and his wife, a certified public accountant (CPA), runs the business aspects of his practice. During the past 5 years, the couple has lived lavishly and, consequently, developed financial problems. They entered counseling stating that the presenting problem was anger and conflict stemming from their financial difficulties. In a recent session with the couple, the wife shared that about a year ago her husband purposely and terminally overmedicated an elderly patient. The elderly patient was the stepmother of the wife, and because of a recent death, the wife is the lone benefactor of a large insurance policy. The counselor believes the fundamental problem in the couple's relationship is guilt over their conspiracy to terminate the life of the elderly stepmother—especially given the fact that the forthcoming insurance policy payment will cover their debts. However, the counselor is wondering whether she has an ethical or legal responsibility to contact the authorities and report the situation.

This case study addresses the tension between honoring the client's right to confidentiality and the counselor's

obligation to a greater societal concern. The counselor's ethical and legal requirements to protect the confidentiality of clients is stated in the ethical codes of counseling professionals, state laws regarding privilege communication, and the constitutional right to privacy. In each case, the privilege or right to confidentiality and privacy belongs to the client. Confidentiality, however, is not an absolute, and there are both ethically and legally mandated exceptions or limits to confidentiality (Ahia & Martin, 1993; American Association for Marriage and Family Therapy, 1991; American Counseling Association [ACA], 1995; Anderson, 1996; Corey, Corey, & Callanan, 1998; Dickson, 1995; Herlihy & Corey, 1996; International Association of Marriage and Family Counselors [IAMFC], 1993; Swenson, 1997).

According to Section A of the ethical code of the IAMFC (1993, p. 75),

Clients have the right to expect that information shared with the counselor will not be disclosed to others and, in the absence of any law to the contrary, the communications between clients and marriage and family counselors should be viewed as privileged. . . . Information obtained from a client can only be disclosed to a third party under the following conditions.

1. The client consents to disclosure by a signed waiver.
2. The client has placed him- or herself or someone else in clear and imminent danger.
3. The law mandates disclosure.
4. The counselor is a defendant in a civil, criminal, or disciplinary action arising from professional activity.

5. The counselor needs to discuss a case for consultation or education purposes. These discussions should not reveal the identity of the client or any other unnecessary aspects of the case.

These guidelines are in agreement with the ethical codes of both the ACA (1995) and the American Association for Marriage and Family Therapy (1991).

Regarding the case study under review, however, the ethical codes do not specifically address past criminal activity. Thus, unless the counselor explicitly believes that the doctor and/or his wife may do something similar in the future and therefore constitute a danger to society, the ethical code appears to indicate that she should not break confidentiality. However, exception Number 3 in the IAMFC Code of Ethics, addressing legal concerns, may implicitly be salient to the case study.

Several persons with doctorates in both counseling and law were contacted, including Dr. Bob Crawford, Dr. Ted Remley, and Dr. Carl Swanson. Remley was the general editor for the ACA Legal Series, whereas Crawford (1993) authored and Swanson (Arthur & Swanson, 1993) coauthored two separate volumes in that series.

All three—Crawford, Remley, and Swanson—indicated that whereas the case study addresses a crime from the past (not immediate or future), confidentiality appeared to be the primary concern. Duty to report past crime—even murder—is not clearly delineated in most jurisdictions. Anderson (1996), Arthur and Swanson (1993), and Remley (personal communication, August 1998) state that counselors are under no legal obligation *per se* to report a client's past or ongoing criminal activity, and to do so may be both unethical and illegal. However, Arthur and Swanson (1993) affirm that criminal behavior that has harmed or threatens harm to others may constitute an exception to confidentiality. The counselor could choose to report the crime and face the possibility of being sued for breach of confidentiality (Anderson, 1996). Given the gravity of the crime, however, Remley (personal communication, August, 1998) stated that he did not believe that any jury would find against the counselor.

The following question arises: If the counselor does not break confidentiality, might she be considered an accessory after the fact should the crime be discovered by authorities? Crawford (personal communication, August 1998) responded:

To be guilty of this crime, a person must render aid, comfort, and/or shelter to the criminal. A failure to report to the police about the wife's comment here generally is not sufficient to constitute this (or any other) crime. . . . I am not aware of any cases where merely rendering "talk therapy" counseling to a client would constitute comforting the criminal as this term has been defined in previous cases.

Huber (1994) offers a similar conclusion in his discussion of the "accessory after the fact" question.

Duty to report past felony crimes against other persons is a gray area because many jurisdictions do not address the issue with any clarity. However, the fact that the victim in this case study was an elderly woman adds another variable into the discussion. Some states do mandate reporting of current and past incidents of elder abuse (Ahia & Martin, 1993; Anderson, 1996; Arthur & Swanson, 1993; Dickson, 1995; Swenson, 1997).

In recent years, many states have passed laws requiring mental health professionals to report known or suspected incidents of the abuse of aged or disabled adults. In most cases, these statutes are very similar to child abuse reporting statutes. Once again reporting is generally (though not always) mandatory, those who report are immune from liability, the counselor-privilege does not apply, and there are stiff penalties for failure to report. (Ahia & Martin, 1993, pp. 31-32)

Ahia and Martin (1993), Anderson (1996), Dickson (1995), and Swanson (personal communication, August 1998) all note, however, that mandatory duty-to-report laws regarding past incidents of elder abuse vary depending on state law.

In response to this case study, the following recommendations are offered for counselors. First, because not all states have duty-to-report laws regarding past crimes and because such laws may permit but not require disclosure of these crimes by counseling professionals, it is essential that counselors are cognizant of their own state's statutes prior to breaking confidentiality (Ahia & Martin, 1993; Anderson, 1996; Arthur & Swanson, 1993; Dickson, 1995; Swenson, 1997). "It is imperative that counselors determine the extent of the law in the state(s) in which they practice and make a good faith effort to comply with reporting requirements" (Anderson, 1996, p. 28). The IAMFC ethical code (1993, Section A.5) indicates that counselors may discuss a case for consultation purposes but that the identity of the client must not be revealed during the consultation. The ACA ethical code (1995, Section H.2.b) further states that when "uncertain as to whether a particular situation or course of action may be in violation of [the] Code of Ethics, counselors consult with other counselors who are knowledgeable about ethics, with colleagues, or with appropriate authorities" (p. 50). Thus, counselors are well advised to seek consultation from a supervisor, knowledgeable colleagues, or an attorney because they may be subject to liability for failing to report when reporting is mandated—or for reporting when a report is not required (Ahia & Martin, 1993). Sharon Erickson, Sandy Magnuson, Ken Norem, Patricia Stevens, and Anita Thomas—all IAMFC Ethics Committee members—affirm the importance of consultation and emphasized the necessity of documenting that consultation did occur.

Second, Anderson (1996), Sharon Erickson (personal communication, August 1998), and Carl Swanson (personal communication, August 1998) suggest that counselors should urge the client(s) to turn themselves in to the proper

authorities. This recommendation is valid regardless of the decision counselors make about breaking confidentiality in order to report the client(s).

Third, Sharon Erickson (personal communication, August 1998) and Anita Thomas (personal communication, August 1998) stated that if a counselor chose to report, he or she would need to refer the client(s) because of the newly created dual relationship; the counselor is now the accuser. However, if counselors choose not to report, they would need to remind clients of the limits of confidentiality throughout the therapeutic relationship.

Finally, whatever action is taken, it is imperative that counselors document the action and include a brief statement explaining their rationale for the action taken. In case of future litigation, the rule of thumb is that whatever is not written (documented) did not occur or does not exist (Anderson, 1996; Corey et al., 1998; Dickson, 1995; Huber, 1994; Swenson, 1997).

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