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Book Review: Psychotherapy, Confidentiality, and Privileged Communication

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BOOK REVIEWS

PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION

BY RALPH SLOVENKO WITH GENE L. USDIN

Springfield: C. C. Thomas, 1966. Pp. xv, 202. \$8.00

This scholarly and thoughtful examination of the problems of privileged communication in psychotherapy is a significant contribution to legal literature. It is also a presentation of one set of problems that arise between the legal and medical professions. Written by an eminent scholar of the law in collaboration with a psychiatrist, it both identifies legal problems and points to the value of effective collaboration between the two disciplines. While it offers definitive proposals about privilege in the practice of individual psychotherapy, it also points to many other problem areas in the practice of the mental health professions which are not so easily resolved.

For centuries physicians have practiced medicine under the assumption that communications between patient and physician are inviolate. The Hippocratic oath, considered to be the basic ethical statement of medical practice, insists that the physician never divulge that which is learned from a patient. Although the physician stands ready to break confidence in the event of serious danger to society, or to the patient himself, his training and his practice are based upon the necessity for confidential communication. When he discovers that there is no legal authorization for the confidentiality which he in his practice and the medical tradition have considered so essential (and there are sixteen such states) it is indeed an eye opener. The physician would be even more surprised to discover, as Slovenko points out, that the legal profession considers medical privileged communication to be a right existing only by statute. Slovenko suggests that the thirty-three statutes providing for the doctor-patient privilege are full of so many exceptions that they "closely resemble a sieve — they let through more than they keep out."

The author reviews the history of legal privilege and points to the Wigmore criteria as being the basis on which decisions have been made about enacting legislation for privileged communication. These criteria are (1) Does the profession require confidential communication? (2) Is the inviolability of that confidence essential

to the purpose of the relationship? (3) Is the relationship one that should be fostered? (4) Is the injury to the relationship through fear of disclosure greater than the expected benefit to justice in obtaining the testimony? Wigmore felt that the communication between attorney and client, between husband and wife, and between penitent and priest justified legislation for privileged communication. He felt that the justification for medical privilege was non-existent and that the real reason for medical men seeking such legislation was professional jealousy on their part. Other critics of medical privilege have argued that disease can be disclosed without shame to the patient, that physicians do not talk to patients anyway, and that patients do talk to physicians in those states without medical privilege.

The physician on the other hand feels that the tradition of medical confidentiality — a tradition expected to be observed by all members of society who become patients — justifies legalization of the practice. It should be noted that all states have legislated about the privileged nature of the attorney-client relationship.

This dichotomy is an excellent example of one of the misunderstandings between the professions of medicine and law. The physician would argue that patients do talk to physicians about many private aspects of their personal life in addition to the symptoms or physical findings of the one disease for which they are presently being treated. He would point out that the only non-emergency justification for the patient to permit his secrets and his body to be shown to the physician is the expectation of confidentiality whether it exists in law or not. Physicians might argue that laws are made by attorneys, interpreted by attorneys and enforced by attorneys and while the physician would respect the ethical standards of an attorney, he would claim a similar respect for the practice of his own profession. He might notice, however, that many attorneys with whom he has had contact advocate abrogation of the physician-patient privilege due to the supervening needs of the legal profession and full courtroom disclosure.

Slovenko recognizes that some professional groups have obtained a communication privilege and he notes that others feel that it is an unfair discrimination if the secrets of one profession are protected but not those of another. He replies that "the administration of justice cannot be influenced by inter-professional jealousies." While this is an admirable philosophical position, the reality is that several professional organizations have obtained legislation for privileged communication. Clinical psychologists have obtained legislation for a privilege the same as exists in the attorney-client relationship in eighteen of the twenty-four states which have statutory cer-

tification or licensure. When the inter-professional conflicts of psychiatry and clinical psychology are aired, this point has not infrequently been cited by the psychologist as evidence of his better position in a court of law.

In this book Slovenko does not retreat from the complexities of the confidential communication required in the mental health professions, which include psychiatry, clinical psychology, social work, counselling and others. He makes a very convincing case for privileged communication in individual psychotherapy showing that it meets the Wigmore criteria. He does not hesitate to point to problems which still need to be solved — such as the question of whether there is sufficient “confidentiality” to require a privilege in group or family psychotherapy or when a parent is present as in child therapy. He points to the special problem confronting the non-physician psychotherapist who would not fall in the normal “physician-patient” category — a problem which is by no means settled among the mental health professions themselves. He depicts the difficulties which arise in pre-litigation examinations and in screening examinations for employment. He notes also that there are legal complications involved in writing case reports or in clinical teaching exercises. Highlighting the problem the psychotherapist faces in regard to written records, he passes to the question of privilege for employees or colleagues of the psychotherapist.

Although Slovenko's book is principally concerned with the practices of mental health professionals, these same questions might well be raised for the entire practice of medicine. It is quite apparent that the techniques of practice are changing and that new types of professionals and sub-professionals are being trained to meet the health needs of our society. One of the consequences of the British health system is that legal privilege has been obtained for physicians in the mental health scheme because they are employees of a governmental minister and fall under his “cloak.” In this country the consequences of new approaches to practice, including group medical practice, raise new questions for the courts. Although the issue of psychotherapy is well presented in Slovenko's book, he frankly states that there are more questions than answers.

Slovenko concludes the book with the suggestion that the problems of privileged communication might be resolved by the application of a general principle, such as that “a communication made in reasonable confidence that it will not be disclosed and in such circumstances that disclosure is shocking to the moral sense of the community should not be disclosed in a judicial proceeding.” The alternative is comprehensive legislation covering every conceivable situation. The book is a well organized examination of the problem

and it has benefited from collaboration between the lawyer and the physician. It would suggest that more communication (not necessarily privileged) between the two professions might well lead to a better understanding of interdisciplinary problems and to more utilitarian legislation.

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