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Some Problems of Confidentiality and How They May Be Avoided

Walter J. Smith, Ph.D.

One of the most bothersome problems in the practice of a number of professions—medicine, psychology, social work, for instance—is that of professional secrecy. This is because a conflict of interest is frequently involved; e.g., the right of the client to privacy *vs.* the right of some third party, or even the general public, to have the knowledge.

For example, the office of the Dean of Men at a certain university, instead of taking disciplinary action against a student guilty of continued infraction of residence hall regulations, referred him to the university's Counseling Center. When the Dean attempted to ascertain whether the student was appearing for coun-



Father Smith is the director of the Chaplaincy Research Program at the VA hospital in Washington, D. C. His article dissects the nature of the word "secret" and outlines the obligations attached to the different kinds of secrets.

selling interviews, the Director of the Counseling Center refused to give any information at all, on the ground that to do so would violate professional secrecy.

Or, a young man was referred to a psychiatrist because his family thought that he was acting in a peculiar manner. During the first interview the client revealed that he was convinced the world was full of evil people and would not be any better until these people were eliminated. He further stated that God had told him that he had been chosen to "clean up the world." The psychiatrist was able to exact a promise from him that we would go directly home after the interview. As soon as he left the office, the psychiatrist phoned the family, told them the young man was deeply disturbed, probably homicidal, and recommended that they have him committed to a psychiatric hospital.

Incidents of this kind pose dilemmas for psychiatrists, psychologists, and other similar professional persons. If they reveal confidential material the good name of the profession may suffer and people may tend not to put their trust in them. If, on the other hand, they do not reveal material which is potentially harmful to others, serious injury or even death may result for innocent third parties.

It is good, therefore, to review the traditional thinking of Catholic moral theology on this question and to refresh our memories about what we once learned with

regard to the obligations of professional persons to hold in strict confidence what their clients have revealed to them.

Professional Confidentiality

In general, we are always obliged to speak the truth; i.e. if a person speaks, what he or she says ought to be true, insofar as the person knows the truth. All human communication would break down completely if people could not be presumed to be telling the truth as they know it.

However, there are other considerations as well. First of all, one is not always required to speak the truth which he knows, and secondly, there are times when he may actually be obliged to hold back from speaking the truth as he knows it.

Thus, as regards speaking the truth, there are three possibilities: first, that the truth must be revealed; second, that the truth must be concealed; and third, that the truth may or may not be revealed, as the person wishes.

As to the first alternative, a person is bound to reveal the truth: 1) when the questioner has a right to know it; e.g. the ordinary person giving testimony in court is required to tell the truth because our system of justice demands it; 2) when revelation of the truth is necessary in order to fulfill some other urgent duty; e.g. a duty in justice, such as the fulfilment of a research contract, or a duty in charity, such as to warn people who are threatened with some danger.

With regard to the second alternative, a person is required to conceal the truth when for some reason it is held in secrecy; in traditional terminology, when it is a *secret*.

A secret is defined as knowledge which the possessor has either the right or the duty to conceal. When the possessor has the *duty* to conceal the knowledge, it is termed a *strict secret*.

Three kinds of strict secrets are usually distinguished. There is, in the first place, the *natural secret*. This has to do with matters which are private in their very nature, such as family business, military or governmental confidential material.

Secondly, the *promised secret* has to do with information which a person has come upon, more or less accidentally, and has subsequently agreed to keep secret.

Lastly, there is the *entrusted secret*, which involves knowledge confided under the condition, expressed or implied, that it will not be revealed.

These three kinds of secrets, it can be readily understood, are not mutually exclusive. It is not unusual for both promised and entrusted secrets to be at the same time natural secrets. Professional secrets are, in fact, usually of this nature.

Obligations Attached to Different Kinds of Secrets

Natural secrets always bind absolutely in justice. The reason for this is that, because of the nature of the material, harm would re-

sult from revealing it. When serious harm would result, the obligation to hold the material confidential is correspondingly serious. For this reason the revelation of military secrets in most societies is punishable by death.

Promised secrets bind in fidelity, because of the promise made. In important matters, however, they may even bind in justice, because of the serious harm which would result from revealing the secret material.

Entrusted secrets always bind strictly in justice because of the at least implicit contract between the recipient and the person revealing the confidential material. The seriousness of the obligation to confidentiality is proportional to the importance of the confidential material.

Sometimes, as mentioned before, there arises a conflict of rights or interests. The right of the person to have something concealed may conflict with the difficulty of the confidant in keeping it secret, or even with the right of a third party to have the confidential information. How can such conflicts be resolved?

Certainly a person is no longer bound to keep material confidential when the matter has become relatively public knowledge, for then it has really lost whatever confidentiality it once had. The obligation to confidentiality likewise ceases when the confiding person's consent to revealing the material has either been given or can rightly be supposed; this is so

because in this instance the right to confidentiality has been waived.

When could such a waiving of the right to confidentiality be supposed? One such instance would be when to keep a natural or promised secret would do serious harm to either the confidant or a third party. This would not be true of an entrusted secret, however.

An entrusted secret may be discussed with others who have knowledge of it, because then nothing is thereby revealed which is not already known by the discussants. However, a person who has been given an entrusted secret by reason of his profession, such as would be the case of a lawyer, physician, clergyman, psychologist, etc. is bound to keep this secret even at serious risk to himself. This is true because considerable harm would result to the community at large by this revelation. When a professional person is found to have revealed confidential material which he possesses by reason of his profession, the general public tends to lose faith in the integrity of persons practicing that profession, at least with regard to their ability to keep confidential material from being revealed. The good of the whole community takes precedence over any individual good in most instances.

Suppose, however, that an individual reveals that he is about to harm himself or others. Then it is usually assumed that he is

not rational or responsible, and that if he were he would want to be protected from performing actions which would be harmful either to himself or others. The professional person has a serious obligation to attend to the best interests of his client, even when the client does not recognize what his best interests are.

Avoiding Problems

One sometimes finds him/herself working for an agency whose policies regarding professional confidentiality are lower or higher than his/her own standards. One can avoid such a situation by carefully checking out these policies before accepting the position.

In private practice it is best to face the issues and make decisions beforehand. In the initial interview with a client, one can explain policies on confidentiality. If a court case is involved, the professional person may have to explain that he/she may be called upon to testify and consequently to reveal much, if not all, the test results and interpretations which have resulted from the professional contacts. If tape recordings are made, the reasons for doing so must be explained, the client's agreement to the procedure must be had, and if any further use of the tapes is contemplated, e.g. staff conferences, research, teaching, etc., the client's permission must be obtained. When reports are to go to other professional persons, e.g. from psychologist to psychiatrist, from psychiatrist to lawyer, this should be clearly

understood by the client and he should sign a form agreeing to this procedure. This latter is for the protection of the professional person him/herself.

The keeping of records should be done in a responsible manner. It has sometimes been suggested that two sets of records be kept, one for the purpose of possible subpoena by a court and containing only harmless material, and the other the authentic professional record. But even the disclosing of harmless records can appear to the general public to be the revelation of entrusted confidential material, and thus can do as much harm to the public image of the profession as if the confi-

dential files themselves were released. If it becomes necessary to destroy records containing secret matters entrusted to a professional person, one should have the courage to do so and take the consequences. On more than one occasion it has been necessary for "one man to die for the people."

These suggestions for the avoidance of problems of professional confidentiality have been gleaned from many conversations with psychiatrists, psychologists, and moral theologians, some informal and others in a course the author formerly taught at the Catholic University of America, entitled "Professional Problems in Psychology."
