

NOTEBOOK ON ETHICS, STANDARDS, AND LEGAL ISSUES FOR COUNSELLORS AND PSYCHOTHERAPISTS

Confidentiality and the Wigmore Criteria

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As counsellors and psychotherapists we are committed to maintaining the confidentiality of our clients communication with us. We are stewards of their confidentiality and cradlers of their secrets. It is usual practice to refer to protection of those confidential communications as a well established ethical concept and to describe privileged communication such as that between a lawyer and a client receiving legal advice and support with litigation as a legal one. This solicitor-client communication is called privileged because it is protected from the reach of the courts and therefore inadmissible as evidence in any court case.

Since every citizen in our Canadian society accused of a crime has the right to make a full answer and defense as a principle of fundamental justice the categories of privileged communication are very limited. For example, although English and Canadian courts have rarely compelled members of the clergy to disclose to the courts confidential religious communication it is not protected as privileged either in common law or statutory law except in Quebec and Newfoundland where it has statutory status as privileged. In the United States, all states have similar statutory protection of clergy-communication which is also referred to as priest-penitent privilege. Even without such protection in Canada, courts one likely to continue the practice of treating it as if it were privileged and to deal with matters for disclosure on a case by case basis. In the United States by 2011, all but one state had enacted counsellor-client privilege statutes. Some of these protect privilege to the fullest extent while others are quite weak with the many exceptions making it not much more secure than counsellor-client confidentiality.

Readers know that our commitment to the maintenance of client confidentiality can not be absolute. It can be breached when; a child is at risk of harm, a client is at risk of significant self-harm, or when there is an imminent risk of the client inflicting serious bodily harm or death to a person or group of persons. Also, since confidentiality always belongs to clients rather than to therapists they can provide their informed consent to have their confidential communication disclosed to others including to a court proceeding. Of course, without client consent and through a subpoena or court order we can be compelled to surrender to a court a counselling record and/or be required to testify.

Despite these potential exceptions to our maintenance of client confidentiality the courts and judges are far from reckless in requiring us to breach confidentiality and they typically demand a compelling reason to require a counsellor or psychotherapist to breach it. Fortunately, they have available to them a general framework for adjudicating any such consideration. It is called the **Wigmore Criteria**. John Henry Wigmore (1863-1943) was an American jurist and an expert on the law of evidence. He presented the following four requirements for jurists when determining if a particular communication is confidential and the factors to be considered when deciding to protect it or compel its disclosure;

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 *relationship* must be one that, in the opinion of the community, ought to be *sedulously fostered*.
4. The *injury* to the relationship that disclosure of the communications would cause must be *greater than the benefit* gained for the correct disposal of the litigation.
(Emphasis in original)

In the case of professional counselling relationships it is usually not difficult to meet the first two criteria. In fact, none other than the former Supreme Court Justice Claire L'Heureux-Dubé' has expressed on behalf of the court, its commitment to the right to privacy and its deep understanding of the importance of confidentiality within the therapeutic relationship (R.v. Mills SCC, 1999). She wrote:

That privacy is essential to maintaining relationships of trust was stressed to this court by the eloquent submissions of many intervenors in this case regarding counselling records. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. Therefore, the protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.

Many interveners in this case pointed out that the therapeutic relationship has important implications for the complainant's psychological integrity. Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship.

Also, in a court decision by the British Columbia Supreme Court (RCL v. SCF 2011) judge Joyce said:

I find there is great public interest in encouraging victims of abuse to seek counselling and to be assured of the confidentiality of that communication. The public interest is served if that confidentiality is fostered to the greatest possible degree.

Counsellors and psychotherapists and their advocates can also persuasively muster arguments to fulfill criterion 4. Such as, in order for individuals to disclose private information that maybe embarrassing, sensitive, and sometimes thoughts that maybe considered irrational or unusual, or a personal history of abuse or other trauma, they require confidence that such disclosures will not be revealed without their permission. Under such confidential conditions citizens can obtain the help they need to live healthier and more productive and satisfying lives. This is, of course, is a significant benefit to society. So for such significant benefit to accrue this type of confidential relationship needs and appears to be "sedulously fostered" by our communities.

If the conditions for criteria 1 to 3 are met it is the remaining criterion 4 that maybe the most challenging. This is where the court has to decide on what side the greater benefit will accrue when it is deciding whether or not to require the disclosure of confidential information to the court. If it is determined that such a disclosure is essential to the courts mission to seek the truth and to fully administer justice in a particular case then disclosure must be granted in whole or in part. A judgement in favour of not compelling a disclosure may be more likely to occur in a civil suit then a criminal one because as Supreme Court Justice Beverly McLaughlin has said *"...the defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty."*

The court must always balance the importance of disclosure to the administration of justice against the public interest in maintaining the confidentiality even when the conditions required in criteria one to three are met. Here are a number of court cases in which the Wigmore criteria was used to render a court decision regarding disclosure:

1. In RCL v. SCF (2011) before the Supreme Court of British Columbia, the judge had to decide whether or not to require the disclosure of the plaintiff's counselling records from the Elizabeth Fry Society where he had gone for counselling. He decided that the counselling met the Wigmore Criteria 1 to 3. With respect to Criterion 4 he denied access to the counselling records for the following reasons:

"the defendant already knows that the plaintiff was abused as a child; that this caused him emotional pain; that he attempted suicide; that he sought help from the Elizabeth Fry Society..." He concluded *"I am not satisfied that these records will assist in proving any material fact."*

2. In R.v. Gruenke (1991, 3 SCR 263) Gruenke and Fosty were convicted of first degree murder. They were appealing based on an argument that Gruenke's disclosure of the murder to a church spiritual counsellor and to the pastor were privileged communications. The court decided that it was not privileged. Applying the Wigmore criteria, it concluded that there was not an expectation of confidentiality at the time of the disclosure and there were compelling reasons to allow it as evidence. The appeal was dismissed.
3. In the Supreme Court of Canada (SCC) decision in the Globe and Mail v. Canada journalist Daniel LaBlanc was asking for journalistic-source privilege to protect his sources with respect to information about what became known as the sponsorship scandal. The court dismissed all arguments in support of such a privilege. However, it did apply the Wigmore criteria and concluded that maintaining the confidentiality of the source in this case was in the public interest but it directed Mr LaBlanc to answer questions about the matter before the court provided it did not reveal identity of his source.
4. In R. v. M (1992) the New Brunswick provincial court dealt with a matter involving school counselling records. In this case a voir dire was held to decide whether or not a trial for a young offender should be heard in an adult court. The court applied the Wigmore criteria in deciding whether or not to permit disclosure of his school counselling record. It decided that criteria 1 to 3 were met and with respect to criterion 4 it denied

access to the record because such information was not essential to its decision. I am familiar with a very similar matter dealt with by a court in Newfoundland in which the judge made a similar decision, however, he did require disclosure of the offender's student cumulative record. A reminder that such a record should never contain counselling notes.

5. In the *Children's and Society of Ottawa v. S(N)* involving a child protection matter the Ontario Supreme Court denied the mother access to her child's school counselling record. It concluded that the child's counselling relationship with the guidance counsellor met all the Wigmore criteria. It concluded that the mother had sufficient information and that it was "in the child's best interest" not to permit the mother to question the guidance counsellor about the counselling notes.
6. On a personal note: Several years ago I was in a provincial court in Newfoundland as a witness regarding a teenager who was charged with a significant criminal offense. I had visited the teenager, who was my counselling client, while he was being held at a secure facility prior to his court appearance. I was asked by the crown attorney about this visit and more particularly about what my client might have disclosed to me about the alleged offense. I was caught off guard but recovered and said to the judge something like "You Honor I need some direction from you before I answer this question because when I spoke with Stephen I am sure that both of us believed that we were speaking in confidence and I like to keep his hard-won trust." I was surprised when he called both lawyers to his bench and after a lengthy and somewhat animated discussion amongst the three of them he informed me that I did not have to answer the question. Of course, I do not know whether or not he applied the Wigmore criteria but I am confident the communication would have met Wigmore criteria 1 to 3. Of course, criterion 4 will always be the challenge for careful judicial decision making and will no doubt continue to be made on a case by case basis.

The Wigmore Criteria can be found in the **CCPA Standards of Practice** on Page 13.

Reference:

Wigmore, J. N. (1961). **Guidance in Trials at Common Law** (Vol. 8. McNaughten Rev)
Boston: Little Brown