

Notebook on Ethics, Standards of Practice and Legal Issues for Counsellors and Psychotherapists

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Saying No to the Police when Noncompliance is the Appropriate Response Some Personal Examples

I have been considering preparation of a *Notebook* on this topic for some time. However, I was really motivated to do so when I became familiar with a recent news story about a nurse in Salt Lake City, Utah, being arrested for refusing a police officer's order to take blood from her unconscious patient. The officer demanded that the nurse obtain the blood sample from a truck driver who was hospitalized after been involved in a vehicle accident. The nurse insisted that it was against hospital policy to do so and the officer told her that she was going to jail for interfering with a criminal investigation. He then informed her that she was under arrest and forcefully placed her in handcuffs. She was released shortly after and later successfully brought assault charges against the officer and his employer.

In the Supreme Court of Canada case, *R.v.Poheretsky*, (1987), the results of a blood sample taken by a physician from an incoherent and delirious patient, at the request of a police officer, were excluded as evidence. In this judgement it states that "*a violation of the sanctity of a person's body is much more serious than that of his office or even his home.*"

In Canada, *The Charter of Rights and Freedoms, Section 8*, concerns the protection of the privacy interests of citizens from wrongful search or seizure. According to a Supreme Court of Canada decision in *R.v.Dyment* (1988), an unlawful seizure "occurs whenever there is a non-consensual taking of an item by the state in respect of which the citizen has a reasonable expectation of privacy"

Although other types of searches and seizures are not as invasive as those blood sample cases, nevertheless they can also be serious privacy violations. If asked to be party to searches and seizures counsellors and psychotherapists have an ethical obligation to resist unless certain conditions are met. The following three examples with which I am personally familiar required such resistance:

Example I: When I was President of the Canadian Counselling Association (CCA, now CCPA), I received an urgent phone call from our Executive Director about some significant breaking news regarding one of our members. The Executive Director had just been informed by a

provincial police officer that the member was recently arrested and charged with a number of serious criminal offenses. The offenses included, as I now recall: possession of a gun and child pornography, and having equipment at his home for the production of false certificates and documents. It was alleged that the member had used such a document to falsely claim that he had completed an undergraduate degree at a Canadian university, and to support his successful admission to a university graduate program from which he acquired a valid master's degree.

I was informed that the police officer had requested a copy of the member's CCA membership file. Our Executive Director had wisely informed the officer that he needed to take some time to consider the request. He was phoning me for direction on the matter. He also informed me that the police officer was very annoyed at what he saw as an unnecessary delay. My advice was to inform the officer that we would provide a copy of the member's file when provided with a search warrant or court order to do so. Shortly after, I received a phone call from the police officer who was clearly already upset over our position. Once he confirmed my identity and that I was the source of the denial of access to the file he became very agitated with me. He accused me of obstructing a criminal investigation and mentioned the seriousness of the alleged crimes as his case for our releasing the member's file without a warrant or court order. He also informed me that the two universities involved and the school board employer of the member had already released their files without the hassle I was causing for him. My privacy violation argument did not convince him of the merits of our position and he ended the phone call without a warm goodbye.

Example II: When I was Chair of the CCA Ethics Committee I received a phone call from a member who was quite upset about an event that had just occurred in her counselling office. She informed me that she had received an unexpected visit from two provincial police officers who demanded the counselling file of a client she had seen several years ago. They stated that the client was currently under investigation for some alleged wrongdoing and that the file was essential to their work on the case. She remained steadfast in her position that she ethically could not acknowledge the identity of her clients. Nor would she provide any counselling records without either client informed consent or a search warrant. Both officers, she said, challenged her position and accused her of standing in the way of justice by her lack of cooperation. One of them had threatened to search her office for the file if she did not soon provide it. Fortunately, that officer did not act on this threat and the two of them had just left her office. I reassured her that she had taken the correct position and told her that it must have taken considerable courage to maintain it in the face of such challenging behaviour on the part of the officers.

Example III: One day I received a phone call from my friend and former Chair of the CCA Ethics Committee, Dr. Lynda Younghusband. She told me to expect a call from a provincial police officer with whom she had just spoken. Apparently one of our young members who had

recently begun a private part-time counselling service had received a visit from a provincial police officer who had insisted on receiving the counselling record of one of her female clients. Furthermore this client had recently died and the police believed that she may have been murdered. The counsellor was already aware of the death of her client and was naturally upset over it. Dr. Youngusband had informed the police officer who had phoned her that she supported our member's position not to release her dead client's counselling record unless she was provided with a search warrant or a court order. In a phone call from the officer shortly after, I agreed with the position of both my colleague and the member. The officer became quite belligerent with me and accused me of being unreasonable and obstructing a serious criminal investigation. I terminated the call after a short exchange. Members are referred to my *Notebook* (2003) entitled *The Issue of Confidentiality when a Client Dies*. In it I remind our members that "*The right to confidentiality does not end with the death of the client and counsellors have a continuing responsibility to protect client confidentiality*". I also provided some advice as to how we should conduct ourselves under what can be a most challenging circumstance.

The following professional legal advice will hopefully help us to be resolute in our noncompliance when it is necessary to do so:

"The natural impulse to cooperate with law enforcement officials must be resisted. The primary response to a law enforcement officer's request for health information should be 'show me your warrant', generally law enforcement officials are not entitled to any health information without a warrant issued by a justice...."

W. Reake, University of Alberta, Faculty of Law, 2000

"Requests from defence counsel should be treated in a manner similar to requests from law enforcement. Other than as part of the litigation process there are no requirements, either in legislation or common law, that defence counsel be granted access to health information. Therefore, all requests from defence counsel should be denied until the health professional is properly served."

Glen L.C. Noel, Lawyer, 2002

In most situations counsellors and psychotherapists can insist on taking some time if they are unsure how to respond to a request or a demand from a police officer to release client information. This will provide them with an opportunity to seek legal and collegial consultation.

I can appreciate that all four police officers mentioned in these examples were likely motivated by their determination to pursue and apprehend those who may have committed serious crimes. However, I was very disappointed in their apparent lack of knowledge about, or concern for, the privacy rights of citizens as they carried out their very important societal responsibilities. Also, the officers were apparently prepared to ignore the real possibility that any evidence wrongly collected could be ruled inadmissible.

On occasion there may be circumstances in which a counsellor or a psychotherapist could, consistent with our ethical code, release private client information without being presented with a warrant or client informed consent. These would be situations in which such a release could prevent or lessen a serious and imminent threat to the health and safety of an individual or to the public.

Such a circumstance could, for example, be one in which a police officer informs a counsellor that her/his client left a suicide note that morning and the counsellor might know where the client often goes or even where the client was planning to go that day. Disclosing information about the possible location could contribute to saving the client's life. For any such disclosures it would be wise to adhere to the following guidelines typically associated with the *Doctrine of Qualified Immunity*:

- The action was taken in good faith;
- There was a demonstrative duty or interest to be fulfilled by the disclosure;
- The disclosure was limited in scope to this duty of interest;
- It was done on a proper occasion; and
- The disclosure was made in an appropriate manner and to the appropriate parties only.

As always I welcome feedback from our readers.