DOCUMENT RESUME

ED 049 502 CG 006 314

AUTHOR	Nolting, Earl; Leege, William
TITLE	Privileged Communication--Rights and Responsibilities of College Counselors Under Wisconsin Law. Volume 4, Number 6. Counseling Center Reports.
INSTITUTION	Wisconsin Univ., Madison. Counseling Center.
PUB DATE	Apr 71
NOTE	17p.
EDRS PRICE	EDRS Price MF-$0.65 HC-$3.29
DESCRIPTORS	*College Students, *Confidentiality, Counseling, Counselor Functions, Counselor Role, *Counselors, Higher Education, *Laws, Legal Problems, *Legal Responsibility, Legislation, Sanctions

ABSTRACT

Selected legal responsibilities of counselors under the present laws of the State of Wisconsin are reviewed. Specifically, statutes concerning privileged communication and confidentiality, drug abuse and abortion are printed in full or in part, and major questions and basic legal principles relevant to them are examined as they pertain to the counselor or psychologist providing professional services in higher education settings. The paper is concerned with the counselor's delicate job, in which he may be liable 'to' the student for a breach of fiduciary duty, or be liable 'with' the student should he go too far in advising him about unlawful acts. (Author/TL)

Counseling Center Reports

The University of Wisconsin 415 West Gilman Street Madison, Wisconsin 53706

Editor: Richard W. Johnson

Volume 7, Number 6 April, 1971

PRIVILEGED COMMUNICATION -- RIGHTS AND RESPONSIBILITIES OF COLLEGE COUNSELORS UNDER WISCONSIN LAW

Earl Nolting and William Leege

Abstract

Selected legal responsibilities of counselors under the present laws of the State of Wisconsin are reviewed. Special attention is given to privileged communication and confidentiality, drug abuse, and abortion. These legal responsibilities are discussed as they pertain to the counselor or psychologist providing professional services in a higher education setting.

Previous University of Wisconsin
Counseling Center Reports

Volume 3, 1969-70

No. 1. Thrush, R. S. Annual Report

No. 2. Johnson, R. W., and North, S. D. Use of Psychological Tests in an Administrative Staff Improvement Program.

No. 3. Johnson, R. W., and St. John, David E. Use of the MVII in Educational Planning with Community College "Career" Students.

No. 4. Whitehill, R. P., and Dipson, J. A. Differential Reading Program Performance of Extraverts and Introverts.

No. 5. Johnson, R. W. Comparability of Old and Revised Forms of SVIB-W.

No. 6. Johnson, R. W. Use of Basic Interest Scales in Interpreting SVIB-W Occupational and Nonoccupational Scores.

No. 7. Thomas, W. F., and Fritz, K. V. Selected Normative Data from the Freshman Testing Program for University of Wisconsin Campuses--Fall, 1969.

No. 8. Thomas, W. F., and Fritz, K.V. Normative Data from the Freshman Testing Program for Selected Schools and Colleges of the University of Wisconsin--Madison Campus.

No. 9. Rice, J. K., Redding, J., and Mettel, T. Activist and Establishment Leaders.

No.10. Whitehill, R. P, and Redding, J. Learning Skills and Information Organization.

No.11. Whitehill, R. P., and Rubin, S. The Effectiveness of Instrumental and Traditional Methods of College Reading Instruction.

No.12. Whitehill, R.P. The Development of Effective Learning Skills Programs.

No.13. Johnson, R. W. Use of Interest Inventories with Women.

Volume 4, 1970-71

No. 1. Thrush, R. S. Annual Report

No. 2. Johnson, R.W. Note on Measurement of Sex and Age Differences on SVIB-M.

No. 3. Kirk, K. W., Ohvall, R. A., and Johnson, R. W. Vocational Interests of Pharmacy Students.

No. 4. Praamsma, S. W., and Fritz, K. V. User's Manual for Item Diagnostic Program (IMDIAG)

No. 5. Johnson, R. W. Congruence of SVIB-W and KOIS Interest Profiles.

Privileged Communication -- Rights and Responsibilities

of College Counselors Under Wisconsin Law

Earl Nolting and Wm. Leege

University of Wisconsin

SCOPE

This paper has been written for the immediate use of the Student Counseling Center Staff of the University of Wisconsin - Madison. It is limited to certain counseling situations that may arise or do arise at that Counseling Center. As such, it is not a comprehensive treatise on the subjects of privileged communication and potential counselor liability Rather, it is a naked statement of existing Wisconsin law.

NO ATTEMPT HAS BEEN MADE BY THE AUTHORS TO COUNSEL OR ADVISE. Relevant statutes and basic legal principles are supplied, BUT ULTIMATE CONCLUSIONS AND APPLICATIONS ARE FOR THE READER TO MAKE.

All attempts at accuracy have been made. However, the authors hereby disclaim all warranties, express or implied!

INTRODUCTION

Individuals seeking professional help usually express a variety of concerns. Counselors are quick to point out that the freest possible interchange takes place when the client knows that what he discusses with his counselor will be held in confidence. Confidentiality, as generally interpreted by counselors means that the counselor does not discuss information gained through counseling with other persons without the express (usually written) consent of the client, except, of course, for purposes of professional consultation or supervision.

Confidentiality is usually viewed as a matter of professional ethics and comprehensive statements of professional ethics have been published

by the American Psychological Association, American Personnel and Guidance Association, and other concerned professional organizations. Professionals also have legal responsibilities under the laws of the state in which they practice. We have found that issues of legal responsibility are unclear to many counselors.

A counselor of students has a very delicate job. His exposure to legal liability is double-barreled in that he may be liable to the student on the one hand and with the student on the other. Should the counselor breach his fiduciary duty, he may be liable to the student for damages. And should he go too far in advising a student in relation to an unlawful act, the counselor may be criminally liable along with that student.

As a result, the individual counselor may experience severe anxiety, for often times outmoded laws frustrate a counselor's sincere efforts to help a student avert personal tragedy.

Perhaps the following statement of the law will fan the fires of anxiety; alternatively, it may relieve some doubts and dispel some preconceived misconceptions about the law. At any rate, the authors are firmly convinced that it never hurts to have a working knowledge of the legal realities.

I. Privileged Communication

A. Unauthorized Disclosures

A student counselor often assumes a confidential role in his relationship with students. In this role he is entrusted with information about the student that would be damaging to that student were the information leaked to others. The law attaches a duty to this confidential relationship, a breach of which may subject the counselor

to civil or criminal liability.

The specific tort involved is that of defamation. Defamation is the invasion of a person's interest in his reputation by communication to others which tends to lower a person in the estimation of the community by holding him up to scorn, ridicule, disgrace or contempt. Defamation can assume the form of speech or writing. If defamation is in spoken form, it is slander. If it is in written form, it is libel.[1]

Wisconsin has a statute that spells out a school psychologists' specific duty of confidence to a counselee. That statute is produced here in its entirety:

> Privileged Communications.[2] No dean of men, dean of women or dean of students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except:
>
> 1) This prohibition may be waived by the student.
>
> 2) This prohibition does not include communications which such dean needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or of being made public.
>
> 3) This prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify. (Emphasis supplied).

Under this statute the following legal inference spells out the basis of liability: Any Wisconsin dean or school psychologist who divulges communication that qualifies as being privileged, and is not exempted by one of the three exceptions, may be personally liable to the student in a civil suit for damages under a defamation theory.

Several important questions arise regarding the application of the statute to the counseling situation. Unfortunately, we are unaided by case law or law review analysis of the statute. This being the case, one man's interpretation and criticism of the statute are just as valid as another's.

One major question is: To whom does the statute apply? Does it apply to counselors in general - or merely the specified deans and psychologists only. There is a good argument that "regular" counselors may not be held liable for breach of a privileged communication, at least not under the statute.

One source feels that the statute affects all members of the counseling staff. In reference to Wis. Stat., s. 885.205, the Legislative Reference Bureau has the opinion that "This bill prohibits any member of the counseling staff at any college in Wisconsin from disclosing communications made to him in the course of investigating conduct of a student enrolled at the school."[3]

There is no indication of the logic used by the Bureau in arriving at its opinion that the statute applies to "any member of the counseling staff."

It could have just as easily asserted that the statute only applied to deans and psychologists, and ex exclusio, the remainder of the staff was exempt. The important thing is how a court of law will interpret the statute; and as already stated, there has been to this date no case applying the statute.

A second question is: Who qualifies as being a psychologist under the statute? Although other statutes are careful to define "Physician" and "chiropractor,"[5] they neglect to define psychologist - an essen-

tial word in the statute at hand. Under the act is a psychologist a registered professional man or merely an education major with several courses of psychology to his credit?

Assemblyman York has introduced an amendment to the privileged communication statute that would clear up its meaning considerably, Assembly Substitute Amendment I to 1969 Aseembly Bill 126. However, that Bill has not yet been disposed of. Hence, Wis. Stat., s. 885.205 is still the law in Wisconsin

B. Compulsory Disclosures

There are situations when a counselor has little or no choice in the decision to disclose information without the express prior written consent of the client. One usually consults with colleagues or supervisors to gain clarification of the situation. Ethical or moral considerations may be carefully examined; legal responsibilities should also be considered in one's decisions.

It has already been stated that a school psychologist may be liable if he discloses privileged communication. Conversely, may he be liable for not disclosing privileged communication? For example, what if a counselor, during the course of a privileged communication, learns of a future action that he feels the authorities should be aware of to avoid loss of life or property. Must he report it? Does he have a legal duty to report what he has learned? Generally, no. Hopefully human qualities will govern in the counselor's balance between the counselee's right to privacy and the severity of the possible loss of life or property.

The American Psychological Association seems to adopt Holme's "clear and present danger test" in resolving the conflict.[6]

> "Information received in confidence is revealed only after most careful deliberation and when there is a clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities."

Under the privileged communication statute there is one situation where the counselor would legally be punished for not disclosing privileged communication. Wis. Stats., s 885.205(3) provides that when the counselor is subpoenaed in a criminal case, the privileged status does not attach to the communication. If the witness fails to report to testify, he can be punished as a disobedient witness.[7] And if he refuses to testify, he can be held in contempt of court.[8]

It could be argued that s. 885.205(3) destroys the very purpose of the privileged communication statute. If the communication can be compelled from the psychologist in any criminal case whatsoever, it is very difficult to see how the communication could ever bear the privileged status.

Evidently the Wisconsin legislature has less respect for psychologists than it does for other professions. Communications to clergymen and attorneys remain privileged, evey before a court of law.[9] Communications to doctors lose their privileged status only in a murder trial, and then only when the "disclosure relates directly to the fact or immediate circumstances of the homocide..."[10]

Several prominent states afford psychologists the same distinction as lawyers or doctors - at least regarding privileged communication:

> 1. New York. 4507. Psychologist. The confidential relations and communications between a psychologist registered under the provisions of article 153 of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communication to be disclosed.[11]

> 2. Illinois. 406. Disclosure of Information by Psychologist-Prohibition-Exceptions. No psychologist shall disclose any information he may have acquired from persons consulting him in his professional capacity, to enable him to render services in his professional capacity, to such persons except only: (1) in trials for homocide when the disclosure relates directly to the fact or immediate circumstances of the homocide...[12]

While not directly informing us of Wisconsin law, the New York and Illinois laws are cited here as evidence that other states, key ones at that, have afforded privileged communication involving psychologists a superior status than Wisconsin does in s. 885.205. Facts like these are often helpful in having a vague and unsatisfactory law revised.

It should be remembered, however, that a testimonial privilege is by definition a barrier to truth and justice, as it results in the exclusion of evidence. As such, the courts are most restrictive in granting the privilege. As one evidence writer points out, "the manifest destiny of evidence law is a progressive lowering of the barrier to truth..." and that "the commentators who take a wide view, whether from the bench, the bar, or the schools, seem to advocate a narrowing of the field of privilege."[13] While that one writer may not be conclusive on the subject, one does get the impression, in reading the literature, that those newer professions that seek a privileged communication statute will be met by an unwilling legislature. And even if the legislation is granted, one suspects that the courts will construe it most restrictively.[14]

It should also be mentioned at this point that records and memoranda of the student counselor are also potential evidence. Should the court find that these writings are not privileged, or that they fall into one of the exceptions of s. 885.205, the records, as well as

the counselor, may be subpoenaed,[15] The inducement to bring the records and/or testify is the court's contempt power.

II. Specific Problem Areas

To illustrate and extend the above points, we felt it would be useful to examine the legal considerations involved in two relatively specific areas. We have chosen two topics of concerns to both students and counselors on most college campuses: drug abuse and abortion. The literature of both the newspapers and journals in the social sciences point to increasing incidence of these problems both on and off college campuses.

Opinions are voiced not only by journalists and social scientists but by parents, administrators, teachers, philosophers, ministers, legislators and law enforcement officers. Drug abuse and abortion have evoked quite a bit of controversy within our society. At this writing, the discussion goes on; the possibility of changing the relevant statutes through either legislative enactment or judicial interpretation of present laws is still an open question. Laws exist which govern and apply sanctions in both areas of behavior, and will probably continue to do so, in some form, for the forseeable future. Both areas entail situations where the counselor not only counsels the student, but may have occasion to obse or assist in the unlawful act. It should be clear that we are not concerned with the pros and cons of the behavior or the professional treatment of the behavior; we are concerned with the law which impinges on both counselor and client regarding the behavior.

Obviously, a counselor may be convicted of a crime if he directly partakes in an unlawful act. It is equally obvious that the counselor will not be convicted of a crime if he merely counsels one who has

committed the crime. The gray area in between is most troublesome. Hopefully, the following discussion will shed some light on the problem.

A. Drug Abuse

Generally, the student counselor has no legal duty to voluntarily report drug use to the authorities. But can he be subpoenaed to testify? Yes, indeed. As mentioned earlier our privileged communication statute denies the privileged status to communications when a criminal case is involved. Since drug abuse is a criminal offense the counselor could be regularly subpoenaed and compelled to testify.

Can the counselor be convicted of drug abuse, even though he himself did not directly use drugs? Yes, it is possible. If he encourgaes, advises or aids the student in his unlawful act, the counselor could be adjudged a "party to crime." As a "party to crime" he could potentially receive a penalty as severe as the student who actually used the drugs. The following is our statute:[16]

> Parties to Crime. (1) Whoever is concerned in the commissions of a crime is a principal and may be charged with and convicted of th commission of the crime although he did not directly commit it and although the person who directly committed it has not been convicted of some other degree of the crime or of some other crim based on the same act.
>
> (2) A person is concerned in the commission of the crime if he:
> (a) Directly commits the crime; or
> (b) Intentionally aids and abets the commission of it; or
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a person is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

What are the legal penalties for illegal drug use? For the illega manufacture, possession or distribution of narcotics, the sentence runs from 2 to 20 years depending on the number of prior convictions. Illegal use or possession of dangerous substances can bring a sentence of up to 2 years imprisonment. Also, intentionally advising or encouraging another to violate the dangerous substances law carries a sentence of up to 5 years and/or $2500 fine.[17]

B. Abortion

The student counselor also has no affirmative legal duty to report unlawful abortions. But abortion is a criminal offense. Therefore, the counselor-client relationship again loses its privileged status; and if regularly subpoenaed, the counselor must testify at the risk of subjecting himself to the contempt power of the court.

May the student counselor be criminally convicted as a party to the crime of abortion? Before we answer that question perhaps an examination of the State of Wisconsin's abortion law is in order. Prior to 1970 our abortion statute read intact as follows:[18]

> Abortion. (1) Any person, other than the mother, who intentionall destroys the life of an unborn child may be fined not more than $5000 or imprisoned not more than 3 years or both.
>
> (2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:
>
> (a) Intentionally destroys the life of an unborn quick child; or
>
> (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. is unnecessary to prove that the fetus was alive when the a causing the mother's death was committed.
>
> (3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such dest by another may be fined not more than $200 or imprisoned no more than 6 months or both.
>
> (4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

Early in 1970 a Milwaukee physician, Dr. Sidney Babbitz, was prosecuted for allegedly having performed an abortion in violation of the preceding statute. While his presecution was pending, Dr. Babbitz sought relief from the United States District Court for the Eastern District of Wisconsin. Among other things he sought to have portions of the Wisconsin abortion statute declared unconstitutional. Dr. Babbitz succeeded in having s. 940.04(1) and (5) invalidated on the grounds that those provisions are in violation of the IX Amendment right of privacy as well as being overbroad i.e., an overly broad extension of the state's police power.[19]

One thing should be noted here. The court's decision in Babbitz did not legalize abortion per se. It did not decide the question of a woman's aborting a "quickened" fetus. It did compare the mother's rights with those of an "unquickened" fetus (i.e., one less than about four and a half months after conception), and held that the mother's interests are superior.

The impact of Babbitz on Wisconsin's abortion statute is by no means certain or final. There is bound to be more litigation on the subject. At any rate, it is safe to say that abortion of a quickened fetus is still a crime and will be prosecuted in Wisconsin.

How does the student counselor fit into this? It is still possible for a counselor to be adjudged a party to the crime of abortion Wisconsin. If he intentionally aids, abets or advises the commissi

of an unlawful abortion the legal machinery is available, should the district attorney wish to prosecute the counselor. And should he be convicted, the counselor can be punished as severely as the actual perpetrator of the unlawful act.

CONCLUSION

Should the professional counselor be exposed to civil liability for breach of a privileged communication, insurance is available. Staff members in counseling centers should individually or as a staff consider the advisability of purchasing such insurance.

Criminal liability is not so easily disposed of. The person (client) breaking the law is subject to penalties under the law if convicted. The professional who simply listened to a client would not be subject to any criminal penalties since it was not he who broke the law. The professional (and his records) could potentially be subpoenaed to testify, in this case, however. It should be obvious that para-professional (lay counselors, etc.) have little, if any, legal basis for confidentiality in their discussions with others.

If the professional intentionally aids, abets, or advises the commission of an unlawful act, he could be prosecuted even though he personally did not commit an unlawful act. As stated earlier, the legal machinery is available to the district attorney to charge the counselor as a party to crime. Whether or not he will use it is another question.

In the criminal area there seem to be "two laws" - the law as embodied in the statutes and the law as actually enforced. The latter is generally of more interest to the practical person. However, its determination is not as easy.

If you want to know the written law, merely read the statutes or this memorandum. But if you want to know how the law is enforced, that is a more difficult task.

One could consult the district attorney, or through University channels one could petition the Attorney General's office for an opinion. The opinion would very likely concern itself soley with the written law; consequently, his recommendation would be unsatisfactory as to a question of how the law is likely to be enforced.

In conclusion, bear in mind these two things: (1) the law is there, waiting to be used against you. And (2) the law is not always enforced. The choice is yours to make. But before you act, it may be wise to consult your attorney.

REFERENCES

1. Reynolds C. Seitz, "Law of Slander and Libel," p. 22, in Law of Guidance and Counseling, Martha L. Ware, ed. in chief, The W. H. Anderson Company, Cincinnati, 1964.

2. WIS. STAT., s. 885.205, (1967). Created by L.1967, c.258, eff. Jan. 5, 1968

3. Legislative Reference Bureau, LRB-147, January 30, 1969.

4. WIS. STAT., s. 990.01(28), (1967).

5. WIS. STAT., s. 990.01(5), (1967).

6. Principle 6(a), Ethical Standards of Psychologists, American Psychological Assn., Washington, D. C., 1967.

7. WIS. STAT., s. 885.11, (1967).

8. WIS. STAT., s. 295.01(5), (1967).

9. WIS. STAT., ss. 885.20, 885.22, (1967).

10. WIS. STAT., s. 885.21(1)(a), (1967).

11. McKinney's Consolidated Laws of New York, Book 7B, Civil Practice Law and Rules, 4507.

12. ILL. REV. STAT., ch. 915, s. 406, (1965)

13. McCormick, Evidence, p. 165, (1954).

14. See Volz, "Law of Confidentiality," in Ware, Law of Guidance and Counseling, op. cit.

15. See Fox, "Use of Records in Court and Other Legal Proceedings," also in Ware, Law of Guidance and Counseling, op. cit.

16. WIS. STAT., s. 939.05, (1967).

17. The relevant sections are WIS. STAT., ss. 161.02, 161.28(1), 161.30(1) (1969). For a handy diagram of the statutes and their respective penalties see "Drugs and You," Student-Faculty Drug Education Advisory Committee, 514 Memorial Union, The University of Wisconsin, 1970.

18. WIS. STAT., s. 940.04, (1967).

19. Babbitz v. McCann, 310 F. Supp. 293 (1970).

Dr. Earl Nolting has been on a joint appointment during 1970-71 serving as Assistant Director of the Counseling Center with responsibility for the Counseling Section and Director of Program Development, Division of Student Affairs, University of Wisconsin, Madison.

William Leege is a third year law student at the University of Wisconsin Law School, Madison.