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# TO DISCLOSE OR NOT TO DISCLOSE: THE DILEMMA OF THE SCHOOL COUNSELOR

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## I. INTRODUCTION

While carrying out their professional duties, school counselors necessarily become holders of personal information communicated to them by students. As recipients of this student information, school counselors often face what may become complicated legal and ethical questions as they decide how to proceed in resolving student problems. For example, how should a counselor respond if a fourteen-year old confides that she is pregnant and does not wish her parents to know? What are the counselor's responsibilities for disclosing student information in cases of child abuse or threats to commit suicide? Counselors at times may be unsure of the nature and extent of potential legal liability, if any, attached to their decisions to disclose or retain information based on student revelations. Adding to the confusion, the terms *confidential* and *privileged* are often used inexactly to describe the communications between school counselors and their clients. In certain other professions, these labels carry with them specific and differing legal protections and obligations.<sup>1</sup> Counselors may be unclear or even misguided regarding the extent to which information attained in their student-counselor conferences might be protected as *privileged* or *confidential*.

This article attempts to clarify both the legal and ethical implications of a school counselor's decision regarding whether to disclose a student's personal communication. This article discusses the distinction between the legal *privilege* of refusing to disclose information and the broader ethical notion of a professional's duty to maintain the *secrets and confidences* of the client-student. Examples illustrate situations in which a counselor might encounter the ramifications of these ethical and legal responsibilities. First, it is necessary to explore the distinction between the narrow notion of a testimonial privilege, which is used for evidentiary purposes, and the broader implications of the ethical duty embodied in the concept of confidentiality. Finally, this article concludes that the counselor must act reasonably in each situation based upon the local standards of the profession; that the degree of

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1. See *generally* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

confidentiality expected from ethical standards is not absolute because of the rights of parents regarding their children and the minor status of the student.

## II. TESTIMONIAL PRIVILEGE

Generally, a testimonial privilege is an individual's right in a court action or other governmental proceeding to refuse to release, or to prevent a third party from releasing, confidential information obtained between a professional and the individual.<sup>2</sup> The establishment of such a privilege requires the balancing of two potentially competing interests: the interest in the full disclosure of facts to facilitate justice in the courts and the interest in encouraging certain desirable relationships which allow clients to speak candidly with professionals.<sup>3</sup>

Historically, statutes extended this testimonial privilege to communications between three types of professionals and their clients: physicians, attorneys and the clergy.<sup>4</sup> In each of these situations, fostering a client's trust that information revealed would remain confidential was deemed necessary to the therapeutic relationships.<sup>5</sup> For example, an attorney could not fully protect a client's rights unless the client felt free to disclose to the attorney all information (even that which was incriminating) without fear of any reprisal in court.<sup>6</sup> Further, in the case of physicians, if patients did not have the assurance of confidentiality, then patients would not feel free to divulge essential information for treatment.<sup>7</sup>

In recent years, some states have enacted legislation extending testimonial privileges to communications between professionals and clients in fields other than physicians, attorneys and clergy.<sup>8</sup> School counselor-student communications are among those now covered by expanded privileged communications statutes.<sup>9</sup> Stat-

2. See JOHN W. STRONG ET AL., *MCCORMICK ON EVIDENCE*, § 72 (3d ed. 1984) [hereinafter *MCCORMICK*]. See also THE AMERICAN SCHOOL COUNSELOR ASSOCIATION, *POSITION STATEMENT, THE SCHOOL COUNSELOR AND CONFIDENTIALITY* (1986) (stating that the student or guardian has a right to disclose or not disclose information).

3. 8 J. WIGMORE, *EVIDENCE* § 2285 (McNaughton rev. 1961).

4. *MCCORMICK*, *supra* note 2, § 72.

5. *MCCORMICK*, *supra* note 2, § 98.

6. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981) [hereinafter *CODE*] (expressing the justification for the privilege). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1990). Each state, through its legislature, has adopted some form of the Model Code or Model Rules as the legal standard governing attorney conduct.

7. *MCCORMICK*, *supra* note 2, § 98.

8. See, e.g., N.C. GEN. STAT. §§ 8-53.3, 8-53.5 (1990) (granting a testimonial privilege to communications between both psychologists and family therapists and their clients).

9. See, e.g., N.C. GEN. STAT. § 8-53.4 (1990).

No person certified by the State Department of Public Instruction as a *school counselor* and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counselling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counselling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.

*Id.* (emphasis added).

utes encompassing the school counselor-student privilege are not uniform; however, and they vary in the degree and scope of the protection that is provided. For example, North Carolina provides fairly broad coverage protecting any information that the counselor acquires in counseling which was "necessary . . . to render counseling services . . ." <sup>10</sup> In addition to affecting the type of communications protected, some statutes also restrict the situations in which the privilege may be invoked. Such statutes often describe circumstances in which the counselor is compelled to disclose otherwise privileged information for the safety of the student or others. <sup>11</sup> By illustration, North Carolina provides a broad exception to the privileged communication statute by requiring disclosure whenever the presiding judge so compels. <sup>12</sup> The judge, however, does not have absolute discretion. She must consider the competing private and public interests in full disclosure matters as well as the interest in encouraging relationships which allow clients to speak candidly with the professional. <sup>13</sup>

In addition to these statutory limitations and restrictions to the testimonial privilege, counselors should be aware that the student, not the professional, holds the privilege. <sup>14</sup> Therefore, the privilege operates for the benefit of the student. The

10. *Id.*

11. For example, some statutes require the reporting of suspected child abuse. The following statutes parallel the federal Child Abuse Prevention and Treatment Act: ALA. CODE §§ 26-14-1 to -13 (1992); ALASKA STAT. §§ 47.17.010-.069 (1990); ARIZ. REV. STAT. ANN. §§ 13-3620 to 3620.01 (West 1989 & Supp. 1992); ARK. CODE ANN. §§ 12-12-501 to 518 (Michie 1987 & Supp. 1991); CAL. PENAL CODE §§ 11164-11173 (West 1992 & Supp. 1993); COLO. REV. STAT. ANN. §§ 19-3-301 to -316 (West Supp. 1992); CONN. GEN. STAT. ANN. §§ 17a-101 to -107 (West 1992); D.C. CODE ANN. §§ 6-2101 to -2107 (1989 & Supp. 1992); FLA. STAT. ANN. §§ 415.501-.514 (West 1986 & Supp. 1993); GA. CODE ANN. §§ 19-7-4 to -5 (1991); HAW. REV. STAT. §§ 350-1 to -7 (1985 & Supp. 1992); IDAHO CODE §§ 16-1601 to 16-1630 (1979 & Supp. 1992); IND. CODE ANN. §§ 31-6-11-1 to -22 (Burns 1987 & Supp. 1992); IOWA CODE ANN. §§ 232.67-77 (West 1985 & Supp. 1993); KAN. STAT. ANN. §§ 38-1501 to 1530 (1986 & Supp. 1992); KY. REV. STAT. ANN. §§ 620.010-.030 (Baldwin 1987 & Supp. 1992); ME. REV. STAT. ANN. tit. 22, §§ 4001-4017 (West 1992 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 119, §§ 51A-51G (Law. Co-op 1975 & Supp. 1993); MICH. COMP. LAWS ANN. §§ 722.621-.636 (West 1993); MINN. STAT. ANN. § 626.556 (West Supp. 1993); MISS. CODE ANN. §§ 43-21-353, 43-23-9 (1981 & Supp. 1992); MO. ANN. STAT. §§ 210.110-.166 (Vernon 1983 and Supp. 1993); MONT. CODE ANN. §§ 41-3-101 to 406 (1991); NEB. REV. STAT. §§ 28-707 to 733 (1989 & Supp. 1992); NEV. REV. STAT. ANN. §§ 432B.010-.255 (Michie 1991); N.H. REV. STAT. ANN. §§ 169-C:29 to :40 (1990); N.J. STAT. ANN. §§ 9:6-8.10 to .20 (West 1993); N.M. STAT. ANN. §§ 32-1-15 to -16 (Michie 1992); N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1992); N.C. GEN. STAT. §§ 7A-516 to -517 (1989 & Supp. 1992); N.D. CENT. CODE §§ 50-25.1-01 to -14 (1989 & Supp. 1991); OHIO REV. CODE ANN. §§ 2151.01-.031, 2151.421 (Baldwin 1987 & Supp. 1992); OKLA. STAT. ANN. tit. 21, §§ 843-848 (West 1983 & Supp. 1993); OR. REV. STAT. §§ 418.740 - 755 (1991); 23 PA. CONS. STAT. ANN. §§ 6311-6333 (1991); R.I. GEN. LAWS §§ 40-11-1 to -16 (1990 & Supp. 1992); S.C. CODE ANN. §§ 20-7-480 to -690 (Law. Co-op. 1985 & Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 26-8A-1 to -29 (Supp. 1991); TENN. CODE ANN. §§ 37-1-401 to -413 (1991 & Supp. 1992); TEX. FAM. CODE ANN. §§ 34.01 -.54 (West 1986 & Supp. 1993); UTAH CODE ANN. §§ 62A-4-401 to -605 (1989 & Supp. 1993); V.T. STAT. ANN. tit. 33, §§ 4911-19 (1991 & Supp. 1992); VA. CODE ANN. §§ 63.1-248.1 to .17 (Michie 1991 & Supp. 1992); WASH. REV. CODE ANN. §§ 26.44.010-.900 (West 1986 & Supp. 1993); W. VA. CODE §§ 49-6A-1 to -10 (1992 & Supp. 1992); WIS. STAT. ANN. §§ 48.981 to -.982 (West 1987 & Supp. 1992); WYO. STAT. §§ 14-3-104 to -215 (1986 & Supp. 1992).

12. See *supra* note 9.

13. See *supra* note 9. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice.

14. See Steven R. Smith, *Privacy, Dangerousness and Counselors*, 15 J.L. & Educ. 121, 124 (1986) [hereinafter Smith].

student may waive the privilege at any time.<sup>15</sup> If the student chooses to waive the privilege, the counselor has no grounds for withholding any information communicated to him by the student.<sup>16</sup> Further, the privilege is generally destroyed if the confidentiality of the relationship is breached by the student at any time.<sup>17</sup> Therefore, once the student discloses any information to anyone other than those covered by the testimonial privilege, in effect waiving the privilege, the claim of privilege cannot be reestablished.

In light of these often pervasive restrictions and limitations, one might legitimately question the testimonial privilege's value to counselors. Although the testimonial privilege does protect against disclosure of student information in the limited context of court and other governmental proceedings, it does nothing to clarify the counselor's ethical and legal position concerning a more frequently encountered dilemma: whether to disclose or retain student information in settings outside of governmental proceedings.<sup>18</sup> To understand the counselor's rights and obligations concerning disclosure to parents, administrators or other third parties, it is necessary to explore the broader ethical and legal concept of *confidentiality*.

### III. CONFIDENTIALITY

"Confidentiality is the general . . . ethical obligation of professionals . . . ."<sup>19</sup> This obligation is usually set out in professional codes or standards which require professionals to maintain the confidences and "secrets revealed to them by their clients."<sup>20</sup> In many professions, codes of ethical standards expressly require that a client's communications be kept confidential.<sup>21</sup> Unlike the testimonial privilege, these ethical standards require the professional to protect client information from disclosure in any context, not just in court or governmental proceedings.<sup>22</sup> Therefore, while an in-court testimonial privilege may be viewed as one way of ensuring

15. *Id.* See also McCORMICK, *supra* note 1, § 93.

16. See Smith, *supra* note 14, at 124.

17. See McCORMICK, *supra* note 2, § 93.

18. Smith, *supra* note 14, at 125.

19. *Id.* at 123.

20. *Id.*

21. See, e.g., CODE, *supra* note 6, DR 4-101(B), which states:

[A] lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure.

*Id.*; the AMERICAN ASSOCIATION FOR COUNSELING AND DEVELOPMENT, ETHICAL STANDARDS § B(2) (Mar. 1988) [hereinafter AACD] which provides, "The counseling relationship and information resulting therefrom are to be kept confidential, consistent with the obligations of the member as a professional person." *Id.*; the AMERICAN SCHOOL COUNSELOR ASSOCIATION, ETHICAL STANDARDS FOR SCHOOL COUNSELORS § A(8) (May 1984) [hereinafter ASCA] which "[p]rotects the confidentiality of information received in the counseling process as specified by law and ethical standards." *Id.* See also, THE AMERICAN SCHOOL COUNSELOR ASSOCIATION, POSITION STATEMENT, THE SCHOOL COUNSELOR AND CONFIDENTIALITY (1986) (noting that "confidentiality assures that disclosures made will not be divulged to others except when authorized by the student."). These Ethical Standards are ideal goals which express the way the profession thinks of how one ought to act.

22. See *supra* note 21.

or protecting confidentiality, the testimonial privilege is a much narrower limitation on disclosure than confidentiality.<sup>23</sup>

Confidentiality may be distinguished from testimonial privilege on other grounds. The testimonial privilege, whether granted statutorily or through common law development, may have the force and effect of law.<sup>24</sup> Therefore, if the privilege is applicable in a given situation, the law enforces and protects that privilege. In contrast, codes of professional ethical standards are promulgated by private professional organizations and not by legislatures.<sup>25</sup> As a result, the standards of confidentiality which they impose are not necessarily enforced and protected by the law. In order to give codes of professional conduct some force in the law, state legislatures must adopt such codes into their state statutes or promulgate the code as part of the rules and regulations of an appropriate governmental agency such as the Department of Education.<sup>26</sup> The Code may also be incorporated into the professional's written contract.

In the legal profession, the American Bar Association has promulgated a *Model Code of Professional Responsibility* and *Model Rules of Professional Conduct*.<sup>27</sup> Each state, through its legislature or judiciary, has adopted in some form either the *Model Code of Professional Responsibility* or the *Model Rules of Professional Conduct*. The standards regulating all attorney conduct, including that regarding client confidences, have the force of law that mandates legal duties and obligations from the lawyer. Violations of these obligations can bring civil liability<sup>28</sup> along with professional sanctions such as censure, reprimand, suspension from the practice of law, or disbarment by the appropriate disciplinary authority.<sup>29</sup>

In contrast, for example, no state or agency has adopted the *American Association for Counseling and Development's (AACD) Ethical Standards*<sup>30</sup> for school guidance counselors. Therefore, while the Association's standards set out ethical imperatives for counselors, these standards may not be enforceable at law but serve only as model behaviors for members of the AACD. Hence, the standards neither provide grounds to legally sanction counselors who disclose student confidences nor do they provide any legal protection to counselors who refuse, for professional reasons, to disclose student confidences to parents or administrators. Further, there are no reported legal cases that hold a school counselor liable for a breach of a confidential relationship. It does not appear from the research or liter-

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23. For further discussion of the privilege/confidentiality distinction, see Smith, *supra* note 14, at 123-25.

24. See generally GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 381-451 (2d ed. 1987).

25. BLEDESTIN, THE CULTURE OF PROFESSIONALISM 407-08 (1976); HUMMELL ET AL., LAW AND ETHICS IN COUNSELING 25-39 (1983) [hereinafter HUMMELL]; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 48-49 (1986).

26. See *infra* p. 9. No state or agency has adopted AACD standards.

27. See *supra* note 6.

28. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 5.6 (1986).

29. *Id.* § 3.5.

30. AMERICAN ASSOCIATION FOR COUNSELING AND DEVELOPMENT, ETHICAL STANDARDS (Mar. 1988).

ature that the counselor's breach of a confidential relationship is a *real* issue but at times is perceived to be one by school counselors.<sup>31</sup>

Adding to the confusion experienced by counselors as to how to proceed in resolving student problems are the different ethical standards imposed on the two categories of counselors: unlicensed and licensed. All school counselors are certified by state boards of education.<sup>32</sup> Usually, they are unlicensed. School counselors, however, may be licensed by a separate state licensing board.<sup>33</sup>

Most state boards of education do not have separate ethical codes for counselors.<sup>34</sup> Therefore, certified school counselors operate under ethical codes designed for teachers which usually do not include a confidentiality section.<sup>35</sup> Licensed counselors, however, may be legally bound by standards promulgated through the licensing board's rulemaking or adjudication process or by contract between the school district and counselor.<sup>36</sup> In that case, the affected licensed school counselor is legally bound to those ethical standards.<sup>37</sup> Again, the research did not disclose any situation of this type. If there is an adoption of an ethical code, the licensed school counselor who breaches the confidentiality standard would technically be in violation of the licensing law and subject to some type of discipline. But to reiterate, there have not been any cases in this area, indicating that there has not yet been an adjudication of this issue.

#### IV. TYPICAL PROBLEMS FACING THE SCHOOL COUNSELOR

The illustrations which follow are intended to exemplify common counseling dilemmas concerning disclosure of different types of student information. These will demonstrate, against the backdrop of the foregoing material, the choices counselors may make and will help delineate the potential legal and ethical ramifications of those choices. It should be noted that school counselors work with minors. This has led some to argue that the doctrine of *in loco parentis* is at work and that the counselor's responsibility is generally to the parents, with obvious exceptions, rather than to the student.<sup>38</sup> Moreover, there is a developing trend in state and federal case law recognizing the existence of a legal duty or special relationship between the school district and a student's parents necessitating disclosure of

31. See FISCHER & SORENSON, *SCHOOL LAW FOR COUNSELORS, PSYCHOLOGISTS AND SOCIAL WORKERS* (1991) (general discussion of confidentiality).

32. HUMMEL, *supra* note 25, at 47-48.

33. HUMMEL, *supra* note 25, at 47-48.

34. HUMMEL, *supra* note 25, at 47-48.

35. See, e.g., NATIONAL EDUCATION ASSOCIATION CODE OF ETHICS (1975).

36. HUMMEL, *supra* note 25, at 47-48.

37. HUMMEL, *supra* note 25, at 47-48.

38. LE ROY JAMES PETERSON ET AL., *THE LAW AND PUBLIC SCHOOL OPERATION* § 14.2a (2d ed. 1978). See also ASCA, *supra* note 21, § B(2)-B(3), which recognize the need to respect the confidentiality in the relationship but still leave room to share with parents.

Some provide that the right to maintain the students' confidentiality rests with the parents and that is limited to testimony in court. It does not bar the disclosure to a parent. See MICH. COMP. LAWS ANN. § 600.2165 (West 1986). This may even mean that counseling may not be done without parental approval.

personal information about the student in certain circumstances.<sup>39</sup> There may be debate as to whether or not the student is entitled to be informed of the *in loco parentis* relationship. If the student enters the relationship believing it is totally confidential, should counselors be required to post signs of *Warning* or *Beware* in their offices?<sup>40</sup>

### A. Pregnancy<sup>41</sup>

Jane Doe, a fourteen-year old student, comes to your office to confide that she is approximately two months pregnant. After calming her, you proceed to outline several alternatives for her to consider. Suggestions may include a referral to Planned Parenthood, adoption, abortion and a meeting with her parents. She immediately recoils and tells you that she does not want to be referred to an agency. Further, she does not want anyone in school to know about her condition, and she especially does not want her parents to be told. After all, she came to you in confidence for help.

Are you legally protected from liability for breaching confidentiality if you violate the wishes of the pupil and inform her parents? What if she seeks to have an abortion without notifying her parents and suffers severe medical complications? Can the parent claim you are liable if you do not disclose the student's predicament?<sup>42</sup>

It is important to note that the testimonial privilege does not apply in this situation since there is no governmental proceeding. For a start, the school counselor may wish to review the school guidelines or the AACD and American School Counselor Association (ASCA)<sup>43</sup> Ethical Standards for some guidance. For example, the AACD Ethical Standards advise a counselor to keep her information confidential and to act in a manner "consistent with the obligations of the member as a professional person."<sup>44</sup> Unfortunately, the Ethical Standards fail to provide the level of detail that other codes may give to their members.<sup>45</sup> Furthermore, the Eth-

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39. *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305 (11th Cir. 1989); *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Phyllis P. v. Claremont Unified Sch. Dist.*, 228 Cal. Rptr. 776 (Cal. Ct. App. 1986); see AMERICAN ASSOCIATION FOR COUNSELING AND DEVELOPMENT, AND ETHICAL STANDARDS (rev. March 1988); AMERICAN SCHOOL COUNSELOR ASSOCIATION ETHICAL STANDARDS FOR SCHOOL COUNSELORS (May 1984); see generally HUMMELL, *supra* note 25, at 25-39.

40. Counselors continually debate the issue as to whether a student should be warned that parents as well as others may have the right of access.

41. Research has indicated that the subject of student drug and alcohol abuse facing school counselors has received very limited examination. The authors of this article, however, suggest that a counselor faced with this type of problem should adopt the same principles of prevention applicable for pregnancy.

42. Parents may be able to successfully sue counselors for violating the parents' constitutionally protected rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). See, e.g., *Arnold v. Board of Educ.*, 880 F.2d 305 (11th Cir. 1989).

43. See ASCA; see also *supra* note 17 and accompanying text.

44. AACD, *supra* note 21, § B(2).

45. See *id.*; cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1-3) (1981) (serving as the corresponding code section to the ASCA).

ical Standards seem to offer little direction and guidance as to what conduct should be followed and what actions can be predicted on behalf of the counselor.<sup>46</sup>

Consequently, because the Ethical Standards do not provide detailed guidance for the daily problems encountered by the school counselor, the counselor should have a working understanding of the generally accepted practice in the community by school counselors regarding the situation, including alternatives used by other counselors.<sup>47</sup> This knowledge of professional practice may be accomplished by membership in professional organizations, subscribing to professional journals, and attending regional and national conferences for school counselors. Also, by networking with school counselors in your state or at least in your region, you may determine the generally accepted professional response to this situation.

The primary concern of counselors is the confidentiality of the relationship between them and the students, since this interest is essential to effective counseling. In determining what type of action should be taken, a reasonable counselor should make an assessment of the student by considering the student's age and maturity, her family home life and the school environment in light of the community standards set forth for a school counselor to follow. Additionally, the student's age will play a role in the necessity for confidentiality and in the student's expectations of privacy.<sup>48</sup> For an older student, confidentiality is more important because she may be less willing to discuss matters without the assurance of confidentiality.<sup>49</sup>

However, in balancing confidentiality against disclosure, if the student's condition indicates that there is clear and imminent danger to the student, the reasonable counselor may choose to take direct personal action or inform responsible authorities.<sup>50</sup> As a matter of fact, the Ethical Standards of both the AACD and ASCA advise that the responsibility to pupils by the school counselor is to inform the appropriate authorities when the pupil's condition indicates a clear and imminent danger to the pupil or to others based on careful deliberation and possible consultation with other professionals.<sup>51</sup> The ASCA standard considers the potential for lawsuits and is a primary reason for school counselors to be knowledgeable in the latest norms in the profession.<sup>52</sup>

It has been suggested that, even with court rulings regarding the need for parental consent in such state-controlled areas as abortion, the minor's health and privacy interests are more important than those of the parents, thus adding to the necessity of confidentiality in the school counselor-student relationship.<sup>53</sup> For example, North Carolina recognizes a minor's right to consent to health treatment for

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46. See, e.g., AACD, *supra* note 21, § B(2).

47. Vernon L. Sheeley & Barbara Herlihy, *Counseling Suicidal Teens: A Duty to Warn and Protect*, 37 SCH. COUNS. 89, 92 (Nov. 1989) [hereinafter Sheeley & Herlihy].

48. *Id.* at 93.

49. *Id.*; Smith, *supra* note 14, at 124.

50. ASCA, *supra* note 21, § A(9).

51. *Id.*; AACD, *supra* note 21, § B(4).

52. ASCA, *supra* note 21, § A(5).

53. Smith, *supra* note 14, at 126-27.

pregnancy, communicable diseases, substance abuse or emotional disturbance.<sup>54</sup> If, however, the opinion of the attending physician indicates that notification of a parent is essential to the life or health of a minor, a physician shall notify a parent.<sup>55</sup>

To reiterate the points to be made regarding a pregnant student, it is important to first note that this situation is not addressed by the testimonial privilege. Second, the ethical standards are not legally binding, and even if your state or jurisdiction has adopted some ethical standards or you rely on the standards of the AACD or ASCA, these standards usually are not detailed and are inadequate predictors of the standard of care to be exercised by school counselors. Third, it is emphasized that the suggested steps a counselor should take include both consulting other counselors with similar or greater credentials in your community to discover what is the generally accepted practice exercised by school counselors and keeping abreast of professional practices by attending conferences that discuss and develop applicable regional, state and national standards. Taking these steps may protect a school counselor from suit either by the student or her parents.

### B. Child Abuse

If a student tells a school counselor about the physical abuse he or she is subject to from a parent, or your observations indicate child abuse, all states impose a statutory duty on the counselor and other professionals to take affirmative action to protect the minor without the threat of civil or criminal liability.<sup>56</sup>

To illustrate this, suppose an eighth grade student is talking to you about her schedule for the high school freshman year, and you notice contusions or abrasions on her that seem unusual. Based on certain questions you ask the student, you believe that she is a victim of child abuse. The action taken by the counselor should follow the school system's written policy regarding child abuse which

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54. N.C. GEN. STAT. § 90-21.5(a) (1990).

55. N.C. GEN. STAT. § 90-21.4(b) (1990).

56. See, e.g., N.C. GEN. STAT. § 7A-543 (Supp. 1992):

Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his name, address, and telephone number. Refusal of the person making the report to give his name shall not preclude the Department's investigation of the alleged abuse or neglect.

In the case of any report of abuse, the Director of Social Services, upon receipt of the report, may immediately provide the appropriate local law-enforcement agency with information on the nature of the report. The law-enforcement agency may investigate the report, and upon request of the Director of the Department of Social Services, the law-enforcement agency may investigate the report, and upon request of the Director of the Department of Social Services, the law-enforcement agency shall provide assistance with the investigation.

*Id.*

should include reports to the proper authorities.<sup>57</sup> After the counselor has filed a report of suspected abuse or neglect, it may later be proved that the child's injuries stem from causes other than abuse or neglect. As a result a parent may decide to sue the teacher and *team* involved in reporting the suspected abuse. Fortunately, chances are slim that the parent will prevail, since most state statutes grant counselors immunity from civil or criminal liability when reporting suspected child abuse cases.<sup>58</sup> It is the failure to report suspected abuse or neglect that may result in criminal sanctions and civil liability.<sup>59</sup> Therefore, even if the counselor wants to protect the student's confidences, the counselor must follow the state statute that requires disclosure.

### C. Criminal Activity Problems

A student comes into your office waiving a knife stating that he intends to kill his math teacher whom he perceives is "picking on him." He tells you his plan, including his intent to kill his teacher after the school bell rings, and he rejects any pleas from you to reconsider his plan of action. The AACD Standards state that a school counselor's responsibility to students is to inform the appropriate authorities when the student's condition indicates a clear and imminent danger to the counselor or others.<sup>60</sup> This should be done after careful deliberation, reviewing written school policy, and, if possible, consultation with other school counselors or professionals such as a psychologist, psychiatrist or social worker. It is clear that there is an ethical obligation to inform appropriate authorities but the legal obligation is less clear. A counselor may have a common law (not statutory) obligation to report the *future* crime to the police and to warn the teacher of the student's plan of action.<sup>61</sup>

In order to fully understand this obligation, a review of the decision in *Tarasoff v. Regents of the University of California*,<sup>62</sup> is important. The facts in the case show that Posenjit Poddar was a voluntary out-patient under the care of a psychologist at the University of California.<sup>63</sup> During the course of treatment, the psychologist learned from Poddar that he intended to kill an unnamed woman, easily identified as Tatiana Tarasoff, because she spurned his advances.<sup>64</sup> At no time did the psychologist notify Tatiana or her parents of Poddar's intention.<sup>65</sup> Eventually, Poddar carried out his threat.<sup>66</sup> Tatiana's parents brought suit against the therapist and oth-

57. Smith, *supra* note 14, at 127.

58. See AMERICAN SCHOOL COUNSELOR ASSOCIATION, POSITION STATEMENT, CHILD ABUSE/CHILD NEGLECT (1981).

59. Smith, *supra* note 14, at 128; Jody Aaron, Note, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 WAYNE L. REV. 183, 188 (1981).

60. AACD, *supra* note 21, § B(4).

61. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

62. 551 P.2d 334 (Cal. 1976).

63. *Id.* at 341.

64. *Id.*

65. *Id.*

66. *Id.*

ers claiming that the defendants should be liable for Tatiana's death because of a failure to warn her or her parents about Poddar's threat.<sup>67</sup> The psychologist defended, claiming that the confidential communication between him and Poddar could not be revealed to a third party.<sup>68</sup>

The Supreme Court of California found in favor of the parents.<sup>69</sup> The court reasoned that as a general rule under common law, a person does not have a duty to control the conduct of another nor to warn those endangered by such conduct.<sup>70</sup> However, an exception to the rule may be a duty to a third person if the defendant (therapist) stands in some *special relationship* to either the person whose conduct needs to be controlled (Poddar) or in a relationship to the foreseeable victim of that conduct.<sup>71</sup> "Such a relationship may support affirmative duties for the benefit of third persons."<sup>72</sup> Therefore, it can be alleged that Tatiana's death proximately resulted from the therapist's negligent failure to warn Tatiana or others that were likely to apprise her of the danger. Further, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious threat or danger to another, the therapist has a duty to exercise reasonable care to protect the foreseeable victim from danger.<sup>73</sup>

In addressing the necessity for confidential communications between the professional and the client (psychologist and patient), the court recognized the "public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy . . ." <sup>74</sup> and the need to protect the sanctity of the communications involved in treatment.<sup>75</sup> When those interests, however, are weighed against the public's interest in safety from violent assault, the court reiterated that "[t]he protective privilege ends where the public peril begins."<sup>76</sup> Consequently, the court held that the plaintiffs could proceed with their suit based on the therapist's failure to warn Tatiana.<sup>77</sup>

Likewise in the preceding illustration, because of the *special relationship* between counselor and student, the counselor has the ability, and perhaps the duty, to protect the math teacher through a warning, and failure to do so would violate this obligation. If no warnings were given and the math teacher were harmed, the math teacher may have a cause of action against the counselor for damages.<sup>78</sup>

In a second illustration, a student tells you in confidence that he committed a crime two days ago. First, you may try to advise him of the benefits of seeing a

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67. *Id.*

68. *Id.* at 346.

69. *Id.* at 353.

70. *Id.* at 343.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 346.

75. *Id.*

76. *Id.* at 347.

77. *Id.* at 348.

78. *See id.*

lawyer in order to seek proper representation. Second, a counselor should determine whether a state statute or school policy requires the reporting of a past crime. If no statute or policy imposes the requirement, a counselor is immune from liability since common law does not impose liability on persons for failing to report a crime.<sup>79</sup> On the other hand, a reasonable counselor may, at his discretion, based on accepted school counselor practice, determine that it is in the best interests of the student to report to authorities the past crime.<sup>80</sup> If so, is the counselor liable to the student? With respect to other health care practitioners, justification for disclosures of confidential information has been found if the best interests of the client are being served.<sup>81</sup>

#### D. Suicide

During the course of a conference with a student, you discover that the student is contemplating suicide. The student confides that his problems stem from his relationship with his girlfriend, and, therefore, he intends to first kill her and then himself. What action should a counselor take? From our previous discussion of the AACD and ASCA Standards, the counselor clearly has an ethical obligation to inform the appropriate authorities.<sup>82</sup> Moreover, in our previous examination of *Tarasoff*, the rule set forth by the California Supreme Court required that a therapist has a duty to exercise reasonable care once it is determined that a patient poses a serious threat or danger to another.<sup>83</sup> In this situation, the counselor should warn the student's girlfriend.<sup>84</sup>

However, it should be noted that no state has extended the *Tarasoff* rule to the protection of a suicidal patient. If the pupil contemplates suicide *only*, and carries out the act, the counselor, it seems, does not have a legal duty to warn the parents.<sup>85</sup> The court's reasoning in *Tarasoff* requires that the disclosure of a confidential communication by a therapist be limited to dangerous or violent assaults on third persons and not self-inflicted harms.<sup>86</sup>

The courts seem to agree that *Tarasoff* requires a foreseeable and identifiable potential victim that the therapist has knowledge of through confidential commu-

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79. See *Mangeris v. Gordon*, 580 P.2d 481 (Nev. 1978) (holding no duty to warn where facts are insufficient to create a reasonably foreseeable risk of criminal activity).

80. *Sheeley & Herlihy*, *supra* note 47, at 94.

81. *Id.*

82. See AACD, *supra* note 20, § B(4); ASCA, *supra* note 20, § A(9); *Sheeley and Herlihy*, *supra* note 47, at 90.

83. *Tarasoff*, 551 P.2d at 340.

84. See *id.*

85. *Id.* at 343; see *supra* note 40.

86. *Bellah v. Greenson*, 146 Cal. Rptr. 535 (Cal. Ct. App. 1978). However, in a case involving a pastor-counselor, there was a different outcome that allowed the claim against the pastor whose client committed suicide. This case of *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (Cal. App. 1984) was distinguished from *Bellah* because it involved intentional counseling methods that caused the client grave mental distress that led to the suicide. Those methods included exacerbating the feelings of guilt, anxiety, and depression of the young parishioner by seemingly convincing him that suicide was an acceptable alternative to living if one is unable to overcome one's sins.

nication.<sup>87</sup> Therefore, the initial problem that was posed indicates that there would be a duty to warn regarding the girlfriend and possibly not a duty to warn regarding a suicide.<sup>88</sup> A reasonable counselor may, at her discretion, determine whether it is in the best interests of the student for the counselor to report the contemplated suicide to the appropriate authorities, especially in light of AACD Standards section B.4 which requires disclosure.

## V. CONCLUSION AND RECOMMENDATIONS

There appear to be other complications regarding the reasonable qualifications of the members of the society for whom the AACD and ASCA Ethical Standards were promulgated. Should it matter whether a counselor has a B.A., M.Ed., M.A., M.S.W. or Ph.D.? Are uniform qualifications needed to produce more detailed guidelines?

The fact that *counselor* is a generic term seems to pose problems for the profession. There are counselors with similar titles of various status and credentials. This is different from the professional fields of law and medicine which have baseline degrees and training for entry into each profession. The requirement of a baseline degree allows for specific code guidelines founded on common education, training and licensing that formulate a common standard of care based on uniform education, training and licensing. This commonality is generally not found within the counseling profession and may be a primary reason for confusion regarding their standards of practice. Further, the AACD and ASCA Ethical Standards do not specify qualifications for a counselor in measurable terms such as degrees, although it is believed these associations would support a master's degree.<sup>89</sup> This imbalance in the Ethical Standards leads to an erosion of the profession's standard of care because counselors may not be required to exercise the same standard of care based on their dissimilar qualifications. In the thirty-three states with counselor licensure requirements, the counselor profession is defined in terms of degrees, experience, and the passing of a national examination. Although all school counselors are certified, many are not licensed.<sup>90</sup>

What may be done to give guidance to counselors of various backgrounds? Suggestions include asking other counselors what proper course of action would be reasonable by counselors within the community; establish a *hot line* to the counselors' professional organization where a trained person would render opinions on

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87. *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. 1988); *Dunkle v. Food Serv. E., Inc.*, 582 A.2d 1342, 1347 (Pa. Super. 1990); see also *Thompson v. Alameda County*, 614 P.2d 728 (Cal. 1980) (narrowing the *Tarasoff* holding to say no duty exists where aggressor made general threats of violence). Cases which have adopted the *Thompson* limitation include the following: *Morton v. Prescott*, 564 So. 2d 913, 915 (Ala. 1990); *Hines v. Bick*, 566 So. 2d 455, 457 (La. Ct. App. 1990); *VanLuchene v. Mont.*, 797 P.2d 932 (Mont. 1990); *Wofford v. Eastern State Hospital*, 795 P.2d 516, 519 (Okla. 1990).

88. See *id.*

89. See AACD, *supra* note 21; ASCA, *supra* note 21.

90. The following states' statutes exempt school counselors from their licensing requirements: ALA. CODE § 34-30-21 (1989); ARK. CODE ANN. § 17-24-103 (Michie 1990); LA. REV. STAT. ANN. § 37.1113 (West 1990); ME. REV. STAT. ANN. tit. 20-A, § 4008 (West 1990); MINN. STAT. § 148B.28 (1990); see also MASS. GEN. LAWS ANN. ch. 71, § 38G (West 1990) (providing an example of requirements for certification).

how a reasonable counselor would handle a similar situation based on the problem, skills and training of the counselor seeking advice.

Another safeguard for counselors might be through the use of informed consent of students and parents. This may be achieved through a school board policy which informs the students and their parents about the state laws, school rules and administrative procedures regarding confidentiality.<sup>91</sup> By encouraging both parents and students to sign a waiver granting a counselor permission to disclose particular information obtained during counseling, a counselor reduces the risks of potential liability for breaching confidentiality or a duty of care to warn if a student's well-being is in danger.<sup>92</sup> Even by taking these steps, however, there is no guarantee that liability would be avoided. Generally, courts do not like to interfere with the daily operation of administration within an agency. Instead, courts give deference to decisions made by school systems and usually do not impose liability when breaching confidentiality is reasonable given the circumstances.<sup>93</sup>

Counselors perform a vital function in the schools. The professional duties require that they obtain confidential information from their students, posing a dilemma of disclosure or nondisclosure. Statutory and ethical standards legislated for the counselor's protection do not afford the security that may be perceived by counselors. Counselors must appreciate their positions and act as a reasonable counselor would act under like situations. This means that school counselors should keep up to date as to the methods and practices of professionals in the local community, the state and possibly the nation. In effect, the only real protection from liability the counselor has is to act reasonably in all situations.

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91. Sheeley & Herlihy, *supra* note 47, at 94-95.

92. *Id.*

93. *Id.* at 94.