

1998

Agenda: The Duty of Confidentiality and Harm To Others: Group #6

Recommended Citation

Agenda: The Duty of Confidentiality and Harm To Others: Group #6, 66 Fordham L. Rev. 1623 (1998).

Available at: <http://ir.lawnet.fordham.edu/flr/vol66/iss4/50>

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AGENDA:

THE DUTY OF CONFIDENTIALITY AND HARM TO OTHERS

Group #6

- I. Purposes and Models of Confidentiality under Secular Law and the Rules of Professional Responsibility
 - A. Purposes
 1. To assist all clients needing help.
 2. To assist those clients who are blameless but not yet identified as such.
 3. To maintain the integrity of the legal system.
 4. To protect the right to counsel.
 5. To enable the lawyer to take a pro-active role and encourage the client to act appropriately.
 - B. Models: Should the nature of the attorney-client relationship affect the scope of confidentiality?
 1. Limited representation: the attorney is asked for limited advice in connection with a specific legal matter.
 2. Selective disclosure: the attorney undertakes to represent the client but gives notice to the client that some information may be revealed, perhaps to the court.
 3. Pro-active representation: the attorney represents a client for a matter or more than one matter and will maintain confidentiality with the understanding that he will seek to persuade the client to avoid harm.
 4. Holistic representation: the attorney attends to the client's whole being, going beyond the legal issues.
- II. Interplay between Religion and Confidentiality

These questions can be discussed from two perspectives: the understanding of religious beliefs by the community holding them and the lawyer's understanding of his or her own beliefs.

 - A. Origin
 1. Do confidentiality rules have a base in religious ideas, stories, or parables?
 2. Is there a basis in religion for keeping secrets premised on the idea of the sanctity of the person?

B. Interpretation

1. Does religion play a role in the interpretation and application of the rules of professional responsibility relating to confidentiality?
2. Should religion play a role?
3. Does religion play a role in making confidentiality decisions when there are gaps in the rules of professional responsibility relating to confidentiality?
4. Should religion play a role?
5. Does religion play a role when applying professional rules relating to confidentiality that are viewed as inconsistent with other rules or hypocritical?
6. Should religion play a role?
7. Is it appropriate to be informed by religious principles if religious texts and interpretations differ from person to person and from religious group to religious group?
8. Is there a distinction between religious principles that are of significance in interpreting and applying the professional rules; i.e., those of universal benefit (everyone in the community can receive the benefit regardless of their faith) or those of a particular benefit (benefit limited to those of a specific religious community i.e., salvation)?

C. Covenant

1. Should there be, between client and attorney, a covenant concept of relationship as explained by Professors Allegretti and Lesnick?
2. Does a covenant concept of relationship affect the level of trust the lawyer has in the client?
3. Does the covenant concept of relationship between attorney and client require the lawyer to urge the client to disclose information in order to avoid harm?
4. Does such urging interfere with the attorney/client relationship of trust?

D. Attorney Role

1. Is there a religious basis for placing the attorney in a special role because of the attorney's expertise, access to the judicial system, or role as an officer of the court?

2. Does the Establishment Clause or the Free Exercise Clause of the First Amendment to the United States Constitution affect the permissible impact of religion upon a lawyer in any activity involving the judicial system?
 3. If the lawyer has a special role based on religion, should this role protect the confidentiality of information given by the client, the integrity of the court procedure, or a third person who may be adversely affected by the client's information?
 4. If the lawyer is also a member of the clergy, is there a basis in religious principle for which role takes primacy?
- E. Challenges to the Professional Rules
1. Can religious principals provide guidance as to whether to challenge the professional rules or to disobey those rules because of:
 - * who drafted them?
 - * the procedure by which they were drafted?
 - * the unequal adverse affects on some clients (poor and disadvantaged)?
 - * inconsistencies between the rules?
 - * inconsistencies between a rule and the lawyer's conscience?
 2. Should religious principles provide guidance as to whether a lawyer should resign from representation when the professional rules about confidentiality prohibit or require disclosure?
 3. Should counsel risk secular sanctions when religious doctrine and secular rules about confidentiality conflict?
- III. Applications of Secular and Religious Doctrine to Breach Confidentiality in Order to Avoid Harm
- A. What circumstances permit or mandate disclosure of information under the rules of professional responsibility?
 - B. What is a lawyer's duty to disclose if a client who is mandated to disclose information by statute, administrative regulation or judicial opinion (e.g. securities, bankruptcy) refuses to do so?
 - C. Do we go to religious guidance to avoid harm only after we have considered principles of contract and agency as well as moral and ethical beliefs derived from philosophy, personal experience, and community standards?

- D. Does the nature of the harm that may be caused by a client's conduct affect the duty of confidentiality under religious principle:
 - 1. Possible future physical injury to another person (e.g., possible collapse of a poorly constructed elevator)?
 - 2. Possible future injury to the environment (e.g., pollution of a river)?
 - 3. Possible future injury to community interests (e.g., secret negotiation with public entities that will have an adverse effect on part of the community; efforts by private business that will have an adverse effect on a community's resources)?
 - 4. Possible death to another person?
 - 5. Systematic threats to the judicial system?
 - 6. Correction of a miscarriage of justice based on a mistake of fact?
- F. Does the certainty or likelihood of harm affect the decision to disclose under religious principle?
- G. Does the use by the client of a lawyer's work affect the decision to maintain a confidence?