

CHAPTER 5

DISCRETION:

THE SECURE CONFIDANT George Farquhar remarked that, "there are secrets in all families", (1) and it is often necessary that these should be shared with a professional adviser. Carr-Saunders and Wilson said of the client: "He places his health and his fortune in the hands of his professional advisers, and he entrusts them with confidences of an intimate and personal kind. He is interested there- fore not only in the technical, but also in what may be called the moral, quality of the service." (2) Why Confidences are Imparted

The need for entrusting confidences is fairly obvious. If the profes- sional adviser is to act as the alter ego of his client (see page 63) he needs to know as much about the client's affairs as the client himself. If he is to give competent advice in a more limited field he must be supplied with all the facts of the case. Sometimes sound advice on a particular matter depends upon thorough familiarity with the client's history and temperament. This particularly applies to advice by a medical adviser or family lawyer. Carr-Saunders and Wilson point out that the doctor can be much helped in making his diagnosis if he knows the whole man — habits, foibles, past and present surroundings, and so on. (3) Another commentator has observed: "No one save the priest in the confessional is so near a witness as the physician of the failings, weak- nesses, degradations and nobility of human beings. No one comes so close to another in suffering, or is thus so privileged, at times, to witness the heights to which human dignity can reach." (4) Types of Confidential Information

The sort of confidential information that comes a doctor's way is infinitely various. The patient may be suffering from a grave disease, such as cancer, which he or his family are anxious should not become known. He may have a complaint with overtones of moral turpitude, such as venereal disease or the effects of drug taking. Patients may 70 **DISCRETION:**

THE SECURE CONFIDANT 71 have suffered injury in circumstances they do not want talked about, such as the wife beaten up by the husband or the thief injured in the course of his criminal activities. There may be mental trouble or personality defects such as homosexuality. Apart from the end- less possibilities in the realm of medicine itself, the physician very often acquires non-medical information about his patients. The psychiatrist in the course of analysis, the anaesthetist listening to the murmurs of a patient returning to consciousness, and others similarly placed may acquire information far removed from the purely medical.

Other types of professional practitioner may well acquire informa- tion which it would be a grave embarrassment to the patient to have widely known. The cosmetic dentist who equips the television "person- ality" with a flashing artificial smile may hold a career in the palm of his hand. The family solicitor builds up a host of facts about his client which would cause inconvenience or worse if revealed. The fact that his house is mortgaged, or that his will makes rather smaller provision for his wife than she might expect, or that he was born out of wedlock or has been in trouble with the police are things the client would prefer to see securely locked away behind the facade of Lincoln's Inn Fields or Bedford Row. The estate agent who could tell you what your neighbour paid for his house, the literary agent who could reveal the plot of the best- selling author's next two or three novels, the surveyor who knows just how many structural flaws there are in your apparently desirable residence — all these could cause great embarrassment if they did not respect their clients' confidences.

More than mere embarrassment is involved, however. Professional people acquire information that, if revealed, could cause great economic loss to their clients. The accountant knows more about the financial position of the company whose accounts he audits than many of the shareholders. Although certain

information is required by law to be made public, its premature disclosure, or the disclosure of other facts not covered by these legal rules, could often cause serious damage. An architect called in to design a new factory may learn trade secrets that his client's competitors would gladly pay to acquire. The patent agent has many opportunities of enriching himself and others by disclosing details of inventions. It is needless to multiply examples: the propensity of professional consultants to acquire confidential information is plain. This is not of course limited to the professions: bank managers and inspectors of taxes, to name but two obvious examples, acquire as much confidential information as many professional consultants. It is however a dominant feature of professional practice.

72

PROFESSIONAL ETHICS The Need for Security

A client needs to feel completely secure that information acquired by his professional consultant will be kept confidential. If he does not have this feeling of security he is likely to withhold information, and thus receive advice which is less complete or effective than it might otherwise be or may even be completely wrong. If the client feels there is a risk of disclosure he may worry and, in medical cases, may even worsen his complaint. With this in mind, the law has created a special privilege in legal matters, the object being "to ensure that a client can confide completely and without any reservation whatever in his own solicitor". (5) Professional Rules

Realising the importance of secrecy, the professions, particularly those of medicine and law, have devised appropriate rules for preserving it. The Hippocratic oath says: "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." (6) The Declaration of Geneva, produced by the World Medical Association, requires a newly-admitted doctor to swear that "I will respect the secrets which are confided in me" and the international code of medical ethics, which is based on this declaration, includes the requirement that "a doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him". (7) In commenting on these rules the British Medical Association point out that the basis of the relationship between a doctor and his patient is one of absolute confidence and mutual respect. The doctor's awareness of the patient's reliance in his trustworthiness "serves to invoke the observation of ethical standards and the need to act always in the best interest of the patient". The effect of this is somewhat weakened by the statement that "the complications of modern life sometimes create difficulties for the doctor in the application of the principle, and on certain occasions it may be necessary to acquiesce in some modification". (8) The wording of this qualification is disquieting. The circumstances in which it is justifiable to break confidence, if they exist, should surely be set out with precision and not left to be inferred from language as vague as this. Such a relaxation of the proper strict standards may be used by some doctors as a justification for revelations which may seem to them harmless, but could in fact cause embarrassment to the patient. It should be possible to go to the doctor with a simple cold and feel certain that its existence will not be disclosed

DISCRETION: THE SECURE CONFIDANT

73 without one's consent. A reputation for absolute fitness may be important to the patient in his work. Even if it is not, the medical man has no business to gossip about his patient's ailments.

Similar rules are explicitly laid down for the Bar (9) and solicitors. (10) The strictness of the rule in the case of solicitors is illustrated by its application to wills: "Where a testator is alive, a solicitor having the custody of his will is not free to disclose the contents of that will to anyone, even to the testator's wife and even if the testator is in a lunatic asylum. If the testator is dead, the solicitor who has the custody of the will must not disclose any information before probate is granted, except to the executors, without the consent of the executors." (11)

Chartered accountants regard it as fundamental to their professional status that they should treat the information contained in accountancy records as being available to them for the purpose only of carrying out

their professional duties. "All members are well aware that to divulge information about a client's affairs would be a breach of professional confidence having the most serious consequences." (12) Other professions have not made express rules for this purpose, but would no doubt treat breaches of confidence as professional misconduct. An example from the surveyor's profession is furnished by Norman J. Hodgkinson in his book *Debit Experience Account* (p. 43): "In the case of a sale or purchase by private treaty, the sale price must not be divulged, although a reporter will often press for this information." He goes on to sanction disclosure to the press of the reserve price or last bid in an auction of property withdrawn without sale, presumably because this information will have been made public in the auction room. A professional rule partly designed to ensure that clients' confidences are preserved is that precluding the sharing of professional offices with persons outside the profession (see page 66). Employed Practitioners

While professional people in private practice would find no difficulty in observing these rules of confidence, the same is not always true of employed practitioners, who may come under pressure from their employers. The B.M.A. has made rules to deal with this situation. For example, it has laid down that medical records should be sent to medical officers employed by government departments only when written consent has been obtained from the patient. (13) Again, personal medical records of workers treated by doctors employed by

74

PROFESSIONAL ETHICS industrial firms are to be kept in the custody of the doctor, who, on termination of his appointment, is required to hand them over only to his successor. If there should be no successor, he must retain the custody of the records himself. (14) While the practitioner will no doubt strive to observe these rules, they are not of course binding on his employers. Cases not infrequently arise where doctors get into the news by resisting demands from the employer to be shown medical records. An example in 1968 was the case of the University College of Aberystwyth, where the authorities applied pressure on the director of the student health service, Dr. John Hughes, to supply details of pregnancies among women students. When Dr. Hughes refused to do this, he was dismissed but later reinstated under pressure from the B.M.A. (IS) In another 1968 case the coroner at an inquest on a university student who had committed suicide criticised the medical officer for not telling the university authorities and the parents when he observed a propensity to suicide. The doctor replied that if he did that sort of thing students would not come to him at all, and a medical spokesman described the coroner's remarks as "quite ludicrous". (15A) **Duration of Duty**

The duty to maintain confidences does not of course end with the practitioner-client relationship. As Sir Thomas Lund puts it, "The duration of the privilege is for ever". (16) Barristers who formerly practised in another profession are specifically precluded from accepting ___ instructions in any matter in which they have been previously instructed in their former professional capacity (17). **Exceptions**

While the principle of secrecy is clear, the detailed working out of the rule can give rise to difficulties. It cannot be an absolute rule, and must be applied with common sense. Sir Thomas Lund gives six categories of information not covered by the rule. These are: 1.

Information derived from collateral sources and not through professional confidence. 2.

Facts patent to the senses, that is facts which are obvious to anyone, as for instance that the client is of unsound mind. 3.

Information which the client intends or authorises to be disclosed. 4.

Records of public proceedings. 5 Information disclosed by one client to an adviser acting in the same matter for several clients. 75 **DISCRETION:**

THE SECURE CONFIDANT

6. Communications made in furtherance of a fraud or crime. (18) Another possible exception occurs in the case of an accountant who is being replaced as auditor of a company. The rules of the Institute of Chartered Accountants require that no accountant shall become the successor to an auditor without first obtaining from him full information about the reasons for the change. Knowledge of Client's Guilt

Laymen often ask how an advocate can conscientiously defend a client who has confided his guilt. This is an old conundrum and reveals a misunderstanding of the advocate's function, which has harmed his reputation throughout the ages. English law is proud of the tradition which enables the biggest villain unhung to find without difficulty someone who will speak for him, and make the best case possible without deliberately misleading the court. The full statement of the position is as follows: "As regards confessions of guilt, different considerations apply to cases in which the confession has been made before the advocate has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings. If the confession has been made before the proceedings have been commenced, it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate. Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused. In considering the duty of an advocate retained to defend a person charged with an offence who, in the circumstances mentioned in the last preceding paragraph, confesses to counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind:- (1)

That every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always

76

PROFESSIONAL ETHICS whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the burden of proof rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the advocate for the accused. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged. The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case. If the duty of the advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his counsel, is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the advocate from his imperative duty to do all he honourably can do for his client. But such a confession imposes very strict limitations on the conduct of the defence. An advocate "may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud". While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence, which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him. A more difficult question is within what limits, in the case 77 DISCRETION:

THE SECURE CONFIDANT supposed, may an advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue

that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go.” (20)

Except in cases, mentioned below, where the law imposes a duty to reveal facts of a criminal nature, the general position of a professional man who learns of such facts (otherwise than as defending advocate) is that he should advise his client to disclose them, or otherwise deal with them in a way which avoids impropriety, and if the client refuses should decline to act further in the matter. Thus where a solicitor learns that documents handed to him by his client have been forged he should advise the client to disclose the forgery and if this is refused should decline to act further. In that event the solicitor would be under a duty to disclose the forgery to any solicitors subsequently instructed by the client to carry through the same transaction. Where a client is engaged in an illegal transaction (e.g. in breach of building regulations) his solicitors should discourage him from continuing and should themselves decline to act for him. (21) Knowledge Derived from Other Clients

Many problems arise through information relating to one client proving material in the affairs of another client of the same practitioner. Although normally a barrister must accept any brief offered to him, he is justified in refusing to accept a brief if thereby he would be embarrassed through his possession of confidential information acquired in a previous case. Where counsel advises a client how to change a design to avoid infringement of a patent he ought to regard his advice on the changed design as confidential and not repeat it to another client with the same problem. (22)

It is considered to be the duty of a patent agent, where two inventors come to him independently with the same invention, to proceed with both applications without informing either client of the existence of the other (23). Solicitors who acted for one client and obtained confidential information are not at liberty to disclose it to new clients, even though it might be of the greatest possible assistance to them. Where a solicitor is concerned in non-contentious business for several clients, but it becomes clear that litigation is probable and that the solicitor would be

78

PROFESSIONAL ETHICS embarrassed in acting for any of the clients by reason of knowledge acquired by him of the other's case, he should ensure that both clients are represented by other solicitors (24). Non-Clients

A practitioner may have a duty to preserve confidences even in the case of persons who are not his clients. Sir Thomas Lund gives the example of solicitors acting for a creditor and receiving a visit from the debtor, who was unrepresented. The debtor asked if he could talk to the solicitors in confidence, and they agreed, whereupon the debtor gave them highly confidential information. The Law Society advised the solicitors that they had acted quite wrongly in putting themselves into the position of giving the debtor a chance to speak to them in confidence, but that having done so they ought not to disclose the information and their only fair course was to tell their client that they had been supplied in confidence with information by the debtor which they were not at liberty to pass on, and therefore they could no longer continue to act. (25) In another case where solicitors received instructions to institute divorce proceedings purporting to come from the husband but in fact coming from the wife, the Law Society advised that there was no objection to their disclosing the information to the husband and his solicitors (26). A solicitor collecting a debt for a client is not allowed to communicate with the debtor's employer or anyone else whose knowledge of the unpaid debt might prejudice the debtor. (27) Rules Imposed by Law

Having discussed the professional rules relating to the keeping of confidences, we turn briefly to the legal position. The law has found it necessary for the furtherance of justice between parties to invest communications between a party and his solicitor, or between the solicitor and counsel, made during and with reference to judicial proceedings or in anticipation or for the purposes of such proceedings, with a legal privilege which protects them from being ordered to be disclosed. The privilege is that of the client and not the legal adviser. If the client elects to waive the privilege it therefore ceases to operate. The law has not extended this protection to other types of professional communication, e.g., those between doctor and

patient. It is clearly however the professional duty of a practitioner to resist disclosure as far as he possibly can without himself incurring legal penalties. If he does hold out to the extent of incurring such penalties they are unlikely to be regarded as a ground for disciplinary proceedings by his professional

DISCRETION: THE SECURE CONFIDENT

79 body. This is indicated by the B.M.A.'s statement of the position: "The doctor's usual course when asked in a court of law for medical information concerning a patient in the absence of that patient's consent is to demur on the ground of professional secrecy. The presiding judge however may over- rule this contention and direct the medical witness to supply the required information. The doctor has no alternative to obey unless he is willing to accept imprisonment for con- tempt of court." (28) The B.M.A. have acknowledged that there may be circumstances in which a medical witness would be acting in accordance with the highest principles of medical ethics by refusing to obey the judge and taking the consequences, but they recommend that "this serious step should only be taken after consultation with those who are competent to advise". (29) C. Croxton-Smith takes the view that an accountant should not answer questions about his client's affairs unless under subpoena. "Even in this event" he goes on "I think it should be made clear to the court that the only information the member has was obtained by him in the course of carrying out his professional duties and that he, therefore, has a strict duty of confidence to his client which he cannot break unless ordered by the court to do so. If the court does so order then the member must of course comply." (30)

While a professional man may thus be compelled by law to disclose confidential information, there are few occasions when he is required by law to volunteer such information. One example is the statutory requirement to notify cases of infectious disease. The Law Society have advised that solicitors should volunteer information to the authorities in certain cases where the national interest requires it. This probably arises only in time of war or serious national emergency, in relation to enemy aliens. Sir Thomas Lund does however mention a case where a solicitor was advised that he should disclose to the Home Office certain details of an anarchist client. (31)

A duty of disclosure formerly existed (in theory at least) where a criminal offence amounting to felony was known to have been committed, since failure to disclose itself mounted to the crime of misprision of felony. This crime has now been abolished however. Privacy

The above discussion has been mainly concerned with the preservation of confidences. A word may be added however on the subject of privacy in consultations. A client may feel confident that his secrets will not be disclosed to the outside world, and yet be hampered and

80

PROFESSIONAL ETHICS embarrassed if he is required to speak of intimate matters, or undergo physical examination, in surroundings where his privacy is not respected. If this happens the consultation is likely to be less effective than it should be. Dr. Willoughby of Derby recorded in his Observations (1863) that on one occasion when an important lady patient was in labour and he was called in by the midwife he paused at the door of the lady's chamber, crouched down and crept into the room on hands and knees so as to examine the patient unperceived. His examination over he crept out again in the same way. (32) For centuries obstetricians were forced to examine their patients in darkness, or without drawing back the bedclothes. This kind of prudery is not unknown today. Peter Fryer records that a reader of Woman's Own wrote in 1962: "I have always attended a male doctor but now I have to undergo a rather intimate operation and my husband says it is a job for a woman doctor . . . This argument is causing trouble between us." (33)

One may smile at such absurdities, but the fact remains that acute discomfort and distress can be caused by lack of privacy. A notorious case is of course that of the teaching hospitals, where many patients undergo the most appalling indignities in full view of the interested gaze of perhaps twenty or thirty youths acquiring medical knowledge. This may be difficult to help, since professional knowledge must be acquired by practical demonstrations. It should however be done discreetly and sympathetically, and avoided so far as

possible. Official policy is to allow patients the right to refuse to be examined or treated in the presence of students.

The qualities of tact, forbearance and sympathy which a professional practitioner ought to display towards his clients will ensure that proper privacy is observed in consultations. It is a subtle characteristic of the relationship between a private consultant and his client that these conditions should prevail. With a service provided by a large organization such as a government department or big company the relationship will be more impersonal, the client may come "as of right", and the practitioner may not feel disposed to accord him more than his bare legal entitlement.