Creating a Confidentiality Agreement

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The Focus of This Report on Confidentiality

This report generally relates to the topic of confidentiality in the counseling setting. There is a significant (but not total) emphasis on pastoral agents acting in the counseling setting. This effort has been made for two reasons. First, a significant number of MARET Counseling and Assessment Software users are indeed from the pastoral field. So, this information is important to them. It is even more important to them since I have discussed the issue of a Confidentiality Agreement with many of them and they don’t have a clue what I’m talking about. That is a dangerous proposition.

Second, however, reaching down to this level of counseling agent – and, I do believe that pastoral counselors are an essential element in the whole counseling arena – we reach everyone. If I am talking to pastors and you are not a pastor, then assume that I am talking to you too! I don’t care if you are a Licensed Counselor, an MSW, a Clinical Psychologist or a Psychiatrist. If I am making a statement to a pastor, assume that statement is also being made to you. Everyone can benefit from this knowledge.

In fact, recently I had the privilege of sitting in on a few counseling sessions with a Clinical (Licensed) Psychologist. That was a paraprofessional relationship that was agreed upon by both the Psychologist and the client. During the three sessions that I attended, the Professional, Licensed Psychologist never once brought up the issue of confidentiality, an official Confidentiality Agreement, or anything of like manner. Afterward I questioned him about the practice and he stated that he didn’t think it was important. I’m sure his lawyer would have strongly disagreed!

The Purpose of the Confidentiality Agreement

A therapist of any sort – a clinical Psychologist, a Psychiatrist, a Licensed Counselor, and unlicensed counselor, a pastor or a laymen who is practicing without a signed Confidentiality Statement initiated and signed on the first day of therapy is playing Russian Roulette with a loaded gun. They are looking for trouble. Chances are, they will likely find it sooner rather than later in their career. Absolutely no one is exempt. This should be the first priority in any practice – I don’t care what type of practice it is.

The purpose of a Confidentiality Agreement is to spell out in clear terms the degree of confidentiality that the client can expect during counseling sessions. This exercise will help the therapist understand the entire scope of confidentiality in therapy. All too often, a therapist explains (verbally) to a client that everything that is discussed in sessions is confidential. Then, the client discloses information that the therapist is required by law to report to authorities\(^1\), the therapist reports that information, and the client is either confused or sues the therapist for the

\(^1\) Such as an act of child sexual abuse of a minor…
breach of confidentiality that they thought was “absolute.” This is a problem that could have – and should have – been prevented from the very first session of therapy.

There is no such thing as “absolute confidentiality” in the counseling office. Certain matters must be reported by law. Other issues must be reported by ethical constraints. Therefore, all of these confidentiality “conditions” must be laid out in a clear and concise document that the client can read prior to disclosing any information.

Without this document presented in writing and signed by both the therapist and the client, the therapist opens themselves up to litigation unnecessarily. Since State laws (in the United States) govern these issues to a large extent, it is not possible for us to create a blanket Confidentiality Agreement and pass it off to the therapist. Furthermore, that would be disadvantageous for the therapist since the process of the therapist exploring the boundaries of confidentiality on their own from their own State’s laws enlightens the therapist to their own local responsibilities. Furthermore, this process instills within the therapist the need to determine these issues prior to actually practicing in any State. Should the therapist ever move to another State (or another country) these issues would be foremost on their mind. The therapist would immediately engage in this same process in their new State to determine their responsibilities for their new location.

There are six sections that should be included in any Confidentiality Agreement. Those are: 1) A general statement accenting the importance of confidentiality in the counseling relationship on the part of both parties – the therapist and the client; 2) a statement regarding the client’s disclosure of information that could lead to church judgments such as excommunication (in the case where the therapeutic process is pastoral), expulsion from membership or other forms of church judgment (again, pastoral in nature); 3) the limitations of confidentiality including the information that the therapist must breach confidentiality by law; 4) a statement or a check box that denotes that the therapist may use “silent consultation” on the behalf of the client; 5) a statement informing the client that no information will be discussed with another therapist that will identify them in any way even for purposes of consultation; and, 6) the process that will be engaged in if the therapist ever deems it necessary to refer the client to another therapist.

We will discuss each of these sections briefly.

The Importance of Confidentiality

The first statement that should be included in any Confidentiality Agreement should be a statement that highlights the need for confidential communication between the client and the therapist. The client must understand that this is a “two way street.” Not only does the therapist need to maintain the strictest standards of confidentiality, but the client also needs to keep the contents of sessions confidential.

Nowhere else is this issue more important – and, more difficult to control – than in the church counseling setting. Any individual in a crisis situation will need to continue talking through their problems. In many cases, individuals in crisis will talk to everyone they see about their issues. In the church setting this presents a problem.

While the pastor may abide very carefully by his word to preserve confidentiality, the client themselves may disclose many things that were said during their sessions with the pastor. This presents a problem. As word begins to circulate throughout the church, it may appear that
the pastor was the one breaching confidentiality when, in fact, it was the client themselves. After a while, the client may come back on the pastor and complain that information about their sessions is “spreading like wildfire” throughout the congregation.

In an effort to prevent this problem, the pastoral counselor may wish to include a statement in their Confidentiality Agreement regarding the client’s need to keep their own issues from spreading in the congregation. The pastoral counselor may even wish to include a statement regarding his or her right to investigate any “leaks” that appear to have spread throughout the church. This may be a preventative measure.

Another issue that surfaces uniquely in the pastoral setting is the issue of apparent release of confidential information from the pulpit in the context of a sermon. This is also true of any classes that the pastor may be teaching.

If, for example, the pastor does a series of teachings on marriage and he discusses the issue of extramarital affairs, a client with whom the pastor is counseling may feel that they have been “singled out” for open display for the whole congregation. This issue needs to be covered at least verbally in the discussion about confidentiality. The creative pastor may also include a statement in the Confidentiality Agreement that discusses that issue.

**Disclosure of Information that could lead to Church Judgment**

When a pastor also acts as a counselor he or she is put in a real “bind” when it comes to certain information that is disclosed during counseling sessions. The pastor who counsels – essentially – is wearing two hats.

The pastor is not only the shepherd of the individual members of the congregation, but the pastor is the overseer of the congregation as a whole. The pastor is its spiritual and moral head. As such, the pastor is significantly responsible for enforcement of penalties decided upon by the church’s government that might lead to excommunication or some other censure in the church.

For example, a congregation may have a moral ruling that would lead to excommunication or some other type of censure for anyone who has had an affair or has committed a significant crime.

This presents a problem for the pastoral counselor. What happens when an individual comes in for counseling and confesses that they have committed one of the moral breaches that demand church judgment of some type (even removal from the position of teaching a Sunday School class)? As pastor, the obligation is to see to it that the laws of the church are enforced. As counselor, there is the obligation to preserve confidentiality (unless, of course, the offense was one that must be reported by law). What does the pastor do in this instance?

If the pastor has not prepared in advance for this eventuality, then they will be stuck in a bind that they will find nearly impossible to get out of. Therefore, this issue must be presented and discussed clearly in the Confidentiality Agreement. It cannot be excluded. Furthermore, this issue will no doubt need to be something that has to be voted on and agreed by the congregation’s oversight committee – the church board, the deacons, the elders, or whoever else might make those decisions. Lack of preparation for these eventualities will be a sure course of a Titanic disaster.

It is my recommendation (personally) that the pastor takes off the pastoral “hat” when engaging in counseling and puts on the counseling hat. This should not be done without permission and full recognition of the responsible committee that determines such matters (the
elders, etc.). Then, the *Confidentiality Agreement* would allow the pastor to spell out in no uncertain terms that moral information disclosed within the context of counseling sessions will not lead to church judgment.

Why do I recommend this action? Because the individual who is engaging in some morally unacceptable behavior is coming for help. They have taken the first step toward confession of sin, toward repentance, and toward restoration. It should be the job of the church as a whole and the pastoral staff in particular to restore those who have fallen. If an individual is not allowed to discuss certain moral issues without fear of judgment then the whole prospect of restoration from moral failure is greatly diminished.

Whatever is decided, this issue must be included with the context of a well written *Confidentiality Agreement*, if that *Confidentiality Agreement* is going to be used in the church setting – even if it won’t generally be used by the pastor.

**Limitations of Confidentiality**

It would be a horrible mistake for the therapist to ever state or even insinuate that confidentiality was universal – without any restrictions. Every type of counselor from Psychiatrists to lay church counselors have a legal obligation to report certain instances to legal authorities or to other official people. Thus, the therapist who hands out absolute confidentiality has painted themselves into a corner that may very well result in litigation.

Each therapist, counselor or pastor needs to determine in their own region exactly what their responsibilities are for reporting certain issues. In cases of child sexual abuse, for example, most every therapist (including a pastor) needs to report that incident to authorities. In many cases where domestic violence is happening wherein under-age children are involved in the home, that instance also needs to be reported. *Pastors are often not exempt!* Not reporting such an incident will result in serious legal issues – maybe even arrest of the therapist. Most certainly any license that an individual holds will be history.

Generally, any time a client states that they are going to harm themselves or another individual that threat must be reported to authorities. The therapist has a greater responsibility to protect life than to preserve confidentiality.

In the case of a previous commission of a crime, however, certain regions protect a therapist from needing to report that crime, depending on the crime that has been committed. If, for example, the crime has a certain period of time in which it surpasses the time where it can be prosecuted (i.e. petty theft), then it might not need to be reported. Capital crimes (e.g. murder) almost always need to be reported since there is no Statute of Limitation on those crimes.

Your *Confidentiality Agreement* needs to include as many specific items as possible detailing those issues which a therapist will need to breach the *Confidentiality Agreement*. The student will need to do some research on this issue for their particular area. Guidelines for this research are best obtained from local area Social Service agencies; at least they are good places to state to gather this type of information.

After the therapist has detailed as many of the reasons for breaching confidentiality as possible they also need to include a general statement within the *Confidentiality Agreement* all of the reasons that the general *Confidentiality Agreement* does not apply. The therapist may also wish to include a “blanket statement” which says that they will need to breach confidentiality on other occasions mandated by law or ethics if they feel the need to do so and responsible authorities designate that confidentiality must be broken.
The Issue of Silent Consultation

Although it is possible for the therapist to engage in “silent consultation” without the client even knowing that it happened, it is always a good idea for the therapist to include a statement regarding silent consultation in the Confidentiality Agreement. In fact, one of the best things that a therapist can do is include silent consultation in the Confidentiality Agreement as a check box.

The concept of silent consultation should be explained to the client and the client should be allowed to give permission or deny permission for the therapist to engage in silent consultation. This always clears the therapist of any perceived wrongdoing, if the therapist engages in silent consultation.

What exactly is construed as “silent consultation?” Silent consultation is any consultation that the therapist engages in wherein the therapist discusses the particular client’s case with another therapist without disclosing any information that could in any way divulge the identity of the client. This is usually done with other therapists who have no knowledge of the clientele of the acting therapist. Many times, the silent consultation is done with therapists who are out-of-state and could not in any way know the particular individual. Silent consultation should be considered a violation of the Confidentiality Agreement if there is absolutely any way for the consulting therapist to gain knowledge of who the client is. The practice of silent consultation is usually done for educational and directional purposes for the counseling therapist. If the client will not allow for silent consultation to occur, then it is unethical for the therapist to use such methods.

Disclosure of Information to another Qualified Professional

In the event that the therapist needs to consult another therapist, and the therapist believes that certain confidential information may be disclosed to the other therapist, the counseling therapist needs to obtain written permission from the client before doing so. This is an especially important topic in the church or agency wherein there are multiple counselors. In the setting that has four counselors, for example, one counselor may not under any circumstances discuss a counseling issue with another one of the four therapists without written permission from the client.

This is often done and can very easily result in litigation. Simply don’t do it! If such an occurrence is common place in your practice, then such permission needs to be contained within the Confidentiality Agreement itself and that facet of the Agreement must be verbally spelled out (and likely initialed) by the client.

If one pastor is counseling a client and needs to discuss the case with another pastor, there is a possibility that the second pastor may figure out who the client is. If the counseling pastor believes that there is any possibility of the client’s case being disclosed and the client being positively identified, then the counseling pastor needs to obtain permission in writing from the client to discuss their case. In the event that the client refuses, the therapist may not consult. It is a clear violation of the Confidentiality Agreement.

A statement regarding these issues should be spelled out clearly in the Confidentiality Agreement stating that the client’s case will or will not be discussed with other pastoral or lay counselors within the local church or the counseling center. This effort allows the client to talk freely and disclose as much information as necessary for their healing.
Disclosure of Information for Referral Purposes

In the event that the client needs to be referred to another therapist for any reason, the original therapist may not disclose any information whatsoever – even “off the record” – to the new therapist. In order to discuss any information with the new therapist the current therapist must have a signed release document that details what information may be transmitted to the new therapist. Without this signed document the release of any information may be grounds for litigation. The therapist must be very strict about this process.

When creating such a referral document, the therapist must consult with the client to determine exactly what information the client wishes for the new therapist to have. This may include assessment results from tests that have been administered, session notes taken by the current therapist, and any other information that the current therapist has accumulated during the process of counseling. Each item that will be released must be included in the release of information document that the therapist will create and the client will sign. The client has the absolute right to review the actual documents that will be transmitted to the new therapist and has right of refusal for transmission of those documents. This must be a signed document on the part of the client.

There should also be specific permission from the client regarding whether or not the current therapist may verbally consult with the new therapist regarding the client’s case. In the event that the client is willing to allow such conversion, that permission for discussion must be included in the release of information document. Furthermore, permission to discuss the client’s case verbally should be spelled out explicitly whether or not the communication is to be a one time event or if the client is giving the therapists the ability to have ongoing discussions regarding the client’s case. Finally, the agreement to allow verbal communication should probably include a statement that excludes the client from having access to the content of the verbal discussion since the content of the verbal discussion will not be recorded and any relay of information discussed may be tainted by exclusion of parts of the whole conversation between the therapists. This should be a signed document.

As a secondary means of communication between therapists, the client might agree to written only communication between therapists. This is disadvantageous to both therapists and should be discouraged as an option. The current therapist may choose to forego any communication other than the transfer of records if the client is requesting this information be placed in writing. That process may be way too time consuming for each of the therapists.

In the event that the client will not agree to any release of information at all to a new therapist, the current therapist should not engage in conversation with a new therapist at all. This would include any type of “silent consultation” on the client’s issue. In fact, if the current therapist has engaged in authorized silent consultation with another therapist in this case it would not be wise to refer the client to the same therapist with whom the current therapist has had silent consultation since the possibility of identification exists and that would breach the original Confidentiality Agreement.

When a client will not agree to allow any information or communication to occur between the current therapist and the new therapist it is wise for the current therapist to simply give the client a list of potential new therapists and let the client choose for themselves whom they will contact. No further contact should ensue.
Issues of premature treatment termination come into play at this point. If the current therapist believes that the client needs to continue therapy and the client is not cooperative in the transfer of information to another therapist, the current therapist has no idea that the client will continue on in therapy. Since such is the case, it is wise for the current therapist to have the client sign a statement that says that the current therapist believes that the client needs continued therapy and that they have been encouraged to continue the course of therapy with another therapist. There is also a place in the MARET Counseling and Assessment Software package that allows the therapist the EXIT reason for termination of therapy. The therapist should cover themselves extensively in that notation regarding the fact that therapy was adversely terminated without referral to a qualified agent.

This signed statement is critically important. This excludes the client from coming back on the current therapist in the future and saying that the current therapist was incompetent in their counsel. This is a common occurrence and the potential of such a backlash from a client needs to be prevented. Thus, the client that is being released to another therapist should sign a statement that says they understand that their treatment is not over and that in the opinion of the current therapist they need continued treatment.

If the client refuses to sign such a statement that statement should be executed by the therapist, notarized and mailed to the client’s home. The current therapist should retain a record of that document so that the current therapist can defend themselves against spurious litigation in the future.

**Assignment**

At this time, the therapist should use the above information to draft a Confidentiality Agreement using all of the guidelines above. The student should not omit anything from this Confidentiality Agreement. Make sure that the Confidentiality Agreement has a place at the bottom for the client and the therapist to sign. There should also be a place to record the date of the Agreement.

The therapist should continue to review this document until all necessary ingredients have been included. Make very attempt to include all facets of the information that has been covered – even though there have been many issues raised. This is one of the most important documents that you can have. And, it doesn’t make what level of counselor you are. Pastors are not except from these regulations. In fact, this is one of the greatest issues that result in unnecessary litigation against churches. Prevent it today!