Confidentiality and the Professions

Rem B. Edwards

Rem B. Edwards is professor of philosophy and a senior member of the medical ethics faculty at the University of Tennessee, Knoxville. He is the author of Reason and Religion: An Introduction to the Philosophy of Religion *(Harcourt Brace Jovanovich, 1972, and University Press of America, 1979) and of* Pleasures and Pains: A Theory of Qualitative Hedonism *(Cornell University Press, 1979). He also edited* Psychiatry and Ethics: Insanity, Rational Autonomy, and Mental Health Care *(Prometheus Books, 1982).*

Edwards identifies a number of values which underlie professional commitments to confidentiality: protecting or promoting the client's (1) privacy, (2) social status, (3) economic advantages, (4) openness of

communication, (5) seeking of professional help, (6) trust in professionals, and (7) autonomous control over personal information. The problem of making exceptions to confidentiality commitments is also examined.

Most professions today have adopted professional codes of ethics which include a professional commitment to confidentiality with respect to professional–client relationships. Indeed, one of the hallmarks of a profession is that it has such a code of ethics, and groups of workers who lobby for social recognition as professionals find it necessary to adopt such a code as an essential step in gaining such recognition. Doctors, nurses, lawyers, engineers, architects, businesspeople, veterinarians, librarians, psychiatrists, social workers, psychologists, and many other professional groups have pledged themselves in one way or another to respect the confidentiality of the professional–client relationship, usually by incorporating a rule of confidentiality in their professional codes and by publicizing their promises of confidentiality to their clients and the general public in a variety of ways. Some of these professional groups, like medicine and law, are supported in their professional commitment to confidentiality not only by the moral sanction of conscience and the social sanction of public opinion but also by the legal sanction of positive law and its means of enforcement. Others, such as veterinary medicine, lack the support of the legal sanction and must find their sanctions primarily in moral conscience and public opinion. Members of the public being served by the professions generally demand some measure of confidentiality from those professionals who serve them, so professional pledges are complemented by client expectations.

Many philosophically interesting questions can be asked about professional commitments to the duty of confidentiality. For example, we may ask for further clarification concerning the nature of such commitments. I shall mean by "confidentiality" a socially publicizable and enforceable pledge to keep secret or hold in confidence any information about the client which is gained by the professional during the normal course of client–professional interactions. We may ask about the justifications for such a professional commitment, and this will be the primary topic of Part I of this essay. We may also ask about the nature of exceptions to rules of confidentiality and about the justifications for such exceptions, if any. This most crucial issue will be touched upon in Part II of this essay.

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I. JUSTIFICATIONS FOR PROFESSIONAL COMMITMENTS TO CONFIDENTIALITY

Rules of confidentiality in codes of professional ethics are "middle level" rather than absolutely fundamental behavioral rules. To say this is to indicate that there are more basic values or rules to which appeal can be made in justifying them. It makes good sense to ask *why* professionals should want to incorporate a commitment to confidentiality within their ideal standards of behavior, and it makes good sense to ask why clients should desire that the professionals who serve them observe such rules. Why should anyone care about confidentiality? Why should professionals make such promises? The answers to these questions constitute the justifications for professional commitments to confidentiality. There are at least seven more basic human values to which appeal may be made in explaining why duties of confidentiality should be assumed. I shall identify and attempt to explain what they are and how they are relevant to professional confidentiality, though I shall not attempt to rank them in any special order of priority or to identify any even more fundamental values that they may involve. My smorgasbord approach will leave the ranking option open to the individual reader.

(1) First of all, confidentiality in professional–client relations is desirable because it affirms and protects the more fundamental value of *privacy.* The scope of this concept extends to information about the individual which he or she regards as too personal or intimate to be disclosed to others. One of the brute but inescapable facts about human nature that we all recognize is that there are some things about ourselves, both physical and psychological, that we do not want to be revealed to others, things which are really not anyone else's business.

To identify these highly personal and private facts, we must know what kinds of information persons in general typically wish not to be disclosed to others, and we must also know the individual preferences of the person at hand. Exactly what facts about ourselves enjoy the status of private facts may vary from person to person, but we all have them. Many of them are common in the sense that all of us usually wish to safeguard the same sorts of information about ourselves. These personal facts about ourselves may be physical facts about our bodily structure, function, and condition, or mental facts about our beliefs, thoughts, feelings, attitudes, and disposition, or behavioral facts about our habits and activities. Such facts lie at the core of our identity as distinctive individuals; and in cherishing and protecting them, we may be either positively evaluating our own well-being and unique individuality or protecting ourselves from certain harms which would befall us if others knew things about us that were none of their damned business. Some of these private facts about ourselves are so secret that we will never relate them to anyone. Some of these facts we will relate to a close circle of acquaintances, including those professionals, such as doctors, nurses, lawyers, and psychiatrists, who can serve us well only if they know us well. Still others we will relate to an even wider circle of acquaintances, and there are many facts about ourselves which we will relate to anyone who wants to know and which do not fall within the realm of privacy at all. A professional commitment to confidentiality is an acknowledgment that we all have a fundamental human interest in privacy and a desire that the behavioral standards of those professionals who serve us should recognize and protect this interest.

Closely related to the positive value of privacy itself are certain disvalues which usually are generated when privacy is violated. A commitment to confidentiality in the professions must be justified in part by a concern for protecting clients against the ensuing harms of embarrassment, shame, guilt, hurt, and general unhappiness which typically follow upon violations of privacy.

(2) Confidentiality in professional–client relationships is desirable also because it affirms and protects the *social status* of the client. Although we profess to be a highly egalitarian society in which all persons enjoy equal social standing, opportunity, and respect, the disappointing reality is that many classes of persons are not allowed to enter as social equals into a variety of social transactions. Blacks and other racial minorities, women and other relatively powerless groups, homosexuals, communists, and other social outcasts, the retarded, deranged, and other handicapped persons are all often assigned an inferior social status. Consequently, they are denied the opportunities, respects, powers, and social standing that others enjoy. Furthermore, many of the conditions for which persons seek professional help are stigmatizing conditions which if publicized to others can rob clients of their social standing and spoil their social identity. To be "in trouble with the law" and seek the professional assistance of an attorney can be greatly disadvantageous socially. To suffer sufficiently from depression, anxiety, obsession, phobia, or other mental disorders to require the professional help of a doctor, psychiatrist, psychologist, minister, or other counselor is to be stigmatized, often irrevocably for life, no matter how much things have improved in the interim. Look at what happened

to Senator Thomas Eagleton, who was George McGovern's first choice for a vice-presidential running mate, when news leaked out that he had previously been treated for depression. Physical conditions may also be socially stigmatizing. If our doctors make it readily known that we suffer from AIDS or sexual herpes virus, we are no longer allowed to enter as equals into certain desirable social transactions! Cancer patients are often shunned by their fellow workers once their condition has been disclosed. Reputations may be damaged in an incredible variety of ways by the professionals who serve us unless they are pledged to confidence. What would happen to the way others view and treat us if our veterinarian broadcasts the fact that we are consistently cruel to our pets or that we are zoophiliacs who engage repeatedly in sexual activities with them? What would happen to our social standing if librarians freely publicized to others the kinds of books and magazines we read? Many professionals have the power to do us social harm if they readily disclose to others the intimate details of our lives, and we require professional confidentiality from them in order to protect our social status.

(3) Confidentiality in professional–client relations is desirable also because it is *economically advantageous* to the client. Medically stigmatized persons often find it extremely difficult to find adequate housing and to obtain and retain jobs. Cancer patients often face serious economic stigmatization after their medical problems have been disclosed. They may be fired, denied promotions, forced into early retirement, and either denied or forced to give up their group health insurance. Usually the loss of jobs is totally unjustifiable, though in rare situations, such as that of the bus driver or pilot with a grave heart condition, it may be quite proper. Professional confidentiality with respect to the details of client activities can often be extremely profitable for the client in a variety of other ways as well, not all of which are legal. The *Model Code of Professional Responsibility* of the American Bar Association requires absolute confidentiality with respect to the *past* crimes of the client, but it also requires disclosure of the intention of the client to commit a *future* crime if the attorney knows beyond a reasonable doubt that a future crime will be committed.[1] Where does this leave the lawyer who learns of *ongoing* financial fraud which can be very advantageous economically to the client and very disadvantageous to the defrauded? Here permitted disclosure about present and future crimes will inevitably involve forbidden disclosure of past crimes! At its February 1983 meeting in New Orleans, members of the ABA considered revising their rules to allow disclosure of confidences when attorneys reasonably believe that their clients are engaged in fraudulent activities which would result in substantial injury to the financial interests of another, but the proposed revision was overwhelmingly rejected. The legal profession apparently believes that professional confidentiality that is economically advantageous to the client is of sufficient importance that it should be honored even when fraud is involved. We may or may not agree with this position, and a thorough treatment of the topic of exceptions to rules of confidentiality would have to consider this issue more carefully. It is at least possible that confidentiality which is economically advantageous to the client is sometimes justifiable and sometimes not. If we were ranking our justifications for confidentiality, we might want to rank this one somewhat lower than some of the others. We might also find, however, that the six other justifications for confidentiality would be sufficient even in the absence of economic advantage.

The situation of the veterinary profession with respect to economic advantage should be contrasted with that of the legal profession. The veterinarian's professional commitment to confidentiality is purely a moral commitment which has no legal recognition and is not supported by legal sanctions.[2] Suppose that a veterinarian has treated a valuable animal that is for sale to or has been sold to a new owner and refuses to turn over

the medical records on the animal to the new owner on grounds of confidentiality owed to the old owner. If challenged in court, the veterinarian will lose every time. The rationale usually given is that veterinary medicine is very much unlike human medicine where privacy is a paramount consideration because animal patients are merely property and the economic advantages involved in such property ownership do not warrant legal enforcement of confidentiality commitments. This of course ignores the facts that most of the other six justifications for confidentiality do apply to the veterinary profession and that professionals are commonly held legally accountable for living up to the publicized moral policies of their professions. At times, perhaps quite rarely, even privacy may be at stake, as with respect to an owner's cruelty to animals or sexual exploitation of pets or livestock. These are just as much matters of privacy as they are liabilities against social reputation and communal respect and recognition. At times also animals are assigned a "sentimental value" which is far above their economic or replacement value and which takes them altogether out of the realm of property value, yet does not assign them intrinsic worth because their value depends on the sentiments of the owner. Veterinarians probably have a much stronger claim to justifiable confidentiality commitments than might appear on the surface or than the law currently recognizes.

(4) Confidentiality in professional–client relations is desirable also because it promotes *openness of communication* between professional and client. If persons accused of crimes or civil offenses are not assured that what they tell their own lawyers will never be used against them in court or elsewhere, they will never communicate to their lawyers the information needed for preparing adequate defenses. Doctors must have access to the most intimate physical, mental, and behavioral data about their patients if they are to diagnose their problems, devise suitable therapies, and provide adequate follow-up care. This is most obviously the case in the domain of mental health care, where disclosure of the most intimate thoughts, feelings, and behaviors of the client is absolutely essential if diagnosis and therapy are to succeed. Unless confidentiality is assured, communication will fail. Doctors practicing physical medicine must gain information about physical conditions which are highly personal and which would be highly disadvantageous socially or economically if disclosed to others, and again confidentiality must be assured if bodies are to be bared. Physicians engaged primarily in physical health care find that they usually must also be psychologists, that they must have access to highly personal data about beliefs, feelings, and life style, that they must treat whole persons and not merely bodies, that their patients must bare their souls as well as their bodies to them if they are to be effective. A pledge of confidentiality facilitates the required openness of communication and, correspondingly, violations of confidentiality discourage openness and cause patients to withhold essential information. Other professions presumably have as much at stake in promoting openness of communication as do law and medicine and also require confidentiality.

Promoting openness of communication and encouraging clients to seek professional help when needed, to be shortly discussed, are often classified as "utilitarian" considerations which justify confidentiality in the professions. If utilitarianism is understood as involving the obligation either to promote well-being or to prevent harm, or both, then all seven of our justifications for confidentiality are "utilitarian" in nature.

(5) Confidentiality in professional–client relations is desirable in order *to encourage clients to seek professional help* when it is needed. Before professionals can communicate openly with their clients, they must first get them into their offices; and the presumption is that clients would simply not seek the professional help that they need unless they are assured of confidentiality. Virtually every article and textbook discussion of confiden-

tiality in medicine and law assumes that, unless confidentiality is assured, clients will not trust or patronize professionals. Interestingly enough, empirical studies of this matter have not been made in the area of physical medicine, though a recent investigation has given strong support to it in the area of psychiatry.[3] "Common sense" would seem to dictate that this assumption is valid, yet the actual situation may be much more complicated than common sense would allow. For example, the willingness of clients to seek professional help may vary significantly depending on client's cost/benefit weighings of professional service gains against confidentiality losses, rather than merely on considerations of confidentiality alone. If we discover that 75 or more medical, administrative, and support staff have access to our medical records in any typical hospital,[4] would that really deter us from seeking hospital care when needed? If the medical condition is trivial, who cares? If the condition is serious, benefits may so clearly outweigh costs that confidentiality would willingly be sacrificed. How many persons with gunshot wounds really refuse medical care on the basis of the knowledge that doctors are required by law to report such wounds to the police? Well, this may depend on the source or gravity of the wound. Are parents considerably less likely to seek help for their battered children given the knowledge that this information will be transmitted to proper authorities? Are persons with various venereal diseases really much less likely to seek help given the same knowledge? Are teen-agers really much less likely to visit birth control clinics if told that their parents are to be informed? The answers may vary considerably from one circumstance to another. We need more hard facts and less common sense to guide us in assessing the validity of this sort of justification for professional confidentiality. This is true as well for the "promoting openness of communication" justification. There is something to it, no doubt, but perhaps not as much in every situation as the textbooks generally assume.

(6) Confidentiality in professional–client relations is desirable because it promotes *trust* between client and professional. Although most published discussions of confidentiality in medicine and other professions list trust as a more fundamental value that justifies professional commitments to confidentiality, the concept of "trust" is often not very well explained. If we define the term to mean "confidence that we can depend on the competence, integrity, support, care, and concern of another," the question of why this is important still remains. Often trust is said to be important because it encourages clients to seek professional help and to communicate openly with the professionals they patronize. This explanation seems to reduce trust to a mere disposition to exemplify justifications (4) and (5) and thus to rob trust of any independent value. Other explanations, especially in medicine, stress the fact that confidence in the competence, integrity, support, care, and concern of the physician is essential to the healing process. Healing is often as much a psychosomatic phenomenon as a physical phenomenon, and trust contributes as much to healing as do medicines, operations, and other physical procedures. In this context, those beliefs, feelings, and attitudes involved in trust are said to be important because they have an instrumental healing and survival value. This instrumental importance of the "placebo effect" of trust is not as obviously applicable to such professions as law and veterinary medicine as it is to human medicine, including psychiatry and clinical psychology. Finally, trust in the professional who serves us may be important because it is regarded as having intrinsic worth, as being something desirable for its own sake in any meaningful human relationship. Here trust is thought to have an immediate utility or worth as opposed to the long-range utilities of encouraging clients to patronize professionals, promoting openness of communication, and contributing to healing and survival. Perhaps it is because trust is thought to have such immediate worth that violations of confidentiality

undermine trust and generally result in the disvalues of mistrust, contempt, deep alienation, and suspicion. Confidentiality is also important to protect us from such interpersonal harms and pains of soul.

(7) Finally, confidentiality in professional–client relations is desirable because it allows persons *autonomous control* over private or personal information about themselves. If we conceive of autonomy as our capacity for making decisions, most of us will find that it is very important to be able to exercise a significant amount of control over our destinies through the personal decisions that we make. Highly personal information about ourselves can affect our fates in very significant ways, and this is the sort of thing over which we wish to exercise control by deciding for ourselves who is to have access to this information and how this information is to be used and by insuring that this information is accurate. Having a capacity for autonomous control over certain intimate details of life in accordance with a rationally informed plan of life is an integral part of what we mean by being a moral agent and is an essential aspect of our happiness; and to the extent that professional confidentiality recognizes and contributes to autonomous decision-making in the client, it thereby promotes moral selfhood and self-enjoyment. Autonomy is often thought to have its own immediate intrinsic worth or to be inherently enjoyable, and to the extent that this is so it is a value that has immediate as well as long-range utilities.

All seven of the justifying values underlying professional confidentiality are either integral aspects of our concept of the well-being of clients or essential conditions of their well-being and thus are utilitarian values. A duty to respect the confidentiality of clients is thus a duty to promote or protect privacy, social standing, economic advantage, openness of communication, seeking of professional help, trust, and autonomy. I hope that this list is close to exhaustive, though I am sure that it is not completely so. I have not listed "because professionals ought to keep their promises" as a reason for assuming duties of confidentiality, for our question has been that of why professionals should ever make such promises in the first place. Once made, this reason becomes an additional consideration supporting confidentiality.

II. EXCEPTIONS TO RULES OF CONFIDENTIALITY

Almost all rules of confidentiality in professional ethics recognize the legitimacy of exceptions to the duty of holding personal information about clients in confidence. For example, the legal profession recognizes four legitimate classes of exceptions. According to the American Bar Association, lawyers may reveal confidences or secrets about clients (1) if they have the client's informed permission to do so, (2) if required by Disciplinary Rules, law, or court order to do so, (3) if they know beyond a reasonable doubt that their client will commit a crime, and (4) if they find it necessary in order to collect their fees or defend themselves or their employees or associates against accusations of wrongful conduct.[5] The code of ethics of the American Medical Association that was in effect for decades prior to 1980 recognized three classes of legitimate exceptions. Confidences could be revealed (1) if required by law, (2) if necessary to protect the welfare of the individual, and (3) if necessary to protect the welfare of society. In 1980 the AMA adopted a new rule of confidentiality which eliminated the second and third exceptions.[6] Now doctors must safeguard confidences "within the constraints of the law." Presumably this means both (1) that they must violate confidences but (2) may not otherwise communicate them except when required or expressly permitted to do so by law. They no longer have any discretion concerning the welfare of the individual or society if the new rule is followed to the letter. The new rule seems to be a step back-

ward rather than forward because laws dealing with medical confidences vary from state to state and are constantly changing, because *good* laws probably have to take the welfare of individuals and society into account anyway, because civil disobedience seems to be ruled out where there are bad laws, and because discretion in such matters is now removed from the medical profession and placed in the hands of legislators and lawyers who may be even less qualified to deal with matters of medical ethics than those physicians who must live constantly with the consequences of their own rules and decisions. Be that as it may, we will further note that the professional code of the American Veterinary Medical Association recognizes the same three classes of exceptions as the pre-1980 AMA code and adds a fourth: the welfare of the client's animals may constitute a legitimate exception to professional confidentiality.[7] Other professional codes also commonly incorporate broad classes of legitimate exceptions to professional confidentiality obligations.

If there are legitimate exceptions to rules of confidentiality, we must acknowledge that, in addition to all those important values which underlie and justify the duty of confidentiality, we human beings also have values which at times may come into conflict with our confidentiality values and which may be even stronger or more important to us than such confidentiality values. If we make this point using the language of rights, even rights may conflict, and other rights may prevail over confidentiality rights. For example, the right to confidentiality may come into conflict with the client's own right to life, with another person's right to societal protection against murder, physical cruelty, or injury, or with the rights of many other persons (i.e., society itself) to societal protection against further criminal activity or the spread of communicable disease.

Let us restrict ourselves to the problems of legitimate exceptions to medical confidentiality, embracing the professional obligations of doctors, nurses, psychiatrists, clinical psychologists, and many other medical support personnel within the scope of our discussion. Medical professionals will constantly confront a variety of circumstances in which they must make decisions concerning the legitimacy of exceptions to the duty of confidentiality. Each of these circumstances exemplifies some conflicting good, duty, or right and requires the ranking of conflicting value commitments for their resolution. Without attempting now to dictate such a ranking, let me invite you to consider the following such circumstances, to identify the conflicting values involved, and to rank these conflicting values in relation to confidentiality values.

Should medical professionals violate confidentiality

1. by telling close relatives about the patient's medical condition without the patient's express permission to do so? (The qualification "without the patient's express permission to do so" will be assumed throughout the remainder of our list).
2. by telling members of the clergy about the patient's medical condition?
3. by telling family members or others who could help watch and care for a patient who seems imminently suicidal?
4. by reporting gunshot wounds to the police?
5. by reporting child abuse cases to the police or the Department of Human Services?
6. by reporting certain communicable diseases such as VD or TB to public health officials?
7. by reporting impotence, frigidity, or homosexuality to a person's fiancé(e)?
8. by reporting that a person is the carrier of a grave and incurable genetically transmitted disease to a person's fiancé(e) or to other close relatives who contemplate having children?
9. by reporting requests by minors for birth control pills to parents?

10. by reporting serious health problems such as heart disease and epilepsy to employers where a patient's occupation, e.g., bus driver or pilot, makes him or her directly responsible for the lives of others?
11. by reporting to police and/or to the threatened individual that a mental patient has threatened to kill someone? If so, should this be required or merely permitted?
12. in consulting with an Ethics Review Committee?
13. where necessary for the training of other health professionals?
14. in obtaining "informal" medical consultations with one's colleagues?
15. as required for making Medicare, Medicaid, and insurance claims?
16. any other exceptions?

I will conclude by identifying three conditions which any plausible resolution of the problem of ranking values conflicting with confidentiality must take into account.

(1) If exceptions are to be made to rules of confidentiality, we need to be reasonably certain that no less costly ways of promoting the competing values are available. For example, it is not usually necessary to disclose information about patients to family members or inquiring clergy without the patient's express permission. A simple effort at communication in advance with the patient about who should be told what provides a clear and workable alternative to such violations of confidentiality in most cases.

(2) Next, we need to be reasonably certain that the conflicting value will in fact be significantly advanced or promoted by the violation of confidentiality. The so-called "squeal rule" which would have required federally funded birth control clinics to report on sexually active teenagers to their parents was touted by proponents as an effective way to advance the competing values of family involvement with and communication about sexual issues, to prevent pregnancies and consequent abortions by making birth control more inaccessible, and to discourage premarital sex by making birth control more inaccessible. It is very doubtful, however, that these conflicting values would in fact be advanced by the proposed "squeal rule" exception to medical confidentiality. More than likely, the results would be a general confirmation of the teen-age prejudice that you cannot trust or communicate with anyone over 30 and a dramatic increase in teen-age pregnancies and abortions with little or no decrease in teen-age sexual activity. Empirical data on this would be gathered at a very high price!

(3) Finally, if exceptions are to be made to rules of confidentiality, we need to be reasonably certain that the competing value or values are clearly more important than our seven confidentiality values themselves. On the surface, it appears that many conflicting values might easily outweigh the values inherent in confidentiality. On the basis of this surface appearance, utilitarian-minded moralists are often accused of being unable to give due weight to the professional duty to hold in confidence information about the client. This is not so obvious, however, if we keep in mind the fact that whatever the conflicting values are, they must be sufficiently important to outweigh the *combined* values of protecting privacy and avoiding the miseries which follow from its violation, of preserving the client's social status and avoiding the social harms which follow from a spoiled social identity, of protecting the client's economic advantage and avoiding the harms which follow from indiscrete exposure, of promoting openness of communication between client and professional, of encouraging clients to seek professional help when needed, of developing trust between client and professional, and of facilitating autonomous control over person information. I shall at this point propose a rule of medical confidentiality which I believe will identify a very limited set of values which do outweigh these combined confidentiality values.

Medical professionals should hold in confidence all information about their patients gained in professional–client relationships *unless*

(a) the patient has *given permission* to disclose, or

(b) a *good law* requires disclosure or

(c) there is a direct and highly probable threat to *the life* of (i) the patient or (ii) one or more other persons, or

(d) there is a direct and highly probable threat of serious *bodily harm* to (i) the patient or (ii) one or more persons, or

(e) there is a direct and highly probable threat of serious *psychological harm* to (i) the patient or (ii) one or more other persons.

This proposed rule deliberately leaves certain questions for further discussion and clarification, such as What constitutes "seriousness"? Who should determine seriousness? What is a "good law"? What is "psychological harm"? How direct and how probable is direct and probable enough? Yet the rule identifies certain conflicting values, i.e., those involved in the protection of the lives and basic psychological and physical integrities of patients and others, as being sufficiently important to outweigh all seven of our confidentiality values where relevant. Can you suggest any improvements? Can you develop parallel rules for other professions?

References

[1]American Bar Association, *Model Code of Professional Responsibility and Code of Judicial Conduct* (Chicago: National Center for Professional Responsibility, 1981), pp. 22–23.

[2]See Soave, O., and L. M. Crawford, *Veterinary Medicine and the Law* (Baltimore: Williams & Wilkins, 1981), pp. 79–80.

[3]Appelbaum, Paul S., Gilead Kapen, Bruce Walters, Charles Lidy, and Loren H. Roth, "Confidentiality: An Empirical Test [illegible]

Concept," *The New England Journal of Medicine* 307, no. 24 (Dec. 9, 1982): 1519.

[5]American Bar Association, *op. cit.*, pp. 22–24.

[6]*Current Opinions of the Judicial Council of the American Medical Association* (Chicago: American Medical Association, 1981), p. ix, section IV.

[7]"Veterinarian–Client Relationships," *Principles of Veterinary Medical Ethics. Opinions and Reports of the Judicial Council*