

Confidentiality and the 1997 ASA Code of Ethics: A Query

by John Lowman and Ted Palys
Simon Fraser University

We are writing to seek clarification of the confidentiality provisions of the 1997 ASA Code of Ethics (Section 11) in view of how changes from the 1989 version may affect our ability to offer guarantees of unlimited confidentiality to research participants, and defend them by resorting to the so-called "Wigmore criteria," a common law test that can be used to establish researcher-participant privilege on a case-by-case basis. These criteria were successfully invoked by Russel Ogden, the only researcher in Canada ever to be faced with a charge of contempt of court for refusing to divulge confidential information to a court (Lowman & Palys, 1998).

The Wigmore criteria require that:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. (Wigmore, 1905, p.3185)

Two changes in the 1997 Code may adversely affect use of these criteria:

1. The addition of admonitions to researchers to consider legal "limitations" to confidentiality in Section 11.02(a); and
2. The removal of a statement in the 1989 principles (section E5) that "Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege and legal force is applied." The 1997 Code (Section 11.01(b)) replaces this with:

"Although confidentiality may be subject to limitations, in general sociologists are obliged to respect the confidentiality of information and the sources of that information even if there is no legal protection or privilege to do so."

Any apparent acceptance of externally imposed a priori limitations to confidentiality may undermine the first criterion of the Wigmore test. We are thus concerned a court could interpret the recognition of "limitations" to confidentiality, combined with deletion of the phrase "and legal force is applied," as evidence the ASA had softened its commitment to research confidentiality by subjugating research ethics to law. The statement in the 1989 Principles about maintaining confidentiality even when "legal force is applied," was valuable precisely because it represented unambiguous evidence that confidentiality is

crucial to the research enterprise, and worth fighting for (Wigmore criterion 2). Also, it clearly recognized a researcher's freedom to pledge unlimited confidentiality to research participants (criterion 1), which legal opinion in both Canada (Marshall, 1992) and the United States (Traynor, 1996) suggests are essential to the legal defense of confidentiality agreements.

We wonder whether the changes noted above arose because the architects of the new Code felt the "legal force" clause was redundant, or a shift in the ethical philosophy underlying it. Because these issues could be crucial for researchers who find themselves subpoenaed, we request clarification about how to interpret the newer Code of Ethics with regard to confidentiality and its limits.

References

Lowman, J., and Palys, T.S., The liability of ethics. *CAUT Bulletin*, 1998, June, p.28.

Marshall, M.A. When is a secret not a secret? <http://www.cookdukecox/newsletters/issue6-1992/secret.htm>, 1992.

Traynor, M. Countering the excessive subpoena for scholarly research. *Law And Contemporary Problems*, 1996, 59(3), 119-148.

Confidentiality and the 1997 ASA Code of Ethics: A Response from COPE

Joyce Iutcovich, Chair (1999)
Sue Hoppe, Past Chair (1998)
John Kennedy, Past Chair (1997)
Felice J. Levine, Executive Office Liaison
Committee on Professional Ethics (COPE)

The query from John Lowman and Ted Palys concerning confidentiality and its treatment in the new ASA Code of Ethics is an important one. One's ability to pledge confidentiality to research participants is a cornerstone of research involving human subjects. Further, a researcher's obligation to maintain the confidentiality of information lies at the heart of the ethical principles of science and research. Thus, the changes in the ASA Code of Ethics regarding the limitations to confidentiality were crafted with the utmost care and reflection. By clarifying the principle, the goal was to strengthen, not to erode it.

The changes in the Code were not intended to undermine a researcher's commitment to confidentiality or to subjugate research ethics to law. In the 1997 Code, there are now seven clauses in Section 11.01 specifically addressed to the significance and scope of *Maintaining Confidentiality*. As Section 11.01(b) states, "Confidential information provided by research participants, students, employees, clients, or others is treated as such by sociologists even if there is no legal protection or privilege to do so." Although the phrase "even when ... legal force is applied" has been eliminated in the 1997 Code, this was not to imply that sociologists should divulge confidential information when pressure from the courts or legal sanction is brought to bear.

However, the new *Code* was written in recognition of the realities of ethical decision making specifically with respect to human protection. Researchers may be confronted with unanticipated circumstances that are clearly health- or life-threatening to research participants, students, employees, clients, or others. When such circumstances arise, it may require rethinking the guarantees of confidentiality, regardless of the law and/or application of legal force to divulge information.

For example, if a researcher discovers child abuse while gathering ethnographic data about family life, what should the researcher do? The underlying intent of the ethical principles applied to research with human subjects is to protect the subjects from harm or risk. In this situation, the researcher faces a choice. Report the child abuse with a potential breach of confidentiality promised to the parent or maintain the confidentiality of the information and risk future harm to the child. The recognition of such a narrow limit to confidentiality is expressed in Section 11.02(b) of the Code: "Sociologists may confront unanticipated circumstances where they become aware of information that is clearly health- or life-threatening to research participants. ... In those cases, sociologists balance the importance of guarantees of confidentiality with other principles in the Code of Ethics, standards of conduct, and applicable law."

Further, consistent with the ethical standard enunciated in Section 11.02(b), the 1997 Code in Section 11.02(a) cautions sociologists before commencing research to be fully informed about all laws or rules which may limit or alter guarantees of confidentiality. In such situations where laws and/or rules exist (and hence can be anticipated), it is incumbent upon researchers to determine their ability to guarantee

absolute confidentiality. Given this reality, the Code of Ethics also includes a standard whereby researchers are *obliged to discuss confidentiality and its limits with research subjects*. Section 11.03(a) states: "When sociologists establish a scientific or professional relationship with persons, they discuss (1) the relevant limitations on confidentiality, and (2) the foreseeable uses of the information generated through their professional work. These are critical sections of the 1997 Code, since it is now incumbent upon a researcher to be fully informed about all laws and rules that may limit or alter guarantees of confidentiality. Further, researchers *may not promise absolute confidentiality* if their ability to do so is limited or if they are unwilling to maintain confidentiality in these situations.

Although limitations to confidentiality under health- or life-threatening circumstances may be the exception, the Committee on Professional Ethics (COPE) recognized the importance of writing a Code that sociologists would not violate when a decision is made to divulge confidential information under such circumstances. Further, the 1997 Code places greater responsibility on sociologists to be aware of these limitations and to discuss them with research participants, students, employees, clients or others at the outset of their research.

If you have any further questions about this or other sections of the 1997 Code of Ethics please contact Joyce Iutcovich at iutcovic001@gannon.edu or (814) 453-4713.

Dr. Ellen Gee, Chair of the SFU Research Ethics Policy Revision Task Force — which is charged with developing a new ethics policy for SFU that is harmonious with the Tri-Council Policy Statement on ethics — read the Footnotes query and response. She then sought clarification of the ASA position on two points being considered by the Task Force, by e-mailing the current Chair of the ASA Committee on Professional Ethics (COPE), and asking for that clarification. COPE's response, with Dr. Gee's queries intermingled therein, is shown below:

From: Ellen Gee <gee@sfu.ca>
To: ethics-taskforce@sfu.ca
Cc: palys@sfu.ca; lowman@sfu.ca
Subject: Response to Ethics Query
Date: Tuesday, March 23, 1999 10:02 AM

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Below is the response that I received back from the American Sociological Association.

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Ellen

Return-Path: <iutcovic001@mail1.gannon.edu>
X-Sender: iutcovic001@mail1.gannon.edu
Date: Tue, 23 Feb 1999 01:42:15 -0500
To: gee@sfu.ca
From: Joyce Iutovich <iutcovic001@mail1.gannon.edu>
Subject: Response to Ethics Query
Cc: levine@asanet.org

Dear Ellen:

The following is a response to your query about the 1997 ASA Code of Ethics with regard to limited/unlimited confidentiality.

In your e-mail of 3/6/99 you stated that your reading of the new ASA Code

"requires researchers (a) to know the relevant law regarding their ability to guarantee absolute confidentiality and (b) to discuss confidentiality and its limits with their research subjects" You then raised these questions:

1) With regard to (a)--In Canada (and the U.S., as far as I understand), there are no legal guarantees regarding academic privilege. Does this then mean that researchers are NEVER in a position to guarantee unlimited confidentiality?

Answer: You are correct that there are no legal guarantees regarding academic privilege similar to what some other professional groups have (e.g., lawyers, doctors, priests...). However, this is a separate issue from the willingness of an academic to promise unlimited confidentiality of information gathered from research subjects. If the academic

researcher is willing to make this promise, regardless of any legal pressure that may be brought to bear (e.g., when the courts hold someone in contempt if they are unwilling to reveal such information), then the academic must be willing to accept the consequences (e.g., go to jail...). Academic privilege is something that some researchers have been willing to fight for and, as Palys and Lowman pointed out, there may be a sound legal basis for arguing for this privilege in court. Hence, if an academic is willing to back up his/her promise, then the promise of unlimited confidentiality can be made.

2. With regard to (b)--this appears to mean that the ASA Code requires researchers to tell their subjects that any data obtained from them COULD be disclosed. Does this not impede research that criminologists (especially, but not exclusively) engage in, given that research subjects will either not want to participate or will hide information from the researcher? Also, does this not preclude researchers from using the Wigmore criteria (re criteria #1) in a court of law in any attempt to protect research-research subject confidentiality/academic privilege?

Answer: The ASA Code requires that researchers fully inform themselves of any laws that might require mandatory reporting or place limits on confidentiality (e.g., many states require reports of child abuse and even those professionals that have "privilege" are obligated to report their knowledge of future criminal behavior or life-threatening situations). Once researchers are fully informed, it is then that they decide if there are circumstances (i.e., certain types of information) in which they are unwilling to promise absolute confidentiality. If there are, then the researchers are obligated to inform their subjects of such circumstances. If they are willing to promise absolute confidentiality regardless of circumstances, then the researcher can make this promise (as stated in the answer to #1 above).

The essence of the 1997 Code is this: researchers are obligated to be fully informed, only make promises they are willing to back up, and be up front with the research subjects about what they are promising. It may be that a researcher is willing to promise confidentiality except in health- or life-threatening situations. If that is the case, then that is what can be promised.

I hope this answers your questions. If you want any further clarification or you have some additional questions, please contact me.

Sincerely,

Joyce Iutovich

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