

Psychologists' professional confidentiality in criminal law

Abstract

This work starts from the premise of the importance of the professional secrecy of the psychologist because it generates trust with his patient. Although this confidentiality enhances the dignity of the person and protects their privacy, it must often be relieved when there is just cause, especially in the face of criminal law. This is so, since it is not about protecting not only the patient but also third parties or society that could suffer damage from the patient's actions of which the patient becomes aware (eg gender violence, desire for suicide, etc.). This generates greater relevance when the psychologist is summoned as a witness in criminal jurisdiction. Hence the need for its study.

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Introduction

Psychological confidentiality is a permanent ethical and legal obligation not to disclose confidential information obtained in the course of professional practice, even after the end of therapy or the patient's death. It protects the client's privacy, although it has specific ethical and legal limits. This confidentiality is fundamental to the therapeutic relationship, fostering trust and allowing the patient to express their thoughts without fear of reprisal. It serves as a cornerstone of the relationship due to a key factor: trust. At the heart of this trust lies the principle of confidentiality, where clients feel safe sharing their deepest and most vulnerable thoughts. For its part, it is argued that confidentiality is enshrined as a legal right in constitutional law, protected under the right to privacy (e.g., Article 19 of the Argentine Constitution), even though this confidentiality is shared by two parties (the professional and the patient or client) and is not exclusive to a single party, and may be waived in exceptional circumstances.

Well, as a corollary to this general mention of professional secrecy, it is appropriate to cite Antonio Royo Marin¹ who in his classic treatise on Ethics places professional secrecy (of the doctor, lawyer, notary, psychologist, etc.) within the realm of entrusted secrecy. However, the matter of professional secrecy may also not be entrusted but rather discovered by the professional (e.g., in the case of a psychologist who learns of it during individual and/or group therapy with the patient(s), that is, when the psychologist has discovered or noticed through indicators or clues that the patient has a pathology, or that they have been the victim of a crime, or that they have committed a crime such as child abuse, gender-based violence, etc.).

In this sense, professional secrecy encompasses not only what the client or patient reveals on their own initiative, and what the professional obtains through questioning, but also everything the professional learns in the course of their work that, by its nature, is confidential.

Maintaining confidentiality when required is a duty of justice because it pertains to one's neighbor (justice is giving each person their due). It concerns the neighbor's privacy and, at times, their honor or reputation, which must not be violated by third parties.

When clients feel that their privacy is protected, they are more inclined to open up and fully participate in the therapeutic process. This sense of security and confidentiality reinforces the psychologist's

credibility and strengthens the therapeutic relationship. Clients view the psychologist as a trusted ally on their journey toward emotional and mental well-being.

In the digital age (e.g., telemedicine), where privacy is increasingly vulnerable, the psychologist's commitment to professional secrecy takes on even greater importance. Clients need to feel assured that their therapeutic conversations will not be compromised by data leaks or breaches of confidentiality. Upholding this commitment reinforces the psychologist's integrity and that of their practice.

If disclosure cannot cause any harm, but confidentiality was promised, upholding it is not a duty of justice (since for there to be injustice, there must be some harm); but it is a violation of the duty of fidelity, unless the law has provided for exceptions (e.g., the presumption of an episode of gender-based violence) or the client has consented to its disclosure.

The so-called breach of private confidence

Although professional confidentiality is fundamental in psychological practice, there are circumstances in which it may conflict with the law. For example, if a client reveals plans to commit a serious crime or cause harm to themselves or others, the psychologist may face an ethical dilemma regarding how to handle this sensitive information.

That is why, even if we start from the premise that confidentiality is fundamental, there are situations where the duty to protect others may conflict with professional secrecy. In such delicate cases, psychologists must carefully balance respect for the client's privacy with the responsibility to prevent harm. This sensitive and ethical approach demonstrates an ongoing commitment to the well-being of all involved, prioritizing the collective good over the individual.

Criminal laws generally punish anyone who, having learned of a secret—by virtue of their status, office, profession, or trade—whose disclosure could cause harm, reveals it without just cause.

In this regard, it should be clarified that, according to Núñez² the term "breach of professional secrecy"—commonly used to describe this offense—restricts its scope, because what is protected is the private secret itself, even if it is not a secret breached by a professional.

Regarding the protected legal interest, Creus³ notes that this offense is designed to prevent the risk that the perpetrator might coerce

the victim's will through the threat—at least implicit—of revealing secrets that came to the perpetrator's knowledge as a result of their professional activity or by virtue of the relationships inherent to their status. He notes in this regard that the fact of having to disclose to a professional a secret that could harm its holder—who, out of necessity or utility (not for other reasons), has had to turn to that professional—could endanger the holder's freedom if the professional were able to reveal it to anyone at will.

The object of the crime is a secret. In its most common understanding, a secret is that which is not disclosed, that which is unknown to an indeterminate number of people. To this common concept is added, in legal terms, the holder's interest in keeping it outside that consent (which is why consent given for disclosure removes the secret nature from the reserved fact or circumstances).

That is why, for the purposes of legal protection, a secret is understood to be not only what the interested parties have kept private and hidden from themselves or from a specific circle of people, but also what, while in such a state, is unknown to the interested party—such as a known medical condition, illness, or psychopathology known to the professional but unknown to the patient (e.g., a mental health discharge summary).²

The typical act of disclosing the secret occurs if the perpetrator reveals it to a third party who does not belong to the circle of those bound to keep it. Disclosure is not necessary; it may be effected by communicating the secret or by allowing a third party to learn of it. Nor is the recipient's ignorance of the secret required; the offense is committed even if the person to whom the perpetrator reveals the secret already knew of it through another source.

The disclosure of the secret constitutes the offense if it is done by the perpetrator without just cause and the disclosure of the secret could cause harm. The absence of just cause is a normative element of the offense, the presence of which justifies the conduct, rendering it atypical.

In this vein, "just cause" is constituted by the cases of justification regulated in Article 34 of the Argentine Penal Code and those enshrined in special laws (e.g., the law on gender-based violence). Among the justifications, the following may be mentioned: a) the consent of the interested party (which must be prior to or concurrent with the disclosure of the secret); b) the defense of one's own interest, which, as Fontan Balestra⁴ notes, means that the rule is the right to disclose, but there is no legal duty to do so (one who is unlawfully attacked may lawfully defend oneself, but is not obligated to do so); c- the defense of a third party's interest; d- the exercise of one's own right (e.g., the collection of fees in a non-abusive manner); e- the legal duty to report or denounce the act to the authorities (e.g., the duty to report crimes subject to ex officio prosecution that public officials become aware of in the course of their duties). The counterpart in this case is provided by Article 277, paragraph 1, subsection D of the Penal Code, which defines as concealment the act of "failing to report the commission of a crime or failing to identify the perpetrator or participant in a crime, when one is obligated to initiate criminal prosecution for a crime of that nature."

As for disclosure, it is required that it be capable of causing harm. It should be clarified, following Núñez², that punishment does not depend on whether the disclosure of the secret may cause harm, but rather on whether its disclosure—that is, its dissemination—may have that effect (it implies potential harm to a material or moral interest, economic or otherwise, for the interested party, a third party, an institution or society, or for the State).

If the disclosure of the secret does not pose a risk that its dissemination might cause harm, the act is not a crime. If harm is caused, the offense remains unchanged since, as Fontán Balestra⁴ states, in this case, harm and risk are placed by law on the same level of significance.

Professional confidentiality of the psychologist

We have already noted that the relationship between the psychologist and the patient is characterized by the trust that underlies it, and as a result of that trust, it is interpreted legally as "an obligation for the professional arising from the contract signed with the client, namely the obligation to maintain professional secrecy."

On the other hand, we must emphasize that the professional is a "necessary confidant" in the sense that the patient does not provide information voluntarily but is often compelled to do so in order to receive adequate service from the professional.

However, regarding the limits of confidentiality, a conflict may arise between professional secrecy—as the duty of confidentiality of the clinical or private psychologist regarding information disclosed in the professional relationship with the patient—and the duty to cooperate with the justice system to establish certain crimes.

It should be clarified that the concept of confidentiality is enshrined in the Hippocratic Oath, and is at the same time a citizen's right that entails the therapist's duty to respect it (professional secrecy).

As for the scope of this secrecy, it encompasses everything the psychologist knows, sees, perceives, or intuitively about the patient. It protects the patient's dignity and safety, serving as a "just cause" for confidentiality.

For this reason, we believe that the psychologist must inform the patient of the limits of confidentiality at the beginning of the professional relationship. Confidentiality may be breached to prevent serious and imminent harm to the patient or third parties, due to a legal requirement (court order), or with the consent of the patient.

Information may be shared for educational purposes, provided the patient's identity is protected, or with the patient's informed consent.

Unjustified breaches of confidentiality can lead to serious criminal and ethical sanctions, as psychologists are considered "necessary confidants."

In summary, the psychologist's professional confidentiality is a key pillar of the therapeutic relationship that fosters trust and credibility. By protecting their clients' privacy, psychologists create a safe space where healing and growth can flourish. This commitment to confidentiality not only strengthens the relationship between psychologist and client but also reflects the highest ethical and professional standards in the practice of psychology.

Case of the psychologist called as a witness

This issue has been described as one of the most delicate and interesting in procedural law regarding witness testimony.

As an example, we can point to what is prescribed by certain procedural rules of criminal law (e.g., Art. 219 of the Criminal Procedure Code of Córdoba, Argentina)⁵: "Every person shall be obligated to appear when summoned by the court and to state the truth regarding whatever they know and are asked about, except for the exceptions established by law." Such exceptions are found in Article 18 of the National Constitution, which provides that no one is compelled to testify against themselves. This guarantee does

not arise from the fact that a person is formally charged. On the contrary, whenever the information that someone might provide in the proceedings could cause them direct harm or put them at risk of being subjected to criminal proceedings, the person has the right to refuse to testify. In other words, this guarantee covers not only the accused but also the witness, as it constitutes a limit on the duty to testify truthfully.⁶

As can be seen, certain individuals—among whom we must include psychologists—are subject to the duty to refrain from testifying about confidential matters, provided such information came to their knowledge by virtue of their status, office, or profession. This is because an interest no less significant than that of the proceedings—and which takes precedence over it—prevents the holder of a professional secret from disclosing it to the court when summoned as a witness. This confidentiality is protected under substantive criminal law (e.g., Articles 156 and 157 of the Argentine Criminal Code), which penalizes its violation, and the duty to testify yields to it. If, despite the prohibition, the statement is nevertheless accepted, it shall be null and void.⁶

However, professional secrecy does not exempt the psychologist from complying with a court summons. Thus, when a psychologist is summoned by the court to disclose the secret of a person—whether a victim or a defendant—and thereby provide information relevant to the investigation, they must comply with the summons. In such a case, the psychologist, in accordance with his or her own conscience, will assess the nature of the matter in question, stating whether there is just because required by law to disclose the secret. In other words, the professional may refuse to testify in all cases where they believe the confidentiality must be maintained. Under these conditions, and only then, is it left to the witness's conscience to decide whether or not to testify on the matter in question. What is at stake here is the good faith of the witness who believes they have just cause to comply with the court's decision.

The professional is not required to answer every question posed by the judicial authority. Once in the presence of the investigating prosecutor and/or judge, the psychologist may invoke professional confidentiality, but only regarding questions that may affect the privacy and personal lives of their patients, and not concerning any other aspects or activities, such as commercial, economic, or financial matters.

In this regard, professional confidentiality does not cease even after the patient-psychologist relationship has ended, as this would amount to placing in the psychologist's hands a tool to keep patients captive out of fear that the secrets they have learned might be disclosed at any time.

Therefore, this confidentiality serves various interests: that of the client, that of the profession itself, and that of society at large, which supports the profession, deeming it valuable and a positive, for the community. In this context, a psychologist may disclose facts protected by professional secrecy without violating it, provided they have the authorization of the person who entrusted them with the information. Indeed, the only person who can expressly release the professional who holds the secret from their obligation to maintain it is the person who entrusted it to them; however, this does not obligate the professional to disclose it, as they are entitled to keep it confidential.

The professional may disclose the information in specific cases where the law expressly provides for it—interpreted in a restrictive sense—and when there is just cause. However, if such consent is revoked by the affected party, the professional is obligated to cease

disclosure, and the obligation to maintain professional confidentiality arises again from that moment onward.

Finally, regarding psychological reports requested at the request of the parents and/or guardians of minors, institutions, or organizations, such reports are subject to the same general duty and right of confidentiality. Consequently, both the psychology professional, the parents and legal representatives, and the requesting administrative body are obligated not to disclose the information outside the strict framework for which it was collected. This is generally established in the codes of ethics of these professionals, which stipulate that information provided to parents and/or other guardians of minors or individuals with limited legal capacity, as well as to the institutions that requested it, must be disclosed in a manner that does not jeopardize the client's future or be used to their detriment.

Furthermore, reports may not be issued in the following cases: a) When there is a relationship of subordination with the person in question, b) When the person who is the subject of the report is the reporter's spouse, a relative by blood up to the fourth degree of kinship, or a relative by marriage up to the second degree.⁷⁻¹⁰

Conclusion

Based on what we have outlined, we must start from the premise that while in our legal system the rule is professional confidentiality and the exception is disclosure when there is just cause, it can be inferred that in the case of a psychologist called as a witness and released from the obligation to maintain confidentiality by the interested party, this release authorizes, but does not obligate, and it is ultimately the professional's conscience that decides.

Professional confidentiality is essential for the patient to feel safe and able to share personal information without fear of it being disclosed. It encompasses not only conversations during consultations but also evaluations, diagnoses, and the results of sessions. We have already noted that in some cases, the psychologist may breach professional confidentiality, such as when the life of the patient or others is at risk, or if there is a court order.

Professional confidentiality is fundamental to building a relationship of trust between the psychologist and the patient, which facilitates the therapeutic process. In this regard, it will be the professional's personal conviction regarding the existence of just cause that will determine whether or not to disclose the secret, notwithstanding that some legal scholars maintain that the existence of professional secrecy is not left exclusively to the witness's opinion, but rather it is incumbent upon the judge to establish whether it applies to the case, with the judge having the authority to release the professional from the duty of confidentiality.

To supplement the foregoing, it is worth adding that professional secrecy is imposed not only by virtue of the provisions of the Penal Code, but also as a consequence of the obligation arising from the civil principles regarding harm and the duty to remedy it, as provided for in substantive civil law.

For this reason, a witness cannot be compelled to answer questions that may affect professional secrecy, the assessment of which is left to the individual's conscience and the professional's own judgment and decision; the professional may be released from such an obligation by the interested party, because a law so provides, or by judicial order.

In short, professional confidentiality is a fundamental obligation in the practice of psychology, which protects patient privacy and fosters trust in the therapeutic relationship.

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None.

Conflicts of interest

The author declare that there is no conflict of interest.

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