

Social Workers and the Duty to Warn

Introduction

Confidential communication with clients is held as a bedrock operating principle by clinical social workers for effective psychotherapy. A client's expectation of privacy facilitates the development of therapeutic trust and the rapport necessary for the disclosure of relevant personal information. Even the U.S. Supreme Court has recognized that "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears," *Jaffee v. Redmond*, 116 S.Ct. 1923, **1928 (1996) . At times the information revealed may be embarrassing or painful or may subject the client to reprisals in personal, professional, or legal relationships, should it become known outside of the healing context.

Social workers' interest in their clients' well-being as primary is sometimes outweighed by the responsibility to protect third parties from harm by the client. In the legal context, this responsibility is known as the "duty to warn" or the "duty to protect."

This Legal Issue of the Month will review case law development in recent years regarding the social workers' duty to warn third parties of a client's threats, following the seminal case, *Tarasoff v. Regents of the University of California* , 551 P.2d 334 (1976). A recent case, *Ewing v. Goldstein* , 15 Cal.Rtpr.3d 864 (2004), *rev. denied* (mem.), also from California , raises questions about the limits of *Tarasoff* and how far to extend the liability of mental health professionals when their clients harm a third party. Many states have instituted a variety of duty to warn requirements by statute.

Tarasoff and its Progeny

The leading judicial decision that established the duty for therapists to warn a potential victim of harm threatened by a client is *Tarasoff v. Regents of the University of California* , 551 P.2d 334 (1976). In *Tarasoff* , the parents of a young woman who was killed by a psychiatric patient sued the various mental health professionals involved in treating him, as well as the police who transported and released him. The patient, Prosenjit Poddar, informed his psychologist that he intended to kill Tarasoff when she returned from a trip. The psychologist and his supervisor contacted the police to take custody of Poddar and to have him committed, but the police released him and no further action was taken to notify Tarasoff or her parents of the threat. The opinion of the California Supreme Court stated:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

The court determined that a special relationship exists between a therapist and client that creates a special duty of protection to those that the client may harm. The court also noted that therapists are not expected to make perfect decisions, but to use the "reasonable degree of

skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances.” Finally, the court acknowledged that what is necessary to discharge the duty to protect potential victims will depend on the facts of each case. In *Tarasoff*, it was not disputed that the therapists believed that their patient would kill. Notifying the police was not sufficient in such a situation when they learned the patient was released from police custody. The court concluded that public policy favors disclosure of confidential information when it is necessary to avert serious harm to others even though there is a risk of unnecessary or improper disclosure at times.

Following the *Tarasoff* reasoning, the Arizona Supreme Court found in *Hamman v. Maricopa County*, 775 P.2d 1122 (1989), that a psychiatrist may be liable for failing to warn or protect the “foreseeable victim” of a dangerous patient, even absent a specific threat of harm, when the clinician should have determined that the patient was dangerous.

Case Law in Other States

As other states have had occasion to review the principles spelled out in *Tarasoff*, a variety of legal analyses has emerged. In some cases, the courts were called on to interpret a statutory duty to warn, while in others the duty to warn was created by common law.

In Colorado, Louisiana, Michigan, Missouri, Vermont and New Jersey, courts have recognized a duty to warn only if the client identified a specific intended victim. Courts in other states (Wisconsin, Delaware, Washington, Nebraska) have found a duty to warn if there is a general threat or a threat to the public at large. In Connecticut and Delaware, courts have found a duty to warn when a class of persons who may be harmed by the patient can be identified. For example, in *Naidu v. Laird*, 539 A.2d 1064 (1988), the Delaware court found that a psychotherapist has a duty to take reasonable precautions to protect others when a patient has had a history of mental illness, including two incidents in which he was involved in automobile accidents while in a psychotic state. In this instance, the court was reviewing a psychiatrist's failure to provide adequate treatment and for discharging the patient prematurely from the hospital.

In *Powell v. Catholic Medical Center*, 749 A.2d 301 (NH 2000), a hospital phlebotomist sued the doctor who failed to warn her of a patient's assaultive tendencies. The doctor was not liable because the statute required warning only of a threat to a specific victim. In this case, a specific threat had not been made; however, a common law duty to exercise reasonable care still existed which created liability on the doctor's part.

The standard for determining when it is necessary to warn a potential victim may also cover instances when the therapist “should have known” about the potential threat. For example, in *Bradley v. Ray*, 904 SW2d 302 (Mo. 1995), the court imputed knowledge to the therapist of information he should have ascertained, had he acted with due care.

A number of states have declined to hold health care professionals liable for failure to warn when it was established that the victim had prior knowledge of the threats. Courts in Iowa, Louisiana, New York and South Carolina have adopted this view based on a lack of proximate cause between the failure to warn and the resulting harm.

Courts in Hawaii, Florida, Alabama, Mississippi and Texas have declined to establish any duty to warn. In contrast, states such as North Carolina and Nebraska have clarified through court

decisions that the duty to warn may not be sufficient in some instances and the therapist may have a duty to take whatever action is necessary to avert the threatened harm, including committing the patient to inpatient hospitalization.

Must the Client be the Communicator of the Threat?

Ewing v. Goldstein, 15 Cal.Rtpr.3d 864 (2004), *rev. denied* (mem.), is a California case decided by an intermediate appeals court that found a duty to warn based on information that may have been communicated by a family member to the patient's outpatient psychiatrist. This case evaluated the California statute regarding the duty to warn, Cal. Civ. Code § 43.92:

(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in [Section 1010 of the Evidence Code](#) in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

(b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

In *Ewing*, the patient, Colello, was treated for several years by a private therapist, Dr. Goldstein, for depression and problems relating to his former girlfriend. Upon disclosing to his father that he was thinking of harming his former girlfriend's new boyfriend, Colello's father contacted Goldstein, who advised him to take his son to the hospital. Colello was admitted, but released the next day, over Goldstein's objections to the hospital psychiatrist. The following day, Colello killed the boyfriend, Keith Ewing, and then committed suicide. Ewing's parents sued Goldstein based on his failure to notify police or to warn their son of the threatened harm.

The California court, on appeal from a motion for summary judgment, found that a communication from a patient's family member constituted a "patient communication" to the psychotherapist, triggering the duty to warn and protect the person threatened. The California Supreme Court declined to review the case despite letters of request from NASW and other organizations.

NASW took the position that the legal liability of psychotherapists should not be expanded to include situations where information about a threat by a client is communicated by a third party to the social worker. The rationale is three-fold: The therapist is generally not in a position to fully evaluate the threat when informed by a third party, the third party may have private reasons for communicating with the therapist about the client that would conflict with the client's treatment, and the party who directly heard the threat is in the best position to notify police or warn the potential victim. The lower court in California clearly disagreed.

Although the plain language of a "duty to warn" law such as California's may state that it is only applicable to communications from the client, does failure to act on communications from third parties constitute an ethical violation? In some situations, ethics may require disclosure even if the law does not clearly state a requirement in regard to third party communications, if the social worker's professional evaluation of the situation leads them to believe there is a credible threat. The issue remains unresolved in California, where the *Ewing* decision has created an

interpretation of the state law in one part of the state. The state Supreme Court, however, has not ruled on the merits.

In another California case, in which a different intermediate appellate court considered the extension of social worker duty to protect third parties, *Trear v. Sills*, 82 Cal.Rptr.2d 281 (Ct. of App. 4th Dist. 1999), the intermediate court declined to find liability to the client's father for the therapist's actions in treating an alleged survivor of child sexual abuse who identified her father as the abuser.

HIPAA and the Duty to Warn

The federal medical privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) affect all of the health care professions. The background information provided by the U.S. Department of Health and Human Services (HHS) with the proposed privacy regulations acknowledged the importance of the *Tarasoff* duty to warn and clarified the relationship between the new regulations and the duty to warn as it is interpreted by the various states. It stated:

This proposed rule is not intended to create a duty to warn or disclose but would simply permit the disclosure under the emergency circumstances consistent with other applicable legal or ethical standards. . . .

We believe that [the] risk [of improper disclosure] would be warranted when balancing the individual's interest in confidentiality against the societal interests to preserve life and protect public safety in those rare emergency circumstances where disclosure is necessary. A covered entity that makes a reasonable judgment under such pressure and discloses protected health information in good faith would not be held liable for wrongful disclosure if circumstances later prove not to have warranted the disclosure.

The final medical privacy regulations permit health care providers to disclose confidential client information to "prevent or lessen a serious and imminent threat to the health or safety of a person or the public." This disclosure is not mandatory under HIPAA, but rather permits notification in instances when state law may require it.

Analysis and Conclusions

A majority of states have created some provision for psychotherapists to warn potential victims or take other action to protect third parties from credible threats of harm communicated by their clients in the course of clinical treatment. States differ regarding the nature of the threat and the source of the communication, as to when the duty to warn is triggered. The recent *Ewing* decision in California suggests that the courts may interpret the duty to warn broadly to include acting on information received from third parties even if a state's statute does not create that duty. Some states have language that triggers a duty to warn if the therapist "should have known" of a threat, but failed to discover it. The California decision places additional responsibility on a social worker for balancing the duty to protect the client's confidentiality with the responsibility to limit the harm to others even if the information is conveyed by persons other than the client.

The HIPAA medical privacy regulations support the concept that professionals should freely exercise their discretion if disclosure of confidential information is necessary to protect the client

or others from serious physical harm. The *NASW Code of Ethics* likewise permits disclosure of client communications in order to prevent serious, foreseeable, and imminent harm to the client or another identified individual.

References

National Association of Social Workers. (1999). *Code of ethics of the National Association of Social Workers*. Washington, DC : Author.

Specific Threat Required to Trigger Duty

- Bardoni v. Kim*, 151 Mich. App. 169 (1986).
Bradley v. Ray, 904 SW2d 302 (Mo. 1995) (duty exists when therapist knows or “should have known” of danger to specific victim).
Brady v. Hopper, 570 F.Supp 1333, 751 F.2d 329 (1984) (applying Colorado law).
Durapau v. Jenkins 656 So.2d 1067 (La. 1995).
McIntosh v. Milano, 168 N.J.Super. 466 (1979) (duty subsequently codified at N.J.Stat.Ann. § 2A:62A-16 (West 1993)).
Peck v. Counseling Serv., 146 Vt. 61 (1985).

General Threat Sufficient to Trigger Duty

- Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (Neb. 1980) (duty to take “whatever precautions are necessary” when there is an “unreasonable risk of harm to others; identifiable victim not necessary to trigger the duty to prevent harm).
Naidu v. Laird, 539 A.2d 1064 (Del. 1988).
Petersen v. State, 100 Wash.2d 421 (Wash. 1983).
Schuster v. Altenberg, 144 Wis.2d 223 (1988) (duty to seek commitment of dangerous patient or duty to warn of patient's dangerous condition).

Threat or Danger to Potential Class of Victims Sufficient to Trigger Duty

- Almonte v. New York Medical College*, 851 F.Supp. 34, 41 (D.Conn.1994) (foreseeable class of victims included pedophile psychiatrist's minor clients).
Naidu v. Laird, 539 A.2d 1064, 1073 (Del.1988) (class includes anyone who could have been injured as a result of accident) (subsequently codified at 16 Del.Code Ann. tit. 16 § 5402 (1994)).

No Proximate Cause for Informed Victim

- Bishop v. South Carolina Dept. of Mental Health*, 331 S.C. 79 (1998) (child's guardian already had knowledge of patient's threats, so no proximate harm from failure to warn).
Doyle v. United States, 530 F.Supp 1278 (1982) (applying La. Law).
Re: Estate of Votteler, 327 NW2d 759 (Iowa 1982) (victim already knew of the threatened danger).
Wagshall v. Wagshall, 538 NYS2d 597 (NY 1989) (no duty to warn individual who was previous victim of patient's violence).

No Duty to Warn

- Boynton v. Burglass*, 590 So.2d 446 (Fla. 1991), *as amended on denial of rehearing* (Dec 24, 1991).
Evans v. United States, 883 F. Supp 124 (SD Miss 1995) (state statute did not permit disclosure).
King v. Smith, 539 So.2d 262 (Ala. 1989).
Seibel v. City and County of Honolulu, 61 Haw. 253 (Hawai'i 1979).
Thapar v. Zezulka, 994 S.W.2d 635 (Texas 1999) (state statute did not permit disclosure).

Duty to Take All Precautions Necessary

- Currie v. U.S.*, 644 F.Supp. 1074 (M.D.N.C. 1986) (may be a duty to commit, but liability avoided when therapist acts in good faith in making decision not to commit).
Lipari v. Sears, Roebuck & Co., 497 F.Supp. 185 (Neb. 1980) (duty to take “whatever precautions are necessary” including civil commitment).

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