“Duty To Warn”

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… Only (my tongue is firmly implanted in cheek) thirty-six years after the landmark Tarasoff vs. Regents of the University of California decision of the California Supreme Court (1976), psychotherapists in California are getting closer to the day when the much misunderstood duty of a psychotherapist (triggered when a patient threatens physical violence against another) is no longer referred to in statute as the “duty to warn.” Even though so many, including the courts, have for decades inaccurately referred to the duty in California as a “duty to warn,” the actual duty is not a duty to warn. At one of the most critical junctures in a psychotherapist’s career (when a patient threatens physical violence against another), it is important for the therapist to know with precision what the duty is, if any, and what the law expects or allows in such situations.

Each state addresses dangerous patient situations somewhat differently. In some states, the therapist or counselor may not be under a duty to warn or a duty to protect (or to make reasonable efforts to warn or protect), but may be allowed to break confidentiality in order to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims. Federal regulations implementing HIPAA (The Privacy Rule) allow for such an exception to confidentiality – which, for covered providers, has to be compared with a state’s requirements or allowances to determine which provision takes precedence in the event of a conflict between state law and the federal regulations. Additionally, many states may have enacted statutes that provide the therapist or counselor with immunity from liability under certain dangerous patient situations or that otherwise address these situations.

How come so many, both within California and outside of California, have for so long thought that the “duty to warn” is the actual duty in California? How can so many, including some “experts,” be so wrong for so many years? The full answer is rather involved, but a brief explanation follows. In 1974, the California Supreme Court decided the Tarasoff v. Regents of the University of California case and did create a duty to warn. There was a large protest from the mental health community in California, and the Court was asked to reconsider its decision. In an unusual move, the California Supreme Court reconsidered its decision and changed the duty from a “duty to warn” to a “duty to protect.” More precisely, the Supreme Court, in its 1976 Tarasoff decision, articulated the duty as a duty to use reasonable care to protect the intended victim from the threatened danger. The Court stated that the discharge of the duty may require the therapist to take one or more steps, depending upon the nature of the case. “Thus, it may call for the therapist 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 also stated that the discharge of the duty of due care “will necessarily vary with the facts of each case.”

Thomas G. Gutheil, M.D., a well-known and well-respected Professor of Psychiatry (and forensic psychiatrist) from Harvard Medical School’s Program in Psychiatry and the Law (at the

Massachusetts Mental Health Center), has explained the mistaken notion of a “duty to warn” thusly: “Why do so many experts, including forensic psychiatrists who should know better, make this same mistake repeatedly? My own hypothesis is that when the earlier, superceded Tarasoff decision in 1974 proposed a duty to warn (and was greeted by a storm of protest from mental health organizations and others) – the idea of warning someone outside the therapy dyad was so arrestingly nonclinical a notion that it became stuck in the collective temporal lobe of psychiatry to such a degree that even experts still get it wrong.”

Senate Bill 1134 (Yee) has been introduced in California and has passed its first hurdle in the Senate Judiciary Committee. This bill would remove the misleading references to a “duty to warn” from the statute that establishes immunity from liability for psychotherapists in situations where a patient has communicated to the psychotherapist a threat of violence against a reasonably identifiable patient. The statute provides immunity from liability for the failure of a psychotherapist to predict dangerousness, and also provides that where a patient does communicate a threat of violence against another to the therapist, the therapist can gain immunity from liability if he or she makes reasonable efforts to communicate the threat to the victim and to law enforcement. The failure to gain immunity from liability (by not taking the specified actions) does not necessarily mean that the practitioner has acted in violation of the duty to use reasonable care to protect the intended victim.

It is important for practitioners to know, with precision, whether or not there is a duty to protect or warn a third party under specified circumstances, what those circumstances are (in other words, when is the duty “triggered”), and what is the specific duty (if any) that must be exercised. Of course, even if there is no duty, the practitioner may have the right to break confidentiality in order to prevent or lessen a threat of physical violence against a third person. Additionally, it is important for mental health prractitioners to know whether or not there is an immunity statute in existence, and if so, under what circumstances and in what manner may the immunity be achieved.

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