Duty to protect versus duty to maintain confidentiality: When does one trump the other?

Article · December 2023

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Duty To Protect Versus Duty To Maintain Confidentiality: When Does One Trump the Other?

Elisa Reiter and Daniel Pollack | **December 28, 2023**

Confidentiality facilitates honest communication by assuring patients that the innermost details of their lives, shared with their health care providers, will remain private. Yet, nearly 50 years ago, the *Tarasoff* case imposed a duty to warn on California mental health professionals, requiring them to take reasonable steps to protect potential victims of their clients. Numerous states followed suit.

This duty is balanced against the patient's right to privacy under HIPAA. In recent years, many courts have held that the duty to warn can be

overridden by the patient's right to privacy if the risk of harm is not imminent or if there is no other way to protect the potential victim. Subsequently, California was among the states that enacted legislation establishing that all mental health professionals have a duty to protect the public and that the duty to warn or protect takes precedence over protecting therapist-patient confidentiality.

Not every state adheres to the concept of the duty to warn taking precedence over the need to maintain client confidentiality. Furthermore, successor cases to *Tarasoff* in some states have expanded the duty by extending the protection to persons who may foreseeably pose harm to persons besides a specifically threatened victim.

In 2004, the California Supreme Court held in *Ewing V. Goldstein* that a psychotherapist has a duty to warn when a patient communicates a serious threat of physical violence against a reasonably identifiable victim. In *Ewing*, the threat was not communicated to the therapist by the patient. Instead, the patient's father advised the therapist that his son had expressed the intent to harm himself and the son's former girlfriend's new love interest. The therapist recommended in-patient treatment.

The hospital discharged the patient over his therapist's objection. After being discharged, the patient killed himself and his former girlfriend's new boyfriend. The therapist had not seen the patient after the patient's father's disclosure. The patient had never directly expressed an intention to harm himself or third parties to his therapist. The victim's parents sued the therapist for failing to warn their son of the patient's intent to do harm:

"The therapist moved for summary judgment on the basis of the California duty to warn statute, which immunizes psychotherapists from liability for any failure to warn of or to 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" (California Civil Code 43.92). The therapist argued he could not be liable for failing to alert the police and the intended victim to danger posed by his patient because the patient had never directly disclosed to him a threat. The trial court granted the motion and dismissed the case because the communication was not from the patient and therefore was immunized under the statute."

The Court of Appeals reversed the trial court, holding that the father's communication to the therapist should be construed as a patient communication within the meaning of the statute. The California Supreme Court refused to hear any additional appeal.

By contrast, the Medical Practices Act of Texas does not impose a duty on physicians to warn potential victims of threats disclosed by patients. The Texas Supreme Court's decision in 1999 in *Thapar v. Zezulka* established that a psychotherapist does not have the duty to warn third parties of a threat of potential harm. However, the Texas Family Code mandates that certain professionals must report abuse of children, the disabled and/or the elderly, providing in pertinent part as follows:

"(b) If a professional has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11 (Indecency with a Child), Penal Code, and the professional has reasonable cause to believe that the child

has been abused as defined by Section 261.001 (Definitions), the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11 (Indecency with a Child), Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers."

Professionals in Texas are charged with the duty to make a report if the professional makes a good faith determination that disclosing the information is necessary to protect the health and safety of a minor or of a person suffering from a disability or an elderly person. This obligation is balanced against the duty to maintain confidentiality.

In Texas, pursuant to the Texas Health and Safety Code Section 611.002, establishes the following duty:

"Sec. 611.002. CONFIDENTIALITY OF INFORMATION AND PROHIBITION AGAINST DISCLOSURE. (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004, 611.0041, or 611.0045.

(b-1) No exception to the privilege of confidentiality under Section 611.004 may be construed to create an independent duty or requirement to disclose the confidential information to which the exception applies.

(c) This section applies regardless of when the patient received services from a professional."

A number of states, including New York, are mandatory reporting states. Other states, like Texas, are permissive reporting states. In New York, Mental Hygiene Law Section 9.46 mandates reporting, and indemnifies the mental health professional from making a good faith report:

"(a) For purposes of this section, the term "mental health professional" shall include a physician, psychologist, registered nurse or licensed clinical social worker.

(b) Notwithstanding any other law to the contrary, when a mental health professional currently providing treatment services to a person determines, in the exercise of reasonable professional judgment, that such person is likely to engage in conduct that would result in serious harm to self or others, he or she shall be required to report, as soon as practicable, to the director of community services, or the director's designee, who shall report to the division of criminal justice services whenever he or she agrees that the person is likely to engage in such conduct. Information transmitted to the division of criminal justice services shall be limited to names and other

non-clinical identifying information, which may only be used for determining whether a license issued pursuant to section 400.00 of the penal law should be suspended or revoked, or for determining whether a person is ineligible for a license issued pursuant to section 400.00 of the penal law, or is no longer permitted under state or federal law to possess a firearm.

(c) Nothing in this section shall be construed to require a mental health professional to take any action which, in the exercise of reasonable professional judgment, would endanger such mental health professional or increase the danger to a potential victim or victims.

(d) The decision of a mental health professional to disclose or not to disclose in accordance with this section, when made reasonably and in good faith, shall not be the basis for any civil or criminal liability of such mental health professional."

The duty to warn continues to evolve. A summary of mandatory reporting states versus permissive reporting states is maintained by the National Conference of State Legislatures. The *Tarasoff* case is still evolving, and the courts are still working to balance the patient's right to privacy against the duty to protect potential victims. As a result, it is important for mental health professionals and attorneys to be aware of the latest legal developments in this area.

Mental health professionals often opine that they are to err on the side of preserving life when presented with a life-threatening situation. Every mental health professional must be familiar with the pertinent laws in their state and seek guidance from their appropriate governing board. Further, they should confer with legal counsel to determine which duty

is given greater weight—the duty to maintain patient confidentiality, or the duty to warn third parties of potential harm.

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Original link: https://www.law.com/newyorklawjournal/2023/12/28/duty-to-protect-versus-duty-to-maintain-confidentiality-when-does-one-trump-the-other/