

Commentary: *Tarasoff* Duties Arising From a Forensic Independent Medical Examination

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The question of whether a *Tarasoff* duty may emerge from a credible threat by an examinee during an independent medical examination has not been extensively addressed in the professional literature. This article analyzes that question and provides suggestions for how to respond to a perceived duty.

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Several jurisdictions have adopted the reasoning in *Tarasoff v. Regents of the University of California*,^{1–4} defining a duty to third parties when a patient of a mental health professional threatens harm to another individual. The original decision stressed the role of “public peril” and the special relationship between treater and patient. Both the language of applicable cases and statutes and the implicit contexts in which such a duty arises are clinical in focus; that is, when present, the duty devolves on a clinician who is treating a patient.

Given that the relationship between examiner and examinee has been distinguished from the traditional doctor-patient relationship,^{5–7} is there a comparable duty for the forensic examiner? Because that treater-examiner distinction is in dispute in some jurisdictions, a question might be raised as to whether an analogous rationale applies (i.e., is forensic evaluation the practice of medicine?). Assuming that some duty may, in fact, arise, the question remains open of what the duty may be and how it is discharged.

A thoughtful discussion of the specific relationship to mandated child abuse reporting appears in remarkable synchronicity in the excellent review by Kapoor and Zonana⁸ in the present issue. The authors note the tension between widespread require-

ments for mandatory reporting of child abuse and ethics-related concerns about medical confidentiality. The matter stands in contrast to *Tarasoff* requirements, which are highly variable from state to state and tend to emerge from particular features of the cases in question rather than from statutory mandates.

The present article further explores these questions. The core question is couched in the following case example.

Case Scenario

In your private office, you are performing an independent medical examination (IME) for some civil or criminal forensic purpose (such as emotional injury, malpractice, competence, insanity, or employment disability). You have, at the outset, given the relevant warnings about nonconfidentiality. At some point during the examination, the examinee makes a credible threat to harm or kill someone at some undesignated time.

Given that your professional relationship with this person is different from that of a doctor and patient (whether or not the difference would be recognized in a court of law), and given that almost all relevant statutes use the term patient rather than examinee, does a duty arise for you to take some action? If we assume that a duty does arise, further questions include the basis for the duty and the matter of whether there are negligence risks both for acting and not acting on a duty. In addition, the duty may differ for an examinee on the same side of the case that retains

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you versus an examinee from the opposing side. Finally, what action is appropriate?

Discussion

All can agree that if the examinee bolts from the room threatening imminent violence, the police should be called; however, the case example is different from that extreme. The following dimensions appear relevant.

Informed Consent

A useful and protective anticipatory step would be to include the possibility of action in the informed-consent process for the examination itself, either orally or in written form. Thus, language may be used such as “I am not your doctor, but under certain circumstances I may have to act as though I were” or “If certain conditions arise that might raise a concern about your injuring yourself or someone else, I may have to intervene” or “to take steps to prevent that and to protect both that person and you.” Of course, even if such a warning were not given, duties may arise in any case, perhaps contained within the basic warning about the nonconfidentiality of forensic examinations. The examinee has been warned that the examiner has permission to report certain information to certain parties, but does that imply a warning about a duty to report or take other action that also effectively breaches confidentiality? In other words, is the basic warning about the limited confidentiality of an IME sufficiently comprehensive? In the service of confidentiality, an examinee may also be warned about not using any identifiable names.

Special emphasis may be laid on the importance of careful definition of warnings when forensic examiners repeatedly see certain populations—for example, in a fitness-for-duty examination, those whose work involves being armed, such as police officers, security guards, and the like. When common dramatic expressions of frustration are made in strong language that might be interpretable as threats, even when not intended as such, overreacting may result in severe damage to careers, even when the evaluation would not otherwise produce that result. Likewise, in some cases a cross-cultural perspective is needed to interpret exclamations such as “I’ll kill that guy!”

Protection

Considering first the “duty to protect,” note that both the threatener and the threatened are protected

by responsive action. The potential victim is protected from the threatened violence, and the threatener is protected from the consequences of potential action, such as prosecution and its after-effects. For purposes of the examination, the examiner’s alliance is with the healthy side of the examinee that does not wish to act in a way that produces dire consequences. If, after having been so warned, the examinee still evinces a threat, the threat is all the more credible and the examiner’s actions more defensible if later challenged. Assessing whether the examinee appreciates and factors in the warning before issuing the threat allows an evaluation of the examinee’s capacity for judgment and self-restraint. A better assessment of the level of risk involved may accrue from inquiring actively into the examinee’s intent in making an open threat during an evaluation.

In essence, the essential protective role of clinician may be impossible to set aside, even for forensic purposes. That is, the role of licensed health care provider acting within a professional capacity may give rise to a duty (whether conceived in ethical or legal terms) to avert harm. Massachusetts, for example, has such a statute. A medical professional may incur an irreducible duty founded in ethics, even when acting in a forensic role. This duty is as likely to arise from the medical professional’s felt sense of mission as it is from external pressures or feared sanctions. To say, “In emergencies, I cannot forget that I am a doctor” is to move up the moral hierarchy from the narrowly legal to the clinical and ethical.

Moreover, the protection of society or of the general public may be a broad requirement that cuts across various role functions and triggers in each a duty to take action. Failure to act may be seen (in practice, if not with a clear legal basis) as turning the examiner into an accomplice of the examinee.

Treater Versus Expert: Role Functions

Whether the fine distinctions that forensic specialists make between clinical and forensic roles would be accepted by the larger society (particularly by judges and juries) if harm resulted is an open question. The examiner may well be seen, by some form of the “last clear chance” legal doctrine, to have had the best opportunity to avert the harm.

Duties to Third Parties

The duty to third parties, the fundamental novelty of the *Tarasoff* case, may have derived from the prin-

ciple, described in the Restatement (second) of Torts (Ref. 7, § 315) of a “special relationship” between the parties, presumably different from but parallel to the doctor-patient relationship, as presupposed by *Tarasoff*.

In a significant case, *Hopewell v. Adibempe*,⁹ liability was found against a treater who inappropriately and maladroitly gave a *Tarasoff* warning, not to a potential victim, but to the personnel office of the victim’s and threatener’s company¹⁰—an unnecessarily wide breach of confidentiality. Its consequences were liability for that treater.¹⁰ This case, arising from a clinical context, suggests that some circumspection about *Tarasoff*-type warnings is expected.

Acting on the Duty

Several actions may serve to discharge the duty. One approach would be to give the first warning or report to the retaining attorney; indeed, absent a statutory command (e.g., in the case of child abuse), one’s first obligation is to the person who has hired the examiner (Griffith EEH, personal communication, September 2009). Before calling the police directly, the examiner should attempt to enlist the attorney to take responsible action. The question arises as to whether the attorney, as well, should be informed and warned at the outset of retention of an examiner’s potential duty to respond to a threat of violence by the client. This may avoid dismaying the attorney when, as a result of the examination, the client is in more trouble than before. However, absent any statutory provisions to the contrary, some jurisdictions (e.g., Maryland; Zonana H, personal communication, September 2009) take the position that a forensic examination falls under attorney-client privilege, which would preclude reporting. It is likely that mandatory reporting for child abuse, say, would still be required.

If the client being examined is from the opposing side, as is commonly the case in an IME, the situation with respect to the examiner’s agency is more complex; notifying the opposing attorney as well as the examiner’s retaining attorney would still seem a reasonable first step. If available, the examinee’s treating professional should also be informed.

Kapoor and Zonana⁸ offer a helpful four-point set of recommendations, with which we concur, to deal

with the dilemma under consideration. The recommendations may be paraphrased as follows:

Know your statutory obligations.

Think about confidentiality warnings, both to examinee and retaining attorney, in advance.

If the decision is made to report, discuss reporting obligations (including mandated ones) with the retaining attorney before making the report, to preserve the working relationship.

Report in a manner that parsimoniously discharges the obligation but does not deliberately cause harm to the examinee.

Whether giving a warning, taking other action, or deciding not to take action, the examiner will clearly benefit from the twin pillars of liability prevention: documentation and consultation. While documentation would obviously be essential no matter which way the decision went, consultation is more problematic, since there might not be sufficient time or a consultant available to provide timely input. Thus, many such consults would occur after some action or no action had been taken. A warning given after some delay in obtaining a consult would still be potentially useful, although perhaps too late to prevent the harm in question.

Conclusion

The questions posed are a first step toward outlining principles and practice in the particular medico-legal situation envisioned here—one for which neither case law nor professional literature has established clear standards. Does that situation require newly conceived principles or practices? In general terms, probably not. A normal sense of personal and professional responsibility is applicable in this context, as it is in others. First, avoid acts of commission or omission that would foreseeably shock the conscience of society (including licensing boards, ethics committees, judges, and juries). Second, do the least possible harm while taking steps to prevent others from doing harm.

The application of these principles is, of course, context-specific and case-specific. The discussion herein points to ways in which generally accepted (and in some cases clinically derived) principles of ethics and risk management can be fine-tuned to fit the situation described. Kapoor and Zonana’s article

indicates that the discussion here is not merely theoretical.

Future explorations may address whether the initial nonconfidentiality warning is sufficient to cover the subsequent reporting of threats made by the examinee and what constitutes the most responsible and effective sequence of actions to take when a credible, serious threat is made. Contributions to these explorations from clinical, ethics, and legal perspectives are welcomed.

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