and its members. To encourage medical professionals to participate, peer review process information is deemed confidential and peer review records are designated privileged. Despite these protections, over recent years, federal appellate court decisions in three circuits representing approximately 12 states have required the release of peer review records to the state protection and advocacy systems.

The *amicus curiae* brief, submitted by the National Disability Rights Network, Alabama Disabilities Advocacy Program, the Office of Protection and Advocacy for Persons with Disabilities (Connecticut), Kentucky Protection and Advocacy, and the Maryland Disability Law Center, in support of VOPA indicated the interest of other state protection and advocacy systems in at least two additional circuits in gaining access to peer review records in their investigation of incidents. The brief acknowledges a concern of the potential "chilling" effect of such access on the peer review process while stating that because VOPA is required by law to keep such records confidential, disclosure to VOPA "will not chill the free exchange of information—and consequent improvement of the health care system—that [Virginia law] is designed to protect" (Brief for National Disability Rights Network *et al.* as *Amici Curiae* Supporting Plaintiff-Appellee, Commonwealth of Virginia v. Reinhard, 2008 U.S. 4th Briefs 1845 (4th Cir. 2008) (No. 08-1845)).

An analysis of a similar issue (Trueblood KV: Implications for the peer review process. *J Am Acad Psychiatry Law* 35:125–8, 2007) addresses the concern raised about the maintenance of the confidentiality of such records once released to the protection and advocacy systems. Acknowledging the growing challenges in maintaining a sense of balance in the peer review process, the author suggests excluding the comprehensive analysis and recommendations and limiting the required disclosures to relevant information.

The effects of this growing trend of increasing access to peer review records go beyond its direct impact on the quality-improvement process and standard of care. There is a significant impact on the field of forensic psychiatry. The American Medical Association has defined expert witness testimony as "the practice of medicine" and therefore subject to peer review. Licensing boards over the years have increased reviews of expert testimony for regulatory purposes. The American Academy of Psychiatry and the Law (AAPL) enables its members to have their testimony reviewed voluntarily by the peer review committee in private or by presenting it to a larger professional audience at its annual meeting. Over the years, AAPL members have come to view this educational process as extremely helpful. However, whether for regulatory or educational purposes, the lack of privilege raises liability concerns for all involved.

This changing landscape may not only deter all professionals involved from participating in the review process, it may also influence the objective execution of their duties or have a detrimental effect on the educational value of the peer review process and affect the standard of care and, ultimately, patient safety.

Note: The U.S. Supreme Court granted a petition for writ of *certiorari* in this case on June 21, 2010.

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In-Court Testimony After Dangerous-Client Warnings

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Court Erred by Allowing Testimony of Social Worker About Threats Made by a Client in a Criminal Trial

In State v. Orr, 969 A.2d 750 (Conn. 2009), the Supreme Court of Connecticut considered John Dean Orr's appeal from a guilty verdict at New London Superior Court, Geographical Area 10. In his appeal, Mr. Orr claimed that testimony by a social worker about threats made to him by Mr. Orr should have been excluded from the criminal proceeding on the basis of social worker-client privilege.

Facts of the Case

Between 2001 and 2003, the defendant, John Dean Orr, and Captain Kenneth Edwards, Jr., of the New London police department met on a regular basis in the captain's office. Capt. Edwards termi-

nated the relationship in 2003, because Mr. Orr began exhibiting aggressive behavior toward him and other officers. On January 11 and 13, 2005, Mr. Orr left two voicemail messages for Capt. Edwards in which he yelled obscenities, wished Capt. Edwards dead, and threatened Capt. Edwards' family. Capt. Edwards recorded the messages and made a complaint to the New London police department. As a result, Mr. Orr was arrested and charged with four counts of harassment in the second degree.

At trial, the state sought to introduce the testimony of five witnesses about threats that Mr. Orr had made toward Capt. Edwards. One of these witnesses, Christopher Burke, was a social worker who had interviewed Mr. Orr in August of 2003, while Mr. Orr was in lockup for an unrelated charge. During this interview, Mr. Burke had become concerned about Mr. Orr's behavior and threats that he made toward Capt. Edwards and his family. Mr. Burke "felt he had a duty to warn [Capt.] Edwards" of this danger (*Orr*, p 757), and he did so. Mr. Orr moved to preclude Mr. Burke's testimony about the interview and subsequent warning, but the trial court denied the motion, concluding that the testimony fell within the dangerous-client exception to the social worker-client confidentiality rule. The court ordered Mr. Burke to testify against Mr. Orr.

At the conclusion of the trial, Mr. Orr was found guilty of two counts of harassment in the second degree. He was sentenced to six months' incarceration, suspended after 60 days, with one year of probation. He appealed the verdict to the state supreme court.

Ruling and Reasoning

The Connecticut Supreme Court affirmed the trial court's verdict. It agreed that the trial court erred in allowing the testimony, but it found that the error was harmless.

In his appeal, Mr. Orr first argued that the trial court erred in concluding that the dangerous-client exception to social worker-client confidentiality contained in the Connecticut statutes permits in-court testimony by the social worker. Therefore, the court improperly ordered Mr. Burke's testimony. Second, Mr. Orr argued that recognition of social worker-client confidentiality is essential to the mental health and well-being of Connecticut citizens and that a testimonial exception to confidentiality would directly undermine this well-being. Third, he argued that the admission of Mr. Burke's testimony was not a harmless error, as the testimony was an essential part of the state's case demonstrating Mr. Orr's threats and dangerousness.

The majority opinion begins by examining the wording of the dangerous-client exception to the social worker-client confidentiality statute. At issue was whether the dangerous-client exception to confidentiality, which clearly allows out-of-court disclosures by a social worker about threats made by a client, should be interpreted as an exception to privilege, which would allow in-court testimony as well. The Connecticut statute recognizes an exception to confidentiality "when a social worker determines that there is a substantial risk of imminent physical injury by the person to himself or others" (Conn. Gen. Stat. § 52-146q (c)(2) (2005)). The court reasoned that the legislature clearly created this exception to confidentiality for the purpose of protecting third parties from harm. Had the legislature wanted to allow in-court testimony about such disclosures, it could have added a similarly worded dangerous-client exception to the social worker-client privilege statute. Thus, the majority interpreted the statute's silence on the issue of in-court testimony as "plain and unambiguous"—that is, clear evidence of the legislature's intention not to create a dangerous-client exception to social worker-client privilege.

The court further supported its conclusion by examining Connecticut's confidentiality and privilege statutes pertaining to other health care professionals, such as psychologists, psychiatrists, physicians, and surgeons. The court noted that the legislature was aware of the importance of protecting confidentiality between health care providers and patients, and it specifically created exceptions when it intended to do so. For example, the psychiatrist-patient confidentiality statute contains eight exceptions, two of which specifically reference in-court testimony (psychiatrists are permitted to testify in court-ordered evaluations and when a patient introduces his mental state as an element of his claim or defense). Again, the court concluded that the legislature's silence on the issue of in-court testimony about *Tarasoff* warnings (*Tarasoff v. Regents of the University of California*, 529 P.2d 553 (Cal. 1974), modified by *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976)), was deliberate and unambiguously intended not to create an exception to social worker-client privilege.

Although the court agreed with the defendant's assertion that the trial court improperly ordered Mr. Burke to testify against Mr. Orr, the guilty verdict of the trial court was affirmed, because the error was considered harmless. The court cited several factors that led to this conclusion. First, Mr. Burke's testimony was limited in scope, as it addressed only Mr. Orr's demeanor toward and feelings about Capt. Edwards, not the content of the alleged threats. Second, Mr. Burke was one of five witnesses who testified about the relationship between Mr. Orr and Capt. Edwards. Third, Capt. Edwards testified about the same incident that Mr. Burke described in his testimony. Finally, the defense was given notice of the state's planned questions of Mr. Burke before his testimony, and so the cross-examination was well prepared. For all of these reasons, the court concluded that excluding Mr. Burke's testimony would not have made a significant difference in the outcome of Mr. Orr's trial.

Dissent

The sole dissenter, Justice Palmer, disagreed with the majority's conclusion that the dangerous-client exception to confidentiality was not meant by the legislature to be also an exception to evidentiary privilege. He agreed that the dangerous-client exception was created to protect third parties from harm, and he argued that the majority's conclusion "seriously and unnecessarily undermines the public safety purpose of the exception" (*Orr*, pp 769–70) by not allowing disclosure of dangerous-client exceptions to include testimony in court. He reasoned that once a social worker has breached confidentiality and warned a third party about a client's threats, the damage to the social worker-client relationship is already done. Testifying about the incident in court would not cause much more damage to the therapeutic relationship. Furthermore, since confidentiality has already been destroyed, the client cannot later claim evidentiary privilege, as only confidential information can be privileged. Justice Palmer looked beyond the language of the statute itself to support his position; he cited the legislative history of the social worker-client confidentiality statute and numerous cases from other jurisdictions to bolster his argument.

Discussion

This case raises several interesting points for discussion. First, it highlights the confusion that many mental health clinicians experience about the difference between confidentiality and privilege, particularly those without forensic training. Although the two terms both involve the clinician's obligation to keep private the information learned from clients, privilege refers specifically to courtroom proceedings. In the aftermath of the *Tarasoff* decisions, courts have almost universally agreed that mental health clinicians have an obligation to make out-of-court disclosures about threats made by patients to protect third parties from harm. However, as this case demonstrates with its vociferous dissent, courts are much more divided on whether testimony about *Tarasoff* warnings should be allowed in subsequent criminal proceedings.

From a psychiatric perspective, the majority opinion in *Orr*, despite its heavy focus on legal issues, such as legislative intent and statutory ambiguity, ultimately arrives at a conclusion that is quite favorable to mental health clinicians. The majority seems to recognize that *Tarasoff* warnings were created specifically to prevent third parties from imminent danger and that testimony about such a warning by the clinician in a criminal proceeding no longer serves that aim. Criminal trials often occur months or years after the warning was made, many times when the defendant is already incarcerated. At that point, testimony by the clinician serves no purpose other than to cause potential legal harm to the defendant.

Finally, this case raises an interesting question about evidentiary privilege and mental health clinicians with differing educational backgrounds. The court clearly (and in our view, rightly) included social workers along with psychologists, psychiatrists, and other types of physicians when delineating the list of professional disciplines whose communications with clients or patients should be privileged. However, we recognize that individuals in our multicultural society seek counseling or healing from many different types of practitioners, from teachers to psychics to acupuncturists. One wonders whether the court would have reached the same conclusion if Mr. Burke had been trained as a folk healer rather than as a social worker. Perhaps future cases will continue to define the nuances of the healing relationship and its role in the courtroom.

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