Commentary: Ethics and Law at the Bar and on the Couch

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Drs. Kachigian and Felthous[1] have vividly highlighted the disarray of current duty-to-warn law—a thorough mess, in my opinion, and steadily growing worse,[2,3]—to the detriment of psychiatric care and hence possibly generating increased, not diminished, patient violence.

Only to underscore the law's confusion, not to embark on a pointless quibble, I confess that I interpret some of the state statutes quite differently from the authors. For example, I would place nine states (plus the District of Columbia), not just two, in the "permissive" category, but would not include Mississippi, whose statute contains both permissive and mandatory language.[4]

Ethics

The American Psychiatric Association appears to impose on psychiatrists no ethical compulsion to give *Tarasoff* warnings (though the wording of the governing provision could be more precise):

> Psychiatrists at times may find it necessary, to protect the patient or the community from imminent danger, to reveal confidential information disclosed by the patient [Ref. 5, p 8].

The American Bar Association likewise makes it quite clear that, as a matter of ethics, lawyers have unfettered discretion in whether to warn of a client's dangerousness. The official rule provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless. . .disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information. . .to the extent the lawyer reasonably believes necessary. . .to prevent reasonably certain death or substantial bodily harm. . . [Ref. 6, p 254].

The Comment to this ethics stricture explains why a mandatory duty to warn would be undesirable and indeed counterproductive, since confidentiality is a fundamental principle:

> The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct [Ref. 6, comment 2].

Courts respect and adhere to this permissive approach for lawyers,[7] as do legal scholars.[8]

A handful of states—Arizona,[9] Connecticut,[10] Florida,[11] Illinois,[12] Nevada,[13] New Jersey,[14] New Mexico,[15] Tennessee,[16] Vermont,[17] and Wisconsin[18]—deviate from the majority approach and impose a *Tarasoff*-type ethics obligation on lawyers. However, this is enforceable only by professional discipline, not tort damages, since the attorney-client relationship does not extend to a third party.

An attorney is an officer of the court. A physician is not. The case for a duty to warn based on professional responsibility (ethics), at least where (as almost always) the threatened conduct would be criminal, is thus far stronger for lawyers than for psychiatrists.

Law

Twenty-seven states, most by statute, override the permissive psychiatric ethics rule and explicitly impose an affirmative duty to warn of a patient's threat or dangerousness, and in many additional states a duty may exist amid unclear law.[4]

For lawyers, however, the ethics code seems to be enough. No state, as far as I am aware, imposes a legal

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(statutory or case law) duty to warn on lawyers. California, for example, apparently the only state with a statute squarely on the subject, permits but does not require disclosure by lawyers,[19] in contrast to its mandatory *Tarasoff* statute for psychiatrists.[20]

The Proposed Reform

There are, in my view, several difficulties with the authors' proposal that the existing *Tarasoff* statutes be clarified.

Firstly, as their data amply reveal, courts will do what they wish with almost any statutory language. Drs. Kachigian and Felthous amazingly, though accurately, observe that "some courts respect the legislative standard, although in a minority of cases" (Ref. 1, p 271).

Preventing violence is police work, not the responsibility nor within the professional competence of psychiatrists. Actuarial risk assessments can be made with greater-than-chance accuracy, but it is alchemy to convert this into legally obligatory individual predictions of dangerousness.[21]

Unfortunately, in a society with ever-diminishing role discipline—where psychologists seek to prescribe medications, where jails and prisons are now the principal long-term psychiatric hospitals, and where emergency rooms struggle under the burden of growing numbers of primary care patients—politicians in the legislatures and on the bench smoothly purvey such feel-good legerdemain (solutions "on the cheap" for social ills) to a wearying citizenry.

It had been established academic catechism for decades by the time I attended law school in the mid-1970s that appellate judges "made" law while pretending simply to "interpret" or "apply" it and that a ubiquitous judicial policy objective, in our era of extensive liability insurance, is risk-spreading. The pretense now is quaint. Risk-spreading is what truly drives duty-to-warn jurisprudence (and most tort law for the past half a century), not "rights" of third parties or "negligence" by psychiatrists or making society "safer." Psychiatrists have insurance and victims do not. The rest is window dressing.

As courts nationwide, led by the example of the United States Supreme Court, grow ever more nakedly political,[22] their decisions are more unstable and the law less comprehensible and less predictable, in the realm of duty to warn as elsewhere. Rearranging words in a *Tarasoff* statute will do little to tame the ensuing case law.

Secondly, law can be salutary only if it is known. There are 50 states, with various approaches to the duty to warn, all incorporating spongy jury issues like "good faith," whether the threat was "serious," whether the patient had the "ability" to carry it out, whether the victim was "readily identifiable," whether the psychiatrist took "reasonable" precautions (where "reasonable" might vary by context, such as an emergency room versus long-term therapy or a face-to-face evaluation versus voicemail), and so on.

The authors plausibly posit that judges and lawyers often may not know that their own jurisdiction has a *Tarasoff* statute, and they point out correctly that the law is in a continual state of flux. Surely, then, to most busy psychiatrists, their precise legal duty in their own jurisdiction is an invisible (and moving) target, and will remain so however it is worded. Each situation, after all, is unique.

Indeed, since the statutes all give full tort immunity for good faith disclosure of a threat, whereas the downside exposure for nondisclosure is catastrophic, one would expect warnings to be far more common, out of simple prudence, if psychiatrists truly understood the duty and its implications.

It may not even be enough, however, to be up-to-the-minute on the precise rule in one's own jurisdiction. Consider a psychiatrist who lives and has an outpatient practice in Virginia (which has case law forbidding, along with a statute requiring, a warning to a third party). The psychiatrist speaks on the phone with his patient while the latter is psychiatrically hospitalized in Maryland (which by statute requires a warning to a third party). The patient conveys what could be construed as a threat against a third party, and both the patient and the putative victim live in Washington, D.C. (which by statute permits but does not seem to require a warning). Which law governs and where might the psychiatrist be sued? It would seem that by obeying the Virginia case, he is automatically violating the Maryland statute, and vice versa, whereas a suit filed in the District of Columbia might evoke instructions inviting the jury to choose and thereby make up the governing law *post hoc*. Lawyers delight in such procedural conundra, and every law school devotes an elective course to it, Conflict of Laws, which did not clear the terrain much for me.

Thirdly, the authors' propounded justification for salvaging *Tarasoff* is, to me, noxious:

> . . .[S]tatutes could. . .extend the clinician's responsibility to include an adequate assessment, when appropriate, to assess the nature and seriousness of the threat. . . . This would encourage clinicians to complete more thorough risk evaluations. . . . The threat itself should be qualified to allow for clinical assessment of its authenticity, and if this assessment did not take place, it would be another potential source of liability. . . . This type of statute would. . .encourage clinicians to complete appropriate evaluations. . . [Ref. 1, p 271].

If psychiatrists need the threat of statutory tort liability to evaluate our patients diligently and appropriately for dangerousness to third parties, we ought also to lobby for statutory standards for assessing suicidality and for considering drug-drug interactions and for fairness in billing for missed appointments. Further, is it practical and reasonable to hold all psychiatrists, most not forensically trained, to conducting "thorough risk evaluations" whenever, with 20:20 hindsight after an act of violence, a jury concludes it was indicated? Most troublingly, high-minded "minimum" workplace standards mandated by statute usually soon become no longer minimums, but the accepted (and therefore acceptable) standard of care.

Legislating professionalism can level the quality of practice down to what is perceived to be adequate and attainable by the least distinguished in the field rather than inspiring each toward his or her greatest excellence. Indeed, by narrowing clinical discretion and flexibility, the *Tarasoff* duty has demonstrably coarsened psychiatric practice and commensurately diluted its healing power.[2]

The legislatures are, of course, dominated by lawyers, and every appellate judge is a former attorney. (The only court whose judges need not be law-trained is the United States Supreme Court, but unfortunately no President has so far taken the opportunity to nominate a nonlawyer.)

It is not self-evident on what basis our lawmakers have concluded that psychiatrists need fuller moral guidance on the value of life than do lawyers.

End It, Don't Mend It

Absent any evidence that *Tarasoff* warnings as a blanket rule reduce net violence, surely Oregon,[23] Illinois,[24] New York,[25] and Texas[26,27] have the issue of danger to third parties about right, in explicitly permitting, but equally explicitly not requiring, a warning.[28] Illinois' statute, for instance, declares:

> Communications may be disclosed. . .when, and to the extent, in the therapist's sole discretion, disclosure is necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence. . . [Ref. 24].

This language will be hard for an appellate court to turn upside-down. Were it coupled with an unambiguous preemption of all inconsistent existing case law in the jurisdiction, a psychiatrist acting in good faith could once again view his or her patient as just that and not as the gun in a game of lawsuit Russian roulette.

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