of the factors to consider in a case analysis of a duty to control a mental health patient. These factors are the existence of a special relationship between the mental health provider and the voluntary outpatient; a duty to control a voluntary outpatient; breach of a duty to control a voluntary outpatient; foreseeability of harm or harm that should have been foreseen by the provider; serious damage or harm to the plaintiff, which has as a proximate cause the breach of a duty to control by the defendant mental health provider; extent of, consequences of, and liability for breach of a duty to control a voluntary outpatient; and public policy considerations (e.g., public safety, the therapeutic relationship between patient and mental health provider, and a patient's right to liberty and treatment in the least restrictive environment).

In the *Santana* decision, the court left the door open to finding a duty to control under different facts and circumstances involving a mental health provider and an outpatient. The court said, "[W]e do not say that an outpatient relationship *never* can give rise to an affirmative duty to control the patient's conduct" (*Santana*, p 665, emphasis in original).

The key implication of the *Santana* case is that in Rhode Island, future plaintiffs who bring claims against mental health providers for breach of duty to control a voluntary outpatient from seriously harming another person will have to prove that a special relationship existed between the mental health provider and the patient in which the provider had the opportunity, and therefore a potential duty, to control the patient. Supporting medical documentation or expert affidavits should be presented to support a plaintiff's claims that the provider had the authority, opportunity, and ability to control its outpatient. Plaintiffs will also bear the burden of proving that the outpatient would have met the stringent statutory criteria for involuntary emergency civil commitment and that the imminent risk of the likelihood of serious harm to others due to the patient's unsupervised presence in the community was either foreseeable or should have been foreseen according to the standard of care in their mental health profession.

While duty to control and duty to protect are well established in the legal vocabulary, these terms do not neatly correspond with mental health concepts. The facts of this case raise issues elsewhere described as problematic in *Tarasoff* cases: relative lack of control over outpatients, whether duty to protect can pass the "but for" test of legal causation, and the absence of a consensus on standard of care in "duty to protect" situations (Thomas M: Expanded liability for psychiatrists: Tarasoff gone crazy? *J Ment Health Law* 11:45–56, 2009).

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Peer Review Privilege in Its Last Throes?

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Protection and Advocacy Agency Seeks to Gain Access to Hospital Peer Review Records in Federal Courts

In Virginia v. Reinhard, 568 F.3d 110 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit reversed a decision by the United States District Court for the Eastern District of Virginia that denied state officials' motion to dismiss a lawsuit filed by the Virginia Office for Protection and Advocacy (VOPA) for failure to release peer review records on the grounds (among others) that the state officials were not immune to suit under the Eleventh Amendment.

Facts of the Case

Congress encourages the states to establish entities such as VOPA to address disability-related matters, such as abuse, neglect, and discrimination. Federal funds are provided, under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act) (42 U.S.C. §§ 15001-15115 (2006)) and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act) (42 U.S.C. §§ 10801-10851 (2006)). The states, under these acts, establish their protection and advocacy entities to be either private or public entities, and Virginia chose the public option.

On July 18, 2008, VOPA filed a complaint before the United States District Court for the Eastern District of Virginia against James Reinhard, Commissioner of the Department of Mental Health, Mental

Retardation, and Substance Abuse Services (DMHMRSAS) and the directors of two state facilities ("the state officials"). VOPA alleged that the state officials were violating federal law by refusing access to peer review records "relating to three persons who died or were injured" (*Reinhard*, p 114) in the facilities operated by DMHMRSAS.

The state officials requested that the court dismiss the case as VOPA had "failed to state a claim" (*Reinhard*, p 114). They argued that they were not in violation of federal law as the Virginia state law and the two federal statutes (the DD Act and the PAIMI Act) had declared peer review records to be privileged. Also, as a state, Virginia (and its officials) was protected by sovereign immunity and could not be sued by another state agency (VOPA) in federal court.

The district court denied the state officials' motion to dismiss on both grounds. First, the court held that "VOPA had stated a claim that the state officials were violating federal law," as the state officials' claim of peer review privilege was an "affirmative defense to the merits" (*Reinhard*, p 114). Second, the court held that sovereign immunity did not prevent VOPA's suit. By claiming a violation of federal law, it met the exception of *Ex parte Young*, 209 U.S. 123 (1908).

The Fourth Circuit, on appeal by the state officials, reviewed the lower court's decision only in regard to sovereign immunity.

Ruling and Reasoning

The U.S. Court of Appeals for the Fourth Circuit held that sovereign immunity barred VOPA from suing the state officials in federal court.

Reviewing the Eleventh Amendment, the Fourth Circuit acknowledged the existence of three exceptions to states' sovereign immunity: when states' immunity is overturned by Congress; when the state waives immunity by consenting to suit in federal court; and by *Ex parte Young* exception, under which the state can be sued in cases of ongoing violation of federal law.

The Fourth Circuit rejected all three exceptions in this case. First, Congress did not overturn states' immunity under the statutes that VOPA cited. Second, although VOPA alleged that by accepting funds under the federal regulations (the DD Act and the PAIMI Act), Virginia waived its sovereign immunity, the appellate court ruled that such a waiver requires an "explicit, emphatic statement." Mere acceptance of federal funds did not mean that the state had consented to be sued. Third, VOPA argued that it is entitled to peer review records under the DD and PAIMI acts and that by refusing, state officials were in violation of federal law, enabling this suit in federal court. The court rejected this argument on the basis that the suit in *Ex parte Young* (and in all subsequent cases) was brought forward by a private plaintiff. Therefore, there was no precedent for its application when the plaintiff (i.e., VOPA) was a state agency.

The court declined to extend the Eleventh Amendment exception established in *Ex parte Young* beyond its traditional scope. To do so would allow a state agency to file suit against officials of the same state in federal court. Raising concerns of "intrusion on state sovereignty that would result when a federal court instructs the state officials on how to conform their conduct to state law" (*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)), the Fourth Circuit directed VOPA to seek relief in Virginia state courts.

The appellate court reversed the judgment of the district court and remanded the case to that court for dismissal.

Discussion

This case deals primarily with the legal principles of sovereign immunity and the appropriate forum for its adjudication. However, the eventual outcome of this suit has significant implications for the hospital peer review process, health care providers, and the medical care they provide.

The medical peer review is a process by which professionals determine whether accepted standards of care have been met in the care and treatment of patients. Although the ultimate goal of the review process is to promote quality medical care and patient safety, typically clinicians' competence and professional conduct are reviewed, bearing potentially significant impact on their clinical privileges and membership in professional societies. All hospitals are mandated to establish peer review committees as part of The Joint Commission (TJC) accreditation requirements.

The Health Care Quality Improvement Act of 1986, 42 USC § 11101 *et seq.* (2006), set forth standards for professional review actions. If these standards are met, then most states offer statutory protection from lawsuits to the professional review body

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-