

Attachment to M.H. Policy No. 93-08
Civil Code Section 43.92

9.1 Duty to Warn Potential Victims

A. Duty to Disclose Confidential Information

The California Supreme Court held, in *Tarasoff v. Regents of the University of California*, 17 Ca.3d 425 (1976), that a psychotherapist must warn, or take other appropriate action to protect the foreseeable victim of a patient's violent tendencies, if (1) a psychotherapist-patient relationship exists, (2) a psychotherapist knows or should have known that the patient is dangerous, and (3) there is a foreseeable victim of the patient's violent tendencies. In carrying out this duty, the psychotherapist may need to release confidential patient information. The court held that in such situations, the justification for protecting the confidentiality of the patient information (e.g., to encourage patients to seek treatment and fully disclose information to their psychotherapist) is outweighed by the need to warn potential victims so that they can protect themselves. In addition, legislation was recently enacted to provide for the release of confidential information when a psychotherapist believes that a patient presents a serious danger of violence to a reasonable foreseeable victim or victims. (See Welfare and Institutional Code Section 5328(s).

The Duty to Warn arises not only when a patient has expressed specific threats against an identifiable victim, but also if a patient's previous history indicates that he or she would be likely to direct violence against a person who can be identified. (*Isblonski v. United States of America*, 712 F.2d 391 {1983}.) Also, a psychotherapist may be liable for injuries a third person suffers as a result of a patient's violent acts if the therapist fails to carry out his or her duty to appropriately evaluate the patient and identify his or her dangerous propensities.

In order to carry out the duty to warn, the psychotherapist must strike a careful balance between protecting the confidentiality of the patient's disclosures and protecting the potential victim. Initially, the psychotherapist should gather relevant information regarding the patient, including that pertaining to the patient's past treatment. The therapist's decision regarding whether it is likely that the patient will carry out his or her threats, or that the patient presents a danger to another person should be documented, together with the information that led to the decision. This will provide important protection against claims that the therapist should not have released the information (if a warning is given) or that the therapist did not carry out his or her duty to warn the potential victim (if a warning was not given). If a warning is given, the therapist should disclose only that information which is necessary to enable the potential victim to recognize the seriousness of the threat and to take proper precautions to protect himself or herself. A general indication to a person that perhaps the person should avoid the

patient may not be sufficient warning. Also, depending upon the patient's therapeutic condition and possible reaction, it is advisable to inform the patient that the warning will be given.

Situations in which a psychotherapist may have a duty to warn a potential victim usually involve difficult decisions, and hospitals and psychotherapists should generally seek legal advice regarding these matters.

B. Immunity for Failure to Predict or Warn

In 1985 the Legislature enacted Section 43.92 of the Civil Code to provide immunity for psychotherapists for failure to predict and/or warn of a patient's violent behavior. However, the immunity will not protect a psychotherapist to whom the patient has communicated a serious threat of physical violence against other persons. That section states:

- “(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened behavior or failing to predict and warn of and protect from a patient's violent behavior except where a patient communicated to the psychotherapist a serious threat of physical violence against a reasonable identifiable victim or victims.”
- “(b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.”

“Psychotherapist” is defined in Evidence Code Section 1010 to mean:

- “(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.
- “(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professional Code.
- “(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professional Code, when he or she is engaged in applied psychotherapy of a non-medical nature.

- “(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.
- “(e) A person licensed as a marriage, family and child counselor under Chapter 12 (commencing with Section 4980) of Division 2 of the Business and Professional Code.”