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MENTAL HEALTH: DUTY TO WARN

House Bill 4237 (Substitute H-2)
House Bill 4238 as introduced
First Analysis (3-20-89)

Sponsor: Rep. David M. Gubow
Committee: Mental Health

THE APPARENT PROBLEM:

In 1974, in the case of Tarasoff v. Board of Regents of the University of California, the California Supreme Court held that a psychotherapist may have a duty to warn someone whom the psychotherapist's patient threatens to hurt. Before the Tarasoff decision, psychiatrists had been held liable for the violent acts of their patients only when the court found a breach of the duty to control hospitalized patients, but since Tarasoff, courts have consistently held that therapists have a duty to protect named third parties when a therapist's patient makes specific threats against that party. A few courts have even extended the duty to unnamed third parties and to property, and a 1983 Michigan case (Davis v. Lihm, subsequently reversed by the Michigan Supreme Court) held a state-employed psychiatrist liable for the actions of a patient who murdered his mother after he was no longer even in treatment.

The wide acceptance by the courts of the duty to protect and its expansion to unnamed victims have substantially increased potential liability for therapists, and yet there are no clear legal ways for therapists to fulfill this duty or to know when the duty to warn takes precedence over the traditional duty to protect the confidentiality of the practitioner-client relationship. Legislation has been proposed which would address these issues

THE CONTENT OF THE BILLS:

House Bill 4237 would amend the Mental Health Code to create a "duty to warn" for mental health practitioners when a patient they were treating threatened physical violence against some third person.

Duty to warn. More specifically, when a patient being treated by a psychiatrist, a psychologist, or a psychiatric social worker communicated a serious threat of physical violence against a third party, and if the patient had the apparent intent and ability to carry out that threat in the foreseeable future, the mental health practitioner would have a duty to take one or more of the following actions:

- Hospitalize the patient or initiate proceedings to hospitalize the patient under Chapter 4 or 4A of the Mental Health Code; or
- Communicate the threat to the potential victim and to the potential victim's or the patient's local police department or county sheriff, or the state police.

Threatened minors. If the potential victim were a minor, in addition to telling the specified law enforcement agency of the threat, the mental health practitioner also would be required to notify the child's custodial or noncustodial parent or guardian (depending on whoever would be most appropriate in terms of the best interests of the child) and the children's protective services office of the Department of Social Services in the child's county of residence. If the threatened minor were 14 years or older, he or she would have to be notified of such threats, but threatened children younger than 14 years old would not have to be told.

Discharge of the duty to warn. The bill would specify that mental health practitioners would not have a duty to warn or to protect a third person except as provided by the bill.

Team treatment of hospitalized patients. If the threatening patient were being treated through team treatment in a hospital, and if the person in charge of the patient's treatment decided to discharge the duty to warn by communicating the threat to the various required parties, the hospital would be responsible for designating someone to communicate the threat to the necessary people.

Confidentiality exemptions. Psychiatrists, psychologists and psychiatric social workers who complied with this newly-created duty to warn would not be in violation of the various legal restrictions on privileged communications, physician-patient privilege, or confidentiality.

Tie-bar. The bill is tie-barred to House Bills 4238 and 4446, which amend the relevant laws to exempt psychiatrists and social workers from their respective practitioner-client confidentiality requirements in cases where they have a duty to warn. (House Bill 4446 is still before the House Mental Health Committee.)

MCL 330.1750 and 330.1946

House Bill 4238 would amend the Revised Judicature Act to allow exemptions from the physician-patient privilege provisions of the act. It would prohibit disclosure of certain information "except as otherwise provided by law." The bill is tie-barred to House Bill 4237.

MCL 600.2157

BACKGROUND INFORMATION:

The Tarasoff case: When a therapist became convinced that his patient posed a threat to Tatiana Tarasoff, the therapist tried unsuccessfully to have the patient committed. The patient terminated therapy and two months later killed Tarasoff. Tarasoff's survivors sued, charging the therapist with negligence in failing to confine the patient and in failing to warn Tarasoff of her danger, but a lower court held that the therapist was statutorily immune on the question of the failure to confine and had no legal obligation to warn the potential victim. However, the California Supreme Court subsequently held that "When a therapist determines or pursuant to the standard of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty. . . may call for him to warn the intended victim or others likely to apprise the intended victim of danger, to notify the police, or take whatever steps are reasonably necessary under the circumstances."

OVER

Davis v. Lhim: A man diagnosed as being a chronic paranoid schizophrenic with a history of alcoholism and heroin addiction was voluntarily treated and discharged from the state hospital. Two years earlier, he had attempted suicide, and his aunt reported at his hospital admission at that time that he "paces the floor and acts strangely, and threatens his mother for money." Two months after being discharged from the state hospital into the custody of his aunt, the man went with his aunt to visit his mother, who had moved out of state. The man got into an argument with his mother and shot and killed her. The jury found the defendant psychiatrist negligent and awarded the victim's estate $500,000, but on appeal, the Supreme Court reversed the lower court's decision on the grounds of governmental immunity and because the patient had threatened his mother directly without expressing this threat to the psychiatrist.

FISCAL IMPLICATIONS:

Fiscal information is not available. (3-20-89)

ARGUMENTS:

For:

Since the Tarasoff decision, courts in at least 12 states and several federal districts have found that there is a psychotherapeutic duty to protect third parties who may be injured by the therapist's patients. Thus, a new responsibility, as well as a substantially increased potential liability, has been imposed on therapists. In addition to posing professional questions over the potential conflict between the therapist's duty to maintain confidentiality on the one hand and to protect society on the other, conflicting court decisions on therapists' liability in "duty to warn" cases have left many therapists uncertain when and how to fulfill this duty. (Questions about this "duty to warn" reportedly are the most common queries directed to the American Psychiatric Association's legal consultation service.)

A number of states (including New Hampshire, California, Colorado, Florida, Kentucky, and Louisiana) have enacted statutes that limit therapists' liability to cases in which the patient has communicated to the therapist a serious threat of violence to a reasonably identifiable victim, and have specified when a therapist has discharged the duty to warn. Under the California law, for example, a therapist discharges the duty to warn by warning the potential victim and the law enforcement agency.

The bill would minimize therapists' liability by establishing a standard of when a therapist had a duty to warn in cases of threats made by a mental health client and would specify what actions a therapist could take to fulfill this duty to warn.

Against:

The bill would fail to adequately protect either patients' rights or professionals from liability. Instead, it would seriously weaken patients' rights to privacy, confidentiality, and unnecessary intrusion while adding to, rather than reducing, avenues of malpractice actions.

The bill would reduce the individual rights of people labeled mentally ill by shifting the balance between protecting therapists' interests and patients' rights too far in favor of interests of professionals. The therapeutic relationship between therapist and client is based on trust. Any breach of confidential information is a breach of that trust and of the therapeutic relationship. Consequently, the possibility that confidentiality may have to be breached is very detrimental to therapy, and thus to the people often most in need of this kind of help.

Ironically, the bill could even have the effect of making the community less safe by either discouraging people from seeking treatment in the first place or by rendering therapy ineffective because the patient withholds important information from the therapist out of fear that this confidential information will be breached.

The bill would allow a mental health practitioner to hospitalize an individual (or to initiate proceedings to hospitalize a patient under the provisions of the Mental Health Code) and to communicate confidential information to both a third party and to a law enforcement agency. Since the code already allows the involuntary hospitalization of people who are a danger to themselves or others, this authorization would seem to be both redundant and unnecessarily intrusive into patients' rights to confidentiality.

In addition, the bill conceivably could actually create new causes for malpractice actions due to vagueness in the language setting up reporting standards. For example, the bill would impose upon mental health practitioners the burden of deciding when a patient had "communicated" a "serious threat of physical violence" against a "reasonably identifiable third person." What is "communication?" An oral statement? A written statement? Nonverbal behavior? (And if not an oral or written statement, when is the mental health professional to know when nonverbal behavior is "communicating" the requisite threat?) And what is to constitute a "serious threat of physical violence?" If a patient were to say that he or she fully intended to go home and slap his or her spouse, would a slap constitute "physical violence?" If so, should the therapist then begin proceedings to hospitalize the patient and to notify the spouse and appropriate law enforcement agency? In addition, the bill apparently would clarify when the mental health practitioner would have a duty to warn by specifying that the patient had "the apparent intent and ability to carry out that threat in the foreseeable future." But what constitutes "the foreseeable future?" Two days? Two months? Two years?

The bill would seem to protect neither patients' rights, the safety of the community, nor professionals from potential liability. The best protection for professionals from liability, and the general public from violent patients, should be the professional judgment of the mental health practitioner. Because an assessment of a patient's potential for violence requires professional judgment, malpractice, rather than simple negligence, is the appropriate standard for determining liability. Similarly, just as assessment of a patient's potential for violence is a professional judgment, so also is choice of action. Statutes specifying what actions a professional must take will serve neither the public nor the professions well, and they will not protect the clinician who fails to exercise professional judgment responsibly.

Response: In light of the conflicting court cases since the Tarasoff decision, it is imperative that the legislature establish statutory guidelines for the duty to warn that Tarasoff imposes. Not only have therapists been successfully sued for failing to warn, they also have been successfully sued for breach of confidentiality when they gave what they believed to be appropriate warning (Hopewell v. Abidempe, No. Gd 78-82756 [Pa. Ct. Comm. Pleas, Alleghey Cty., Civ. Div. June 1, 1981]).

MORE

Leaving malpractice alone as the appropriate standard for determining liability is not an adequate response, as the case of Davis v. Lhim illustrates. In fact, this case appears to be a classic example of what clinicians most fear: liability based solely on a failure to predict accurately. The lower court decision in Davis v. Lhim, although eventually reversed by the state supreme court, involved a former inpatient, not currently in treatment, who had no known history of violence toward others and who had vaguely threatened the victim two years earlier. There was no allegation that the defendant psychiatrist had departed from the usual standard of care in any way, and the patient was similar to many other troubled patients who are legally discharged from state hospitals.

With regard to the issue of whether or not the bill's language is too vague, the language is careful to distinguish between serious and frivolous threats, threats that the patient has the apparent intent and ability to carry out, and sets a timeframe by specifying that the intent and ability must refer to the foreseeable future, a term that has been interpreted in case law. No statutory language can capture all relevant and appropriate situations, and the bill is no exception in that regard. The mental health practitioner will still have to exercise professional judgment, as is right and proper, and that simply is a fact of professional practice in general. Finally, by specifying the actions that the practitioner can take to fulfill his or her duty to warn, the bill does not add redundant provisions to the code but rather provides a way for practitioners to make the needed judgements balancing the confidentiality of the therapeutic relationship against their responsibility to protect the public safety. Individual patient's rights will continue to be important, but must — as the Tarasoff decision emphasized — be balanced against community safety as well.

POSITIONS:

The Department of Mental Health supports the bills. (3-20-89)

The Michigan State Medical Society supports the bills. (3-20-89)

The Michigan Psychological Association supports the bills. (3-20-89)

The Michigan Hospital Association supports House Bill 4237 but does not have a position on House Bill 4238. (3-20-89)

The Michigan Psychiatric Society supports the bills. (3-20-89)

Michigan Protection and Advocacy Service, Inc. does not support the bill. (3-20-89)