Confidentiality and the Dangerous Patient

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – June 2007

Although I have previously written about this topic on several occasions (see Archives), the tragic shootings at Virginia Tech in April raise issues and concerns for therapists and counselors from a number of perspectives. While we do not know the full facts as to what involvement a counselor or therapist may have had in this occurrence, if at all (at this time it appears that there was none), there has been considerable discussion about the issue in general and some hypothesizing about what could happen in any given case. Because of the breadth of this issue, CPH and I have decided to devote this issue of the Avoiding Liability Bulletin to this one subject. While some of the information may be repetitive of earlier Bulletins, the subject warrants ongoing attention.

A. HIPAA or State Law?

HIPAA is probably not the first thing that comes to mind when this subject is raised, but it is relevant. Many therapists and counselors are not HIPAA covered providers, so state law regarding the dangerous patient exceptions to confidentiality would be applicable to those practitioners. Others, however, may be covered by HIPAA's privacy rules, and they are therefore required to not only know the specifics as to how HIPAA treats the subject, but must also know state law and how state law may differ from the HIPAA regulation. When there is a conflict between state law and HIPAA, a general rule is that whichever of the two protects patient privacy the most will be the applicable standard. This determination may not always be easy and may sometimes be problematic.

HIPAA in this case essentially provides an exception to confidentiality to avert a serious threat to health or safety. The rules (regulations) provide, in part, that the patient's consent or authorization is not required if the "covered entity" (this could be an individual's private practice), in good faith, believes that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and the disclosure is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. The regulation is seemingly respectful of state law and other legal authority in that it says that the actions of covered entities in making the disclosures should be "consistent with applicable law and standards of ethical conduct." This language should help to resolve any conflicts between HIPAA and state law.

B. Danger to Self, Property or Others?

It cannot be repeated enough that state laws often vary in fine nuance when it comes to the issue of exceptions to confidentiality and the dangerous patient. In most states, therapists and counselors may break confidentiality when the patient is in such mental or emotional condition as to be a danger to self

or to others and when disclosure is necessary to prevent the threatened danger. Some states recognize that a danger to the property of others will likewise permit disclosure by mental health practitioners in order to prevent, for example, the setting of a fire in an unoccupied building. With respect to the setting of a fire, for example, it is interesting to note that the HIPAA regulations make reference to the health or safety of a person or the public (emphasis mine).

C. Duty to Warn or Protect? Right or Duty?

One of the most famous cases in this area of practice is the Tarasoff v. Regents of theUniversity of California case decided by the California Supreme Court in 1976. This decision, while binding in California, is not binding in other states, but its influence throughout the country is well documented. And yet, the case has been widely misunderstood within California and elsewhere. Perhaps the greatest misconception is the notion that the decision established a "duty to warn" an identifiable victim of the serious and imminent threats of physical violence by the patient.

In fact, the actual duty created by the court was a duty to use reasonable care to protect the intended victim from the threatened danger. This duty to protect might be executed in a variety of ways, including but not limited to, involuntary or voluntary commitment, calling the police, or attempting to warn the intended victim.

What is the precise duty in your state? Is it really a duty to warn or is it a duty to protect? If so, who must be warned – the intended victim, the police, others? Some states may provide for the right (permission) to warn, leaving it to the discretion of the practitioner, and may not impose a duty to warn or protect or a requirement to break confidentiality. Nevertheless, therapists and counselors who have the right to warn or to break confidentiality will often want to use that authority to try to prevent imminent physical violence to others.

D. When Is the Duty Triggered?

Does the law of your state require that a duty to warn or protect only arises when the patient utters a serious threat of imminent violence against another, or does the duty arise if the therapist or counselor "puts two and two together" and determines from factors other than an explicit threat of violence that an imminent danger of violence exists? The answer to this question is important in several respects. If the therapist or counselor acts too quickly or without sufficient reason, the patient may sue the therapist for breach of confidentiality and the therapist may not be entitled to immunity, if the pre-conditions of the immunity statute are not met (e.g., communication of a serious and imminent threat of physical violence has not been made by the patient to the therapist).

If the therapist or counselor fails to act at all, and physical violence is inflicted on another (e.g., the patient's co-employees and supervisors) by the patient, the issue of when is the duty to warn and/or protect "triggered" becomes critical to the therapist. If the duty is not triggered under applicable law in a particular state, then the duty to keep communications and information confidential applies.

Unfortunately, sometimes therapists or counselors get judged with the benefit of hindsight. While it may be alleged that the therapist should have known of the danger, therapists are not generally required or expected to predict violence. In the Tarasoff decision referred to above, the court said it best when it stated: “We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence … the therapist is free to exercise his or her own best judgment without liability: proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.”

E. Immunity From Liability?

If a therapist or counselor does break confidentiality, will he or she be immune from liability as to a lawsuit from the patient for breach of confidentiality? Will the therapist or counselor be immune from liability as to lawsuits from those who are harmed by the patient’s violence? What needs to be done in order to “earn” immunity? Does your state’s law address these questions? The answers to these questions must be thoroughly understood, since most therapists would at least like the opportunity to be immune from liability. In some states, the therapist can take any one of a number of actions in order to be entitled to immunity. Perhaps the therapist can warn the intended victim, or notify the police, or hospitalize the patient, either voluntarily or involuntarily, or implement a more rigorous treatment plan.

In California, however, the therapist must do two specific things in order to be entitled to immunity from liability. In cases where a patient communicates to the therapist a serious threat of physical violence against a reasonably identifiable victim, the therapist must make reasonable efforts to communicate the threat to the intended victim(s) and to a law enforcement agency. It is interesting to note that hospitalization of the patient, even involuntary hospitalization, does not get the therapist immunity from liability in California, although it may be an appropriate option for the therapist to pursue. Even though a therapist does not get immunity from liability, it does not necessarily follow that he or she will be found to be negligent. Immunity ends the case quickly. With no immunity, a judge or jury will decide whether the therapist acted in a reasonable manner.