Dangerous Patients and the Therapist's Duty

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – June 2006

… In a previous issue of the Avoiding Liability Bulletin, under the heading of *Dangerous Patients and the "Tarasoff Duty"*(April 2005, Volume 2), I described a problem in California and asked about the law in your state regarding the duty, if any, on the part of a therapist or counselor to protect a third party from the threatened physical violence of the patient. The law varies in fine nuance from state to state, not only with respect to the issue of the specific duty and how it may be discharged, but with respect to the issue of when the duty is "triggered."

For example, one trigger (consistent with the famed California Supreme Court's 1976 decision in Tarasoff v. Regents University of California) is ***when the therapist determines*** *that the patient presents a serious danger (e.g., imminent) of physical violence to a readily identifiable other*. Another type of trigger is ***when the patient communicates to the therapist an explicit threat*** *to kill or inflict serious bodily injury against a reasonably identified victim*.

As you might discern, the differences between these two approaches to the "trigger" of the duty are significant. In the first example, the therapist's determination may apparently be made not only as the result of a threat made by the patient, but by a variety of factors, such as communications and information received from others, a review of prior treatment records, the patient's nonverbal communications, and the patient's communications (verbal and non-verbal) that do not amount to "an explicit threat."

In the second example, the duty is arguably triggered only if there is an ***explicit threat communicated*** by the patient to the therapist. Thus, in some cases a therapist might determine that the patient is an imminent danger of serious physical violence to a readily identifiable other, but might apparently owe no "duty to warn" or "duty to protect" the victim because there was no communicated and explicit threat. Some state statutes (or case law) combine these kinds of approaches to the "trigger," while others may contain different and somewhat ambiguous language. One must read the state laws (and case law) very carefully in order to discern the exact parameters for the "trigger" of the duty.

If one doesn't understand when the duty is triggered, he/she may be breaking confidentiality if certain disclosures are made without the patient's written authorization. Of course, it is quite possible that the state law will *allow or permit* disclosures to be made in situations that do not *require* the therapist or counselor to warn or notify anyone (e.g., situations that do not involve explicit threats of imminent physical violence).

Once one understands when the duty is triggered, it is then important to understand what the actual duty is. For example, is it a duty to warn, a duty to protect, or a duty to warn and protect? It is also important to understand how the duty is to be discharged in order to obtain (if possible) immunity from liability, and whether the therapist can take other reasonable action that may not result in liability (even though the action taken does not entitle the therapist to immunity)