Dangerous Patients

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – November 2010

… Suppose that a therapist or counselor determines that his or her patient presents an imminent danger of serious physical violence to an identified other, and suppose further that the practitioner warns the intended victim (e.g., the patient's supervisor at work) of the danger and notifies the police, but the violence nevertheless occurs. In the prosecution of the patient for murder, for example, the District Attorney may subpoena the practitioner to testify to both the specific communications with the patient that led the practitioner to make the warnings and to the specific warnings or notifications that were made. If the patient and the practitioner both asserted the psychotherapist-patient privilege, would a court uphold the claim of privilege or require the practitioner to testify when called by the District Attorney?

The argument in favor of upholding the privilege might be that the therapist or counselor abided by the relevant duty or authority to make the warning in order to protect another, and that the public policy of allowing or requiring a warning in order to protect the public was accomplished. Now that there is a trial, the privilege should be respected and the practitioner should not have to testify against his or her client. Arguably, the patient did not waive the privilege by any of his actions. Privileges are generally to be liberally construed so that the patient's expectations of confidentiality and privacy are protected. The California Supreme Court rejected these arguments years ago when they decided a case in California involving the claim of privilege in a murder case much like the above example.

The Court (in a 4-3 decision) ruled that the therapist could be forced to testify as to the communications between the patient and the therapist that led the therapist to believe that the patient was a danger and to warn the victim, as well as the actual warning made by the therapist. In making its decision, the court relied upon the wording of the California statute, which states that there is no privilege if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. The Court was, in essence, saying that the communications evidencing a danger to another or expressing threats against another were never privileged. Thus, the therapist could be forced to testify because of the inapplicability of the claim of privilege and because of the general rule that no person can refuse to be a witness and to testify (and produce records) about matters within his or her knowledge or control.

How would the law treat a similar matter in the state where you practice? Are you permitted or required to warn when the patient threatens serious and imminent harm to another? Would a claim of privilege be upheld if the patient was later prosecuted for harm caused to the victim, despite the warning from the treating therapist? While the question may not be easily answered, the practitioner's first instinct

should be to assert the privilege. Ultimately, the court will make its decision and the practitioner will usually comply with the court’s order.