Duty to Warn

written by Richard Leslie | May 24, 2016

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Media coverage of the March 2015 tragic airplane crash in the French Alps once again brought to the fore the related issues of a therapist's "duty to warn" and confidentiality when treating the dangerous patient. Much of the debate and discussion in the national media focused on the following public policy question – when should confidentiality give way to the need to prevent serious physical harm to the public or to one or more individuals? One commentator responded to that question as follows: "The protective privilege ends where the public peril begins." This clever (but vague) statement comes from the famed Tarasoff v. Regents of the University of California decision by the California Supreme Court in 1974, which came to be known, inaccurately, as the case which established a "duty to warn."

What I discovered from the media coverage was that there was a considerable amount of confusion, misinformation, broad generalities, and uncertainty being dispensed over the airwaves by the so-called experts or pundits. More than one commentator stated that when public safety is in peril, therapists are required to make a report to the authorities. Mention of the "duty to warn" was made. What was not said is the fact that in some states, there is no duty to warn – only a right to warn. Some commentators made it seem as though HIPAA required that all health care providers had to keep everything confidential under all circumstances and that all providers were governed by HIPAA. The reality is that HIPAA contains (in the federal regulations known as the "Privacy Rule") its own exceptions to confidentiality, including the exception for what I will call "dangerous patient situations." Also, unless the practitioner is a "covered entity," he or she will be regulated by state law rather than by federal law or regulation.

Public policy questions were raised by this tragedy. Should a mental health practitioner be under a duty to report to the authorities or to the employer the fact that a client/commercial airline pilot is depressed or severely depressed? Is there a difference between practitioners who act in a treating role vs. an examining role? With respect to the latter question, there is a difference in the duties owed by a mental health practitioner who privately treats a patient and a practitioner who is hired by an employer to examine the patient/employee prior to or post-hiring. It should be clear to the patient that the practitioner who is in an examining role will report the results of the examination, perhaps in significant detail, to the employer. Thus, if it were discovered by the "examiner" that the pilot was depressed, this might get back to the employer and jeopardize the employee's job – dependent upon the facts and circumstances. But if that same depressed pilot was seeing a therapist or counselor in a private practice situation, the practitioner would likely be required to keep the information (including the diagnosis) confidential.

Think about a pilot who tells her therapist that she occasionally uses cocaine. Is the therapist under any

duty to report? Is the pilot/patient entitled to confidentiality? Suppose that the pilot shows no signs of suicidal ideation and no intent to harm anyone else. She describes herself as a recreational user and admits to snorting a small amount in the cockpit on one occasion eight years earlier. Making a report to the authorities or the employer will likely negatively impact the patient's career – maybe permanently – and may result in a lawsuit against the therapist for breach of confidentiality. Keeping the information confidential will protect the privacy of the patient, allow for continued treatment by the therapist, and allow for continued monitoring and possible improvement of the patient's condition. When considering such issues, practitioners sometimes ask themselves, among other things, whether they should act in a manner that is best for them (the individual practitioners) or in a manner that is best for the patient.

It is critical to understand the statutory and case law in your state to determine whether you are under an affirmative duty to protect others or the public, and precisely when that duty arises, or whether there is simply a right to act (e.g., choose to break confidentiality by calling the police or the intended victim). Practitioners will also want to know if there is an immunity statute in their state that protects practitioners from liability if they take specific actions under the circumstances described in the statute. Whatever the action taken, it is useful to first obtain corroboration of one's judgment by means of a clinical consultation, if time and circumstance permit.