DUTY TO WARN EXPANDED BY CALIFORNIA COURT

By Stephen E. Berger, Ph.D., ABPP and Michael A. Berger, J.D.[1]

In July, the California Appellate Court for the 2nd District issued a ruling that expands the Duty to Warn. The California Supreme Court has declined to review the ruling[2]. In the case of *Ewing v. Goldstein*, the Trial Court ruled that Dr. Goldstein (a California licensed Marriage and Family Therapist) was immune from liability when his patient murdered another man and then killed himself. Dr. Goldstein apparently received communication from his patient's father that led Dr. Goldstein to believe that his (adult) patient was an imminent threat to another person (whose name, phone number and address Dr. Goldstein did not know). Dr. Goldstein's patient was in the hospital, and Dr. Goldstein notified the treating psychiatrist of his concerns. However, since Dr. Goldstein did not receive this communication directly from the patient, he did not believe that he could violate his patient's confidentiality by notifying police and the potential victim. The Trial Court agreed that the Duty to Warn applied only if the patient communicated to the therapist the threat of serious bodily injury to another.

The relevant provision of the California Civil Code 43.92 reads: There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

The Trial Court reasoned from the above that the Duty to Warn only arises if the patient makes the communication to the therapist to the therapist and dismissed the case. The Court of Appeals reasoned differently. The Court referred to a 1977 case: *Grosslight v. Superior Court*.[3] In that case, the California Supreme Court held that when family members make communications to the patient's therapist in the course of assisting in the patient's treatment, then those communications are privileged the same as if they had come from the patient herself or himself, and the privilege belongs to the patient just as with all communications that the patient makes to the therapist. That is wonderful news.

However, in tortured reasoning, the Appellate Court reasoned that if communications from family members to a patient's therapist are privileged just as are the patient's own communications to the therapist, then **ALL** duties and responsibilities arising from a patient's own communications also apply to communications received from family

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[2] Among the organizations urging the Supreme Court to accept the case for review were the California Psychological Association, APA, CAPP, and three California county psychology associations.

[3] *Grosslight v. Superior Court* ……

members. As a partial aside, the Court explicitly stated that it would not indicate whether the Duty to Warn would be triggered by communications a therapist received from a "good friend" of the patient! In the meantime, legal counsel to the California Department of Mental Health advised that the Department should treat "credible" communications from **anyone** as triggering the Duty to Warn.

It is also interesting to note that the plaintiff had not argued that Goldstein had a Duty to Warn. Instead, the plaintiff argued that the immunity from liability provision of the California Civil Code (partially cited above) was unconstitutionally **vague**. The Appellate Court not only ruled that the Code was not (unconstitutionally vague), but that the Code and the Legislature's intent was so clear that the Court could tell that the words referring to communications a therapist received from a patient actually meant: communications a therapist received from the patient **or a family member**, although the law is not so clear as to tell us whether communications from a patient's good friend also triggered the Duty to Warn.

Obviously, this irrational ruling must be challenged. Avenues include further Court action and/or further clarification by the legislature. In the meanwhile, California therapists have the official positions of various professional organizations including those listed in footnote 2, that will serve to disarm any "expert" who attempts to testify under oath, swearing that there is a Standard of Care that the expert can apply in any specific case to conclude that the therapist had failed to competently evaluate the hearsay communications received from "purported" family members. It is recommended that you become familiar with the reasoning and arguments made to the California Supreme Court so that you will be educated and better able to protect yourself from this aberrant ruling.