Keeping Secrets That Harm Others: Medical Standards Illuminate Lawyer's Dilemma

Shelly Stucky Watson

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol71/iss4/6
Keeping Secrets that Harm Others:
Medical Standards Illuminate Lawyer's Dilemma

TABLE OF CONTENTS

I. Introduction ............................................ 1124
II. Doctor's Duty to Warn Identifiable Third Persons ........ 1124
   A. Tarasoff and the Common Law Duty .................. 1124
   B. Statutory Adoption .................................... 1126
III. Lawyers' Commitment to Confidentiality ................ 1128
    A. Historical Underpinnings ............................ 1128
    B. Current Justifications and Rationales .......... 1129
IV. Challenging Confidentiality Harmful to Innocent Third Persons ........................................ 1131
    A. Application of Tarasoff to Attorneys .......... 1131
       1. The Tarasoff Arguments .......................... 1131
       2. The Attorney-Client Relationship as a Special Relationship ........................................ 1131
          a. Prediction of Dangerousness ................. 1131
          b. Power to Control the Client ................ 1133
          c. Duty to Society and Public Policy .......... 1133
    B. Hawkins v. Kings County Rehabilitation Services ... 1136
       1. The Hawkins Decision ............................ 1137
       2. Warnings from Third Parties ...................... 1137
       3. An Attorney's Duty to the Intended Victim .... 1139
    C. Troublesome Exceptions to Current Lawyer Confidentiality ........................................ 1140
       1. Crime-Fraud Exception ............................. 1140
       2. Lawyer Self-protection ............................ 1140
       3. Implications of the Troublesome Exceptions ... 1141
    D. Weighing Interests by Comparing Medicine and Law ................................................ 1141
       1. Patient/Client Interest in Confidentiality ........ 1141
       2. Interest of Third Persons .......................... 1142
       3. Physician/Lawyer Interest ........................ 1143

* Associate, Betterman & Katelman, Omaha, Nebraska.
In routine cases, physician-patient and attorney-client confidentiality is uncontroversial. Confidentiality protects patients and clients, and is thought to enable the professional systems to work. Nevertheless, situations exist in which strict confidentiality may conflict with society's interests. Both common law and statutory law in medical literature recognize a duty to warn identifiable third persons when a patient threatens to harm them. It is the thesis of this Article that a parallel duty to warn third persons of impending harm should exist in the attorney-client sphere.

The following discussion focuses on the comparison of the medical duty to disclose and the lawyer's duty of confidentiality in unusual cases—those in which independent societal interests arguably outweigh the client's interests in secrecy. A comparison of the professions highlights weaknesses in confidentiality's traditional justifications and rationales.

The Article first presents an overview of the medical duty of disclosure to prevent harm to third persons. Next the traditional lawyer confidentiality rules are discussed. Then the Article challenges lawyer confidentiality by analogy, logical extension of the special relationships doctrine, discussing troublesome exceptions to the lawyers' confidentiality rule and comparing the medical duty to disclose. Finally the Article concludes that in the case of harm to third persons, lawyers should be under an affirmative duty to disclose client confidences.

II. DOCTOR'S DUTY TO WARN IDENTIFIABLE THIRD PERSONS

A. Tarasoff and the Common Law Duty

In 1967, Prosenjot Poddar entered the University of California at Berkeley where he met another student, Tatiana Tarasoff. In love with Tatiana, but apparently Tatiana had no similar attraction. Poddar fell depressed and sought psychiatric counselling as a voluntary out-patient at the Cowell Memorial Hospital at the university.

In the course of treatment, Poddar informed one of the treating psychiatrists, Dr. Moore, that he intended to kill Tatiana when she returned from a summer in Brazil. Dr. Moore decided to have Poddar

1. This version of facts of Tarasoff is from People v. Poddar, 518 P.2d 342 (Cal. 1974), the criminal action against Prosenjot Poddar.
committed for observation in a mental hospital. Poddar was taken into custody by campus police but was released after they were satisfied he was rational and he promised to stay away from Tatiana. Subsequently, the director of the psychiatry department at the hospital overrode Dr. Moore’s orders and directed that Poddar not be placed in seventy-two hour evaluation.

Two months later, when Tatiana returned from Brazil, she was murdered by Poddar. At no time did the therapists attempt to warn Tatiana or her parents of Poddar’s threats. Tatiana’s parents brought a wrongful death action against the Regents of the University of California, the campus police, and the hospital psychotherapists who handled Poddar’s case.

The California Supreme Court held that Tatiana’s parents could state a cause of action for negligent failure to warn against the psychotherapists but not against the police. The majority recognized the traditional rule that one does not ordinarily owe a duty to control the conduct of another or warn those endangered by such conduct. However, the court noted an exception where the defendant stood in some special relationship with the aggressor or the foreseeable victim. The opinion stated the psychotherapist-patient relationship between Poddar and the therapists created a special relationship that supported affirmative duties for the benefit of third parties. Accordingly, the therapists had a duty to warn Tatiana based upon their special relationship with Poddar. Although by definition the duty to warn requires a breach of patient confidentiality, the court reasoned that “the benefits of the confidential communications must be weighed against the public interest in safety from violent assault.” In sum, the psychotherapist-patient relationship subjects the psychotherapist to an affirmative duty to warn, and the relationship’s confidentiality does not prevent disclosure.

Despite vigorous objections and scholarly criticism of the majority’s standard, the Tarasoff rule was adopted in many other jurisdictions in various forms. As a result, there is confusion about the

2. Poddar was convicted of the second-degree murder of Tatiana Tarasoff; however, the conviction was reversed on appeal due to error in the jury instructions. Since five years had passed since the original trial and it seemed unlikely a retrial would result in a conviction, Poddar was not retried but released on condition he return to India. Vanessa Merton, Confidentiality and the “Dangerous” Patient: Implications of Tarasoff for Psychiatrists and Lawyers, 31 EMORY L.J. 263, 290 (1982).


requirements of the rule and the extent to which psychotherapists and other health professionals may be liable. In response to the confusion, nearly one quarter of the states have now adopted statutes codifying the Tarasoff duty.\(^7\)

B. Statutory Adoption

The statutes\(^8\) limit the civil liability of mental health care providers for failing to predict violence by their patients and for failing to warn or take precautions to protect other people for impending violence. Generally, the duty of a professional to warn or take precautions against violence by a patient arises only when a patient has communicated a threat against a third person to the professional. Under most statutes, if a professional is forced to disclose confidential information to discharge this duty, the professional is immune from liability under other statutes which protect patient confidentiality.\(^9\)

The statutes are distinguished from one another by four factors: (1) who is subject to the duty to warn or take precautions; (2) the type of threats which will activate the duty; (3) the required identifiability of the victim; and (4) the proper means of discharging the duty.\(^10\) The statutes address these factors through a variety of approaches.

Four significant differences appear among all the statutes and the Tarasoff line of cases.\(^11\) The statutes attempt to provide a solution to the legal dilemma between breaching confidentiality and giving a warning or taking precautions. Typically, the statutes do not have explicit reasonableness standards regarding when the duty to warn or take precautions arises and what actions the professional should choose to fulfill this duty.

First, most of the statutes grant immunity to therapists who breach confidentiality in order to discharge the duty to warn. This prevents the dilemma, recognized by Justice Clark, which confronts psychotherapists under Tarasoff. By an explicit grant of immunity, the statutes shield therapists from a draconian choice between fulfilling a statutory duty to preserve confidence or a Tarasoff-like duty to reveal. These approaches afford the mental health professional some breathing space in which to avoid the disclose-reveal dilemma in close cases.

Second, no professional reasonableness standard determines when the duty arises under the statutes. Under the Tarasoff line of cases, the existence of the duty depends upon the operations of a standard of reasonableness used to judge the professional's determination of the

---

7. Id. at 401.
8. For a comprehensive treatment of the statutes see id. at 401-03.
9. Id. at 403.
10. Id.
11. See id. at 409-11. The following discussion of the various statutes is drawn from Mr. Geske's Note.
patients dangerous disposition. Under case law, when a professional applies the standard of the profession with reasonable care and finds that the patient poses a serious danger of violence to others, the duty arises to protect third party potential victims. The statutes, on the other hand, determine when the duty arises by looking to the actions of the patient, not the reasonableness of the professional. The patient must communicate a threat before a professional has any duty to take precautions to protect a third party. Under the statutory scheme, therefore, it is no longer an issue whether a professional should have predicted violence by the patient. Rather, if the patient makes a threat, the duty arises independently of the operations of a legal standard of professional reasonableness.12

Third, the language of the statutes does away with the reasonableness test used in Tarasoff to evaluate the professional's choice of the actions necessary to discharge the duty. The statutes specifically prescribe alternative actions which may discharge the duty, including warning the victim or the police, or both. It is significant that several of the statutes give a choice of action to be made within the discretion of the professional. Unlike Tarasoff, the statutes have no explicit provision for reviewing whether the professional made a negligent choice of actions to discharge the duty under the circumstances.

Recall in Tarasoff the defendants originally called the police to have Poddar detained. The police did not detain him because he appeared rational and promised to stay away from Tatiana. According to the court, the psychotherapists' actions were nonetheless subject to review to determine whether they had done all that was reasonably necessary to protect Tatiana from the threat. On the other hand, under many of the current statutes, a notification to either the police or the potential victim would discharge the duty.13 Under such a statute, the defendants in Tarasoff might have prevailed. Having notified the police, they would not have been liable for taking over action to protect Tatiana as needed under the circumstances. Moreover, under any of the statutes which require notification of both the police and the victim, the therapists should have known beforehand that a call to the victim was also required. Presuming that they had followed such a clear command, their action might not have been subject to a further reasonableness test and may have protected them from liability. Thus, regarding the sufficiency of warnings and precautions, the stat-

12. These rules are undoubtedly more easily applied and more certain. However, they are a mechanistic means to deal with these types of human problems.

13. It is interesting that notification which would have discharged the psychotherapist's duty under these new statutes would not have effectively warned Tatiana Tarasoff. Of course effective warnings cannot be the standard, but ought to be the goal.
utes limit mental health professionals' liability for the violent acts of their patients.

Finally, most of the statutes retain something like the reasonably or readily identifiable victim standard to determine whether the duty to warn or take precautions arises. Thus, in the majority of states, a reasonableness rule must still be used to determine when the duty arises. Even in the face of threats by the patient, the statutory duty will not arise unless the potential victim is reasonably or readily identifiable.

III. LAWYERS' COMMITMENT TO CONFIDENTIALITY

A. Historical Underpinnings

Today's claim of attorney-client confidentiality may be based on either the Canons, Code, or Rules of Professional Responsibility or on the Rules of Evidence. Each of these sources can likely trace its ancestry to the ancient common-law principle of sanctity between a person and her counsel. Ironically, the purpose of the exception in the early 1500s was not concern for the client's interests but rather the honor of the attorney.

By the late 1700s, the attorney's honor was no longer the primary concern, since the "judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy..." The basis for the privilege became the desire to provide a nonapprehensive forum for people seeking legal advice. As such, the scope of the privilege was expanded from covering only communications made during current litigation to protecting any communications made in any legal consultation, regardless of whether there was litigation or even a controversy.

The generally accepted argument is that in order for an adversarial system to work, an attorney must be able to effectively relate the client's side of the story to the court. In order to effectively relate the story, the argument goes, the entire story must be available to the attorney. Without a rule of confidentiality, the concern is that clients would feel compelled to withhold information from the person who most needs that information.

14. By far the most in-depth analysis of the historical basis for attorney-client confidentiality can be found in Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 IOWA L. REV. 1091 (1985). In contrast to my superficial treatment of the history and the sources of confidentiality, Subin dissects the background and interplay of the sources of the privilege.
16. Id. at 543.
17. Id.
18. Id. at 545.
This policy has been furthered by the American Bar Association in its Model Code. Ethical Consideration 4-1 provides that:

[a] lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.19

The comment accompanying Model Rule 1.2 more specifically states that attorneys "should defer to the client regarding . . . concern for third persons who might be adversely affected."20

B. Current Justifications21 and Rationales

Currently, the primary argument in favor of attorney-client confidentiality is the same non-apprehensive forum argument as was developed in the 1700s. The justification rests on a three-step syllogism. First, for the adversary system to operate, citizens must use lawyers to resolve disputes and the lawyers must be able to represent clients effectively. Second, attorneys can be effective only if they have all relevant facts at their disposal. Third, clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret.22 Thus, the argument goes, attorney-client confidentiality is the foundation of orderly and effective adversarial justice.23

The bar relies on additional rationales for confidentiality. Propponents claim that confidentiality improves the attorney-client relationship. It fosters aspects of lawyer and client "dignity"24 by promoting compliance with the law. And, in theory, confidentiality helps lawyers discover improprieties that the client may be planning and dissuades them from so acting.

Practical considerations may also tend to support maintenance of strict confidentiality. One concern might be the client's expectation and reliance on complete confidentiality. Limiting confidentiality might cause client uncertainty regarding what information could be

19. MODEL CODE PROFESSIONAL RESPONSIBILITY EC 4-1 (1980), see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).
21. Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351 (1989). Zacharias calls for empirical research regarding the theoretical underpinnings of strict confidentiality and, in doing so, offers an insightful discussion of the justifications of confidentiality. His thoughtful commentary provided the basis for Part III of this Article.
22. There is no empirical data to support this position. For data to the contrary see id. at 379-408.
23. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.3 (1986).
24. See id. § 6.1.4, at 244. In general, if confidentiality encourages the use of counsel, it also may promote compliance with the law.
disclosed without fear of repercussions. This uncertainty may induce the client to lie or "attorney-shop" for an attorney who maintains such confidences. Finally, the client might feel that the disclosure of information by an attorney whose help was sought by the subject of the disclosure is simply unfair.

Undoubtedly, each of these reasons has played a role in preserving rules favoring secrecy. In many ways, strict confidentiality also serves personal interests of segments of the bar. For example, the rules relieve lawyers from the psychological costs of having to make difficult ethical decisions. It is far simpler to apply a broad rule of confidentiality than face each decision on a factual basis.

On balance, however, it is difficult, for example, for the attorney who knows the truth to ignore the rights of one who has been falsely accused of a crime. The falsely accused ought to be able to compel the testimony of those who know he is innocent—if not the guilty person himself due to Fifth Amendment protections, then the attorney who knows his client is guilty. The attorney should be permitted to come forward with information sufficient to acquit the falsely accused.

In addition, confidentiality rules may benefit an attorney financially. For instance, a tax attorney may learn from working with the books of a client that the client has collected enormous sums for shipments received and distributed from Costa Rica. The client will say only that the income is from services rendered. The lawyer knows the client has a national distribution system. The lawyer certainly suspects drug trafficking, but if ever confronted publicly will claim confidentiality. In this way, the attorney can continue to provide services for which she is well compensated. This self-serving rationale is not a legitimate reason for continuing broad confidentiality rules. I address it because, like each of the other rationales discussed in this section, it contributes to the reasons legal professionals are reluctant to create exceptions in confidentiality rules.

To accept the arguments in favor of confidentiality, one must reach one of two conclusions: first, that clients would use lawyers significantly less if more exceptions to confidentiality existed; second, that clients who employ lawyers would reveal substantially less information. Both conclusions are questionable.

It is doubtful that clients fully understand the confidentiality rules as they now stand—if indeed, the rules are explained to them at all. Even a lawyer who makes a good faith effort to explain the rules and

25. Julia Thomas-Fishburn, Attorney-Client Confidences: Punishing the Innocent, 61 U. Colo. L. Rev. 185, 200-02 (1990) (relating the facts of a chilling Texas case in which the court denied testimony that would have absolved the defendant from guilt in a murder case. The testimony was not allowed because of a technical rule of evidence).
exceptions to a client will likely leave clients confused, at least as to the details.

A need for help in a complex area likely drives the desire to consult lawyers, not the security of confidential disclosures. As matters become complex, laypersons are faced with no choice but to consult an expert.

This serious need may also be a catalyst in prompting full and accurate disclosure. Admittedly, in personal areas the client likely takes comfort in knowing unnecessary details will not be disclosed. However, absent such personal details that disclose intent to harm a third person, there is no reason for this aspect of confidentiality to change. If the client does withhold facts, it remains unclear whether the representation will be significantly altered. A lawyer who knows only partial facts can provide good quality legal advice on the basis of that information.

Confidentiality rules undoubtedly effect client disclosure, but in the abstract it is difficult to determine the extent of any effect. If the number of clients needing broad confidentiality rules is small, the interest in confidentiality should be outweighed by societal interests in allowing, or even mandating, disclosures.

IV. CHALLENGING CONFIDENTIALITY HARMFUL TO INNOCENT THIRD PERSONS

A. Application of Tarasoff to Attorneys

1. The Tarasoff Arguments

The two major arguments supporting the Tarasoff duty are the special relationship between the psychotherapist and patient and the protection of society from violent assault. A situation where an attorney fails to disclose his client's threatened violence to a third party appears analogous to the situation of the psychotherapist in Tarasoff; however, some important differences remain.

2. The Attorney-Client Relationship as a Special Relationship

a. Prediction of Dangerousness

The attorney-client relationship differs from the psychotherapist-patient relationship in several respects. The psychotherapist-patient relationship is based on solving the patient's mental health problems, including any tendencies or fantasies toward violence. As a result, the psychotherapist is trained to explore and solve psychological problems that sometimes lead to violence. She is not only aware of the unique responsibility, but also has the skill and expertise to handle such situations.

On the other hand, the attorney-client relationship is based on
solving the client's legal problems; complex psychological problems of
the client are peripheral and generally not within the scope of the at-
torney's skills or services. Because the attorney lacks the necessary
skills and expertise, the attorney should not be expected to act as a
psychotherapist in exploring psychological problems and determining
treatment. These differences between the attorney-client and psycho-
therapist-patient relationships are inherent in the difference between
the professions.

The Tarasoff standard creating a duty for psychotherapists to warn
third parties forwarded by the majority was sharply criticized in a sep-
arate opinion by Justice Mosk. Justice Mosk argued that the duty to
warn should apply only where the psychotherapist has "in fact" pre-
dicted the patient's potential for violence. His proposed limitation
was based on the inherent unreliability of predictions by psychothera-
pists of violence by their patients. Mosk cited People v. Burnick,
where the same court determined that psychotherapists' predictions of
violence are unreliable, and therefore held that a person cannot be
committed as a mentally disordered sex offender unless found to be
such beyond a reasonable doubt.

In the majority opinion of Tarasoff, Justice Tobriner distinguished
Burnick and rejected arguments that psychotherapists are incapable
of predicting when a patient will carry out threats. Justice Tobriner
observed that in Burnick the issue was whether a patient should be
incarcerated, but in Tarasoff the issue was merely whether the ther-
apist should take any steps to protect a threatened victim. Moreover,
he concluded that inaccuracy in predicting violence should not negate
a duty to warn, because "[t]he risk that unnecessary warning may be
given is a reasonable price to pay for the lives of possible victims that
may be saved."

Thus, psychotherapists' inaccuracy in predicting violence does not
preclude a duty to warn. Although attorneys arguably have less capa-
bility to predict violence, it is unlikely that they would convince a
court that they should not owe such a duty on the "inability-to-pre-
dict" rationale. One reason is that in most cases the threat of harm to
the third party is credible and clear. The ability to predict dangerous-
ness loses its significance in clear cases. Nonetheless it is the excep-
tional case where the intent to harm a third party is not clear. In
unclear cases it is unlikely that a duty to warn would arise for either a
psychotherapist or a lawyer.

27. Id. at 349 n.18.
28. Id. at 349.
b. Power to Control the Client

Authorities on the psychotherapist's duty to warn have suggested that the preferred course for the psychotherapist is not to breach confidentiality, but to have the patient voluntarily or involuntarily committed.29 This option is available to the attorney, albeit in a slightly restricted form.

For example, Nebraska laws concerning commitment of a mentally ill dangerous person30 provide that if a person believes another to be mentally ill and dangerous, she can inform the county attorney and, along with the sheriff, ask that commitment proceedings be commenced.31 The definition of a "mentally ill dangerous person" applies to mentally ill or substance-abusing persons who present a substantial risk of serious harm to themselves or others as manifested by evidence of violent acts, recent suicide attempts or other threats of harm.32 If, after being so informed, the county attorney concurs that the individual is dangerous and voluntary hospitalization or less restrictive treatment would not suffice, the county attorney then drafts a petition for review by the mental health board who is given the power to make commitment determinations. Physicians and psychologists are provided an additional tool in the form of a limited privilege to hold a dangerous individual until a peace officer arrives, if the physician or psychologist has probable cause to believe such individual is a mentally ill dangerous person. Attorneys do not have the advantage of this limited privilege.

Thus, the attorney-client relationship is one of slightly less control by the lawyer over the client than the doctor over the patient. This slight degree of difference in control should not be determinative of whether a duty is owed. It is foreseeable that the discharge of the duty should be impacted if a situation arises where the lawyer attempts to warn the identifiable victim and cannot reach him at that time. In such circumstances the lawyer may not be successful in warning the victim. There should be an exception in such instances for good faith efforts to warn.

c. Duty to Society and Public Policy

One of the more persuasive arguments for creating the Tarasoff duty is the need to protect society from violent assault. It seems few distinctions would excuse an attorney from a duty to warn similar to

that of psychotherapists. However, attorneys also share similarities with one class that has escaped such affirmative duties: the police.

The most relevant police case is *Tarasoff* itself, where the court held the campus police owed no duty to warn Tatiana. The *Tarasoff* court held that the police defendants had no special relationship with either Tatiana or Poddar that would create a duty to warn Tatiana or her parents.\(^3\) A footnote in the opinion reveals the underlying reason for excluding the police from a duty to warn: "The assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy."\(^4\)

Various California cases have addressed the public policy issue when considering whether the police should have a duty in tort to prevent foreseeable and avoidable violence. In *Morgan v. County of Yuba*, a woman feared the consequences of the release of a man who was arrested for threatening her.\(^5\) The police made a specific promise to warn her of his release but failed to do so; the man killed her upon his release. The court held that a duty to warn was created by her "dependence" upon their promise.

Nevertheless, expansion of this duty has been consistently rejected. The California Supreme Court, in *Davidson v. City of Westminster*, distinguished *Morgan* and refused to find a special relationship between the police and the plaintiff.\(^6\) In *Davidson*, the police were conducting a stake-out of a laundromat to apprehend a man who had previously attacked women in nearby laundromats. The police saw someone they believed to be the attacker enter and leave the laundromat several times but the police failed to act, waiting for the attacker to act criminally. The attacker reentered and stabbed the plaintiff, who was not warned by the police. The court distinguished *Morgan* and other similar cases because in *Davidson* no special relationship was created by dependence, and that the conduct of the police did not increase the risk that the plaintiff would have faced had the officers not been present.\(^7\)

Consequently, courts have been reluctant to create affirmative duties for the police absent a specific promise to warn or protect. The cases base their holdings on the lack of a special relationship. However, it is not readily apparent how *Tarasoff* and *Davidson* can be

---

34. *Id.* at 349 n.18.
37. *Id.* at 900. The *Davidson* opinion refers to the *Tarasoff* footnote which questions the recognition of a cause of action against police defendants on the basis of causation problems and public policy. It is my view that the public policy still does not excuse the police in this case because the very purpose of the police is to protect the public—not to catch a suspect in such a manner as to preserve the best legal case against him.
reconciled since the police spent time with Poddar and were aware of his threats. It would follow that the evidence the police had would create a special relationship between the police and Poddar sufficient for a duty to arise to protect Poddar's identifiable victim, Tatiana. Unless self-discharge of the duty to warn is allowed because the threats are retracted, it seems illogical that the police have no duty to warn while the psychotherapists do. This dilemma has led one commentator to suggest that the true distinction is not in whether there was a special relationship, but in whether the party has a supposed power of predicting violence.\(^{38}\)

In spite of some surface similarities between police and attorneys, the persuasive analogy is between psychiatrists and attorneys. Both the psychiatrist and the attorney have a professional relationship with a single patient or client. Professionals are considered ethically bound to the patient or client in what is commonly categorized as a fiduciary relationship, and the fiduciary role is indicative of the special relationship between the professional and the client. The tort liability for creating a duty to warn third persons should logically cover the cases where such a special relationship exists. The special relationship creates obligations toward the patient or client that are not present in the typical police-society member relationship.

The relationship of police and society stands in stark contrast to the relationship of professionals and their patients and clients. Unlike professionals, policepersons have no special relationship with any single member of society. Instead, they have a general duty toward society in general. Police protection based on special relationships arises only at the moment the police make a specific promise to protect a specific society member.

The special relationship analysis provides a more satisfactory explanation for reconciling Morgan and Davidson. In Morgan, the police made a specific promise to warn the plaintiff which resulted in the creation of a special relationship sufficient to impose liability on the police for failure to warn. After such a promise was made, by failing to warn the plaintiff, the police in effect breached their self-created affirmative obligation toward the plaintiff.

Contrast Davidson, where no specific promise to protect the plaintiff was made by police. In Davidson, the police were bound only by the general law enforcement duty to protect the public. Thus, there arose no special relationship sufficient to impose the duty to warn a specific person. The Davidson court couched the special relationship in terms of reliance by the plaintiff in Morgan. However, it is likely that the plaintiff in Davidson also relied to some extent on police pro-

\(^{38}\) Merton, \textit{supra} note 2, at 341.
tection. It makes more sense to talk in terms of justified reliance—justified because a special relationship was created.

*Tarasoff* remains difficult because the police knew of the specific threats and it seems initially that actual knowledge might trigger an affirmative duty to warn. Yet, knowledge, absent a promise to protect a specific individual, should not rise to the special relationship test. Nothing short of an actual promise to warn a specific person should create the requisite special relationship in the police context.

It follows that any professional should have an obligation to warn third parties. Professionals, by definition, are in a special relationship with their clients. In this sense psychiatrists are indistinguishable from lawyers.

**B. *Hawkins v. Kings County Rehabilitation Services***

A 1979 State of Washington case, *Hawkins v. King County Rehabilitation Services*, is the only reported case of an attorney being sued for failing to disclose the dangerous threat of a client. 39 *Hawkins* offers insight on whether an attorney should owe a duty to warn and whether the duty should be limited as compared to that of psychotherapists. Although *Hawkins* differed factually from *Tarasoff*, 40 it offers some compelling arguments regarding the creation of an affirmative duty for attorneys to warn of a client's intended violent assault.

Michael Hawkins was arrested and booked on a misdemeanor charge of possession of marijuana. A court-appointed attorney, Richard Sanders, had a conference with Hawkins, wherein the client directed that Sanders secure his release on bail. Prior to the bail hearing, Sanders was warned by Hawkins's psychiatrist and his mother's attorney that Hawkins was mentally ill and potentially dangerous to himself and others. Hawkins had previously threatened his mother and sister. Hawkins did not express threats or manifest any agitated behavior in Sanders' presence.

Sanders subsequently appeared at a bail hearing for Hawkins and failed to volunteer any information concerning Hawkins's mental illness or dangerousness. Sanders forewarned the psychiatrist and Mrs. Hawkins of Hawkins's pending release on bail. About eight days later, Hawkins attacked his mother with a knife and attempted suicide by jumping off a bridge, which resulted in the amputation of both his legs.

Mrs. Hawkins filed an action on behalf of herself and her son, alleging that Sanders was negligent under two theories. First, the complaint alleged that Sanders was liable for malpractice for failing to

---


40. *Id.* at 365.
disclose the information regarding Hawkins's mental illness and dan-
gerousness to the judge who set bail. Second, Sanders allegedly breached a common law duty to protect foreseeable victims for his cli-
ent's known dangerousness.41

1. The Hawkins Decision

The Hawkins court distinguished Tarasoff on three grounds. First, in Tarasoff, Tatiana was unaware of Poddar's threats; in Hawkins, the potential victims were aware of Hawkins's dangerousness. Second, in Tarasoff, the psychotherapist had personally heard his client disclose an intention to kill Tatiana. In Hawkins, Sanders heard nothing from Hawkins and had no reason to believe his client was dangerous other than the warnings from third parties, Mrs. Hawkins' attorney and the psychiatrist. Third, Sanders received no information that Hawkins planned to assault any specific person, only that he was mentally ill and likely to be dangerous to himself and others. Thus, the court con-
cluded that since Hawkins posed no obvious threat to an unknowing, identifiable third party, Sanders had no duty to warn potential

The issue of whether an affirmative duty existed was not addressed because the Hawkins case was distinguished factually from the Tarasoff holding. Nevertheless, the court acknowledged the amicus curiae brief and accepted in dicta its proposed rule for limiting attor-
ney's potential liability for failure to warn.43 The court stated that the common law duty to volunteer information about a client to a court considering pretrial releases must be limited to situations where the information gained convinces counsel that his client intends to commit a crime or inflict injury upon unknowing third persons. It stated,

"[W]e are persuaded by the position advanced by amicus 'that the obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing party.'"

The court was unwilling to extend such a duty to the Hawkins facts.

2. Warnings from Third Parties

The Hawkins court does not conclude that an attorney should never have a duty to warn on the basis of information obtained from third parties. However, because Sanders had no first-hand knowledge of his client's threat to others but received the information from third parties, it raises the question of what standard of evidence is sufficient to permit an attorney to disclose in order to protect a potential victim.

41. Id. at 363 (citing Tarasoff).
42. Id. at 366.
43. Id. at 365.
Addressing whether illegality will defeat the privilege of confidentiality, the United States Supreme Court in *United States v. Clark* 44, held that a mere charge of illegality will not defeat the privilege. The Court held that *prima facie* evidence must show that the client intends to commit a crime. A *prima facie* showing of a client’s intent to commit a violent assault could be met without a first-hand disclosure from the client. However, this standard merely permits disclosure, and it does not suggest that *prima facie* evidence is sufficient to establish an attorneys’ liability for failure to disclose. Regardless, it is possible that evidence from third parties as to a client’s dangerousness could not meet stricter standards.

Disallowing permissive disclosure merely because the evidence is not disclosed by the client is overly restrictive. Such a requirement would undercut the underlying purpose of imposing the duty to disclose—protecting third persons from harm. One can imagine cases where the evidence is circumstantial and piecemeal, yet the harm is still great. The gravity of the threatened harm is not diminished by the sources or types of evidence. If one admits that there is a duty to warn others, then it must follow that the source and type of the evidence should not alter the duty.

The standard of evidence, however, should be more strict absent a direct indication from the client to the attorney of the intent to harm. The problem of predicting dangerousness is escalated absent direct evidence from the client. Predicting dangerousness from information and evidence obtained through third persons and then imposing a duty to warn potential victims is not a duty to impose readily.

Both *Hawkins* and *Clark* deal exclusively with permitted disclosure to protect third persons. It is probable that mandated disclosure is appropriate in some cases. The *Tarasoff* lesson is that client disclosures of direct threats to a readily identifiable victim triggers a mandatory duty to disclose for psychotherapists. It would be inconsistent to posit that the same threats produce only a permissive duty for lawyers.

The reluctance on the part of the courts to impose such a duty on lawyers is understandable. First, judges are former practicing lawyers and can thus easily understand the consequences of imposing this duty. Second, creating affirmative duties to aid third parties by warning potential victims is likely seen as a slippery slope in professional liability. Further, the distinction between lawyer-client relationships and other trust producing relationships blur sufficiently for a mandatory disclosure rule to be viewed as a Pandora’s box. The ex-

44. *United States v. Clark*, 289 U.S. 1 (1933)(holding that evidence of a juror’s intentional concealment on *voir dire* of her disqualification, of her arguments with other jurors during the trial and of her vote, held sufficient to overcome claim of privilege).
pansion of the special relationships doctrine to include duty to warn scenarios, when viewed from the bench, may be paramount to creating a specific and affirmative duty to rescue.

At this juncture in the law it seems we must either retreat from the duty to warn for physicians or impose a consistent duty on lawyers. Imposing a duty to warn upon lawyers in this narrow set of cases is appropriate. The doctor-patient and lawyer-client professional relationships certainly support application of the special relationship doctrine. Additionally, it seems only right that lawyers and doctors have special obligations to society by virtue of their respective professions.

The proper standard of evidence is one that takes into account whether the patient or client disclosed the intended harm and whether the obligation is permissive or mandatory. Perhaps the most appropriate way to handle the evidentiary problem is to allow disclosure when the client has not directly disclosed the intended harm or threats to the professional, as in Hawkins; and to mandate disclosure in the direct threat cases like Tarasoff. Such a formulation of the rule would protect the interests of the potential victim and attempt to balance the harshness of the obligation on the professional.

How strict the standards in the respective cases should be is something that remains to be seen. My own lack of personal experience, having only begun practicing law and dealing with my own clients, inhibits my assertion of precise standards.

3. An Attorney's Duty to the Intended Victim

In addition to the question of third party warnings, Hawkins raises the question of whether an attorney should have a duty to determine whether specific victims are identifiable. The Tarasoff court determined that for a psychotherapist to have a duty to warn, the threatened party must be a foreseeable victim of danger. However, the court refused to limit the duty to circumstances where the therapist actually knows who the victim might be. Instead, the court spoke in terms of persons "readily identifiable." In Tarasoff the psychotherapists did not know Tatiana or her name, but it was not disputed that she was readily identifiable.

How then should the attorney's duty to a potential victim be framed? In distinguishing Tarasoff, the Hawkins court noted only that Hawkins was mentally ill and likely to be dangerous to himself and others. Still, Sanders was aware that Hawkins had previously threatened his mother and sister. Thus, they were "readily identifiable" potential victims. However, in Hawkins there were no specific threats, merely evidence that the client was dangerous and that he had previously threatened these family members. Under different cir-

cumstances, where there are specific threats and identifiable threatened parties, the rule of Tarasoff should apply.

C. Troublesome Exceptions to Current Lawyer Confidentiality

1. Crime-Fraud Exception

The law prohibits a lawyer from assisting a client in planning future crimes and other illegal acts. The justification is thought to be two-fold: to prevent wrongdoers from eluding the consequence of wrongdoing when they know the activity to be illegal, and to prevent lawyers from aiding wrongdoers. Clearly there is a problem in distinguishing past crimes from future crimes under these justifications. There is no magic moment when an ongoing crime becomes a past crime. The past and future blur, and therefore distinctions must be determined factually.

2. Lawyer Self-protection

Lawyers' needs to reveal client information for self-protection create a limited exception to the general confidentiality rule. The professional codes and rules generally recognize an exception that permits a lawyer to testify as to information that is otherwise confidential to protect the lawyer against a claim of malpractice, or to collect a fee. The defense against malpractice is more easily justifiable than fee collection.

In the case of a client suing an attorney for malpractice, the confidential information may be crucial to the evidence in the case. Many courts set aside the privilege because the client is deemed to have "waived" it by voluntarily placing the contexts of privileged communications into issue. To permit the lawyer to respond fairly to the client's charges, the lawyer is authorized to breach the privilege defensively.

However, fee-collection is different. It permits the attorney to disclose client confidences from an offensive posture. The exception provides that a lawyer suing a client for an alleged wrongful failure to pay a fee may use confidential information to establish the claim.

Several justifications for the exception can be attempted. Argua-
bly, lawyers should be entitled to use privileged information to protect their economic interests. Moreover, fairness should prevent a client from employing the privilege to the lawyer's disadvantage. But whatever might be said in favor of each of the arguments, the overriding consideration is that the rationale also could be used to suppress other applications of the attorney-client privilege. The privilege inflicts numerous sorts of harm on nonlawyers that has not been considered detrimental enough to have it set aside.51

3. Implications of the Troublesome Exceptions

The necessity of the established right of the attorney to disclose confidences in self-defense or to prevent future crimes seems obvious. However, it is fundamentally inconsistent to bar disclosure when harm to third persons is threatened. It would seem that if, despite strict confidentiality, attorneys can disclose future crimes and extricate themselves from harm caused by the client, they should certainly be at minimum permitted to disclose impending harm to identifiable third persons.

If disclosure cannot be justified by the argument that a lawyer may avoid harm to a third party through disclosure, it follows that it would not be justified by a lawyer merely seeking to avoid harm to herself when her competence is challenged or if she must collect her fee. To let lawyers disclose client information in particular contexts must remain a normative question: Are the beneficial effects of strict confidentiality outweighed by countervailing negative effects or by societal benefits resulting from particular disclosures? A comparison of competing interests in medical confidentiality cases provides some insight.

D. Weighing Interests by Comparing Medicine and Law

1. Patient/Client Interest in Confidentiality

It is no surprise that people who consult either doctors or lawyers would prefer the subject of the consultation be kept confidential. The personal nature of the services provided by each is, in fact, a fundamental characteristic of both professions. In the ordinary case the duty to keep the confidences of clients/patients poses no problem for the respective professional. The very essence of a professional relationship dictates such a fiduciary relationship between the parties.

For illustration, consider a hypothetical loosely drawn from a re-

51. Id. § 6.7.8 at 308.
52. The scope of permitted disclosure and mandatory disclosure is discussed by many commentators. See, e.g., Subin, supra note 14. I purposely leave this question unanswered. It is my intuition that a general tort reasonableness standard should prevail as opposed to classification by gravity or severity of the harm, or by a felony/misdemeanor line as suggested by Professor Subin.
A doctor's patient is a deeply disturbed bisexual AIDS virus carrier who is deliberately trying to infect other people with the disease. The patient is due the same interests in secrecy as before: the right to privacy and freedom from stigma of the disease. Nevertheless, the patient additionally desires that confidentiality principles operate to allow him to harm others. In such a case, others can be harmed through nondisclosure.

Clearly the legitimacy of the patient's interests have changed. The legitimate interest in privacy of information which is of no concern to others is obvious. Contrast such legitimate privacy interests with the case of the AIDS patient who intends to harm others through nondisclosure. In the AIDS scenario, professing an interest in privacy in order to harm others is insupportable. Yet, were the lawyer the one to whom the patient disclosed, there is no justification for lawyer disclosure in order to protect against harm to third persons.

2. Interest of Third Persons

Whether the AIDS virus carrier tells his doctor or his lawyer of his intended plan to "conquer the world" makes no difference to the intended victims. These innocent third persons, like Tatiana Tarasoff, have no knowledge and no reason to take special precautions. The third persons' interest is really an interest in being rescued. Long shunned by tort law, a duty to rescue makes a certain amount of intuitive and moral sense to many people. Creating such an affirmative duty to rescue by disclosing threats of harm in this instance is not undertaken lightly. The duty to rescue should apply narrowly in instances where the rescuer stands in a special relationship to the rescuee. Relationships where the duty would be imposed then would be limited to familial relationships, fiduciary relationships and to other relationships that impose the same obligations as fiduciary relationships. Notably, the special relationship may only run one direction, as is likely in the case of physicians and lawyers to their patients and clients. The strength of the argument that an interest in being rescued is valid is based in the closeness of the relationship. The closer the relationship, the stronger the argument for the obligation to rescue. Perhaps this is why an infant's parents can be criminally charged with abandonment. The trust relationship between the pro-

54. Id.
55. Other than the obvious threat of AIDS to homosexual men. The third person may well be the AIDS carrier's wife.
56. Also, the relationships seem to stand on different footing. The special relationship to the potential victim is a relationship of protection. The special relationship to the potential attacker is a relationship of control.
fessional and the patient or client is projected to the third person\textsuperscript{57} to protect the third person from harm the patient or client intends to commit. It is true that the more drastic the means needed to rescue the victim, the closer the relationship must be to sustain the duty. A simple telephone call to warn the identifiable victim or the police, however, is easily justified by the attorney-client relationship. Throwing oneself in front of the intended victim about to be shot by your client is not warranted. Again, a reasonableness standard should apply.

3. **Physician/Lawyer Interest**

Physicians and lawyers have interests both in keeping the information confidential and in disclosing it. The physician would like to treat the patient's underlying mental illness and control the AIDS-related symptoms. This treatment plan may be in jeopardy if the plan to infect others is disclosed. The patient will lose confidence in the physician, and perhaps in the whole mental health system.

On the other hand, the physician would want to disclose in order to protect others from the spread of a deadly disease. After all, a major goal of physicians is to prevent the spread of disease through immunization and quarantine.

The lawyer would have similar reasons for keeping the secret: to maintain open communication\textsuperscript{58} and trust in the relationship. Arguably the lawyer could dissuade the AIDS virus carrier from acting by bringing it to his attention that to knowingly spread the disease would be improper. I stop short of categorizing it as a crime because, unless spreading disease becomes subject to criminal sanctions, research has shown no successful homicide prosecutions against an AIDS virus carrier, even one who allegedly intentionally infects another.

The lawyer may struggle internally as to whether informing potential victims is proper. Yet, the law of confidentiality is clear—she is not allowed, let alone mandated, to disclose the impending harm.

4. **Societal Interest**

How does all of this square with society's interest? Surely society has an interest in respecting personal autonomy and liberty to the greatest extent possible. This liberty is at the center of the rationale for confidentiality. Yet, there is a competing value—a third party's liberty is at stake. Society should not differentiate whether the infor-

\textsuperscript{57} This projection of the trust relationship may well create a conflict of interests for the professional.

\textsuperscript{58} When an attorney intentionally withholds information, failure to disclose is morally problematic because it involves professional trying to build and encourage trust and then using it to deceive. Pizzimenti, supra note 49, at 477.
mation is disclosed to a physician or a lawyer. To whom the disclosure is made is immaterial. Instead, society should strike a balance in favor of preventing danger to life against the possibility that some individual freedom will be sacrificed. Or against the possibility that patient/client disclosure to physicians/attorneys are chilled.

V. CONCLUSION

Under proper circumstances, attorneys should have a duty in tort to breach confidentiality and take steps to protect a third party. Application of Tarasoff illustrates that lawyers owe a duty to protect third persons from harm when they stand in a special relationship to their client and/or the third person. My opinion is that direct threats of serious physical harm to a third party should mandate a lawyer warning. Discharge of the duty by warning the police, in cases where the identifiable victim could be warned, should not be available because it undercuts the protection function of the warning.

However, threats known to the lawyer through indirect evidence, or instances where the serious harm is of a non-physical nature should fall under a permissive disclosure rule. A rebuttable presumption in favor of disclosure might occur when the reasonable lawyer would conclude that the indirect evidence of serious physical harm is substantial and conclusive enough to justify breaching confidentiality. Of course, the parameters of disclosure rules and the applicable evidentiary standards need to be fleshed out, just as in any developing area of law. However, the application of Tarasoff to the attorney disclosure situation, the logical application of the special relationships doctrine, the exceptions to strict confidentiality that currently exist and the weighing of interests uniformly suggest that attorneys owe such a duty.