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NEW YORK PSYCHOLOGISTS AND SOCIAL WORKERS: CONFIDENTIALITY AND PROFESSIONAL MALPRACTICE

DIANNE S. LANDI*

In New York, confidential relations and communications between a psychologist registered under article 153 of the New York State Education Law and his or her client are privileged.¹ Moreover, a person duly registered as a certified social worker under article 154 of the New York State Education Law is not permitted to divulge communications with a client made in the course of their professional relationship.² This same privilege applies to a clerk, stenographer, or other employee working for a social worker in connection with such communications.³

The statute pertaining to registered social workers, unlike the statute pertaining to registered psychologists, contains four exceptions to the privilege.⁴ If one of these exceptions is present in a given case, the communication is not privileged. These exceptions are: communications authorized for revelation by the client; communications revealing the contemplation of a crime or harmful act; communications by a child under the age of sixteen when such information indicates the child has been the victim of a crime; and communications in which the client waives the privilege by bringing charges against the social worker that involve confi-

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¹ See N.Y. Crv. PRAC. L. & R. 4507 (McKinney Supp. 1988).

² See *id.* 4508.

³ See *id.*

⁴ See *id.* 4508(a)(1)-(4).

dential communications between that client and the social worker.⁵

To qualify as confidential, a communication must be made in reliance on both its confidentiality, and the relationship between the client and the registered psychologist or social worker.⁶ If the communication is made in the presence of a third party, it will not be considered a privileged communication.⁷ In addition, certain basic information is not considered privileged, including names of patients, and facts that are plainly observable by a layperson.⁸

In order to invoke the privilege, the communication must be made or received by a client. A client is a person who has sought the help of a professional and has been accepted for care by that professional.⁹ The importance of this relationship was illustrated in a wrongful death action in which the widow of a deceased psychiatric patient brought suit against a hospital.¹⁰ The conversation between the patient's social worker and the patient's widow was not excluded at trial as a privileged communication because the widow was not the client of the social worker.¹¹ In another case, a defendant was picked up in Utah on an assault charge and sent to

⁵ See *id.*

⁶ See *id.* 4507, 4508(a). The necessity that the information be disclosed in the course of "professional employment" is specifically stated with regard to social workers. See *id.* 4508; see also *People v. McHugh*, 124 Misc. 2d 823, 829, 478 N.Y.S.2d 754, 758 (Sup. Ct. Bronx County 1984) (defendant had burden of proving that social worker was acting in professional capacity). In regard to registered psychologists, however, it is incorporated by reference to the attorney-client privilege. See N.Y. CIV. PRAC. L. & R. 4507 (McKinney Supp. 1988); see also *id.* 4503(a) ("professional employment" required for attorney-client privilege).

⁷ See *People v. Harris*, 57 N.Y.2d 335, 343, 442 N.E.2d 1205, 1208, 456 N.Y.S.2d 694, 697, *cert. denied*, 460 U.S. 1047 (1982). There is no direct statutory language indicating that the privilege is waived by the presence of third parties with regard to social workers and psychologists. However, it would seem a logical application of the rule developed for privileges in general, and applied in *Harris* between a client and attorney. See *id.* See generally E. CLEARY, MCCORMICK ON EVIDENCE § 91, at 215-16 (3d ed. 1984) (discussing effect of third parties on attorney-client privilege).

⁸ See, e.g., *Doe v. Hynes*, 104 Misc. 2d 398, 403-04, 428 N.Y.S.2d 810, 814 (Sup. Ct. Monroe County 1980). In *Doe*, medicaid billings revealing dates of clients' treatment and identity of some clients were deemed not privileged and were released in furtherance of public policy against medicaid fraud. See *id.*; cf. *In re Shangel*, 742 F.2d 61, 62 (2d Cir. 1984) (attorney's client's name and fee information not privileged absent special circumstances); *People v. Hedges*, 98 App. Div. 2d 950, 950, 470 N.Y.S.2d 61, 62 (4th Dep't 1983) (exception for medical evidence plainly observable by layman).

⁹ See, e.g., *Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980) (client must contact attorney for professional advice to give rise to attorney-client privilege).

¹⁰ See *Lichenstein v. Montefiore Hosp. & Medical Center*, 56 App. Div. 2d 281, 282-83, 392 N.Y.S.2d 18, 20-21 (1st Dep't 1977).

¹¹ See *id.* at 285, 392 N.Y.S.2d at 21. The *Lichenstein* court also noted that any privilege which might have existed was potentially waived by bringing the instant action. See *id.*

a state hospital for evaluation.¹² While in the hospital, he had several conversations with an unregistered social worker.¹³ Despite the social worker's admonitions to the effect that the conversations were not privileged, the defendant freely admitted that he had committed a murder.¹⁴ The conversations were not privileged both because the defendant was not a client of the social worker and the social worker was not registered under article 154 of the New York State Education Law.¹⁵

Under article 153 of the Education Law, only a licensed practitioner shall be authorized to use the term "psychologist," "psychology," or "psychological" in connection with his or her practice.¹⁶ Under article 154 of the Education Law, the certified practice of social work

is defined as engaging . . . in social casework, social group work, community organization, administration of a social work program, social work education, social work research, or any combination of these in accordance with social work principles and methods. . . . [f]or the purpose of helping individuals, families, groups and communities to prevent or to resolve problems caused by social or emotional stress.¹⁷

For the Family Consultation Service, a Catholic counseling service under the New York Archdiocese, whose staff includes many who are not registered psychologists or social workers, the question of whether communications made between a client and an unregistered counselor is an important one. As a general rule, only communications between the client and a registered psychologist or social worker are protected by the privilege.¹⁸ Staff members having access to privileged communications in connection with their duties would be similarly restricted by the cloak of confidentiality.¹⁹ Communications between a client and an unregistered counsellor are not privileged.²⁰ However, there have been instances where counsellors and other staff members who were not registered psychologists or social workers were deemed to fall within the statutory privilege. In one of those cases, a wife sought a divorce and custody of her three

¹² See *People v. Lipsky*, 102 Misc. 2d 19, 20-21, 423 N.Y.S.2d 599, 600-01 (Monroe County Ct. 1979).

¹³ See *id.* at 21-22, 423 N.Y.S.2d at 601-02.

¹⁴ See *id.* at 22, 423 N.Y.S.2d at 601.

¹⁵ See *id.* at 23-24, 423 N.Y.S.2d at 602-03.

¹⁶ See N.Y. EDUC. LAW § 7601 (McKinney 1985).

¹⁷ *Id.* § 7701.

¹⁸ See *supra* notes 1-9 and accompanying text (discussion of privilege between psychologist or social worker and respective clients).

¹⁹ See N.Y. CIV. PRAC. L. & R. 4507 (McKinney Supp. 1988) (creating privilege restriction for psychologist's staff through incorporation of attorney-client privilege as codified in 4503(a)); *id.* 4508 (specific privilege restriction for staff of social worker).

²⁰ See *People v. Lipsky*, 102 Misc. 2d 19, 23-24, 423 N.Y.S.2d 599, 602-03 (Monroe County Ct. 1979).

children.²¹ Her husband subpoenaed records of the Jewish Family Service.²² A number of years prior to commencing the divorce proceedings, the parties had sought the help of the Jewish Family Service.²³ Both the husband and wife were interviewed by staff personnel including, but not limited to, registered social workers and a psychiatrist.²⁴ The court refused to enforce the subpoena, holding that the totality of the agency's function fell within the protection of the privilege.²⁵ Perhaps counseling services provided by the Family Consultation Service might be deemed similarly privileged.

The privilege of confidentiality belongs to the client alone and cannot be waived by the social worker or psychologist without the express consent of the client.²⁶ Express consent, however, can be a tricky concept, as the following two examples illustrate. In one case, a defendant was on trial for manslaughter.²⁷ He took the stand and testified that stab wounds on his body had been inflicted by another.²⁸ The court held that the defendant had not waived his privilege by testifying as to the cause of his wounds and, therefore, the hospital psychologist who had interviewed him could not testify as to the patient's earlier testimony that the wounds were self-inflicted.²⁹ In another criminal case, a defendant affirmatively put his mental condition in issue by raising the defense of insanity. The court held that the defendant had waived his privilege.³⁰

The law does permit a client to authorize a psychologist or social worker to disclose privileged communications for the purpose of obtaining insurance benefits.³¹ The client does not waive the privilege by giving this authorization.³²

²¹ See *Yaron v. Yaron*, 83 Misc. 2d 276, 276-77, 372 N.Y.S.2d 518, 519 (Sup. Ct. N.Y. County 1975).

²² *Id.* at 277, 372 N.Y.S.2d at 519.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 277-78, 372 N.Y.S.2d at 519-20.

²⁶ See N.Y. CIV. PRAC. L. & R. 4507 (McKinney Supp. 1988) (affording psychologist's client same protection as attorney's); *id.* 4508(a)(1) (client may authorize social worker to release otherwise privileged information); *cf. id.* 4503(a) (attorney-client information privileged unless waived by client). See generally *Community Servs. Soc'y v. Welfare Ins. Gen.*, 91 Misc. 2d 383, 385-89, 398 N.Y.S.2d 92, 95-96 (Sup. Ct. N.Y. County 1977) (discussing client-social worker privilege as compared to other established privileges), *aff'd*, 65 App. Div. 2d 734, 411 N.Y.S.2d 188 (1st Dep't 1978).

²⁷ See *People v. Wilkins*, 65 N.Y.2d 172, 174, 480 N.E.2d 373, 374, 490 N.Y.S.2d 759, 760 (1985).

²⁸ See *id.* at 175, 480 N.E.2d at 375, 490 N.Y.S.2d at 761.

²⁹ See *id.* at 179-80, 480 N.E.2d at 377-78, 490 N.Y.S.2d at 763-64.

³⁰ See *Florida v. Axelson*, 80 Misc. 2d 419, 420, 363 N.Y.S.2d 200, 201-02 (Sup. Ct. N.Y. County 1974).

³¹ See N.Y. CIV. PRAC. L. & R. 4508(b) (McKinney Supp. 1988).

³² See *id.*

The privilege of confidentiality is not absolute, regardless of whether the professional involved is an attorney, a physician, a psychologist, or a social worker.³³ The privilege may be superseded by competing interests, whether imposed by statute or by a court. Some competing interests may be deemed more important than the policy embodied in the privilege of fostering trust and confidence between the client and the professional.³⁴

Detection and prevention of child abuse is one area where legislation has abrogated the psychologist-client and social worker-client privileges.³⁵ Section 1046 of New York's Family Court Act provides that neither the psychologist-client privilege nor the social worker-client privilege shall be a ground for excluding evidence that would otherwise be admissible in an action concerning child abuse or neglect.³⁶ Privilege may also be abrogated in the area of controlled substances. Article 33 of the New York State Public Health Law eliminates any privilege for communications concerning the illegal sale and acquisition of drugs as well as imposing specific reporting requirements upon licensed dispensaries of these substances.³⁷

Confidentiality has also been limited in the area of clinical records for patients at a facility.³⁸ A facility is defined as any place in which services are provided to the mentally disabled including a psychiatric center, developmental center, institute, clinic, ward, or building.³⁹ A place that renders nonresidential services for the mentally disabled is not included in this definition. Therefore, this exception to confidentiality would not apply to the Family Consultation Service.⁴⁰

Acquired Immune Deficiency Syndrome ("AIDS") is a topic in the forefront of current legislative activity. More than 450 bills were introduced in state legislatures on the subject of AIDS in 1987 alone. AIDS legislation in the various states has addressed the confidentiality of records concerning antibody testing, blood processing, storage and distribution, employment, housing, informed consent, insurance, marriage, prison population, and reporting requirements. New York legislation prohibits the release of information regarding AIDS victims contained in

³³ See, e.g., *In re Koretta*, 118 Misc. 2d 660, 661, 461 N.Y.S.2d 205, 206 (Family Ct. N.Y. County 1983) (social worker-client privilege not absolute).

³⁴ See, e.g., *Perry v. Fiumano*, 61 App. Div. 2d 512, 518-19, 403 N.Y.S.2d 382, 386 (4th Dep't 1978) (paramount interest of protecting infant's safety); *Doe v. Hynes*, 104 Misc. 2d 398, 403, 428 N.Y.S.2d 810, 814 (Sup. Ct. Monroe County 1980) (investigating medicaid fraud paramount to psychologist-client privilege).

³⁵ See *Perry*, 61 App. Div. 2d at 518-19, 403 N.Y.S.2d at 386.

³⁶ See N.Y. JUD. LAW § 1046(a)(vii) (McKinney 1983 & Supp. 1988).

³⁷ See N.Y. PUB. HEALTH LAW § 3350 (McKinney 1985).

³⁸ See N.Y. MENTAL HYG. LAW § 33.13 (McKinney 1988 & Supp. 1989).

³⁹ See *id.* § 19.11 (McKinney 1988).

⁴⁰ See *id.* § 31.13.

confidential research records,⁴¹ although medically confirmed cases of AIDS constitute a condition to be reported to the New York State Commissioner of Health.⁴² Originally, these laws were directed solely to the medical community, but legislation has recently been passed to create confidentiality when any persons "providing any health or social service" are informed by a client that he or she is suffering from AIDS.⁴³

As already stated, courts are frequently asked to invade the privilege of confidentiality. In determining the appropriateness of invading a privilege, courts have traditionally balanced the importance of the privileged relationship against the importance of the proper disposition of the litigation involved.⁴⁴ Courts seem most willing to invade the privilege when confronted with a custody dispute⁴⁵ or a paternity proceeding,⁴⁶ as both deal with the future well-being of a child.

The protection afforded to a communication in which a party confesses to a crime, or reveals essential elements of a crime, remains uncertain. Under current privilege statutes, as pertaining to social workers, the only express exception to privilege exists when a client reveals the contemplation of a crime or harmful act.⁴⁷ However, in one case, the representations made by the defendant to a social worker revealing the commission of welfare fraud were held to be admissible in grand jury proceedings.⁴⁸ Moreover, in a case involving a juvenile who tried to suppress her inculcating communications with a social worker,⁴⁹ the motion was denied and the social worker was required to testify.⁵⁰ The juvenile, a fifteen-year-old, had been charged with arson at Euphrasian Residence. The court, applying the aforementioned balancing test, determined that the importance of the arson determination overcame the juvenile's claim of privilege.⁵¹

Communications revealing a client's suicidal intent present special

⁴¹ See N.Y. PUB. HEALTH LAW § 2776(2) (McKinney 1985) (providing for confidentiality of personal data of AIDS victims); see also *id.* § 206(1)(j) (McKinney 1971) (confidentiality provisions incorporated by § 2776). See generally *id.* §§ 2775-2779 (McKinney 1985) (powers, duties, and goals of New York's Acquired Immune Deficiency Syndrome Institute).

⁴² See N.Y. Sanitary Code, [1988] 10 N.Y.C.R.R. § 24-1.1.

⁴³ N.Y. PUB. HEALTH LAW § 2782 (McKinney Supp. 1989) (effective Feb. 1, 1989).

⁴⁴ See generally WIGMORE ON EVIDENCE § 2285 (J. McNaughton ed. 1961) (discussing balance of privilege and policy considerations).

⁴⁵ See, e.g., *Perry v. Fiumano*, 61 App. Div. 2d 512, 403 N.Y.S.2d 382 (4th Dep't 1978).

⁴⁶ See *Humphrey v. Nordan*, 79 Misc. 2d 192, 359 N.Y.S.2d 733 (Family Ct. Queens County 1974).

⁴⁷ See N.Y. CIV. PRAC. L. & R. 4508 (McKinney Supp. 1988).

⁴⁸ See *People v. O'Gorman*, 91 Misc. 2d 539, 542-43, 398 N.Y.S.2d 336, 339 (Sup. Ct. Suffolk County 1977).

⁴⁹ See *In re Koretta*, 118 Misc. 2d 660, 461 N.Y.S.2d 205 (Family Ct. N.Y. County 1983).

⁵⁰ See *id.* at 661-64, 461 N.Y.S.2d at 207-08.

⁵¹ See *id.*

problems to a psychologist or social worker. Since a communication made to a social worker revealing the contemplation of a crime or harmful act is not privileged, a client's threat of suicide would fall within this exception.⁵² However, by revealing such communications the social worker may be violating an express or implied covenant to the client that communications would be confidential. The aforementioned exception does not apply to psychologists. The psychologist may also have the same express or implied covenant of confidentiality.⁵³ In one case, a patient brought an action against his psychiatrist for damages when the psychiatrist disclosed confidential information to the patient's wife.⁵⁴ The court found a breach of confidentiality by the psychiatrist springing from the implied covenant of confidence for all disclosures made by the patient concerning that patient's physical or mental condition.⁵⁵ The court found no justification for the disclosure, but kept the possibility open that certain disclosures of information to a spouse might be justified under circumstances of physical danger to the patient, spouse, or third party.⁵⁶

In all cases, an attorney should be consulted before taking any action. The ramifications of such action may involve not only the privilege, but also a lawsuit against the psychologist or social worker based on allegations of professional malpractice, breach of an express or implied covenant of confidentiality, fraud, or defamation.

PROFESSIONAL MALPRACTICE

Professional malpractice occurs when a professional acts negligently, *i.e.*, without reasonable care, and breaches a duty owed to a client or third party.⁵⁷ What is reasonable under the circumstances depends upon the standards which are acceptable in the particular profession.⁵⁸

The scope of the duty that a professional owes to a mentally disturbed client raises important questions. The prevalent duty owed to a client is that of maintaining the confidentiality of the communications between the client and the professional.⁵⁹ As discussed, there is a statu-

⁵² See N.Y. CIV. PRAC. L. & R. 4508 (McKinney Supp. 1988).

⁵³ See *id.* 4507.

⁵⁴ See *MacDonald v Clinger*, 84 App. Div. 2d 482, 482-83, 446 N.Y.S.2d 801, 802 (4th Dep't 1982).

⁵⁵ See *id.* at 486, 446 N.Y.S.2d at 804.

⁵⁶ See *id.* at 488, 446 N.Y.S.2d at 805.

⁵⁷ See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 32 (5th ed. 1984).

⁵⁸ See *id.*; see also *Goodman v. Emergency Hosp.*, 96 Misc. 2d 1116, 1118, 410 N.Y.S.2d 511, 512 (Sup. Ct. Erie County 1978) (standard of care for medical profession is standard of such care in that medical community).

⁵⁹ See *Anker v. Brodnitz*, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (Sup. Ct. Queens County 1979). The *Anker* court noted the high regard New York places on the physician-patient privilege

tory privilege belonging to a client dealing with a registered psychologist or social worker. It is the duty of the social worker or psychologist to maintain confidentiality, and this duty devolves to other staff personnel who may come across the confidential communications in the performance of their duties. In certain instances, this duty may extend to third parties who may come across confidential information. In one case, the former patient of a psychiatrist brought an action against the psychiatrist and the psychiatrist's husband for invasion of privacy.⁶⁰ The defendants had published a book eight years after the plaintiff's treatment. The book reported the plaintiff's thoughts, feelings, fantasies, and background history verbatim.⁶¹ However, the plaintiff's identity was not revealed.⁶² The court found a breach of contract as well as an invasion of privacy arising from both the statutory physician-patient privilege and an implied covenant of confidentiality.⁶³ The plaintiff received compensatory damages of \$20,000 based on her sufferings, including insomnia, nightmares, and reclusive behavior.⁶⁴ The defendants were also permanently enjoined from violating the plaintiff's rights by any further circulation of the book.⁶⁵

As mentioned, the statutory privilege is not all-inclusive. For example, the communications between an unregistered counselor or social worker and his or her respective clients are not covered. The extent of the privilege attached to such communications is uncertain. Nevertheless, it is fair to state that the client, advised by a Family Consultation Service counselor, generally expects that he or she may rely upon the confidentiality of this relationship. This reliance may give rise to a duty on the part of the counselor to keep that communication confidential.

In certain cases, two opposing duties may conflict, with one duty militating in favor of confidentiality and the other against. This occurs in "negligent release" and "duty to warn" cases.

A. *Negligent Release*

Negligent release occurs in the context of a hospital, or other inpatient facility, which breaches its duty to the public by prematurely releasing a patient with dangerous propensities.⁶⁶ Since the Family Consulta-

and the privilege's goals of encouraging free communication and preventing patient humiliation. See *id.* at 152-53, 413 N.Y.S.2d at 584-86; see also S. STONE & R. LIEBMAN, TESTIMONIAL PRIVILEGES § 7.02 (1983) (discussing importance of nondisclosure by psychotherapists).

⁶⁰ *Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. N.Y. County 1977).

⁶¹ *Id.* at 204, 400 N.Y.S.2d at 670-71.

⁶² *Id.* at 205, 400 N.Y.S.2d at 671.

⁶³ *Id.* at 210-15, 400 N.Y.S.2d at 674-78.

⁶⁴ *Id.* at 217-18, 400 N.Y.S.2d at 679.

⁶⁵ *Id.* at 218, 400 N.Y.S.2d at 679-80.

⁶⁶ See, e.g., *Austin W. Jones Co. v. State*, 122 Me. 214, 223-24, 119 A. 577, 581-82 (1923).

tion Service does not provide any residential services, premature release cases are unlikely to affect it.

B. Duty to Warn Third Parties

The theory of duty to warn was introduced in California by *Tarasoff v. Regents of the University of California*.⁶⁷ In *Tarasoff*, plaintiffs were the parents of a young woman murdered by Prosenjit Poddar. Poddar had received counseling at the University of California at Berkeley, and had informed his psychiatrist that he planned to kill a certain young woman.⁶⁸ Although he did not specifically name her, other revelations identified Poddar's intended victim.⁶⁹ The psychiatrist notified campus police, who briefly detained Poddar, but no other action was taken.⁷⁰ Shortly thereafter, Poddar murdered the young woman.⁷¹ The court recognized a duty on the part of psychiatrists to protect third parties from patients whom they consider dangerous, even if violative of the ethic of confidentiality.⁷² Therefore, a psychiatrist could be civilly liable for the death by virtue of his failure to warn the young woman of the danger that Poddar presented.⁷³

A subsequent California case limited this duty.⁷⁴ In that case, a juvenile offender was released from a county institution on temporary leave. The juvenile had a history of violent and sexually abusive behavior toward young children and had indicated to authorities at the institution that, if released, he would kill a child in his mother's neighborhood.⁷⁵ He did not specifically identify the child to the authorities at the time he made his revelation, but upon release, he murdered a child.⁷⁶ The California Supreme Court dismissed the duty to warn suit which had been brought by the murdered child's parent.⁷⁷ The court held that in duty to warn cases, the victim must be identifiable.⁷⁸

Beyond this identity requirement, the client must communicate his or her intent to commit a violent act to a counselor for the institution to

⁶⁷ 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

⁶⁸ *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.

⁶⁹ *Id.* at 431, 551 P.2d at 341, 131 Cal. Rptr. at 21.

⁷⁰ *Id.*

⁷¹ *Id.* at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.

⁷² *Id.* at 440-41, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27.

⁷³ *Id.* at 446-47, 551 P.2d at 351, 131 Cal. Rptr. at 31.

⁷⁴ See *Thompson v. County of Alameda*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

⁷⁵ *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.

⁷⁶ *Id.* at 749-58, 614 P.2d at 732-38, 167 Cal. Rptr. at 74-80.

⁷⁷ *Id.*

⁷⁸ *Id.* at 752-53, 614 P.2d at 734, 167 Cal. Rptr. at 76.

be held liable.⁷⁹ For example, in one case, remarkable, perhaps, for its demonstration of chutzpah, a dentist named Shaw was under the care of a husband-wife psychiatrist team who had simultaneously been treating Shaw, Shaw's mistress, and the mistress' husband.⁸⁰ The husband came home one night to discover his wife and Shaw in bed together. The husband fired five bullets into Shaw,⁸¹ but Shaw lived and brought a civil action against the husband and the psychiatric team. Shaw's theory was that the psychiatrists should have warned him of the husband's unstable and violent condition, which was foreseeable and an immediate danger.⁸² Shaw's mistress, however, had told Shaw on the day of the incident that her husband was acting bizarrely and was carrying a gun.⁸³ The lower court dismissed the case against the psychiatric team on the grounds that Shaw had assumed the risk by having the affair. The appeals court affirmed on different grounds, namely, that the husband had never communicated to the therapists that he had an intention to kill or injure Shaw.⁸⁴

Tarasoff has been followed in many states,⁸⁵ sometimes with modification,⁸⁶ and has been rejected in many states.⁸⁷ New York, while not specifically adopting *Tarasoff*, has held in one case that the State, which operated an outpatient facility, was liable to a third party for injuries she suffered when assaulted at knifepoint by an outpatient.⁸⁸ The court in this case found that the psychiatrist who was treating the outpatient did not carefully examine the patient, the medical record, or vital information made available by concerned third parties about the recent behavior of the patient.⁸⁹ The court characterized the psychiatrist as taking an "almost casual consideration" of the problems of a deeply troubled patient.⁹⁰ It was stated by the court that a member of the general public, such as the injured plaintiff, should not be required to accept such a risk of

⁷⁹ See Note, *Thompson v. County of Alameda: Tort Plaintiff's Paradise Lost?*, 76 Nw. U.L. REV. 331, 337-39 (1981) (discussing various ramifications of identity requirement).

⁸⁰ *Shaw v. Glickman*, 45 Md. App. 718, 415 A.2d 625 (1980).

⁸¹ *Id.* at 719-20, 415 A.2d at 627.

⁸² *Id.* at 721, 415 A.2d at 628.

⁸³ *Id.*, 415 A.2d at 627.

⁸⁴ *Id.* at 725, 415 A.2d at 630.

⁸⁵ See, e.g., *Peck v. Counseling Serv. of Addison County*, 146 Vt. 61, 68, 499 A.2d 422, 427 (1985) (adopting identity requirement); *McIntosh v. Milano*, 168 N.J. Super. 466, 489, 403 A.2d 500, 511-12 (1979) (same).

⁸⁶ See, e.g., *Petersen v. State*, 100 Wash. 2d 421, 428, 671 P.2d 230, 237 (1983) (adding duty for physicians to protect anyone potentially injured by mental patient).

⁸⁷ See, e.g., *Cain v. Rijken*, 300 Or. 706, 717, 717 P.2d 140, 147 (1986) (rejecting *Tarasoff* and utilizing statutory negligence criteria in action against mental health provider).

⁸⁸ See *Clark v. State*, 99 App. Div. 2d 616, 472 N.Y.S.2d 170 (3d Dep't 1984).

⁸⁹ *Id.* at 617, 472 N.Y.S.2d at 172-73.

⁹⁰ *Id.*, 472 N.Y.S.2d at 172.

harm.⁹¹

The duty to warn third parties has had some troubling consequences. One consequence is a reluctance of professionals to cooperate in criminal proceedings against a client who has been accused of assault or murder, for fear of furnishing information which could be used against the professional in a civil suit.⁹² For example, A is charged with the murder of B. A's defense is insanity and he waives his privilege, seeking to have his psychiatrist testify that he is insane. Assuming A had previously revealed to his psychiatrist that he had an intense desire to kill B because he could not tolerate B's laugh, the psychiatrist might conclude that A is insane. If the psychiatrist gives his opinion on the stand that A is insane, he will have to testify to A's revelation regarding B. If the psychiatrist so testifies, however, he risks liability for breaching his own duty to warn B of this danger.⁹³

Another troublesome consequence of the duty to warn is that professionals may become more cautious about what they put in treatment records which may be subpoenaed at a later date.⁹⁴ If observations and revelations are kept off the record, the professional's capacity to effectively treat his or her client could be affected. In any event, the motivation exists to resolve uncertainties by keeping material off the record to protect oneself from expensive, time-consuming, and reputation-damaging civil lawsuits.⁹⁵

⁹¹ *Id.*, 472 N.Y.S.2d at 173.

⁹² See Merton, *Confidentiality and the "Dangerous" Patient: Implication of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 322-24 (1982).

⁹³ *Id.* at 317-19; see *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979).

⁹⁴ See Merton, *supra* note 92, at 324.

⁹⁵ See *id.*