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Duty to Warn and Protect

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on their own and are dependent on others to intervene on their behalf. When counselors, through their confidential relation with clients, learn that a vulnerable person is at risk of harm, they have a duty to act to prevent the harm. This is a higher duty than the duty to maintain confidentiality. (p. 95)

It is important to disclose only information pertinent to the current problem (e.g., to help prevent a suicide attempt). Duty to protect includes not only others who are reasonably identifiable victims but also the clients themselves, such as those who are suicidal. In its revised *ACA Code of Ethics*, the American Counseling Association (ACA; 2005) addresses a sensitive and controversial topic with the inclusion of a new standard to give counselors guidance when trying to best meet the needs of the terminally ill and palliative end-of-life care for terminally ill clients. Standard A.9.c. states,

Counselors who provide services to terminally ill clients who are considering hastening their own deaths have the option of breaking or not breaking confidentiality, depending on applicable laws and the specific circumstances of the situation and after seeking consultation or supervision from appropriate professional and legal parties. (p. 6)

The duty to warn did not have a sudden onset brought on by a specific court case, but rather for years, mental health professionals were involved in giving expert testimony about the likelihood that a potential patient was mentally ill and a threat to the physical safety and well-being of self or others. Although the decision in 1976 in the *Tarasoff v. Regents of the University of California* case is the landmark court case in which the duty to warn (and breach confidentiality) was decided, there were other court cases that preceded it. Under what conditions a counselor has a duty to warn (or protect) a potential victim, law enforcement officials, or another person of a client's dangerousness has been the focus of ever-increasing lawsuits (Austin, Moline, & Williams, 1990).

In the *Tarasoff* case, a young man named Prosenjit Poddar admitted to his psychologist, Lawrence Moore, that he wanted to kill an unnamed girlfriend (who was easily identifiable as Tatiana Tarasoff) when she returned from a trip to Brazil. Dr. Moore proceeded to notify campus authorities and his superiors of the threat that Poddar had made. The campus police picked Poddar up and detained him for questioning but found that he was "rational." Once he agreed to stay away from Tarasoff, they released him. Dr. Moore's superiors ordered all records of this situation with Poddar destroyed. Shortly after Tarasoff returned from her trip, Poddar killed her. Tarasoff's parents sued the officers, mental health practitioners, the head of the medical center (i.e., Cowell Hospital at the University of California, Berkeley) where Poddar was treated as an outpatient, and the Board of Regents of the University of California for negligence in failure to warn Miss Tarasoff or her family of Poddar's threats.

■ Duty to Warn and Protect

Professional counselors, spurred by the courts, have a dual ethical and legal responsibility to protect others from potentially dangerous clients, to protect clients from being harmed by others, and to protect clients from themselves. The delicate balance between confidentiality and the duty to warn and protect others must be handled on a case-by-case basis. The majority of individual state laws require counselors to breach confidentiality in order to warn and protect someone who is in danger. All states and U.S. jurisdictions now have mandatory reporting statutes for suspected physical, sexual, or emotional child abuse or neglect. There are also several states with mandatory reporting statutes for elder abuse or abuse of other persons presumed to have limited ability to care for themselves. Remley and Herlihy (2001) explained,

A duty to protect from harm arises when someone is especially dependent on others or is some way vulnerable to the choices and actions of others. Persons in a vulnerable position are unable to avoid risk of harm

The responsibility to protect the public from dangerous actions of violent clients entails liability for civil damages when counselors neglect this duty by (a) failing to diagnose or predict dangerousness, (b) failing to warn potential victims of violent behavior, (c) failing to commit dangerous clients, and (d) prematurely discharging dangerous clients from a hospital (Austin et al., 1990). Although a lower court dismissed the *Tarasoff* suit in 1974, the parents appealed, and the California Supreme Court ruled in favor of the parents in 1976, holding that a failure to warn an intended victim was professionally irresponsible. The court's ruling requires that psychotherapists breach confidentiality when the general welfare and safety of others is involved. Because this was a California case, courts in other states are not bound to decide a similar case in the same way. In fact, the court decisions over the years appear to be both conflicting and confusing to mental health professionals. Also, there is no consensus among the states about the particular circumstances in which a counselor has a duty to warn. Not only is it difficult at times for counselors to determine an exception to confidentiality, it is especially challenging to predict dangerousness because human behavior is not always predictable (Remley & Herlihy, 2001).

Under the *Tarasoff* decision regarding the duty to warn "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonable identifiable victim or victims" (Moline, Williams, & Austin, 1998, p. 89), the psychotherapist must first accurately diagnose the client's tendency to behave in dangerous ways toward others. Deciding whether a particular client is dangerous is a challenge for every counselor. This first duty is judged by the standards of professional negligence. Whereas with the first *Tarasoff* ruling in 1974, the lower court cited a "duty to warn," this duty was expanded by the California Supreme Court into a "duty to protect" third parties from dangerous clients. Professional counselors can protect others through traditional clinical interventions, such as reassessment, recommending medication changes, referral, or hospitalization, as well as warning potential victims, contacting the police, or informing the state child or elder protection agency (Corey, Corey, & Callanan, 2007). Additional caution must be demonstrated in taking steps that convey respect while treating clients in the least restrictive environment or in ways that are the least disruptive or intrusive for the client. Choices of action for the counselor on a continuum may range from the least intrusive action (e.g., obtaining a promise from the client not to harm anyone else) to the most intrusive action (e.g., involuntary hospitalization; Remley & Herlihy, 2001).

Since the 1976 California court ruling in the *Tarasoff* appeal, professional counselors have been seriously concerned about the ethical and legal ramifications of the duty to warn and protect. Whereas for many years the *ACA Code of Ethics* stated that confidentiality was to be broken if there was "clear and imminent danger," the current 2005 *ACA Code of Ethics* states in Section B.2.a. that confidentiality is broken when there is "serious and foreseeable harm." Of equal concern to counselors is the potential liability in court actions in dealing with clients who are dangerous to others.

Following is a list of suggestions that are related to duty to warn and protect issues associated with counseling suicidal clients who are minors and that are applicable to protecting both clients and counselors:

- Professional counselors should know the privileged communication or confidentiality laws in the state where they are employed (Sheeley & Herlihy, 1989).
- Counselors should have available and circulate descriptions and explanations of confidentiality and its limits. It has become a "standard of care" practice to address the limits of confidentiality before any therapeutic process begins (Moline et al., 1998).
- Counselors should keep apprised of related court decisions and also be well versed in their respective state licensure board stipulations, because the *Tarasoff* decision does not apply in every state (Sheeley & Herlihy, 1989).
- Counselors should be familiar with mental health professional organization's representative codes of ethics. The courts usually look to professional standards of ethics to examine the standard of care and how the ordinary and prudent practitioner might act under similar circumstances and determine whether a legal duty by a counselor has been breached. This standard of behavior is usually established by the testimony of experts (Moline et al., 1998).
- When employed by a school district, counselors should communicate the need for related school board policies (Sheeley & Herlihy, 1989).
- When counseling minors, counselors should develop policy handbooks and document confirmation that they received the materials (Sheeley & Herlihy, 1989).
- Counselors should keep accurate notes and records. Federal and/or state law may require adequate record keeping (Moline et al., 1998). The courts may view a failure to keep records as a failure to give service. Clear and concise record keeping is mandatory for a successful review by the legal system, insurance companies, and supervisors. Record keeping protects both the client and counselor by demonstrating that treatment occurred and that the evaluation and counseling plan were consistent with the standards of the profession.
- Counselors should consult with professional peers concerning doubts about client assessments and treatment interventions and only reveal information germane to the consultation (Sheeley & Herlihy, 1989).
- Counselors should know an attorney to contact for legal assistance, especially if their records are subpoenaed or they are required to testify, or both (Moline et al., 1998).
- Counselors should be certain to have professional liability insurance and understand the coverage included in their policy. Although places of employment usually have a professional liability insurance plan, ACA, the American School Counselor Association, and other mental health professional organizations make this coverage available to their members.

Other instances when counselors may have a duty to protect clients who are harming self include eating disorders, substance abuse, reckless and/or promiscuous sexual behavior, cult membership, and criminal activity. There are also circumstances (e.g., a client is known to have a disease that is both communicable and life threatening) according to the 2005 *ACA Code of Ethics* (Standard B.2.b. Contagious, Life-Threatening Diseases) where counselors may be justified in disclosing information to an endangered third party but are not necessarily obligated to take this course of action. Counselors are especially challenged when working with minors and dealing with balancing confidentiality and duty-to-protect dilemmas about such things as youth sexuality, counseling minors about birth control or abortion, and whether or not to notify parents. Counselors need to be aware of their own values, competence, and scope of practice and refer clients who could be better helped by another mental health professional.

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References

- American Counseling Association. (2005). *ACA code of ethics*. Alexandria, VA: Author.
- Austin, K. M., Moline, M. E., & Williams, G. T. (1990). *Confronting malpractice: Legal and ethical dilemmas in psychotherapy*. Newbury Park, CA: Sage.
- Corey, G., Corey, M. S., & Callanan, P. (2007). *Issues and ethics in the helping professions* (7th ed.). Pacific Grove, CA: Thomson Brooks/Cole.
- Moline, M. E., Williams, G. T., & Austin, K. M. (1998). *Documenting psychotherapy: Essentials for mental health practitioners*. Thousand Oaks, CA: Sage.
- Remley, T. P., Jr., & Herlihy, B. (2001). *Ethical, legal, and professional issues in counseling*. Upper Saddle River, NJ: Prentice Hall.
- Sheeley, V. L., & Herlihy, B. (1989). Counseling suicidal teens: A duty to warn and protect. *School Counselor*, 37, 89-97.
- Tarasoff v. Regents of the University of California, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).