Ethics in Social Work - Duty to Warn

By Jamie Berman, LCSW-R, CASAC

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Brief Bio:

Jamie Berman, LCSW-R, CASAC is the Admissions Director at a leading enhanced substance abuse treatment agency in Manhattan. She is a licensed social worker in the states of New York and New Jersey and a licensed psychotherapist in New York. Jamie received her Master of Social Work from Adelphi University and SIFI Certification from New York University. She is an adjunct professor of graduate studies at Touro College and a mentor to Social Work graduate students. Jamie has conducted trainings on topics such as Signs and Symptoms of Withdrawal – Detoxification Process, Interview Skill for Chemical Dependency Counseling and Assessing Client Risk for Self Harm. Jamie is a member of the National Association of Social Workers and an active member of a planning committee to provide annual state conferences for criminal justice system and treatment providers.
Course Summary

This course will provide mental health professionals with an understanding of the concept of ethics as related to duty to warn. It will also focus on confidentiality vs. the Duty to Warn in regards to HIV disclosure for social workers. It will provide direction when there are situations that are unclear. Some guidance will also be given on how to determine whether or not a client is violent or homicidal. Most importantly, I believe one will learn that there are no clear cut answers. Social workers must be equipped with knowledge and use his/her best judgment when making decisions.

Course Objectives

Upon completing this course students will:

1. Learn about ethical and legal issues surrounding duty to warn.
2. Gain an understanding of Tarasoff.
3. Learn how to assess for violence, dangerousness or Tarasoff.
4. Learn about confidentiality vs. duty to warn as it pertains to HIV disclosure guidelines for social workers.
Duty to Warn

Duty to warn refers to the responsibility of a clinician to breach confidentiality if a client or other identifiable person is in clear or imminent danger. In situations where there is clear evidence of danger to the client or other persons, the clinician must determine the degree of seriousness of the threat and notify the person in danger and others who are in a position to protect that person from harm (Herlihy & Sheeley, 1988; Pate, 1992). An example of this would be if a student tells the school counselor that another student is planning to commit suicide. The counselor is obligated to investigate and should not leave the indicated student alone until the parents or guardians have arrived (Davis & Ritchie, 1993).

The legal precedent of this concept was set in the case of Tarasoff v. Regents of the University of California (1976). In this case, according to Keith-Spiegel and Koocher (1985), a University of California student named Prosenjit Poddar was seeing a psychologist at the university’s student health center after a woman named Tatiana Tarasoff had “broke his heart.” The psychologist reported that Poddar was dangerous because of his pathological attachment to Tarasoff and because he intended to purchase a gun. The psychologist notified the police both verbally and in writing. The police questioned Poddar and found him to be rational; they made Poddar promise to stay away from Tarasoff. Two months later, Poddar killed Tarasoff. When Tarasoff’s parents attempted to sue the university of
California, health center staff members and the police, the courts dismissed the case. The Tarasoff family appealed to the Supreme Court of California, asserting that the defendants had a duty to warn Tatiana Tarasoff or her family of the danger and that they should have persisted to ensure Poddar’s confinement. In a 1974 ruling, the court held that the therapist did have a duty to warn Ms. Tarasoff. In a second ruling (Tarasoff, 1976), the court released the police from liability without explanation and more broadly formulated the duty of therapists, imposing a duty to use reasonable care to protect third parties against dangers posed by the patients (Keith-Spiegel and Koocher, 1985, p.62). The case of Tarasoff V. Regents of the University of California (1976) imposed and affirmative duty on therapists to warn a potential victim of intended harm by the client, stating that the right to confidentiality ends when the public peril begins (cited in Fulero, 1988). This legal decision sets affirmative duty precedents in cases of harm to others that is generally accepted within the social work profession (McWhinney, Haskins-Herkenham, and Hare 1992).

New Jersey is one of the many states, along with California, which imposed a duty to breach psychotherapist-patient confidentiality and warn of potential violence against a third party. The Superior court of New Jersey, in 1979, in the case of McIntosh V. Milano ruled that a psychotherapist should have assumed a duty to act reasonably to protect a potential victim. This case was factually similar to Tarasoff as evidenced by the following events.

The psychiatrist, Dr. Milano, failed to warn the intended victim, Kimberly McIntosh of potentially homicidal behavior of his client, Lee Morgenstein. His
client verbally shared his fantasies including having fear of others, being a hero or
important villain, threatening with a knife those who might intimidate him, and
having sex with Kimberly, the girl next door. Lee informed the psychiatrist that he
shot BBs several times at Kimberly’s car when she left on a date. He also showed the
doctor a knife he had bought and chose to carry around. The psychiatrist was
aware of Lee’s possessive feelings towards Kimberly along with the fact that he
wanted her to suffer as he had. He also expressed hatred towards her boyfriends.
The doctor had communicated with Lee’s parents several times but never with
Kimberly or her parents. Lee ultimately bought a gun and shot and killed
Kimberly.
Kimberly’s family filed suit and they utilized the testimony of a psychiatric expert
who claimed that Dr. Milano committed “a gross deviation from acceptable medical
practice by failing to warn the decedent, her parents or the appropriate
authorities” and that the client’s dangerousness was not a prediction but “a known
fact.” The wording of the lawsuit revealed the impact of the previous Tarasoff
decision.
Dr. Milano argued the following: the Tarasoff decision would create an unworkable
duty because it was predicated on an unreliable prediction of dangerousness; the
client’s hostile impulses existed within fantasy; treatment would have been
negatively affected by the confidentiality breach; therapists would be hesitant to
work with potentially dangerous clients; and such a duty would lead to numerous
commitments to institutions. The court rejected these arguments and stated that
confidentiality was not an absolute and community welfare comes first when duty to
disclose is compelled by law. The court ruled on whether Dr. Milano should have concluded Morganstein to be a danger to McIntosh and whether or not duty to warn existed and was breached. This was a prevalent issue for the jury. The jury found for Dr. Milano and ruled that he did not breach a duty to warn the victim.

The New Jersey Statute 2A:62A-16, medical or counseling practitioners immunity from civil liability, states that when a duty to warn and protect situation exists it should be handled in the following way:

a. Any person who is licensed in the State of New Jersey to practice psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling whether or not compensation is received or expected, is immune from any civil liability for a patient’s violent act against another person or against him/herself unless the practitioner has incurred a duty to warn and protect the potential victim as set forth in subsection b, of this section and fails to discharge that duty as set forth in subsection c, of this section.

b. a duty to warn and protect is incurred when the following conditions exist:

1. The patient has communicated to the practitioner a threat of imminent, serious physical violence against a readily identifiable individual or against him/herself and the circumstances are such that a reasonable professional in the practitioner’s area of expertise would believe the patient intended to carry out the threat; or

2. The circumstances are such that a reasonable professional in the practitioner’s area of expertise would believe the patient intended to carry out an imminent, serious physical violence against a readily
identifiable individual or against him/herself.

c. A licensed practitioner of psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling shall discharge the duty to warn and protect as set forth in subsection b, of this section by doing any one or more of the following:

1. Arranging for the patient to be admitted voluntarily to a psychiatric unit of a general hospital, a short term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L. 1987, c. 116 (C.30:4-27.1 et seq.);
2. Initiating procedures for involuntary commitment of the patient to a short-term facility, a special psychiatric hospital or psychiatric facility, under the provisions of P.L. 1987, c. 116 (C.30:4027.1 et seq.):
3. Advising a local law enforcement authority of the patient’s threat and the identity of intended victim;
4. Warning the intended victim of the threat, or, in the case of an intended victim who is under the age of 18, warning the parent or guardian of the intended victim; or
5. If the patient is under the age of 18 and threatens to commit suicide or bodily injury upon himself, warning the parent or guardian of the patient.

d. A practitioner who is licensed in the state of New Jersey to practice psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling who, in complying with subsection c. of this section, discloses a privileged communication, is immune from civil liability to that disclosure.
The case of Bradley Center V. Wessner reveals the duty not to negligently release a dangerous client. Wessner, the patient, was voluntarily admitted to a facility for psychiatric care due to being upset about his wife’s extramarital affair. He repeatedly threatened to kill his wife and lover and admitted to a therapist that he possessed a weapon in his care for that purpose. Wessner was granted an unrestricted weekend pass to visit his children who lived with his wife – and while in the home he shot and killed his wife and her lover. The children filed a wrongful death suit claiming the psychiatric center breached a duty to exercise control over Wessner. The Georgia Supreme Court ruled that a physician has a duty to take responsible care to prevent a potentially dangerous patient from inflicting harm (Laughran & Bakken, 1984).

Mental-health professionals working with potentially dangerous clients face ethical, legal and moral dilemmas. They must assess risk involved to the client, the potential victim, and to themselves for breaking confidentiality. Accordingly, therapists are encouraged to complete thorough histories, inform clients of confidentiality limits, keep notes of client threats, record step taken to protect others if deemed necessary and seek consultation.

**Summary of Tarasoff**

Licensed social workers and other mental health professionals are compelled to reveal confidential information about their clients when they are a harm to themselves or others. As well, all professionals (mental health, educational, and health care) who work with minors are mandated to reports incidents of alleged
child abuse whether the child client agrees or not (Levine & Wallach, 2002, pp. 274-285). The California Supreme Court decision in Tarasoff v. Regents of the University of California (1974;1976) set a standard for practitioners to reveal confidential information in their duty to warn others of the potential dangers from a client.

Assessment For Violence, Dangerousness, or Tarasoff

Experts and courts accept that social workers cannot predict with any certainty who will be dangerous or when. The methods for assessing suicide are more acceptable in court than are those for homicide. “Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance” (Stromberg et al., 1988, p 522). That being said, the following is a compilation of input from various sources that is relevant to the assessment of homicide and violence.

- History of violence – single most predictive factor (Simon, 2001)
- Gender – Males are 10 to 1 over females more likely
  [www.continuingcourses.net/active/courses/course021.php](http://www.continuingcourses.net/active/courses/course021.php)
- Substance abuse – increases the likelihood of violence (Stromberg et al., 1988)
- Mental incapacity – interfering [www.continuingcourses.net/course021.php](http://www.continuingcourses.net/course021.php)
- Organized plan – (Simon, 2001)
- Unavailability of support group [www.continuingcourses.net/courses021.php](http://www.continuingcourses.net/courses021.php)
- Violent environment [www.continuingcourses.net/courses021.php](http://www.continuingcourses.net/courses021.php)

Confidentiality Vs. the Duty to Warn; HIV-Disclosure Guidelines for Social Workers

Mental health professionals often feel caught in a legal dilemma with respect to a client’s HIV status. On one hand, there is a basic duty to keep client information confidential. This is especially true of information about HIV infection, which can
be embarrassing or harmful to the client if revealed to others. On the other hand, there may be a duty to warn others if the client poses some threat to them. A conflict between these two duties can arise in many different situations. For example; the client may be reluctant to tell his/her spouse or partner about his infection; the client may be an adolescent who does not want his/her parents to know; the client may be an I.V. drug user who shares needles with others; or the client may be a sex-industry worker.

Mental health workers want clear, straightforward answers about when to maintain confidentiality and when and to whom a disclosure must be made in order to avoid liability. Unfortunately, the law does not always provide definitive answers. This is so because both the duty of confidentiality and the duty to warn are relatively new and their scopes have yet to be clearly defined by legislatures or courts. There are some practical steps that can be taken to avoid this dilemma.

**Practical Steps**

1. Avoid learning of contacts

Although there may be no sure answers once faced with this conflict, it is often possible to avoid it in the first place. The duty to warn does not require that providers search out possible threats posed by a client. Thus, a provider can avoid this dilemma by simply not asking for information about whom the client may have exposed. You can and should counsel the client about the need for disclosure to those whom he/she has exposed an on the need for preventing exposure. The client should be informed of the severe criminal and civil liability for exposing another, and offer help in making disclosure if the client wants help.
2. Have the client disclose

If you are aware of a specific individual whom the client has exposed, the best way to handle the situation is to have the client disclose his/her HIV status to the contact. It should be explained to the client that the contact needs to know about the exposure so that he or she can be tested and, if necessary, begins treatment. If the client is reluctant, offer help in making the disclosure. If appropriate, offer to be there when the client makes the disclosure to help answer any question that may arise. If the client refuses to notify the contact, inform him/her that you may have to notify the contact if he/she fails to do so. If you learn that a client is engaging in activities which could infect others, but you do not know any specific contacts, explain to the clients the harm he/she is doing and the steps necessary to prevent this. You may also mention the civil and criminal penalties for intentionally exposing another to HIV. The criminal penalty is up to 10-years of incarceration. In cases that have gone to trial, judges have imposed the maximum penalty. The client may also be sued for money damages for intentional exposure. In such cases, awards are usually in the hundreds of thousands of dollars.

3. Have the client consent to disclosure

Some clients fear making a disclosure to past contacts because of criminal or civil liability. These clients may be willing to warn a contact if there identities are not revealed. In this situation, it may not be a good idea for the social worker to directly
notify a contact. Some contacts will deduce the identity of the client simply by whom is making the disclosure. Others may react with hostility or violence when informed by a stranger that they may have HIV. For these reasons, you or the client may choose to call HIV/AIDS Services Program, in the Epidemiology Division of the Office of Public Health (OPH), Louisiana Department of Health and Hospitals. At that time you can provide the names, addresses, and physical descriptions of the contacts. You should not disclose the identity of your client. OPH will notify the contacts that they may have been exposed and they should be tested. If you feel you have no alternative but to make a direct disclosure, ask the client to sign a written consent, specifying what is to be told and to whom. www.aidslaw.org/confident.pdf

The Duty of Confidentiality

There are at least two statutes that deal with specific instances of client confidentiality. LA R.S. 37:12718(b) applies only to social workers and prohibits disclosures of a client’s statements without the client’s written consent. A second statute, LA R.S. 40:1300. 11-16, the HIV Testing & Confidentiality statute, prohibits any HIV test result to be disclosed without written consent. There is an exception to this duty. Disclosure is permissible, despite the client’s objection, if doing so is necessary to prevent a greater harm to a third person. When deciding if a particular disclosure is permissible, the following factors should be considered: the harm to the client in making the disclosure, the probability that harm will result of a third party if the disclosure is not made. Even if disclosure is allowed, it is necessary to do so in a way that is the least harmful to the client.

www.aidslaw.org/confident.pdf
There is no clear cut rule on disclosure by social workers. The general rule of thumb is a very vague standard based on subjective evaluations. The HIV Confidentiality Statue, the law which most closely governs this situation, does not authorize disclosure by anyone other than a physician. You should be very cautious when deciding to disclose a client’s HIV status; in essence you are gambling that a judge or jury will view these factors in the same light as you have.

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The “Tarasoff” duty, has yet to be construed with respect to the disclosure of HIV information, so it is not clear what is required. It is possible that it simply does not apply to HIV exposure. The courts could determine that the HIV Confidentiality Statute exclusively controls when HIV status may be disclosed. If that statute does not allow disclosure, then you may not disclose regardless of LA R.S.9:2800.2. Even if LA R.S.9:2800.2 are not preempted by the Confidentiality statute, it is still unclear when it requires a warning. For example, does sharing needles or failing to practice safer sex constitutes a “threat of physical violence”

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There are additional laws governing disclosure when children are at risk. The Louisiana Children’s Code, Ch. C. Art. 609, et. Seq., creates a duty to report dangers to a child’s physical or mental health or welfare. It also immunizes the social worker from civil or criminal liability if a disclosure is made under good faith. It is also necessary to report situations in which a child is put at risk of being infected. While the duty to report such situations is clear, the mere fact that a child or parent has HIV does not permit a report or disclosure of HIV status. Such a
report should only be considered if there is a danger of infections, or if it is necessary in order to get treatment for the child. www.aidslaw.org/confident.pdf

4. Minimizing liability when faced with conflict

When faced with a conflict, it may be impossible to accurately guess what the law requires. There are, some steps you can take to minimize your personal liability in the event you guess incorrectly. The first is to document all your attempts to have the client disclosures and/or stop exposure prone activities. Also document the client’s response. If you later choose to disclose and you are sued by the client, you will have proof that you took measures short of disclosure and that these proved inadequate. If you choose not to disclose and are sued by a third party, you will have proof that you took substantial measures to protect the third party. Showing a judge or jury that your decision was thoughtfully made may help minimize any damages they award against you. www.aidslaw.org/confident.pdf

The second step you can take to protect yourself is to follow your employer’s policy on disclosure. Although you may be sued and may still lose, your employer will likely have to reimburse you if you were following its policy. All organizations where disclosure conflicts could arise, should have a policy on disclosure. When making a disclosure decision, always double check with your supervisor to make sure you are correctly applying the policy. Document all your requests, consultations and conversations. Do not reveal the client’s identity during these consultations. If you are in private practice and do not have an attorney or a supervisor to talk to, speak with a consultation group about what to do. Because the HIV Confidentiality Statute allows disclosure only by physicians, referring the
matter to the physician might release you from further legal obligation.

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In deciding to disclose, you and your organization should take a broad view of the situation. If your organization develops a reputation for disclosing HIV information, many clients will avoid you entirely or withhold information. Thus, you will lose the ability to counsel people. You should also be aware that making an unnecessary disclosure or making a disclosure in a way that needlessly frightens or alarms the contact could make you liable to the contact for the emotional harm you have caused that person. Be certain that there is a realistic risk of infection. Additionally, never simply inform someone that he or she has been exposed to HIV. Many people still equate HIV infection with a death sentence.

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“Professional ethics are at the core of social work. The profession has an obligation to articulate its basic values, ethical principles, and ethical standards. The NASW Code of Ethics sets forth these values, principles, and standards to guide social workers’ conduct. The code is relevant to all social workers and social work students, regardless of their professional functions, settings in which they work, or the populations they serve” www.socialworkers.org/pubs/code/code.asp
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