VERMONT MEDICAL SOCIETY

To: Members of the House Judiciary Committee

From: Jessa Barnard, Vice President for Policy & General Counsel

Date: April 19, 2017

Re: S. 3, An Act Relating to a Mental Health Professional's Duty to Warn

Representative Grad and members of the Judiciary Committee, thank you for considering the views of the Vermont Medical Society on S. 3. The VMS is the state's largest physician membership organization, representing over 2000 physicians, physician assistants and medical students across specialties and geographic location. I am also speaking to you today on behalf of the Vermont Psychiatric Association, made up of more than 130 psychiatrist-members who practice in settings including hospitals, designated agencies, federally qualified health centers and private practice.

The Vermont Medical Society and Vermont Psychiatric Association are proud to be working together with a large and diverse stakeholder group, including patient and family advocacy organizations, provider professional associations, community agencies and health care facilities, to craft a solution that returns Vermont to an understandable duty-to-warn standard, as articulated in the stakeholder-proposed amendment to S.3.

Physicians across Vermont have been watching the developments in the *Kuligoski* case with great concern since the first Supreme Court decision released last spring. Protecting information gathered in association with the care of patients is a core value in health care and a fundamental element of creating a meaningful physician-patient relationship. The *Kuligoski* decision threatens to upend decades of established law in Vermont that created narrow, well-understood exceptions to confidentiality in the clinical setting. It is also a very difficult to interpret – leaving clinicians unclear on how to meet the duty and reluctant to release patients to less restrictive settings.

You have already heard this morning several explanations of the *Peck* and *Kuligoski* decisions, so rather than repeat the standards created, I will mention several differences between the cases.

<u>Three key pieces of *Peck* make the duty workable</u>:

1. The danger must be serious and imminent. A clinician is not required to predict the future, or make guesses about a patient's likelihood of violence.
2. The patient has the ability to act on the threats.
3. The victims are identifiable. The clinician knows who to warn.

<u>Several factors make the *Kuligoski* decision unworkable for physicians and other mental health professionals</u>:

134 MAIN STREET • P.O. BOX 1457 • MONTPELIER, VERMONT 05601-1457
TEL.: 802-223-7898 • 800-640-8767 • FAX: 802-223-1201

1. The decision no longer requires that danger be imminent or serious. Any violent behavior documented anywhere in the patient's history may be sufficient to trigger the duty to "warn the caretakers of the patient's risk of violence." While the facts of the case have not been litigated, the decision was based on a situation in which the patient was discharged from in-patient care in November 2010, last contacted his outpatient care team in December 2010 and injured the victim over two months later, in late-February 2011.
2. It abandons the "identifiable victim" requirement. Instead the decision requires mental health professionals to guess as to who victims of a patient's potential violence may be. The Court provided professionals with little guidance regarding who falls into the definition of a "caretaker" or within the "zone of danger." "Caretakers" may likely be someone with no legal or family relationship to the patient. In the *Kuligoski* case, the patient was an adult with no guardian and he had the legal right to make his own treatment decisions.
3. The requirement to provide caretakers information about a patient's "risk of violence" and advise caretakers on how to "recognize the dangers" of caring for someone with a psychotic disorder ignores scientific research demonstrating the limited connection between mental illness and dangerousness and the inability of clinicians to predict violence.
4. The standard conflicts with federal HIPAA confidentiality standards – which allows disclosure only in cases of serious and imminent threats and when made to someone reasonable able to lessen the threat - and leads to clinicians having to choose between violating legal obligations to maintain confidentiality and the new state caretaker/zone of danger warnings.

The stakeholder-proposed amendment to S.3 addresses these problems with the *Kuligoski* decision in the following ways:

1. Explicitly states that *Kuligoski* is abrogated;
2. States that a mental health professionals' duty to warn is established in common law by *Peck v. Counseling Service of Addison County*;
3. References the comprehensive regulatory process and federal rules that apply to all discharges; and
4. Acknowledges in the bill's findings that people who are diagnosed with mental illness are no more likely to be violent than any other person.

Thank you for considering our proposed amendments and we look forward to working with your Committee to advance this effort.