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Hon. Maxine Grad
Chair
House Judiciary Committee
State House
Montpelier, VT 05406

RE: S.3 An Act Relating to Mental Health Professionals' Duty to Warn

Dear Representative Grad and Members of the House Judiciary Committee:

I write to urge you to reject S. 3, or better yet to substitute a reasonable care in the circumstances standard for the substance of the legislation.

Thank you for giving me the opportunity to testify of this legislation last Thursday. I apologize if my presentation seemed disorganized; the matter is complex, and was taken off guard by the need to confine my remarks to few minutes.

I understand that you are under considerable pressure to adopt this legislation. A group of stakeholders has come together behind it, and they represent powerful interests within the mental health treatment community. The Commissioner of Mental Health, virtually every association of mental health providers, and a patient advocacy group stand united behind it. They say there is an overwhelming need for legislation, and it seems I stand alone, or nearly so, in opposing it.

Nearly everyone who is aware of the status of our mental health treatment system seems to agree that it is broken and in need of fundamental reform. But almost everything that might be done to fix the problems is expensive and difficult, and no consensus seems to exist on how the system might be repaired or how any repair might be funded. There is fundamental tension between the desire to get state of the art treatment to patients and the fully justified concern that we respect the fundamental personal autonomy of those who resist treatment, unless they are imminently dangerous to themselves or others.

And so we don't know where to turn to fix the system nor to relieve the understandable fatigue and stress of the persons, both professionals and line-level mental health workers, who struggle to deal with these issues on a day to day basis.

And so when the "stakeholders" come to the Legislature and tell you that they that feel oppressed by a new Supreme Court decision that expands their potential liability, you as legislators feel that that this is a place where you can help and that you should do so. I understand that.

But there is no free lunch and this effort to protect mental health professionals will come at a high cost. It will benefit no one but the insurance industry, reduce public safety, and, in a few cases, leave seriously injured Vermonters without compensation for very significant losses. In the end, it is special interest tort reform.

Adopting S. 3 will do no good, will do great harm, and will miss a real opportunity to rationalize our law in a significant way. Please reject this legislation -- or better yet -- adopt new legislation that would improve the law and protect members of the public who would otherwise be harmed or perhaps even lose their lives.

Although I am not a mental health expert, in my years of work on the *Kuligoski* case and other cases that have involved mental health issues, I have learned a few things.

First, the fears of mental health professionals of exposure to liability because of *Kuligoski* are vastly overblown.

Even the stakeholder's draft of the legislation reflects this. It is true, as the legislation would have you find, that:

> The overwhelming majority of people diagnosed with mental illness are not more likely to be violent than any other person; the majority of interpersonal violence in the United States is committed by people with no diagnosable mental illness.

S. 3 at Paragraph 1. Even the Stakeholders are telling you there will be few acts of violence by persons with mental illness. As a result, inevitably, there will be few injuries and inevitably even fewer cases.

Since many persons – too many – who suffer from mental illnesses are not receiving treatment, even in those few instances in which the mentally ill cause injury, there will be no mental health professional to sue and therefore no claim.

And even when a person suffering from mental illness and receiving treatment causes injury to a third person, the likelihood of litigation remains low. I can tell you from personal experience that plaintiffs' lawyers must be rational decision makers to stay in business. These cases are expensive and time consuming to bring and pursue; lawyers cannot make many mistakes in choosing to bring high stakes malpractice litigation if they are to avoid bankruptcy.

This litigation is a kind of medical malpractice litigation. That means that not every mistake a mental health professional makes results in liability. Professionals make mistakes. Not every observation that is inaccurate, not every judgment that proves to wrong, not every therapy that is unsuccessful or even harmful, amounts to malpractice. Only a mistake that falls beneath a recognized standard of the profession in question (be it of a psychiatrist, psychologist, psychiatric social worker, etc.) and causes harm amounts to malpractice. That puts up another screen to protect the mental health professional: before her or she can hope to win a malpractice

case, the lawyer must identify a member of the defendant's own profession to review the facts, agree to testify against the defendant as an expert witness, and be prepared to offer that witness' professional opinion, under oath, that:

a. to a reasonable degree of medical certainty (more likely than not) the defendant has failed to meet an identifiable and recognized standard of the profession; and
b. that the failure identified has caused the plaintiff's injury.

Some medical professionals and some of their lawyers will claim this is a charade: that one can always find an expert witness for hire who will say anything for a price. This is just not true. It is very hard to find professionals who will testify against members of their professions. They just don't want to do it. The burden of finding a competent and willing expert witness is a heavy one.

And a lawyer who relies on an unreliable expert is a foolish gambler. The case is likely to go to trial, his expert is likely to be exposed as a charlatan, and the case is almost certain to be lost.

The funnel through which cases relying on the *Kuligoski* decision is narrower still. We argued in the Supreme Court that mental health professionals treating mentally ill patients who present an imminent risk of serious bodily harm to third parties should be held to the standard of doing the reasonable thing in the circumstances. The Supreme Court rejected this standard and adopted a far narrower one. It held that in those cases in which a patent who is known to present an imminent risk of serious harm, or where a competent professional should recognize such a risk, that the professional -- if the patient is to be supported in the community by non-professional caregiver -- should provide adequate information about the patient to the caregiver.

So, to summarize, violence by mental patients is rare, even when it occurs there is no claim unless the mental health professional have failed to meet the standards of their own professions, and under *Kuligoski,* only failure to inform caregiver cases are authorized.

The sky is not falling. It is not even cloudy.

Second, the real beneficiaries of S. 3 will not be mental health professionals, it will be their liability insurers.

Given the choice, it is human to prefer not to be held accountable rather than it is to volunteer to do so.

But professionals who do critically important work like psychiatrists and psychologists take on very important responsibilities. Often, the health and sometimes even the lives of their patients and those who come into contact with their patients, depends on their competence and diligence.

Few serious professionals would take on such responsibilities without professional liability insurance. It is really those insurance companies – companies that have already agreed to protect mental health professionals from any significant loss due to an act of malpractice – who will be benefited if you adopt S. 3.

Third, the Court's decision in *Kuligoski* is not the source of great stress on our mental health system.

You have been told that, because of the Supreme Court's decision in *Kuligoski v. Brattleboro Retreat*, more persons with mental illness are being held in emergency rooms, subjected to involuntary examinations and involuntary medication orders and held in involuntary commitments.

Whether the data really suggests this is debatable: the Commissioner of Mental Health was publically claiming this **before** the decision in *Kuligoski* had even become final.

But whether or not the data is statistically meaningful, it is important to recognize that the very professionals who are loudly complaining about the decision are the gatekeepers of the doors to the involuntary therapy.

They are legally obligated not to order involuntary therapy unless it is justified, but they come before you tell you that they are over-prescribing involuntary therapy to protect their own interest in avoiding litigation.

This argument is reminiscent of the definition chutzpah; it is like the boy who murdered his parents who says to the court: "have mercy on me, I am an orphan."

It is an argument that should be firmly rejected.

Fourth, the suggestion that mental health professions cannot predict which patients will become violent is misleading.

Of course, it is true that mental health practitioners cannot **always** predict when patients are going to be violent. But that does not mean that they can **never** tell when a patient is going to be violent.

If professionals could never tell, how could they go into court and testify, as they often do, that a particular patient presents an imminent risk do harm to him or herself or others and should be involuntarily committed or required to take medication? Our involuntary commitment and involuntary medication system rests on the ability of mental health professionals to do just that. And they do.

A professional may not always be able to tell which patents will become violent, but there are patients who professionals can tell are very likely to become violent.

If you reject S. 3, professionals will not be held liable for failing to get close calls right; the research and the profession understands that in some cases it is hard to tell, and getting it wrong will **not** fall beneath a professional standard of care.

But there are cases where it is relatively easy to see that a patent presents and imminent risk of serious harm to self or others.

Consider this hypothetical case: The patient has been diagnosed as a paranoid schizophrenic, and has a history of auditory hallucinations that urge him to act violently. He has been on medication

for a time and has done well. He is living in the community with his care-giver parents, who believe he is taking his medication.

He tells his psychiatrist that he believes he has gotten all well and has stopped taking his medication. He says that the "voices" have returned and have told him to a public place and kill as many people as he can. He says that the voices are right. He says that he has a gun and he is going to use it.

Under S. 3, the psychiatrist would **not** be obligated to do anything at all. There is no identifiable victim, so there is no duty to warn under *Peck v. Addison County Counseling Service*. As a result of S. 3, you would have abrogated the obligation the psychiatrist would have under *Kuligoski* to inform the patient's caregivers.

Is this good public policy?

There is a better answer. Under the *Restatement (Third) of Torts*, promulgated by the American Law Institute, if the psychiatrist has or should have recognized an imminent risk of serious harm, the psychiatrist would be obligated to act reasonably to prevent it.

The Restatement provides:

> **§ 41. Duty To Third Parties Based On Special Relationship With Person Posing Risks**
>
> (a) An actor **in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship**.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> (1) a parent with dependent children,
> (2) a custodian with those in its custody,
> (3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and
> **(4) a mental-health professional with patients.**
>
> (emphasis added)

The commentary relating to mental health professionals notes:

> Once such a patient is identified, the duty imposed by reasonable care depends on the circumstances: reasonable care may require providing appropriate treatment, warning others of the risks posed by the patient, seeking the patient's agreement to a voluntary commitment, making efforts to commit the patient involuntarily, or taking other steps to ameliorate the risk posed by the patient. In some cases, reasonable care may require a warning to someone other than the potential victim, such as parents, law-enforcement officials, or other appropriate government officials.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 cmt. G (Am. Law Inst. 2012).

This is a fair and reasonable approach this problem. And that is the rule that the most recent State supreme Court to decide this issue adopted. *Volk v. Demeeleer,* ___*Wash.*___, ___ (Washington Supreme Court, No. 91387-1, December 16 2016).

I urge you to adopt a strike-all amendment substituting language that would apply the Restatement "reasonable care in the circumstances" approach.

This would point mental health professionals in the right direction: to make a reasonable and good faith efforts to balance the interests of patients in getting or even refusing treatment that respects their personal autonomy on the one hand with the interests of public safety on the other.

Thank you for considering my views.

Rich Cassidy