VERMONT MEDICAL SOCIETY RESOLUTION

Amending a Clinician's Duty to Warn

Adopted at VMS Annual Meeting on November 5, 2016

Whereas, Protecting information gathered in association with the care of the patient is a core value in health care and respecting patient privacy is fundamental as an expression of respect for patient autonomy and a prerequisite for trust;[1] and

Whereas, Confidentiality is especially critical to the therapeutic relationship when providing mental health services - privacy in mental health treatment is essential to encourage persons in need of treatment to seek care and patients' openness in treatment can be a prerequisite to resolving the problems leading to potential violence;[2] and

Whereas, With some exceptions codified in state or federal law, health professionals can be legally liable for breaching confidentiality; one exception springs from an effort to protect victims from a patient's violent behavior;[3] and

Whereas, Standards for requiring a professional response to threats of violence have been based on balancing "'the interests of those injured by psychiatric outpatients against the interests of the mental health profession in honoring the confidentiality of the patient-therapist relationship and in respecting the humanitarian and due process concerns that limit the involuntary hospitalization of the mentally ill;'"[4] and

Whereas, The standard in Vermont since 1985 for responding to concerns of violence was set by the Vermont Supreme Court's *Peck* decision and states: "a mental health professional who knows, or based upon the standards of the mental health profession, should know that his or her patient poses *a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger*;"[5] and

Whereas, The *Peck* standard creating a duty to warn in the cases of identifiable victims is consistent with the seminal "duty to warn" *Tarassoff* decision issued by the California Supreme Court in 1976[6] and the past four decades of legal developments regarding duty to warn standards;[7] and

Whereas, Of the 43 states that have specifically addressed whether to impose a duty on mental health professionals, the clear majority limit the duty to identifiable victims (19), identifiable

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[1] *AMA Code of Medical Ethics, 3.1.1, Privacy in Health Care; AMA Principle of Medical Ethics, IV*

[2] *American Psychiatric Association, Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services (2014); see also Brief of Amicus Curiae, Disability Rights Vermont, Inc., Kuligoski v. Brattleboro Retreat, Docket No. 47-2-14 Wmcv at 7*

[3] *National Council of State Legislators, Mental Health Professionals' Duty to Warn, accessed July 12, 2016*

[4] *Kuligoski v. Brattleboro Retreat, 2016 VT 54A ¶ 95 (dissent), citing Fraser v. United States, 674 A.2d 811, 816 (Conn. 1996)*

[5] *Peck v. Counseling Services of Addison Co., Inc, 146 Vt. 61, 499 A.2d 422 (1985)*

[6] *Tarasoff v. Regents of the University of California 551 P.3d 334, 340 (Cal.1976), holding that a therapist who "determines, or pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another…incurs an obligation to use reasonable care to protect the intended victim against such danger."*

[7] *See Kuligoski, supra note 4 ¶ 89 (dissent).*

1 victims or members of an identifiable group (3), or identifiable victims or specific threats of
2 violent acts (4);[8] and
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4 Whereas, The *Peck* standard has been understood and applied by psychiatrists, emergency
5 physicians and other clinicians providing mental health services, as well as patients seeking
6 mental health services;[9] and
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8 Whereas, In May 2016, the Vermont Supreme Court decided the case *Kuligoski v Brattleboro*
9 *Retreat* and significantly expanded the duty to warn standard in Vermont;[10] and
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11 Whereas, In May, the appellees, Brattleboro Retreat and Northeast Kingdom Counseling
12 Services, moved for reargument of the case by the Vermont Supreme Court; and
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14 Whereas, A number of health care and patient organizations filed amicus curiae briefs in favor
15 of reargument, including the Vermont Secretary of the Agency of Human Services; AHS stated
16 that "the Court's decision has consequences far beyond this case. The duty created here will
17 affect countless interactions between providers and their patients across the state [and] will
18 cause more harm than good;" and
19
20 Whereas, In September, the Supreme Court denied the appellees request for reargument and
21 issued an amended opinion;[11]
22
23 Whereas, The *Kuligoski* decision holds that a clinician must warn about risk of harm by a
24 patient not just to identifiable victims but to a "caretaker" who is "actively engaging with the
25 patient's provider in connection with the patient's care. . ., the provider substantially relies on
26 that caregiver's ongoing participation, and the caregiver himself or herself is within the zone of
27 danger of the patient's violent propensities;"[12]
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29 Whereas, the *Kuligoski* decision also creates for clinicians an entirely new "duty to provide
30 information" to caretakers to "enable [the caregiver] to fulfill their role in keeping [the
31 patient] safe;"[13] and
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33 Whereas, the *Kuligoski* decision is nearly impossible for clinicians to implement, providing scant
34 guidance regarding who falls in the "zone of danger," and what information needs to be
35 provided to caretakers; and
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37 Whereas, The *Kuligoski* decision threatens the "fundamental policy underlying [Vermont's]
38 mental health system, a policy designed to maximize a patient's freedom and dignity by
39 providing treatment in the least restrictive environment possible"[14] and puts clinicians in the
40 impossible position of choosing between treating patients in the least restrictive environment
41 or facing civil liability for the criminal acts of former patients;[15] and

[8] *Appellee Brattleboro Retreat's Brief, Kuligoski v. Brattleboro Retreat, Docket No. 47-2-14 Wmcv at 12-13.*
[9] *Brief of Amicus Curiae, Disability Rights Vermont, Inc., Kuligoski v. Brattleboro Retreat, Docket No. 47-2-14 Wmcv at 8*
[10] *Kuligoski, supra note 4*
[11] *Id.*
[12] *Id. at ¶ 52*
[13] *Id. at ¶ 64*
[14] *Id. at ¶ 105 (dissent);*
[15] *Appellee Brattleboro Retreat's Brief, Kuligoski v. Brattleboro Retreat, Docket No. 47-2-14 Wmcv at 22.*

Whereas, The requirement in *Kuligoski* to provide information to a broad group of caregivers is in conflict with federal and state law and ethical standards regarding exceptions to safeguarding patient confidentiality;[16] and

Whereas, A "duty to inform" is defined nowhere else in legal or medical standards[17] and will "continue to perplex and bedevil practitioners in the field of mental health who might actually attempt to understand the obligations imposed and comply;"[18]

Whereas, 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[19] ignores scientific research demonstrating the limited connection between mental illness and dangerousness and the inability of clinicians to predict violence;[20] and

Whereas, the *Kuligoski* decision is of concern to a range of health care professionals and organizations, including the Vermont Psychiatric Association, Vermont Association of Hospitals and Health Systems, the University of Vermont Medical Center, the Vermont Council of Developmental and Mental Health Services, Disability Rights Vermont and others; therefore be it

Resolved, VMS will work with partner organizations to advocate for a restoration of Vermont's previous duty to warn standard, through supporting ongoing litigation efforts and/or urging the Vermont General Assembly to enact legislation explicitly overruling the *Kuligoski* decision and replacing it with a statutory duty to warn standard requiring a serious risk of danger to an identifiable victim.

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[16] *Consistent with Peck, HIPAA allows disclosure of information only when "necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public" when such disclosure is "to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat…." 45 CFR 164.512(j); AMA Code of Medical Ethics, Section 3.2.1, Confidentiality, allows physicians to disclose personal health information "to other third parties situated to mitigate the threat when in the physician's judgment there is a reasonable probability that…the patient will inflict serious physical harm on an identified individual or individuals." See also Kuligoski, supra note 4 at ¶ 124-125 (dissent), discussing how the new requirements are inconsistent with the exceptions in HIPAA.*

[17] *Kuligoski, supra note 4 at ¶ 101 (dissent), stating "Nothing in plaintiffs' briefing below or before this Court identifies any medical treatises or other literature defining and describing the basic clinical standards, practices and therapeutic goals underlying such a duty. Nothing in the briefing identifies any decisional law or authority elsewhere specifically recognizing such a duty."*

[18] *Id. at ¶ 122 (dissent)*

[19] *Id. at ¶ 44*

[20] *See Brief of Amicus Curiae, University of Vermont Medical Center, Central Vermont Medical Center and Rutland Regional Medical Center, Kuligoski v. Brattleboro Retreat, Docket No. 47-2-14 Wmcv at 4, 14-23, providing an overview of the scientific literature.*