Testimony of Darlene Furey, Executive Director, Vermont Chapter, National Association of Social Workers, regarding Senate Bill 3

Thank you for the opportunity to testify regarding this critical bill. I am Darlene Furey, the Executive Director of NASW Vermont. I have masters degrees in social work and in in law and social policy. I am a licensed independent clinical social worker in Vermont and in Pennsylvania. As an adjunct professor, I have taught both clinical and policy social work courses on the masters level at Temple University and Rutgers University. I currently teach in the social work department at the University of Vermont. I also have a small private practice in Montpelier.

I am providing this testimony on behalf of the National Association of Social Workers, which is the largest membership organization of professional social workers in the United States, with approximately 132,000 members. The Association works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies. Here in Vermont, we are extremely concerned about the negative impact the *Kuligoski* decision will have on mental health care.

NASW strongly supports the general approach to provide a reasoned and fair fix concerning the Vermont Supreme Court's decision in the *Kuligoski* case. That case imposes an unfair -- and unclear -- burden on social workers and other mental health providers to warn an ill-defined set of potential victims and caregivers. As a result, providers will be subject to unjustifiable negligence actions -- and the privacy interests of patients, as well as their rights to receive care in non-restrictive settings, will be compromised.

We want to see a return to the standard adopted previously by the Vermont Supreme Court in 1985 in the *Peck v. Counseling Service of Addison County, Inc.* case. That case limited the duty to serious and imminent threats communicated by patients concerning identifiable victims. Indeed, this standard is consistent with that used in the large majority of states today -- which have recognized that such an approach is compelled by good public policy related to mental health care.

Critical Role of Social Workers in Providing Mental Health Care

NASW has a particularly strong interest in this issue, given the primary role of clinical social workers, nationwide, in providing mental health care. According to the Substance Abuse and Mental Health Services Administration, there are more clinically trained social workers than psychiatrists, psychologists, and psychiatric nurses combined.[1] Specifically, there are approximately 200,000 social workers in the United States who

[1] Substance Abuse and Mental Health Services Administration, *Behavioral health, United States, 2012* (2013) (HHS Publication No. SMA 13-4797), p. 192 (hereinafter "SAMHSA Report"), available at www.ncbi.nlm.nih.gov/books/NBK174670/ (visited October 17, 2016).

are licensed at the clinical level.[2] And in Vermont, there are approximately 1300 licensed independent clinical social workers. Further, the relatively higher cost of psychiatrists' and psychologists' services makes it difficult for many individuals with mental health issues (many of whom are uninsured) to access such services. For many low-income individuals, in fact for most Americans, clinical social workers provide most of their primary mental health care.

Background on the *Kuligoski* Case

In this case, a patient, Evan Rapoza, who had been diagnosed with mental illness, was discharged from an inpatient psychiatric facility into the care of his parents; his treatment plan included medication and visits to an outpatient treatment facility. Sometime later, in an apartment building owned by Mr. Rapoza's parents, he assaulted Mr. Kuligoski, who had been repairing a furnace there. The Kuligoski family sued both facilities. The court dismissed the case, finding that the defendants were under no duty to control Mr. Rapoza when the assault occurred, and that the mental health service providers could not have foreseen that Mr. Kuligoski would be a victim of Mr. Rapoza's actions.

The family appealed to the state Supreme Court, which reversed the lower court decision, and found that the facilities may indeed have liability for their actions. In a departure from the trend in other state courts and legislatures on this issue, the decision creates a new duty – to warn not the patient's targeted victims, but the patients' caregivers, so they may control the patient and prevent injury to the public.

In a very strong dissent, joined in by two justices, it was stated that although science and the law have evolved in the years since the California Supreme Court issued its seminal decision in the *Tarasoff* case -- which set the standard followed by many other states regarding the duty to warn -- they "have simply not evolved in any way that remotely supports the majority's decision to expand exponentially the duty owed by a mental health professional to protect third parties in the circumstances presented here."

Further, the dissent stated that the majority opinion:

> has created and imposed on mental health care providers a duty so ill-defined and uninformed that even the best, and the best-intentioned, providers will be confused and conflicted as to their professional obligations. Ironically, although the majority clearly believes that its decision represents progressive thinking, it is at odds with the real interests of Vermont's health care providers, patients, and the public at large.

[2] SAMHSA Report, see Table 93 "Mental Health and Substance Abuse Treatment Providers, by discipline and state: number, United States, 2008, 2009, and 2011."

Duty to Warn Other States

In states that have established a statutory duty to warn on the part of mental health practitioners, the large majority impose such a duty only where the patient has made a threat regarding a specific, readily identifiable potential victim.[3]

Similarly, a majority of the courts around the country which have considered the issue have imposed such a duty only if the client identified a specific intended victim. And a few states have determined that public policy does not support any mandatory duty on the part of a mental health care provider to protect third parties from a potentially violent patient.

Policy and Legal Arguments in Favor of a More Limited Duty

The court's decision does not rely on a proper balancing of the interest in protecting public safety with the interests of providing effective treatment and safeguarding individual rights. The majority of courts and state legislatures, in adopting the more narrow duty – owed only with regard to potential serious and imminent risks to readily identifiable victims – have recognized a variety of public policy interests.

First, although there is a compelling interest in protecting the public from assault by mental health patients with violent propensities, there is a stronger countervailing interest in safeguarding the confidential character of psychotherapy communications. The *Kuligoski* decision removes the requirement that that the danger be imminent and serious. Any violent behavior occurring in the past may be sufficient to trigger the duty to warn caretakers of the patient's risk of violence, compromising the confidential relationship between patient and therapist.

Confidentiality is crucial to a mental health professional's ability to treat clients. Clinical social workers well-understand that therapy is not effective if patients stay away or do not open up when they do seek treatment. And patients do stay away and fail to open up if they cannot trust that their confidences are being kept to the greatest extent possible.

Further, it is recognized that forecasting future dangerousness is extremely difficult. Mental health professionals are dedicated to giving effective treatment to those who pose a risk of violence, but they cannot accurately predict whether and when any particular patient will have a violent outburst, much less who will be the target of the violence.

[3] See the state law compilation, *Mental Health Professionals' Duty to Warn*, prepared by the National Conference on State Legislatures, available at http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx.

Regarding these first two interests, as the dissent in the *Kuligoski* case notes, "the societal costs of breaching the therapeutic bond based on generalized threats of violence — all too commonplace in the therapeutic setting — do not justify whatever uncertain benefits may flow from expanding the duty to unspecified third parties based on an inherently inexact risk assessment made all the more difficult where the potential target is not identified."

Mental health professionals and their patients deserve clear standards for the limited circumstances when practitioners are required to breach patient confidentiality in order to fulfill their duty to warn those at risk.

Also, there is a significant concern that patients would be unnecessarily hospitalized or maintained in hospitals and other restrictive environments longer than necessary to avoid potential liability. Mental health care providers, who will be uncertain as to how this new standard can be satisfied, will decide to favor more restrictive treatment settings, rather than risk a lawsuit by any random victim of assault by their patient. That is, the actions of mental health practitioners may be influenced more by fear of liability than by their clinical judgment. In addition to being an entirely unjustified practice, it would not be a practical approach in Vermont, as we have a shortage of available psychiatric beds.

Further, the new standard may very well discourage clients from seeking treatment, as they will fear being unnecessarily placed in restrictive settings. And the standard could have the effect of causing providers to be more selective in whom they accept for care.

The *Tarasoff* approach, adopted by most states, and the standard Vermont adopted in *Peck* is appropriate because it provides a clear, narrow and understandable standard.

As the dissent observed,

> Under this new duty, mental health providers will have to consider generalized threats of violence directed against no one in particular . . ., and will have to weigh whether to violate the patient-physician privilege, thus damaging whatever therapeutic relationship existed and perhaps the treatment of the patient as well. After the risk assessment, they will then, in trying to place the patient in the least restrictive environment available, need to do an educational assessment of potential caregivers. . . . [t]he majority identifies no professional standards, legal authority, or public policies to support a duty so "extraordinary in its scope and implications." Long after this Court has forgotten about it, this amorphous duty to train or assist will continue to perplex and bedevil practitioners in the field of mental health who must actually attempt to understand the obligations imposed and comply.

Further, the new duty created by the court conflicts with the protections set out in the HIPAA Privacy regulations. Although these regulations permit disclosure of patient information without consent in order to avert a serious threat to health or safety, such disclosure is only permissible when the disclosure "is necessary to prevent or lessen a serious **and imminent** threat to the health or safety of a person or the public." See 45

CFR 164.512(j). The new rule conflicts with this requirement, as it imposes no requirement that the threat be imminent. Therefore, the requirement would be preempted by HIPAA.

Finally, I personally fear *Kuligoski* will have a chilling effect on mental health practice in Vermont. As the Executive Director of NASW Vermont, every day, I speak to social workers who are interested in moving to our beautiful state and want to know what the climate for social work practice is in Vermont. I talk to young social work students who are considering going into practice here. When they hear about the expanded duty to warn under *Kuligoski*, they recoil. I listen to seasoned clinicians talking about leaving private practice because of the conflict and confusion it creates. We need more social workers in Vermont, not fewer. I believe *Kuligoski* will have the unintended consequence of deterring mental health professionals from practicing here, and considering the overtaxed state of our mental health system, that would be a disaster.

Thanks so much for your consideration of our testimony.