**Assignment 3.1: Confidentiality and Duty to Report in Texas**

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CNS 780 BG

31 October 2021

**Confidentiality and Duty to Report in Texas**

Many of Texas’ laws surrounding confidentiality and privileged communication reflect standards typical in the counseling profession, establishing strong protections for clients and delineating when those protections must or can be removed within codified legal statutes (Remley & Herlihy, 2020; Texas Health and Safety Code § 161, 2021). One distinction between Texas and other states is that Texas does not mandate a professional’s duty to report suspected or actual homicidality or suicidality, refusing to adopt the *Tarasoff* precedent as other states have (Cantu & Hopson, 2000). Most notable case law surrounding confidentiality, privileged communication, and duty to report in Texas focuses on this divergence from the *Tarasoff* standard. Likewise, this divergence yields important implications for therapy clients, the public, clinicians, and the various mental health disciplines within Texas.

**Mandatory and Authorized Reporting**

The privileged communication between a counselor and a client is robustly protected by Texas state law apart from a few exceptions which require or authorize professional counselors to void confidentiality (Texas Administrative Code § 681, 2020; Texas Health and Safety Code § 611, 2021). Texas Administrative Code § 681 (2020) notes the situations that void confidentiality by mandating reporting of confidential information, as well as the specific statutes that call for such mandates. Such situations include observing or suspecting abuse, neglect, or exploitation of a minor, elderly person, or disabled person, abuse, neglect, unprofessional conduct, or unethical conduct within a health care facility, sexual exploitation by a fellow mental health clinician, or when mandated reporting is necessitated when working with a sex offender (Texas Administrative Code § 681, 2020). Texas Civil Practice and Remedies Code § 81 (2011) further notes the various mental health professionals [MHP] included in the sexual exploitation mandate (e.g. MFTs, LPCs, physicians, and psychologists, among others), defines sexual exploitation (e.g. sexual intercourse, sexual contact, etc.), mental health services, among other necessary terms, and explains that all mental healthcare providers are mandated to report instances of MHP’s committing sexual exploitation, despite any arrangement of privileged communication with the source of this information. Likewise, Texas Family Code § 261 (2021), notes that clinicians must void confidentiality and privileged communication to report child neglect and/or abuse, including physical, emotional, mental, and sexual abuse, to the Department of Family and Protective Services within two days of being notified of the abuse or, otherwise, be held liable for aiding in the abuse. Texas Human Resources Code § 48 (2021) and Texas Health and Safety Code § 161 (2021) outline the mandates to report cases of elder abuse, neglect, and exploitation to the Department of Family and Protective Services and to report abuse and unethical behavior in health care facilities to the Department of Health and Human Services, respectively. Finally, Texas Occupations Code § 109 (2019) states that MHPs must submit information about the treatment of sex offenders to law enforcement or other MHPs upon request.

Texas Health and Safety Code § 611 (2021) notes the instances in which MHPs may breach confidentiality with or without being mandated to do so. In judicial settings, MHPs may release information when acting as a defendant in a legal battle with a client, when providing a court-ordered mental health examination, in cases involving the parent-child relationship, when a client or their representative waives confidentiality in writing, during an involuntary commitment of the client, when subpoenaed, or in any criminal case involving the client (Texas Health and Safety Code § 611, 2021). MHPs may also release confidential information when they are mandated to report, when there is written permission from the client to release information, to facilitate billing of services, financial audits, and program evaluations, to a deceased client’s personal representative, to correctional facility personnel in order to provide the client with services, to meet a request for the medical records of a deceased or incompetent client, to other MHPs or employees within their practice who aid in treatment or case management, and to mental health, medical, or to law enforcement personnel when a client expresses an intent of imminent violence or suicide or if a client is facing an actual or suspected impending mental or emotional injury (Texas Health and Safety Code § 611, 2021). Emotional and mental injury are not defined in this last point. Likewise, this point does not allow for counselors to contact potential victims or the support system of imminently suicidal clients. Furthermore, immunity from liability in the event of such authorized but not mandated disclosures is never mentioned in Texas Health and Safety Code § 611 (2021).

**Case Law & Duty to Warn**

Much of the case law surrounding the limits of confidentiality and privileged communication in Texas focuses on MHPs lack of a duty to warn/protect mandate or the ability to contact potential victims of a client or the family members of an imminently suicidal client.

*Kerrville State Hospital v. Clark* (1998) demonstrated the need for a duty to warn precedent after a patient at a mental hospital, initially admitted involuntarily for homicidality and later readmitted voluntarily for the same, left his voluntary stay at the hospital and murdered his wife, the identified target from his initial institutionalization. However, the judge’s ruling came short of mandating or allowing clinicians to warn potential victims despite alluding to the potential impact of such a ruling, instead determining that the hospital should have further detained the patient (*Kerrville State Hospital v. Clark*, 1998). In *Zezulka v. Thapar* (1997), another hospital released a patient, knowing that he had a persistent desire to murder his stepfather, without warning the stepfather of this danger. In response to a suit filed against the therapist for failing to warn, the court again alluded to the need for a duty to warn precedent, noting the *Tarasoff* case, but came short of setting the precedent in a Texas court and instead simply removed clinician immunity from civil wrongful death suits stemming from such cases (*Zezulka v. Thapar,* 1997). This case was then overturned in *Thapar v. Zezulka* (1999) when the court decided to restore clinician liability protection in civil wrongful death cases related to a clinician’s failure to report a threat to a potential victim and stated that clinicians have no duty to warn. The law in Texas has remained the same since the passing of these cases: clinicians in Texas have no duty nor ability to warn potential victims or those close to imminently suicidal clients.

**Discussion**

As a citizen of Texas, it is difficult to accept that the state’s courts will not follow the widely accepted *Tarasoff* precedent and establish a duty to warn protocol (Cantu & Hopson, 2000). Likewise, it is irresponsible for the state to disallow clinicians to contact potential victims or the family members of a client who is intent on suicide. I believe that reforms need to be made in this area immediately to allow clinicians to better protect their clients and the population at large. Conversely, mandatory reporting for child abuse, elder abuse, and abuse within institutions is a good idea in that it helps to ensure the welfare of the public.

As a client, I would hope that a therapist would do all they could to prevent me from committing suicide or harming someone; however, some suicidal or homicidal clients may appreciate being able to discuss these experiences without the threat of detainment or confrontation. I would also feel comfortable with the states mandatory reporting laws because my values system is firmly against the abuse and exploitation of others.

As a counselor, I believe that Texas’ failure to emulate the *Tarasoff* ruling inflates client autonomy at the expense of justice for clients and potential victims, leaving counselors to betray nonmaleficence by knowingly allowing harm to come to others while having the power to stop it (ACA, 2014). The lack of a duty or ability to warn conflicts with ACA Code of Ethics (2014) sections A.1.a. calling client welfare a top priority, A.4.a. requiring counselors to avoid harming others, and B.2.a. which requires counselors to protect clients and others from known harm (ACA, 2014). Similarly, Texas provides no duty or ability to report the suspected spreading of life-threatening diseases, also endangering potential victims, providing no liability to MHPs who report, and violating ACA code B.2.c. which calls for such reporting (ACA, 2014).

The other mandatory and authorized reporting procedures seem to provide opportunities for counselors to preserve the public good and protect client confidentiality. For example, counselors are protected when filing a mandated report mentioned in Texas Administrative Code § 681 (2020), saving counselors from legal and civil liability. Likewise, Texas Health and Safety Code § 611 (2021), allows counselors to advocate for client confidentiality, even when faced with a court order or subpoena. However, the lack of an ability or duty to warn could put counselors in the position of allowing somebody to pay the ultimate price for another’s inaction. That would be a difficult legal standard for me to uphold as a counselor, knowing that I could save somebody’s life if only I gave them an unauthorized warning.

**Conclusion**

While Texas does concretely outline many of the potential scenarios in which confidentiality and privileged communication may or must be compromised, the refusal of the state’s courts to institute a duty or ability to warn the appropriate parties in cases of homicidality, suicidality, and the spreading of infectious diseases puts counselors in an impossible position of choosing between their careers and legal status and helping a client or potential victim in dire need. Relevant case law also demonstrates that the courts are conflicted on the need for a duty to warn precedent (*Kerrville State Hospital v. Clark,* 1996; *Thapar v. Zezulka,*1999; *Zezulka v. Thapar,* 1997). The aforementioned statutes in the Texas legal code do allow for much freedom on the part of the counselor to advocate for their clients and report the appropriate authorities in numerous circumstances; however, the refusal to allow clinicians to prevent serious harm by contacting potential victims or the supports of at-risk clients is an egregious error. While confidentiality and privileged communication are well protected in Texas, counselors are not allowed to fully fulfill our ethical obligation to protect others.

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