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L.A. Law School

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L.A. LAW SCHOOL

*Excerpts from an Original Screenplay by Jan C. Costello**

FADE IN:

EXT. LOYOLA LAW SCHOOL—DAY

PALMER walks from the parking structure towards the Oak Tree Quadrangle behind Merrifield Hall. She approaches a group of casually dressed students sitting on one of the concrete ledges that surround the oak tree. She appears to ask for directions, and one of the students points her towards the Burns Building. Palmer proceeds up the Frank O. Gehry narrowing stairs and into the Burns Building.

INT. COSTELLO'S OFFICE

COSTELLO sits at her computer and types. There is a knock at the door.

COSTELLO

Just a minute.

Costello walks to the door and opens it.

COSTELLO

Yes?

PALMER

Professor Costello, you don't know me, but I used to work with Dr. Stan Ziegler,¹ and he always said that if I had any legal or ethical questions you were the one to see. My name

* Professor of Law, Loyola Law School, Los Angeles, California.

1. This Essay is dedicated to the memory of Stan W. Ziegler, Ph.D. (1950-1995), a talented, conscientious, and ethical therapist, and my good friend for over twenty years. Stan volunteered his friends' time and expertise as generously as he did his own. He once cheerfully informed me that, upon seizing the microphone at a conference on legal and ethical issues, he had given my telephone number to about 150 therapists and told them, "If you have any questions, just call Jan." Mercifully, only a few of them have.

is Dr. Jennifer Palmer and I'm in practice here in California.² I'm concerned about something that has occurred with one of my patients, and I'd like to discuss it with you. But before I do, uh—you will keep this conversation confidential, won't you?

COSTELLO

Since you're consulting me as an attorney, you're my client and this whole conversation is privileged. Just as you do, I have an ethical obligation to keep confidential my client's communications—with very rare exceptions.

PALMER

Well, here's my problem: My patient, Ben Jones, has confessed to me that he committed a murder. An innocent man, Frank Smith, is going to be executed for that same murder next Friday. Ben could stop the execution by turning himself in, and I know he's thinking about it, but what if he doesn't? Ethically, should I disclose his confession to somebody who can stop the execution? And if I do disclose it, can Ben Jones sue me? Could I lose my professional license?

COSTELLO

Should you disclose Ben's confession? That's an ethical question, and while I could talk you through the pros and cons,³ you ultimately have to decide that for yourself. Your

2. The hypothetical did not indicate where the therapist was in practice. I added this fact because California law is well established as to the patient's general right to confidentiality and privacy under the state constitution. See *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 841-42, 228 Cal. Rptr. 545, 548 (1986). As to the duty of the therapist to disclose confidential communications where necessary to avert harm, see *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). Most important, however, is that the scope of the so-called dangerous patient exception to the psychotherapist-patient privilege, California Evidence Code § 1024, has been recently clarified in a series of decisions by the California Supreme Court. See *Menendez v. Superior Court*, 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992) (interpreting its earlier decisions in *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990) and *People v. Wharton*, 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (1991)). The "retrospective" application of the dangerous patient exception to compel testimony about a murder confession like the one in this hypothetical is a real possibility.

3. As could anyone who has read the following masterful essays: Philip J. Candilis & Paul S. Applebaum, *A Confession of Murder: The Psychiatrist's Dilemma*, 29 LOY. L.A.

other questions—if you disclose Ben’s confession can he successfully sue you and whether you can lose your license—raise several legal issues. What the consequences of your disclosure would be would depend upon whether the disclosure was lawful.

PALMER

That’s really what I need—legal advice. I mean, if you tell me that the law requires me to disclose, I don’t have much of a choice. While I know that some therapists do refuse to comply with the law and take their chances on being punished, I don’t see myself defying a court order. And if you tell me that I don’t have to disclose, and that Ben could sue me if I do . . . I’ve only been in private practice a few years and I don’t have a lot of money . . . maybe I shouldn’t let fear of a lawsuit keep me from doing the right thing . . . but it might . . . and yet the thought of an innocent man dying, when I could stop it . . .

COSTELLO

I know this is an agonizing decision, and I’ll do my best to help you by giving you my legal opinion. The two legal issues are: First, do you have a duty to disclose the confession? Second, in the absence of such a duty, does the law give you the discretion to disclose Ben’s confession without violating either his right to confidentiality or your professional code of ethics?

If you made the disclosure because the law requires it, you certainly would have not violated Ben’s right to confidentiality.⁴ Ben could still sue you, but not successfully—and that’s an important distinction. If you ask, “Can he sue me?”, the answer is, “Sure. Anybody can file suit against anybody for any reason.” The real question is, “Can he successfully sue me?”

L. REV. 1691 (1996); Michael L. Perlin, “I’ll Give You Shelter From the Storm”: *Privilege, Confidentiality and Confessions of Crime*, 29 LOY. L.A. L. REV 1699 (1996); Robert Sadoff, *Ethical Obligations for the Psychiatrist: Confidentiality, Privilege, and Privacy in Psychiatric Treatment*, 29 LOY. L.A. L. REV 1709 (1996); Daniel W. Shuman, *The Case of the Confidential Confession: Psychiatry*, 29 LOY. L.A. L. REV 1717 (1996).

4. See *infra* note 39.

As for losing your license, I need to first know, Dr. Palmer, are you a psychiatrist or psychologist?

PALMER

A psychiatrist.

COSTELLO

So you're bound by the American Psychiatric Association's (APA) ethical code⁵ and can release confidential information only with the authorization of the patient or "under proper legal compulsion."⁶

PALMER

Ben hasn't given consent, and I haven't gotten a court order or anything, so I can't disclose his confession.

COSTELLO

Not so fast. A court order isn't the only form of proper legal compulsion. Before we look at whether Ben has given consent or what proper legal compulsion means, we need to determine whether Ben's communications with you are confidential in the first place. And by the way, because I'll use both terms in our discussion, "confidentiality" refers to your general obligation not to disclose a patient's communications to you without their consent. "Privilege" refers to your patient's right to prevent you from disclosing those communications in a court of law. So as to the same statement your patient made to you, the existence of a privilege would operate to prevent you from repeating it in

5. According to the Principles of Medical Ethics, "[a] physician . . . shall safeguard patient confidences within the constraints of the law." AMERICAN PSYCHIATRIC ASS'N, *THE PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* § 4, at 2 (1984). In addition, "[a] psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion." *Id.* at 6 (annotations to § 4).

6. William J. Winslade and Judith Wilson Ross, however, point out that the "[a]nnotations state, first, that the psychiatrist 'must be circumspect in the information that he/she chooses to disclose.'" William J. Winslade & Judith Wilson Ross, *Privacy, Confidentiality and Autonomy in Psychotherapy*, 64 NEB. L. REV. 578, 608 (1985). Additionally, "[p]sychiatrists are permitted to release confidential information in the event that it is necessary to protect the patient or the community from imminent danger." *Id.* at 612.

a judicial forum, while the duty of confidentiality would apply to nonjudicial disclosures.

PALMER

I think I understand. Confidentiality is what would prevent me from calling, say, the governor, and telling him to stop the execution because Ben confessed to the murder.⁷ And privilege means that if I were called to testify in court about Ben's statements to me, Ben could prevent me from answering.⁸

COSTELLO

Yes, that's right. And in order to know whether confidentiality or privilege applies here, we need to determine: Is the confession Ben made to you a "confidential communication"?⁹ This will depend in part on the context of Ben's therapy with you and on his expectation of confidentiality. Tell me a little about Ben Jones and how he came to begin therapy with you.

PALMER

Ben has a serious substance abuse problem. He's been in and out of prison over the last twenty years, usually for drug-related offenses or small-time robberies to support his drug habit. The last time he was in prison he received some

7. A patient's communications to his therapist as well as the therapist's "impressions and diagnosis, and other details of his professional relationship with [the patient] fall within the zone of privacy protected by" the California Constitution. *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 843, 228 Cal. Rptr. 545, 549 (1986) (referring to CAL. CONST. art. I, § 1).

8. "[T]he patient . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . ." CAL. EVID. CODE § 1014 (West 1995).

9. The California Evidence Code defines "confidential communication between patient and psychotherapist" as

information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted, and [this] includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Id. § 1012 (West 1995).

psychiatric counseling, and when he was released he was referred to me to continue weekly therapy sessions.

COSTELLO

Are you being paid by the state, or is Ben a private patient?

PALMER

I'm not paid by the state. I signed up with a referral program to treat criminal offenders with substance abuse problems. Ben and the other patients from that program are private patients, and I charge them on a sliding scale.

COSTELLO

Is Ben on parole?

PALMER

I'm not sure. Why?

COSTELLO

If the therapy is a condition of parole, he may expect that you will prepare reports on his progress for his parole officer. In that case he would not have the expectation of privacy that is essential for a privilege.¹⁰ You could disclose his confession to his parole officer without violating any right of confidentiality.

PALMER

He hasn't said anything about my sending reports to a parole officer.

COSTELLO

So much for that argument. If he isn't on parole, and has no expectation that you will report to his parole officer—

10. In "real life" it is unlikely that Ben would be seeing a therapist as a private patient, especially since he is a drug addict who needs to commit robberies to support his habit and probably cannot afford Dr. Palmer's hourly fees. If he were referred for therapy after discharge from prison, it would likely be as a condition of parole, and there would be some arrangement, identified to Ben in advance, for sending reports of his therapy to his parole officer. But since in that case we wouldn't have the fun of working through the entire hypothetical, I have created a factual situation that ensures the communication to Dr. Palmer was confidential and privileged at the outset.

PALMER

All I know is that he started seeing me right after he got out of prison.

COSTELLO

Do you think his motive in starting therapy was a sincere desire to be helped, or just fear of going back to prison? It's been suggested that there is no privilege if the patient's "dominant purpose" for seeing the therapist is not a sincere desire for treatment.¹¹ But the California Supreme Court—in a case called *Menendez* which I'll tell you more about soon—said that in determining whether the psychotherapist-patient privilege applies, the *motives* of the patient and therapist are not as important as their *actions*.¹² Ben may be hoping to stay out of prison, and you may be hoping to pay off your mortgage with his fees, but so long as you both do the tasks required by therapy, it's likely that a court will find the relationship is privileged. Does Ben appear to sincerely participate in therapy, or do you think he's just using you?

PALMER

I think he's sincere in wanting to stay out of jail and sincere in wanting to get off drugs, but he's not making very good progress. He participates as much as most of my patients, and many of my patients only come because someone in their life—their spouse or their employer—says they have to

11. See, e.g., *People v. Cabral*, 12 Cal. App. 4th 820, 827-28, 15 Cal. Rptr. 2d 866, 870 (1993) (holding that a letter written to a psychologist in which the defendant stated that he molested his daughter was not privileged because defendant's dominant purpose in writing the letter was to avoid a prison term and not to obtain treatment).

12. In *Menendez v. Superior Court*, 3 Cal. 4th 435, 454, 834 P.2d 786, 797-98, 11 Cal. Rptr. 2d 92, 103-04 (1992), the court stated:

[M]otive is largely, if not totally, immaterial. It appears that in virtually all psychotherapy, what motivates the participants is *not* psychotherapy for its own sake. For example, the psychotherapist is sometimes motivated by self-interest, as where he earns his living solely through his practice. For his part, the patient is sometimes motivated by self-preservation, as where he struggles to resist the temptation of suicide or antisocial conduct. As a general matter, the dispositive fact is *what* the participants do, not *why*.

Id.

or else. I don't really like the idea of saying that because somebody has mixed motives for entering therapy, there's no privilege.

COSTELLO

Well, it was just a thought. I'm trying to explore all the ways which will enable you to make the disclosure if you want to—and if your relationship with Ben wasn't privileged at all, that would certainly help. But I agree it's a weak argument.

So let's assume that the confession is a confidential communication and that privilege applied at the time it was made. But does it still apply? Ben may have already waived the privilege—at least as to the confession of murder—by talking about it with somebody other than you. Did he tell you whether he has confessed to anybody else?

PALMER

He's got a public defender, Claire Hopewell. He told me that he's talked to her about the murder. And he also talked to a man named Samuels, some kind of clergyman, whom he knew as a child.

COSTELLO

Each of those conversations can qualify for its own privilege—the first as attorney-client,¹³ the second as clergyman-penitent.¹⁴ So neither of those disclosures constitute a waiver of his privilege.¹⁵ The fact that Ben seems to be disclosing his murder only in privileged contexts suggests that he views therapy with you in the same light and expects you to keep his disclosure confidential.

I think we need to assume that a court would find initially that your therapist-patient relationship with Ben is privileged. So that means you are bound by the APA ethics code to preserve the confidentiality of Ben's communications, unless under proper legal compulsion. If you have a legal duty to disclose Ben's confession, then doing so would

13. CAL. EVID. CODE §§ 950-962 (West 1995).

14. *Id.* §§ 1030-1034.

15. "A disclosure that is itself privileged is not a waiver of any privilege." *Id.* § 912(c).

not violate the APA ethics code. So now let's consider whether you have such a duty.¹⁶

PALMER

You mean like under *Tarasoff*?¹⁷ I thought about that. I know that if a patient makes a threat of future harm to an identifiable victim, the therapist has a duty to warn the victim and call the police. That's what the state law says, right?¹⁸

COSTELLO

You are correct that under California state law, the therapist's duty under *Tarasoff* is satisfied by warning the victim and calling the police. The original decision imposed a broader responsibility to take "whatever other steps are reasonably necessary."¹⁹ But you can see how it would leave the therapist too vulnerable. How would you know what was reasonably necessary until after the fact, when the harm either was or wasn't averted? So the California legislature spelled out what a therapist has to do to satisfy *Tarasoff*.

16. Exceptions [to the duty of confidentiality] are usually found: (1) where the patient puts his mental state in issue in other litigation (2) where there is a conflict between confidentiality and a police power statute (3) *where there is a judicially or legislatively imposed duty to warn a third party of an individual's foreseeable danger*.

3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 12.37, at 106 n.655 (1989) (emphasis added) (citations omitted).

17. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

18. California Civil Code § 43.92(b)—enacted after the *Tarasoff* decision—actually limits the therapist's duty to "making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency." CAL. CIV. CODE § 43.92(b) (West 1995). The broader language of *Tarasoff* is as follows:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Tarasoff, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

19. *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

PALMER

But is this really a *Tarasoff* situation? I always thought the *Tarasoff* duty only applied where the patient threatens to harm somebody in the future. The therapist is supposed to tell the police about the threat and warn the victim, so the harm can be prevented. But Ben hasn't threatened to kill or harm anyone.²⁰ He confessed that he committed a murder in the past. The victim can't be warned because he's already dead.

COSTELLO

What about Frank Smith, the innocent guy about to be executed? Isn't he a "victim" of "future harm"? The crime of murder may be a past crime, but the language of *Tarasoff* refers to future *danger*, not just future "crimes."²¹

PALMER

But Ben isn't going to kill Frank Smith. The state will.

COSTELLO

For there to be a *Tarasoff* duty, does it matter if the danger or harm won't be caused directly by the patient's own hand? What if you had a patient who was a Mafia boss, and he told you: "My orders, unless recalled, will be carried out by my agent. I said to kill A, B, and C. A and B are already dead. I could stop the killing of C by a phone call, but I won't.

20. Charles J. Meyers states:

Normally a patient's confession of past wrongdoing is confidential information that a psychotherapist is bound to keep secret [M]urder is not an exception. A confession of an *intention* to commit murder, however, could be the basis for a legal and ethical breach of confidentiality in the form of a *Tarasoff* warning to the potential victim and the police; and the same statement of intent to commit murder, [could] form . . . the basis of an exception to the psychotherapist-patient privilege.

Charles J. Meyers, *Where the Protective Privilege Ends: California Changes the Rules for Dangerous Psychotherapy Patients*, J. PSYCHIATRY & L., Spring-Summer 1991, at 5, 7.

21. Compare CAL. EVID. CODE § 956.5 (West 1995) (stating that there's no privilege if a lawyer reasonably believes disclosure of a communication is necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm) with CAL. EVID. CODE § 1024 (West 1995) (codifying the dangerous patient exception to psychotherapist-patient privilege, stating that no privilege exists if a therapist has reasonable cause to believe disclosure of a communication is necessary to prevent the threatened danger).

This is exactly how, when and by whom *C* will be killed.
...

PALMER

I can see making a *Tarasoff* disclosure in that case, because even though my Mafia patient wouldn't be pulling the trigger, he would really be causing the death of *C*. But there the patient *wants C* to die. Ben doesn't want the state to execute Frank Smith. The state isn't Ben's henchman like the Mafia boss's killer.

COSTELLO

Well, let's try another hypothetical. Is Ben more comparable to a patient who says, "I put lethal poison in a jar of soup in the refrigerator at home. *A*, not knowing about the poison, will heat it up for *B* next Friday—she always serves soup for *B* on Friday—unless I go there and get the jar. But I'm not going to."

PALMER

There the harm is still in the future but it was caused by a past act of the patient's—plus I guess by the patient's failure to act in the future. That's more like Ben. Smith will be executed by the "innocent" state because of Ben's past act and his future failure to act.

Hey, this really makes sense to me. I seem to remember back in my ethics training that there wasn't any problem disclosing a patient's confession that he planted a bomb that would go off in a hospital. The wrong act would have been planting the bomb, and it would have been done in the past, but since the harm had not yet occurred, it was OK to disclose.²² This seems like the same thing to me here.

22. "[I]f a patient tells a doctor in confidence that he has brought a time bomb into the hospital and hidden it under the bed of one of his patients, 'it would be a strange doctor indeed who would feel that his professional confidence should not be violated.'" Brian Domb, Note, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist Patient Privilege*, 5 J. L. & HEALTH (1990-1991) 209, 223 n.102 (quoting K. MENNINGER, A MANUAL FOR PSYCHIATRIC CASE STUDY 36 (1960)).

COSTELLO

Exactly! You're getting good at this. Have you ever considered going to law school?

PALMER

Oh, I've got enough stress in my life as it is. You've convinced me I have a *Tarasoff* duty and have to call the police and the victim. How do I contact Frank Smith?

COSTELLO

You probably couldn't contact Frank Smith directly on death row. You could, however, contact his attorney. As a practical matter, the attorney is representing Frank Smith's interests and will likely act on your information to stop the execution.

PALMER

When I call the attorney and the police, what do I say? How much can I tell them?

COSTELLO

Good question. Under *Tarasoff* the therapist has a duty only to disclose the communications that are necessary to prevent the harm.²³ What kind of information here is necessary to get the police to understand the danger?

First, what is Ben's "confidential communication?" "I killed X?" or "Y will be executed next Friday for a crime I committed?" How about "and I'm not going to do anything to stop it from happening?"

"I killed Y" is not enough to justify a *Tarasoff* warning. We are arguing that the threat to Frank Smith is caused by Ben's past act plus his failure to take action—turn himself in—to stop the consequent future harm. "Warning" Frank Smith or Frank Smith's lawyer that Smith's about to

23. The court held that:

[T]he therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

Tarasoff, 17 Cal. 3d at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27.

be wrongfully executed makes no sense; he knows that. Warning the police that Frank Smith is about to be wrongfully executed similarly makes no sense without the essential components of Ben's confession and Ben's statement that he is not going to do anything to prevent the execution. If our interpretation of *Tarasoff* is correct, you should say that Ben Jones is a danger to Frank Smith because he is the murderer and he is not going to act to prevent Smith's wrongful execution.

You need to disclose enough so that they understand the danger and can act to avoid it—which here might involve informing the district attorney or the governor of the existence of Ben's confession. But of course you have a continuing duty to preserve the confidentiality of all the rest of Ben's confidential communications with you. If and when Ben is prosecuted for the murder, and you are called to testify against him, the "dangerous patient" exception will apply only as to the information you disclosed to the police and the communications which caused you to reasonably conclude that Ben was dangerous.²⁴

PALMER

When Ben left me yesterday he was still deciding what to do. He might turn himself in after all. Does my *Tarasoff* duty exist before I'm sure that he's not going to turn himself in?

24. If a therapist delivers a *Tarasoff* warning about a patient, the dangerous patient exception applies to the communication *about* the danger—for example the language the therapist uses to warn the potential victim and whatever other language or observations by the therapist that gave rise to the "reasonable suspicion" that the patient was dangerous. All other communications remain privileged, unless they qualify for some other exception. *Menendez v. Superior Court*, 3 Cal. 4th 435, 455, 834 P.2d 786, 798, 11 Cal. Rptr. 2d 92, 104 (1992). In *People v. Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983), a child-patient disclosed evidence of sexual abuse to a therapist, who reported the disclosure as required by statute. The stepparent molester, who was also patient of the therapist, subsequently confessed to the therapist. The therapist, relying on incorrect legal advice from the police that she had a duty to do so, disclosed the confession. The court held no privilege existed as to the child's statement because it was correctly reported pursuant to a legal duty, but the stepparent's privilege was not eliminated under the "child abuse exception" since the therapist's disclosure was not in fact required by law. *Id.* at 514, 668 P.2d at 744-45, 194 Cal. Rptr. at 437-38.

COSTELLO

Do you reasonably think he might not turn himself in? That he'll let Frank Smith be executed? Reasonable assessment of dangerousness is the standard under *Tarasoff*; that triggers the duty and qualifies the dangerous patient exception. You don't have to be correct in your belief that the patient is dangerous, only reasonable.²⁵

PALMER

I still don't understand how this dangerous patient exception works. Suppose I do call the police and tell them what you suggested. Then later they charge Ben with the murder, and they call me to testify to his confession. Is there no way he or I can object to my testifying?

COSTELLO

The patient, not the therapist, is the holder of the privilege, so when you are called to testify it will be up to Ben to assert the privilege.²⁶ The prosecution will then have to show that the dangerous patient exception applies to the communications they want to ask you about. But that shouldn't be hard for them. Once you have made a *Tarasoff* disclosure, the "factual predicate" has been satisfied for the "dangerous patient" exception.

25. [T]he requisite "reasonable cause to believe" must be determined in light of the standards of the psychotherapeutic community. The test is objective, but takes account of all the relevant circumstances; it is based on the norms prevailing among psychotherapists as a group, but allows broad discretion to the individual psychotherapist.

Menendez, 3 Cal. 4th at 451, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101. Although expert testimony may be necessary to determine the standard of care—if the issue is whether a therapist should have realized that a *Tarasoff* duty existed—the court can find that the dangerous patient exception applies even without expert assistance "where the patient has made an actual threat of violence or the therapist has actually determined that the patient posed such a danger." *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 605, 162 Cal. Rptr. 724, 733 (1980).

26. The California Evidence Code provides that the "holder of the privilege" is "[t]he patient when he has no guardian or conservator." CAL. EVID. CODE § 1013(a) (West 1995). It is well established that the therapist has no independent right to assert the privilege if the patient or the patient's representative has waived the privilege. See *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

PALMER

So there's no way I can give a *Tarasoff* disclosure to prevent Smith's execution without also having my testimony about Ben's confession qualify for the dangerous patient exception?

COSTELLO

Right. In fact, even if you had only decided that your *Tarasoff* duty existed, and you never got around to actually making the disclosure, the dangerous patient exception would still apply to any communications by Ben which had convinced you he was dangerous. The California Supreme Court in a case called *People v. Wharton*²⁷ made it plain that the dangerous patient exception was "not keyed to . . . disclosure" or warning, but to the "existence of the specified factual predicate," that is, the therapist's reasonable cause for belief in the dangerousness of the patient and the necessity of disclosure.²⁸ So if somehow the prosecution learned from another source that Ben had confessed the murder to you, and also that you had decided that Ben was dangerous and had planned to make a *Tarasoff* disclosure, they could still obtain your testimony under the dangerous patient exception by proving the factual predicate existed.²⁹

PALMER

But if I don't make a *Tarasoff* disclosure, and the prosecution calls me, how can they prove the factual predicate existed?

27. 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (1991).

28. *Id.* at 560-61, 809 P.2d at 313, 280 Cal. Rptr. at 653.

29. For example, in *People v. Hopkins*, 44 Cal. App. 3d 669, 119 Cal. Rptr. 61 (1975), the defendant was charged with burglary and robbery. On the same day of the offense, the defendant, a veteran with an alcohol problem, confessed his part in the crime to a psychiatrist at the Veteran's Administration (VA) hospital. The prosecutor called the VA psychiatrist to testify to the confession. The court found that the confession was not privileged under California Evidence Code § 1024 because the VA psychiatrist had reasonable cause to believe that the defendant was dangerous and that disclosure of the confession was necessary to prevent the threatened danger.

The court in *Mavroudis*, 102 Cal. App. 3d at 603, 162 Cal. Rptr. at 731 (1980), relied on *Hopkins* as "authority . . . for a retrospective application of" California Evidence Code § 1024.

COSTELLO

I suppose they could try to show, using the objective standard, that a reasonable therapist in your position, hearing Ben's confession, would have concluded that he was dangerous to Frank Smith and that disclosure was necessary to prevent Smith's wrongful execution.³⁰

PALMER

But would a reasonable therapist even think about the execution of Smith as a *Tarasoff*-type future harm? I mean, it makes sense to me, but I'm not sure it will to anybody else.

COSTELLO

No, we may be totally wrong in our analysis—or at least so far away from the general understanding of *Tarasoff* that our theory wouldn't occur to the prosecution.³¹ But I'm sure a simpler theory will, in light of the *Menendez* case: That you, as a reasonable therapist, should believe that Ben Jones is dangerous to someone *other* than Frank Smith, and that disclosure of Ben's confession is necessary to protect that person.

PALMER

I guess, since Ben has killed before, he may be more likely to kill again, and so he is dangerous in that sense. But *Tarasoff* disclosures usually are only required when there is an identifiable victim or small group of victims, like family

30. This was the approach used in *Mavroudis*, where the court authorized *in camera* inspection of the defendant's therapist's records to determine whether the therapist had a duty to disclose. Such a duty existed if prior to the time the patient injured the plaintiffs, the therapist had determined or reasonably should have determined that the patient presented a serious danger of violence to the plaintiffs. *Mavroudis*, 10 Cal. App. 3d at 605-06, 16 Cal. Rptr. at 732-33.

31. If we were wrong in our analysis, and Palmer—relying on my incorrect advice—disclosed Ben's confession, it's remotely possible that in a later prosecution of Ben a court would rule that the dangerous patient exception didn't apply to Ben's confession to Palmer. But under *People v. Stritzinger*, 34 Cal. 3d 505, 512-13, 668 P.2d 738, 743, 194 Cal. Rptr. 431, 436 (1983), that's a long shot. I think we would have to assume that, if Palmer made a disclosure based on a mistaken *Tarasoff* theory, a court would find that § 1024 applies.

members; you don't have to call the police to say "my patient X might hurt somebody sometime."

COSTELLO

You're right, you don't.³² But here there's an obvious target of Ben's potential violence: You.

PALMER

Me? But Ben's never threatened me.

COSTELLO

What do you think would happen if you told him you were going to turn him into the police? Do you think he'd kill you to prevent that? Or at least threaten violence to try to frighten you into silence?

PALMER

He might.

COSTELLO

The minute he does, you've got the factual predicate for a *Tarasoff* disclosure and a dangerous patient exception. The California Supreme Court said in *Menendez* that the dangerous patient exception "does not demand that the patient must be dangerous to a person *other than* the psychotherapist."³³ In that case the court found that the dangerous patient exception applied to notes that Dr. Oziel took of two therapy sessions with defendants Lyle and Erik Menendez. Lyle and Erik had confessed to Dr. Oziel that they killed their parents.³⁴ The trial court had made factual

32. The intended victim need not be specifically named by the patient, but must be readily identifiable. *Tarasoff*, 17 Cal. 3d at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11. In *Tarasoff* the court recognized that it would be unreasonable to expect the therapist to interrogate the patient or to conduct an investigation to discover the identity of the patient's intended victim. *Mavroudis*, 102 Cal. App. 3d at 600, 162 Cal. Rptr. at 729.

33. *Menendez v. Superior Court*, 3 Cal. 4th 435, 451, 834 P.2d 786, 796, 11 Cal. Rptr. 2d 92, 102 (1992).

34. *Id.* at 450, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101.

findings that, during those sessions, Lyle and Erik had threatened Dr. Oziel's life.³⁵

PALMER

So if I tell Ben that I may turn him in, and he threatens me, can I then disclose both his threats and his confession?

COSTELLO

Under *Menendez* and *Wharton* I believe you can, because as soon as the factual predicate was satisfied—you reasonably perceived Ben was dangerous to you and that disclosure was necessary to protect yourself—the dangerous patient exception applies. By the way, do you share offices with anybody or live with anybody? If so, you may share Dr. Oziel's concern that, if you're in danger, those closest to you may also be in danger. You can make a disclosure to them of your fear of Ben and the reason for it—that is, Ben's confession. Doing so will reinforce the evidence for the factual predicate, even though, as I told you, under *Wharton* you don't actually need to have warned anybody for the dangerous patient exception to apply.

PALMER

What if Ben doesn't actually threaten me, but just looks very upset and angry? I used to think he was pretty harmless, but now that I know he's a murderer, it wouldn't take much to make me afraid of him.

COSTELLO

Although in *Menendez* the patients did make explicit threats to Dr. Oziel, neither the *Tarasoff* duty nor the dangerous patient exception requires an explicit utterance of a threat or intent to harm. The factual predicate begins when the therapist reasonably believes the patient is dangerous. And of course a therapist could reach such a conclusion even if the patient never uttered a threat, based upon the patient's past behavior and other information obtained during

35. During those sessions, Lyle and Erik "made threats of harm that were aimed at him alone but also collaterally endangered his wife, Laurel Oziel, and his lover, Judalon Smyth, because of their relationships." *Id.* at 444, 834 P.2d at 791, 11 Cal. Rptr. at 97.

therapy. For instance, a patient who couldn't accept his own violent feelings toward a potential victim might well say, "I'd never hurt X. I love X. X is like my other half." But the therapist, assessing all the information about that patient, could reasonably decide that X is in danger from the patient. So even if Ben doesn't explicitly threaten you, if you have enough other information to make a reasonable assessment of dangerousness and the need to disclose to prevent harm, *Tarasoff* and the dangerous patient exception apply.

PALMER

The more I think about it, the more I don't like the idea of confronting Ben. He might not just threaten to kill me—he might just go ahead and do it!

COSTELLO

I hate to put it this way, but you need to set Ben up. You need to put him in a situation where he threatens you, or where your perception of danger is reasonable, so you can disclose. But you want to discourage him from killing you right on the spot. How about putting all the information about his confession and your plans to confront him and urge him to turn himself in on tape or in a letter. Give the tape or letter to your lawyer, that's still privileged, and tell Ben it will be released as of a certain day if by then he hasn't turned himself in. And tell Ben further that you've set up a schedule to call in to your lawyer, and if you fail to do so, because, for instance, something bad had happened to you, the tape or letter will instantly be sent to the police.

PALMER

That sounds good. If he turns himself in, that would be the best thing. But whether he confesses, or the tape/letter is sent to the police, an innocent person won't die. And since Ben knows the disclosure will be made whether I'm dead or alive, he'll have no incentive to kill me.

COSTELLO

Unless he's so furious at what he may see as your betrayal of his trust that he can't control himself.

PALMER

Oh, it really does feel like that. Like I'm betraying his trust. And I was trained, and I really believe that my loyalty should be to my patient. But don't I have a duty to Frank Smith, even though I don't know him, or to society?

COSTELLO

All the commentaries on professional ethical codes add some mushy language about the therapist's discretion to weigh the interests of patient versus those of society.³⁶ In *Menendez* and *Wharton* the court says the California legislature has done this same balancing of interests, and so established the *Tarasoff* duty and the California Evidence Code section 1024 dangerous patient exception.³⁷ Arguably since ethics codes allow you some discretion, if you choose the same balance of interests and reach the same conclusion as the California legislature, this is not obviously wrong and should not subject you to discipline.³⁸

We've discussed all the ways in which you may disclose if you want to—either by coming up with a persuasive argument that *Tarasoff* can be stretched to cover these facts with Frank Smith as the victim, or by confronting Ben so that he may be dangerous to you, so that you are the victim. If you go either route, I think you'll satisfy the APA ethical code. Certainly you won't have to worry about Ben successfully suing you for violating his confidentiality or

36. Winslade & Ross, *supra* note 6, at 606-14. For example, the American Psychological Association's Confidentiality Principle permits disclosure "in those unusual circumstances in which not to do so would result in clear danger to the person or others." *Id.* at 607 (citing Principle 5 in Am. Psychological Ass'n, *Ethical Principles of Psychologists*, 36 THE AMERICAN PSYCHOLOGIST 633, 635-36 (1981)). The American Psychoanalytic Association's Principles of Ethics for Psychoanalysts gives professional discretion to disclose "when the interests of the patient conflict with the welfare of the community at large." *Id.* at 608 (citing AMERICAN PSYCHOANALYTIC ASS'N, THE PRINCIPLES OF ETHICS FOR PSYCHOANALYSTS AND PROVISIONS FOR IMPLEMENTATION OF THE PRINCIPLE OF ETHICS FOR PSYCHOANALYSTS § 2 (1983)).

37. *Menendez*, 3 Cal. 4th at 452, 834 P.2d at 796, 11 Cal. Rptr. at 102 (1992) (citing *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 441 n.13, 551 P.2d 334, 347 n.13, 131 Cal. Rptr. 14, 27 n.13); *People v. Wharton*, 53 Cal. 3d 522, 561-62, 809 P.2d 290, 313, 280 Cal. Rptr. 631, 654 (1991)).

38. It would be helpful to know whether the therapist in *Strizinger* who relied on inaccurate legal advice from the police—and so made an unnecessary disclosure of the stepparent's confession—was later sanctioned.

privacy rights. Since you disclosed under requirement of law, there is no violation because Ben didn't have the right to keep that secret.³⁹

On the other hand, if you want to keep Ben's confession confidential, you can just keep quiet about it. Unless Ben discloses to somebody in a nonconfidential, nonprivileged context, the chances are slim that you'll ever be subpoenaed.

PALMER

But what if that does happen—I don't disclose, but the prosecutor calls me to testify. And Ben asserts the privilege, and for some reason the prosecutor doesn't succeed in proving that the dangerous patient exception applies. Can the judge just say "we need the information anyway, in the interests of justice" or something like that, and compel me to testify?

COSTELLO

No, that's one way in which the privilege is still strong in California. In *Menendez* the prosecution tried to apply that argument to communications made to Dr. Oziel which the court had found did not qualify under the dangerous patient exception, asserting the People's right to truth finding in legal proceedings under the state constitution⁴⁰ outweighed the defendant's right to privacy. The *Menendez* court rejected the argument, pointing out that the state legislature established an exception to physician-patient privilege for criminal cases, but did not do this for psychotherapist-patient

39. *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 840 n.2, 228 Cal. Rptr. 545, 547 n.2 (1986) (noting that disclosure based on the duty to warn others and dangerous patient exception was available as an affirmative defense in an action by patient for damages); *People v. Gomez*, 134 Cal. App. 3d 874, 881, 185 Cal. Rptr. 155, 159 (1982) (finding no violation of patient's right of privacy to report threats pursuant to *Tarasoff* and stating "any privilege, even as to a psychiatrist . . . was negated by section 1024").

40. The prosecution relied on the California Constitution, Article I, § 29, which provides that "[i]n a criminal case, the people of the State of California have the right to due process of law . . ." and on California Constitution Article I, § 28, which establishes the People's right to truth in evidence. *Menendez*, 3 Cal. 4th at 456-57 n.18, 834 P.2d at 799 n.18, 11 Cal. Rptr. 2d at 105 n.18.

privilege.⁴¹ Unless Ben waives the privilege, or the court finds no privilege under California Evidence Code section 1024, I don't believe you could be forced to testify about Ben's confession.⁴² And here's a very important point to remember: If you are subpoenaed, wait until the judge rules that there is no privilege and that you have to testify: Don't volunteer! That's the one way in which you surely could make yourself liable for damages to Ben.⁴³

PALMER

This is getting all so tortured and complicated. If the state wants me to testify about threats by patients, or confessions by patients, why don't they just eliminate the privilege?

COSTELLO

Well, we as a society want to have our cake and eat it too. The legislature recognizes a privilege in order to encourage people to get help and not do harm, but if they do harm anyway we want to nail them. So we establish a constitutional right to confidentiality/privacy but at the same time tell therapists they have a duty to predict dangerousness and to prevent harm. If as part of preventing harm, they want to involuntarily hospitalize the patient, of course they need to be able to testify against the patient in commitment

41. "As a general matter at least, the privilege appears paramount to prosecution." *Id.* at 456 n.18, 834 P.2d at 799 n.18, 11 Cal. Rptr. at 105 n.18. The court also rejected the prosecution's argument that the People's state constitutional right to truth in evidence trumped the privilege. *Id.*

42. Some commentators have suggested that the state may have a compelling interest in overriding privilege to get to murder confession of past crimes where they have resulted from compulsive behavior or addictions likely to result in future crimes as well.

Dean Smith has argued that after the commission of a crime, presumably including homicide, the state's interest in obtaining what amounts to a confession to the therapist is weak because, at that point, the state can no longer prevent the crime's commission. Theoretically, though, the argument could be made that some criminal behavior is prone to repetition just like child abuse, and should be an exception to the privilege if the crime is outrageous enough to society's sensibilities—such as homicide.

Domb, *supra* note 22, at 234 n.176 (citing Steven Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 55 (1980)).

43. "[A] psychotherapist who volunteers information concerning a patient obtained in connection with their relationship, does so at his or her peril." *Cutter*, 183 Cal. App. 3d at 847, 228 Cal. Rptr. at 552.

proceedings. So we establish a privilege exception for that.⁴⁴ But what if, despite these precautions, some terrible harm, such as a murder, occurs? If the patient, now a criminal defendant, pleads insanity or puts mental condition at issue as a defense, naturally the state will want privilege exceptions for that, and indeed, these exist.⁴⁵ But what if the defendant does not put mental state at issue or introduce a psychiatric defense; how is the prosecution to obtain the testimony of the therapist against the patient? The court in *Wharton* found a way, by applying the dangerous patient exception to statements made by the defendant before the murder of the victim, but after disclosure of those statements could prevent harm to the victim.⁴⁶ In *Wharton*, the defendant's therapists had indeed made *Tarasoff* warnings to the victim, so the requisite factual predicate was satisfied for California Evidence Code section 1024. But what if the therapists never made a *Tarasoff* warning, indeed, never thought of making one? *Wharton* suggests that they should have known, and if the prosecution can prove that, the dangerous patient exception will apply. But why make the prosecution prove it? The courts soon will be tempted to take the logical next step: The retroactive assumption that a killer must have been dangerous enough to warrant a *Tarasoff* warning in the past, whether the therapist actually realized it or not. Using that logic, there eventually will be

44. CAL. EVID. CODE § 1024 (West 1995) (dangerous patient exception) and CAL. EVID. CODE § 1025 (West 1995) (no privilege in competency proceeding).

45. CAL. EVID. CODE § 1016 (West 1995) (no privilege for tender of issue of mental or emotional condition) and CAL. EVID. CODE § 1023 (West 1995) (no privilege in criminal sanity proceeding).

46. According to Justice Stanley Mosk, the court in *Wharton* "misconstrued the pertinent statutory provisions with mischievous effect." Stanley Mosk, *Psychotherapist and Patient in the California Supreme Court: Ground Lost and Ground Regained*, 20 PEPP. L. REV. 415, 415 (1993). "[T]he *Wharton* majority erroneously construed the 'dangerous patient' exception so as to effectively abolish the crucial requirement that *disclosure of the communication is necessary to prevent threatened harm*." *Id.* at 420. In *Wharton*, prior to committing the murder, the defendant had told both of his therapists that he planned to kill the victim. *People v. Wharton*, 53 Cal. 3d 522, 549, 809 P.2d 290, 304, 280 Cal. Rptr. 631, 645 (1991). Both therapists warned the eventual victim and testified at trial about the defendant's threatening statements. The *Wharton* court found the "dangerous patient exception" applied to defendant's threats, even though the victim was now dead and disclosure of the threats by the therapist was not necessary to prevent future harm. *Id.* at 562, 809 P.2d at 314, 280 Cal. Rptr. at 655.

no therapist-patient privilege for any criminal defendant charged with a violent crime.

But that's not where the case law in California stands today. *Wharton* and *Menendez* don't say there is no privilege as to past crimes, or no privilege in criminal proceedings, period. However, the fact patterns in those two cases give therapists who want to disclose—or prosecutors who want to show that section 1024 applies—a blueprint for satisfying the factual predicate.

PALMER

Well all this is very interesting, and I'm really glad I talked to a law professor to get such an in depth explanation. But I've got a lot of thinking to do. Could you maybe just sum up your advice?

COSTELLO

Sure. If you decide not to disclose the confession, don't ask Ben any further about it, don't create any factual predicate to justify a warning—no dangerous patient exception. And hope that a prosecutor never learns about Ben's confession to you.

If you do want to tell, *Menendez* gives you a blueprint as to how to do it. Let me know if you decide to go with the tape or letter route.

PALMER

Thanks, I will. It's a terrible burden, this knowledge of Ben's confession. I feel better just having shared it with you.

PALMER leaves the office and COSTELLO is left alone.

COSTELLO

So Dr. Palmer is my client and she has told me about Ben's confession and that Frank Smith will be executed for Ben's crime. If she decides to disclose Ben's confession, I don't have a problem. But what if she doesn't? What do I do

then? I think I need some good ethical advice—I wonder if Kay Tate is still here?⁴⁷

COSTELLO picks up the phone and punches four numbers.

COSTELLO

Kay, do you have a few minutes?

FADE OUT

47. For Professor Tate's opinion, see Kathryn W. Tate, *The Hypothetical as a Teaching Tool*, 29 LOY. L.A. L. REV 1659 (1996).

