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September 23, 2004

*PROFESSIONAL CORPORATIONS

SENT VIA FEDERAL EXPRESS

Honorable Ronald M. George,
Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street, Room 1295
San Francisco, CA 94102

SI27363

RECEIVED
SEP 24 2004
CLERK SUPREME COURT

RE: Letter Supporting Petition for Review or Alternatively,
Depublication of *Ewing, et al v. Goldstein* (Court of Appeal, Second
Appellate District, Division Eight, 2nd Gr. No. B163112

Dear Chief Justice George and Associate Justices:

The American Psychological Association and the California Psychological Association, write to support the petition of Dr. Goldstein seeking review of the decision of the Court of Appeal Second Appellate District Division Eight in *Ewing v. Goldstein*. If review is not granted, pursuant to California Rules of Court, Rule 979, APA and CPA support depublication of the decision.

The American Psychological Association ("APA") has been the principal professional association of psychologists in the United States since 1892. Its membership numbers more than 155,000 members nationwide. The California Psychological Association ("CPA") is a state affiliate of APA, and has a membership of more than 2,900 licensed psychologists in California. APA and CPA members in clinical practice treat hundreds of thousands of patients each year who are willing to enter treatment only because they expect and rely on confidentiality of the patient therapist relationship. APA and CPA members therefore have a substantial interest in legal rules that affect the therapists' duty in relation to their patients and their patients' right to confidentiality — issues that are critically impacted by the Court of Appeal's decision in this case.

In *Ewing v. Goldstein*, The Court of Appeal, Second Appellate District, Division Eight, erroneously concluded that the narrow exception to the California statute exempting psychotherapists from liability for failing to warn of or predict a patient's dangerousness should be expanded to impose a duty to warn of threats by a patient reported to the therapist by third parties. This was a dramatic expansion of the statutory duty which arises under the language of the statute only "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim." In broadening the exception in this manner, the Court of Appeal reached an incorrect decision that contradicts the plain terms of the statute and will adversely affect the therapeutic relationship for many California patients. For these reasons as described more fully below, APA and CPA and their members whose relationships with patients will be affected by this ruling are gravely concerned and, strongly support the petition for review filed by the defendant and respondent Dr. David Goldstein. If review is not granted, pursuant to California Rules of Court, Rule 979, APA and CPA support depublication of the decision.

If the Court accepts *Ewing v. Goldstein* for review, APA and CPA will seek leave to file an amicus curiae brief with the Court providing detailed support for the position that the decision, if left standing, will have dramatic adverse effects on the practice of psychotherapy in California. The following summarizes some of the key factors that underlie APA and CPA's decision to support Dr. Goldstein's petition for review and seek reversal of the Court of Appeal rewriting of the statute:

1.) The Importance of Confidentiality and Trust in the Psychotherapeutic Relationship.

There is no doubt that communications made in the course of psychotherapy sessions are made with the expectation that they will be held in confidence. Clients' expectations of confidentiality are based in part on psychologists' ethical duty to maintain confidentiality. The APA ethics code dictates that psychologists "have a primary obligation and take reasonable precautions to protect confidential information" obtained, among other situations, in therapy. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct, Standard 4.01 (2002)*.

Clients' expectations of confidentiality are reinforced by state laws throughout the country that provide a psychotherapist-patient privilege. State laws that ensure the privacy of medical records, provide causes of action for wrongful disclosure of confidential information, or otherwise protect the privacy of the psychotherapist client relationship further bolster clients' expectations of confidentiality. The concept of confidentiality is at the core of the psychotherapeutic relationship.

The establishment of a relationship of trust between client and therapist is essential to successful psychotherapy. A client who seeks psychotherapy must expose his most intimate thoughts, feelings, and fantasies. In therapy, it is not unusual for patients to express intense feelings of anger or frustration toward others, sometimes including violence. Researchers have found that fear of disclosure of therapeutic communications may cause some clients to terminate prematurely the psychotherapeutic relationship and may deter persons with mental or emotional problems from seeking needed treatment in the first place. (See Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence*.)

There is likewise no dispute that the psychotherapist-patient relationship is one that society considers worthy of being fostered. Countless people seek professional help to cope with daily stress, family turbulence, mental illness, and severe emotional trauma, and research has shown that psychotherapy can be highly effective in addressing these problems. For those mentally ill people who have a potential to be dangerous, an effective psychotherapeutic relationship can play a key role in minimizing violent or self-destructive behavior. It is plainly in the interest of society as a whole to nurture the emotional health of its members by not discouraging therapy as a means of addressing problems. (See *Jaffee v. Redmond*, 518 U.S. 1 (1996).)

2.) Exceptions to the Rule of Confidentiality are, by Necessity Narrow and Definitive.

The limited exception to the professional and ethical duty of confidentiality has developed from cases in which the therapist's relationship with the patient provides a basis for the therapist to make a professional assessment that there is a real risk of physical harm to another. Therapists' duty to exercise reasonable care in protecting third parties from violent acts by their patients can be traced to this Court's decision in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976). In that case, the Court carefully balanced the public interest in maintaining the confidentiality of patient communications to their therapists against the public interest in safety from violent assault, where the psychotherapist has a reasonable professional basis to conclude that the client is a threat to a specific person. See *id.* at 440. The imposition of special duties on mental health professionals in *Tarasoff* was based on the therapist's special relationship with the patient. Underlying this is an apparent recognition of the therapist's unique position, due to the confidential relationship with the patient, 1.) to obtain information concerning the patient's motivations and plans that other individuals were not likely to receive and 2.) to assess that patient's threat to actually do physical harm (*i.e.*, to make a professional determination about whether the threat is a serious threat). In the case of verbal threats made by a patient to a third party and reported as hearsay to the therapist by that third party, the psychologist is neither the sole person with such information nor in a special position to assess such threat.

Decisions subsequent to *Tarasoff* seem to expand the duty defined in *Tarasoff* – but importantly – not one of these cases involved communications from anyone other than the patient to the therapist. Nonetheless, concerned about the impact of imposing uncertain duties to third parties on therapists, the California legislature enacted legislation to limit and define the duty of a therapist to third parties. California Civil Code section 43.92, subdivision (a), provides in relevant part:

There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist . . . in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior, except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. (Civ. Code §43.92, subd. (a). Italics and emphasis added.)

Under the plain language of Section 43.92, it is only where “the patient has communicated “ to the psychotherapist a serious threat against another that the psychotherapist must balance his duty to his client against his duty to a possible victim.

3.) The Adverse Effects of the Court of Appeal's Decision in *Ewing v. Goldstein*.

Assessment of the risk of violence by a patient who has made a verbal threat in the therapist's presence is both highly complex and difficult under the best of conditions. Psychologists making assessments of the likelihood of actual violence rely on their clinical skills in understanding the patient and interpreting the meaning of the utterance based on facts such as the context of the communication, the emotions surrounding the utterance, and the relationships between the parties. Of course, such a threat would likely be followed up with questions from the therapist designed to assist in assessing the seriousness of the threat. In addition, actuarial factors such as age, gender, socioeconomic status, prior history of violence, and prior or current substance abuse that make the risk of violence higher are also considered. Leaving aside the serious issue of how accurately mental health professionals can assess the dangerousness of or risk posed by a patient under the best clinical circumstances, assessing a threat reportedly made by the patient outside of the therapist's presence to another person and described to the therapist by a third party is materially more difficult, or at times impossible. It is even unclear whether the therapist is better able to make such assessment than any other member of the public, particularly the person who heard the threat.

From the practitioner's perspective, imposing a duty to evaluate a threat of violence if the report comes from a third party rather than a direct communication with the patient is untenable. One of the reasons the California statute limits the duty to only those instances where the patient had communicated to the therapist a serious threat was to protect the therapist from having to rely on potentially unreliable reports from third parties. Issues of family dynamics - - including parent-adult child interactions and spousal and dating relationships - - are often important aspects of focus in therapy. The Court of Appeal's decision could be read to require that the therapist attempt to assess the veracity of a communication about a patient's threat from a third party such as a possibly estranged spouse, over-involved or controlling parent, or other family member who may have his or her own motives or agenda in communicating the threat.

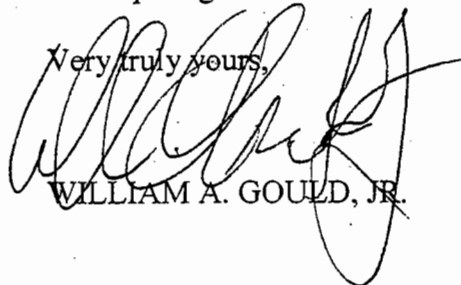
In addition, nothing in the Court of Appeal's decision suggests the outer limits of those individuals whose communication about such a threat could trigger a duty by the psychologist. If this expansion of section 43.92 is permitted to stand, the psychologist or other mental health professional could be in the untenable position of having to accept calls from roommates, neighbors, or extended family members, or even anonymous callers, assess the veracity of the caller, his or her relationship to the patient and motivations for calling, and the seriousness of the threat, and possibly act upon the alleged threat made by the patient while at the same time being unable, due to confidentiality, to acknowledge that he or she is even seeing the patient for therapy. Also absent from the decision is consideration of the effect of a broader interpretation of section 43.92 in promoting so called "false Tarasoff warnings" by therapists to avoid liability, with attendant adverse effects on the patient.

Imposition of a duty to warn based on a patient threat reported by a third party will necessarily result in overassessment of dangerousness since many more threats are made than are acted upon and the psychologist or other mental health professional has no other means to protect against legal liability. Overprediction, in turn, would result in disclosures to friends, family members, employers, or others the fantasies of many who present no real danger of violent behavior. At the very least, such warning could have a negative effect on such patient's lives, precipitating a deteriorating situation and capable of generating precisely the type of violent responses the rule was intended to protect against. For example, providing a warning to a family member or friend may well seriously interrupt a relationship that might be acting as a positive structure in the patient's life. Similarly, providing a warning to a co-worker or employer may well result in loss of employment, removing another stabilizing structure in a patient's life. Such a duty also poses the risk that giving the warning would sabotage the therapist's ability to stabilize the patient by provoking the patient to abandon therapy. These increased risks accompany no clear contribution to increased safety.

Such a rule alters and risks destroying the therapeutic relationship, with no demonstrable countervailing gain such as that which the legislature found in adopting the narrow exception to Section 43.92. By definition and practice, the psychotherapeutic relationship is one, which depends for its success upon the creation of an atmosphere of confidentiality in which embarrassing facts, fantasies, feelings, and thoughts will be freed from censorship. A major element universally recognized as necessary to the success of psychotherapy is the willingness for unreserved self-revelation. Because of the intimacy of psychotherapy and the consequent fear of disclosure, the concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship. Requiring the psychologist to break such confidence by reporting to others outside the therapeutic relationship that the client is a threat is therefore likely to nullify the trust necessary to continue therapy, particularly when based on third party communications and should be compelled by the law only under the most limited circumstances.

In summary, APA and CPA cannot overstate the importance to the profession of a clear and unambiguous definition of the circumstances under which psychologists and other mental health professionals are required to discharge a duty to persons other than their clients. The statute at issue here was drafted to create that bright line as well as limit the liability of mental health professionals except in narrowly defined circumstances. The Court of Appeal's decision, in ignoring the plain words of the statute and expanding the psychologist's duty to warn and protect others regarding threats reported indirectly from third parties, strikes the balance in a manner that poses unreasonable duties on therapists that will harm the therapeutic process without the justification of a strong compensating benefit based on the unique knowledge and skill of the therapist. APA and CPA believe that if all the interests are weighed with an understanding of the professional and legal context in which Section 43.92 was adopted, the Court will find that the plain language of the statute, which requires that the patient communicate the threat directly to the therapist, is both a clear and appropriate balancing of conflicting and important competing interests.

Very truly yours,



WILLIAM A. GOULD, JR.

WAG:cas
Enclosures

cc: Nathalie Gilfoyle, General Counsel
American Psychological Association

141818.1

1 PROOF OF SERVICE BY MAIL

2
3 I, Christine A. Sparling declare:

4 I am employed in the County of Sacramento. I am over the age of eighteen (18) years and
5 not a party to the within action. My business address is 400 Capitol Mall, Twenty-Second Floor,
6 Sacramento, CA 95814.

7 On September 23, 2004 I served the **LETTER SUPPORTING PETITION FOR**
8 **REVIEW OR ALTERNATIVELY, DEPUBLICATION OF EWING, ET AL. V.**
9 **GOLDSTEIN (COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION**
10 **EIGHT, 2ND GR. NO. B163112)** on the following persons by placing a true copy thereof
11 enclosed in a sealed envelope as shown below and by placing the envelope for collection and
12 mailing on the date and at the place shown in our ordinary business practices. I am readily
13 familiar with the business practices for collection and processing correspondence for mailing. On
14 the same day that correspondence is placed for collection and mailing at Sacramento, California,
15 it is deposited in the ordinary course of business with the United States Postal Service in a sealed
16 envelope with postage fully prepaid as follows:

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24 Executed on September 23, 2004, at Sacramento, California.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct.

27
28 
CHRISTINE A. SPARLING