
NOTES

UNVEILING THE TRUTH WHEN IT MATTERS MOST: IMPLEMENTING THE *TARASOFF* DUTY FOR CALIFORNIA'S ATTORNEYS

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The profession of the law possesses extraordinary powers. Lawyers can make the arrogant humble and the weak strong. In control of the course of litigation and armed with the knowledge of right and wrong, they are most able to abjure illegal or tortious conduct; it is their duty to do so. As occupants of a high public trust and officers of the court, they are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience than those who are willing to endure the dust of transgression.¹

I. INTRODUCTION

In 1979, the California Supreme Court first allowed public safety concerns to override the duty of confidentiality imposed upon psychotherapists,² leading lawyers and commentators across the country to reexamine the scope of a similar duty imposed upon attorneys. Many felt

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1. *Kimmel v. Goland*, 793 P.2d 524, 531 (Cal. 1990).

2. *See Tarasoff v. Board of Regents*, 551 P.2d 334 (Cal. 1976). For a summary of the facts and holding in the case, see *infra* Part II.A.

that a duty of disclosure was appropriate for attorneys in situations where third parties could be protected from serious harm or death.³ Accordingly, numerous states enacted at least permissive duties of disclosure. California, however, maintained a strict duty of confidentiality for many years.

In 1994, the California Legislature finally enacted an exception to the attorney-client privilege for prevention of harm to third parties in California Evidence Code section 956.5. This legislation carved out a preference for human life over privileged information like that seen in *Tarasoff v. Board of Regents*. However, a great amount of confusion ensued as to whether it was meant to create an exception to the strict duty of confidentiality codified in California Business and Professions Code section 6068(e).⁴ A close look at the legislative history behind Evidence Code section 956.5 reveals that the California legislature in fact intended to create an obligatory duty of disclosure through section 956.5, and thus it should be regarded as an exception to the duty of confidentiality. This exception should apply not only to psychotherapists, but also to attorneys, based on the parallels between the attorney-client and psychotherapist-patient special relationships.

Part II of this note will trace the call for reform of attorneys' duty of confidentiality and the steady progression toward the California Legislature's enactment of Evidence Code section 956.5. Part III will show that the policy considerations underlying the necessity of strict confidentiality have been eroded in California. Part IV will discuss the suitability of the *Tarasoff* duty for different types of attorneys ranging from criminal lawyers to in-house counsel. Specifically, I will show that the special relationship status of the attorney-client relationship is substantially similar to that of psychotherapists and their patients. However, to accommodate differences in professional training, attorneys should be required to disclose the threat of harm only in situations where a *reasonable attorney* would perceive such a threat. Finally, Part V will propose an amendment to Business and Professions Code section 6068(e)

3. See generally Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of A Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986); Shelly Stucky Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123 (1992); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

4. See Jeffrey P. Kerrane, *Will Tarasoff Liability Be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 828, 831 (1995) ("Does an exception to the attorney-client privilege create a corresponding exception to the attorney's ethical duty of confidentiality? . . . [T]here is a distinct lack of California case law addressing this question . . ."). See also *infra* Part II.D.

that would promote public safety by ensuring that the *Tarasoff* duty is extended to attorneys while simultaneously maintaining an appropriate level of confidentiality.

II. THE PERMISSIVE EXCEPTION TO CONFIDENTIALITY IN CALIFORNIA

A. THE *TARASOFF* DECISION

Tatiana Tarasoff was murdered by Prosenjit Poddar in October of 1969.⁵ Two months prior to the killing, Poddar had informed Dr. Lawrence Moore, a psychologist employed by the University of California at Berkeley, that he intended to kill Tatiana upon her return from a summer in Brazil.⁶ In light of this revelation, Dr. Moore, who had been treating Poddar for depression, wanted to have Poddar committed for observation in a mental hospital.⁷ However, the campus police released Poddar shortly after taking him into custody because they were convinced he was rational, and he promised to stay away from Tatiana.⁸ The director of psychiatry at UC Berkeley subsequently ordered that Poddar not be committed for evaluation.⁹ No one ever warned Tatiana or her family of the danger posed by Poddar.

Following Tatiana's murder, her parents brought a wrongful death action against the Regents of the University of California, the psychotherapists handling Poddar's case, and the campus police. The California Supreme Court held that the Tarasoffs could state a cause of action against the psychotherapists for negligent failure to warn.¹⁰ The opinion noted that at common law, a person typically does not have a duty to control the conduct of another or warn those put in jeopardy by the conduct unless he or she stands in a special relationship to the dangerous party or potential victim. The court found that the psychotherapist-patient relationship, such as that between the UC Berkeley psychotherapists and Poddar, was a special relationship, and therefore the psychotherapists had a

5. See *Tarasoff*, 551 P.2d at 339-40.

6. See *id.*

7. See *id.* at 341. The Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5150 (West 1998), allows for the involuntary commitment of people alleged to be dangerous to themselves or others for up to 72 hours for initial evaluation.

8. See *Tarasoff*, 551 P.2d at 341.

9. See *id.* at 340.

10. See *id.* at 343.

duty to use reasonable care to protect Tatiana.¹¹ Warning Tatiana was a necessary step to save her from danger—the psychotherapists’ failure to do so constituted a breach of the care owed to her.¹²

However, the *Tarasoff* court did not stop there. It recognized that imposing a duty to warn would result in a violation of patient confidentiality. Yet it concluded that public safety warranted greater protection than confidential communications: “[t]he protective privilege ends where public peril begins.”¹³ The importance of confidentiality in the psychotherapist-patient relationship was not powerful enough to overcome the necessity of disclosure when human life was at stake.

B. THE CALL FOR REFORM

Following the *Tarasoff* decision, a great deal of attention was focused on the attorney-client relationship, considering its similar confidential character. The American Bar Association recognized the potential conflict between confidentiality and public safety, adopting (in both the Model Code of Professional Conduct and the Model Rules of Professional Conduct) provisions for confidentiality and exceptions permitting disclosure to prevent violent crimes.¹⁴ The California Legislature, on the other hand, which had adopted provisions for confidentiality and the attorney-client privilege,¹⁵ initially refused to enact any exception to confidentiality for violent crimes.¹⁶

California’s failure to act was remarkable in light of the numerous calls for permitting disclosure of client confidences following the ABA’s proposals for the permissive exception. Numerous scholars and commentators claimed that at the very least, permissive disclosure was necessary in light of the compelling interest in saving human lives.¹⁷

11. *See id.* at 343-44.

12. *See id.*

13. *Id.* at 347.

14. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). *See also* Sands, *supra* note 3, at 358.

15. *See* CAL. EVID. CODE § 954 (West 1999); CAL. BUS. & PROF. CODE § 6068(e) (West 1999).

16. California does not have professional rules regarding lawyers’ duty of confidentiality. All standards regarding confidentiality, including exceptions, pertaining to the legal profession have been codified. As such, the California Legislature, rather than the California State Bar, is ultimately responsible for any modifications in this area.

17. *See* Sands, *supra* note 3, at 372. According to Sands:

Under proper circumstances, perhaps in cases of child abuse, attorneys will likely have a duty in tort to breach confidentiality and take steps to protect a third party. However, if attorneys are subject to such liability, the standard for assessing civil liability should be more permissive than that for psychotherapists.

Additionally, formal opinions issued by the L.A. County Bar Association indicated that the threat of future crimes ought to be disclosed when necessary to prevent immediate serious or deadly harm.¹⁸ However, these proposals fell on deaf ears in the California Legislature for nearly ten years. Perhaps the Legislature held a view similar to the San Diego County Bar Association, that the duty of confidentiality imposed by California Business and Professions Code section 6068(e)¹⁹ leaves “no discretion for disclosure or other warning of a client’s intent to inflict serious bodily harm or death upon another person.”²⁰

C. ATTORNEY DISCLOSURE AND JUDICIAL RESPONSE: *HAWKINS V. KING COUNTY REHABILITATION SERVICES*

While the California Legislature failed to act, the Washington Supreme Court took on the issue of whether *Tarasoff* should carry over to attorneys.²¹ The principles laid down in *Tarasoff* found support in *Hawkins v. King County Department of Rehabilitation Services*, the only reported case where an attorney was sued for failing to disclose threats of violence made by his client. The court ultimately concluded on the basis of factual distinctions from *Tarasoff*²² that no duty of disclosure should be imposed on the attorney; however, the court indicated that a permissive duty of disclosure would be appropriate in the attorney-client context.

In *Hawkins*, a court-appointed attorney, Richard Sanders, helped his client, Michael Hawkins, secure release on bail from a misdemeanor marijuana charge.²³ Just prior to the bail hearing, Hawkins’ psychiatrist and his mother’s attorney warned Sanders that Hawkins was mentally ill and could be dangerous to himself and others.²⁴ At the bail hearing,

Id. See also *Watson*, *supra* note 3, at 1141 (“It would seem that if, despite strict confidentiality, attorneys can disclose future crimes and extricate themselves from harm caused by the client, they should certainly be at minimum permitted to disclose impending harm.”); *Zacharias*, *supra* note 3, at 408 (“[S]trict confidentiality rules often reduce lawyers’ ability and desire to act. Allowing lawyers some leeway to reveal client information would not destroy our legal order.”).

18. See Los Angeles County Bar Ass’n, Formal Op. Nos. 264 (1959) [hereinafter Op. 264], 436 (1985) [hereinafter Op. 436].

19. This provision makes it the attorney’s duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients.” CAL. BUS. & PROF. CODE § 6068(e) (West 1999).

20. San Diego County Bar Ass’n, Ethics Op. 1990-1 (1990).

21. See *Hawkins v. King County Dep’t of Rehab. Servs.*, 602 P.2d 361 (Wash. 1979).

22. See *id.* at 365-66.

23. See *id.* at 363.

24. See *id.*

Sanders did not volunteer any of this information.²⁵ Eight days after his release, Hawkins attacked his mother with a knife and attempted suicide, injuring himself badly while jumping off a bridge.²⁶ This injury resulted in the amputation of both of his legs.²⁷ Mrs. Hawkins subsequently sued Sanders for negligence, claiming he had breached his common law duty to warn potential victims.²⁸

In reaching its decision, the court accepted a proposal in the *amicus curiae* brief that the attorney's duty of confidentiality must be balanced against the public interest in safety from violent attack.²⁹ The court found that attorneys could *permissively* disclose client confidences to prevent a violent attack and that an *obligatory* duty to disclose should exist when the attorney knows "beyond a reasonable doubt" that his client is determined to seriously injure an unsuspecting third party.³⁰ However, the court declined to impose a duty to disclose upon Sanders because (1) Hawkins' potential victims (his mother and sister) were already aware of his dangerousness, (2) Sanders received no information that Hawkins planned to assault anyone, and (3) Sanders never received information directly from Hawkins that indicated he was dangerous.³¹

Therefore, despite finding that Sanders owed no duty to disclose, the Washington Supreme Court made it clear that the *Tarasoff* principles would carry over to the attorney-client context in an appropriate case, at least to the extent of creating a permissive exception to confidentiality. In this respect, the *Hawkins* court was well ahead of the California Legislature, which failed to recognize until 1993 that the public's interest in safety may overcome the client's interest in confidentiality when the two are balanced against each other.

D. CLIENTS AND CONFIDENTIALITY

Seventeen years after the *Tarasoff* decision, the California Legislature finally attempted to follow the prevailing sentiment regarding disclosure of client confidences expressed in scholarly articles and the *Hawkins* decision. In 1993, the Legislature enacted California Evidence Code section 956.5, creating an exception to the attorney-client privilege when disclosure is

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.* at 365.

30. *See id.*

31. *See id.* at 365-66.

reasonably necessary to prevent the client from committing a violent criminal act.³² This exception parallels the exception to the psychotherapist-patient privilege codified in California Evidence Code section 1024.³³ However, section 956.5's effect has not been as clear as that of section 1024. Since the enactment of section 956.5, a great amount of debate has arisen as to how section 956.5 relates to Business and Professions Code section 6068(e).

Business and Professions Code section 6068(e) is California's codified duty of confidentiality for attorneys. California Evidence Code section 956.5, while clearly an exception to the attorney-client privilege contained in California Evidence Code section 954, is not as clearly an amendment to the duty of confidentiality itself.³⁴ In terms of scope, the duty of confidentiality is a much broader requirement than the attorney-client privilege. The attorney-client privilege is a rule of *evidence* protecting private communications between client and lawyer that occur *in the course of the professional relationship and further the client's interests*.³⁵ On the other hand, the duty of confidentiality is an ethical rule of *professional responsibility* that prevents the client's secrets from being revealed to any outside party, *regardless of how the lawyer came to know the secret*.³⁶ Since section 956.5 only directly creates an exception to the evidentiary privilege, and fails to discuss the duty of confidentiality, it has served primarily to confuse, rather than clarify, the issue of attorney disclosure.³⁷

The best solution to this problem is for the Legislature to adopt an exception to Business and Professions Code section 6068(e). Other commentators have argued that the appropriate amendment would create a

32. This provision reads in relevant part: "There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." CAL. EVID. CODE § 956.5 (West 1999).

33. This provision reads:

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

CAL. EVID. CODE § 1024 (West 1999).

34. See Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 378-97 (1995). See also Kerrane, *supra* note 4, at 827-29.

35. See Kerrane, *supra* note 4, 827-28 (emphasis added).

36. See *id.* (emphasis added).

37. Generally speaking, an exception to the attorney-client privilege will not automatically create an exception to the duty of confidentiality. However, the legislative history of section 956.5 strongly suggests an intent to modify both the evidentiary privilege and the ethical duty. See *id.* at 828-29; *infra* notes 68-73 and accompanying text.

permissive duty of disclosure.³⁸ However, a more effective solution is to create an *obligatory* duty of disclosure for attorneys similar to that fashioned for psychotherapists by the *Tarasoff* court. The remainder of this Note will argue that an exception *requiring* disclosure in order to prevent violent crime is justified on two grounds. First, mandatory disclosure reflects the true intent of the California Legislature in enacting section 956.5, particularly in light of the steady erosion of the duty of confidentiality an attorney owes to a client.³⁹ Second, the *Tarasoff* rationale for imposing mandatory disclosure upon psychotherapists—the existence of a “special relationship” between psychotherapist and patient—carries over to attorneys due to the parallel special relationship between attorney and client.⁴⁰

III. THE NOT-SO-SACRED STATUS OF CONFIDENTIALITY

One of the most common arguments advanced against imposing *Tarasoff* liability on attorneys (both in California and other jurisdictions) is the high value placed on confidentiality in the attorney-client relationship. Historically, confidentiality has been viewed as critical in ensuring that clients openly communicate with their attorneys, enabling attorneys to adequately provide effective legal representation.⁴¹ The California Legislature reinforced the importance of attorney confidences by requiring attorneys to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”⁴² However, even in California, the sanctity of confidentiality in the attorney-client relationship has been steadily eroded over the years—a fact that the California Legislature must have recognized when it enacted California Evidence Code § 956.5.

A. PREVIOUSLY APPROVED EXCEPTIONS TO CONFIDENTIALITY

Prior to enacting section 956.5, the California Legislature, mirroring the ethical rules in most other jurisdictions, approved disclosure of client

38. See Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1467-68 (1995); Kerrane, *supra* note 4, at 831, 833; Zacharias, *supra* note 34, at 405.

39. See *infra* Part III.

40. See *infra* Part IV.

41. See Watson, *supra* note 3, at 1128-31; Zacharias, *supra* note 3, at 352-61.

42. CAL. BUS. & PROF. CODE § 6068(e) (West 1999).

confidences in two situations:⁴³ the crime-fraud exception⁴⁴ and attorney self-protection.⁴⁵

Under the crime-fraud exception, lawyers are authorized to disclose client confidences when the client seeks or obtains the lawyer's services in order to commit or plan to commit a crime or fraud. Under such circumstances, the attorney-client privilege cannot be used to shield wrongdoers or to enable attorneys to assist wrongdoers.⁴⁶ As for attorney self-protection, lawyers are empowered to disclose confidential client information in order to defend against a claim of malpractice or in order to collect a fee.⁴⁷

These exceptions demonstrate the California Legislature's opinion that the attorney-client relationship can still function effectively despite some exceptions to complete confidentiality; otherwise it would never have allowed such exceptions. The Legislature carved out a narrow area where loss of confidentiality is justified by societal interests, while retaining secrecy for most communications, to retain free and uninhibited interactions between attorneys and clients. Stated generally, the Legislature's exceptions indicate that the rule of confidentiality does not apply in situations where illegality or harm to an attorney (in terms of reputation or finances) are potential consequences. Preventing illegal harm to third parties seems to be a natural corollary to the already recognized exceptions. In fact it would be "fundamentally inconsistent to bar disclosure when harm to third persons is threatened."⁴⁸ Requiring attorneys to disclose confidences in order to avert life-threatening harm to others would merely continue an apparent trend of placing societal welfare and safety above the interest in confidentiality.

The Legislature is not alone in recognizing that confidentiality should not be regarded as absolute in the attorney-client relationship. The California Supreme Court noted the susceptibility of confidentiality to exceptions in discussing the appropriateness of the crime-fraud exception.⁴⁹ Additionally, the Los Angeles County Bar Association has been a

43. Client consent is another exception to the duty of confidentiality. However, for the purposes of this subpart, I am limiting my discussion to exceptions where disclosure occurs without client permission, as would be the case when protecting third parties from harm.

44. See CAL. EVID. CODE § 956 (West 1999).

45. See CAL. EVID. CODE § 958 (West 1999).

46. See Watson, *supra* note 3, at 1140 ("The law prohibits a lawyer from assisting a client in planning future crimes and other illegal acts.").

47. See CAL. EVID. CODE § 958 (West 1999).

48. Watson, *supra* note 3, at 1141.

49. See *People v. Meredith*, 631 P.2d 46, 53 (Cal. 1981).

forerunner in arguing that confidentiality can be overridden by countervailing societal interests, including potential harm to third parties.⁵⁰ In light of these statements, it is clear that the court and legal experts feel that confidentiality is not necessary for all communications in order to effectuate open communication and capable legal representation.

B. CLIENTS' EXPECTATIONS OF CONFIDENTIALITY

The Legislature's willingness to carve out exceptions to confidentiality likely stemmed not only from its recognition of countervailing social interests, but also from a belief that despite the exceptions, most clients would still trust their lawyers enough to provide the information necessary for adequate legal representation. The reality of clients' knowledge of confidentiality rules supports this conclusion and makes room for requiring disclosure to prevent harm to third parties.

Many aspects of confidentiality are ambiguous, and clients who are untrained in the legal profession certainly will not know each rule and exception relating to confidentiality. In order to believe that limitations on confidentiality would cause clients to use lawyers significantly less or that clients would reveal substantially less information requires acceptance of a highly doubtful premise that clients fully understand the confidentiality rules.⁵¹ In reality, many attorneys do not explain the details of all of the confidentiality rules to their clients, and those making a good faith effort to explain the rules will undoubtedly confuse some clients.⁵² As such, most clients end up with simply a general understanding that attorney-client conversations usually remain confidential, but can be revealed on occasion.⁵³

Despite client uncertainty, no empirical evidence has shown that significant numbers of clients are staying away from attorneys or refusing to confide in them. The likely reason for this response is that people simply need lawyers. Due to the complexity of the matters, the threat of being sued or the need to sue to redress grievances drives clients to

50. As early as 1959, the L.A. County Bar Association held the opinion that disclosure of client confidences was appropriate when the benefits of disclosure outweighed the policies underlying confidentiality. *See* Op. 264. In light of the erosion of the idea that confidentiality is necessary to ensure open communication and preserve the attorney-client relationship, this opinion supports the idea of disclosure to protect third parties from harm. Additionally, as recently as 1985, the L.A. County Bar stated that attorneys should be allowed to divulge future crimes to prevent immediate and serious harm. *See* Op. 436.

51. *See* Watson, *supra* note 3, at 1130; Zacharias, *supra* note 3, at 364-65.

52. *See* Watson, *supra* note 3, at 1130-31.

53. *See* Zacharias, *supra* note 3, at 365.

lawyers.⁵⁴ Since most clients only have a general understanding of confidentiality, creating additional limited disclosure requirements is not likely to affect the client's decision to confide in an attorney.⁵⁵ Clients who are uneasy about confidentiality would be unlikely to provide full disclosure to their attorneys no matter how much secrecy is guaranteed by an attorney, while clients who face legal matters beyond their understanding or control will likely feel compelled to confide in their attorneys.

In essence, since most clients are not well versed on the parameters of confidentiality, additional modification of disclosure rules will probably not affect the majority of attorney-client relationships. The crime-fraud and lawyer self-protection exceptions did not destroy the critical dynamic of the attorney-client relationship. Imposing a disclosure requirement to prevent imminent bodily harm to third parties, which follows in the tradition of these previously created exceptions by placing societal safety and welfare above client confidentiality, would similarly have little to no effect on clients' expectations of confidence.

C. PERMISSIVE VERSUS REQUIRED DISCLOSURE

To strike the appropriate balance between client confidentiality (recognizing its ability to be limited) and society's interest in preventing violent crime, numerous commentators have argued that disclosure of client confidences to prevent harm to third parties should simply be permissive unless the attorney has no doubts about the client's harmful intentions.⁵⁶ This rationale reflects the decision of the *Hawkins* court: "[T]he obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person."⁵⁷

Unfortunately, this approach has also carried over into the proposals of many commentators who have specifically analyzed Section 956.5 and concluded that the exception to the duty of confidentiality in section

54. *See id.* at 363-64.

55. *See id.* at 365-66.

56. *See Sands, supra* note 3, at 370. *See also Watson, supra* note 3, at 1144 (suggesting that non-physical threats of harm should fall under a permissive rule and that a rebuttable presumption favoring disclosure should only occur when the harm threatened is serious); Zacharias, *supra* note 3, at 408 (concluding lawyers should be allowed "some leeway to reveal client information").

57. *Hawkins v. King County, Dep't of Rehab. Servs.*, 602 P.2d 361, 365 (Wash. Ct. App. 1979).

6068(e) should be permissive.⁵⁸ This approach begs the question: Why shy away from advocating *Tarasoff* liability for attorneys through required disclosure? Two answers have emerged. Some feel that the attorney-client relationship differs from the psychotherapist-patient relationship in critical ways that preclude imposition of *Tarasoff* liability.⁵⁹ The fallacy of this position will be exposed in Part IV. Others feel that permissive disclosure preserves the appropriate level of confidentiality and reflects the true intent of the California Legislature in enacting section 956.5.

This second line of reasoning is also fallacious. As noted above, the previously created exceptions to confidentiality demonstrate that the duty of confidentiality is not absolute. In adding another exception, a mere permissive duty of disclosure assures no more confidentiality in the attorney-client relationship than requiring disclosure to protect third parties. In effect, giving attorneys permission to disclose client confidences to protect third parties gives clients *no assurances* that their confidences will be kept. A permissive disclosure exception removes the expectation of confidentiality to an extent that there is no difference between it and required disclosure. At the very least, required disclosure provides clarity to clients with a bright line rule.

Furthermore, under a permissive disclosure scheme, attorneys would be saddled with the difficult task of having to choose between client confidences and protection of third parties. For example, suppose a family law attorney is representing a parent in a child custody or divorce suit. The parent/client tells the attorney that he or she has been going through tough times and has abused the child—a fact of which the other parent is unaware. Under the current state of the law, the attorney's obligations in such a situation are unclear.⁶⁰ The lawyer has no obligation to report the child abuse,⁶¹ and therefore the attorney becomes trapped in a divided loyalty situation: loyalty to the client on the one hand versus human loyalty to the child on the other.

Creating permissive disclosure requirements for the attorney would not help this dilemma, since permissive disclosure would not provide a

58. See Kerrane, *supra* note 4, at 840-43; Zacharias, *supra* note 34, at 405.

59. See *infra* Part IV.

60. See Sands, *supra* note 3, at 366-67.

61. California's child abuse reporting statute, The Child Abuse and Neglect Reporting Act, mirrors the statutes of 27 other states in that while it requires professionals from a variety of fields to report child abuse (such as health practitioners, clergy members, and firefighters), it does not require attorneys to report abuse. See CAL. PENAL CODE § 11166 (West 1999). See also Richard P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 217 (1992).

clear mandate for any particular course of action, leaving the lawyer to struggle between betraying the client's confidence or betraying the attorney's own conscience. Creating a mandatory duty of disclosure to prevent future harm is the right solution to such a divided loyalty dilemma. Requiring disclosure reflects the notion that confidentiality is in fact not absolute in the attorney-client relationship.⁶² Clients certainly have an interest in confidentiality and privacy, but the legitimacy of those interests is greatly diminished when privacy is invoked to harm others, especially children.⁶³

Additionally, courts regularly indicate that protecting children from abuse is a compelling state interest.⁶⁴ This interest is powerful enough to abrogate professional privileges in a variety of fields, ranging from psychotherapists to clergy members.⁶⁵ Imposing a mandatory disclosure duty to prevent future harm would apply to this compelling interest because a revelation of child abuse (even as a past event) can be considered a threat of future harm: Child abuse is a repetitive crime that rarely occurs in a single instance.⁶⁶

Thus, a mandatory disclosure duty to prevent future harm will eliminate the divided loyalty dilemmas attorneys face under a permissive disclosure scheme. At the same time, mandatory disclosure would account for the value placed upon human life, notably enhancing lawyers' roles among professionals in serving the compelling interest of protecting children. Considering that a permissive duty would not enhance clients' view of the confidentiality offered by their lawyers, and that such a duty would place an unnecessary burden upon attorneys, *requiring* disclosure is a far more advantageous approach to applying section 956.5 to attorneys.⁶⁷

62. See *supra* Parts III.A-B.

63. See Watson, *supra* note 3, at 1142.

64. See, e.g., *People v. Younghanz*, 202 Cal. Rptr. 907, 910 (Ct. App. 1984); *People v. Stritzinger*, 668 P.2d 738, 742-43 (Cal. 1983). See also Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 245-46 (1987).

65. See CAL. PENAL CODE § 11166 (West 1999) (requiring disclosure of child abuse by "any child care custodian, health practitioner, employee of child protective agency, child visitation monitor, firefighter, animal control officer, . . . humane society officer . . . [or] clergy member"). See also Stuart, *supra* note 64, at 247-48.

66. See Stuart, *supra* note 64, at 246 ("One of the most distinctive attributes of child abuse is the ongoing nature of the crime. It is a pattern of behavior . . . [c]hild abuse is not simply a crime which occurs at a single point in time and then ceases; it is a *past, present, and future* crime.").

67. The proper outcome of balancing confidentiality and preventing harm to third parties is best summarized by Elizabeth Torphy-Donzella:

Confidentiality is, of course, an important core value of the attorney/client relationship. However, when the attorney knows that a client's actions (or inactions) will cause future death or substantial bodily harm, the value of the confiding client is pitted against the value of the life of another No manner of abstract reasoning about the increased opportunity for

The legislative intent behind section 956.5 provides further justification for creating an obligatory disclosure duty for attorneys. Section 956.5 was enacted as part of S.B. 645, originally an attorney discipline bill.⁶⁸ The text of section 956.5 as enacted speaks of creating an exception to the attorney-client privilege. Section 956.5 does not include a specific provision indicating that the duty of disclosure is obligatory, hence the section may have been written to create a permissive duty of disclosure. However, the most significant clue as to whether the legislators intended section 956.5 to create permissive or required disclosure is contained in the original version of 956.5. When S.B. 645 was amended to include section 956.5, the original version of the proposal contained a provision authorizing permissive disclosure by exempting from civil liability attorneys who decided not to take preventative action.⁶⁹ An Assembly Committee report sharply criticized the allowance for permissive disclosure: "This immunity clearly departs from the law that governs psychotherapists under similar circumstances It is not clear why attorneys should not be held to a similar standard of conduct."⁷⁰

Only fifteen days after the Assembly Committee report was issued, the permissive disclosure provision was removed from the bill.⁷¹ Such a measure in the wake of criticism indicated a strong legislative intent to impose civil liability on attorneys who chose not to prevent harm, thus creating an obligatory duty of disclosure. By removing the permissive disclosure provision, the California Legislature equated the attorney-client relationship with the psychotherapist-patient relationship, making "a conscious decision to allow the *Tarasoff* liability to extend to attorneys."⁷²

the lawyer to convince the client to do the right thing or the sanctity of the promise between confidant and confider can make the balance tip in favor of anything less than disclosure.

Elizabeth Torphy-Donzella, *Products Liability Litigation and Third-Party Harm: The Ethics of Nondisclosure*, 5 GEO. J. LEGAL ETHICS 435, 453-54 (1991).

68. See Kerrane, *supra* note 4, at 832.

69. See S.B. 645, California Senate, 1993-94 Regular Sess., 1993 Cal. Laws, as amended May 12, 1993, at 30. The bill stated in relevant part:

Section 956.5 is added to the evidence code, to read:

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

The lawyer's decision not to take preventative action permitted by subdivision (a) does not violate this section and shall not result in civil liability.

Id.

70. Assembly Comm. on Judiciary, Comm. Report for 1993 California Senate Bill 645, 1993-94 Regular Sess., (Aug. 18, 1993). See also Kerrane, *supra* note 4 at 833.

71. See S.B. 645, California Senate, 1993-94 Regular Sess., 1993 Cal. Laws, as amended Sept. 2, 1993.

72. Kerrane, *supra* note 4, at 833.

The final draft of the bill enacted into law contained no allowance for permissive disclosure.⁷³

The narrow limitations on confidentiality recognized by the California Legislature, the California Supreme Court, and the L.A. County Bar Association, along with clients' limited understanding of the rules for confidential communications, leave ample room for requiring disclosure of impending harm without damaging the privacy necessary to secure effective attorney-client relationships. Additionally, requiring disclosure rather than merely permitting attorneys to prevent harm to third parties reflects the most sensible balance of confidentiality and human life and carries out the legislative intent underlying section 956.5. Commentators arguing for mere permissive disclosure have lost sight of the big picture.⁷⁴

IV. TARASOFF'S APPLICATION TO ATTORNEYS: PSYCHOTHERAPIST-PATIENT AND ATTORNEY-CLIENT RELATIONSHIPS

While the lowered expectations of confidentiality provide justification for requiring disclosure of client confidences to protect third parties, the similarities between the psychologist-patient and attorney-client relationships provide the strongest justification for applying the *Tarasoff* duty to attorneys. The language of the *Tarasoff* decision indicates that the nature of the special relationship between psychologist and patient provided the impetus for imposing a duty of disclosure. A close examination of the attorney-client relationship reveals a nearly identical special relationship such that the *Tarasoff* rationale clearly applies equally to attorneys, provided lawyers are held to a standard of disclosure which accommodates the differences in professional training (for example, one requiring disclosure in situations where a *reasonable attorney* would recognize the threat of harm).

73. See CAL. EVID. CODE § 956.5 (West 1999).

74. Monroe H. Freedman discusses the virtue of disclosure in light the factors considered in Part III of this note:

The exception to save human life is far more compelling than the other exceptions to confidentiality that the *Restatement* has already recognized. Death is indeed different and the value at stake therefore outweighs the financial interests of the lawyer or of third parties Moreover, an exception to save life would pose no significant systemic threat to lawyer-client confidentiality In short, to push the confidentiality rule to the mindless and immoral extreme of sacrificing innocent human life is "rigour and not law."

Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1636-37 (1996).

A. *TARASOFF* AND PSYCHOTHERAPISTS

When the *Tarasoff* court began its analysis of the appropriate circumstances that require a duty to warn, the majority recognized that the common law generally does not impose a duty to protect third parties.⁷⁵ However, the court went on to indicate that a duty to warn third parties is appropriate where “the defendant bears some *special relationship* to the dangerous person or to the potential victim . . . the relationship between a therapist and his patient satisfies this requirement”⁷⁶ This special relationship recognized by the court was different from the traditional special relationships giving rise to a duty to warn in prior cases.⁷⁷ Previously, California courts had only imposed a duty to warn where a defendant had a special relationship with *both* the victim and the dangerous party.⁷⁸

Yet the psychotherapists in *Tarasoff* were found to have a duty to warn despite having no preexisting relationship with Tatiana that would create a responsibility to protect her. The *Tarasoff* court, following precedent from other jurisdictions, found that the extent of the special relationship between a psychotherapist and patient was sufficient to create a duty for the psychotherapist to protect both the patient and others from danger posed by the patient.⁷⁹ In essence, the therapist takes on enormous responsibility in becoming privy to sensitive information—a responsibility that carries over to third parties when the psychotherapist learns they are in danger. A direct relationship with the potential victim is thus not necessary.⁸⁰

Additionally, the court realized that imposing a duty to warn upon therapists implicitly requires violation of the duty of confidentiality

75. See *Tarasoff v. Board of Regents*, 551 P.2d 334, 342-43 (Cal 1976).

76. *Id.* at 343 (emphasis added).

77. See *id.* at 344.

78. See *id.*

79. See *id.*

80. The special relationship requirement in the *Tarasoff* decision might be seen as mandating that the defendant be the only person able to save the potential victim (which would actually indicate a special relationship between the defendant and victim to coincide with traditional requirements) in order to impose a duty to warn. While the psychotherapists were the only ones able to prevent harm to Tatiana, the court did not indicate that the duty to warn was conditioned upon such a status. Creating such a requirement would prove very problematic, potentially causing therapists to pass off their duty to protect third parties onto others, assuming they might have the necessary information to stop the harm (i.e. social worker, probation officer, etc.). Such a problem would defeat the purpose of creating the duty of disclosure in the first place. Since the *Tarasoff* court did not directly condition the duty to warn upon independent information, this Note will focus instead upon the general aspects of the psychotherapist-patient special relationship which led to the duty to protect third parties.

imposed upon psychotherapists to protect patient confidences. The court felt that a balancing test between interests in confidentiality and public safety was needed to determine whether requiring disclosure was actually appropriate.⁸¹ In ultimately determining that the balance swung in favor of disclosure, the *Tarasoff* majority emphasized California Evidence Code section 1024,⁸² a codified exception to the psychotherapist-patient privilege.⁸³ The existence of such an exception indicated to the court that the California Legislature had already performed the necessary balancing and found that public welfare was the heavier interest. Thus, the court found that “the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others.”⁸⁴ In light of the legislative balancing, the special relationship of psychologist and patient could justify a duty to warn despite conflicts with confidentiality.

The special relationship of attorneys and their clients similarly justifies a duty of disclosure. Most commentators point only to the criminal context as appropriate for carrying over the duty to disclose confidences.⁸⁵ However, as the remainder of this section will show, the *Tarasoff* duty is appropriate for all attorneys, running the gamut from criminal attorneys who learn that their clients intend to harm a third party, to in-house counsel who have learned that their clients intend to market a defective product.⁸⁶ Throughout the remainder of the paper, these two examples will be used demonstrate that the duty of disclosure can and should be applied to all attorneys.

81. “Against this interest [in confidentiality], however, we must weigh the public interest in safety from violent assault.” *Id.* at 346. A similar balancing test was advocated by the Los Angeles County Bar Association in 1959 as a method of determining when disclosure by attorneys was appropriate in order to protect third parties from harm. *See* Op. 264, *supra* note 18. As I will show in Part IV.B, the results of the balancing test for attorneys are the same as for psychologists.

82. Section 1024 reads in relevant part: “There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.” CAL. EVID. CODE § 1024 (West 1999).

83. *See Tarasoff*, 551 P.2d at 346-47.

84. *Id.* at 347.

85. *See generally* Kerrane, *supra* note 4; Sands, *supra* note 3; Watson, *supra* note 3; Zacharias, *supra* note 34.

86. The propriety of extending the duty to disclose beyond criminal lawyers to lawyers involved in product liability action was recognized by David Luban in his discussion of the Ford Pinto case (where Ford allegedly made a statistical calculation that it would be more expensive to modify its dangerous gas tank than to absorb the costs of lawsuits brought by Pinto drivers seriously injured or killed by explosions due to rear-end collisions): “it is the actions themselves rather than their legal classification that give rise to the need for whistleblowing.” DAVID LUBAN, *LAWYERS AND JUSTICE* 215 (1988). *See also* Torphy-Donzella, *supra* note 67, at 453.

B. THE ATTORNEY-CLIENT SPECIAL RELATIONSHIP: FROM CRIMINAL
LAWYER TO IN-HOUSE COUNSEL

As discussed above, the imposition of a duty to warn upon psychotherapists in *Tarasoff* centered on the notion of special relationships.⁸⁷ To carry the requirement of disclosure to protect third parties over to attorneys, it is critical to find the same special relationship between an attorney and his client. For many years, the primary hurdle to linking the two relationships was that, unlike for psychotherapists, there were no exceptions to the requirement of privileged communications for attorneys in California, even to protect third parties. In fact, in 1990 the California Supreme Court directly compared the attorney-client relationship to the psychotherapist-patient relationship in *People v. Clark*.⁸⁸

The court in *Clark* found the relationships to be very different—its underlying basis for this finding rested upon the greater level of confidentiality required of attorneys than that required of psychotherapists. The *Clark* court stressed: “The Legislature has recognized this distinction in purpose in Evidence code section 1024, where it provides that there is no privilege . . . if the therapist believes it is necessary to disclose the communication . . . [n]o express exception to the attorney-client privilege exists for threats of future criminal conduct.”⁸⁹ The language in Evidence Code section 1024 was also a key component in the *Tarasoff* court’s finding that the special relationship between the psychotherapist and patient was sufficient to justify imposing a duty to warn despite the psychotherapist’s duty of confidentiality.⁹⁰

However, the distinction between the attorney-client and psychotherapist-patient relationships expressed by the *Clark* court breaks down in light of the enactment of Evidence code section 956.5 by the California Legislature in 1993. Section 956.5 virtually mirrors the language of section 1024, indicating that “there is no privilege . . . if the lawyer reasonably believes that disclosure of any confidential communication . . . is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.”⁹¹ Under Evidence Code section 956.5, just as the

87. See *Tarasoff*, 551 P.2d at 343 (“the relationship between a psychotherapist and his patient satisfies this requirement”).

88. 789 P.2d 127, 150-54 (Cal. 1990).

89. *Id.* at 152.

90. See *supra* Part IV.A.

91. CAL. EVID. CODE § 956.5 (West 1999).

Tarasoff court indicated in reference to psychotherapists and section 1024, the Legislature has balanced attorney confidentiality against public safety and found safety to be the more important interest. Any attempt to argue that the *Tarasoff* duty should not carry over to attorneys due to different expectations of confidentiality in the attorney-client relationship simply cannot hold water in light of Evidence Code section 956.5. This exception to the attorney-client privilege fits directly into a critical component of the *Tarasoff* court's rationale for creating a duty of disclosure for psychotherapists—legislative mandate.⁹²

Since Evidence Code section 956.5 reflected legislative balancing of societal welfare against confidentiality in the attorney-client context, the remaining principal argument against extending the *Tarasoff* duty to attorneys is the different *type* of special relationship attorneys have with their clients. Specifically, commentators have argued that attorneys have less ability to predict dangerousness and less power to control their clients than psychotherapists.⁹³ Prediction of dangerousness and power to control the client implicate concerns that disclosure of client confidences by lawyers might not be accurate or effective in preventing harm to third parties. However, these concerns are misguided because the differences in attorneys' abilities to predict dangerousness and control clients are relatively minor issues and should not preclude extension of the *Tarasoff* duty to attorneys.

1. *Predicting Dangerousness*

Attorneys certainly are not trained in evaluating the behavior of others in the same way as psychotherapists. Yet under the rationale presented by the *Tarasoff* court, this difference should not prevent requiring disclosure by attorneys to prevent potential harm to third parties. In *Tarasoff*, the court indicated that in imposing the duty to warn, the proper standard for professionals was "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional] under

92. Note also that Evidence code section 956.5 reflects the conditions under which the Los Angeles County Bar Association (in Formal Opinion 264) back in 1959 advocated attorney disclosure of client confidences—a finding that the interests in attorney confidentiality are outweighed by a countervailing interest (i.e., public welfare). See Op. 264, *supra* note 18.

93. As Professor Sands writes:

The differences between the attorney-client and psychotherapist-patient relationships are inherent in the differences between the professions. Specifically, an attorney, due to the lack of specific training, is less capable of predicting if a client is serious in his or her threats, and has fewer alternatives; that is, unlike a psychotherapist, he or she cannot recommend voluntary or involuntary commitment.

Sands, *supra* note 3, at 362. See also Watson, *supra* note 3, at 1131-33.

similar circumstances.”⁹⁴ Accuracy in predicting violence was not a prerequisite for finding that the duty to warn was appropriate. Thus, attorneys would not be expected to have extraordinary skill in predicting dangerousness to make the *Tarasoff* duty applicable.

What would attorneys have to “know” in order for this duty to attach? There can be no precise answer to this question, but rather a *standard* of knowledge is appropriate, as enumerated in *Tarasoff* for psychotherapists.⁹⁵ Lawyers would essentially be held to a “common sense standard”⁹⁶ reflecting the reasonable abilities of lawyers to gauge the dangerous propensities of their clients.⁹⁷

It would be a mistake to believe that this reasonableness standard would result in lawyers repeatedly failing to predict danger. On the contrary, attorneys are often in a unique position to know about the danger posed by their clients, unlike psychotherapists who typically know only as much about their patients as the patients are willing to disclose.⁹⁸ Criminal attorneys are often well informed about their clients’ criminal backgrounds and personalities,⁹⁹ particularly with clients whom they have represented on more than one occasion. Such knowledge could give attorneys keen insights into the dangerous propensities of their clients and aid them in reasonably assessing whether a client’s threat was serious. In-house attorneys also stand in a unique position to know about the dangers their clients pose to society. Since manufacturers continuously face the threat of product liability suits, they are motivated to keep their attorneys informed about their products and the capabilities of those products. The frequent open communication between in-house counsel and the management/ownership of the company gives the attorney a reasonable understanding of the potential danger posed by the products of the client.

94. *Tarasoff*, 551 P.2d at 345. See also Kerrane, *supra* note 4, at 838.

95. See *supra* Part IV.A.

96. Kerrane, *supra* note 4, at 838.

97. The facts necessary to trigger the duty to warn will likely vary from case to case. For most criminal attorneys, a verbalized threat of harm will probably be necessary to trigger the duty, since attorneys should not be expected to read into the demeanor of their clients as psychotherapists are trained to do. However, a direct threat would probably not be necessary in every situation—consider the previous example of a family attorney who learns the client is a child abuser. This is a recurring tendency and thus disclosure of abuse in the past would probably be sufficient to trigger warning, even without a statement of intent to abuse in the future. Determination of the actual facts needed for triggering the duty should ultimately be left to the courts based on the *reasonable abilities of lawyers* in order to stay true to the *Tarasoff* decision.

98. See Kerrane, *supra* note 4, at 838.

99. See *id.*

Furthermore, accurate prediction of violence was not of paramount importance to the *Tarasoff* court when it imposed the duty to warn upon psychotherapists. The court recognized that psychotherapists are very limited in making accurate predictions of dangerousness. As the majority stated, "professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim."¹⁰⁰ In fact, in a separate opinion, Justice Mosk expressed concern about "inherently unreliable" psychiatric predictions of violence.¹⁰¹ He focused on the court's opinion in *People v. Burnick*, where the unreliability of psychiatric predictions of dangerousness led the court to conclude that a person could not be committed as a mentally disordered sex offender unless found to be such beyond a reasonable doubt.¹⁰²

Additionally, a wide body of scholarly literature has documented the inaccuracy of psychiatric predictions of dangerousness.¹⁰³ Researchers have found that "even under controlled conditions, at least 60 to 70 percent of the people whom psychiatrists judge to be dangerous may, in fact, be harmless."¹⁰⁴ Coccozza and Steadman present some of the most telling statistics in their independent research on accuracy of predictions of violence. They studied felony defendants held incompetent to stand trial in New York state between 1971-72 and found that a *higher percentage* of defendants predicted *nondangerous* by psychiatrists were subsequently arrested for a violent crime after release to the community than those who were predicted dangerous.¹⁰⁵

Despite the problems of inaccuracy demonstrated by such statistics, the *Tarasoff* court was not deterred in its decision to impose a duty to warn upon psychotherapists. Again employing a balancing test, the court found that inaccurate prediction was a legitimate trade-off for safety.¹⁰⁶ The

100. *Tarasoff*, 551 P.2d at 346.

101. *Id.* at 354 (Mosk, J., concurring in part and dissenting in part).

102. *See People v. Burnick*, 535 P.2d 352 (Cal. 1975). *See also Sands*, *supra* note 3, at 362-63 (discussing Judge Mosk's arguments regarding the unreliability of psychiatric predictions).

103. *See generally* Joseph J. Coccozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932 (1975).

104. Ennis & Litwack, *supra* note 103, at 714.

105. Among 257 felony defendants found incompetent to stand trial from 1971-72, 14% (13 of 96) evaluated as dangerous were rearrested for a violent crime after release, as opposed to 16% (11 of 70) of those evaluated as nondangerous. *See Coccozza & Steadman*, *supra* note 103, at 1095-98.

106. According to the majority: "The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved." *Tarasoff*, 551 P.2d at 346.

value of human life certainly outweighed potential erroneous predictions that could, at worst, harm a patient's reputation and cause him or her to seek a different therapist.

Based on this rationale, the potential for attorney inaccuracy in prediction of dangerousness also should not be an obstacle to implementing the *Tarasoff* duty in the attorney-client special relationship. Attorneys, despite occasional inaccuracies, will be able to live up to the expectations of reasonable predictions of dangerousness under the common-sense standard appropriate for the profession. As noted above, lawyers ranging from criminal attorneys to in-house counsel find themselves in a unique position to assess their clients' intentions due to disclosures made by clients when seeking advice. Criminal attorneys will likely most frequently encounter direct threats against a third party that indicate very clear intentions.¹⁰⁷

As for in-house counsel, applying the reasonableness standard is definitely appropriate to predict whether a client intends to market a dangerous product. In fact, such a reasonableness standard has already been imposed upon the manufacturers, retailers, and distributors of consumer products under the Consumer Product Safety Act (the "CPSA").¹⁰⁸ If there is a reasonable belief of potential serious harm or death resulting from products sold to consumers, then disclosure to the Consumer Product Safety Commission (the "CPSC") is required.¹⁰⁹ Because the open communication between in-house counsel and their clients (manufacturers, retailers, or distributors) is utilized for the attorney to provide product-liability advice, in-house lawyers will have access to the same information that would require their clients to disclose threats of

107. "[I]t is the exceptional case where the intent to harm a third party is not clear. In unclear cases it is unlikely that a duty to warn would arise for either a psychotherapist or a lawyer." Watson, *supra* note 3, at 1132.

108. 15 U.S.C. §§ 2051-84 (1994). The disclosure requirements of the CPSA appear in section 15(b) of the Act and include:

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product . . . (3) creates an unreasonable risk of serious injury or death, shall immediately inform the Commission of such failure to comply, of such defect, or of such risk

15 U.S.C. § 2064(b).

109. Under this duty of disclosure, attorneys would not be required to undertake a cost-benefit analysis on products liability issues. In fact, manufacturers are not even asked to do so under the CPSA. Rather, if there is a reasonable basis for believing the products have the hidden potential for causing serious harm or death, disclosure is required. The CPSC itself will make the determination as to whether the product is ultimately safe for marketing by weighing all relevant factors. *See* 15 U.S.C. § 2064(c).

harm. Thus, in-house counsel would comply with the the standard of disclosure that the Legislature has already found appropriate for their clients, who possess the same product information attorneys would have access to.

2. *Power to Control the Client*

The attorney-client special relationship does involve somewhat less control by the lawyer over the client than the psychotherapist over the patient. This aspect of the special relationship relates to the duty to warn because psychotherapists have the alternative of commitment if they are unable to contact potential victims to provide warning. An attorney, on the other hand, lacks the power to directly order commitment of his or her client. However, this slight difference in control should not preclude imposition of the duty to warn because attorneys can pursue alternative methods, if necessary, to control dangerous clients. Thus, the nature of the attorney-client special relationship is substantially similar to that of the psychotherapist and patient.

In-house counsel who become aware that their clients intend to market a product that is likely to cause serious bodily harm or death might be able to control their clients' conduct simply by warning the clients about the potential financial liability.¹¹⁰ However, this is not a fool-proof method since a manufacturer might decide that potential profits would more than compensate for any potential liability.¹¹¹ In-house lawyers certainly lack the capability to warn each and every potential customer individually. But, another alternative remains: In-house attorneys would find little trouble controlling their clients' conduct by utilizing the same channels available to their clients—the CPSC. Under the CPSA, once the CPSC is made aware of a potential safety hazard and has decided to conduct a hearing concerning the product's safety, the CPSC can apply directly to a district court and obtain a preliminary injunction against distribution of the product.¹¹² The injunction would prevent the dangerous product from

110. This method is currently recommended under CAL. RULE OF PROFESSIONAL CONDUCT 3-600.

111. Such a view was taken by the Ford Motor Company in producing the Pinto with a defective gas tank design. See STUART M. SPEISER, LAWSUIT 356-62 (1980).

112. The CPSA reads in relevant part:

(g) Preliminary injunction. (1) If the Commission has initiated a proceeding under this section for the issuance of an order . . . with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission . . . may, in accordance with section 2061(d) of this title, apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding.

getting to the potential victims, hence, controlling the clients' conduct until the hearing had been completed by the CPSC. While the in-house attorney cannot stop the client on his own, the availability of reporting to the CPSC gives the attorney an indirect method of controlling conduct when necessary.

The incentive for in-house attorneys to use this disclosure to indirectly control client conduct (in addition to the obvious moral consideration of protecting life) is based on the protective function that in-house attorneys play for the entities they represent.¹¹³ A California attorney representing an organization (such as an in-house counsel) is charged with the duty to represent the *entity*, not the officers, shareholders, or directors.¹¹⁴ As such, the attorney owes a duty of care to protect the interests of the entity itself. In carrying out that duty, an attorney has an ethical obligation to take action to protect the entity when an agent of the organization intends to act in a way that is or might be a violation of law.¹¹⁵

Furthermore, as the Ninth Circuit has made clear, the attorney's duty of due care includes protecting his or her client from liability which may arise from illegal behavior.¹¹⁶ An in-house lawyer who becomes aware that his client intends to market a defective product and does not disclose the information to the CPSC to stop the product would ultimately open his or her client up to product liability suits. Failing to prevent liability arising from harm to third parties would make the attorney subject to malpractice for not carrying out his duty of care owed to the entity as a whole. According to the *O'Melveny* court: "a lawyer has to act competently to avoid public harm when he learns that his is a dishonest client."¹¹⁷ The in-

15 U.S.C. § 2064(g)(1).

113. In-house lawyers may feel a need for additional motivation to disclose since they will typically face situations where the potential victims are not specific individuals, but rather "consumers" generally. The lack of a tangible person to visualize as a victim might make the connection between disclosure and protecting life more tenuous for some attorneys.

114. See CAL. RULE OF PROF. CONDUCT 3-600(A) (1999).

115. See CAL. RULE OF PROF. CONDUCT 3-600(B) (1999). Currently, attorneys presented with such a predicament are encouraged, under Rule 3-600(B)(1)-(2), to advocate reconsideration of the matter or work up the internal chain of command within the entity to seek a change in behavior. This complicated duty illustrates the importance of protecting the entity over its agents when the interests of the two conflict.

116. See *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 748-49 (9th Cir. 1992), *rev'd and remanded on other grounds*, 512 U.S. 79 (1992). On remand, the Ninth Circuit readopted its previous opinion with the exception of Part IV.B, concerning whether the FDIC had rights or defenses not available to the entity it replaced in the suit. See 61 F.3d 17, 19-20 (9th Cir. 1995). The portion of the previous decision concerning *attorneys' duties* was located in Part III, and thus readopted in the later opinion.

117. 969 F.2d at 748.

house attorney's obligation to protect his or her client (the organization itself) from internal illegal behavior and thus avoid malpractice liability provides a powerful motivation for the lawyer to disclose information necessary to prevent harm to third parties. Imposing a duty of disclosure reflects not only the idea of protecting third parties, but also reemphasizes the accepted notion of protecting the entity as the client rather than its officers or directors, when the interests of management stand in opposition to the best interests of the client.¹¹⁸

Unfortunately, the current scheme of ethical responsibility requires an in-house attorney to resign rather than disclose confidences outside of the entity in order to prevent harm.¹¹⁹ However, this obstacle to disclosure can be easily overcome. Rule 3-600 states that an attorney may undertake protective actions on behalf of the entity provided the duty to protect confidential information "as provided in Business and Professions Code section 6068, subdivision (e)" is not violated.¹²⁰ Thus, amending Business & Professions Code section 6068(e) to include a duty of disclosure to prevent harm to third parties (as I will propose in Part V), would open the door to disclosure by in-house counsel without violating Rule 3-600.

In the criminal context, client control is a much tougher issue. The biggest concern that has been highlighted is the inability of attorneys to involuntarily commit dangerous clients.¹²¹ Without such an alternative, some commentators fear that imposing the *Tarasoff* duty would mean attorneys would be held liable for failing to warn victims that they were unable to locate, despite a good faith effort to warn.¹²² Others have even suggested that commitment is a preferable alternative to disclosure in all circumstances.¹²³ Clearly, not every dangerous client is mentally ill or ought to be committed. However, since much emphasis has been placed on

118. Under the current scheme of permissive disclosure, attorneys certainly have business disincentives to violate client confidences—notably, clients would likely take their business elsewhere if they learned that their lawyers had voluntarily disclosed confidential information. Thus, job security operates against the in-house lawyer. Mandating disclosure would overcome these disincentives because clients could not seek out lawyers willing to hide dangerous secrets—lawyers who undertook such activities would face the consequence of losing their license to practice along with civil and perhaps even criminal penalties.

119. See CAL. RULE OF PROF. CONDUCT 3-600(C).

120. CAL. RULE OF PROF. CONDUCT 3-600(B).

121. See Sands, *supra* note 3, at 359; Watson, *supra* note 3, at 1133.

122. See Watson, *supra* note 3, at 1133.

123. See generally Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976) (arguing that commitment best protects both the patient and victim because disclosure would only serve to anger the patient by making him or her feel as though the therapist was siding with the object of the patient's anger).

attorneys' inability to control clients that psychotherapists could otherwise control, I will focus my discussion of criminal lawyers' powers on the very clients that psychotherapists could commit—those who are mentally ill.

The concern over a lack of authority to commit clients is miscalculated. Attorneys do in fact have the ability to control their clients through involuntary commitment, although lawyers cannot independently order commitment. Lawyers' ability to commit arises under the Lanterman-Petris-Short Act.¹²⁴ This act allows any person in California to refer a dangerous person (who, due to mental disorder, is dangerous to himself or others) to an official designated by the State Department of Mental Health, who can place the person into commitment for a 72-hour evaluation period if the official finds "probable cause."¹²⁵ The statement of the person calling the dangerous party to the official's attention can serve as the probable cause.¹²⁶ As such, a criminal lawyer (or any attorney for that matter) can provide the probable cause necessary for a State Department of Mental Health official to commit the attorney's client, should that alternative become needed. Since attorneys function in a fiduciary capacity, and have obtained professional status, their views concerning the dangerous propensities of their clients will likely be respected and serve as sufficient probable cause for the 72-hour evaluation. Criminal attorneys have the ability to play a crucial role in controlling truly dangerous clients by seeing to it that those clients are referred to the appropriate official who can order commitment. The Lanterman-Petris-Short Act provides criminal lawyers with an indirect ability to commit their clients, thus giving attorneys power to control dangerous clients which is substantially similar to the power therapists can exercise over their patients.¹²⁷

The CPSA and the Lanterman-Petris-Short Act provide attorneys in all forms of practice with the tools for indirect restraints on their clients.

124. See CAL. WELF. & INST. CODE § 5150 *et. seq.* (West 1998).

125. See CAL. WELF. & INST. CODE § 5150.

126. See *id.*

127. Excessive use of the involuntary commitment option by attorneys could certainly lead to a number of problems in terms of attorney-client relations. However, those problems are beyond the scope of this Note. While commitment is not a perfect alternative, it shows that attorneys do have comparable power to control. Certainly, providing attorneys with a duty to warn in light of this alternative is preferable to leaving involuntary commitment as the only option for controlling dangerous clients. As the *Tarasoff* court noted, commitment is a drastic option because it "depriv[es] the patient of his liberty." 551 P.2d at 346. For a general discussion of the consequences of involuntary commitment, see Mark Allen Hart, Note, *Lanterman-Petris-Short Act*, 7 LOY. L.A. L. REV. 93 (1974); Ingo Keilitz, W. Lawrence Fitch, & Bradley D. McGraw, *Study of Involuntary Civil Commitment in Los Angeles*, 14 SW. U. L. REV. 241 (1984).

While attorneys may not be able to control their clients as easily as psychotherapists, they nevertheless can exercise similar power to stop dangerous activities, and therefore the attorney-client special relationship warrants extension of the *Tarasoff* duty.

C. PROTECTING IDENTIFIABLE VICTIMS

A critical aspect of imposing the duty to warn upon attorneys is ensuring that lawyers actually know *who* to warn. In *Tarasoff*, the court emphasized that the psychotherapists had a duty to warn the foreseeable victim of the threatened danger or those who can reasonably be expected to notify him or her.¹²⁸ This requirement would certainly carry over to the duty placed upon attorneys. Such a requirement would pose little trouble for criminal attorneys, since much like therapists, the threats of danger they would typically hear would be directed at another individual. Criminal attorneys would then be left with the task of finding that individual or someone close to him or her.

On the other hand, this standard seems problematic for in-house counsel. Since their clients will be producing or selling products that could potentially reach thousands of consumers, how could these attorneys possibly warn the potential victims? This complication would initially seem to prevent imposition of the *Tarasoff* duty on such attorneys.

Once again, the Consumer Product Safety Act provides a solution to the problem. The CPSC provides a centralized agency, the CPSC, which can not only secure injunctions to prevent products from entering the market, but also can require the issue of public notices or individually mailed notices to each known customer who already bought the product.¹²⁹ Since the CPSC is a centralized agency, it has much broader capabilities to coordinate the type of warning that is needed to reach all of the appropriate consumers and ensure that the warning is publicized. Thus, the duty to warn can be extended to in-house counsel as well as criminal attorneys

128. See *Tarasoff*, 551 P.2d at 347.

129. The CPSC provides:

If the Commission determines . . . that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply. . . . (3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

15 U.S.C. § 2064(c).

since in-house attorneys can warn potential victims through disclosure to the CPSC.

V. PROPOSAL FOR REFORM

The California Legislature's enactment of Evidence Code section 956.5 in 1993 reflected a legislative judgment that the interest in public safety from violent harm outweighed any interest in attorney-client confidentiality. This should have been the stepping stone to imposing the *Tarasoff* duty upon attorneys in California, especially considering the legislative history underlying section 956.5.¹³⁰ The erosion of confidentiality interests over the years as well as the striking similarities between the psychotherapist-patient and attorney-client special relationships provide additional impetus for applying the duty to warn to attorneys.

However, the language in Business and Professions Code section 6068(e), without any exceptions to its requirement of absolute confidentiality, has resulted in a great deal of confusion, making the courts and commentators unwilling to extend *Tarasoff* liability to lawyers. Thus, another legislative modification is necessary to ensure that the duty to warn is appropriately extended to attorneys. I propose that Business and Professions Code section 6068(e) be amended to include the following provision:

Disclosure of confidential communications relating to client representation is required when an attorney reasonably believes that disclosure of such information is necessary to prevent harm to a third party likely to result in death or substantial bodily harm.

This amendment expressly creates an exception to the confidentiality requirement while requiring disclosure in accordance with *Tarasoff* liability. The wording of this amendment reflects the *Tarasoff* rationale by requiring disclosure based on a reasonable belief of harm.¹³¹ As discussed above, this requirement also reflects the differing abilities of professionals

130. See *infra* Part III.C.

131. Professor Sands argued that attorneys should be required to disclose confidential information only if the attorney believes "beyond a reasonable doubt" that his or her client intends to inflict serious harm. See Sands, *supra* note 3, at 361. This proposal not only ignores the *Tarasoff* court's rationale, but also gives attorneys an incentive to remain ignorant in order to avoid the disclosure duty. "Beyond a reasonable doubt" allows attorneys to escape liability by simply failing to investigate a suspicion that the client intends harm. Such a large loophole does not reflect the purpose underlying the *Tarasoff* duty: placing human well being ahead of secrecy.

in predicting dangerousness.¹³² Attorneys would be expected to predict dangerousness and disclose this threat only when it is reasonable for attorneys to do so, rather than in situations where a therapist would anticipate violent behavior. This distinction accommodates differences in professional training, while still upholding the legislative mandate that social welfare outweighs confidentiality.

VI. CONCLUSION

The principles of the *Tarasoff* decision are alive and well today in the context of the attorney-client relationship. The recognized limitations on confidentiality coupled with the nature of the special relationship between attorney and client echo the conditions that made the psychologist-patient relationship ripe for the implementation of a duty of disclosure to protect third parties back in 1979. Perhaps the greatest irony is that California, the very state whose Supreme Court recognized the need to place public safety ahead of confidentiality for therapists, has had so much trouble imposing the same balance in the attorney-client relationship. Creating Evidence Code section 956.5 was a good first step by the Legislature, but it was not sufficient to clearly establish that the *Tarasoff* duty applies to the legal profession. With one simple amendment to the Business and Professions Code, the California Legislature can remedy this deficiency. The new amendment will rightfully instruct all attorneys, ranging from criminal lawyers to in-house counsel, that confidentiality is no longer a bar to protecting the most sacred interest of all: human life.

132. See *infra* Part IV.B.1.