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Lawyers: A Call to Duty

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An emotional father is going through a bitter divorce with his wife. His business is beginning to suffer as a result and he is fearful that he will lose custody of his two children as well. He confides in his attorney that if he does not get custody of his children, he will kill the judge, whom he deems responsible for his loss. What must his attorney do? If the attorney warns the judge, he[1] may violate his duty to maintain confidentiality with his client.[2] He may also jeopardize his client's case since the judge might consider the client's threats in determining the issue of custody.[3] If he does not warn the judge, the judge's life, as well as the lives of innocent bystanders, may be lost.[4]

This or a similar scenario is more likely to occur in a society that is increasingly using violence as a way to deal with problems.[5] The problems presented in the situation involving attorney and client are similar to those confronted by the psychotherapist faced with a potentially dangerous patient such as in *Tarasoff v. Regents of*

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1. The pronouns "he," "his," and "him," as used in this article, are not intended to convey the masculine gender alone. This usage is employed in a generic sense to avoid awkward grammatical situations that would likely occur due to the limitations of the English language.

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) exemplifies the approach of the vast majority of the states. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) represents the approach states are presently considering.

3. As a practical matter, it is difficult for the judge not to be prejudiced against the client when he has been personally threatened.

4. In October, 1983, a man unhappy about the results of post-decree divorce proceedings killed the judge and his ex-wife's attorney in a courtroom in Chicago. Nat'l L.J., Nov. 7, 1983, at 3.

5. As a result of this upsurge in violent incidents and threats directed toward judges and other court personnel, courthouses across the country are resorting to increased use of security devices. The federal court security budget was $12 million for fiscal 1983 and has been increased to $18.7 million in fiscal 1984, to $25.5 million in fiscal 1985 and to $35 million in fiscal 1986. Even though some of the security measures have helped, in the last year alone there have been a number of fatal courthouse incidents. There are no comprehensive statistics to document the rise in violence, but federal and state court administrators and law enforcement personnel say the problem is increasing in magnitude. Nat'l L.J., July 16, 1984 at 1.

the University of California.[6] But the issues presented are distinct in that the dilemma faced by the lawyer, of whether to reveal his client's communications or remain silent, presents a potential confrontation between concerns of public safety and preservation of attorney-client confidential communications.[7] This article will explore this potential conflict and will propose a workable solution. The proposal calls for the imposition of a legal duty on a lawyer to warn or take other reasonable action to protect identifiable third persons from a client who has expressed an intention to commit an act endangering these third persons. This proposal naturally implicates the much argued issues of whether an attorney owes such a duty to potential victims of his client and whether such a duty is compatible with the attorney's obligations to protect the confidences and interests of his client.

In order to resolve these issues, there are two questions that one must consider. The first is whether a duty of care to protect or warn a third person in these circumstances is consistent with accepted tort concepts. If this question can be answered affirmatively, one must address the second inquiry, exploring the attorney's ethical obligations to both the threatened party and his client by balancing the policies underlying attorney-client confidential communications with the concern for public safety.

I. The Evolution of a Duty to Warn

Whether there is a duty to protect or warn is actually a question of whether one party's interests are entitled to legal protection against another's conduct.[8] In early cases considering whether such a duty

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6. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). This opinion is the result of a rehearing by the California Supreme Court. The original opinion rendered in December, 1974, Tarasoff v. Regents of the University of California, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) was vacated by this decision. The original opinion had caused such great controversy that the California Supreme Court decided to rehear the case, considering many *amicus curiae* briefs in addition to those of the parties.

7. The attorney is ethically bound not to reveal attorney-client confidential communications. Model Code of Professional Responsibility EC 4-4 (1984); Model Rules of Professional Conduct Rule 1.6 (1983). In addition, all states recognize that there exists an attorney-client privilege which protects most of these communications from being revealed in a court proceeding. Both the ethical obligation and the evidentiary privilege are broader than those held by the psychotherapist in *Tarasoff* and, as this article will explore, involve different considerations.

8. W. Prosser & W. Keeton, Prosser and Keeton on The Law of Torts § 53 (5th ed. 1984). The New Jersey Supreme Court stated that "[w]hether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the

existed, the courts looked primarily at the allegedly improper conduct, distinguishing between misfeasance and nonfeasance.[9] Without much difficulty, the courts found liability for failure to warn when there was an affirmative act, or misfeasance. But the courts were reluctant, and continue to remain reticent, to force persons to help one another.[10] In finding no liability for nonfeasance, the courts reasoned that when there was no affirmative act, there could be no duty. Unlike misfeasance, the defendant had not made the situation worse by his failure to warn, but had only failed to benefit another.[11] The case reporters are replete with decisions echoing these ideas.[12] These decisions appear callous in result[13] both to the public and to many in the legal profession. Writers have strongly criticized these decisions for their failure to impose a natural legal duty upon men to keep others safe from harm.[14]

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parties, the nature of the risk, and the public interest in the proposed solution." Goldberg v. Housing Authority of Newark, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) (emphasis in original).

9. W. PROSSER & W. KEETON, *supra* note 8, § 56. Professor Harper and Judge Kime discuss this distinction between misfeasance and nonfeasance. They recognize that the line that separates the two is shadowy in places and is subject to manipulation with the result being that any set of facts is capable of being either compressed or expanded to fit into one mold or the other. They find that a sounder basis of analysis is the relationship of the parties. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

10. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

11. S. GREEN, JUDGE AND JURY 62 (1930). *See generally* W. PROSSER & W. KEETON, *supra* note 8.

12. Louisville & Nashville R.R. v. Scruggs, 161 Ala. 97, 49 So. 399 (1909); Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966); Bishop v. City of Chicago, 121 Ill. App. 2d 33, 257 N.E.2d 152 (1970); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Farwell v. Keaton, 51 Mich. App. 585, 215 N.W.2d 753 (1974); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898); Sidwell v. McVay, 282 P.2d 756 (Okla. 1955); Cramer v. Mengerhausen, 275 Or. 223, 550 P.2d 740 (1976); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959); *see also* Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981) (wherein the court disallowed civil action against police for failure to investigate and dispatch officers to scene of crime when called by victims because no specific duty was owed by police to individual without existence of special relationship). *Contra* Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984) (the court found that there was a duty owed to the public to remove intoxicated motorists from the highway because a special relationship exists between the police and the public).

13. The Supreme Court of Kansas stated with poignant effect, the position of the courts. "With the humane side of the question courts are not concerned. . . . For withholding relief from the suffering . . . penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence or punishment for the recreant act is swift and sure." Union Pacific Ry. v. Cappier, 66 Kan. 649, 633, 72 P. 281, 282 (1903).

14. Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Bohlen, *supra* note 10, at

The courts, however, with the ebbing of the strongly individualistic philosophy of the early common law[15] and the increasing interdependence of societal units, responded to this criticism and began the transition toward finding a legal obligation to assist.[16] Courts have encountered great difficulty in arriving at a fair and workable rule for "rescuers" when there was no finding of causation on their part.[17] Even so, exceptions to the general rule of no liability for nonfeasance arose in the common law.

A. The Requirement of a Special Relationship

Courts have created these exceptions based on findings of special relationships between the defendant and the person whose conduct the defendant has the opportunity to control or between the defendant and the foreseeable victim of the threatened conduct.[18] Professor Harper and Judge Kime,[19] as early as 1934, analyzed the role that these special relationships play in society and the obligations tort law attaches to that role. Social policy heavily influences the law of torts.[20] Interactivities of human beings create social relationships.

217; Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196 (1946); Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DE PAUL L. REV. 147 (1980); Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Weinrib, *supra* note 10, at 247.

15. W. PROSSER & W. KEETON, *supra* note 8, § 56.

16. Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952). The state legislatures of Vermont and Minnesota have also recognized the need to impose a legal duty to assist others in trouble. In going beyond the normal immunity from liability for ordinary negligence to persons rendering aid that has been codified in what are commonly referred to as good samaritan statutes, these two states have made the duty to render aid mandatory with fines imposed for violation of the duty. VT. STAT. ANN. tit. 12 § 519(a) (1973); MINN. STAT. § 604.05 (Supp. 1987). This is unique in American law but is common in Europe, where thirteen countries have required that one must provide reasonable assistance to a person in peril. These countries are Czechoslovakia, Denmark, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Rumania, Turkey and the U.S.S.R. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 59 (1972). These changing legal obligations being imposed by the legislatures may better reflect the changing public policy than the courts. Note, *The Duty to Rescue and the Good Samaritan Statute: Minn. Stat.* § 604.05 (1984), 8 HAMLINE L. REV. 231 (1985); Note, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VT. L. REV. 143 (1982). A federal district court, by footnote, refused to apply the statute to civil liability noting that the statute dealt solely with "emergency medical care." St. Johnsbury & Lamoille County R.R. v. Canadian Pac. Ry., 341 F. Supp. 1368 (D. Vt.), *aff'd*, 469 F.2d 1395 (2d Cir. 1972).

17. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

18. W. PROSSER & W. KEETON, *supra* note 8, § 56.

19. Harper & Kime, *supra* note 9, at 886.

20. Caldwell v. Bechtel, Inc. 631 F.2d 989 (D.C. Cir. 1980); W. PROSSER & W. KEETON, *supra* note 8, § 56.

Some of these relationships are tenuous and the law attaches no special obligations to them. Others, however, are of sufficient importance to require certain assurances of safety to person and property for a sound and stable social order. The general attitude of the community molds the social policies that ultimately determine which relationships require what assurances. It is the purpose of the common law to interpret these policies and to incorporate them into bodies of law. With the changing character of society, these relationships become more and more complicated, necessitating modifications and extensions of the common law. The recent modifications and extensions of the common law in the area of special relationships giving rise to duties to warn show that the principles governing the duty owed by one person to another have the same elasticity that characterizes much of modern tort law.[21]

The first of these exceptions to the common law rule precluding liability arose when the courts recognized that an individual undertook a duty when he held himself out to the public as one who provides a service.[22] As a guideline, the *Restatement (Second) of Torts* has recognized certain relationships of this character.[23] Relationships warranting such a duty include carrier and passenger,[24] innkeeper and guest,[25] employer and employee,[26] mall owner and invitee,[27] and landlord and tenant.[28] All of these situations involve duties owed by the defendants to persons with whom they have a special relationship. Some courts have extended this duty of care arising from special relationships to include a duty of care to third persons. Relationships giving rise to a duty to third persons exist, for example, between hospitals and patients, when the patient may

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21. Harper & Kime, *supra* note 9, at 904.

22. Capital Elec. Power Ass'n. v. Hinson, 230 Miss. 311, 92 So. 2d 867 (1957). Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927).

23. RESTATEMENT (SECOND) OF TORTS § 314A (1965) sets out "Special Relations Giving Rise to Duty to Aid or Protect," which includes the relationships between common carrier and passengers, innkeeper and guests, possessor of land holding it open to the public, and those who, by law or voluntarily, take custody of others and thereby deprive them of their normal opportunities to protect themselves.

24. Hanback v. Seaboard Coastline R.R., 396 F. Supp. 80 (D.S.C. 1975).

25. Tobin v. Slutsky, 506 F.2d 1097 (2d Cir. 1974); Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 561 (1966); Allen v. Babrab, Inc., 438 So. 2d 356 (Fla. 1983).

26. Lillie v. Thompson, 332 U.S. 459 (1947).

27. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981).

28. Ramsay v. Morrissette, 252 A.2d 509 (D.C. Cir. 1969).

endanger other persons;[29] between possessors of land or chattels and a licensee;[30] between parole boards and inmates, when the inmate upon release poses a danger to the public;[31] between employers and employees, when a dangerous employee may harm the public;[32] between police officers and members of the public, when a member of the public is injured by an intoxicated motorist;[33] and between parents and children, when a parent may be legally responsible for the actions of his child.[34]

B. The Requirement of a Right to Control

All of these duties that courts have found to be owed to a third party arise from either an explicit or implicit right of control. But as the number of special relationships that courts deem to warrant a duty of care to third persons has increased, the requirement of defendant control over the dangerous individual has seemingly diminished. There remains, however, a requirement of some degree of control when it is necessary as a protective measure. Scholars, however, have forecast that control would not be a prerequisite if an express duty to warn were established. Dean Prosser predicted a further evolution in the common law to encompass such a duty not predicated on control:

> This process of extension has been slow, and marked with extreme caution; but there is reason to think that it may continue until it approaches a general holding that the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid with little inconvenience, creates a sufficient relation to impose a duty of action.[35]

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29. Merchants Nat'l. Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967).

30. Mangione v. Dimino, 39 A.D.2d 128, 332 N.Y.S.2d 683 (Sup. Ct. 1972).

31. Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).

32. Wanca v. Penn Indus., 260 F.2d 350 (2d Cir. 1958).

33. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984). *But see* Bailey v. Town of Forks, 38 Wash. App. 656, 688 P.2d 526 (1984).

34. Estate of Mathes v. Ireland, 419 N.E.2d 782 (Ind. Ct. App. 1981); Mitchell v. Wiltfong, 4 Kan. App. 2d 231, 604 P.2d 79 (1979); Eldredge v. Kamp Kachess Youth Serv., 90 Wash. 2d 402, 583 P.2d 626 (1978).

35. W. PROSSER & W. KEETON, *supra* note 8, § 56 at 377. This language also appears in W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) and therefore is attributed to Dean Prosser.

It is within this area of growing exceptions[36] that the proposed duty of the attorney to potential victims of his client should fall.

The California Supreme Court approached Dean Prosser's prediction of the development of a duty to warn in the landmark case of *Tarasoff v. Regents of the University of California*.[37] The court did not require the element of defendant's control, but instead varied what was required of the defendant by the nature of the duty imposed.[38] *Tarasoff* involved a psychotherapist's failure to warn the intended victim of his patient's threat to kill her.[39] The court did not require that there be any control, but instead looked carefully at the psychotherapist-patient relationship and the type of duty to be imposed.[40] The court concluded that by entering into a doctor-patient relationship,[41] the therapist became sufficiently involved to assume some responsibility, not only for the safety of his patient, but also for the safety of third persons whom the doctor knew to be threatened by his patient.[42] Thus, the court applied the

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36. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

37. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). Mr. Poddar told his clinical psychologist during treatment at the student health center at the University of California of his intention to kill Ms. Tarasoff. The psychologist considered Poddar to be potentially dangerous and requested that he be detained by the police for possible civil commitment. The campus police took Poddar into custody briefly, but released him when he did not appear dangerous. The psychologist's supervisor directed that no further action be taken to detain Poddar. No one warned Ms. Tarasoff or her family of the threats. Later, Poddar killed Ms. Tarasoff. *Id.* at 430-31, 551 P.2d at 339-40, 131 Cal. Rptr. at 19-20. The reported case of the criminal prosecution sets out the facts in greater detail. People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

38. *Tarasoff*, 17 Cal. 3d at 433-45, 551 P.2d at 342-49, 131 Cal. Rptr. at 22-29.

39. *Id.* at 431, 551 P.2d at 339-40, 131 Cal. Rptr. at 19-20.

40. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. It may be argued that *Tarasoff* substituted the requirement of professional expertise for the element of control required in relationships that are custodial in nature, so that it would not be a question of whether they have the ability to control but rather the requisite training to reasonably foresee the danger and ability to act on it. The cases following *Tarasoff* do not support this argument. Those opinions are limited to a discussion of the special relationships rather than control or training. Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

41. The duty to warn third persons has long been recognized for the doctor-patient relationship. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612 (1921) (failure to warn of typhoid fever); Derrick v. Ontario Community Hosp., 47 Cal. App. 3d 145, 120 Cal. Rptr. 566 (1975) (failure to warn that patient had highly contagious disease); Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899) (failure to warn of danger of becoming infected by dressing husband's wounds); Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351 (1959) (failure to warn of tuberculosis); Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928) (failure to warn of infectiousness of small pox).

42. *Tarasoff*, 17 Cal. 3d at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (1976) (quoting Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1030 (1974)).

exception set out in Section 315 of *The Restatement (Second) of Torts*.[43] Prior decisions involving physicians had either found a duty to control patients[44] or a duty to warn third persons.[45] It was, therefore, a logical progression to impose this duty to warn on therapists in outpatient situations.[46]

The New Jersey Superior Court followed the California lead in *McIntosh v. Milano*.[47] The *McIntosh* court found that psychiatrists and therapists may have a duty to warn intended or potential victims of their patients.[48] The New Jersey court, in coming to the same conclusion as *Tarasoff* as to the existence of a special relationship, noted that duties to warn, including statutory requirements for the reporting of diseases, exist in doctor-patient relationships.[49] The court further found that there existed an additional special relationship between the therapist and the community.[50] According to the court, this relationship undeniably gives rise to an obligation to protect the welfare of the community.[51]

C. Significant Recent Decisions Imposing a Duty to Warn

In the most recent case finding a special relationship giving rise to a duty to warn, the Federal District Court of Nebraska in *Lipari v. Sears, Roebuck & Co.*[52] adopted the analysis of *Tarasoff* and

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43. *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

44. *Id. See, e.g.*, Vistica v. Presbyterian Hospital, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967). The *Vistica* court used the example of a hospital's duty to exercise reasonable care to control the behavior of a patient that may endanger other persons.

45. *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. The *Vistica* court referred to the doctor's duty to warn a patient if the patient's condition or medication renders certain conduct dangerous to others, such as driving a car.

46. *Tarasoff*, 17 Cal. 3d at 436, 551 P.2d at 344, 131 Cal. Rptr. at 24. The court recognized that a special relationship need not be established between the defendant and both the victim and the person whose conduct created the danger. *Id.*; *see also Vistica*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577.

47. 168 N.J. Super. 466, 403 A.2d 500 (1979).

48. *Id.* at 489, 403 A.2d at 511-12.

49. *Id.* at 484-85, 489-90, 403 A.2d at 509-10, 512.

50. *Id.* at 486-87, 489-90, 403 A.2d at 510, 512.

51. *Id.*

52. 497 F. Supp. 185 (D. Neb. 1980). This case arose when Mr. Cribbs entered a night club and fired a shotgun into a crowded dining room, killing Dennis Lipari and seriously wounding his wife. Cribbs had purchased the gun from Sears and had been receiving psychiatric care from a day care facility of the Veterans Administration. *Id.* at 187. The judge, in his order denying the Government's motion to dismiss the action against the Veterans Adminsitration, looked to Nebraska law as required under the Federal Tort Claims Act. *Id.* at 190. The court stated that the decisions in *Tarasoff* and *McIntosh* were a well-reasoned framework for analysis of the issue but acknowledged that it was bound to determine first whether the Nebraska Supreme Court would adopt the analysis. *Id.*

McIntosh. *Lipari* also found a special relationship to exist between therapist and patient. The judge found that Nebraska's recognition of a doctor's duty to the public to disclose information to prevent the spread of a contagious disease gives rise to the inference that the physician-patient relationship imposes affirmative duties on the physician for the benefit of third persons.[53] The court thereby found that the relationship between therapist and patient, which is sufficiently similar to that of physician and patient, justifies the imposition of an affirmative duty on therapists.[54] To date, every court faced with this question has found that a doctor-patient or therapist-patient relationship is sufficient to support an affirmative duty.[55]

The courts, in creating affirmative duties prior to *Tarasoff*, *McIntosh*, and *Lipari*, had found that a power to control was a prerequisite to the imposition of a duty to warn.[56] The elimination of the requirement of an element of control is one of the most significant changes made by these recent decisions. All three of these decisions involved relationships in which control was non-existent or minimal.[57] The degree of control in the earlier cases was relevant in determining what protective measures could reasonably be expected. But, as the court in *Tarasoff* found, non-existence of control does not justify complete failure to impose a duty.[58]

As with the therapist-patient relationship, control is absent from the special relationship that exists between attorneys and clients.[59] Attorneys do have control to the extent that an attorney gives his

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53. *Id.* at 191-93.

54. *Id.* at 191.

55. The decision in Tarasoff was greatly criticized. However most of the criticism dealt with the preservation of therapist-patient confidential communications rather than the legal question of whether the relationship was sufficient to sustain an affirmative duty. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists To Safeguard Society*, 90 HARV. L. REV. 358 (1976). In addition, legal writers have called for the extention of the duty in *Tarasoff* to forensic psychiatrists. Note, *The Application of the* Tarasoff *Duty to Forensic Psychiatry*, 66 VA. L. REV. 715 (1980).

56. See Note, *Affirmative Duties in Tort Following* Tarasoff, 58 ST. JOHN'S L. REV. 492, 518-22 (1984), in which one commentator argued that attorneys do have an ability to control similar to that found in relationships that the law has recognized as sufficiently "special" to warrant the imposition of affirmative duties. This argument might not withstand a vigorous analysis and comparison with the various elements of control from special relationships in which duties are recognized.

57. Prior to those decisions, the cases had dealt with situations in which there was already custodial control and, therefore, there was an association of the duty with this custodial control.

58. *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

59. Note, *supra* note 56, at 522.

client advice and the advice is often followed.[60] But this control is not the type formerly giving rise to the duty to act. Courts may ultimately have to explore the degree to which some attorneys could control their clients, but only in those cases in which the court is considering requiring control as an element of the imposition of a duty.[61]

With this slow but continuous extension of exceptions to the common law arising from special relationships comes additional questions: Is the relationship between the attorney and client special enough to warrant the imposition of affirmative duties to third persons? Is the relationship between the attorney and the general public special enough to warrant the imposition of affirmative duties to third persons?

II. What Courts Consider the Characteristics of Special Relationships

In order to answer these questions, one must determine what the courts consider as special relationships. The California Supreme Court did not attempt to expressly answer this in *Tarasoff*.[62] The court was silent as to what characteristics of the relationship between therapist and patient justified a deviation from the common law rule that no duty existed to protect third persons. The court merely analogized the relationship to that of physician and patient, basing its determination on the long standing requirements of the medical profession to warn the public.[63]

The *Restatement (Second) of Torts* is no more helpful in defining what is required of a relationship to make it "special." Section 314A, entitled "Special Relations Giving Rise to Duty to Aid or Protect," is just as vague as *Tarasoff*.[64] It merely sets out those specific relationships that have been previously recognized in the common law as exceptions to the rule. In the caveat to that section, the American Law Institute is completely noncommittal regarding

60. Courts previously had found that there was no requirement that the doctor possess control over his patient in doctor-patient relationships in which the doctor was required to warn the public of a contagious disease.

61. The cases generally do not find a duty requiring some control unless there are actually elements of control existing as opposed to the mere possibility of influence. *See, e.g.*, Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976).

62. *See supra* notes 37-46 and accompanying text.

63. *Tarasoff*, 17 Cal.3d at 437, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.

64. Restatement (Second) of Torts § 314A (1965).

the imposition of a duty, expressing no opinion concerning whether duties arise from other relationships.[65]

Professor Harper and Judge Kime's analysis provides guidance for establishing criteria to determine whether a special relationship exists.[66] These scholars state that when guarantees of safety to person and property are necessary for a sound and safe social order, the attitude of the community will require affirmative assurances from a particular relationship.[67] This approach seeks a balancing of the threat to public safety with the difficulty that would be incurred by imposing the duty. The court in *Tarasoff* utilized just such an approach, weighing the ease of issuing a warning against the gravity of the preventable physical injury and thereby carved out an exception to the common law by finding a special relationship.[68]

Professor Leon Green recognized that the same customs and mores that control other aspects of society, including the everyday relations that prevail throughout society, control the decisions of the courts. He asserted that attempting to label these factors would encourage dispute as to the terms and their meanings.[69] Seemingly, because of a fear of this result, courts hesitate to define "special relationships." By ambiguously defining or making no attempt to define what constitutes a special relationship, the courts remain unhampered to make extensions and exceptions to the common law.[70] Thus, in refraining from defining this important term, the courts remain free to consider the changing nature of relationships

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65. *Id.*

66. Harper & Kime, *supra* note 9. Additional support can be found following other approaches. Professor Marshall Shapo analyzes these relationships and corresponding duties based on power. His general thesis is that persons who can use energy, ability, or information to aid others in serious peril without significant inconvenience or harm to themselves should do so. M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER & PUBLIC POLICY xii (1977).

67. Harper & Kime, *supra* note 9, at 904-05.

68. 17 Cal. at 438-41, 551 P.2d at 344-46, 131 Cal. Rptr. at 24-26.

69. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1033 (1928).

70. Professor Green argues that there are factors that are common to all sorts of relationships, including the law, that control how they are administered. He lists five that are the most significant in influencing the determination of duties. Green lists these as "(1) the administrative factor, (2) the ethical or moral factor, (3) the economic factor, (4) the prophylactic factor, and (5) the justice factor." Green, *supra* note 69, at 1034-35. He argues that each of these must be considered to some extent to reach an acceptable decision. When one or more of the "social senses" that correspond to these factors is offended, the human interest that seeks protection by the imposition of a duty will fail to receive the protection sought, hence no duty will be found. *Id.*

in society and what responsibilities should result from these changes.[71]

A. Application of These Principles to the Attorney-Client Relationship

1. The Attorney's Conflicting Duties to the Client and the Public

The relationship between a lawyer and his client is distinct from many other relationships because of the confidentiality that exists

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71. In discussing this conflict, it will be helpful to distinguish between the attorney-client confidential communication and the attorney-client privilege. The terms are not necessarily interchangeable. Confidential communications generally refer to communications, both oral and written, between an attorney and his client. Such communications may include information that the attorney obtains regarding the client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1984); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). The mandate for protection of the confidential communications is found in the CODE OF PROFESSIONAL RESPONSIBILITY in Canon 4 and in the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 "Confidentiality of Information." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1984); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). The term attorney-client privilege on the other hand is an evidentiary privilege and refers to the client's right to prevent his confidential communications from being revealed in a court proceeding. Authority for this privilege may be found in either the common law or by statute in all of the states. The attorney-client privilege is a time honored right that seems to have its roots in Roman law, in which tribunals forbade a lawyer to be a witness in his client's case. Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 17 CALIF. L. REV. 488-89 (1928). The rationale for the rule was that the testimony could not be believed since the advocate had a strong motive for misstatement. In addition, it was generally thought that it would violate solidarity with the client and thus make the advocate a disreputable person, unworthy of belief. *Id.* Dean Wigmore and Professor Hazard disagree as to how strong a foundation the privilege had in early English law, but the two scholars agree that by the eighteenth century the emphasis upon the honor of the advocate had diminished and that the basis that supported the privilege was the need for full disclosure to the lawyer. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, §§ 2290, 2291 (McNaughton rev. ed. 1961); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070 (1978). From its adoption in American common law, the attorney-client privilege was fraught with exceptions and limitations. J. WIGMORE, *supra*, §§ 2290, 2291. *See, e.g.*, Hatton v. Robinson, 31 Mass. (14 Pick.) 416 (1833); Rochester City Bank v. Suydam, Sage & Co., 5 How. Pr. 254 (N.Y. Sup. Ct. 1851); Dixon v. Parmelee, 2 Vt. 185 (1829). G. HAZARD AND W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 1087-90 (1985).

The basic test to determine whether a communication is confidential and whether a communication is entitled to treatment as a privileged communication is the same. The attorney-client privilege is more limited than the ethical obligation for it applies only to communications between lawyer and client and does not include information the lawyer learns on his own during the course of his representation. In addition, the privilege may be lost if third persons other than the lawyer's employees and agents are present during the conversation. United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978); Buntrock v. Buntrock, 419 So. 2d 402, 403 (Fla. Dist. Ct. App. 1982). This article will make reference to both confidential and privileged communications.

between the client and his attorney. The question of whether to reveal communications between attorney and client raises a conflict between important competing policies: the protection of attorney-client confidential communications and the role of confidentiality in the administration of justice and the public interest in safety from violent assault. Which of these policies should prevail in such a conflict? There is no judicial decision directly addressing the question of where the balance should be struck.

The primary policy underlying both the attorney-client privilege and confidence is to facilitate full and complete disclosure by the client to his attorney in order to provide for the proper administration of justice. This policy has been recognized by the United States Supreme Court[72] and other authorities,[73] and has recently been vehemently defended in the debate over changes in the *Model Rules of Professional Conduct*.[74] Professor Monroe Freedman, an ardent advocate for the attorney-client confidence, has proposed that there are at least two benefits of this relationship to the public interest: enhancement of individual autonomy by increasing the client's knowledge of the lawful choices available to him, and furtherance of trust between lawyer and client, placing the lawyer in a position to give advice that is socially desirable.[75] Are these policies of the privilege and the confidential communication thwarted or threatened by placing a duty on attorneys to reveal communications that involve a threatened crime?

Professor Freedman argues that clients who may be tempted to commit crime can often be dissuaded by professional counsel, but only if the lawyer knows of the intended crime. Thus the public interest is furthered by trust between lawyer and client.[76] Professor Freedman's argument depends on two important conclusions. First, it depends on whether the client will be less likely to communicate to his lawyer an intent to commit physical harm to another if the

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72. Trammel v. United States, 445 U.S. 40 (1980). Chief Justice Burger wrote: "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* at 51. The courts have not blindly granted the privilege, but have looked at balancing the suppression of truth with the betrayal of confidence.

73. Radin, *supra* note 71, at 487.

74. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980). G. HAZARD AND W. HODES, *supra* note 71, at 89.

75. Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A.J. 428 (1982).

76. *Id.*

attorney's legal duty is to take reasonable steps to warn or protect the intended victim. This is not the case under the present system of professional responsibility since the attorney may reveal communications of a client to commit a future crime.[77] Second, it depends on the premise that the lawyer will attempt to dissuade his client from committing the crime. In the first instance, it is unlikely that a client would discern a distinction between a legal duty to reveal and the attorney's ethical option of revealing. If there is any hesitancy in communicating information to the attorney, it would be the same in either instance. The client would be just as likely to communicate his intent to commit a crime whether his lawyer had a legal duty or an ethical right to reveal the information. In addition, an individual who is likely to communicate an intent to commit physical harm is arguably not as rational as other clients and, therefore, would be less likely to be as concerned with such fine distinctions. Nor would such an irrational individual be easily dissuaded from his threatened action. Furthermore, the imposition of a legal duty to take action would be more likely to assure extensive discussion of the threatened action between the lawyer and his client as called for by Professor Freedman. The present system provides no encouragement to the lawyer to dissuade his client from violence. The only present check on the lawyer's conduct is his own conscience. The imposition of the additional impetus of a duty to warn would, therefore, further the public interest. The lawyer would then have a real incentive to either dissuade the client from committing the crime or provide an effective warning.

But even Professor Freedman recognizes that communication concerning a client's intention to commit acts that forseeably might result in serious bodily harm to others is not the type of communication intended to be protected under the attorney-client confidence. Freedman writes that "it seems clear that the lawyer should reveal information necessary to save a life."[78] This statement indicates that social policy supports such a duty when the nature of the harm is great. The incursion that Professor Freedman and many lawyers fear is not in the area of threatened violent acts, but in the area of communications that deal with possible perjury or future torts.[79] This author's research has uncovered no published argument

77. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1980).
78. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, 6 (1975).
79. *Id.; see also* Bowman, *The Proposed Model Rules of Professional Conduct: What*

for preventing an attorney from revealing communications when his client's statements involve threats of future physical harm to another.

On the other hand, the historical exceptions to the attorney-client privilege found in the *Federal Rules of Evidence*,[80] the *Standards for Criminal Justice*,[81] the *Code of Professional Responsibility*[82] and, by analogy, the cases that place a similar duty to take reasonable care to warn or protect on psychotherapists in their therapist-patient relationships all provide support for the required revelation of communications from a client to his attorney when the communication involves possible physical violence.[83] Courts may look to the *Federal Rules of Evidence*[84] for an expression of legislative policy concerning the balance between the safety of foreseeable victims and protection of communications between attorney and client. Similarly, Rule 502(d)(1) of the *Revised Uniform Rules of Evidence* provides an exception to the attorney-client privilege for situations when "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit

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Hath the ABA Wrought?, 13 PAC. L.J. 273, 301-04 (1982); Comment, *The Proposed Model Rules of Professional Responsibility: Disclosure of Clients' Fraud in Negotiation*, 16 U.C. DAVIS L. REV. 419 (1983).

80. FED. R. EVID. 501 (1984); UNIF. R. EVID. 502(d)(1), 13A U.L.A. 257 (1986).

81. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-3.7 (rev. ed. 1984).

82. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4- 101(c)(3) (1980).

83. Lipari v. Sears Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

84. The *Federal Rules of Evidence* have been adopted by 27 states, Puerto Rico and the military: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, Wyoming, Vermont and Utah. Of these, Arizona, Colorado, Iowa, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington and Wyoming omitted section 502.

Debate over the proposed privilege rules, which at one time included some thirteen different privileges, delayed the adoption of the *Federal Rules of Evidence* over two years. There was considerable concern that the adoption of specific privileges would be substantive rather than procedural. Debate also revealed other constitutional questions. Congress compromised by codification of a general rule, Federal Rule of Evidence 501, which allows federal courts to apply the state law on privileges. 2 J. WEINSTEIN & M. BERGES, WEINSTEIN'S EVIDENCE § 501[01] (1975). At least one federal court has applied the draft of Rule 503, which is Rule 502 in the Revised Uniform Rules of Evidence, even though Congress did not adopt it. The court recognized that the reason Congress did not specifically adopt an attorney-client privilege was not a rejection of the privilege itself but rather that Congress chose not to enunciate the privilege by rule. *In re* Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich. 1977).

what the client knew or reasonably should have known to be a crime or fraud."[85] A strict interpretation of this exception includes only the client's furtherance of a crime or to situations when the client actually seeks aid from the attorney to commit an illegal act.[86] But even a strict interpretation makes clear that attorneys must carefully scrutinize communications involving future crimes to see if they warrant the protection of the privilege. When those crimes might result in physical injury or death, the balancing test is less difficult since the policy for the privilege, as recognized by the United States Supreme Court,[87] is the proper administration of justice. One cannot logically argue that protecting communications threatening future violence serves such a policy.

In addition to the expression of legislative policy embodied in the *Federal Rules of Evidence*, the American Bar Association has expressed its position on the balancing of these interests. The clearest expression of the ABA's policy is contained in the *Standards Relating to the Administration of Criminal Justice*. Standard 4-3.7(d), which is directed to defense lawyers, states:

> [A] lawyer may reveal the expressed intention of a client to commit a crime and the information necessary to prevent the crime, and the lawyer *must* do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his or her part is necessary to prevent it.[88]

Though the commentary that follows this standard is not part of the official ABA policy, it does represent the opinions of the judiciary as well as the defense and prosecution attorneys that make up the ABA Standards Committee on Association Standards for Criminal Justice.[89] In the commentary, the Committee stated that the lawyer should reveal the client's intention to commit a crime, especially when the crime is one that would seriously endanger

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85. UNIF. R. EVID. 502(d)(1), 13A U.L.A. 257 (1986).

86. Dean Wigmore, an advocate of the privilege, admitted that the basis for the privilege was unverifiable and that the privilege should be given a narrow application: "[The privilege's] benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 J. WIGMORE, *supra* note 71, § 2291 at 554.

87. Trammel v. United States, 445 U.S. 40 (1980).

88. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 4-3.7 (rev. ed. 1984) (emphasis added).

89. *Id.* at XV.

someone's life or safety. According to the Committee, "the lawyer has a duty to take action to protect against [the crime's] commission."[90] The language adopted by both the ABA in these standards and the Committee in its comments is unequivocal. Whether the lawyer should act is not a matter of discretion, but is obligatory.

Unfortunately, other expressions of ABA policy are not as unqualified. The *Model Code of Professional Responsibility*, adopted in 1969 and last amended in 1980,[91] serves as the basis for most of the binding ethical codes adopted by the states. Disciplinary Rule 4-101(c)(3) provides that: "A lawyer may reveal: [t]he intention of his client to commit a crime and the information necessary to prevent the crime." This language, which almost all of the states presently use, does not call for mandatory disclosure.[92] It does, however, make revelation permissible, and, therefore, any such action would be ethical. Yet when the ABA began consideration of new standards, considerable debate[93] resulted from a proposal that called for mandatory disclosure.[94] Because of the controversy caused by that language, the drafting committee revised its final draft to retain the permissive language.[95] One might argue that this is the best expression of the public policy as to the disclosure of confidential communications since there was considerable debate before adoption by the ABA. One might further argue that the present policy is a rejection of mandatory requirements of disclosure.[96] Such ar-

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90. *Id.* at 4.50.

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

92. Florida and Virginia require disclosure. *See infra* note 118.

93. Burke, *ATLA-ABA Tiff Looms Over Altering Ethics Code*, Nat'l L.J., May 19, 1980, at 10; Freedman, *The Model Rules: Ready to Fly? Improved, but Unworthy of Adoption*, 69 A.B.A.J. 866 (July 83); Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyers Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 740 (1981); Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1 (1980); Subin, *War Over Client Confidentiality: In Defense of the Kutak Approach*, Nat'l L.J., Jan. 19, 1981, at 22; *see also* MODEL RULES OF PROFESSIONAL CONDUCT, Chairman's Introduction at 507 (1983).

94. The Discussion Draft, released in January 1980, included language that a lawyer shall disclose information to the extent necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (Discussion Draft 1980). When the mandatory language was deleted, Rule 1.7(b) was changed to Rule 1.6(b)(1).

95. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

96. The version adopted by the House of Delegates of the American Bar Association in August 1983 is found in Rule 1.6(b)(1) and reads: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from com-

guments strengthen assertions that confidentiality between attorney and client is preferred.

There are, however, several problems with these arguments. The first is that the *Model Code* permits disclosure; therefore, such disclosure is not a violation of any ethical standards. When this is coupled with the implicit need to provide for an exception to the otherwise inviolate rule of confidentiality in order to protect others, it is arguable that the prevention of bodily harm or death outweighs all other considerations. Further, the policy of the ABA is not an expression of public policy, but instead is the policy of lawyers. Much of the criticism of the ABA's rejection of the earlier drafts containing mandatory language requiring disclosure alleged that the true reason for rejecting those drafts was self-serving and not for the betterment of the public.[97] That the majority of the House of Delegates of the ABA was unwilling to make disclosure mandatory does not give us a true indication of public policy, but only what requirements lawyers are willing to impose on other lawyers.

Even though the privilege of confidentiality is the client's and not the lawyer's, some unscrupulous members of the legal profession have used the privilege to hide behind and to avoid the moral world and its responsibilities. Attorneys following that course of conduct may remain amoral and turn aside those difficult moral dilemmas and decisions, responding to challenges with assertions that the lawyer's job is to represent his client's interests, not to make determinations about whether his client is going to violate the law.[98] It is unquestionable that the decision of whether the client's statement is a real threat is an extremely difficult one. Without a mandatory disclosure requirement one may avoid having to

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mitting a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The comments that accompany the Model Rules are even more explicit in stating that even within this limited context a disclosure is purely discretionary: "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does *not* violate this Rule." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1984) (emphasis added). The changes made by the American Bar Association from its prior Model Code do represent a more limited exception to confidentiality by the more specific language employed. Under this rule there are three requirements that were not present in the prior Model Code. First, the disclosure is limited to the information necessary to prevent the crime. Second, the crime is one likely to result in imminent death or substantial bodily harm. Third, both requirements are based on a reasonable belief by the lawyer. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

97. G. HAZARD & W. HODES, *supra* note 71, at 102.

98. Wasserstrom, *infra* note 136, at 9.

answer that difficult question, with the possible result of physical harm to or loss of life of another. Because the attorney has an obligation to avoid these consequences, the requirement of answering the question is a natural responsibility that a lawyer should assume upon entering the profession.

Whether the individual states will adopt the language of the ABA's *Model Rules of Professional Conduct* remains to be seen. The Supreme Court of Arizona has adopted a version of Rule 1.6 that requires disclosure,[99] while Florida and Virginia, which have ethical codes adopted from the ABA's *Model Code*, also require disclosure.[100] The fact that some states have chosen language that places more importance on public safety than on attorney-client communication is especially significant considering the debate surrounding the new *Model Rules* and the language that was ultimately adopted.

The courts in *Tarasoff*,[101] *McIntosh*[102] and *Lipari*[103] raised these same issues. The courts dealt with these issues by balancing the therapist-patient privilege and its protecting of confidential communications against protecting public safety. All three courts, in weighing the policies, found the protection of the public to override the therapist-patient privilege. In fact no court, in considering the imposition of this duty, has rejected this conclusion.[104] In *McIntosh*,[105] the New Jersey Superior Court, in recognizing that a therapist has a duty to take reasonable steps to protect a potential victim from his patient, even went so far as to analyze the language of the *Principles of Medical Ethics* as consonant with the ethical requirements of attorneys in the attorney-client relationships.[106]

The *McIntosh* court adopted the view that psychiatrists may find it necessary, in order to protect the community from imminent danger, to reveal confidential information disclosed by the patient.

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99. 17A A.R.S. RULES OF PROFESSIONAL CONDUCT Rule 42 ER 1.6(b) (1986) ("A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.").

100. FLA. STAT. § DR 4-101(D)(2) (1986); VA. CODE § II DR 4-101(D)(2) (1986).

101. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

102. 168 N.J. Super. 466, 403 A.2d 500 (1979).

103. 497 F. Supp. 185 (D. Neb. 1980).

104. The courts have either decided that it was not foreseeable for that particular victim in that they were not easily identifiable or did not have to decide the issue of whether there was a duty.

105. *Tarasoff*, 168 N.J. Super. 466, 403 A.2d 500 (1979).

106. *Id.* at 491, 403 A.2d at 512.

The court went on to say that this principle applied to attorneys as well, indicating that the court would be receptive to imposing on attorneys a similar duty to warn.[107] Though neither the *Tarasoff* nor *Lipari* opinion contained such indications of the applicability of the courts' opinion to other relationships, they were both clear that, when it came down to the competing interests in protecting confidential communications and safety of the public, safety prevailed.[108]

In balancing confidentiality with public safety, it would be helpful to know if either serves the purposes for which it has been touted. To empirically test the effect that the privilege of confidential communications has on what people divulge to counsel would be extremely difficult and the results highly questionable. Studies could not adequately segregate other factors that affect one's willingness to confide totally in his attorney. In one empirical study of the psychotherapist-patient privilege, researchers attacked the theoretical justification that the absence of a privilege deters or delays people from seeking therapy.[109] The major consideration, according to the researchers, was anonymity, which was not preserved by a privilege.[110]The findings of their study further revealed that the privilege played no role in the patient's decision to seek therapy.[111] There was also no showing of a change in the numbers of persons seeking therapy after the enactment of a psychotherapist-patient

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107. *Id.* at 491, 403 A.2d 513.

108. This is not to say that the courts were not concerned with predictability of dangerousness or foreseeability of potential victims. These remain important concerns of the courts. The *Lipari* court, in interpreting what it thought to be Nebraska law, did not require that the victim be identified. Instead the court found that the class of persons of which the victim was a member be foreseen to be exposed to an unreasonable risk of harm. Lipari v. Sears Roebuck & Co., 497 F. Supp. 185, 194-95 (D. Neb. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 281, comment C). *Tarasoff* did not require that the victim be readily identifiable but subsequent cases have limited it to identifiable victims. Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 599, 162 Cal. Rptr. 724, 729 (1980).

109. Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 928 (1982).

110. *Id.* at 900-01; *The Eagleton Affair: Stigma of Mental Disorder*, Sci. News, Aug. 5, 1972, at 84.

111. Shuman & Weiner, *supra* note 109, at 925. One year after the *Tarasoff* decision *Stanford Law Review* conducted an empirical study of California therapists to determine the effects of *Tarasoff*. The survey concluded that the decision did not result in the destruction of effective therapeutic relationships as had been predicted. In fact, therapists admitted having warned third persons threatened by their patients prior to *Tarasoff*. Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 190 (1978).

privilege.[112] True, the attorney-client privilege and confidential communication differ from the psychotherapist-patient privilege in that anonymity, while it is generally preserved in the attorney-client context,[113] is not absolute.[114] Under either the present exception of permissive right of the attorney to reveal the confidence or the proposed affirmative duty to reveal, the attorney may potentially destroy the attendant anonymity. So, theoretically, the preservation of the client's anonymity will not affect the client's decision to communicate with his attorney.

As with the psychotherapist-patient relationship, there are factors other than confidentiality that may have more bearing on the client's willingness to communicate completely. The attorney must foster his client's trust and confidence in both the attorney-client relationship and the system in order for clients to feel confident in divulging additional facts.[115] It has always been difficult for the criminal lawyer to get his client to reveal all the relevant facts due to a basic distrust by criminal clients in the whole judicial system and their unfounded fear that their lawyer will reveal all to the prosecutor.[116] This perception exists notwithstanding the long-established attorney-client confidentiality.[117] Does the change from permissive to mandatory language change the fact that under either provision the communication may not be confidential since the attorney is permitted by his ethical obligation to reveal the statement? Florida presently has a requirement that the attorney reveal the

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112. Shuman & Weiner, *supra* note 109, at 924-25.

113. The attorney-client privilege as distinguished from the confidential communication is much more limited and applies only to communications between attorney and client. The ethical confidential communication is broader and covers all information about a client. G. HAZARD & W. HODES, *supra* note 71, at 90. *See also* American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971); *In Re* Kozlov, 79 N.J. 232, 242-43, 398 A.2d 882, 887 (1979); Brennan v. Brennan, 281 Pa. Super. 362, 372, 422 A.2d 510, 515 (1980).

114. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1982) states: "A Lawyer may reveal: Confidences or secrets when . . . required by law or court order." This language does not appear in the new Model Rules of Professional Conduct, but it is argued that the "required by law" exception will be read into Rule 1.6. G. HAZARD & W. HODES, *supra* note 71, at 93-94; *see also In re* Grand Jury Proceedings (United States v. Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982).

115. Trammel v. United States, 445 U.S. 40, 51 (1980).

116. Blunt admissions to the client about the likely consequences of withholding crucial facts from his attorney is more effective than explanations of esoteric testimonial privileges to induce the client to speak freely. 4 CRIMINAL DEFENSE TECHNIQUES § 77A.12 (1986).

117. Freedman, *supra* note 75, at 431-32. Pickholz, *The Proposed Model Rules of Professional Conduct—And Other Assaults Upon the Attorney-Client Relationship: Does "Serving the Public Interest" Disserve the Public Interest?*, 36 BUS. LAW. 1841, 1851 (1981).

communication,[118] yet there has been no criticism or showing that the rule has adversely affected the attorney-client relationship.

A greater problem arises in trying to show an effect on the public safety. Since the problem presents itself only as a threat, it would be almost impossible to show how many threats have been aborted by attorney actions. The main evaluative benefit may be the public perception of attorneys and the view that attorneys are not totally amoral or worse, immoral, as is the view of the public in many instances.

2. Is the Attorney-Client Relationship Special?

In determining if there should be a duty to warn imposed in the attorney-client context, it is important to examine the relationship that an attorney has with his client to see if it satisfies the somewhat nebulous tests of *Tarasoff* and the *Restatement (Second) of Torts* establishing what relationships are considered special. By any standard definition, the attorney-client relationship is a spe-

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118. In the recent debate over the proposed *Model Rules of Professional Conduct*, the argument arose that the so called "whistle blower" provision necessitates a disclaimer to the client similar to a *Miranda* warning. This would seriously jeopardize the trust that a client must have in his attorney. The Florida provision has been effective since October 1, 1970. FLA. STAT. CODE OF PROF. RESP. § DR 4-101(D)(2) (1986) reads: "A lawyer *shall* reveal: The intention of his client to commit a crime and the information necessary to prevent the crime" (emphasis added). Virginia also has a mandatory disclosure requirement but it did not go into effect until October 1, 1983. There has been no indication of problems as a result of its enactment. The Virginia provision is more specific. VA. CODE ANN. § II DR 4-101(D)(1) (1986) reads:

> A lawyer shall reveal: The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.

The Arizona Supreme Court has adopted the new Model Rules of Professional Conduct and followed the recommendation of the Arizona State Bar's Board of Govenors by amending Rule 1.6 to require disclosure. 17A ARIZ. REV. STAT. ANN. RULES OF PROFESSIONAL CONDUCT 42 ER 1.6(b) (1986). These rules became effective February 1, 1985 and thus have not been in force long enough to see what, if any, effect they will have on attorney-client communications, public safety or the public perception of lawyers.

Both the present *Code of Professional Responsibility* and the newly adopted *Model Rules of Professional Conduct* could be said to implicitly call for this same requirement in situations involving future crimes that might result in physical harm. However, no one has ever suggested that these ethical codes require any type of warning to the client or that they do harm to the attorney-client relationship.

cial one.[119] In many jurisdictions, attorneys are known as counselors at law.[120] The term "counselor" had special meaning at one time.[121] But now all lawyers in the United States perform the functions that once were divided between attorneys and counselors: to appear in court and argue cases as well as advise clients about legal matters.[122]

Further support for a determination that the attorney-client relationship is special is found in the fact that the attorney, as the problem solver in society, is often the first person sought to handle a problem, whether legal or nonlegal.[123] This role as a problem solver may have diminished in importance with the creation of more social agencies and non-legal specialists. But even now, the attorney is often the first one consulted by those with a variety of problems, referring those problems that are better handled by others to the proper agency, program or specialist. In the areas of domestic relations, debtor-creditor law, criminal law, business, tax, and innumerous other areas, the attorney is asked for advice ranging

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119. *Webster's* defines the term to be a distinctive or uncommon connection. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1525, 1741 (2d ed. 1979).

120. In speaking of the functions of a great lawyer, New Jersey Supreme Court Chief Justice Vanderbilt said that the first function was to be

> a wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice. Effective counseling necessarily involves a thorough going knowledge of the principles of the law not merely as they appear in the books but as they actually operate in action. In equal measure counseling calls for a wide and deep knowledge of human nature and of modern society.

Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954).

121. In the early history of the American legal profession the English practice, which makes a formal distinction between barristers (counselors) and solicitors (attorneys) was followed. LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERCIAN APPROACHES COMPARED 128 (H. Jones ed. 1977).

122. The English practice of having a formal distinction did not persist beyond the first years of the Republic. *Id.*

123. The Code of Professional Responsibility recognizes this role. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1982) states: "Advice of a lawyer to his client need not be confined to purely legal considerations." The *Model Rules of Professional Conduct* have gone further in recognizing the importance of advice that is not solely legal in nature. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) states in part: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The comment to this rule further explains the advice that a lawyer may render: "Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts."

from with whom the client can have sexual relations to whether he should sell his automobile. The relationship that a client has with his attorney may be considered many times more special than that between clergy and penitent, doctor and patient, or husband and wife[124] due to the broad range of issues dealt with by the legal profession.

Courts have long recognized the relationship between attorney and client as "special," requiring due care by the attorney in the work performed for the client.[125] He may be liable to either the client, or possibly third persons, if he is negligent in performing his professional work. The courts have further found the attorney client relationship to be a fiduciary relationship since it is one in which the client reposes special confidence or trust in the attorney resulting in influence and sometimes domination by the attorney.[126] What the courts are recognizing is a power that they have granted to the legal profession, a power to exclusive control of a vast body of information. Because of this power, the lawyer is able to wield enormous influence over both the individual client as well as the workings of the general public. By the imposition of duties of reasonable care in the performance of legal work and the requirement that one not unreasonably use this power of influence, the courts are defining the responsibilities that society attaches to the granting of the power to the legal profession. It follows that the imposition

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124. The RESTATEMENT (SECOND) OF TORTS gives the relations between husband and wife as an example of one in which a duty to aid or protect may be imposed in the future. RESTATEMENT (SECOND) OF TORTS § 314A, Comment b (1965).

125. *E.g.*, Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971); Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972); McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983); Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48 (1981); Comment, *Attorney Malpractice—Third Party Beneficiaries—Named Beneficiaries Under a Will May Bring a Cause of Action in Assumpset Against the Drafting Attorney*, 88 DICK. L. REV. 535 (1984).

126. Gaffney v. Harmon, 405 Ind. 273, 90 N.E.2d 785 (1950); Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983) (when the court finds trust and confidence on one side of the relationship and dominance and influence on the other, such relationships have been found to be fiduciary by the courts in addition to being "special" for the purposes of imposition of duties). Krieg v. Felgner, 400 Ill. 113, 79 N.E.2d 60 (1948); Marti v. Standard Fire Ins. Co., 127 N.J.L. 591, 23 A.2d 576 (1942); *In re* Estate of Eakle, 33 Cal. App. 2d 379, 91 P.2d 954 (1939). One commentator has suggested that attorneys should have a duty to warn when a special fiduciary relationship existed with their client such that they were receiving a benefit for their services coupled with an ability to control their client's affairs for the benefit of the threatened third party. Note, *Affirmative Duties in Tort Following* Tarasoff, 58 ST. JOHN'S L. REV. 492, 516 (1984).

on an attorney of a duty of reasonable care to warn in order to avoid serious physical injury to others at the hands of his client is another responsibility that society should impose in exchange for the attorney's right to control the valuable information society receives from the legal profession.

Within the profession itself, it is recognized that the attorney-client relationship is a special one, if not sacrosanct.[127] The Ethical Considerations for Canon 7 of the *Code of Professional Responsibility*, which represent the objectives and principles of the profession, state that the duty of a lawyer is to represent his client zealously.[128] This Canon itself calls for a unique relationship. In addition, the ties between attorney and client include another factor, economic bonds, which is sometimes looked on by the courts as important in the imposition of a duty.[129] Even those doing pro bono work are in a relationship that is as special as one with economic considerations and are under the same requirements and responsibilities with respect to their clients and third persons.[130] Thus it can be said that, under standard criteria, the attorney-client relationship is a unique and special one.

Applying the test discussed by Harper and Kime,[131] that which balances the threat of safety versus the inconvenience and burden that would be placed on the legal profession, it would be difficult to conclude anything but that a special relationship exists between attorney and client. To prevent serious physical injury or save a life by requiring an easily issued warning[132] would certainly be the

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127. In describing the lawyer's duty to zealously represent his client, the relationship between client and attorney was described as one of "sacred trust." Rochelle & Payne, *The Struggle for Public Understanding*, 25 TEX. B.J. 109, 159 (1962).

128. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1982). The new *Model Rules of Professional Conduct* contain no single rule that is as clear in stating the lawyer's duty to his client but the overall approach remains the same.

129. McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949). Dean McNiece and Professor Thornton refer to this as the "benefit principle." Their thesis is not limited to economic benefits but includes also social and psychological benefits. They argue that benefit is the sine qua non for the existence of duty in affirmative duty situations. *Id.* at 1282-87. Clearly if benefit is the guiding principle for determining whether a duty should be imposed, attorneys would unquestionably be required to take some reasonable action in these situations.

130. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

131. *See supra* note 55 and accompanying text. This test was first used in *Tarasoff* and impliedly adopted in *McIntosh* and *Lipari*.

132. This article does not address the very difficult question of breach of confidential communications between attorney and client.

community will of which Harper and Kime spoke.[133] The moral and social standards of our society undoubtedly mandate that a lawyer's knowledge obtained from his client by virtue of the unique relationship between attorney and client imposes a duty to warn.[134]

B. Does a Special Relationship Exist Between an Attorney and Third Persons?

It may also be argued that a special relationship exists between attorneys and both the public and third persons.[135] By the very nature of their position as professionals[136] and their obligation to work toward the fair administration of justice,[137] attorneys have a responsibility to the general public. They are granted an exclusive license to handle the affairs of the public,[138] even those affairs that determine the people's property, rights and liberty. In addition, not only is a lawyer licensed by the state to conduct an economic monopoly, but also much of the training received by attorneys is paid

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133. Harper & Kime, *supra* note 9.

134. W. PROSSER & W. KEETON, *supra* note 8, § 56.

135. This has already been extended to include liability to third parties for a lawyer's malpractice in the areas of estate planning, collection work, and real estate, with further expansion possible. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971); Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618 (1985); State *ex rel.* Scott v. Roper, 688 S.W.2d 757 (Mo. 1985). Avery, *Significant Current Trends Affecting Malpractice Liability of Lawyers in the Fields of Real Property, Probate and Trust Law*, 13 REAL PROP. & TR. J. 574 (1978). Probert & Hendricks, *Lawyer Malpractice and Nonclients*, 55 FLA. B.J. 620 (1981); Comment, *General Practitioners Beware: The Duty to Refer an Estate Planning Client to a Specialist*, 14 CUMB. L. REV. 103 (1984); Comment, *Attorney Malpractice—Third Party Beneficiaries—Named Beneficiaries Under a Will May Bring a Cause of Action in Assumpsit Against the Drafting Attorney*, 88 DICK. L. REV. 535 (1984); Comment, *Liability of Lawyers to Third Parties for Professional Negligence in Oregon*, 60 OR. L. REV. 375 (1981).

136. This term has been used liberally to include anyone that engages in an activity for pay. This includes such occupations as sports or even crime; however, this is not the sense that this term is employed here. "Professional" connotes one that works in a profession that has certain unique characteristics that set it apart from other occupations in society. The requirements that make one a professional include: (1) that there be a substantial period of formal education with several years devoted solely to the subject matter of the profession; (2) that the profession is both an economic monopoly and largely self-regulated. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). Professor Wasserstrom further defined "professions" as involving, "at their core a significant interpersonal relationship between the professional, on the one hand, and the person who is thought to require the professional services: the patient or the client." *Id.* at 2, n.1.

137. Langen v. Borkowski, 188 Wis. 277, 301, 206 N.W. 181, 190 (1925).

138. *In re* Snyder, 105 S. Ct. 2874 (1985).

for by considerable infusions of public money.[139] In addition, the lawyer is an officer of the court,[140] the institution from which social order emanates. The responsibilities assumed when one is admitted to the Bar go far beyond service to the client. As observed by Justice Cardozo, "[m]embership in the bar is a privilege burdened with conditions. [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."[141] A society that grants these privileges to attorneys should also expect the profession to assume the responsibility of taking reasonable steps to maintain the public safety, especially when the required effort is minimal. Under the Harper and Kime test, a special relationship arguably exists between attorneys and the public they serve.

There are important questions raised by this finding of a special relationship between attorney and client or attorneys and the public. Does the resulting duty extend to the general public, to a certain group, or only to named victims? How is an attorney going to know when his client's threats are real as opposed to mere remarks made to express emotions of frustration, lost love, or other feelings, without any intent to carry out the verbal minacity? These questions are often referred to as questions of forseeability.

C. Is the Injury Caused by the Client Forseeable?

Questions of forseeability are important considerations courts must address in determining whether they should impose any duty.[142] Such forseeability questions are especially significant when defining duties to warn, which courts may define as broadly as to include the general public or as specific as to include only a single, named individual. Because of problems of foreseeability, every court since *Tarasoff* that has considered a duty to warn has wrestled with the question of who is owed such a duty. The California Supreme Court in *Thompson v. County of Alameda*[143] unsuccessfully attempted to give some guidance as to whom a duty to warn must be given. In

139. Consider, for example, the supplementing of legal education by state legislation to state supported schools as well as government loans.

140. *Ex Parte* Garland, 71 U.S. 333, 378 (1866).

141. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928).

142. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

143. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

Thompson, county officials released James, a juvenile offender, to the custody of his mother without any warning to any agency or person. The county knew that James had indicated he would, if released, take the life of a young child in his neighborhood.[144] The California court, in what might be viewed as a retreat from *Tarasoff*, denied the existence of a duty to warn.[145] The court distinguished the facts in *Thompson* from those in *Tarasoff* by finding that, in *Thompson*, there was no specifically identifiable victim who could be effectively warned. In addition, the court gave great weight to policy considerations supporting the continuation of the county's rehabilitative release program.[146] Due largely to the court's concentration on issues that would protect the county government from liability, the *Thompson* court provided no guidance for the limitations that the court placed on the duty to warn.[147]

As the dissent pointed out, the identity of the victim was foreseeable in that he was a child from James' neighborhood. The dissent further asserted that the court should require at least some warning to the threatening juvenile offender's mother.[148] This warning would then have placed a traditional duty on the mother to control James or warn the neighbors. But the county had failed to take even this simple step. Countering the dissent's argument, the majority reasoned that it would be too speculative to expect a mother of an almost eighteen year-old juvenile offender to assume a twenty-four hour surveillance to prevent harm to some unidentified potential victim.[149] The disagreement among the members of the California Supreme Court is typical of courts addressing for-

144. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.

145. Murphy, *supra* note 14, at 174-75.

146. In addition to its concern to protect an unnamed victim, the court espoused considerable concern to protect the rehabilitative release program for juvenile offenders and to avoid the burden that would be placed on county governments by requiring a warning on release. The court also considered the pragmatic question of whether a general warning to either the mother or the neighborhood would have been effective. The court concluded that a general warning that a released offender posed an unspecific threat to the neighborhood would jeopardize rehabilitative efforts by its resulting stigmatization while at the same time not providing limited protection due to it being so indefinite as to who was threatened and how they were in danger. *Thomson*, 27 Cal. 3d at 754-58, 614 P.2d at 735-37, 167 Cal. Rptr. at 77-80.

147. Note, Thompson v. County of Alameda: *Tort Plaintiffs' Paradise Lost?*, 76 NW. U.L. REV. 331, 334 (1981). *See generally* Note, *Affirmative Duty After* Tarasoff, 11 HOFSTRA L. REV. 1013 (1983).

148. Thompson v. County of Alameda, 27 Cal. 3d at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80 (1980).

149. *Id.* at 758, 614 P.2d at 737-38, 167 Cal. Rptr. at 79-80.

seeability issues since problems of where to draw the line on forseeability are common.

The case of *Palsgraf v. Long Island Railroad*[150] clearly shows a divergence in views in the area of forseeability. Since *Palsgraf*, the state of the law on forseeability has not improved.[151] *Thompson*, like *Tarasoff*, concluded that the court should direct its attention to social policy in order to resolve the forseeability issue.[152] The *Thompson* court devoted much of its analysis of this issue to the policy of providing juveniles with a nonrestrictive release.[153] The majority found in favor of this policy instead of for what it termed an ineffectual warning to an undefined segment of the public.[154] What can be drawn from *Thompson* is that the forseeability inquiry necessitates a careful balance of the involved public policies. In the context of the attorney-client relationship therefore, there must be some benefit recognized by public policy to be derived from a duty to warn before courts should impose such a duty.[155]

The need for an effective warning is even more appropriate in the analysis of duty in the attorney-client context than in the *Thompson* situation. When the desire for public safety is balanced with the policy underlying the attorney-client confidence, the analysis requires a showing that the threat is real and that there is a possibility of identification of those threatened. It is not an oversimplification of the very difficult problem presented to require some specificity in either the threat or the identity of the victim. To require less would increase the possibility that neither desirable policy would be preserved. The more difficult question may be how much specificity is to be required.

The Washington Court of Appeals in *Hawkins v. King County*,[156] is the only court that has directly addressed the question of whether an attorney has a duty to warn. In making its determination, the court found that one of the critical factors was the identification

150. 248 N.Y. 339, 162 N.E. 99 (1928).

151. W. PROSSER & W. KEETON, *supra* note 8, § 43.

152. *Thompson*, 27 Cal. 3d at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.

153. *Id.* at 754-58, 614 P.2d at 735-37, 167 Cal. Rptr. at 77- 78.

154. *Id.* at 758, 614 at 738, 167 Cal. Rptr. at 80.

155. *See, e.g.*, Brady v. Hopper, 570 F. Supp. 1333, 1339 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984). Judge Moore, in dismissing a suit brought by persons injured in an assassination attempt on the President, expressly recognized that the prerequisite of a finding of specific threats to specific victims is a necessary policy when balancing it with the unpredictability of human behavior. *Id.*

156. 24 Wash. App. 338, 602 P.2d 361 (1979).

of a specific potential victim.[157] The court granted summary judgment to attorney Richard Sanders for an action brought against him by the mother of a former client in both her individual capacity and as the guardian of her son Michael Hawkins.[158] The Hawkinses charged that Sanders had negligently violated a common law duty to warn forseeable victims of an individual he knew to be potentially dangerous.[159] The Washington court distinguished the case from *Tarasoff* on the basis of three factual differences. First, Mrs. Hawkins was already aware of her son's possible dangerousness in contrast to Tatiana Tarasoff's ignorance of the patient's dangerousness or of any risk of harm.[160] Second, Sanders received no information that Hawkins actually planned to assault anyone, whereas in *Tarasoff* the patient stated his intent to do harm to Tatiana.[161] The third was that Sanders received no information directly from his client.[162]

The *Hawkins* court balanced social policies using principles of forseeability. The court, recognizing a common law duty on the attorney to warn,[163] limited that duty to situations in which the information gained by the attorney is specific enough to conclude that there is a real threat or that the potential victims are not already aware of the danger.[164] In effect, the court weighed the potential harm to the attorney-client relationship with the benefit of the preservation of safety, striking the balance in these circumstances by upholding the confidentiality of the attorney-client relationship.

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157. *Id.* at 339, 602 P.2d at 363. Plaintiff brought an action for legal malpractice. He also alleged that failure to disclose at the bail hearing the information that Sanders possessed regarding Hawkins' mental state was mandated by both court rules and the *Code of Professional Responsibility*. The court granted summary judgment in favor of Sanders.

158. *Id.* at 339, 346, 602 P.2d at 363, 366.

159. Sanders was appointed to represent Michael Hawkins on a possession of marijuana charge. He was told by an attorney employed by Hawkin's mother that Hawkins was mentally ill and dangerous. Five days later, a psychiatrist informed Sanders that Hawkins was mentally ill and was a danger to himself and others, warning that he should not be released from custody. At the bail hearing on the marijuana charge, Sanders did not volunteer any information regarding Hawkins' alleged illness or dangerousness. Hawkins was released on bond and Mrs. Hawkins was informed of her son's release. Eight days after his release, Hawkins assaulted his mother, and then attempted suicide resulting in the loss of both of his legs. *Id.* at 34, 602 P.2d at 363.

160. *Id.* at 344-45, 602 P.2d at 365-66.

161. *Id.*

162. *Id.* at 345, 602 P.2d at 366.

163. *Id.* at 343, 602 P.2d at 365.

164. *Id.* at 344, 602 P.2d at 365.

The proper prerequisite to the duty to warn for the attorney with a threatening client is that there is enough specific information available for the attorney to make some effective warning or take other measures amounting to reasonable care. Without this requirement of specificity, there may be many warnings made with no apparent likelihood that serious physical harm or death might result.

The lack of the requirement of specificity was a very legitimate criticism leveled at the duty imposed on therapists.[165] Without this requirement of definiteness a lawyer would be taking general actions with little positive effect and the possibility that his actions could be detrimental.[166] To provide the lawyer with guidelines within which he may act in the context of the threatening client makes it more likely that his actions will be reasonable and purposeful. How much information is required would be a question for the trier of fact under a reasonable person standard.[167] Such factual questions are always difficult, but the court system regularly requires juries to grapple with such issues in much more complex litigation.[168]

D. How Does an Attorney Know His Client Will Carry Out the Threat?

Another question raised is how an attorney untrained in psychology will be able to distinguish irrational statements from those that the client actually intends to carry out. Both before and after the *Tarasoff* decision, psychiatrists argued that they were unable to predict violent behavior in their patients;[169] therefore, if courts

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165. W. PROSSER & W. KEETON, *supra* note 8, § 56.

166. Dependent on the extent of the warning made by the attorney, the client's reputation may have been damaged. This could result in possible liability of the attorney for defamation. The specificity required would likely provide the truth necessary to avoid this exposure or avoid the publication of the threats.

167. In negligence cases the standard of care that one must meet is that of a reasonable man under like circumstances. RESTATEMENT (SECOND) OF TORTS § 283 (1965). The jury is instructed to take the circumstances into account. W. PROSSER & W. KEETON, *supra* note 8, § 32.

168. Standards of care for doctors in medical malpractice cases, industry standards of care in products liability cases, as well as attorneys standards of care in attorney malpractice cases are all matters presented to juries.

169. *See generally* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 33 (1976); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Gurevitz, Tarasoff: *Protective Privilege versus Public Peril*, 134 Am. J. Psychiatry 289 (1977); Skodol & Karasu, *Emergency Psychiatry and the Assaultive Patient*, 135 AM. J. PSYCHIATRY 202 (1978); Sloan & Klein, *Psychotherapeutic Disclosures: A Conflict Between Right and Duty*, 9 U. TOL. L. REV. 57 (1977).

were to impose such a duty, it would be disastrous to their profession.[170] Studies, however, have shown that imposition of the duty has not adversely affected the practice or psychology.[171] But how can we impose such a requirement on attorneys who have no training in the area of psychology? The key difference is in the varying standards of care imposed in the two situations. The standard for an attorney would be that of a reasonable person, whereas that imposed on a therapist is a much higher standard, "the standard of his profession."[172] Based on the lower standard of care imposed on attorneys, the trier of fact would be able to determine, based on the circumstances, whether it was reasonable to impose such a duty of action on the attorney and what type of action the attorney should have taken.

III. CONCLUSION

Under present tort trends, there is a substantial basis for finding an affirmative duty of reasonable care by an attorney to third persons when the attorney has learned through a communication from his client that the client intends to do physical harm to another. This conclusion considers the clash of two strong policies, the preservation of confidence between attorneys and clients and the interest in public safety. The question of whether the relationship between attorney and client is of a nature that warrants a legal duty to third persons is another difficult question that must be addressed.

In summary, this proposal is modest and follows guidelines similar to those set out in *Thompson v. County of Alameda.*[173] There are three requirements: First, there must be a named, identifiable victim or a specific group of identifiable individuals. Second, there must be a determination that the client poses a predictable threat of physical harm to the named or identifiable victim. Third, it must be possible that these victims can be effectively warned or other reasonable action taken that would be effective in preserving their safety. If these situations are present, then the lawyer has an affirmative duty to take reasonable action.

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170. Merton, *Confidentiality and the "Dangerous" Patient: Implications of* Tarasoff *for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 297-98 (1982).

171. *See generally* Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165 (1978).

172. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976).

173. 27 Cal. 3d 741, 758, 614 P.2d 728, 738, 167 Cal. Rptr. 70, 80 (1980).

A careful consideration of the hypothetical situation presented in the introduction to this article provides an illustration of the proposed requirement of an affirmative duty to warn third persons and its actual application.[174] In that hypothetical, there is a direct threat against the judge; therefore, the judge, or anyone near him, could be a foreseeable victim. However, the specificity in this example is not required. What is necessary to satisfy the requirement that the victims be foreseeable is sufficient information from which a specified group of individuals can be identified as the target of the client's threat.[175]

In addition to forseeability of the victim, the imposition of an affirmative duty requires that it be forseeable that the client would use violence that would result in serious physical harm to third persons. The attorney must act as a reasonable person under the circumstances. The test would be whether a reasonable person who had information that the client has used violence before would conclude that the client would use violence in this situation.

There are other factors that the lawyer may know and that courts should instruct the fact-finder to consider in evaluating the forseeability or predictability of violence. These include the manner in which the "threat" was communicated by the client to the attorney, the tone of voice, the specificity of the threatened acts, the number of times the threats were communicated to the lawyer, whether any prior threats were made and, if any, their outcome. The attorney should evaluate these and other circumstances under which the client made the threats as any reasonable person would evaluate them under the circumstances. Thus, the lawyer would not be judged by a standard requiring psychiatric expertise but instead by a standard that would apply common sense and good judgment.[176] Some critics argue this standard would be as accurate as

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174. *See supra* text accompanying notes 1-4.

175. The Ninth Circuit in a Federal Tort Claims Act case brought in California rejected government arguments that an outpatient of a Veterans Administration Hospital had made no specific threats against specific individuals and therefore his murder of his girlfriend was not foreseeable. The court held that the patient's prior medical history, indicating that he would direct violence against women close to him, was sufficient to give rise to a duty to warn the patient's girlfriend of his dangerousness. The court said the case fell between the specifically named victim in *Tarasoff* and the general group of neighborhood children in *Thompson*. Jablonski *ex rel.* Pahls v. United States, 712 F.2d 391, 398 (9th Cir. 1983).

176. It has been argued that to assess indications of possible dangerousness without an actual instance of a prior dangerous act would require the highest degree of psychiatric expertise. Kozol, Boucher and Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371, 384 (1972).

that of the expert, for many experts in the field of psychiatry have questioned their profession's ability to predict violence.[177]

Applying this reasonable person standard to our hypothetical, the lawyer would consider whether his client had previously threatened the use of violence and followed through on those threats. This is the type of information that a lawyer would likely have. The existence of prior acts of violence or lack thereof would be an important factor to consider in the lawyer's evaluation of whether it is likely or forseeable that his client would carry out this threat along with the other factors referred to above.

If the victim and the threat are determined to be forseeable, then the question becomes what action must be taken by the lawyer in exercising his duty. This should also be based on a standard of reasonableness. What then would be required to satisfy this standard? When evaluating the action taken by the attorney, the court must consider the existence of the attorney-client relationship and the value of preserving the resulting confidences. For example, employing our hypothetical, the attorney would wish to avoid informing the judge directly of his client's threat, in order to minimize any prejudice to his client. Thus, a warning to the court bailiff might satisfy the requirement by providing safety and still maintaining some confidentiality. A general warning on the other hand that some client or some judge was threatened might not be specific enough to be effective. Respect for both policies, public safety, and the attorney-client privilege, should remain. Without this requirement of an effective warning neither policy would be furthered. The result would be ineffective warnings that would provide no public safety while breaching the existing confidentiality.

With the more specific warning, there exists the possibility that the judge may learn the client's identity directly or even indirectly by deduction. The attorney could then take steps to avoid prejudice to the client such as seeking the recusal of the judge. The problem of a client directly threatening a judge has arisen before, and though a difficult situation, it is one for which our system has found solutions.[178]

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177. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 364-65 n.2 (1972); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 712 (1974).

178. *See* 28 U.S.C. § 144 (1982) (when any party files an affidavit that the presiding judge has a personal bias or prejudice, the judge should proceed no further in the case); CODE OF JUDICIAL CONDUCT Canon 3(c)(1)(a) (1973) ("[a] judge should disqualify himself

Why require such a duty when this situation rarely occurs? First, there is an increase in both the violence and threats to members of the judicial system directly and to others in society. Especially in a society of laws, we cannot allow fear and violence to control. Second, public knowledge that the legal profession has a duty to disclose future crime would greatly enhance the ability of lawyers to provide legal services. Third, it would provide a way for innocent third persons to be compensated in the event of a breach of duty.

The natural result would be the enhancement of the administration of justice. Efficient administration of justice is the primary purpose of the attorney-client privilege. If the ultimate determination of whether any duty exists is a question of public policy, how can one deny that policy calls for the prevention of physical harm and preservation of life when the risks are minimal to the attorney-client relationship?

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in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has personal bias or prejudice concerning a party. . . ").