Editor's Note:

Of all the forces affecting mental health services in the 1970's, none has been more profound than the law. Legal challenges to traditional mental health practice in such areas as right to treatment, commitment, dangerousness, right to freedom and the like, have substantially altered the shape and substance of mental health programs. As a result, mental health law has developed as a new field of knowledge, one with which mental health administrators must become familiar.

This issue of ADMINISTRATION IN MENTAL HEALTH introduces a new feature—the first in a series of articles on mental health law by Alexander D. Brooks, Professor of Law and Psychiatry at Rutgers University. Professor Brooks is widely known and respected as an author and lecturer on mental health law. In 1975, he received the Guttmacher Award from the American Psychiatric Association for his book, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM.

I know this new series will be of value to you. As always, your comments are most welcome.

Saul Feldman

Mental health professionals throughout the country are concerned about a novel ruling in the case of Tarasoff v. Regents of the University of California [131 Cal. Rptr. 14 (1976)], handed down recently by the California Supreme Court, requiring psychotherapists, at the risk of being held liable in damages for negligence, to warn prospective victims of serious threats of violence made by patients while in therapy. Although the California ruling applies only to therapists in that state and nowhere else, therapists elsewhere view the decision with serious concern. They anticipate that such a case might arise in their states and that a therapist, in failing to warn, might innocently commit a negligent act without adequate recognition of a legal duty. This concern is aggravated by the fact that new legal responsibilities announced by the courts tend to have a retrospective as well as prospective effect. That is, a defendant may be held liable for negligence even where there are no legal rules at the time he acted that characterized his behavior as negligent.

The Tarasoff "duty to warn" decision was originally announced by the California Supreme Court on December 23, 1974. As would be expected, it created shock waves, particularly in the psychiatric profession. An urgent request was made for a rehearing, which the Court granted. The American Psychiatric Association filed an amicus brief, as did others. The Court then reconsidered. On July 1, 1976, a year and a half after the decision was first announced, the Court announced that it had reaffirmed its original ruling, with minor modifications. The decision was not unanimous; the court was split 5-2 on one branch of the ruling and 4-3 on another aspect of the case.

Psychotherapists in California will now have to live with Tarasoff and therapists elsewhere are advised to study it carefully in order to be informed of its requirements so that they can be on guard as to possible future developments in their own states.

In this comment I will explicate the ruling and its underlying rationale with the hope that concerned readers will be able to view the Tarasoff decision and its likely consequences realistically and without excessive alarm.

The Tarasoff case arose out of the killing of a young woman, Tatiana
Tarasoff, by a graduate student at the University of California at Berkeley, named Poddar. In brief, Tatiana had rejected Poddar as a boyfriend. As a result, Poddar underwent a severe emotional crisis. He was advised to go into therapy and did so, with a University psychologist. While in therapy Poddar confided to his therapist his intention to kill Tatiana when she returned from a trip to Brazil. The therapist was alarmed by this and consulted with two psychiatric colleagues. They all took the threat seriously and agreed that Poddar should be committed. The campus police were notified to take Poddar into custody and assist in his commitment. Unfortunately the three campus policemen involved were persuaded by Poddar that he was rational and released him. Later, the therapist's superior, the director of the department of psychiatry at the hospital, ordered that no further correspondence and therapeutic notes destroyed.

In any event, no one warned Tatiana Tarasoff or her parents, or anyone else close to Tatiana, that Poddar had threatened to kill her even though the threat had been taken very seriously. Shortly afterwards, Poddar killed Tatiana Tarasoff by shooting and stabbing her.

Tatiana's parents brought an action for wrongful death against the psychotherapists, the campus police and the University of California. The trial court dismissed the lawsuit, ruling that the various defendants owed no duty to the victim to warn her, or anyone else, of her plight. But the California Supreme Court reversed, ruling that there was a duty on the part of the psychotherapists to warn Tatiana of her danger and holding that a failure to warn under the circumstances of this case was in fact negligent. That issue is still to be tried or otherwise resolved. What the court did was to announce a new law establishing a duty in cases of this kind.

Although there were a number of issues in this major case, such as the responsibility of the police, this discussion will focus only on the major issue of consequence to psychotherapists in California and elsewhere, the duty of the therapist to warn. The ruling of the California Supreme Court was stated as follows:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.

This ruling is novel. No such precise obligation has ever before been imposed on psychotherapists in any American jurisdiction. But the ruling, like many other judicial decisions, is a logical outgrowth of earlier state and federal cases in which courts have often articulated a duty on the part of mental health professionals to warn others about the dangerousness of mental patients released into the community. The California court pointed out that the Tarasoff duty to warn is entirely consistent with the earlier California negligence cases which established the responsibility of therapists toward members of the general public. The Court reasoned that therapists stand "in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct."

Is the decision a sound one? Some psychotherapists are concerned that the decision will not accomplish the results sought for but in the process will put an unnecessarily heavy burden on therapists, causing undue anxiety. Further, there is a view that the decision will cause much mischief and disruption of therapeutic relationships to the disadvantage of all—patients, potential victims, and therapists alike.

In deciding this case, the Court was faced with a great dilemma: which is more important, the preservation of confidences between patient and therapist, even when the confidences describe a great risk of violence to others, or steps that would require a breach of that confidentiality in the interest of preserving the life of innocent persons?

The court opted for the safety of the public. The judges were by no means insensitive to the value of confidentiality in the therapeutic relationship. They recognized its contribution to the effectiveness of psychotherapy. But in common with others who have considered the issue they decided that the lives of others came first. Said the Court aphoristically, "The protective privilege ends where the public peril begins."

Traditionally, revelation of a confidential communication between doctor and patient is neither a breach of trust nor a violation of professional ethics where, in the words of the American Medical Association's Principles of Medical Ethics (Section 9), such a breach "becomes necessary in order to protect the welfare of the individuals or of the community." Moreover, it is a logical step from the proposition that the disclosure of a threat of one to do violence to another is neither unethical or illegal to the further proposition that the protection of society requires it. In other words, the right to breach a confidence in order to warn becomes a responsibility to do so.

For years it has been the legal duty of a physician to warn members of a patient's family as to his contagious diseases or concerning the dangerous effect of drugs administered to him. Those who oppose the decision do not