**Case 6.**

Ewing v. Goldstein

Letter in Support of Petition for Review filed 9/04
Court: California Supreme Court
Year of Decision: 2004

Read the [letter of petition for review](https://www.apa.org/about/offices/ogc/amicus/ewing.pdf%22%20%5Co%20%22ewing%22%20%5Ct%20%22_blank) (PDF, 111KB)

Issue

This case seeks review of a decision that extends California's duty to warn statute from communications from the patient to the therapist to include communications about the patient from a third party

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Duty to Warn/Protect

Facts

In this case, the patient did not tell his therapist of intent to harm himself and a former girlfriend's new boyfriend but did communicate this to his father. The father in turn told the therapist of his conversation and the therapist encouraged the father to have his son hospitalized. The inpatient psychiatrist discharged the patient over the therapist's objection by telephone and the patient then killed the boyfriend and himself. (The therapist did not see the patient after the father called and never was advised by the patient of his intent to harm the victim.) The parents of the victim sued the therapist for failure to warn. The therapist moved for summary judgment on the basis of the Cali. duty to warn statute, which immunizes psychotherapists from liability for any failure to warn of or to protect from a patient's violent behavior except "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims” (California Civil Code 43.92). The therapist argued he could not be liable for failing to alert the police and the intended victim to danger posed by his patient because the patient had never directly disclosed to him a threat. The trial court granted the motion and dismissed the case because the communication was not from the patient and therefore was immunized under the statute.

The Court of Appeal reversed the trial court's decision stating that the trial court too narrowly construed the duty to warn statute and further stating that a communication from a family member to a therapist made for the purpose of advancing a patient's therapy, is a "patient communication" within the meaning of the statute.

APA's Position

APA joined with the California Psychological Association to submit a letter in support of a petition for review and depublication of the appellant decision. The letter addressed the increased liability and the probable undermining of effective psychotherapy represented by the appellate decision. The letter advised that APA and CPA would provide detailed support for the position that the decision, if left standing, will have dramatic adverse effects on the practice of psychotherapy in California. Specifically, it was noted that exposing therapists to risks when a third party reports that a client has made a serious threat of harm to others unreasonably broadens the extent to which therapists may be subjected to liability for failing to protect those who are subsequently harmed by their patients, and, at the same time, removes or at least diminishes the professional judgment of the therapist in assessing through communication with the patient whether the risk is indeed "serious."

The key factors addressed by APA and CPA's decision to support petition for review include: 1) the importance of confidentiality and trust in the psychotherapeutic relationship (and the chilling effect on willingness to seek therapy if patients believe that confidences may be violated); 2) exceptions to the rule of confidentiality are, by necessity narrow and definitive (involving the careful balancing of the public interest in maintaining the confidentiality of patient communications to their therapists against the public interest in safety from violent assault, where the psychotherapist has a reasonable professional basis to conclude that the client is a threat to a specific person); and 3) the adverse effects of the Court of Appeal's decision (e.g., undermine existing therapeutic relationships, deter potentially dangerous individuals from seeking treatment, prevent full disclosure of patients' thoughts, imposition of a duty to warn based on a patient threat reported by a third party will necessarily result in over assessment of dangerousness since many more threats are made than are acted upon and the psychologist has no other means to protect against legal liability).

What’s the conclusion?

**Case 8.**

A school Counsellor’s Notes In 1995, a mother, residing within the Cranbrook School District of British Columbia, sought access to an elementary school counsellor’s notes from counselling sessions with the woman’s two children. She said that she was interested not in what the notes might say about what the children had said to the counsellor but rather what the counsellor had said to them. The school counsellor and her school district refused to release the counselling notes. The School District invoked the argument that such refusal was permitted under section 19(1)a of the Freedom to Information Act (FIPPA) of British Columbia. This section permits discretionary refusal of such a request if disclosure can reasonably be predicted to negatively affect the mental or physical health or the safety of the person(s) involved. The Information and Privacy Commissioner of B. C. was asked, by this parent, to rule on this refusal decision. The commissioner ruled that the counsellor’s notes were in the custody and control of the School District which meant that the Commissioner had the jurisdiction to rule on the matter because such notes were covered by the provisions of the FIPPA. The counsellor, dissatisfied with the Commissioner’s ruling, took the matter to Court. She argued before the Court that her notes were really her personal possession made only as an aid to her and , in fact, she reasoned she was not required to keep counselling notes anyway and that she kept them in a notebook at home. The Court ruled in favour of the Commissioner’s view that the notes were under the custody and control of the School District because they originated as an aspect of the counsellor’s work as a District Employee. Therefore, the question of access to these counselling notes came under the authority of the freedom in Information and Protection of Privacy Act. The jurisdictional decision notwithstanding, the question of whether or not the notes should be released in this instance warranted additional consideration. On this matter the counsellor argued that she had an ethical obligation to keep the notes confidential.

(Nielson v. British Columbia (Information and Privacy Commissioner), 08/07/1998. B. C. J. No. 1640, Vancouver, B. C.)

What’s the conclusion?

**Case 7.**

Access to the Questions, Answers, and Scoring Procedures of Standardized Tests In 1994 parents residing within the jurisdiction of the Lincoln County Board of Education wanted to challenge the school psychologist’s decision that their daughter was not a gifted student. In making this judgement, the psychologist had relied heavily on the results of the Stanford Binet Intelligence Scales. The School Board refused the parents’ “freedom of information” request to see all the answers and the scoring procedures for their daughter’s performance on the Stanford-Binet. School authorities argued that they had a discretionary right of refusal under a section of the Ontario Freedom of Information and Protection of Privacy Act. They further reasoned that the Stanford-Binet was purchased from a third party, in this case, Nelson Canada, and that maintenance of confidentiality with respect to answers and scoring procedures was essential to the integrity and continuing validity of this psychometric instrument. Nelson Canada also argued that disclosure would reveal a trade secret and have economic consequence for it. When the parents referred this case to the Information and Privacy Commissioner his decision was that the one-page creativity test developed by the School Board should be released to the parents along with a separated copy of the fourteen pages of the Stanford-Binet Booklet on which the student’s answers were recorded. Because a release of this booklet would reveal the scoring pages and invalidate the Test, the School Board refused the order and went to Court. The Board argued that the Commissioner (actually an assistant commissioner in this instance) ignored the significant consequences of releasing these pages, particularly those relating to the Vocabulary and Absurdities sections of the Test. [1994] O.J. No.2899(Div. Ct.)

What’s the conclusion?