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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JAMES TREAR,	)	
	)	
Appellant,	)	
	)	Superior Court of Orange County
v.	)	No. 72 89 82
	)	Honorable Thomas N. Thrasher
JUDITH SILLS,	)	
	)	
Appellee,	)	
	)	

BRIEF OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS CALIFORNIA CHAPTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

On Appeal from a Judgment of
the Superior Court of Orange County,
Hon. Thomas N. Thrasher, Judge Presiding

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STATEMENT OF THE CASE

Amici accepts the statement of the case as presented by the parties in their respective briefs.

STATEMENT OF THE ISSUES

1. Does California law impose upon a Clinical Social Worker a duty of care to a Third Party when diagnosing or treating an adult patient for child sexual abuse?

INTRODUCTION

In recent years, courts in California and elsewhere have seen an increasing number of cases addressing the scope of duty of mental health professionals, including licensed clinical social workers, owed to non-patient, non-client third parties, (hereafter "third parties"), in connection with treatment of their patients or clients (hereafter "patients").

The present case exemplifies the recent trend by third parties outside the scope of the mental health professional-patient relationship attempting to gain access to and widen such relationship in order to create a legal duty owed to third parties who may suffer injuries related to the treatment provided by a mental health professional. In particular, the instant case asks the Court to establish a duty on the part of clinical social workers and other mental health professionals to protect third parties from allegations of child sexual abuse.

Expanding the social worker's duty of care to include third parties when the social worker's diagnosis is that the patient is a victim of child abuse would be unreasonable and conflict with other established public policies. Creating a duty of care to a person not within the therapist-patient relationship would unreasonably extend the legal concept of duty, impede a number of worthy public policy goals, jeopardize the social worker-patient privilege, complicate effective treatment, and conflict with the child sexual abuse reporting statutes enacted to eradicate this tragic crime. Amici seek this opportunity to argue that social workers already have a duty to protect third parties in specified circumstances, and should not now be required to meet an additional standard of due care toward third parties when those parties may face allegations of child sexual abuse.

I. EXPANDING A SOCIAL WORKER'S DUTY OF CARE TO EXTEND TO THIRD PARTY WHEN DIAGNOSING OR TREATING CHILD ABUSE VIOLATES THE CONCEPT OF DUTY

Current law does not impose on a mental health professional a duty of care toward third parties who are not within the diagnostic and treatment relationship, except in discreetly outlined situations involving threats of serious physical harm or where there is an ongoing or direct professional relationship between the therapist and the individual claiming harm. When the

patient is a suspected victim of child abuse, the clinical social worker or other mental health professional does not owe a duty to the suspected or alleged abuser in connection with the diagnosis and treatment of the patient. To conclude so would set up barriers to diagnosis and treatment, and would impact on child abuse enforcement statutes. Thus, this Court should not expand a social worker's duty to permit a parent to bring a negligent misdiagnosis claim against the therapist treating his or her adult child, the situation presented by the instant case.

A. A Social Worker Has No Duty to Warn A Third Party of Possible Allegations of Child Sexual Abuse When Making a Determination of Whether A Patient Has Suffered Child Sexual Abuse

In *Tarasoff* v. *Regents of the University of California*, (1976) 17 Cal.3d 425, the Supreme Court, only after a lengthy and thoughtful analysis balancing the significant interests at issue, extended liability to a psychotherapist who had failed to warn a third party of the risk of serious bodily injury of which the therapist had learned during the therapeutic relationship with the patient. The Court concluded that the special relationship between a therapist and his patient, combined with the therapist's knowledge that his patient posed a significant threat of violence to another, gives rise to a duty to use reasonable care to protect the intended victim against such danger. *Id.* at 439.

While the court in *Tarasoff* acknowledged that the most important of the *Rowland* v. *Christian* ((1968) 69 Cal.2d 108) factors for determining the existence of a duty was the foreseeability of the harm, the court considered a number of factors and made clear that a duty to warn was not to be premised on foreseeability alone. Indeed, the *Tarasoff* court found that

a duty to a third party outside of the therapeutic relationship arose and outweighed the countervailing concerns only because of the psychotherapist's knowledge of the patient's threat of serious physical harm to the third party. *Tarasoff*, 17 Cal.3d at 440.

The social policy concern in favor of avoiding a threat of serious physical harm to a third party justifies jeopardizing the therapist/patient relationship to impose a duty upon the therapist. No such social or public policy concern is implicated when the threat to the third party is that he or she might be sued or publicly embarrassed. And, it is for this reason that the courts have discouraged an expansive view of *Tarasoff*. In *Bellah* v. *Greenson*, (1978) 81 Cal.App.3d 614, the court refused to accept plaintiffs' contention that *Tarasoff* imposed a new duty on the therapist "to warn others of the likelihood of any and all harm which might be inflicted by a patient." *Id.* at 621. Rather, the court concluded that *Tarasoff* "requires only that a therapist disclose the contents of a confidential communication where the risk to be prevented thereby is the danger of violent assault, and not where the risk of harm is of self-inflicted harm or mere property damage." *Id.* See also, *Reisner* v. *Regents of the University of California*, (1995) 31 Cal.App.4th 1195. In *Reisner*, the court held that a patient's boyfriend could state a cause of action against the patient's doctor for failing to warn the patient that she had contracted HIV which subsequently infected the boyfriend. The court found however, that the physician's duty was to warn the patient, not the third party boyfriend, and held that the boyfriend could state a cause of action on the assumption that if the patient had been advised of the life threatening risk, she would have altered her conduct so as not to place her boyfriend at risk.

The instant case provides no parallel situation of physical harm which would require an extension of the social worker's duty of care.

B. **No Duty to Protect Third Parties Accused of Child Abuse Exists Under Direct Victim Theory of Liability**

Since no exception to the traditional concept of a duty of care exists which would require a social worker to go beyond the therapist-patient relationship to warn a third party accused of sexual abuse, third parties who argue for social worker liability in such situations alternatively assert that a duty arises to a third party in the false allegation cases under the theory that the third party is a "direct victim" of the social worker's negligence. However, this theory offers no better support for extension of the duty which appellant now seeks, for it is premised on the existence of a relationship between the social worker and the third party which generally is lacking in social worker-patient relationships such as the one at issue here, in which the social worker suspected that the patient has been abused.

The direct victim theory is most often asserted in false allegation cases involving third party allegations of negligent infliction of emotional distress. *See Jacova* v. *United Merchandising Corporation*, (1992) 9 Cal.App.4th 88 (where a closely related person is not a direct victim of a psychotherapist's negligence, that person cannot state a cause of action for negligent infliction of emotional distress). It is well-settled that, "'[t]he negligent causing of emotional distress is not an independent tort but the tort of negligence . . . '" *Thing* v. *La Chusa*, (1989) 48 Cal.3d 644, 647 (quoting 6 Witkin, Summary of California Law (9th Ed.) Torts, § 838 p. 195).

Thus, a cause of action for emotional distress requires a showing of a legal duty of care, its breach, causation and resulting injury. *Marlene F.* v. *Affiliated Psychiatric Medical Clinic, Inc.*, (1989) 48 Cal.3d 583, 588. While a patient can assert an emotional distress claim for misdiagnosis against his or her therapist owing to the existence of the therapist-patient

relationship and the concomitant duty of due care owed by the therapist to the patient, a non-patient third party cannot assert such a claim for the harm because the alleged misdiagnosis is, by its very nature, directed to the patient.

Amici contend that it is reasonable to limit the class of those individuals that may assert claims for negligence or emotional distress under a direct victim theory of liability to those persons within the therapist-patient relationship. An extension of such duty to individuals outside the relationship who tenuously claim to be directly affected by the conduct of the therapist invites abuse of the concept of duty and places a suffocating restraint upon the therapist in situations involving abuse. In addition, such an extension of duty would erect a false barrier to compliance with and effective enforcement of the statutes requiring reporting of child abuse.

Accordingly, direct victim liability should be limited to situations where a preexisting relationship between the parties will permit the imposition of a duty running from the therapist to the alleged injured plaintiff. In *Molien* v. *Kaiser Foundation Hospitals*, (1980) 27 Cal.3d 916, the Supreme Court first utilized a direct victim theory to create a duty from a health care provider to a third party. There a physician directed his patient, the plaintiff's wife, to advise the plaintiff that she had been diagnosed with syphilis because of the danger of the contagious disease to him. The court "found that a hospital and a doctor owed a duty directly to the husband of a patient, who had been diagnosed incorrectly by the doctor as having syphilis and had been told to so advise her husband in order that he could receive testing and, if necessary, treatment." *Id.*, at 923. The court reached its decision only because the "alleged tortious conduct of the defendant was directed to him as well as to his wife." *Id.* But, subsequent decisions have made clear that *Molien* is to be read restrictively.

In *Marlene F.*, three mothers brought their sons to a therapist for counseling for family emotional problems. The therapist subsequently molested each of the boys during counseling sessions. The mothers sought to recover for their own emotional distress. Here, too, liability was premised on a pre-existing relationship between the therapist and the Plaintiffs.

> The therapist's tortious conduct was, by its very nature, "directed at" the mother plaintiffs because he treated the mothers directly and the very purpose of the therapy for both mothers and sons was to resolve intra-family difficulties by improving the mother-son relationships. The clear implication is that the court would not have viewed the mothers as "direct victims" had the therapist treated the sons only for the purpose of resolving the sons' individual emotional problems, even if these problems led to family difficulties, rather than treating the parent-child family problems themselves.

Schwarz v. *Regents of the University of California*, (1990) 226 Cal.App.3d 149.

Absent a preexisting patient-therapist relationship, California courts have been unwilling to find a duty of care on the direct victim theory. *Huggins.* v. *Longs Drug Stores California, Inc.*, (1993) 6 Cal.4th 124 (parent cannot recover for a doctor's misdiagnosis of his child in the absence of a pre-existing relationship); *Schwarz* v. *Regents of the University of California*, 226 Cal.App.3d 149 (court rejected the notion that foreseeability of harm alone would give rise to a new duty); *Smith* v. *Pust*, (1993) 19 Cal.App.4th 263 (claim under direct victim theory requires an actual therapist-patient relationship).

Thus, in cases involving diagnosis of possible child abuse, the fact that an interest of the parent who is the alleged abuser is implicated and foreseeable does not suffice to impose liability nor negate the countervailing concerns of privacy and effective treatment so as to create a duty where the parent has no relationship with the therapist. California law is clear that "[m]ere

foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." *Nally v. Grace Community Church of the Valley*, (1988) 47 Cal.3d 278, 297. Other jurisdictions are in accord.

C. Non-California Direct Victim Cases Involving False Allegations of Child Abuse Also Require a Preexisting Relationship

The rejection of foreseeability alone as a basis for finding a duty was recently addressed in a Texas Supreme Court case containing essentially the same issues and facts as in the case at hand. In *Bird* v. *W.C.W.*, (1994) 868 S.W.2d 767, a father accused of sexually abusing his children brought a professional negligence action against the psychotherapist who had treated his children, alleging that the psychotherapist's diagnosis was incorrect. The father had no physician-patient relationship with either the diagnosing psychotherapist or the clinic. The court held that foreseeability of harm to a parent accused of sexual abuse, alone, is not a sufficient basis for creating a new duty. *Id.*, at 770.

In *Lindgren* v. *Moore*, 1995 WL 608535 (N.D.Ill.), the father, sister and brother of Amy Lindgren sued her therapist and her therapist's supervisor under malpractice and negligence theories for allegedly inducing a "false memory syndrome" leading her to conclude that she had been sexually molested by her father many years before. The court agreed that, "absent a 'special relationship' which is either physically dependent [as the relationship between a mother and fetus] or a very near approximation thereof, Illinois courts would not allow third parties such as these plaintiffs to recover on a malpractice or negligence claim under the circumstances of this case." *Lindgren* 1995 WL 608535 at 5. The court rejected the plaintiffs' argument that being related to the patient was enough to create a special relationship finding it "fell far short of the unique nexus that meets the special relationship standard." *Id.* at 4.

The *Lindgren* court stated, "[t]he primary reason why doctors and psychiatrists should not be held to have a duty to third party, non-patients is simple: doctors should owe their duty to their patient and not to anyone else." *Id.* at 5. Perhaps most relevant to the case at hand, the court continued:

> The practice of medicine is fraught with legal potholes, and doctors should not have to navigate over new crevasses created by a heavy-handed judiciary. For purposes of standing to assert a malpractice claim, doctors should be free to recommend a course of treatment and act on the patient's response to the recommendation free from the possibility that someone other than the patient might complain in the future.

Id.

Thus, this Court should also conclude that the therapist social worker owes no duty of care to a third party alleged or suspected abuser under a duty to a direct victim theory. The circumstances of this case should not be expanded to permit a cause of action, for such circumstances required to be present in order to create a duty have been carefully prescribed by judicial decisions so as to protect the significant countervailing concerns of public policy.

II. EXPANDING A SOCIAL WORKER'S DUTY OF CARE TO EXTEND TO PROTECT A THIRD PARTY ALLEGED ABUSER OUTSIDE THE THERAPIST-PATIENT RELATIONSHIP IN SITUATIONS WHICH DO NOT THREATEN IMMINENT SERIOUS PHYSICAL HARM WOULD OFFEND PUBLIC POLICY.

Imposing upon social workers a duty of care toward potential abusers will interfere with proper evaluation and treatment of victims of sexual abuse. First, the threat of additional liability will chill social workers' communications with their patient. For example, if a social worker, in reviewing a patient's history, asks questions about whether the patient was ever sexually abused as a child and the patient later files charges alleging abuse by a parent, should the social worker be potentially liable for damages simply for discussing the patient's history

with the patient? Such a result would be absurd for it is imperative that the social worker be able to review and discuss all relevant facts and issues in an evaluation of mental and emotional illness without fearing subsequent suit from third parties, whether they are close to or remote and unconnected to the patient. Otherwise, the evaluation process cannot be thorough, subjecting the patient to the possibility of incorrect or incomplete treatment owing to a lack of information. Ironically, if the psychotherapist or social worker is not free to elicit and act on all relevant information from a patient, the patient could bring a professional negligence suit against the therapist.

Further, the threat of additional liability will lead to underreporting of child sexual abuse by social workers. As one appellate court noted:

> The Legislature has identified the fear of civil liability for allegedly false reports as a major deterrent to the reporting of suspected cases of child abuse by professionals. Recent revisions to the Child Abuse Reporting Act have been largely directed at reducing or eliminating to the extent possible, professional fear of litigation resulting from the required reports.

Krikorian v. *Barry*, (1987) 196 Cal.App.3d 1211, 1222. Put simply, the Legislature has made a choice to risk occasional false reports in order to achieve maximum identification of actual instances of child sexual abuse. Reopening the door to civil suits would reverse this course and frustrate legislative objectives.

As the Texas Supreme Court stated, "[a] claimant's right to sue a mental health professional must be considered in light of countervailing concerns, including the social utility of eradicating sexual abuse." *Bird*, at 770. Indeed, "[b]ecause they are dealing with such a

sensitive situation, mental health professionals should be allowed to exercise their professional judgment in diagnosing sexual abuse of a child without the judicial imposition of a countervailing duty to third parties." *Id.*

The California Legislature has clearly signalled its desire to safeguard the mental health profession from liability where a determination of child sexual abuse is involved. As will be discussed more fully below, the Penal Code imposes upon health care professionals the duty to report to appropriate officials all cases of actual or suspected child abuse. The legislature and the courts, however, have recognized the importance of therapist-patient confidentiality, and have established immunity for health care professionals who comply with the mandatory reporting requirement. As one Court noted in considering the mandatory reporting child abuse statutes, "[f]aced with a choice between absolute immunity, which would promote reporting but preclude redress to those harmed by false accusations, and conditional immunity, which would limit reporting but allow redress, the Legislature through various amendments, ultimately selected absolute immunity." *Stecks v. Young*, (1995) 38 Cal.App.4th 365, 367; *Storch v. Silverman*, (1986) 186 Cal.App.3d 671, 679-81. Similarly, this Court should conclude that in order to promote compliance with the laws mandating reporting of child sexual abuse and effective sexual abuse treatment, the duty of care required in the therapist-patient relationship does not encompass or extend to third-party alleged abusers.

Amici urge the court to take this opportunity to confirm the importance of the statutory policy encouraging reporting of child abuse and to promote effective treatment by rejecting Appellant's suggestion that the duty of a mental health practitioner be expanded to include a duty of due care to those not within the therapeutic relationship.

III. EXPANDING SOCIAL WORKERS' DUTIES TO THIRD PARTY ALLEGED ABUSERS COULD VIOLATE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

In California, communications between a psychotherapist and patient are protected by the codified psychotherapist-patient privilege and the constitutional right to privacy. *Cal.Evid.Code § 1014*; Cal. Const., art. I, Sec. 1. This privilege is a fundamental aspect of the relationship between a therapist and patient, upon which successful therapy most often depends. Accordingly, in addition to the statutory provisions, professional standards of conduct mandate protection of confidentiality and privacy concerns. NASW Standards For the Practice of Clinical Social Work.[1] As one court noted, "[t]he accurate diagnosis and accurate treatment in psychotherapy are greatly dependent upon conditions of trust and confidentiality between a therapist and patient." *Scull* v. *Superior Court*, (1988) 206 Cal.App.3d 784. The California Supreme Court stated:

> We have recognized the contemporary value of the psychiatric profession, and its potential for the relief of emotional disturbances and of the inevitable tensions produced in our modern, complex society. [citations omitted] That value is bottomed on a confidential relationship; but the doctor can be of assistance only if the patient may freely relate his thoughts and actions, his fears and fantasies, his strengths and weaknesses, in a completely uninhibited manner.

People v. *Stritzinger*, (1983) 34 Cal.3d 505, 514. Absent the assurance of confidentiality, victims of sexual abuse would be extremely reluctant to seek much needed help from a clinical social worker or other licensed mental health professional.

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[1] Standard Six states, "[c]linical social workers shall safeguard the confidential nature of the treatment relationship and of the information obtained within that relationship." Absent explicit, overriding requirements, the clinical social worker may only divulge information with the written and informed consent of the client. Standard Six, NASW Standards for the Practice of Clinical Social Work.

In essence, *Evid.Code § 1014* provides that "the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . " *Evid.Code § 1014*. "[T]he legislative intent behind this privilege is to promote the confidentiality that is essential for successful psychotherapy." *Roe* v. *Superior Court*, (1991) 229 Cal.App.3d 832, 834. In its accompanying Senate Committee Comment to § *1014*, the Committee stated that, "unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment depends." *Evid.Code § 1014*, Comment, Senate Committee on the Judiciary (West 1966).

The privilege operates to protect the right to privacy guaranteed under Article I, section 1, of the California Constitution. California law holds that the privilege is "an aspect of the patient's constitutional right to privacy." *Stritzinger*, 34 Cal.3d at 511. Specifically, "[a] patient's interest in keeping such confidential revelations from public purview, in retaining substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage." *In re Lufschutz*, (1970) 2 Cal.3d 415, 431.

Further, under NASW Standards for the Practice of Clinical Social Work, social workers are required to safeguard the "confidential nature of the treatment relationship and of the information obtained within that relationship." Under the NASW Code of Ethics, "the social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional services." Indeed, "[t]he confidential nature of communications between social workers and their clients has been a cardinal principle of the social work profession from its earliest years and, indeed, undergirds the therapeutic worker-client

relationship." *NASW Policy Statement on Confidentiality and Information Utilization*, NASW, August 1993 Delegate Assembly.

Confidentiality concerns are an especially sensitive priority in situations involving allegations of sexual abuse. To make sure the law facilitates the reporting of sexual abuse to the fullest extent, the California Legislature has insured victims that their disclosures will remain as confidential as possible under the existing privileges. It has also taken steps such as enacting *Evid. Code* § *1035.8*, which establishes a sexual assault victim-counselor privilege, to extend confidentiality protection to other professionals likely to encounter sexual assault claims. Like the confidentiality privilege of § *1014*, the purpose of § *1035.8* is to "encourage those that believe that they have been victimized by sexual assault to come forward and make full and frank reports so that they may be advised and assisted." *People* v. *Gilbert*, (1992) 5 Cal.App.4th 1372, 1383. A victim will not seek aid if he or she believes that by reporting the identity of the suspected abuser, the social worker, in turn, must measure the potential harm to the third party abuser pursuant to a duty of due care to those not within the therapeutic relationship, which appellant here urges upon the court.[2]

The California Legislature has codified specific exceptions to the psychotherapist/patient privilege only where it deems the public interest to outweigh the privilege. *See* e.g. *Evid. Code* § *1018* (No privilege where "the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort"); *Evid. Code* § *1025* (No privilege "in a proceeding brought by or on behalf of the patient to establish his competence").

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[2] Further, establishing such a duty would severely complicate the effectiveness of the laws requiring the reporting of child abuse.

Each exception is specifically and narrowly prescribed such as the duty to warn where there is a serious threat of danger. *Evid.Code* § *1024* (No privilege "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger").

Judicially created exceptions are even more rare and must be warranted by exceptional circumstances. The state interest must be compelling. *Stritzinger*, 34 Cal.3d at 511. Of particular relevance here, one exception has been carved out "in furtherance of the state's compelling interest to further the reporting, detection and prosecution of child abuse cases." *Roe* 229 Cal.App.3d 832, 845. In *Roe*, the court found that the psychotherapist-patient privilege would give way to permit reports of child abuse to be made pursuant to *Pen.Code* § 11172.

In *Tarasoff*, 17 Cal.3d at 440, the court underscored the importance of preserving a potential patient's confidence in the treatment seeking process stating, "we recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication." The court only departed from this favored protection of the confidential character of patient-psychotherapist communications when it weighed such a policy against the "public interest in safety from violent assault". *Id.* (emphasis added)

Tarasoff makes clear that there must be a substantial, compelling public interest in those rare cases creating an exception to the privilege. This is because in California, "[f]or policy reasons, the psychotherapist-patient privilege is broadly construed in favor of the patient and exceptions to the privilege are [to be] narrowly construed." *People* v. *Castro*, (1994) 30

Cal.App.4th 390, 394. *See Stritzinger*, (1983) 34 Cal.3d at 511. Surely, to extend the psychotherapist's duty of care to third party abusers would interfere with the relationship between the therapist and the patient in treating child abuse and would severely impact the confidentiality of that relationship and the privilege accorded it in California law. The exception to the privilege which Plaintiff asks this Court to create would severely damage a victim's trust in a social worker as well as impede the social worker's ability to help such a victim.

IV. SOCIAL WORKERS' DUTIES ARE SPECIFICALLY AND ADEQUATELY PRESCRIBED BY CURRENT LAWS AND REGULATIONS.

A. Social Workers Must Follow Strict Statutory and Regulatory Requirements and Professional Standards

In order to be licensed as a clinical social worker, California, as do most states, requires a candidate to meet strict training requirements, statutory rules and administrative regulations. Generally, certification for clinical social work requires a master's degree in social work plus at least two years experience as well as successful completion of an examination. *California Bus. & Prof. Code § 4996.2.* Once certified, a clinical social worker must maintain the standards of the profession. *See Bus. & Prof. Code §§ 4990-4998.7*; NASW Standards for the Practice of Clinical Social Work; NASW Code of Ethics. Of particular relevance to this Court; before becoming licensed, clinical social workers are required to have completed course work or training in child abuse assessment and reporting. *Bus. & Prof. Code § 28*; *16 California Code of Regulations § 1807.2.* Under NASW Standards for the Practice of Clinical Social Work, a clinical social worker must develop specialized knowledge and understanding of therapeutic and preventive interventions, thus keeping current with the latest mental health issues such as the repressed memory syndrome.

To impose the duty of care to third party abusers which appellant urges upon this Court would add a requirement for clinical social work practice which is not statutorily articulated or professionally mandated, and which would directly interfere with the relationship between the social worker and the patient. Moreover, the duty which appellant would impose would be antithetical to the objectives of the statutory and regulatory frameworks -- protecting the patient, encouraging comprehensive and effective treatment, and eliminating child abuse.

B. Social Workers Are Required Under California Law to Report Suspected Instances of Child Sexual Abuse

In addition to the licensing requirements and professional standards, clinical social workers have specific duties under California statutes with respect to the treatment of those patients who are suspected to have suffered child sexual abuse. Recognizing the importance of stopping child abuse, California has imposed mandatory reporting obligations as a way to insure that child abuse victims are identified and protected.

The California Penal Code requires clinical social workers to report the identity of any person who is alleged by the victim to be the person who committed acts of sexual abuse. *Penal Code, §§ 11160, 11165.8. Penal Code § 11166* requires health care practitioners, including social workers, and other persons likely to detect abuse to report promptly all suspected and known instances of child abuse to a child protective agency for investigation. *Penal Code § 11172* provides to those health practitioners absolute immunity against civil or criminal liability for reporting such abuse. California courts have steadfastly upheld the absolute nature of the child abuse reporting immunity, "[t]hus, even if an individual designated as a mandated reporter pursuant to section 11161 submits a false report with the intent to vex, annoy or harass an innocent party, civil or criminal liability cannot be imposed." *McMartin* v. *Children's Institute*

International, (1989) 212 Cal.App.3d 1393, 1397. *See* also *Storch* v. *Silverman*, 186 Cal.App.3d 671 (following a detailed review of the legislative history of § *11161 and* § *11172*, the court concluded that those persons required to report cases of child abuse be absolutely immune).

Further, it is important to note that § *11172*'s protection encompasses not only the act of reporting but the underlying investigation as well.

> [S]ection 11172 was intended to provide absolute immunity to professionals for conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a professional capacity or within the scope of employment, as well as for the act of reporting.

Krikorian v. *Barry*, 196 Cal.App.3d at 1223. In holding that § *11172* reaches professional services rendered in connection with the identification or diagnosis of suspected cases of child abuse the court reasoned:

> A law conferring "absolute" immunity for the act of reporting suspected child abuse, but not for professional activities contributing to its identification, would not likely allay the fear of a prospective reporter that an angry parent might initiate litigation for damages, following a report which is subsequently proven to be mistaken.

Id. One recent decision emphasized the importance of the policy goals underlying the child abuse reporting statutes stating, "[t]hese statutes, all of which reflect the state's compelling interest in preventing child abuse, are premised on the belief that reporting suspected abuse is fundamental to protecting children. The objective has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention." *Stecks* v. *Young*, 38 Cal.App.4th at 366.

Most importantly, the appellate court recognized that, "[c]ommitted to the belief that reporting requirements protect children, the Legislature consistently has increased, not decreased, reporting obligations and has afforded greater, not less, protection to mandated reporters whose reports turn out to be unfounded." *Id.* (emphasis added). *See* also *Storch* v. *Silverman*, 186 Cal.App.3d 671.

Thus, a social worker has numerous duties of care to abide by when treating a patient who may have suffered child sexual abuse and the duty which Appellant would have the Court impose would not enhance treatment of the patient, nor would it further public policy objectives. The clinical social worker must conform to applicable statutes, regulations and guidelines governing the social work practice, as well as those specific rules aimed at eradicating child sexual abuse. Nowhere in the California statutes or in the extensive regulations and standards concerning licensed clinical social workers is there imposed upon a licensed clinical social worker a duty of care toward alleged abusers. California courts have imposed a duty on psychotherapists including social workers to prevent harm to third parties only where there is risk of serious physical violence or where there is a direct relationship between the therapist and third party. The Court should not now impose a duty on social workers and other psychotherapists, to protect an alleged abuser when diagnosing child sexual abuse, for such a holding would unduly expand the concept of duty and would violate or interfere with the public policy concerns addressed in the California child abuse statutes.

CONCLUSION

The existing duties of a social worker have been carefully prescribed and tailored so as to not unduly and unreasonably intrude upon significant public policy concerns such as the prevention of child sexual abuse and the promotion of effective treatment. A balance of competing interests has already been established by the legislature. Imposition of a duty of care to third-party alleged abusers would upset the balance, thereby hindering the effective delivery of clinical social work services so valuable in serving the mental health needs of the California community.

DATED: January 16, 1996

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