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WILL TARASOFF LIABILITY BE EXTENDED TO ATTORNEYS IN LIGHT OF NEW CALIFORNIA EVIDENCE CODE SECTION 956.5?

Jeffrey P. Kerrane*

I. INTRODUCTION

Tanya Tarasoff met Prosenjit Poddar while taking folk dancing classes at the University of California, Berkeley's International House dormitory in 1968.1 On New Year's Eve, they kissed.2 Prosenjit interpreted the kiss as the beginning of a serious relationship.3 Shortly thereafter, however, Tanya told Prosenjit that she was not interested in an intimate relationship.4 Prosenjit, thrown into a severe emotional crisis,5 began to stalk Tanya.6 On the occasions when they met, Prosenjit tape recorded their conversations in order to ascertain why she did not love him.7

During the summer of 1969, Tanya went to Brazil, and Prosenjit began seeing a clinical psychologist.8 On August 18, 1969, Prosenjit told his psychologist, Dr. Moore, that he intended to kill Tanya when she returned home to Berkeley.9 Dr. Moore sent a letter to campus police, notifying them that Prosenjit was "a danger to the welfare of other people and himself."10 Campus police temporarily took Prosenjit into custody, but released him after being convinced that he would stay away from Tanya.11 When Tanya returned from Brazil, neither Dr. Moore nor the campus police made any

* J.D., 1994, University of San Diego; B.A., 1991, University of California, Los Angeles.
2. Id.
3. Id.
4. Id.
5. Id.
7. Id. at 344.
8. Id.
10. Id.
11. Id.
effort to warn her of Prosenjit's stated intentions. On October 27, 1969, Prosenjit went to Tanya's home and asked to speak to her. She refused, and began to scream. Prosenjit shot her with a pellet gun, pursued her as she ran from the house, then stabbed her to death.

Tanya Tarasoff's parents sued the psychologist, among others, for the wrongful death of their daughter. It was in this case, Tarasoff v. Regents of University of California, that the California Supreme Court held, "[w]hen 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."

From then on, California psychotherapists had a civil obligation to take reasonable steps to protect the general public from the violent acts of their patients. This obligation is a reflection of the court's attempt to balance public safety interests with the need for confidentiality in psychotherapist-patient communications. At least in cases of threatened violent assault, the court has determined that the interest in public safety is supreme.

The Tarasoff decision, perhaps not coincidentally, does not mention the attorney-client relationship. After all, Tarasoff's keystone is California Evidence Code section 1024, which provides an exception to the psychotherapist-patient privilege when the psychotherapist has reason to believe the patient may be dangerous. At the time, there was no corresponding exception to the attorney-client privilege. California has traditionally been the state most protective of the

14. Id.
15. Id.
18. Id. at 340.
19. Id. at 346-47.
20. Id.
21. Id.
22. California Evidence Code section 1024 states: "[t]here is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." CAL. EVID. CODE § 1024 (Deering 1986).
confidential relationship between attorneys and their clients.\textsuperscript{23} California Business and Professions Code section 6068(e) states that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."\textsuperscript{24} This statutory language appears to leave no room for exceptions.\textsuperscript{25}

All this may have changed on January 1, 1994, when California Evidence Code section 956.5 took effect, creating a new exception to the attorney-client privilege.\textsuperscript{26} The new section provides: "[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."\textsuperscript{27}

With this new exception in place, it is probable that the California Supreme Court will reexamine the \textit{Tarasoff} decision, expanding its scope to include the attorney-client relationship.\textsuperscript{28}

II. THE ATTORNEY-CLIENT PRIVILEGE V. THE ATTORNEY'S DUTY OF CONFIDENTIALITY

The attorney-client privilege is a rule of evidence found in California Evidence Code section 954.\textsuperscript{29} It protects private

\textsuperscript{23} See San Diego County Bar Ass'n Ethics Comm., Op. 1 (1990-1); \textsc{Stephen Gillers} & \textsc{Norman Dorsen}, \textsc{Regulation of Lawyers: Problems of Law and Ethics} 20 (1990).

\textsuperscript{24} \textsc{Cal. Bus. \& Prof. Code} § 6068(e) (Deering 1993).

\textsuperscript{25} See San Diego County Bar Ass'n Ethics Comm., Op. 1 (1990-1); see also GILLERS \& DORSEN, supra note 23 at 20.

\textsuperscript{26} \textsc{Cal. Evid. Code} § 956.5 (Deering Supp. 1995).

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} Public defenders and other government-employed attorneys will not be protected by governmental immunity in this case. Government Code section 820.2 declares that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion [was] abused." \textsc{Cal. Gov't. Code} § 820.2 (Deering 1982). The court in \textit{Tarasoff} addressed this provision, stating that it provides immunity for only "basic policy decisions." \textit{Tarasoff v. Regents of Univ. of Cal.}, 551 P.2d 334, 349 (Cal. 1976). On this ground, the court refused to extend governmental immunity to protect Dr. Moore, a state-employed psychologist, from liability for his failure to warn Tanya Tarasoff. \textit{Id.} at 349-50. It therefore follows that if \textit{Tarasoff} liability is extended to include attorneys, then public defenders and other government-employed attorneys will enjoy no governmental immunity.

\textsuperscript{29} California Evidence Code section 954 provides in pertinent part:
communications between the client and the lawyer in the course of the attorney-client relationship, and in furtherance of the client’s interests. The attorney’s duty of confidentiality is broader. It ethically prohibits an attorney from revealing her or his client’s secrets to any unauthorized party regardless of how the attorney learned the secret.

Does an exception to the attorney-client privilege create a corresponding exception to the attorney’s ethical duty of confidentiality? Generally, the answer to this question is no. Although there is a distinct lack of California case law addressing this question, courts in other jurisdictions have held that an exception to the attorney-client privilege is not necessarily an exception to the attorney’s ethical duty. In Brennan’s, Inc. v. Brennan’s Restaurants, the Fifth Circuit Court of Appeals stated:

[T]he ethical duty is broader than the evidentiary privilege: “This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should not use information acquired in the course

Subject to section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;
(b) A person who is authorized to claim the privilege by the holder of the privilege; or
(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

30. California Evidence Code section 952 states:
As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer in consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

31. See supra note 24 and accompanying text.
32. See supra notes 24-25 and accompanying text.
33. See infra notes 34-38 and accompanying text.
34. 590 F.2d 168 (5th Cir. 1979).
of the representation of a client to the disadvantage of the client . . . . Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship.\textsuperscript{35}

Conversely, an exception to the ethical duty is not necessarily an exception to the privilege. In \textit{Kleinfield v. State},\textsuperscript{36} a client made a statement to his counsel implicating himself in a past homicide and threatening future violence.\textsuperscript{37} The court held that the statement remained privileged although the attorney had the authority to reveal it under Florida's ethics rules.\textsuperscript{38}

On the other hand, the legislative history of the new exception seems to suggest the California Legislature's intent to create an exception to the privilege as well as an exception to the ethical duty.

\section*{III. LEGISLATIVE HISTORY}

On June 3, 1993, the California Supreme Court rejected for the second time the State Bar's Proposed Rule of Professional Conduct 3-100 ("Proposed Rule 3-100"),\textsuperscript{39} which would have created an exception to the attorney-client ethical duty of confidentiality.\textsuperscript{40} The rule would have permitted an attor-

\textsuperscript{35} Id. at 172. (quoting ABA Code of Professional Responsibility, EC 4-4 (1970))(citation omitted) (ellipsis within quotations in original).

\textsuperscript{36} 568 So. 2d 937 (Fla. 1990).

\textsuperscript{37} Id. at 939.

\textsuperscript{38} Id.

\textsuperscript{39} The proposed rule was originally sent to the California Supreme Court for approval in December 1987. Letter from Board Committee on Admissions and Competence to Members of the Board of Governors 1 (March 9, 1991) (on file with the Santa Clara Law Review). The court returned the rule in June 1988 with an accompanying letter stating:

\begin{quote}
Regarding Proposed Rule 3-100(C)(3) (Duty to Maintain Client Confidence and Secrets Inviolate), in what context does it allow for disclosure of otherwise privileged attorney-client information? To the extent it permits disclosure in a judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the Legislature's intent underlying Evidence Code section 950 et seq. (Cf. Pitches v. Superior Court (1974) 11 Cal. 3d 531, 539-540). Where the Legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?
\end{quote}

\textit{Id.} at 1-2.

The court was concerned with the potential conflict between an attorney's ethical duty of confidentiality and the attorney-client privilege. The court questioned its authority to modify the legislatively created attorney-client privilege.

\textsuperscript{40} Proposed Rule of Professional Conduct 3-100 stated in pertinent part:
ney to reveal a confidence "to prevent the commission of a
criminal act that the member believes is likely to result in
death or bodily harm." The proposed rule would not, how-
ever, have created an affirmative duty on the attorney to re-
veal any confidences. According to the State Bar, the rule
also would have had no effect on the attorney-client privi-
lege. The California Supreme Court rejected this rule the
second time without comment.

In response to the heated debate over amending the Cali-
ifornia Rules of Professional Conduct, State Senator Robert
Presley amended Senate Bill 645 ("S.B. 645"), his attorney
discipline bill, to include new Evidence Code section 956.5. When the bill became law, it effected a change in the
attorney-client relationship perhaps more profound than was
originally intended by the State Bar with its Proposed Rule
3-100. Evidence Code section 956.5 does not give attorneys

(C) A member may reveal a confidence or secret:

. . .

(3) To the extent the member reasonably believes necessary;
(a) to prevent the commission of a criminal act that the
member believes is likely to result in death or substantial
bodily harm,
discretion to disclose information to authorities when they believe a client may commit a violent crime; rather, it allows an attorney to be compelled to reveal such information in court.\textsuperscript{48} Furthermore, it does not expressly create an exception to the attorney's duty of confidentiality found in Business and Professions Code section 6068(e).\textsuperscript{49} Whether Evidence Code section 956.5 implicitly creates an exception to the attorney's ethical duty of confidentiality remains to be seen.

Section 956.5 is an approximate parallel to the psychotherapist-patient exception found in section 1024. What does this mean to California attorneys? Based upon the justifications for its holding in Tarasoff, the California Supreme Court may no longer find a meaningful distinction between the psychotherapist-patient and the attorney-client privilege.

This means that a client who tells his attorney that he is about to commit a violent crime may force his attorney to make a difficult decision. If the attorney remains silent and the client follows through on his threat, the attorney may be subject to Tarasoff liability. On the other hand, if the attorney discloses what he knows to the authorities, a judge, or the potential victim, the attorney may be subject to discipline for violating his ethical duty of confidentiality found in Business and Professions Code section 6068(e).

IV. LEGISLATIVE INTENT

The court will likely consider whether the California Legislature intended to impose Tarasoff liability on lawyers who fail to disclose when they reasonably believe that a client may

\textsuperscript{48} See supra note 26.

\textsuperscript{49} See supra note 26.
commit a violent crime. This analysis should consider whether the Legislature intended to create an exception to the attorney's duty of confidentiality. It seems unlikely that the courts would impose Tarasoff liability on an attorney who is bound by an ethical duty to maintain confidentiality despite the likelihood that a client will cause death or substantial bodily harm. The legislative history of S.B. 645, however, suggests that it was, in fact, intended to impose Tarasoff liability on attorneys, and also, to create an exception to an attorney's ethical duty of confidentiality. When it was introduced on March 2, 1993, S.B. 645 was simply an attorney discipline bill. It made changes to the State Bar Court, the Bar's Complainants' Grievance Panel, and several laws governing attorneys. On May 12, 1993, it was amended to create new Evidence Code section 956.5. Originally, the section required that the attorney believe the threatened death or substantial bodily harm be "imminent." Later, the word "imminent" was removed, expanding the exception to include threats of even remote future crimes.

50. See infra notes 57-60 and accompanying text.
52. Id.
Section 956.5 is added to the evidence code, to read:
(A) There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
(B) A lawyer's decision not to take preventative action permitted by subdivision (A) does not violate this section and shall not result in civil liability.

Id. (emphasis added).

The emphasized portions were removed before the bill was signed by Governor Wilson on October 9, 1993.
54. Id.
56. Some scholars argue that because the new rule does not limit itself to "imminent" criminal acts, even corporate lawyers may find themselves within its reach.

Consider a business client who consults a lawyer about whether a possible concealed danger in a product or in the workplace must be reported under Penal Code section 387 (the 'Be a Manager, Go to Jail' law). Failure properly to report, warn or abate is a crime both on the part of the manager and the corporation. If management fails to act in
Perhaps most significantly for attorneys, the original version contained a provision that specifically exempted attorneys who decide not to take preventative action from civil liability.\textsuperscript{57} Before the bill was signed, this provision was removed, evidencing a clear legislative intent to impose civil liability on attorneys who decide not to take preventative action.\textsuperscript{58}

An Assembly Committee report, dated only fifteen days before the provision granting attorney immunity was deleted, stated: \textquote{[t]his immunity clearly departs from the law that governs psychotherapists under similar circumstances \ldots . It is not clear why attorneys should not be held to a similar standard of conduct.}\textsuperscript{59}

The language of this report, followed by the subsequent removal of the immunity provision, suggests only one conclusion. The Legislature rejected the notion that the distinction between the psychotherapist-patient and the attorney-client privilege warrants immunity for attorneys, but not for psychotherapists. The Legislature made a conscious decision to allow the \textit{Tarasoff} liability to extend to attorneys.\textsuperscript{60} It is now left to the courts to carry out the Legislature's intentions.

V. EXAMPLES

Before the enactment of section 956.5, California courts and the San Diego County Bar Association issued opinions concerning whether an attorney may disclose a client confidence when the attorney has reason to believe the client will...
cause death or substantial bodily harm. In holding that an attorney was prohibited from making such a disclosure, the opinions cited the lack of an exception to the attorney-client privilege in such cases. Now that such an exception exists, these bodies will have to recognize that the previous distinction no longer exists in order to remain consistent with their past opinions. Consequently, Tarasoff liability should be extended to attorneys.

A. San Diego County Bar Association Ethics Opinion 1990-1

The enactment of Evidence Code section 956.5 practically eliminates the distinction between the psychotherapist-patient privilege and the attorney-client privilege in relation to disclosure to prevent a client/patient from committing a crime likely to result in death or bodily harm. In 1990, before Evidence Code section 956.5 was enacted, the San Diego Bar Association issued an ethics opinion distinguishing the two privileges. The opinion states:

[T]he analysis applied by the California Supreme Court in Tarasoff is unavailable in the attorney-client relationship. The Evidence Code codifies both the attorney-client and the psychotherapist-patient privileges. See, Evidence Code §§ 954, 1014. However, section 1024 also codifies the "Tarasoff-exception" to the psychotherapist privilege. Thus the existence of the Legislature's express exception to the psychotherapist-patient privilege stands in contrast to the absence of a similar exception to the attorney client privilege.

Read in light of the fact that the California Legislature has now codified an exception to the attorney-client privilege, which is similar to the pre-existing exception to the psychotherapist-patient privilege, the opinion seems to suggest that the "Tarasoff-exception" now exists for the attorney-client privilege as well.

61. See infra notes 63-75 and accompanying text.
62. See infra notes 63-75 and accompanying text.
64. Id. at 3.
B. People v. Clark

In a case decided prior to the enactment of Evidence Code section 956.5, the California Supreme Court examined the differences between the attorney-client privilege and the psychotherapist-patient privilege. The court stated:

"The purpose underlying [the psychotherapist-patient privilege] is not to prevent the use of defendant's statements against him in legal proceedings. It exists to prevent the unnecessary disclosure of statements made in confidence in the course of privileged communication with a therapist and thereby to facilitate treatment.

The attorney-client privilege serves a different purpose, however. It exists to permit a client to freely and frankly reveal confidential information, including past criminal conduct, to the attorney or others whose purpose is to assist the attorney, and to thereby enable the attorney to adequately represent the client. In a criminal case the privilege also serves to preserve the defendant's privilege against self-incrimination that might otherwise be deemed to have been waived by his revelation of incriminating information."

This explanation of the difference between the attorney-client privilege and the psychotherapist-patient privilege is not completely clear. Both privileges result in "prevent[ing] the use of defendant's statements against him in legal proceedings." Both "prevent the unnecessary disclosure of statements made in confidence in the course of privileged communication." Both allow a patient or a client to "freely and frankly reveal confidential information." Also, both exist to allow the attorney or psychotherapist to adequately counsel the client or patient.

The only distinction of merit lies in the stated purpose of the attorney-client privilege to protect the client's privilege against self-incrimination. Such a purpose does not exist in

66. Id. at 150-53.
67. Id. at 151-52 (citations and footnote omitted) (emphasis added).
68. Id. at 151.
69. Id.
71. Id.
72. U.S. CONST. amend. V (stating in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself.").
the psychotherapist-patient privilege. A client's privilege against self-incrimination, however, is almost never infringed by an attorney disclosing information to prevent a future crime.\textsuperscript{73} Thus, this distinction is not relevant in an analysis of whether Tarasoff liability should be extended to attorneys.

The court in Clark further explained the basis for its determination: "The Legislature has recognized this distinction in purpose in Evidence code section 1024, where it provides that there is no privilege under 'this article,' i.e., article 7, which contains only the psychotherapist-patient privilege, if the therapist believes it is necessary to disclose the communication."\textsuperscript{74}

Because section 956.5 now corresponds to section 1024, the distinction has blurred. In enacting section 956.5, the Legislature has determined that the purposes of the attorney-client privilege are outweighed by public policy to protect potential crime victims.\textsuperscript{75}

VI. POLICY ISSUES

Inevitably, a case in which an attorney is sued on a Tarasoff basis will reach California courts, and there is no doubt the courts will consider many of the same policy questions presented in Tarasoff. Many policy issues may be quickly decided in favor of extending Tarasoff liability because these questions are identical to those already consid-


\textsuperscript{74} Clark, 789 P.2d at 152.

\textsuperscript{75} This is not a difficult conclusion to accept. The California Legislature has become increasingly concerned with crime, and has recently passed several tough crime and sentencing laws. This includes the "three-strikes" sentencing law for repeat felony offenders—one of the toughest sentencing laws in the United States.
ered and decided against psychotherapists in *Tarasoff*.

Other issues are unique to the attorney-client relationship and require serious consideration.

Attorneys will argue that free and open communication is necessary to the legal profession in order to provide competent representation to clients, and that to impose a duty on attorneys to disclose any client’s confidences will make competent representation impossible. If a client cannot feel completely free to disclose information to his attorney, the attorney will not be able to obtain enough information to adequately represent the client. This, some will argue, will interfere with a client’s Sixth Amendment right to effective assistance of counsel.

In Sixth Amendment contexts, as well as Fifth Amendment contexts, the United States Supreme Court has held that these rights are protected only to the extent of the traditional attorney-client privilege and other ethical rules.

The court considered similar arguments by psychotherapists in *Tarasoff*. In *Tarasoff*, the court concluded that by creating an exception to the psychotherapist-patient privilege, the Legislature was in effect saying that these concerns are not valid when life is on the line. Thus, the Legislature has weighed the need for confidentiality in the psychotherapist-patient relationship and decided that it is outweighed by the concern for public safety.

Furthermore, attorneys will argue that it is unfair to impose civil liability on an attorney for the future acts of a client

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76. See infra notes 81-90 and accompanying text.
77. See infra notes 78-80, 91 and accompanying text.
78. U.S. Const. amend. VI (stating in relevant part that “the accused shall ... have the Assistance of Counsel for his defence.”).
79. U.S. Const. amend. V.
82. “We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others.” *Id.* at 347.
because it is difficult to determine if a client's threat is serious. After all, attorneys are not in the business of predicting behavior, and could not be expected to predict a client's behavior with the same exactness as could a psychotherapist.

In Tarasoff, the court quoted hornbook law to the effect that a professional person must exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances."\(^8\) Attorneys would thus be held only to a common sense standard. It is unlikely that attorneys would be expected to display any special skill in predicting behavior. On the other hand, an attorney is often in an unique position to know about the dangerousness of a client. The attorney often knows much about a client's criminal history and personality, as well as the facts surrounding the client's current case.

A psychotherapist, on the other hand, often knows no more about a patient than the patient reveals. In fact, the defendants and amicus curiae argued in Tarasoff that "psychiatric predictions of violence are inherently unreliable."\(^8\) The Tarasoff court cited cases from California and other jurisdictions where a special relationship was found which created a duty to warn a third party.\(^8\) In each of these cases, the party with the duty to warn was not specially trained in behavior prediction.\(^8\) The court also cited decisions where the doctor-patient relationship was found sufficient to support the duty of reasonable care in protecting others from dangers emanating from the patient's illness.\(^8\) In another cited case, a court held parents liable for not warning a babysitter of the violent proclivities of their child.\(^8\) In yet another case, a state was found to have a duty to warn foster parents

\(^83\). Id. at 345.
\(^84\). Id. at 354 (concurring opinion).
\(^85\). See infra notes 87-90 and accompanying text.
\(^86\). See infra notes 87-90 and accompanying text.
\(^88\). Tarasoff, 551 P.2d at 334 (citing Ellis v. D'Angelo, 253 P.2d 675 (Cal. 1953)).
of the dangerous tendencies of their ward. In a final case, a court sustained a cause of action against a sheriff who had promised to warn a third party before releasing a prisoner, but failed to do so.

After the enactment of Evidence Code section 956.5, the only meritorious distinction between the attorney-client privilege and the psychotherapist-patient privilege are the client's Fifth and Sixth Amendment rights, which have no parallel in the psychotherapist-patient relationship. As explained above, Fifth and Sixth Amendment rights will almost never be implicated in protecting a client from the disclosure of a future crime.

VII. CURRENT DILEMMA

Currently, if an attorney reveals any of her or his client's "secrets," she or he is in violation of Business and Professions Code section 6068(e), and can be disciplined by the State Bar for violating the ethical duty to remain silent. Technically, this is true even if the attorney makes the disclosure pursuant to a court order, even one seemingly authorized by Evidence Code 956.5. Additionally, clients can maintain various claims against the attorney for revealing privileged or ethically protected information. A client could allege a breach of an express or implied promise to maintain confidentiality, breach of statutory duty, invasion of privacy, malpractice, or breach of fiduciary duty.

On the other hand, if the attorney does not make a disclosure in order to prevent her or his client from committing a

89. Tarasoff, 551 P.2d at 344 (citing Johnson v. State, 447 P.2d 352 (Cal. 1968)).
90. Tarasoff, 551 P.2d at 344 (citing Morgan v. City of Yuba, 230 Cal. App. 2d 938 (1964)).
91. See supra notes 72-73, 78-80 and accompanying text.
92. See supra note 24 and accompanying text.
93. See supra note 24 and accompanying text.
94. See supra note 26 and accompanying text.
96. Breach of Confidence, supra note 95 at 1446.
97. Id. at 1447.
98. Id. at 1428-30.
100. Breach of Confidence, supra note 95, at 1448-49, 1459-60.
criminal act likely to result in death or substantial bodily harm, the attorney may face a wrongful death claim under a possible extension of Tarasoff.\textsuperscript{101} Financial considerations aside, the attorney must consider the possible harm that could accrue to an innocent individual as a result of her or his silence.

VIII. TWO PROPOSALS

Sometime shortly before the passage of S.B. 645, a Los Angeles law firm received a threat from a prospective client against a judge.\textsuperscript{102} The firm believed the threat to be credible.\textsuperscript{103} After extensive consultation, the firm concluded that it was constrained by Business and Professions Code section 6068(e) from revealing the individual's identity.\textsuperscript{104}

Had this incident occurred after the passage of S.B. 645, would the firm have acted differently? Business and Professions Code section 6068(e) remains unaltered and could still be interpreted as imposing an ethical duty on the firm to maintain the client's confidence. However, new Evidence Code section 956.5 clearly allows disclosure to be compelled by a court order.\textsuperscript{105} The firm may now rightfully consider possible Tarasoff liability should it choose not to disclose and the client follows through on his threat.

If the firm believes it has an ethical duty to maintain confidentiality, then no court is likely to become aware that the client has harmful intentions, and the firm will never be compelled by a court to reveal the information. Thus, section 956.5 will not aid in preventing the intended harm. This seems to clearly circumvent the intentions of the Legislature.\textsuperscript{106} The only way for the legislative intent to be realized is to recognize an exception to the attorney's duty of confidentiality. The courts may do this on their own, but this is certainly not a given. In order to alleviate this confusion, the Legislature should adopt an exception to Business and Professions Code section 6068(e), allowing non-court-compelled

\textsuperscript{101} Compare Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976).
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} See supra note 26 and accompanying text.
\textsuperscript{106} See supra note 102.
disclosure whenever there is not a privilege under Evidence Code section 956.5. This proposal would eliminate the current conflict between Evidence Code 956.5 and Business and Professions Code section 6068(e), by allowing the attorney a choice. The attorney would choose whether or not to disclose information that might prevent a client from committing the threatened act, thereby avoiding potential Tarasoff liability.

An even better exception to Business and Professions Code section 6068(e) would allow voluntary disclosure of “any necessary information, when the attorney reasonably believes that disclosure is necessary to prevent a criminal act that the attorney believes is likely to result in imminent death or substantial bodily harm.” This proposal would allow a disclosure different in three respects from that contemplated in section 956.5. First, it would not limit the disclosure to “confidential communication” as defined by Evidence Code section 952.107 Since section 6068(e) protects all of the client’s “secrets,” regardless of whether they meet the definition of “confidential communication,” the attorney should be free to disclose “any necessary information” in the interest of public safety.108 Second, the disclosable information would not be limited to those situations necessary to prevent the client from committing a criminal act. The attorney would be able to disclose confidential information to prevent third party criminal acts. The interest in public safety is no more implicated in a case where the client is about to commit the anticipated harm than in a case where a third party is about to commit the harm.109 Finally, there would be no exception

107. See supra note 30.
108. An example should make this distinction clear. Suppose Attorney represents Client on a robbery charge. Client’s Mother, a reliable source, informs Attorney that Client has purchased a weapon and intends to kill Client’s robbery victim in order to prevent Victim from testifying against Client at trial. In this case, the information would not be protected by the attorney-client privilege, because the information was not obtained through a “confidential communication between client and lawyer” as required by Evidence Code section 952. See supra note 30 and accompanying text. However, this information is still a “secret” of the client and is protected by Business and Professions Code section 6068(e). See supra note 24 and accompanying text. If Attorney is able to form a reasonable belief that disclosure is necessary to prevent Client from killing Victim, Attorney should be able to disclose. The public safety interest is the same regardless of the source of the information.
109. For example, Client informs Attorney that Client’s Brother is about to kill Victim. If Client does not consent to disclosure of this information, it would be protected by both the attorney-client privilege and the attorney’s ethical
to the attorney's duty of confidentiality unless the threatened harm was "imminent." Because the first two differences expand the scope of permissible disclosures from that of section 956.5, this difference would prevent uncompelled disclosure when the anticipated harm is too speculative to outweigh the client's interest in confidentiality.¹¹⁰

The second, and preferred proposal would create a solution to another related problem. Once the attorney decides that disclosure is necessary to prevent the criminal act, the questions are how much information does the attorney reveal, and to whom? The attorney may disclose only "any necessary information, when the attorney reasonably believes that disclosure is necessary to prevent a criminal act that the attorney believes is likely to result in imminent death or substantial bodily harm."¹¹¹ The attorney must therefore minimize the disclosure to what is needed to prevent the harm, without unnecessarily compromising the client's interest in confidentiality. The attorney could, therefore, disclose information without disclosing his clients identity, if unnecessary. The attorney could also reasonably decide whether it is necessary to inform the police, the victim, a third party, or perhaps some combination of these. This gives the attorney flexibility to prevent the intended harm, to minimize the loss of confidentiality, and to avoid Tarasoff liability.¹¹²

¹¹⁰. One could imagine a situation where Mother tells Attorney that Neighbor plans to kill Client's Victim on some date far in the future. Because such a threat may never materialize, and may be preventable without disclosure, Client's interests in confidentiality outweigh the public safety interest. Attorney may still take steps to prevent the harm if it does not result in disclosure of Client's secrets. Eventually, if the anticipated harm becomes imminent, Attorney may disclose.


¹¹². Using the example in supra note 108, Attorney may decide to disclose to Mother, believing that disclosure is all that is necessary to prevent Client from killing Victim. Alternatively, Attorney may warn Victim and/or police without...
IX. Conclusion

It is still unclear whether California attorneys may, on their own initiative, disclose confidential information when they reasonably believe disclosure is necessary to prevent a client from committing a criminal act that is likely to result in death or substantial bodily harm. Presently, if the attorney discloses, she or he may be subject to State Bar discipline for violating Business and Professions Code section 6068(e), or she or he may be subject to a number of civil actions by the client. On the other hand, if the attorney maintains confidence, she or he may be subjected to Tarasoff liability, and she or he may allow an innocent individual to suffer serious harm. Until this issue is clearly resolved by the California courts or legislature, attorneys will continue to face this ethical and economic dilemma.