A Tale of Two States: Beware of Tarasoff Extension for Hearsay Communications

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INTRODUCTION

**IS THERE A DUTY TO WARN WHEN A PSYCHIATRIST HEARS OF A THREAT TO A THIRD PARTY FROM A PATIENT’S FAMILY MEMBER?**

If only practicing psychiatry were as easy as speaking with, evaluating, and treating the actual patients. Instead, in today’s practice of medicine, a psychiatrist's practice entails, among other things, speaking with patients’ family members and complying with ever-changing legal duties. Psychiatrists, no doubt, are well aware of the decision in _Tarasoff v. Regents of University of California_,¹ where the California Supreme Court famously (or infamously)² first articulated a mental health professional's legal duty to warn a third party of a patient’s intended physical violence. However, _Tarasoff_ left open the question of whether a psychiatrist has a duty to warn if the information that his or her patient intends to harm a third person comes from the patient's family member. In those scenarios, what is the psychiatrist's legal duty? Consider the following hypothetical.

Imagine that Dr. Mary has treated Johnny for several months for schizophrenia. On September 1, at the end of one session, Johnny’s father advised Dr. Mary outside Johnny’s presence that earlier in the day Johnny told Johnny’s father that Johnny intended to shoot Billy at 3:00 p.m. on September 2. Dr. Mary advised Johnny’s father that Johnny never mentioned anything remotely near a threat during their sessions, but nevertheless convinced Johnny to voluntarily check into a psychiatric hospital. Dr. Mary then advised the hospital's staff psychiatrist of the importance of retaining Johnny for observation; however, she did not document the threat in Johnny's medical records or verbally advise the staff psychiatrist of the threat relayed to her. Dr. Mary also did not notify Billy or law enforcement of the purported "danger." On the morning of September 2, the hospital discharged Johnny. Later that day, Johnny shot Billy.³

Under the above hypothetical, does Dr. Mary owe a legal duty to advise Billy of the "threat" Johnny's father relayed to her? The answer, in short, depends on many factors, including, of course, the law in the particular state in which Dr. Mary practices. Yet assume that Dr. Mary practices in Michigan, and that Michigan has on its books a law imposing a duty to warn a third person if a "patient communicates" to a psychiatrist a threat of physical violence against a reasonably identifiable third person.⁴ Does Dr. Mary now owe a duty to warn after her conversation with Johnny's father? Not according to a recent Michigan court, since, in Michigan, Johnny's father's communication is not a "patient communication."
Now assume that Dr. Mary practices in California instead, and that California similarly imposes a legal duty to warn if the "patient has communicated" a threat to a psychiatrist. Dr. Mary must have no duty to warn, right? Wrong. According to a recent California court, Dr. Mary does, in fact, have a legal duty to warn, because in California, a family member's communication is a "patient communication."

Now change the hypothetical by assuming that Dr. Mary did document the threat Johnny’s father relayed to her in Johnny’s medical records, and gave those records to the hospital psychiatrist upon admitting Johnny as an in-patient in the hospital. Assume, also, that Dr. Mary verbally advised the hospital psychiatrist of the threat relayed to her. Does this alter, or even discharge, Dr. Mary’s duties or liability? And what about the hospital psychiatrist; does she have a legal duty to warn under the circumstances?

This article examines the psychiatrist's duty to warn when the information of a patient's threat toward a third person is received from various hearsay sources, i.e., from someone besides the patient directly. This article first summarizes the decision in Tarasoff, noting that it left open the question of the existence of a duty when the critical information comes from the patient's family member. This article then notes that several states, including those in Michigan and California, have enacted Tarasoff duty to warn laws through case law or statutes. Next, there is a summary of recent court decisions in Michigan and California interpreting their respective Tarasoff laws, in which the two states surprisingly reached completely opposite conclusions as to the breadth of the duty to warn, despite having nearly identical duty to warn laws. Finally, there is a discussion of some of the various issues hearsay communications can present in the context of a psychiatrist’s duty to warn, including whether verbal communications between psychiatrists or information written in a patient's medical records can trigger or discharge the duty to warn, along with some practical advice to help manage through those issues.

BACKGROUND

TARASOFF V REGENTS OF THE UNIVERSITY OF CALIFORNIA – THE DUTY TO WARN IS CREATED

Approximately fifty years ago, California recognized the common law rule that one person has no duty to control either another's conduct or warn those potentially endangered by a person's conduct. Yet on July 1, 1976, that all changed. It was then that the California Supreme Court issued the decision in Tarasoff that has sent shivers through many psychiatrists, by holding that "once a therapist does in fact determine, or . . . should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." Depending on the nature of the case, this new legal duty may require warning the intended victim.

For all of its holdings and rules, however, Tarasoff did not answer the question whether a psychiatrist's receipt of information that a patient has threatened to harm a third party from a non-patient source, such as the patient's family member, triggers a duty to warn.
MANY STATES ADOPT TARASOFF DUTY TO WARN

Generally, state laws are created in either of two ways, through either “case law” or through “statutory law.” The former, "case law," is created by a court adopting a rule of law through resolving a lawsuit. The latter, "statutory" law, involves a state legislature adopting a rule by enacting a statute that is binding in that state. In some instances, a court may adopt a rule of law through case law, only to have the state legislature later adopt a statute in response to either accept, reject, or alter the case law.

After Tarasoff, states reacted in different ways regarding whether to impose a legal duty to warn third parties, resulting in varying “duty to warn laws” throughout the United States. A small number of state courts rejected the Tarasoff rule, and adopted a rule that a mental health professional treating outpatients has no liability to third persons injured by their outpatients. Yet the majority of states adopted the Tarasoff rule, through either case law or statutory law, thereby imposing on psychiatrists a legal duty to warn.

A few states, such as Michigan and California, initially adopted a legal duty to warn through case law, only to have their respective state legislatures later enact a statutory duty to warn. Among other reasons, duty to warn statutes have been enacted to (1) limit the liability of mental health providers, by expressly delineating both the limited situations in which those providers have a legal duty to warn, and the particular actions those providers can take to fulfill that legal duty as a matter of law; and (2) “abolish the expansive rulings of Tarasoff . . .” Despite these “purposes,” statutes designed to limit Tarasoff are, on occasion, actually being used to expand Tarasoff.

DISCUSSION

TARASOFF REVISITED: A RETENTION OR EXTENSION? A LESSON IN CONTRASTS – MICHIGAN AND CALIFORNIA

Michigan Limits Duty to Warn to Communications from a Patient Directly

Although Michigan initially adopted a Tarasoff duty to warn through case law in 1983, the Michigan State Legislature later adopted a Tarasoff duty to warn statute in 1989. That statute, Mich. Comp. Laws §333.1946, provides that a mental health professional has no duty to warn a third person of a threat, except where:

“. . . a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future . . . ."

In December 2004, the Michigan Court of Appeals interpreted whether Section 333.1946 imposes a duty to warn where the communication of a patient’s threat to a third person comes not from the patient at all, but from the patient’s family member; the Court concluded that third-party communications do not trigger a duty under Section 333.1946. In Martin, the plaintiff father sued Dr. Shin, his son’s psychiatrist, after one of the father’s sons (Terry) fatally shot his brother (Timothy) and wounded the plaintiff father. Earlier on the day of the shooting, the father had brought Terry in to see Dr. Shin, but, during the visit, the father (not Terry) was the only one to communicate information to Dr. Shin. When Terry shot Timothy later that day, the plaintiff
father sued Dr. Shin and his hospital employer. The father asserted that Dr. Shin owed a duty to warn under Section 333.1946, relying on the father’s affidavit in which he attested that he advised Dr. Shin of Terry’s suicidal and homicidal threats. According to the father, Dr. Shin violated Section 333.1946 by failing to warn the father and the police that Terry posed a threat of violence to Timothy. The trial court dismissed the lawsuit, ruling that Dr. Shin had no duty under Section 333.1946 because there was no communication of a threat from the patient (Terry) to Dr. Shin.14

The Michigan Court of Appeals upheld the trial court’s dismissal of the lawsuit. The Court noted that the language in Section 333.1946 unambiguously imposes a legal duty to warn only if "a patient communicates a threat of physical violence against a reasonably identifiable third person."14 The Court rejected the argument that the third-party communication from the plaintiff father to Dr. Shin gave rise to a duty, since it defies the plain language in Section 330.1946.14 That statute triggers a duty only if (a) there is a communication of a threat of violence, (b) by a patient.14 Given that it was the father – and not the patient – who communicated any information to Dr. Shin regarding a threat of violence, Dr. Shin had no duty to warn under Section 333.1946. Thus, the Court affirmed the trial court’s dismissal of the suit.14

CALIFORNIA EXTENDS DUTY TO WARN TO COMMUNICATIONS FROM A PATIENT’S FAMILY MEMBER

Like Michigan, California adopted a duty to warn rule through case law (i.e., Tarasoff), only to have its State Legislature later adopt a duty to warn statute.5 The California statute, Cal. Civ. Code §43.92, is nearly identical to Michigan’s Section 333.1946, as it provides that a mental health professional has no legal duty to warn of a patient’s threatened behavior, except where:

". . the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."5

Recently, California courts issued two decisions (Ewing I3 and Ewing II15) stemming from facts nearly identical to that in Martin, interpreting whether Section 43.92 imposes a duty to warn when the communication comes not from the patient but from the patient’s family member; surprisingly, the California court reached the exact opposite conclusion as in Michigan. The decisions in Ewing I and Ewing II grew out of a single lawsuit filed by a family against an out-patient therapist and in-patient hospital facility, respectively, based on a claim that the out-patient therapist and hospital’s social worker failed to warn after receiving information of a patient’s threats to harm a third person from the patient’s family. Those decisions are summarized below.

**Ewing I: Patient’s Family Member’s Communication of Patient’s Threat to Out-Patient Therapist Triggers Duty to Warn**

In Ewing v. Goldstein ("Ewing I")3, the defendant therapist, Dr. Goldstein, provided therapeutic services to a patient, Geno Colello, regarding Geno’s difficulties with a former girlfriend, Diana Williams. On June 21, Geno advised his father (Victor) that he was considering harming Williams’ new boyfriend, Ewing. When Geno’s father told Dr. Goldstein of Geno’s threats, Dr. Goldstein persuaded Geno to admit himself into a psychiatric hospital under the supervision of a hospital staff psychiatrist. On the next day, June 22, the hospital advised Geno’s father of its intent to discharge Geno, prompting Geno’s father to notify Dr. Goldstein of the hospital’s
intentions. Although Dr. Goldstein contacted the hospital staff psychiatrist and "explained why [Geno] should remain hospitalized," the staff psychiatrist advised Dr. Goldstein that Geno was not suicidal and would be discharged."³ Dr. Goldstein urged the staff psychiatrist to reevaluate Geno and keep him hospitalized through the weekend; however, the hospital released Geno on June 22. On June 23, Geno murdered Ewing.

Ewing's parents then sued Dr. Goldstein for wrongful death, claiming that Dr. Goldstein breached his duty under Section 43.92 to warn Ewing of the risk Geno posed. The trial court dismissed the case, ruling that Dr. Goldstein had no duty under Section 43.92 because the information of Geno's threat came from Geno's father.

The California Court of Appeals, however, reversed, and held that a communication from a patient's family member to a therapist, made for purposes of advancing the patient's treatment, is a "patient communication" triggering the duty to warn in Section 43.92.³ The Court conceded that Section 43.92 refers only to a communication by a "patient," and that the California Legislature specifically defined "patient" as "a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition."³ Nevertheless, the California Court held that communications from a patient's family member fall within the meaning of the phrase "patient has communicated" in Section 43.92.³ It interpreted Section 43.92 to impose a legal duty to warn "when the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment."³ According to the Court, there was no "principled reason" why information shared through a third party (as opposed from the patient directly) should not trigger the duty in Section 43.92,³ stating its interpretation is consistent with the "legislative history" of Section 43.92, the "evils it sought to remedy," and "the rule of reason."³ Since Dr. Goldstein received communication from Geno's father of Geno's threat to Ewing, the Court determined that the trial court erred in refusing to consider the information Geno's father shared with Dr. Goldstein in deciding if there was a factual dispute concerning whether Geno communicated to Dr. Goldstein a serious threat of physical violence to another.³

**EWING II: PATIENT’S FAMILY MEMBER’S COMMUNICATION TO IN-PATIENT THERAPIST TRIGGERS DUTY TO WARN**

At issue in *Ewing II*¹⁵ was Ewing's family's attempt to hold liable the in-patient hospital that treated and then discharged Geno, for Ewing's wrongful death on the theory that Geno's father told the hospital's social worker of Geno's threats to harm Ewing and the social worker violated Section 43.92 by not warning Ewing. In *Ewing II*, Ewing's family alleged that after Geno threatened to harm Ewing, Geno's father brought Geno to the defendant hospital for treatment. At the hospital, Ewing's family alleged, Geno's father advised the hospital in-patient social worker of Geno's threats to Ewing; in response, the social worker persuaded Geno to voluntarily admit himself into the hospital, but did not warn either Ewing or police. Ewing's family argued that the social worker's inaction breached Section 43.92, rendering the employer (hospital) liable. The trial court dismissed the lawsuit against the hospital, ruling that the hospital could not be liable for the social worker's inaction, since the social worker did not receive any information of a threat from the patient himself and therefore could not have violated Section 43.92.
The *Ewing II* Court of Appeals reversed, and relying on its ruling in *Ewing I*, concluded that information received from the patient’s father to the social worker could trigger a duty to warn under Section 43.92. The Court explained that the critical inquiry is whether the social worker “actually held the belief or made the prediction” that a patient posed a risk of inflicting serious physical harm upon a reasonably identifiable third person; if so, it is irrelevant that the belief or prediction “was premised, in some measure, on information derived from a member of the patient’s family.” The Court therefore allowed the lawsuit against the hospital to proceed, with the jury deciding if the social worker violated Section 43.92.

### TABLE 1: COMPARE AND CONTRAST *MARTIN* WITH *EWING I* AND *EWING II*

**State:**
- Michigan
- California
- California

**Case Name:**
- *Martin*
- *Ewing I*
- *Ewing II*

**Statute:**
- Duty to warn exists if a patient communicates a threat to a mental health professional a threat of physical violence against a reasonably identifiable third party
- Duty to warn exists if patient has communicated to a psychotherapist a serious threat of physical violence against a reasonably identifiable victim
- Duty to warn exists if patient has communicated to a psychotherapist a serious threat of physical violence against a reasonably identifiable victim

**Facts:**
- Dad tells psychiatrist he feels threatened by son’s suicidal and homicidal threats
- Psychiatrist does not warn third party
- Son murders brother
Son tells dad thinking of harming Ewing
Dad tells out-patient therapist of threats
Therapist does not warn Ewing or law enforcement of threat
Hospital releases son
Son murders Ewing

Son tells dad thinking of harming Ewing
Dad tells in-patient hospital social worker of threats
Social worker does not warn Ewing or law enforcement of threat
Hospital releases son
Son murders Ewing

Court Holdings:

- Dad’s communication is not “patient communication”
- Psychiatrist had no duty to warn under statute
- Psychiatrist did not violate statute

- Dad’s communication is a “patient communication”
- Out-patient therapist had duty to warn
- Question of whether therapist believed patient intended to harm victim was for jury to decide

- Dad’s communication is a “patient communication”
- Question of whether in-patient social worker believed or predicted threat is for jury to decide

LESSONS TO TAKE AWAY

1) KNOW THE LAW IN YOUR JURISDICTION: AT LEAST ONE STATE HAS EXTENDED DUTY TO WARN TO COMMUNICATIONS FROM A PATIENT’S FAMILY MEMBER.

In today’s ever-changing world, it is as important as ever to be aware of the laws in your state. In the context of a duty to warn, as noted, states have reacted to the Tarasoff decision in widely different manners; some have rejected it while most have adopted.\textsuperscript{7,9} Given the stakes at issue in duty to warn cases,\textsuperscript{16} it is important for practitioners to understand (a) whether their state imposes a legal duty to warn, and (b) if so, what triggers that duty (i.e., only communication from a patient, or communication from a patient’s family member, communication from patient’s friend).
Practitioners should also become familiar with their state’s interpretation of such a duty. While most states that impose a duty to warn provide that the duty is triggered upon a “patient communication,” states have interpreted that language differently. At least one state interpreted that language literally and imposed a narrow duty (only communications of a threat that come directly from a patient trigger the duty to warn)\(^\text{14}\), while another state interpreted it broadly and created a broad duty (communications from either patient directly or from family member relating patient’s threats trigger duty to warn).\(^\text{3,15}\) In at least one jurisdiction, a court has taken the once alarmingly-broad rule in Tarasoff and extended it even farther, to now impose a legal duty to warn when the information comes exclusively from a patient’s “family member.”\(^\text{3,15}\)

2) THE IMPORTANCE OF ACTING REASONABLY.

Fundamentally, all medical malpractice claims, such as a duty to warn claim, arise out of a plaintiff’s claim that the practitioner acted unreasonably in a certain scenario.\(^\text{17}\) Practitioners should keep this in mind when faced with a duty to warn scenario, and, in addition to taking those steps called for under the letter of the law of their state, also take those actions that are medically, ethically, and legally reasonable. Doing so will go a long way toward helping avoid liability.

3) PROPER HANDLING OF HEARSAY COMMUNICATIONS IS AT A PREMIUM.

The decisions in Martin, Ewing I, and Ewing II also show the importance of practitioners being able to properly handle issues that third-party communications can present to avoid a duty to warn lawsuit. A psychiatrist undoubtedly has several conversations daily about a patient with persons other than the actual patient. While many of these conversations, commonly referred to as third-party communications or hearsay communications,\(^\text{6}\) do not identify a patient’s threat to harm a third person, it is in those instances in which the hearsay conversations do identify such a threat that practitioners should recognize that the duty to warn may be implicated, and be prepared to act accordingly.

Below are some of the types of issues that hearsay communications can raise in the context of the duty to warn. If we assume that the relevant jurisdiction imposes a legal duty to warn upon receipt of “patient communication,” consider the following scenarios:

**DO FAMILY MEMBER COMMUNICATIONS TRIGGER DUTY TO WARN?**

- Does a psychiatrist who receives information from a patient’s family member that the patient has threatened to harm a third party, have a legal duty to warn?

- As noted, the answer depends upon the law in your jurisdiction. There appears to be a split of authority concerning whether that type of hearsay communication from a patient’s family member triggers a legal duty to warn.\(^\text{18}\) In two states that have nearly identical laws, one state has ruled that such hearsay does not trigger the duty to warn,\(^\text{14}\) while the other state ruled that hearsay does trigger the duty.\(^\text{3,15}\)
DOES EITHER READING OF A THREAT IN MEDICAL RECORDS OR BEING VERBALLY TOLD OF A THREAT BY ANOTHER PRACTITIONER TRIGGER A DUTY TO WARN?

- Imagine that in the hypothetical at the beginning of this article, Dr. Mary documented the threat Johnny’s father told her in Johnny’s medical records. If Dr. Mary later referred Johnny to an in-patient hospital psychiatrist, Dr. Steve, and Dr. Steve read Dr. Mary’s notes of the threat, would Dr. Steve have a duty to warn? Is the answer different if Dr. Steve did not learn of the threat by reading the medical records but instead by a conversation with Dr. Mary?

- Again, the answer depends upon your jurisdiction. In those jurisdictions that interpret the Tarasoff rule narrowly, Dr. Steve, the in-patient psychiatrist, probably does not have a legal duty upon either reading of a threat in medical records or being verbally told of the threat, because neither circumstance entails a “patient communication” of a threat. However, in states that interpret the Tarasoff rule broadly (e.g., California), the answer is less than certain. California appears to impose a legal duty to warn whenever there is any communication made to a physician for purposes of advancing the patient’s treatment, regardless of the source.

- As a practical matter, Dr. Steve should take a few steps to try to add certainty to the situation, including personally assessing the patient to try to verify the “threat”. Should the “threat” reveal itself during those communications, then the duty to warn question is easily answered. If the “threat” is not revealed, then Dr. Steve should carefully make his own assessment of the patient, keeping in mind the information learned, and act accordingly.

- In deciding the appropriate steps to take, Dr. Steve should be aware that if he fails to warn the victim and police under this scenario and is later sued, he will likely not have public favor on his side if the matter goes to trial. This is because, upon hearing evidence that Dr. Steve had reason to believe physical harm would occur and that he still did not act, a jury would in all likelihood shift any sympathy for the victim. Due to this legal world reality, a psychiatrist who either reads in referral notes or is verbally advised from another physician that a patient has threatened physical harm on a third party, should likely proceed as if the legal duty to warn exists, and act accordingly.

WHAT IF YOU DON’T BELIEVE THE THREAT RELAYED TO YOU?

- What if a psychiatrist receives information from a patient’s family member that the patient has threatened a third party, but the psychiatrist does not believe the family member’s report is credible? Is there still a legal duty to warn? What should the psychiatrist do then?

- This scenario no doubt puts the practitioner in a difficult position, given the near-impossible task called upon to determine the veracity of a “threat” relayed to the practitioner. Yet practitioners should bear in mind that duty to warn laws generally seek to balance competing policy interests: preserving and promoting the physician-patient confidence on the one hand, with protecting the safety of someone whom the patient intends to harm on the other hand. States which impose a duty to warn have made a policy choice that certain credible threats toward third parties fall outside of the protected physician-patient confidence, and therefore must be acted upon.
Yet the practitioner should consult the patient directly, and attempt to assess and evaluate the “threat” relayed to her through the third party. Through this assessment and evaluation, the practitioner can then make a more informed decision on the proper course of conduct.

In helping determine whether the psychiatrist should take actions to warn third parties, practitioners should balance all factors associated with reporting and not reporting the threat. If the psychiatrist does not report the threat, there is the potential that the threat will turn out to be genuine, the victim is hurt or worse, and the psychiatrist is sued for failing to warn. If the psychiatrist reports the threat, these become among the worst case scenarios: breaching the doctor-patient privilege, perhaps tainting the reputation of the patient, and perhaps falsely distressing the “victim.” After evaluating the patient and these factors, the practitioner will be in a better position to make informed decisions as to the steps needed to satisfy the patient’s need and the public’s need to be protected; in most cases, the practitioner will likely be better off erring on the side of reporting the “threat.”

**IF THERE IS A DUTY, HOW DO YOU SATISFY YOUR LEGAL OBLIGATIONS?**

If a psychiatrist receives information that by all accounts triggers a legal duty to warn, how does the psychiatrist satisfy that duty? Is it sufficient to note the threats in the patient’s medical records? If the patient is being admitted, is the psychiatrist’s duty satisfied by verbally telling the in-patient psychiatrist of the “threat”?

States that impose a legal duty to warn typically articulate the steps needed to be taken in order to satisfy the duty to warn. First resort must be made to the relevant state’s laws. Under most duty to warn laws, a psychiatrist satisfies the legal duty to warn by making reasonable efforts to advise the intended “victim” and police of the threat. Although it is doubtful that a psychiatrist will have been deemed to have satisfied a legal duty to warn by merely verbally advising another physician or documenting the patient’s medical records of the threat relayed to her, such communications are nevertheless further indicia of acting reasonably, and such actions should be taken in addition to the acts required by the duty to warn law.

**CONCLUSION**

In sum, it appears that the practice of psychiatry is, once again, complicated by many factors, making the practice of psychiatry as challenging today as ever before. Complying with the seemingly ever-changing legal duty to warn is yet another example. Yet the practitioner who is aware of their state’s duty to warn laws and interpretations thereof, who acts reasonably when told – first-hand or through hearsay - that a patient has communicated a threat to harm a third person, and who weighs all potential consequences of one’s actions, will likely be well on their way to ensuring compliance with their state’s legal duty to warn.

**REFERENCES**


3 This hypothetical is based upon a hypothetical discussed in Ewing v. Goldstein, 120 Cal.App.4th 807, 819; 15 Cal.Rptr.3d 864 (Cal. Ct. App. 2004) (Ewing I).


11 E.g., LSA-RS '9:2800.2 (West 1997).


14 Martin v. Renaissance West Community Health Services, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 249651, dec'd 12/9/04).

