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April 10, 2019

The Honorable Michael Carpenter, Senate Chair
The Honorable Donna Bailey, House Chair
Joint Standing Committee on Judiciary
State House, Room 438
Augusta, Maine 04330

**RE: L.D. 287, AN ACT TO IMPOSE ON MENTAL HEALTH PROFESSIONALS A DUTY TO
WARN AND PROTECT**

Dear Senator Carpenter, Representative Bailey, and Members of the Joint Standing Committee on Judiciary:

I am writing to express the Maine Medical Association's opposition to L.D. 287 because I am not certain of my ability to get to the public hearing because of other public hearing commitments in the State House complex. I am sorry that I have not had an opportunity to appear before you and to introduce myself this session. With the appointment of Gordon Smith as Director of Opioid Response for the State, I am the Interim CEO of the Maine Medical Association (MMA).

The MMA is a professional organization representing more than 4300 physicians, residents, and medical students in Maine whose mission is to support Maine physicians, advance the quality of medicine in Maine, and promote the health of all Maine citizens.

I have not had an opportunity to discuss L.D. 287 with Representative Tepler or the proponents of the bill about their rationale for bringing it forward, but I do not think we would disagree in concept. I simply do not believe the bill is necessary and, could further complicate the legal analysis necessary to advise health care practitioners affected by the bill.

L.D. 287 proposes to codify in Maine statutes the 1976 *Tarasoff* decision of the California Supreme Court that stands for the proposition that a mental health practitioner not only *may* breach legal and ethical obligations to protect the confidentiality of a patient's treatment information, but *must* warn a potential victim when a patient makes a clear and direct threat of imminent harm to a third party. The decision stands for a "duty to warn" that I believe is widely recognized among health care practitioners today.

So, I fear that proponents of L.D. 287 are going to testify that Maine has no "duty to warn" law and I would disagree with such an assertion. In my nearly 30 years of working in health law in Maine and advising health care practitioners, I have observed that the *Tarasoff* standard of a "duty to warn" is well-known and well-settled in the common law in this country. I think that legislative bodies must proceed very cautiously when considering proposals to codify settled aspects of the common law because of the potential for conflict between a long-standing common law concept and a new

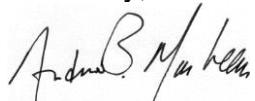
statutory one, or confusion among those affected by either or both laws. Moreover, legislators attempting to codify a common law concept may inadvertently omit an element or an individual who would have likely been governed by the common law.

The potential risks in codifying a common law standard are apparent in at least two aspects of L.D. 287. The first risk is that the scope of individuals covered in the bill is too narrow. It appears that nurses are not included in the bill and there may be other health care practitioners who should be included in the bill. The Committee also faces some risk in trying to articulate a standard by which an individual having a "duty to warn" can determine if a warning is appropriate. It would be important to distinguish between generalized anger and grievances from a direct threat of imminent harm to a clearly identified individual.

Health care practitioners, whether in the behavioral health field or not, sometimes have encounters with difficult patients and must balance their primary ethical and legal obligations to that patient with a common law obligation to a third party, such as Tarasoff, or a moral commitment to society (as in the case of potential drug diversion by a patient). Health care practitioners must exercise professional judgment in many aspects of clinical relationships and I would urge caution in attempting to codify situations that require professional judgment.

Thank you for considering MMA's views on L.D. 287. I will try to be at your work session on the bill.

Sincerely,



Andrew B. MacLean