

Implications of red flag gun laws for counselors

Question: I am a licensed clinical professional counselor in Maryland and work with a population at high risk of harm to self and others. Many of my clients possess firearms. At a conference not long ago, a speaker mentioned that Maryland recently passed a “red flag law” pertaining to guns. Can you explain what this might mean to me and to other counselors who live in states with this type of law?

Answer: First, the term “red flag law” is common parlance for relatively new state legislative enactments that permit the initiation of firearm removal from a person whose conduct has raised a red flag of concern. (This type of law is distinct from the Federal Trade Commission’s Red Flags Rule, which was enacted several years ago to combat identity theft.) Prior to 2018, red flag laws had been enacted in Connecticut, Indiana, Washington, Oregon and California. Florida enacted a red flag law after 17 students and staff members were killed by a gunman at Marjorie Stoneman Douglas High School in Parkland on Feb. 14, 2018. Maryland, Vermont, Rhode Island, New Jersey, Delaware, Massachusetts and Illinois also enacted such statutes in 2018. This makes for a total of 13 state red flag laws, with other states considering adoption of such laws. It’s interesting to note that both “red” and “blue” states have been involved in adopting red flag gun laws.

Depending on the jurisdiction, these laws are more accurately called “gun violence restraining orders,” “extreme risk protective orders” or “dangerous persons firearms seizure laws.” They are not the same thing as an “order of protection” in which a judge orders one person to stay away from another. Typically, red flag laws permit family members, law enforcement officers or

certain other individuals to initiate a process to remove firearms from a person whose conduct presents a concern. In Maryland and certain other states, a mental health professional is among those authorized to initiate the gun removal process; as a licensed clinical professional counselor in Maryland, you are specifically authorized by your state statute to initiate this process.

The specifics of these red flag laws vary considerably from state to state. Typically, they address crisis situations, and removal is temporary, not permanent, in most circumstances. Individuals are usually allowed to petition the court for return of firearms after a set period of time, which can range from two weeks to one year.

According to the American Psychiatric Association’s “Resource Document on Risk-Based Gun Removal Laws” (June 2018), one positive aspect of such laws is that they focus on acute dangerousness rather than on mental health history or diagnosis (for a download of the document, go to apapsy.ch/Gun_Removal).

The red flag laws in some states provide another avenue for mental health professionals to address their concerns of a client’s potentially dangerous behavior, along with existing state laws governing therapists’ duty to warn/duty to protect (often referred to as the Tarasoff rule). Another positive aspect of red flag laws is that they provide leverage for families to convince their loved ones to voluntarily surrender their firearms during a period of crisis. Additionally, according to the American Psychiatric Association’s resource document, some data suggest that the laws may lead to an increase in mental health treatment and might be especially effective in dealing with individuals at risk of suicide.

A potential drawback of these laws is that they do not typically provide

immunity from liability for breach of confidentiality or other civil actions that clients could bring against a counselor or other mental health professional who initiates the firearm-removal process. If a counselor were to take action under the applicable state statute, it would be important to document the reasoning underlying the decision, as well as other actions that were considered and adopted or ruled out. The counselor should reveal only the information necessary to achieve safety for the client or others.

In addition, if the counselor were called to testify at a subsequent court hearing, the counselor might wish to seek legal advice or notify her or his professional liability insurance carrier to see if legal representation can be provided. The counselor’s attorney could help determine if other statutes or case law related to duty to warn/duty to protect would apply. If children or vulnerable adults are specifically at risk, the counselor should ascertain whether there is also a duty to report to child protective services or another applicable state social services agency. Furthermore, the counselor would need to consider the effect of initiating the gun-removal practice on the therapeutic relationship.

Proactively, counselors are advised to read and know the statutes in their respective states. For example, in Maryland, the statute and accompanying material are available on the website of the District Court of Maryland at mdcourts.gov/district/ERPO#petitioner.

Counselors who are not practicing in one of the 13 states mentioned earlier should be aware that there may be legislative efforts under way in their own states on this issue. If so, this may be the best time to request that their respective state legislature add a provision granting immunity to clinicians or others who in good faith institute the gun-removal

process when a person with a firearm poses a risk of danger to self or others. It also may be the best time to request that the legislation specify that clinicians do *not* have an affirmative *duty* to initiate the process. Finally, counselors who practice in states with red flag gun laws may wish to consider amending their informed consent documents and discussions to include possible initiation of the weapon-removal process in appropriate circumstances. ♦

Anne Marie "Nancy" Wheeler is an attorney licensed in Maryland and the District of Columbia. The information presented here is for educational purposes only. For specific legal advice, please consult your own local health care attorney.

Letters to the editor:
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CEO's Message

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carry out the directive of your elected representatives on the ACA Governing Council.

With all of the divisiveness we see occurring in society, my hope in 2019 is that the counseling profession will be able to communicate a message to those in government that the rhetoric, false information and lack of financial support must end. Our top priorities this year include enhancing your practice, providing resources for the work you do and effecting real change.

The ACA staff and I wish you the best this year and want you to know how incredibly thankful we are for the work you do.

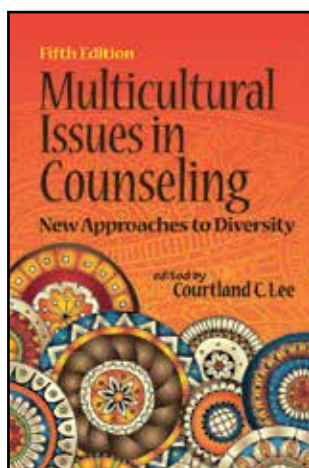
As always, I look forward to your comments, questions and thoughts. Feel free to call me at 800-347-6647 ext. 231 or email me at ryep@counseling.org. You can also follow me on Twitter: @Richyep. Be well. ♦

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