

5/27/77

Memorandum 77-38

Subject: Study 63.80 - Revisions of the Psychotherapist-Patient Privilege

Attached are two copies of a staff draft of a tentative recommendation, prepared by Mr. Sterling, to carry out the decisions of the Commission made at a prior meeting when revisions of the psychotherapist-patient privilege were considered. Please mark your editorial revisions on one copy to turn in to the staff at the June meeting. Also attached is a copy of Memorandum 76-18 which contains background information. Although the draft of the tentative recommendation draws heavily on this memorandum, the background information may be useful to our two new Commissioners.

The staff is greatly concerned about one aspect of the tentative recommendation. Our concern goes to the proposal to expand subdivision (a) of Section 1010 (page 8 of the tentative recommendation). The existing subdivision (a)--which is limited to a doctor who devotes "a substantial portion of his time to the practice of psychiatry"--will be expanded to cover any doctor "while engaged in the diagnosis or treatment of a mental or emotional condition." We are greatly concerned because we believe that this expansion will either kill the entire proposal for improvement of the psychotherapist-patient privilege or will lead to the enactment of additional exceptions to the privilege that will deprive persons who are consulting psychiatrists and other psychotherapists of the protection they now have. This is because the district attorneys have consistently opposed expansion of the privilege, and I would anticipate that personal injury lawyers and others would also oppose expansion of subdivision (a) absent a showing of some deficiency in the existing California law under this subdivision. As you will recall, this expansion was not suggested by any source in California and, as far as we know, no source in California seeks such an expansion. No one has advised us of any inadequacy in present subdivision (a). The expansion finds its source in the proposed Federal Rules of Evidence; these rules were never adopted by Congress because of the substantial opposition to the proposed rules on privilege both on the ground that they were beyond the authority of the court and on the

ground that the substance of the rules was inadequate. We found one law review article that noted that the proposed rule on the psychotherapist-patient privilege was opposed by the American Bar Association; one source indicated that the basis of the objection was that the broad scope of the proposed privilege would keep relevant information from the fact finder, but we have not found any written statement as to the grounds for the ABA objection. We are also concerned that the change in subdivision (a) will create a practical problem of judicial administration. The judge can apply existing subdivision (a) fairly easily since he need only determine whether the doctor is a psychiatrist. The expanded rule may require that the judge go into the nature and cause of the condition being diagnosed or treated to determine whether it is a "mental or emotional condition" and would appear to expand greatly the scope of the privilege, especially if it is true that 80-90 percent of physical illness has a mental or emotional cause or component. On balance, the staff does not believe that such an expansion of the privilege is desirable.

We have one other minor point we wish to make concerning the tentative recommendation. This concerns subdivision (b) of Section 1010 on page 8 of the tentative recommendation. The Commission there proposes to expand the scope of subdivision (b) to cover a psychologist licensed or certified under the laws of another state. We have no problem with this expansion. However, we note that this does not follow the federal rule which would have expanded it to include "any state or nation." In this connection, it should be noted that Business and Professions Code Section 2912 provides:

2912. Nothing in this chapter shall be construed to restrict or prevent a person who is licensed or certified as a psychologist in another state or territory of the United States or in a foreign country or province from offering psychological services in this state for a period not to exceed 30 days in any calendar year.

After the Commission has reviewed these policy issues and any others raised at the meeting, the staff is hopeful that the tentative recommendation (with any necessary revisions) can be approved for distribution for comment after the June meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Staff Draft

TENTATIVE RECOMMENDATION

relating to

REVISION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Evidence Code provisions relating to the psychotherapist-patient privilege were enacted in 1965¹ upon recommendation of the California Law Revision Commission.² These provisions have been the subject of several subsequent Commission recommendations, with the result that they have been amended and supplemented a number of times.³ In the course of its continuing study of the law relating to evidence, the Commission has reviewed the psychotherapist-patient privilege in the light of recent law review articles,⁴ monographs and other communica-

1. 1965 Cal. Stats., Ch. 299. As originally enacted, the psychotherapist-patient privilege was contained in Sections 1010-1026 of the Evidence Code. Sections 1027 and 1028 were added by legislation enacted in 1970. Unless otherwise noted, all section references herein are to the Evidence Code.
2. See Recommendation Proposing an Evidence Code, 7 Cal. L. Revision Comm'n Reports 1 (1965). For the Commission's background study on the psychotherapist-patient privilege, see A Privilege Not Covered by the Uniform Rules--Psychotherapist-Patient Privilege, 6 Cal. L. Revision Comm'n Reports 417 (1964).
3. See Recommendation Relating to the Evidence Code: Number 1--Evidence Code Revisions, 8 Cal. L. Revision Comm'n Reports 101 (1967); Recommendation Relating to the Evidence Code: Number 4--Revision of the Privileges Article, 9 Cal. L. Revision Comm'n Reports 501 (1969); Recommendation Relating to the Evidence Code: Number 5--Revisions of the Evidence Code, 9 Cal. L. Revision Comm'n Reports 137 (1969). See also 1967 Cal. Stats., Ch. 650; 1970 Cal. Stats., Chs. 1396, 1397. A number of other amendments have been made in these provisions to conform these provisions to other recent enactments.
4. See, e.g., Louisell & Sinclair, Reflections on the Law of Privileged Communications--The Psychotherapist-Patient Privilege in Perspective, 59 Cal. L. Rev. 30 (1971); Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Cal. L. Rev. 1050 (1973); Psychotherapist-Patient Privilege, 62 Cal. L. Rev. 504 (1974); Comment, California Evidence Code Section 771: Conflict with Privileged Communications, 6 Pac. L.J. 612 (1975); Comment, Tarasoff v. Regents of the University of California: Psychotherapists, Policemen and the Duty to Warn--An Unreasonable Extension of the Common Law? 6 Golden Gate L. Rev. 229 (1975).

tions received by the Commission,⁵ and the Federal Rules of Evidence.⁶ As a result of this review, the Commission has determined that a number of revisions in the scope of the psychotherapist-patient privilege are desirable.

The Commission recognizes that any extension of the scope of protection afforded confidential communications necessarily handicaps the court or jury in its effort to make a correct determination of the facts. Hence, the social utility of any new privilege or of any extension of an existing privilege must be weighed against the social detriment inherent in the calculated suppression of relevant evidence. Applying this criterion to the psychotherapist-patient privilege, the Commission is persuaded that the psychotherapist-patient privilege is unduly restrictive and therefore makes the following recommendations.

Physicians Other Than Psychiatrists

Section 1010(a) includes within the psychotherapist-patient privilege physicians who specialize in psychiatry or are reasonably believed by the patient to so specialize.⁷ This limitation to psychiatrists only is overly restrictive since a physician who is not a psychiatrist may give aid of a psychotherapeutic nature in the ordinary course of treatment. Elimination of the restriction to psychiatrists only will also

5. See, e.g., Letter from Professor John Kaplan (May 23, 1975), on file in the Commission's offices. Professor Jack Friedenthal prepared a background study for the Commission, whose coverage includes the psychotherapist-patient privilege. See Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code (mimeo 1976). The Commission has also had the benefit of an unpublished paper by Robert Plattner, The California Psychotherapist-Patient Privilege (Stanford Law School 1975).
6. The Federal Rules of Evidence do not contain a statutory psychotherapist-patient privilege. See Rule 501. However, the Supreme Court Advisory Committee's proposed rules included a statutory privilege with notes thereon. See Proposed Federal Rules of Evidence, Rule 504 (Callaghan 1974, J. Schmertz ed.). The Commission has consulted the proposed rules and notes which reflect the most recent thinking in the field.
7. Section 1010(a) applies to a physician "who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry."

avoid the need to make refined distinctions concerning what is and what is not the practice of psychiatry.⁸

Psychologists Licensed in Other Jurisdictions

Section 1010(b) includes within the psychotherapist-patient privilege psychologists licensed in California.⁹ However, a psychologist licensed or certified in another jurisdiction may give treatment in California.¹⁰ For this reason, Section 1010(b) should be broadened to include psychologists licensed or certified in another jurisdiction. The requirement that the psychologist be in fact licensed or certified, and not merely believed to be so by the patient, is justified by the number of persons, other than physicians, purporting to render psychotherapeutic aid and the variety of their theories.¹¹

Licensed Educational Psychologists

Legislation enacted in 1970 provides for the licensure of educational psychologists.¹² A licensed educational psychologist may engage in private practice and provide substantially the same services as school psychologists who are already included within the psychotherapist-patient privilege.¹³ The qualifications for a licensed educational

8. See Supreme Court Advisory Committee's Note to Section 504 of the Proposed Federal Rules of Evidence (1973).

9. Section 1010(b) requires licensure under Chapter 5.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code (psychologists).

10. Business and Professions Code Section 2912 provides:

2912. Nothing in this chapter shall be construed to restrict or prevent a person who is licensed or certified as a psychologist in another state or territory of the United States or in a foreign country or province from offering psychological services in this state for a period not to exceed 30 days in any calendar year.

11. See Supreme Court Advisory Committee's Note to Section 504 of the Proposed Federal Rules of Evidence (1973).

12. See Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 5 of the Business and Professions Code (licensed educational psychologists), enacted by 1970 Cal. Stats., Ch. 1305, § 5.

13. See Section 1010(d).

psychologist are more stringent than for a school psychologist, the licensed educational psychologist being required to have three years of full-time experience as a credentialed school psychologist in the public schools or experience which the examining board deems equivalent.¹⁴ For these reasons, the psychotherapist-patient privilege should be broadened to include the licensed educational psychologist.

Psychiatric Social Workers

The psychotherapist-patient privilege does not now apply to psychiatric social workers.¹⁵ The psychiatric social worker is an important source of applied psychotherapy of a nonmedical nature in public health institutions, performing the same functions as other presently privileged professionals.¹⁶ By excluding psychiatric social workers, the existing privilege statute often works to protect the rich and deny the poor who must rely on psychiatric social workers, not psychiatrists, for their psychotherapeutic aid. The Commission recommends expansion of the psychotherapist-patient privilege to include confidential communications to psychiatric social workers. To assure adequate qualifications for the psychiatric social worker, the privilege should be limited to those who have substantially the same qualifications and duties as a state psychiatric social worker¹⁷ and who work in state or county mental health facilities or facilities that qualify for reimbursement under the California medical assistance program or under Title XVIII of the Social Security Act.

Professional Corporations

Conforming amendments to the Joscone-Knox Professional Corporation Act made clear that the relation of physician and patient exists between a medical corporation and the patient to whom it renders services,¹⁸ but

14. Bus. & Prof. Code § 17862.

15. Belmont v. State Personnel Bd., 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974).

16. See Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Cal. L. Rev. 1050 (1973).

17. See California State Personnel Board, Specification, Psychiatric Social Worker (rev. 1973).

18. See 1968 Cal. Stats., Ch. 1375, § 3.

failed to make clear that the relationship of psychotherapist and patient also exists between a medical corporation and the patient to whom it renders services.¹⁹ Likewise, provisions authorizing a marriage, family, or child counseling corporation neglected to make clear that the relationship of psychotherapist and patient exists between such a corporation and its patient.²⁰ The application of the psychotherapist-patient privilege to a medical corporation and to a marriage, family, or child counseling corporation should be made clear and the provision located in an appropriate place in the psychotherapist-patient statute.

Group and Family Therapy

There is a question whether the psychotherapist-patient privilege applies in group and family therapy situations. Section 1012 defines a confidential communication between patient and psychotherapist to include information transmitted between a patient and psychotherapist "in confidence" and by a means which, so far as the patient is aware, discloses the information to no third persons "other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." Although these statutory exceptions would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.

In light of the frequent use of group therapy for the treatment of emotional and mental problems, it is important that this form of treatment be covered by the psychotherapist-patient privilege. Group therapy is now used more and more in the areas of marriage and family counseling, juvenile delinquency, alcoholism, and others. It is a growing and promising form of psychotherapeutic aid and should be encouraged and

19. Section 1014 was amended in 1969 to make clear that a psychological corporation is covered and again in 1972 to cover a licensed clinical social workers corporation.

20. See Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 5 of the Business and Professions Code, enacted by 1972 Cal. Stats., Ch. 1318, § 1.

protected by the privilege.²¹

The policy considerations underlying the privilege dictate that it encompass communications made in the course of group therapy. Psychotherapy, including group therapy, requires the candid revelation of matters that not only are intimate and embarrassing, but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group therapy treatment because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-privilege protects against disclosure of communications made during family or other group therapy. It should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, communications made in the course of group therapy would be within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons.

Application of Privilege in Criminal Proceedings

Section 1028 makes the psychotherapist-patient privilege applicable in criminal proceedings where the psychotherapist is a psychiatrist or psychologist, but inapplicable in criminal proceedings where the psychotherapist is a clinical social worker, school psychologist, or marriage, family, and child counselor.²² The basis for this distinction is not clear. A patient consulting a psychotherapist expects to receive the benefit of the privilege regardless of the type of psychotherapist consulted; Section 1028 frustrates this expectation in the case of criminal proceedings.

The major effect of Section 1028 is to deny the privilege to the poor and lower-middle class, who must utilize clinical social workers and family counselors, while preserving the privilege for precisely the

21. See, e.g., Group Therapy and Privileged Communications, 43 Ind. L.J. 93 (1967); Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 Wayne L. Rev. 609 (1964).

22. Section 1028 provides that, "Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding."

same types of communications by the upper-middle class and the rich, who can afford psychiatrists and psychologists. Section 1028 may also discourage potential patients from seeking treatment for mental and emotional disorders for fear of disclosure of communications in criminal proceedings. This is particularly important in drug addiction cases, but it is important in other cases as well.

The interest of society in facilitating the conviction of patients by making their communications to their psychotherapists admissible in criminal proceedings is adequately protected by two other exceptions to the privilege. Section 1027 denies the privilege where a child under 16 is the victim of a crime and disclosure would be in the best interests of the child. Section 1024 denies the privilege where the patient is dangerous to himself or herself or to others. In addition, the psychotherapist may be personally liable for failure to exercise due care to disclose the communication where disclosure is essential to avert danger to others.²³

The Commission believes that the harm caused by Section 1028 far outweighs any benefits to society that it provides. The provision should be repealed.

The Commission's recommendations would be effectuated by enactment of the following measure:

23. *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

An act to amend Sections 1010, 1012, and 1014 of, to add Section 1010.5 to, and to repeal Section 1028 of, the Evidence Code, relating to the psychotherapist-patient privilege.

The people of the State of California do enact as follows:

Evidence Code § 1010 (amended)

SECTION 1. Section 1010 of the Evidence Code is amended to read:

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation ~~who devotes, or is reasonably believed by the patient to devote, a substantial~~ portion of his time to the practice of psychiatry; while engaged in the diagnosis or treatment of a mental or emotional condition.

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions ~~Code; Code or licensed or certified as a psychologist under the laws of~~ another state.

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professions Code, ~~when he is~~ while engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.

(e) A person licensed as a marriage, family and child counselor under Chapter 4 (commencing with Section 17800) of Part 3, Division 5 of the Business and Professions Code.

(f) A person licensed as a licensed educational psychologist under Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 5 of the Business and Professions Code.

(g) A person who is serving as a psychiatric social worker in a mental health services facility of the State of California, or a person who is serving as a psychiatric social worker with substantially the same qualifications and duties as a state psychiatric social worker in a mental health services facility provided by the county or qualifying for

reimbursement under the California medical assistance program under Section 14021 of the Welfare and Institutions Code, or under Title XVIII of the Federal Social Security Act and regulations thereunder, while engaged in applied psychotherapy of a nonmedical nature.

Comment. Subdivision (a) of Section 1010 is revised to make clear that a physician need not be a psychiatrist for the psychotherapist-patient privilege to apply. The privilege applies to any psychotherapeutic diagnosis or treatment by a physician, whether or not a psychiatrist.

Subdivision (b) is amended to recognize the possibility of treatment of a patient by a psychologist licensed or certified in another state. See Bus. & Prof. Code § 2912.

Subdivision (f) is added to include a licensed educational psychologist as a psychotherapist for the purpose of the privilege. This addition complements subdivision (d) (school psychologist). For the qualifications for a licensed educational psychologist, see Bus. & Prof. Code § 17862.

Subdivision (g) is added to include a psychiatric social worker as a psychotherapist for the purpose of the privilege. This addition overrules Lelmont v. State Personnel Board, 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974). The addition of subdivision (g) is based on functional similarities between presently privileged professionals and psychiatric social workers. See generally Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Cal. L. Rev. 1050 (1973). Subdivision (g) is limited to those psychiatric social workers who have substantially the same qualifications and duties as a state psychiatric social worker and who work in state or county mental health services facilities or facilities that qualify for reimbursement under the California medical assistance program or under Title XVIII of the Social Security Act.

Evidence Code § 1010.5 (added)

SEC. 2. Section 1010.5 is added to the Evidence Code, to read:

1010.5. The relationship of a psychotherapist and patient shall exist between the following corporations and the patients to whom they render professional services, as well as between such patients and psychotherapists employed by such corporations to render services to such patients:

(a) A medical corporation as defined in Article 17 (commencing with Section 2500) of Chapter 5 of Division 2 of the Business and Professions Code.

(b) A psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(c) A licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code.

(d) A marriage, family or child counseling corporation as defined in Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 5 of the Business and Professions Code.

Comment. Section 1010.5 is added to continue the second paragraph of Section 1014(c) with the exception of the definition of "persons" which is not continued. See Section 1014 and Comment thereto. Subdivisions (a) and (d) are new; they make clear the application of the psychotherapist-patient privilege to types of professional corporations not previously covered.

Evidence Code § 1012 (amended)

SEC. 3. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient

and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient 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 psychotherapist is consulted, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to make clear that the scope of the section embraces marriage counseling, family counseling, and other forms of group therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons. The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evid. Code § 912(c) and (d).

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Evidence Code § 1014 (amended)

SEC. 4. Section 1014 of the Evidence Code is amended to read:

1014. Subject to Section 912 and except as otherwise provided in this article, 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 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 psychotherapist 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.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2925) of Chapter 6-6 of Division 2 of the Business and Professions Code or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between such patients and psychotherapists employed by such corporations to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, associations and other groups and entities.

Comment. The second paragraph of Section 1014(a), with the exception of the definition of "persons," is continued in Section 1010.5. "Person" is defined in Section 175 to include a partnership, corporation, association, and other organizations.

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Evidence Code § 1028 (repealed)

SEC. 5. Section 1028 of the Evidence Code is repealed.

~~1028.~~ Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding.

Comment. Former Section 1028 is not continued.