

4/1/68

## Memorandum 68-44

Subject: Study 63 - Evidence Code (Psychotherapist-Patient Privilege)

Attached as Exhibit I (pink) is a letter from James E. Dixon, a Ventura attorney, pointing out that the psychotherapist-patient privilege is not clearly made applicable to group therapy situations by Evidence Code Sections 912, 1010, and 1012. The pertinent statute sections are set out in Exhibit II (yellow) attached.

The staff has not doubt that this situation will be the subject of clarifying legislation. The policy question presented is whether the Commission wishes to prepare the legislation or to have it prepared by some interested member of the Legislature. In view of the Commission's background on the Evidence Code, we believe that the necessary amendments should be prepared by the Commission.

The staff suggests two amendments to eliminate the existing uncertainty in the law:

- (1) Evidence Code Section 1012 should be amended as follows:

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 examination, or treatment or those to whom disclosure is reasonable necessary for the transmission of the information or the accomplishment of the purpose of the consultation, or examination, or treatment, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

This amendment is a desirable one without regard to the problem of group therapy. Probably, however, "consultation" would be construed to include "treatment."

(2) Evidence Code Section 912, relating to waiver, should be amended to add a new subdivision (e). The text of this section is set out on page 1 of Exhibit II. The new subdivision should read:

(e) The making of a communication in the course of group therapy conducted under the direction of a psychotherapist is not a waiver of the privilege provided by Section 1014 (psychotherapist-patient privilege) if the communication is otherwise protected by that privilege.

In view of the growing importance of group therapy in the treatment of psychological disorders, the staff believes that it is essential that the Evidence Code provisions be clarified. We believe that the amendments set out above are sufficient to make the law clear.

Respectfully submitted,

Gorden E. McClintock  
Junior Counsel

EXHIBIT I

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JAMES E. DIXON  
KENNETH L. RIDING

March 11, 1968

C  
Assemblyman Ken MacDonald  
Thirty-Seventh District  
State Capitol  
Sacramento, California 95814

Dear Ken:

The recently adopted Evidence Code created a confidential communication privilege between patient and psychotherapist. This means that whatever a patient tells a psychotherapist or whatever a psychotherapist tells a patient cannot be revealed in court except in limited instances. (See Evidence Code 1012.)

I believe that this should be broadened to include all those people who are in the group where the psychiatrist or psychologist prescribes group therapy for the patient. It seems to me that under the present law, other members of the group can be made to testify.

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Y  
The problem arises because Section 1010 of the Evidence Code defines a psychotherapist as a doctor practicing psychiatry or as a certified psychologist; Section 912 covering waiver of the privilege doesn't seem to cover this situation; and Section 1012 which might cover the situation doesn't seem to do so. Section 1012 says that the communication is confidential if, as far as the patient is aware, it discloses the information "to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom the disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination." Other members of a group in a group therapy situation may be present "to further the interest of the patient" but this is not in a consultation or examination; and they are certainly not persons to whom disclosure is "reasonably necessary for transmission of the information." Possibly they are "reasonably necessary for" the accomplishment of the purpose of the consultation or examination. However it could be made more clear.

I have been advised that group therapy is an exceedingly useful tool for the psychiatrist to use in treating emotional and mental problems; that this requires the frank revelation of matters that are not only embarrassing but which could be harmful to the patient's interest; and that instances have arisen where a patient will not talk freely in a group for

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fear that others in the group can be compelled to testify about his statements. (All these reasons are given in the Legislative Committee's comment regarding the reason for the creation of the psychotherapist-patient privilege.)

Take for example a spouse being treated for some emotional problem affecting his marriage. He has perhaps strayed and his wife doesn't know of this. For effective treatment by the group therapy method, he should discuss his experience but he doesn't dare do so because his spouse may first compel him to reveal the identity of other members of the group and can then ask the other members of the group what he has said while in therapy and the other members of the group appear to have no privilege to refuse to testify.

I would remedy this situation by making the following amendments:

A. To Section 1010, which defines psychotherapist, add the following subparagraph (c): For the purpose of the privilege created by this Article only, a psychotherapist includes those persons who are also patients as defined in Section 1011 who are present with the patient at group therapy at the direction of a person defined in subparagraphs (a) or (b) of this section.

B. Section 1012 should be amended by inserting, about two-thirds of the way through, the word "treatment" so that it would read, from about mid-point, "... discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, treatment or examination, or..."

The Evidence Code is well constructed and very intricate in its operation. It should not be lightly amended. I feel however that this group therapy situation is something that was overlooked and which should be covered.

I am sending an identical letter to Senator Lagomarsino.

Very truly yours,

James E. Dixon

JED:ja

CC: Dr. Walter R. Townsend  
California State Bar Association  
Law Revision Commission

## EXHIBIT II

§ 912. Waiver of privilege. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege. (Stats. 1965, c. 299, § 912.)

## Comment--Senate Committee on Judiciary

This section covers in some detail the matter of waiver of those privileges that protect confidential communications.

*Subdivision (a).* Subdivision (a) states the general rule with respect to the manner in which a privilege is waived. Failure to claim the privilege where the holder of the

privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver. This seems to be the existing law. See *City & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 233, 231 P.2d 26, 29 (1951); *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 P. 688 (1897). There is, however,

at least one case that is out of harmony with this rule. *People v. Kar*, 129 Cal.App.2d 436, 277 P.2d 94 (1954) (defendant's failure to claim privilege to prevent a witness from testifying to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

*Subdivision (b)*. A waiver of the privilege by a joint holder of the privilege does not operate to waive the privilege for any of the other joint holders of the privilege. This codifies existing law. See *People v. Kar*, 129 Cal.App.2d 436, 277 P.2d 94 (1954); *People v. Abair*, 102 Cal. App.2d 765, 228 P.2d 336 (1951).

*Subdivision (c)*. A privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his lawyer-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence in the course of the attorney-client relationship what it was that he told his wife. And a person does not waive the lawyer-client privilege as to a communication by relating it to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in

another, privileged communication, there has not been such an abandonment. Of course, this rule does not apply unless the revelation was within the scope of the relationship in which it was made; a client consulting his lawyer on a contract matter who blurts out that he told his doctor that he had a venereal disease has waived the privilege, even though he intended the revelation to be confidential, because the revelation was not necessary to the contract business at hand.

*Subdivision (d)*. Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer, physician, or psychotherapist was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege, even though the disclosure is made with the client's knowledge and consent. Nor would a physician's or psychotherapist's keeping of confidential records necessary to diagnose or treat a patient, such as confidential hospital records, be a waiver of the privilege, even though other authorized persons have access to the records. Similarly, the patient's presentation of a physician's prescription to a registered pharmacist would not constitute a waiver of the physician-patient privilege because such disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted. See also Evidence Code

§ 992. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure.

Subdivision (d) may change California law. *Green v. Superior Court*, 220 Cal.App.2d 121, 33 Cal.

Rptr. 604 (1963) (hearing denied), held that the physician-patient privilege did not provide protection against disclosure by a pharmacist of information concerning the nature of drugs dispensed upon prescription. See also *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949) (applying the California law of privileges and holding that a lawyer's revelation to an accountant of a client's communication to the lawyer waived the client's privilege if such revelation was authorized by the client).

§ 1010. "Psychotherapist". 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; or

(b) A person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code. (Stats.1965, c. 299, § 1010.)

Comment—Law Revision Commission

A "psychotherapist" is defined to include only a person who is or who is reasonably believed to be a psychiatrist or who is a California cer-

tified psychologist (see Bus. & Prof. Code § 2900 et seq.). See the Comment to Section 990.

§ 1011. "Patient". As used in this article, "patient" means 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 or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems. (Stats.1965, c. 299, § 1011.)

Comment—Assembly Committee on Judiciary

See the Comment to Section 991. Section 1011 is comparable to Section 991 (physician-patient privilege) except that the definition of "patient" in Section 1011 includes not only persons seeking diagnosis

or treatment of a mental or emotional condition but also persons who submit to examination for purposes of psychiatric or psychological research. See the Comment to Section 1014.

**§ 1012. "Confidential communication between patient and psychotherapist"**

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 examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

**Law Revision Commission Comment**

**1967 Amendment**

The express inclusion of "a diagnosis" in the last clause will preclude a possible construction of this section that would leave

an uncommunicated diagnosis unprotected by the privilege. Such a construction would virtually destroy the privilege.

**§ 1014. Psychotherapist-patient privilege.** 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. (Stats.1965, c. 299, § 1014.)



This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege.

Psychiatrists now have only the physician-patient privilege which is enjoyed by physicians generally. On the other hand, persons who consult certified psychologists have a much broader privilege under Business and Professions Code Section 2904 (superseded by the Evidence Code). There is no rational basis for this distinction.

A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.

The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to

other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

The Commission has also been informed that adequate research cannot be carried on in this field unless persons examined in connection therewith can be guaranteed that their disclosures will be kept confidential.

The privilege also applies to psychologists and supersedes the psychologist-patient privilege provided in Section 2904 of the Business and Professions Code. The new privilege is one for psychotherapists generally.

Generally, the privilege provided by this article follows the physician-patient privilege, and the Comments to Sections 990 through 1007 are pertinent. The following differences, however, should be noted:

(1) The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal proceedings. This difference in the scope of the

two privileges is based on the fact that the Law Revision Commission has been advised that proper psychotherapy often is denied a patient solely because he will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told. The Commission has also been advised that research in this field will be unduly hampered unless the privilege is available in criminal proceedings.

Although the psychotherapist-patient privilege applies in a criminal proceeding, the privilege is not available to a defendant who puts his mental or emotional condition in issue, as, for example, by a plea of insanity or a claim of diminished responsibility. See Evidence Code §§ 1016 and 1023. In such a proceeding, the trier of fact should have available to it all information that can be obtained in regard to the defendant's mental or emotional condition. That evidence can often be furnished by the psychotherapist who examined or treated the patient-defendant.

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. Evidence Code § 1004. Section 1024 provides a considerably narrower exception in the psychotherapist-patient privilege.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. Evidence Code § 999. Nor does it apply in certain administrative proceedings. Evidence Code § 1007. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. See Evidence Code § 998. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no similar exception in administrative proceedings or civil actions involving the patient's criminal conduct.