

7/9/67

Commissioner primarily responsible: Ball

Memorandum 68-67

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

Attached are two copies of a draft of a tentative recommendation reflecting the decision of the Commission at the June meeting to amend Evidence Code Section 1012 to secure the extension of the psychotherapist - patient privilege to all treatment, including group therapy. Please make your suggested editorial revisions on one copy and return it to the staff at the July meeting.

Upon further review the staff recommends that only Section 1012 be amended. It was earlier suggested that Evidence Code Section 912 be amended to add a new subdivision (e) to 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.

Thus addition appears unnecessary to secure the desired protection, inasmuch as Section 912 (c) already provides: "A disclosure that is itself privileged is not a waiver of any privilege." See also Evidence Code Section 912 (d). The making of a communication in the course of group therapy would, with the amendment of Section 1012, clearly be "a disclosure that is itself privileged." To ensure this interpretation, the comment to Section 1012 makes specific reference to group therapy.

The staff was also requested to check the Evidence Code to determine whether the psychotherapist-patient privilege would protect a

Psychotherapist who prescribes narcotics or some other illegal form of treatment to a patient. In certain limited circumstances the possibility of the privilege being invoked may exist. As a starting point, the definition of the confidential communication would clearly embrace such a prescription. (See Section 1012, defining the confidential communication as including "advice given by the psychotherapist in the course of that relationship.") However, generally speaking the "holder of the privilege" is the patient, not the psychotherapist. Evidence Code Section 1013. The patient can waive the privilege at any time. See Evidence Code Section 912. The psychotherapist is permitted to claim the privilege only if the "holder" (patient) is in existence and the holder has not instructed him to disclose. Moreover the privilege cannot be invoked if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit a crime. Evidence Code Section 1018.

It would appear to be a rare circumstance where illegal treatment was prescribed, that it could not be shown that psychotherapist and patient were engaging in an activity within the scope of Section 1018 thereby destroying the privilege or that the innocent patient would not voluntarily cooperate and waive the privilege. Finally it should be noted that Section 1020 provides:

There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist . . . , of a duty arising out of the psychotherapist - patient relationship.

While obviously intended to cover the more common civil malpractice action, the Section is not so delimited. To prescribe illegal treatment breaches the duty of the psychotherapist to his patient. The nonexistence of the privilege should result whether the proceeding be civil action between psychotherapist and patient or criminal or administrative

proceeding directed against the psychotherapist. The staff concludes that no change in the Evidence Code is needed to deal with the illegal prescription problem.

Respectfully submitted,

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#63

TENTATIVE RECOMMENDATION OF THE
CALIFORNIA LAW REVISION COMMISSION

relating to

EVIDENCE CODE (PSYCHOTHERAPIST-PATIENT PRIVILEGE: ¹
APPLICABILITY TO GROUP THERAPY.

In 1965, upon the recommendation of the Law Revision Commission, the Legislature enacted a new California Evidence Code. The Commission contemplated that, as lawyers and judges became familiar with the provisions of the Evidence Code, they would find some of its provisions in need of clarification or revision, and would make suggestions to the Commission in this connection. At the suggestion of Mr. James E. Dixon, the Commission has considered Section 1012 of the Evidence Code and has concluded that additional clarification would be desirable.

Section 1012 defines a "confidential communication between patient and psychotherapist" to include:

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. . . .

Although "consultation" would probably be construed to include "treatment," the Commission believes that the express inclusion of "treatment" would be helpful. This seems particularly true in the light of the frequent use of group therapy for the treatment of emotional and mental problems. The policy considerations that require that there be a psychotherapist-patient privilege at all dictate that the privilege encompass

¹ Letter from James E. Dixon to Assemblyman Ken MacDonald, March 11, 1968, on file with California Law Revision Commission.

communications made in the course of group therapy. Psychotherapy, including group therapy, requires the frank revelation of matters that are not only embarrassing but which could be harmful to the patient's interest; the Commission has received reliable reports that persons in need of treatment sometimes refuse such treatment because the confidentiality of their communications is in doubt. The presence of a group simply multiplies these doubts, which a clarification in the section could perhaps alleviate.

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

An act to amend Section 1012 of the Evidence Code, relating to communications between patient and psychotherapist.

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

Section 1. 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 examination, or treatment 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, or treatment, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. The express inclusion of "treatment" in Section 1012 forecloses the possibility that the section would not be construed to embrace all treatment, including group therapy. Moreover, the addition of "treatment" makes it clear that the making of a confidential communication in the course of group therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).