

Memorandum 68-102

Subject: Study 63 - Evidence Code (Revision of Privileges Article)

At the last meeting, the Commission determined to extend the psychotherapist-patient privilege to cover confidential communications made to school psychologists in the course of diagnosis or treatment of mental or emotional conditions. At the same time the Commission asked the staff to make an examination of the statutes and to contact professional organizations to determine whether any other professional groups are performing psychotherapy and are licensed or otherwise determined to be qualified by a state licensing board.

The staff has prepared a "Staff Suggested Draft" of a Recommendation which would extend the psychotherapist-patient privilege to two additional professional groups. We attach two copies; please mark your suggested revisions on one copy.

The staff finds that the 1968 session enacted legislation creating a Social Worker and Marriage Counselor Qualifications Board whose jurisdiction includes the licensing of (1) clinical social workers and (2) marriage, family, and child counselors. In addition, the 1968 Legislature enacted legislation that precludes a person from serving as a clinical social worker without a license. The staff has examined the 1968 legislation, the pertinent administrative regulations, and the other statutes and recommends that both clinical social workers and marriage, family, and child counselors be included under the psychotherapist-patient privilege. Although a bill was introduced in the Assembly at the 1968 session to include these groups under the privilege it died in the Assembly Judiciary Committee. Some members of the Committee (one contacted us) felt that the matter needed more

careful analysis before a bill to extend the privilege was enacted. The State Bar opposed the bill, but I am advised that the State Bar representative expressed a willingness to get together with the interested groups to attempt to develop sound legislation.

The necessary qualifications, type of work performed, and reasons justifying extension of the privilege to these groups are summarized in the attached staff suggested recommendations. (Note that "licensed clinical social workers" are not social workers in the traditional sense.) The attached background study contains additional background information. See also Exhibit I (letter from Dr. Robert L. Dean, Assistant Clinical Professor of Psychiatric Social Work, Department of Psychiatry, University of California School of Medicine).

The significant changes made in the Recommendation previously approved for printing are found on pages 6-8 (general discussion of psychotherapist-patient privilege) and pages (recommended amendment of Evidence Code Section 1010) of the attached Recommendation.

The 1968 Assembly Bill would have amended the Evidence Code section defining "patient" for the purposes of the psychotherapist-patient privilege to include a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of "achieving more adequate, satisfying, or productive social adjustment." The existing section covers persons who consult a psychotherapist or submit 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." The staff recommends that no

change made in the definition of patient. We have, however, indicated in the Comment to Evidence Code Section 1010 that the privilege extends to marriage, family, and child counseling.

Respectfully submitted,

John Cook
Student Legal Assistant

ROBERT L. DEAN, M. A.
2107 VAN NESS AVENUE, SUITE 409
SAN FRANCISCO, CALIFORNIA 94109
OR 3-8383

October 8, 1968

Mr. John Demouilly, Executive Secretary
Law Revision Commission
School of Law, Stanford University
Palo Alto, California

Dear Mr. Demouilly:

I am very pleased to learn that the Law Revision Commission is reexamining the matter of privileged communication. Under present law there is no privileged communication for social workers in any setting except for those whose communications may be covered because they are working under the general supervision of a psychiatrist. Although privilege has been extended to the entire field of social work in some states, and I believe a case can be made for this in California, a specific segment of the profession at present working under a definite handicap is the group of licensed clinical social workers. This is a group of social workers numbering a little over 300 in California. They were formerly designated as certified clinical social workers prior to the enactment of SB 1224 in the 1968 Legislative session.

Licensed clinical social workers possess high standards of training and experience beyond their professional training of a master's degree from a school of social work. This experience and training must include at least two years in using psychotherapeutic methods and measures in an agency, clinic or hospital, one year of which must have been under the supervision of the same professional person. Such social workers are engaged in psychotherapy, marriage, family, and child counseling, and often work collaboratively with psychologists and psychiatrists in treating families in psychotherapy. Increasingly they work independently in private practice.

CLINICAL SOCIAL WORK

BY APPOINTMENT

ROBERT L. DEAN, M. A.
2107 VAN NESS AVENUE, SUITE 403
SAN FRANCISCO, CALIFORNIA 94109
OR 3-8388


I am enclosing a copy of SB 1224 on which I have marked the paragraphs defining our practice. The law will be effective in November. After July, 1969 an examination will be required for the license. A committee of clinical social workers is currently helping the Board of Social Work Examiners prepare the examination.

In reference to our telephone conversation, I have checked with my colleagues throughout California, and I am collecting case examples in which our work has suffered because of the absence of privilege. I shall forward as many as possible to you prior to your meeting on October 17, 18 and 19. I shall continue to collect them for later use.

I hope it may be possible for myself and one other clinical social worker to attend the meeting as observers.

Thank you for your interest.

Sincerely yours



Robert L. Dean
Clinical Social Worker

BACKGROUND STUDY

Persons Authorized to Engage in Rendering Services of a Psychological Nature

The licensure laws regulating the rendition of services of a psychological nature are distinctive in regard to the lack of specificity with which they define the scope of practice. The medical and paramedical licensure statutes by comparison present seemingly specific definitions of the scope of practice. This problem can be illustrated by reference to the Psychology Licensure Law which may present the most restrictive definition of the scope of practice in this general field. The practice of psychology is defined by Section 2903 of the Business and Professions Code as: "the application of principles, methods, and procedures of understanding, predicting and influencing behavior, such as the principles pertaining to learning, perception, motivation, thinking" A definition as broad as the above provides no specific criteria by which the practice of psychology can be defined or described; but perhaps a more specific and concrete definition will not and cannot be formulated. The concept that the young science of psychology will make major breakthroughs in theory and principle relating to mental health as the other hard core sciences have done in the twentieth century may be unfounded. Psychotherapy, psychology, and clinical social work all deal with the immensely complex human being, his accumulated learning experiences, and his structure of social and moral values which are often distorted and unrelated to reality. There are no tangibles upon which to work or upon which to measure results. For example, is it better for a young couple locked in an unhappy and unstable marriage to learn to adjust

to an incomplete relationship or is it better that they separate? The picture is further clouded by the continuing controversy whether symptoms or causes should be treated.

Licensure laws fall into two categories, permissive and mandatory, according to the restrictions placed upon practice by unlicensed persons. Permissive licensure merely prohibits use of a specified title unless one has met the minimum requirements specified by law and has obtained a license to practice. For example, permissive licensure in the field of law would permit anyone to engage in the practice of law so long as he did not represent himself to be an attorney, lawyer, and the like. In the medical field, permissive licensure is still common for nurses, practical nurses, physical therapists, dental hygienists, and others. Mandatory licensure prohibits practice without a license.

The list of professional governmentally regulated bodies rendering services of a psychological nature with no testimonial privilege include: school psychologists; clinical social workers; marriage, family, and child counselors. Registered social workers apparently do not render services of a psychological nature. The functions that each occupational group is authorized to perform and the requirements of character, education, and training that licensed practitioners must meet will be set out below.

Licensure of persons rendering services of a psychological nature is a relatively recent development. Psychologists were not licensed until 1957. Another feature of this act recognized the need for supervised clinical experience--a feature all subsequent acts in this general field have incorporated. The Psychology Certification Act of

1957 contained a special provision granting them a testimonial privilege. Cal. Stats. 1957, Ch. 2320, § 1, p. 4038. When the Evidence Code was enacted in 1965, this provision was repealed and reenacted as Section 1010.

Statutory regulation of social workers has a longer history. The first social worker licensure law was enacted in 1945. This statute provided for permissive licensure of "Registered Social Workers." In 1963, there was further statutory development with the enactment of the chapter licensing marriage counselors. The most recent category of social workers was created in 1967. The 1967 Clinical Social Worker law created a new category of personnel whose practice was broader than the combined practice of registered social workers and marriage counselors and in many respects is similar to the practice of psychiatrists or psychologists. The clinical social worker licensing law was amended in 1968 to make licensure mandatory. The first signs of merger or consolidation of the three laws regulating social workers have begun to emerge. In 1968, the California Legislature enacted into law a bill which abolished the previously separate boards for the three categories of social workers and created the Social Worker and Marriage Counselor Qualifications Board with jurisdiction over the certification of registered social workers, clinical social workers, and marriage counselors. This appears to be a step in the right direction since the training for all three is similar.

Registered Social Workers

1. Licensure and Definition of Practice

Permissive licensure of registered social workers is provided for by the Business and Professions Code. See Bus. & Prof. Code §§ 9020-9039.

The practice of a registered social worker includes "the rehabilitation of the individual or group in adjustment to society and includes a person engaged in social case work and community organization" Cal. Admin. Code, Tit. 16, § 1812.

2. Qualifications

The requirements to obtain a registered social worker license are citizenship, two years of full-time graduate study in social work, a master's degree, and satisfactory completion of an examination. Cal. Admin. Code, Tit. 16, § 1810.

Marriage, Family, and Child Counselors

1. Licensure and Definition of Practice

Marriage, family, and child counselors are regulated by the Business and Professions Code, Sections 17800-17847. The practice of marriage counselling is simply defined as engaging in or offering to perform marriage, family, or child counselling. A marriage counselor is authorized to use psychotherapeutic measures in connection with his work. 49 Ops. Cal. Atty. Gen. 104 (1967).

Most licensure statutes are either mandatory or permissive; the marriage counselling statutes fail to neatly fall into either category. The statute provides "no person who engages in the business of marriage, family, or child counselling shall advertise himself as being, or performing the services of, a marriage, family, child, domestic, or marital consultant or advisor, nor in any way use these or any similar titles to imply that he performs these services without a license as provided by this chapter." Business and Professions Code Section 17800. Advertising has been given a broad definition and includes any card,

sign or marking with or without limiting qualification. Business and Professions Code Section 17802. In one sense, licensure is permissive because unless one advertises he need not possess a license to engage in marriage counselling. However, it is unlike a permissive licensure statute in that no specific title is protected. Moreover, permissive licensure statutes generally would permit advertising that one engages in or performs certain services as long as no representation as to title is made. Except for marriage counselors whose practice consists entirely of referrals, this statute appears to achieve the same result as mandatory licensure.

Certain exceptions from licensure which may relate to the question above are provided for in the marriage counselor licensure law. Section 17808 provides for waivers to certain institutions; waivers of the requirements of the marriage counselling licensure requirements may be granted to properly accredited non-profit, charitable institutions and to educational institutions which demonstrate (1) adequate supervision of nonlicensed counselling personnel and (2) community need or training need. Business and Professions Code Section 17808. Section 17800 provides that the provisions of the Social Work Licensing Law, Medical Practices Act, or Psychology Licensing Law are not restricted by the chapter on marriage counselling.

2. Qualifications

Sections 17803-17804 provide that the Social Worker and Marriage Counselor Qualifications Board shall grant a license to an applicant who has the following minimum qualifications: at least a master's degree in marriage counselling, social work, or one of the behavioral sciences, and at least two years of approved, supervised experience.

3. Related Provisions

Sections 1730-1772 of the Code of Civil Procedure establishes a system providing for a Conciliation Court to handle and counsel spouses embroiled in domestic controversies. The Conciliation Court Law is invoked whenever it appears to the court that a minor child is involved in an action for divorce, annulment, or separate maintenance and that there is some reasonable possibility of a reconciliation between the spouses. Code of Civil Procedure Section 1771. All communications, verbal or written, from either of the parties to the judge, commissioner, or court-appointed marriage counselor made during reconciliation proceedings are deemed to be official information within the testimonial privilege provided by Section 1040 of the Evidence Code. The qualifications required of full-time marriage counselors employed by the Conciliation Court of the County of Los Angeles are a master's degree and ten years experience.

Clinical Social Workers

1. Licensure and Definition of Practice

Clinical social workers are licensed by the Social Worker and Marriage Counselor Qualifications Board. A.B. 1494; Ch. 1398 (1968 Reg. Sess.). Licensure of the practice of clinical social work, previously permissive, will be mandatory on and after July 1, 1969. S.B. 1224; Ch. 1329 (1968 Reg. Sess.). Section 9049 of the Business and Professions Code, amended S.B. 1224 (1968 Reg. Sess.), defines the practice of clinical social work and psychotherapy:

The practice of clinical social work is defined as a service in which a special knowledge of social resources, human capabilities, and the part that unconscious motivation plays in determining behavior, is directed at helping people to achieve more adequate, satisfying and productive social

adjustments. The application of social work principles and methods includes, but is not restricted to, counseling and using applied psychotherapy of a nonmedical nature with individuals, families and groups, providing information and referral services, providing or arranging for the provision of social services, explaining and interpreting the psychosocial aspects in the situations of individuals, families or groups, helping communities to organize, to provide, or improve social and health services, and doing research related to social work.

Psychotherapy, within the meaning of this chapter, is the use of psychosocial methods within a professional relationship, to assist the person or persons to achieve a better psychosocial adaptation, to acquire greater human realization of psychosocial potential and adaptation, to modify internal and external conditions which affect individuals, groups, or communities in respect to behavior, emotions, and thinking, in respect to their intrapersonal and interpersonal processes. [Emphasis added.]

Exceptions to the licensure requirements for clinical social workers exist. Section 9052 (S.B. 1224, Ch. 1329, 1968 Reg. Sess.) exempts qualified members of other professional groups, such as physicians, psychologists, attorneys, and ministers. Section 9053 (S.B. 1224, Ch. 1329, 1968 Reg. Sess.) provides an exception for persons practicing in designated private and governmental organizations, such as the Department of Health, Education, and Welfare, family and children services agencies, accredited colleges, and private psychiatric clinics. Section 9054 (S.B. 1224, Ch. 1329, 1968 Reg. Sess.) provides a limited exception for persons employed by accredited academic institutions, public schools, government agencies, as well as social work interns.

2. Qualifications

An applicant for a license as a clinical social worker must fulfill the following minimum qualifications: (1) is at least 21 years of age, (2) is of good moral character, (3) is a U.S. citizen, (4) has received a master's degree from a school of social work, and (5) has had two

years experience in the use of psychosocial and psychotherapeutic methods and measures. Bus. & Prof. Code § 9042 (S.B. 1224, Ch. 1329, 1968 Reg. Sess.).

School Psychologists

This summary regarding the qualifications and practice of school psychologists is provided primarily for purposes of comparison.

1. Licensure and Definition of Practice

Education Code Section 6908 provides that a public school child may not be placed in an educational program for the mentally retarded unless he has been given careful individual examination and his parents have been consulted. Only a certified school psychologist may administer the required examination and recommend such placement.

2. Qualifications

Employment as a school psychologist requires the possession of a "standard designated services credential with specialization in pupil's personnel services." Education Code Section 13196. An applicant for such a credential must possess the following qualifications: a bachelor's degree; at least a master's degree in social work, rehabilitation counseling, or in any academic subject if supplemented by designated courses, or a license to practice psychology; sixty semester hours devoted to academic and clinical training in the field of pupil personnel services; an approved internship; and verification by an approved institution that the applicant is competent to administer individual examinations of minors and recommend placement in a program for mentally retarded children. Cal. Admin. Code, Tit. 5, § 6402.

Other Personnel

In addition to the above governmentally regulated categories of manpower, there may be others performing similar services under non-governmental regulation. However, recognition of nongovernmental regulation for purposes of defining the psychotherapist-patient privilege might substantially lessen the incentive to obtain governmental certification of competence--if this is decided to be a legitimate consideration. Moreover, it would seem many could qualify for a license under one of the three social worker statutes, depending on their qualifications, if they felt the need to qualify for the psychotherapist-patient privilege.

Recommendation

The question whether the psychotherapist-patient privilege should be extended to others presents two interrelated problems; the qualifications and duties of other categories of manpower and the contours of the privilege itself. To facilitate resolution of these problems, it may be appropriate for the Commission to reconsider at this time some questions basic to the psychotherapist-patient privilege. A primary inquiry relates to the justification for conditioning the privilege on the competence (as measured by the licensure laws) of the practitioner. Unlike the attorney-client, physician-patient, and psychiatrist-patient privileges, a reasonable belief that the person consulted is a licensed psychologist is insufficient to create a privileged communication. This distinction can only be justified, if at all, on the basis of a policy inarticulated in the Evidence Code and Comments thereto. See Comment to Section 1014 of the Evidence Code. That Comment emphasizes that the purpose of the psychotherapist-patient privilege is to encourage the

patient to give the psychotherapist the personal information necessary for psychotherapeutic diagnosis, treatment, or research by relieving the patient's apprehension that the information will be disclosed without his consent. The Comment states:

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 Comment goes on to point out differences between the psychotherapist-patient privilege and the physician-patient privilege but fails to point out that the patient's reasonable belief is relevant to the former only if the practitioner is a psychiatrist. Prior to the enactment of the Evidence Code, however, the psychologist-patient privilege was broader than both the physician-patient and psychiatrist-patient privilege in that the patient's reasonable belief was important only in regards to the psychologist-patient privilege. Where the physician was unlicensed,

the patient's reasonable belief that the physician or psychiatrist was licensed could not create a privilege. The Evidence Code completely reversed this without comment. One possible explanation for the present distinction between psychiatrists and psychologists is that in 1965 when the Evidence Code was enacted the psychology certification act provided for permissive title protection licensure only. Thus, it might have been feared that there would be numerous unlicensed practitioners operating under an unprotected "psychological" title. The Commission's 1964 privileges study, 6 Cal. L. Revision Comm'n Reports 201, 435-437 (1964), supports this analysis:

However, reasonable belief by the patient that a psychologist is licensed or certified is not sufficient. This is a departure from the general scheme of the Uniform Rules which protect patients from reasonable mistakes as to unlicensed practitioners. However, it is suggested that practical considerations require this departure. There are many persons who are not licensed as psychologists who purport to render psychotherapeutic aid. The extent of the problem that would be created if the "reasonable belief" provision were extended beyond the psychiatrist is suggested in the following newspaper article

The article discusses a chiropractor's practicing as a "electro-
psychometrist--now unlawful under the psychology licensing law. Imposing this risk on the patient is necessary in order to draft a meaningful definition of psychotherapist. Though it may be argued that concern for the competency of practitioners is relevant to licensure laws but not to the Evidence Code, the whole problem seemingly has been obviated by a recent amendment which makes licensure mandatory in order to practice psychology. It is therefore suggested, that Section 1010(b) be amended to read:

(b) A person licensed , or reasonably believed by the patient to be licensed, as a psychologist

Determination of the breadth of the psychotherapist-patient privilege should not be made until the expectations of a person consulting a psychologist, clinical social worker, etc., are considered. Laws grossly deviating from general expectations are destined for a short life. Another consideration that should enter the balance is the nature, quality, quantity, and social utility of the evidence likely to be suppressed by a broader privilege. The question of extending the privilege to others was briefly considered in the Commission's 1964¹ privileges study. Recognizing that the justifications for the psychotherapist-patient privilege were equally applicable to marriage counselors and social workers, the Commission did not recommend extension of the privilege to these groups for reasons which have been rendered obsolete by developments in the licensure laws and in the field of clinical social work generally. The stated reasons were (1) inability to define these groups and (2) lack of demonstrated practical need for the privilege.

¹ The Commission's recommendation stated:

It is true that the general medical practitioner may use psychotherapeutic techniques in treating some of his patients. But marriage counselors, social workers, educators and others also may use psychotherapeutic techniques as a part of their professional activities. The same reasoning that justifies extending the privilege to the general medical practitioner is equally applicable to these other professions. The difficulty of defining when the privilege may be claimed to prevent disclosure of a communication to a person not specializing in psychotherapy is a practical reason for not extending the privilege to cover such communications. Moreover, as a matter of policy, there does not appear to be sufficient justification for extending the privilege. It has not been established that general medical practitioners, social workers, educators and others have been greatly hindered in their professional activities because communications between them and their patients are not protected by a psychotherapist-patient privilege. The contrary is true in the case of the psychiatrist or clinical psychologist. [Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Article V, Privileges, 6 Cal. L. Revision Comm'n Reports 201, 431 (1964).]

Professional groups making extensive use of psychotherapy appear to have a practical need for the privilege of refusing to disclose personal and confidential statements made to them for therapy purposes. Bills attempting to extend the psychotherapist-patient privilege to marriage counselors and clinical and social workers have been introduced in the 1967 and 1968 legislative sessions. They were defeated due to the opposition of the Bar Association. Future attempts to extend the privilege may be expected.

It is questionable that psychiatrists, psychologists, and school psychologists can demonstrate a significantly greater need for a testimonial privilege than clinical social workers and marriage counselors. Licensed clinical social workers are trained both academically and clinically to use psychoterapeutic techniques. They are often involved in individual therapy requiring frank revelation of the intimate details of the patient's life. In short, their practice is quite similar to that of psychologists who have the privilege. Marriage counselors also are trained both academically and clinically and are authorized to use psychotherapy in their practice.

The Conciliation Court Law establishes two principles clearly applicable to the question of whether marriage counselors should come within the psychotherapist-patient privilege: namely, counseling aimed at resolving family and domestic problems is in the public interest and ought to be encouraged, and privacy and confidentiality of communications made in the course of marriage counseling is necessary to encourage the full disclosure necessary for treatment. There appears to be no good reason to require persons with marital problems to invoke the aid of the Conciliation Court in order to be

assured that intimate and frank disclosures made in the interests of furthering reconciliation will not be used against them. This assurance of confidentiality should also be available to persons with domestic problems who consult private, licensed marriage counselors.

Although it is recognized that the extension of the privilege to cover communications to school psychologists, clinical social workers, and marriage counselors may operate in particular cases to withhold relevant information, the interests of society will be better served if such persons are able to assure clients that their confidences will be protected. The Law Revision Commission has been advised that school psychologists, clinical social workers, and marriage counselors have encountered difficulty in obtaining needed information because they are unable to assure their clients that their communications will be protected against disclosure.

Registered social workers do not possess the clinical training required of psychologists, school psychologists, clinical social workers, and marriage counselors. Such clinical training is considered essential to competent performance of case work. The practice of registered social workers does not generate the practical need for the privilege.

Therefore, it is recommended that: (1) Clinical social workers and marriage counselors be afforded the same testimonial privilege as psychologists and school psychologists and (2) that no other categories of licensed or unlicensed personnel be afforded the psychotherapist-patient privilege.

#63

Revised October 11, 1968

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION
RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 4--Revision of the Privileges Article

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

STAFF SUGGESTED DRAFT

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

October 21, 1968

To His Excellency, Ronald Reagan
Governor of California and
The Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study the law of evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. This is the second recommendation made as a result of this continuous review. The first was submitted in 1967. See Recommendation Relating to the Evidence Code: Number 1-- Evidence Code Revisions, 8 Cal. L. Revision Comm'n Reports 101 (1967). See also Chapter 650 of the Statutes of 1967.

Respectfully submitted,

Sho Sato
Chairman

RECOMMENDATION OF THE
CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

NUMBER 4--REVISION OF THE PRIVILEGES ARTICLE

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others.¹

MARITAL PRIVILEGE

The Commission has reviewed HEAFEY, CALIFORNIA TRIAL OBJECTIONS (Cal. Cont. Ed. Bar 1967) and has concluded that Sections 971 and 973 require revision to eliminate problems identified by Mr. Heafey. Accordingly, the Commission makes the following recommendations.

¹For further discussion, see 8 CAL. L. REVISION COMM'N REPORTS 1314 (1967); 9 CAL. L. REVISION COMM'N REPORTS 00 (1969).

Section 971

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by any adverse party unless the witness spouse consents or the adverse party has no knowledge of the marriage. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person not to testify against his spouse (Evidence Code Section 970).

In a multi-party action, the privilege of a married person not to be called as a witness may have undesirable consequences. The privilege not to be called apparently permits the married person to refuse to take the stand even though the testimony sought would relate to a part of the case totally unconnected with his spouse. As worded, the privilege is unconditional; it is violated by calling the married person as a witness whether or not the testimony will be "against" his spouse.

Edwin A. Heafey, Jr. has stated the problem as follows:

For example, if a plaintiff has causes of action against A and B but sues A alone, neither privilege can prevent the plaintiff from calling Mrs. B as a witness and obtaining her testimony on matters that are relevant to the cause of action against A and do not adversely affect B. However, if plaintiff joins A and B in the same action and wants to call Mrs. B for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party adverse to her spouse . . . and from questioning her by her privilege not to testify against her spouse. . . .²

The privilege not to be called as a witness also may lead to complications where both spouses are parties to the proceeding. Where an

²HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 315 (Cal. Cont. Ed. Bar 1967).

action is defended or prosecuted by a married person for the "immediate benefit" of his spouse or of himself and his spouse, Evidence Code Section 973(b) provides that either spouse may be required to testify against the other. Evidence Code Section 972(a) provides that either spouse may be required to testify in litigation between the spouses. Thus, the privilege not to be called and the privilege not to testify against the other spouse are not available in most cases in which both spouses are parties.³ However, where the spouses are co-plaintiffs or co-defendants and the action of each is not considered to be for the "immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case.⁴ Moreover, the adverse party apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.⁵

³See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

⁴"Allowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship." HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 49.9 at 317 (Cal. Cont. Ed. Bar 1967).

⁵Id. § 40.10 at 317.

If the privilege of a spouse not to be called as a witness were limited to criminal cases,⁶ the significant problems identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against" the party spouse. Accordingly, the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.

⁶Apparently this privilege was not recognized in civil cases before adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See *People v. Carmelo*, 94 Cal. App.2d 301, 210 P.2d 538 (1949); *People v. Moore*, 111 Cal. App. 632, 295 Pac. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury.

Section 973

Section 973(a) provides that a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under Section 970 (privilege not to be called) or 971 (privilege not to testify against spouse) in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges--including the privilege not to testify against the party spouse--are waived, despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.⁷ The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

⁷See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission has received a number of suggestions that the Evidence Code article relating to the psychotherapist-patient privilege (Sections 1010-1026) be revised to eliminate uncertainties or overcome deficiencies. Although these suggestions differ in detail, they make two significant criticisms of the existing provisions. First, it has been suggested that the definition of "psychotherapist" in Section 1010 is too narrow, for it includes only psychiatrists and licensed psychologists, thereby excluding various other highly qualified professional groups who may lawfully administer psychotherapy. Second, it has been urged that the application of the privilege to the increasingly common group therapy situation is uncertain and should be clarified.

With respect to privileges generally, the Commission has recognized that any extension of the scope of protection afforded confidential communication necessarily handicaps, at least to some extent, the court or jury in its effort to reach a just result. 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--so to speak--of relevant and perhaps cogent evidence. The Commission, therefore, generally takes the view that any extension of a privilege must be clearly warranted and must be supported by a distinct social policy in favor of facilitating the communications or revelations to which the privilege is extended. With respect to the psychotherapist-patient privilege, however, the Commission is persuaded that Sections 1010 and 1012 of the Evidence Code are unduly restrictive and therefore makes the following recommendations.

Section 1010

For the purposes of the psychotherapist-patient privilege, Section 1010 defines a "psychotherapist" as (a) a physician who specializes in psychiatry or (b) a person licensed as a psychologist. Subdivision (b) refers to the Psychology Licensing Law (Business and Professions Code Sections 2900-2986) which provides for the licensing of psychologists by the Board of Medical Examiners. That statute, however, exempts from its licensing requirements various professional groups whose members engage in work or activities of a psychological nature. See Business and Professions Code Sections 2908-2910. Thus, some persons who may lawfully use psychotherapeutic techniques are not covered by the psychotherapist-patient privilege because they are neither psychiatrists nor licensed psychologists. Specifically, the Psychology Licensing Law exempts (1) school psychologists, (2) clinical social workers, and (3) marriage, family, and child counselors.

This discrepancy between the persons who may lawfully practice psychotherapy and the persons listed in Section 1010 of the Evidence Code inevitably raises the question whether the definition of "psychotherapist" in Section 1010 is sufficiently broad. The Commission has reviewed the statutory and administrative regulations that relate to persons who render services of a psychological nature, as well as the nature of their practice, and has concluded that Section 1010 should be broadened to include the following groups.

⁸ Assembly Bill No. 1874 of the 1968 Regular Session would have extended the psychotherapist-patient privilege to clinical social workers and marriage, family, and child counselors. The bill died in the Assembly Committee on the Judiciary.

1. School psychologists. To be exempted from the Psychology Licensing Law, school psychologists must (1) hold an appropriate credential issued by the State Board of Education, (2) engage in psychological activities "as part of the duties for which they were employed," and (3) perform such activities "solely within the confines of or under the jurisdiction of the organization in which they are employed." See Business and Professions Code Section 2909. The qualifications of an applicant for a school psychologist's credential are specified by the Education Code and regulations of the Board, and include at least a master's degree and an approved internship. Such an applicant may or may not be a licensed psychologist, but if he is not he must have other prescribed qualifications. See Section 13196 of the Education Code and Section 6402 of Title 5 of the California Administrative Code. Thus, a school psychologist must establish his qualifications as such to the satisfaction of the State Board of Education and must be serving as a psychologist under the direction and jurisdiction of a school district. Nonetheless, under existing law, the question whether the psychotherapist privilege pertains to a school psychologist turns on the fortuity of whether or not he is licensed as a psychologist as well as being certified as a school psychologist.

The specialized services afforded by school psychologists entail problems of diagnosis of mental and emotional conditions that do not differ greatly from the services provided by psychologists who work in other settings. Moreover, determining the cause of a child's difficulties in school frequently depends on the candid revelation of the circumstances of the child, his parents, and others. Unless the child and his parents are assured that the necessary information can be held in confidence, they will be reluctant to

make the full disclosure upon which diagnosis and treatment depend.

Thus, in view of their technical qualifications and the nature and importance of the service rendered by them, it seems clear that certified school psychologists should be included in the group of persons to whom a privileged communication may be made.

2. Clinical social workers. Clinical social workers are licensed by the Social Worker and Marriage Counselor Qualifications Board. See Sections 9040-9051 of the Business and Professions Code. An applicant for such a license must have a master's degree from a school of social work and two years' experience in a hospital, clinic, or agency "in the use of psychosocial and psychotherapeutic methods and measures." See Business and Professions Code Section 9042 as amended by Chapter 1329 of the Statutes of 1968. Thus, such licensees are trained both academically and clinically in the use of psychotherapeutic techniques. They provide individual, marriage, family, and child counseling and often work collaboratively with psychologists and psychiatrists. Increasingly, they work independently in private practice. They make extensive use of applied psychotherapy. Indeed, the statutory definition of their function places particular emphasis on this aspect of their work. See Business and Professions Code Section 9049. This therapy, in turn, requires revelation of the most intimate details of the subject's life. Thus, it appears that the service rendered by licensed clinical social workers is not distinguishable from that provided by other psychotherapists and that such workers should be added to the group covered by the psychotherapist-patient privilege.

3. Marriage, family, and child counselors. Persons who undertake to afford marriage, family, or child counseling also are licensed by the Social Workers and Marriage Counselor Qualifications Board. See Business and Professions Code Sections 17800-17847. The minimum qualifications for a license include a master's degree in marriage counseling, social work, or one of the behavioral sciences, and at least two years of supervised clinical experience. See Business and Professions Code Section 17804. Although the marriage, family, or child counseling is not defined in detail by statute, it is clear that the licensees are trained both academically and clinically in the use of psychotherapy. In addition, it is equally clear that professional amelioration of troubled marriages and unhappy homes entails the frank revelation of the intimate details of the family life. Unless the parties are assured that such information can be kept in utmost confidence, they cannot be expected to make the required disclosures. A need for the privacy and confidentiality of such communications is already recognized in the Conciliation Court Law (Code of Civil Procedure Sections 1730-1772). All communications, verbal or written, from either of the parties to the judge, commissioner, or court-appointed counselor are expressly made subject to the privilege for official information conferred by Section 1040 of the Evidence Code. See Code of Civil Procedure Section 1747. This assurance of confidentiality should also be available to persons who consult licensed counselors in other settings and for this reason such counselors should therefore be added to the group covered by the psychotherapist privilege afforded by the Evidence Code.

In summary, the Commission believes that although extension of the privilege to cover communications to school psychologists, clinical social

workers, and marriage, family, and child counselors may operate to withhold relevant information, the interests of society will be better served if such professionals are able to assure their clients that the confidences of the client will be respected. The Commission is advised that, as a practical matter, these practitioners have difficulty in obtaining needed information due to the lack of privilege under existing law. Accordingly, the Commission recommends that confidential communications to them be placed upon the same footing as such communications to licensed psychologists.

Section 1012

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

information . . . 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 to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation or examination.

Although "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" 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 the 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. 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-patient privilege protects against disclosure of communications made during 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 third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted."

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

An act to amend Sections 971, 973, 1010, and 1012 of the Evidence Code, relating to evidence.

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

Evidence Code Section 971 (amended)

Section 1. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a party-to-a defendant in a criminal proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended to preclude the assertion by a married person of a privilege not to be called as a witness in a civil proceeding. As to any proceeding to which his spouse was a party, the former wording of Section 971 appeared to authorize a married person to refuse to take the stand when called by a party adverse to his spouse even in multi-party litigation where the testimony sought related to a part of the case wholly unconnected with the party spouse. See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 414 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. Id. § 40.10, at 317.

§ 971

Elimination of the privilege not to be called in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege not to testify against one's spouse in any proceeding (Section 970), and the privilege for confidential marital communications (Section 980) are available in a civil proceeding. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case, the non-party spouse should be required to testify. If the testimony would be "against" the party spouse, the witness spouse may claim the privilege not to testify given by Section 970.

Evidence Code Section 973 (amended)

Sec. 2. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who ~~testifies-in-a-proceeding-to-which-his-spouse-is-a party,-or-who~~ testifies for or against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment. Subdivision (a) of Section 973 is amended to eliminate a problem that arose in litigation involving more than two parties. In multiparty civil litigation, if a married person is called as a witness by a party other than his spouse in an action to which his spouse is a party, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the former wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges--including the privilege not to testify against the party spouse--were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.

PROPOSED LEGISLATION

NOTE: Subdivision (d) and (e) would be added to cover clinical social workers and marriage, family, and child counselors.

Sec. 3. 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; ~~or~~

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code - ;

(c) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the State Board of Education;

(d) 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; or

(e) A person licensed as a marriage, family, and child counselor under Chapter 4 (commencing with Section 17300) of Part 3 of Division 7 of the Business and Professions Code.

Comment. Section 1010 is amended to include school psychologists, clinical social workers, and marriage, family, and child counselors within the definition of "psychotherapist." To be included under Section 1010, a school psychologist must hold an appropriate ~~credential~~

issued by the State Board of Education. See Sections 13187-13188, 13196 of the Education Code; Cal. Adm. Code, Tit. 5, subch. 10.1, group 7. The credential specified in subdivision (c) includes one issued under former law which is equivalent to the standard designated services credential with specialization in pupil personnel services authorizing service as a school psychologist. See Sections 11753 and 13187-13187.1 of the Education Code. A clinical social worker or marriage, family, and child counselor must have the appropriate license to be included under Section 1010.

Although the psychotherapist may render a broader scope of service, the privilege under this article covers confidential communications made in the course of diagnosis or treatment of a mental or emotional condition or an examination for purposes of psychiatric or psychological research. See Section 1011 and the Comment to that section. Thus, the privilege under this article covers individual diagnosis and treatment and such activities as marriage, family, and child counseling. See also Recommendations Relating to the Evidence Code: Number 4--Revisions of the Privileges Article, 9 Cal. L. Revision Comm'n Reports 600 (1969).

§ 1012

Sec. 4. 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 ~~er-examination~~ , including other patients present at group therapy, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose ~~ef-the-consultation-er-examination~~ for which the psychotherapist is consulted , and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to add "including other patients present at group therapy" in order to foreclose the possibility that the section would be construed not to embrace group therapy. However, it should be noted that communications made in the course of group therapy are within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." The making of a communication that meets these two requirements in the course of group therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

§ 1012

The other amendments are technical and conform the language of Section 1012 to that of Section 992, the comparable section relating to the physician-patient privilege. Deletion of the words "or examination" makes no substantive change since "consultation" is broad enough to cover an examination. See Section 992. Substitution of "for which the psychotherapist is consulted" for "of the consultation or examination" adopts the language used in subdivision (d) of Section 912 and in Section 992.