

Second Supplement to Memorandum 68-107

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

Attached are additional letters received since distribution of the First Supplement to Memorandum 68-107.

Exhibit I is a letter from Justice John B. Molinari stating: "I am in favor of the recommendation since I believe that if the subject privilege is to be meaningful, it should be extended to the disciplines included in the recommendation." Justice Molinari served as the Chairman of the Special Subcommittee of the Judicial Council on the Evidence Code when the code was being drafted.

Exhibit II is a letter from Dr. Arthur M. Bodin, Training and Education Director, Mental Research Institute, Palo Alto. He states he approves the general direction and intent of the Commission's tentative recommendation. However, he raises a number of matters in the psychotherapist-patient privilege that he believes should be clarified. He is working with Professor Aidan Gough of the University of Santa Clara School of Law on a law review article dealing with these matters. Please read his letter for the various matters he suggests be dealt with in the recommendation to the 1969 Legislature. The staff recommends against dealing with any of these matters in the recommendation to the 1969 Legislature. We believe that the matters raised in his letter should be studied by the Commission when time permits after the law review article has been published. We do not believe that the problems he raises will be easy to solve and any solutions will certainly require considerable review by interested persons and organizations. Accordingly, the staff suggests that Dr. Bodin's letter be the subject of further study after the review article he is preparing has been published.

Exhibit III is a letter from a Deputy District Attorney in San Mateo County. He questions whether studies, tests, and other materials assembled by school psychologists may be withheld from parents and school administrators as well as everyone else. "You may wish to consider some clarification of the rules relating to minors in schools and perhaps also outside of schools." This matter is dealt with in Evidence Code Section 1013:

1013. As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

Section 1013 might be amended to make a provision for the minor who has a living parent or parents by adding a subdivision (d) to read:

(d) The mother or father of the patient if the patient is under 14 years of age.

The staff does not recommend that any change be made in Section 1013.

Exhibit III also notes the enactment of Section 10901 of the Education Code which greatly restricts the tests that may be given by psychologists in schools without the written consent of the parent or guardian. We do not see how the enactment of this section affects the privilege.

Exhibit IV suggests that the tentative recommendation deal with the problem of confidentiality of the official agency records of, for example, a child-placing agency which is licensed by the State Department of Social Welfare. The staff does not consider this to be a

matter properly within the scope of the tentative recommendation. The solution, if a problem does exist, is for the interested persons to obtain enactment of a statute making such records confidential. Many such statutes exist making particular records confidential.

In addition to the letters attached, we also received a letter from Jane Taylor Goraj, Palo Alto, indicating approval of the tentative recommendation.

Respectfully submitted,

John H. DeMouly
Executive Secretary

2nd Supp. Memo 68-107

EXHIBIT I

FIRST DISTRICT
DIVISION ONE



JOHN B. MOLINARI
PRESIDING JUSTICE

STATE OF CALIFORNIA
Court of Appeal
STATE BUILDING-CIVIC CENTER
SAN FRANCISCO

November 15, 1968

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear John:

I am sorry that I could not answer your communication regarding the tentative recommendation of the Commission relating to the psychotherapist-patient privilege under the Evidence Code until today. I am in favor of the recommendation since I believe that if the subject privilege is to be meaningful, it should be extended to the disciplines included in the recommendation.

With kindest personal regards, I am

Sincerely,

A handwritten signature in cursive script, appearing to read "John B. Molinari".

JOHN B. MOLINARI

JEM:fs

MRI

MENTAL RESEARCH INSTITUTE

555 Middlefield Road, Palo Alto, California 94301

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November 11, 1968

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I am writing to applaud the general direction and intent of your commission's "Tentative Recommendation Relating to the Evidence Code, Number 55--the Psychotherapist-Patient Privilege." In addition, I wish to make some observations and suggestions about what appear to me to be loopholes.

It might be pertinent first to give some of the background of my interest in this matter. In connection with chairing the Study Group on Marriage and Divorce of the California State Psychological Association and the Legislative Affairs Committee of the South Bay Society of Clinical Psychologists, I have been carrying on a continuous dialogue with Professor Aidan Gough of the University of Santa Clara School of Law since his service on the Governor's Commission on Marriage and the Family. Our focus has been on the joint concerns of psychotherapists and the law, and we are currently working on an article for a law review on "Conjoint Therapies and the Law."

The main thrusts of the bill appear to be in the direction of extending the psychotherapist-patient privilege to cover a broader spectrum of therapies done by a wider range of professionals. With regard to the former goal, however, the apparent intent may fall short of the mark unless the language of the ultimate bill specifically includes a number of conjoint therapies. These include the following: (1) family therapy, (2) family counseling, (3) marital therapy, (4) couple therapy (premarital and other unmarried couples), (5) divorce therapy or counseling, (6) marriage counseling, (7) multiple family therapy, (8) couples group therapy, and (9) network therapy (with extended family systems plus relevant boarders, friends, teachers, etc.). With the possible exception of couples group therapy, these conjoint therapies are not usually what therapists construe by the phrase "group therapy." Therefore, some explicit inclusion of all of these terms should probably be made in the bill itself. This could be done in at least two ways: either by including the whole foregoing list of conjoint therapies right along with the phrase "group therapy," or by inserting a sentence to define "group therapy" as including each of the conjoint therapy varieties listed.

A second point unclear in the present draft concerns the common situation in which the format of family therapy includes individual as well as conjoint sessions on some alternating or concurrent basis. Does the wife's privilege extend to disclosures made by husband in his individual sessions but within the context of the total family therapy program? This question is made still more difficult by the fact that not all therapists who use such a combined format would define the individual sessions as part of the family therapy program. This being the case, would a written statement signed by the therapist and the family members have any legal

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standing in establishing whether any individual sessions are components of the family therapy rather than separate program(s)?

A third point unclear in the present draft concerns a relatively rare circumstance which could nevertheless cause considerable confusion in those cases in which it occurs. More specifically, a family therapist may occasionally have some communication by telephone or letter with a family member who will not participate to the extent of appearing in the office. Such communication may even take the form of one or more telephone conversations conducted with the knowledge of all parties during the actual therapy session(s). Does the party on the other end of the telephone have the psychotherapist-patient privilege by virtue of contributing to the process of therapy, notwithstanding his reluctant and peripheral manner of participation and the fact that his physical absence attests to his refusal to be defined as a patient by dint of being "in therapy?"

There is a far more common variant of the dilemma just described. Specifically, one or more family members who are actually present and participating in the office sessions--at least in one or more home visit sessions--may be doing so with the reservation that they are there only for some other family member. This reservation is sometimes a private feeling, not made explicit to anyone else.

A fourth area not sufficiently covered in the present draft is the unidirectionality of the psychotherapist-patient privilege. The lawyer-client relationship is not constrained by one-way privilege. There is a very cogent reason why this precedent for mutual privilege should be extended to include psychotherapists. Namely, the techniques of psychotherapy today often include the therapist's making some explicit use of his own personal background or current situation in the discussion. He may volunteer some personal story or feeling, or give an authentic response to a direct question, and such questions are particularly likely to arise in the context of family therapy with uninhibited children participating. The therapist's own self-disclosures will in all probability be taken as exemplifying his attitudes toward openness on the part of the family members he is treating. He must therefore bear in mind that his own responses may constitute a model for those he is treating. Within this framework he must weigh the relative costs and gains of his example with regard to two conflicting values: personal privacy on the one hand, and interpersonal openness on the other. Since the interests of his patients may sometimes be served best by his electing to be open about himself, it is in the public interest to extend to the therapist, as well as the patient, the protection of privilege.

By calling attention to some potential loopholes and other problems in need of resolution, I hope these comments prove helpful to your committee. The draft impresses me as excellent in its purposes, and I hope you will find ways to incorporate the ideas presented here, perhaps by tightening some sections through increased specificity and inclusiveness in listing who is covered, under what circumstances,

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and for what.

Sincerely,



Arthur M. Bodin, Ph.D.
Training and Education Director
Mental Research Institute

President-Elect
Association of Family Therapists

AMB/f

COUNTY OF SAN MATEO

KEITH C. SORENSON, DISTRICT ATTORNEY

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ROBERT E. CAREY
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JAMES M. PARMELEC
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A. L. LAMFORT
CHIEF INSPECTOR

November 13, 1968

California Law Revision Commission
School of Law, Stanford University
Stanford, California, 94305

Re: Psychotherapist-Patient Privilege.

Gentlemen:-

In reviewing your proposed revision of Sections 1010-1026 of the Evidence Code, it has occurred to me that several comments might be appropriate.

On several occasions the writer has met with groups of school psychologists to discuss the legal nature of the material prepared in the course of their duties. They have frequently urged that they should be able to make their studies, tests, reports and other materials confidential. I have at times been disturbed at their contentions that the tests given should be privileged in the sense that they should be able to withhold them from parents and school administrators as well as everyone else. I have stated my opinion that the privilege is that of the patient, not the doctor or psychologist, and that if the patient is a minor the privilege must be exercised by the parent or guardian. They seem unwilling to accept this interpretation of the law as a practical solution of their problems. You may wish to consider some clarification of the rules relating to minors in schools and perhaps also outside of schools.

You should also consider the possible effect on your revisions of the recently enacted Section 10901 of the Education Code (Chapter 795, 1968) which greatly restricts the tests that may be given by psychologists in schools without the written consent of the parent or guardian. It would seem that the legislative intent is clear that the privilege should not be so strong as to encourage a failure to reveal such tests and the results to parents or guardians of pupils.

Very truly yours,

KEITH C. SORENSON
District Attorney

HEG:MK

By

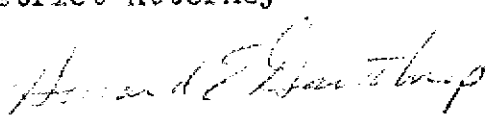

Howard E. Gawthrop
Deputy

EXHIBIT IV
CATHOLIC CHARITIES
OF THE ARCHDIOCESE OF SAN FRANCISCO

1625 MISSION STREET • SAN FRANCISCO, CALIFORNIA 94103 • 863-3200

November 14, 1968

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

We received your tentative recommendation regarding the Evidence Code on the psychotherapist-patient privilege. I realize that this is past the deadline which was established for the submission of comments regarding this, but I am writing to you anyway in the hope that our thinking may be incorporated in future revisions of this proposal.

What we are basically requesting you to consider is the matter of the records of licensed social agencies. The proposal that you make refers only to individual practitioners, but makes no reference to the official agency records of, for example a child-placing agency which is licensed by the State Department of Social Welfare. The law recognizes such agencies in the specific exemption that is granted in the Marriage and Family Counselor Law and the Clinical Social Worker Law, indicating that personnel of such agencies are exempt from the necessity of having such licenses. Many personnel will have them, but the law seems to accept that the license granted to the agency provides sufficient protection to the public. It seems to us that all of the arguments which apply to the necessity of the psychotherapist having the protection of law on the confidential nature of the material in their records apply equally to the material in licensed agency records.

We hope that you will give this matter your consideration in future discussions of this change in the law. With every best wish, I am

Sincerely yours,

James B. Flynn
Very Reverend Msgr. James B. Flynn
General Director

JBF:mc

MOST REVEREND JOSEPH T. MCGUCKEN, S.T.D.
Archbishop of San Francisco
President

Bl. Rev. Msgr. James M. Murray, M.S.W.
Secretary

Very Rev. Msgr. James B. Flynn, A.C.S.W.
General Director

Very Rev. Msgr. Timothy E. O'Brien, M.S.W.
Assistant Director

Rev. John F. McCarthy, M.S.W.
Assistant Director

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