

#63

10/2/73

Memorandum 73-90

Subject: Study 63 - Evidence Code Section 999

Attached is a copy of the revised recommendation relating to Evidence Code Section 999. This recommendation was approved for printing at the September meeting. However, substantial revisions were required as a result of actions taken at the September meeting. Accordingly, we are providing you with this copy of the revised recommendation in case you want to discuss it at the October meeting. Unless there are objections or revisions made at the meeting or submitted to the staff at the meeting, we are planning to send the attached recommendation to the printer after the October meeting.

Respectfully submitted,

John H. DeMully
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

EVIDENCE CODE SECTION 999—THE "CRIMINAL CONDUCT" EXCEPTION
TO THE PHYSICIAN-PATIENT PRIVILEGE

September 1973

CALIFORNIA LAW REVISION COMMISSION
School of Law
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September 20, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

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 to study 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.

This recommendation is submitted as a result of this continuing review and is made in response to a suggestion in the vacated opinion in Fontes v. Superior Court, 104 Cal. Rptr. 845 (Ct. App. 1972), that the need for Section 999 of the Evidence Code be reevaluated. Section 999 provides that the physician-patient privilege is not applicable in a proceeding to recover damages on account of conduct of the patient which constitutes a crime. Although a rehearing was granted in Fontes and the case was ultimately decided on another ground, the vacated opinion is reprinted as an addendum to this recommendation because it contains a good discussion of the background, effect, and problems inherent in Section 999.

Respectfully submitted,
JOHN D. MILLER
Chairman

RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION

relating to

EVIDENCE CODE SECTION 999--THE "CRIMINAL CONDUCT" EXCEPTION
TO THE PHYSICIAN-PATIENT PRIVILEGE

Section 999 of the Evidence Code provides that the physician-patient privilege¹ is not applicable "in a proceeding to recover damages on account of conduct of the patient which constitutes a crime." The Commission recommends that this exception to the physician-patient privilege be repealed for the following reasons:

1. The exception involves the court in collateral inquiries which are not justified by its utility. It is easy to apply only where the patient has been tried and convicted of the crime.² Where the patient has been tried and acquitted of the crime, the court is faced in the civil case with the question whether the acquittal should be accepted as determinative against application of the exception.³ And in the great majority of cases in which the exception might be invoked--where there has been no criminal trial--the

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1. See Evid. Code §§ 990-1007.
 2. Where the patient has been convicted of a crime punishable as a felony, the exception is unnecessary because the judgment of conviction is admissible under Evidence Code Section 1300 and is obviously of much greater evidentiary value than the confidential communication between the patient and his physician in establishing that the patient engaged in the criminal conduct. Section 1300 applies to any crime punishable as a felony. The fact that a misdemeanor sentence is imposed does not affect the admissibility of the judgment of a conviction under the section. As to the reasons for limiting Section 1300 to crimes punishable as a felony, thus excluding admission of evidence of a judgment of conviction of a misdemeanor, see discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence: Article VIII. Hearsay Evidence, 4 Cal. L. Revision Comm'n Reports 301, 540 (1963).
 3. Some of the issues involved in determining the effect of the judgment of acquittal are listed in note 5 infra.

court must rule on whether the exception applies⁴ and determine the extent of the evidentiary showing as to the criminality of the patient's conduct required to invoke the exception.⁵

2. No satisfactory justification has been given for the exception. See the discussion in Fontes v. Superior Court, set out in the *addendum* to this *recommendation*.

3. Repeal of the exception will rarely prevent access to medical information needed in a damage action since the court has the power under

4. See Evid. Code § 405 and Comment thereto. The procedure in ruling on the applicability of the privilege is explained in the Comment to Section 405 as follows:

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding.

* * * * *

Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. [Citations omitted.] The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an exception to the privilege is applicable. . . .

5. This raises difficult questions. Must the judge find the patient guilty beyond a reasonable doubt as in a regular criminal trial or only guilty by the civil trial standard of a preponderance of the evidence? Do all the protections afforded a defendant in a criminal trial apply in the judge's determination of the preliminary fact under Section 999? What is the meaning of the word "crime" in Section 999? Does "crime" include minor traffic violations? What relationship between the issue in the civil action for damages and the alleged criminal conduct is required to satisfy the exception? What use may be made of the evidence disclosed at the hearing on the claim of the privilege?

Code of Civil Procedure Section 2032 to order the defendant to submit to a physical, mental, or blood examination.⁶ Repeal of the exception will not make evidence unavailable in a criminal action since the privilege is not applicable in criminal proceedings.⁷ Likewise, the other limitations⁸ and exceptions⁹ to the physician-patient privilege will continue.

6. See *Harabedian v. Superior Court*, 195 Cal. App.2d 26, 15 Cal. Rptr. 420 (1961). See also Code Civ. Proc. § 2034 (sanctions for failure to comply with order under Section 2032).

7. Evid. Code § 998.

8. See definitions of "patient" (Evid. Code § 990) and "confidential communication between patient and physician" (Evid. Code § 992).

9. See Evid. Code §§ 996 (so-called patient-litigant exception), 997 (services of physician sought or obtained to assist in crime or tort), 998 (criminal proceeding), 1000 (parties claiming through deceased patient), 1001 (breach of duty arising out of physician-patient relationship), 1002 (intention of deceased patient concerning writing affecting property interest), 1003 (validity of writing affecting property interest), 1004 (commitment or similar proceeding), 1005 (proceeding to establish patient's competence), 1006 (required report), 1007 (proceeding to determine right, license, or privilege). See also Evid. Code § 912 (waiver of privilege).

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

An act to repeal Section 999 of the Evidence Code, relating to the physician-patient privilege.

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

Section 1. Section 999 of the Evidence Code is repealed.

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.

Comment. Section 999 is repealed because it was burdensome and difficult to administer, unjustified, and unnecessary.

See Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 0000 (1973). Where medical information is needed, the patient may be ordered to submit to an examination under Code of Civil Procedure Section 2032. See also Code Civ. Proc. § 2034 (sanctions for failure to comply with order under Section 2032).