

Memorandum 83-97

Subject: Study K-300 - Psychotherapist-Patient Privilege

Attached as Exhibit 1 is a letter from Arthur M. Bodin suggesting that the Commission give further study to revisions of the psychotherapist-patient privilege. The Commission has made a number of recommendations for revision of this privilege, the most recent being a recommendation published in 1979. The history of the Commission's experience in studying and making recommendations concerning this privilege is outlined in Exhibit 2 attached.

Dr. Bodin indicates that further revisions may be needed in the 1979 recommendation. He believes that support can be obtained for a new recommendation on this subject. A copy of the 1979 recommendation is attached.

In view of the priorities established at the last meeting and taking into account the Commission's experience in proposing legislation to improve the law in this area, the staff regrets that it must recommend against giving this matter further study at this time. We believe that the Commission should suggest to Dr. Bodin that the persons interested in reforming the law in this area use the Commission's 1979 recommendation as a starting point and make such changes in that recommendation as they believe are desirable. They can then obtain a legislator to introduce their recommended bill and can seek to have it enacted and approved by the Governor.

The staff regrets that the schedule for production of a new Probate Code adopted at the last meeting does not provide time to study this matter further because we believe that it is an important area in need of reform.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

September 22, 1983

Mr. John DeMouilly
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94306

Dear Mr. DeMouilly:

Thank you very much for sending me all the material.

I would like to urge the Commission to put this matter on their agenda once more. I may be able to be of assistance in getting the California State Psychological Association to back such an effort, and possibly to line up a legislator to introduce this. I have in mind Senator Paul Carpenter who is a psychologist. We now have a Confidentiality Committee and I would like for us to keep in touch as we may have additional revisions to suggest for a new bill.

Sincerely,



Arthur M. Bodin, Ph.D.
Clinical Psychologist

AMB:BB

Exhibit 2

HISTORY OF PSYCHOTHERAPIST-PATIENT PRIVILEGE RECOMMENDATIONS

In 1968, the Commission recommended legislation to revise portions of the privileges article of the Evidence Code. See Recommendation Relating to the Evidence Code: Number 4--Revision of the Privileges Article. The major portion of the recommended legislation proposed revisions of the psychotherapist-patient privilege. The recommended legislation passed the Legislature in 1969 in amended form but was vetoed by Governor Reagan. The vetoed bill would have extended the scope of the privilege to cover school psychologists, clinical social workers, and marriage, family and child counselors and would have made clear the privilege covered group therapy. The Governor vetoed the 1969 bill because he objected to so extending the privilege.

In 1970, a bill was passed extending the privilege to the additional therapists as recommended by the Commission (with a provision that the privilege did not apply in a criminal proceeding if the therapist was one of the group added in 1970) and language was added that might be construed to cover group therapy.

In 1977, the Commission published a recommendation that proposed to expand the scope of the psychotherapist-patient privilege to cover patients of psychologists licensed in other jurisdictions who are legally practicing in California, psychologists employed by nonprofit community agencies, licensed educational psychologists, and psychiatric social workers. The recommendation also proposed to make clear that family and group therapy are included within the privilege and proposed to repeal the exception for "criminal proceedings" (the application of which under existing law depends on the type of psychotherapist making or receiving the confidential communication). The bill was introduced by Assemblyman Charles Imbrecht. It passed the Legislature but was vetoed by Governor Brown.

In 1979, after additional study, the Commission published a new recommendation which contained the earlier recommended legislation as it passed the Legislature and was the same as the earlier recommendation except that it added a provision to codify the rule that the psychotherapist-patient privilege protects a parent or other third person who

provides confidential information to a psychotherapist which is necessary for the diagnosis or treatment of a patient. We were unable to find an author for this bill in time to have the bill introduced before the deadline for introduction of bills.

From time to time bills have been introduced at the request of interested groups or organizations to implement one or another of the Commission's recommendations relating to the psychotherapist-patient privilege. The latest is Senate Bill 439 introduced in 1983. This bill was vetoed by Governor Deukmejian.

**APPENDIX XIII
STATE OF CALIFORNIA**

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Psychotherapist-Patient Privilege

November 1979

**CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305**

(1307)

NOTE

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

Cite this recommendation as *Recommendation Relating to Psychotherapist—Patient Privilege*, 15 CAL. L. REVISION COMM'N REPORTS 1307 (1980).

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
(415) 497-1731

BEATRICE F. LAWSON
Chairperson

SENATOR OMER L. BAINS
ASSEMBLYMAN ALISTER McALISTER
JUDITH ABSELS ASHMAN
GEORGE Y. CHINN
ERNEST N. HROSHIGE
JEAN C. LOVE
WARREN M. STANTON
BION M. GREGORY
& Office

November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the California Law Revision Commission. Pursuant to legislative authority of Resolution Chapter 130 of the statutes of 1965, the Commission has maintained a continuing review of the Evidence Code to determine whether any technical or substantive changes are necessary.

As a result of this continuing review, the Commission submitted a recommendation to the 1978 Legislature relating to the psychotherapist-patient privilege. See *Recommendation Relating to Psychotherapist-Patient Privilege*, 14 Cal. L. Revision Comm'n Reports 127 (1978). The recommendation proposed to expand the scope of the privilege to cover patients of certain psychotherapists who are not now covered by the privilege, to make clear that family and group therapy are included within the privilege, to repeal the exception for "criminal proceedings" (the application of which under existing law depends on the type of psychotherapist making or receiving the confidential communication), and to make technical revisions in the provisions relating to professional corporations.

Assembly Bill No. 2517 was introduced by Assemblyman Imbrecht at the 1978 legislative session to effectuate the recommendation. The bill passed the Legislature but was vetoed by the Governor.

In preparing this new recommendation, the Commission has considered the Governor's veto message and other communications the Commission received concerning Assembly Bill No. 2517. The Commission has also reviewed the provisions

of Chapter 832 of the Statutes of 1979. Chapter 832 made significant and important improvements in the protection provided minors under the psychotherapist-patient privilege. Although these improvements deal to some extent with the problems dealt with in the Commission's earlier recommendation, the Commission has concluded that legislation is still required to remedy deficiencies in the existing psychotherapist-patient privilege provisions of the Evidence Code.

The proposed legislation contained in this new recommendation is the same as Assembly Bill No. 2517 as it passed the Legislature in 1978. This recommendation is the same as the earlier recommendation except that this recommendation adds a provision to codify the rule that the psychotherapist-patient privilege protects a parent or other third person who provides confidential information to a psychotherapist which is necessary for the diagnosis or treatment of a patient. This provision was included in Assembly Bill No. 2517 in the form in which it passed the Legislature in 1978.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Evidence Code provisions relating to the psychotherapist-patient privilege were enacted in 1965¹ upon recommendation of the California Law Revision Commission.² These provisions have been the subject of several subsequent Commission recommendations, with the result that they have been amended and supplemented a number of times.³ In the course of its continuing study of the law relating to evidence, the Commission has reviewed the psychotherapist-patient privilege in the light of recent law review articles,⁴ monographs and other communications received by the Commission,⁵ and the

¹ 1965 Cal. Stats. ch. 299. As originally enacted, the psychotherapist-patient privilege was contained in Sections 1010-1026 of the Evidence Code. Sections 1027 and 1028 were added by legislation enacted in 1970. Section 1014.5 was added by legislation enacted in 1979. Unless otherwise noted, all section references herein are to the Evidence Code.

² See *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965). For the Commission's background study on the psychotherapist-patient privilege, see *A Privilege Not Covered by the Uniform Rules—Psychotherapist-Patient Privilege*, 6 Cal. L. Revision Comm'n Reports 417 (1964).

³ See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions*, 8 Cal. L. Revision Comm'n Reports 101 (1967); *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article*, 9 Cal. L. Revision Comm'n Reports 501 (1969); *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code*, 9 Cal. L. Revision Comm'n Reports 137 (1969). See also 1967 Cal. Stats. ch. 650; 1970 Cal. Stats. chs. 1396, 1397; 1979 Cal. Stats. ch. 832. A number of other amendments have been made in these provisions to conform to other recent enactments.

⁴ See, e.g., Louisell & Sinclair, *Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 Calif. L. Rev. 30 (1971); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050 (1973); *Supreme Court of California 1972-1973, Psychotherapist-Patient Privilege*, 62 Calif. L. Rev. 406, 604 (1974); Comment, *California Evidence Code Section 771: Conflict with Privileged Communications*, 6 Pac. L.J. 612 (1975); Comment, *Tarasoff v. Regents of the University of California: Psychotherapists, Policemen and the Duty to Warn—An Unreasonable Extension of the Common Law?* 6 Golden Gate U.L. Rev. 229 (1975); Note, *Untangling Tarasoff: Tarasoff v. Regents of The University of California*, 29 Hastings L.J. 179, 194-96 (1977); Comment, *Discovery of Psychotherapist-Patient Communications After Tarasoff*, 15 San Diego L. Rev. 265 (1978); 8 Golden Gate U.L. Rev. 55 (1977).

⁵ See, e.g., Letter, dated May 23, 1975, from Professor John Kaplan, Stanford Law School, and letter, dated February 16, 1978, from Justice Robert Kingsley, Court of Appeal, Second District, both letters on file in the Commission's offices. Professor Jack Friedenthal prepared a background study for the Commission. The coverage of the study includes the psychotherapist-patient privilege. See Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence*

Federal Rules of Evidence.⁶ The Commission has also reviewed the provisions of Chapter 832 of the Statutes of 1979, which gives the protection of the psychotherapist-patient privilege to various professionals who provide mental health treatment or counseling to a minor. As a result of this review, the Commission has determined that a number of revisions in the scope of the psychotherapist-patient privilege are desirable.

The Commission recognizes that any extension of the scope of protection afforded confidential communications necessarily handicaps the court or jury in its effort to make a correct determination of the facts. 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 of relevant evidence. Applying this criterion to the psychotherapist-patient privilege, the Commission is persuaded that protection afforded by the psychotherapist-patient privilege is unduly limited and therefore makes the following recommendations.

Psychologists Licensed in Other Jurisdictions

Section 1010(b) of the Evidence Code includes within the psychotherapist-patient privilege psychologists licensed in California.⁷ However, a psychologist licensed or certified in another state or nation may give treatment in California.⁸ For this reason, Section 1010(b) should be broadened to include the patient of a psychologist licensed or certified in another state or nation.⁹ This expansion will

Code (mimeo 1976). The Commission has also had the benefit of an unpublished paper by Robert Plattner, *The California Psychotherapist-Patient Privilege* (Stanford Law School 1975).

⁶ The Federal Rules of Evidence do not contain a statutory psychotherapist-patient privilege. See Rule 501. However, the Supreme Court Advisory Committee's proposed rules included a statutory privilege with notes thereon. See Proposed Federal Rules of Evidence, Rule 504 (J. Schmertz ed. 1974). The Commission has consulted the proposed rules and notes in preparing this recommendation.

⁷ Section 1010(b) requires licensure under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code (psychologists).

⁸ Business and Professions Code Section 2912 provides:

2912. Nothing in this chapter shall be construed to restrict or prevent a person who is licensed or certified as a psychologist in another state or territory of the United States or in a foreign country or province from offering psychological services in this state for a period not to exceed 30 days in any calendar year.

⁹ For a comparable recommendation, see Supreme Court Advisory Committee's Note to Section 504 of the Proposed Federal Rules of Evidence (J. Schmertz ed. 1974).

conform subdivision (b) to subdivision (a) which covers a patient of a psychiatrist authorized to practice in "any state or nation."

Psychologists Employed by Nonprofit Community Agencies

Subdivision (d) of Section 2909 of the Business and Professions Code authorizes a nonprofit community agency which receives a minimum of 25 percent of its financial support from federal, state, and local governmental sources to employ unlicensed psychologists to provide psychological services to patients served by the agency. These psychologists must be registered with the Psychology Examining Committee at the time of employment¹⁰ and must possess an earned doctorate degree in psychology or in educational psychology or a doctorate degree deemed equivalent by regulation adopted by the committee.¹¹ In addition, they must have one year or more of professional experience of a type which the committee determines will competently and safely permit them to engage in rendering psychological services. In view of these stringent requirements and the need to provide protection to patients who utilize the services of nonprofit community agencies for psychotherapeutic treatment, the scope of the psychotherapist-patient privilege should be extended to include patients of the psychologists described above.

Licensed Educational Psychologists

Legislation enacted in 1970 provides for the licensure of educational psychologists.¹² A licensed educational psychologist may engage in private practice and provide substantially the same services as school psychologists who are already included within the psychotherapist-patient privilege.¹³ The qualifications for a licensed educational

¹⁰ The exemption from the licensing requirement is for a maximum of two years from the date of registration.

¹¹ The degree must be obtained from the University of California, Stanford University, the University of Southern California, or from another educational institution approved by the committee as offering a comparable program.

¹² See Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code (licensed educational psychologists), enacted by 1970 Cal. Stats. ch. 1305, § 5.

¹³ See Evid. Code § 1010(d).

psychologist are more stringent than for a school psychologist, the licensed educational psychologist being required to have three years of full-time experience as a credentialed school psychologist in the public schools or experience which the examining board deems equivalent.¹⁴ For these reasons, the psychotherapist-patient privilege should be broadened to include the licensed educational psychologist. This would be consistent with Evidence Code Section 1014.5, which was enacted in 1979¹⁵ and extends the psychotherapist-patient privilege to a licensed educational psychologist who provides mental health treatment or counseling to a minor under Civil Code Section 25.9.¹⁶

Psychiatric Social Workers

Section 1014.5 of the Evidence Code extends the psychotherapist-patient privilege to social workers having not less than two years of post-Masters experience in a mental health setting¹⁷ when providing mental health treatment or counseling to a minor under Civil Code Section 25.9. Except to this limited extent, the psychotherapist-patient privilege does not now apply to psychiatric social workers.¹⁸ The psychiatric social worker is an important source of applied psychotherapy of a nonmedical nature in public health facilities.¹⁹ By excluding psychiatric social workers, the existing privilege statute denies the protection of the privilege to those who rely on psychiatric social workers for psychotherapeutic aid. To provide equality of treatment, the Commission recommends expansion of the psychotherapist-patient privilege to include all patients receiving psychotherapy from psychiatric social workers. This would expand the existing privilege to cover not only all minors (covered to some extent under existing Section 1014.5) but also adults

¹⁴ Bus. & Prof. Code § 17862.

¹⁵ 1979 Cal. Stats. ch. 832.

¹⁶ See Civil Code § 25.9(d).

¹⁷ See Civil Code § 25.9(d) (adopting by reference Section 625 of Article 8 of Subchapter 3 of Chapter 1 of Title 9 of the California Administrative Code, defining "social worker").

¹⁸ *Belmont v. State Personnel Bd.*, 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974).

¹⁹ See Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1060 (1973).

and family members treated by a psychiatric social worker. To assure adequate qualifications for the psychiatric social worker, the expanded privilege should be limited²⁰ to (1) those psychiatric social workers who are employed by the state and (2) those psychiatric social workers who have not less than the minimum qualifications required of a state psychiatric social worker²¹ and work in a city, county, or other local mental health facility that is operated as a part of the approved county Short-Doyle Plan.²²

Professional Corporations

Conforming amendments to the Moscone-Knox Professional Corporation Act made clear that the relation of physician and patient exists between a medical corporation and the patient to whom it renders services,²³ but failed to make clear that the relationship of psychotherapist and patient also exists between a medical corporation and the patient to whom it renders services.²⁴ Likewise, provisions authorizing the formation of a marriage, family, or child counseling corporation neglected to make clear that the relationship of psychotherapist and patient exists between such a corporation and its patient.²⁵ The application of the psychotherapist-patient privilege to a medical corporation and to a marriage, family, or child counseling corporation should be made clear and the provision located in an appropriate place in the psychotherapist-patient statute.

Group and Family Therapy

There is a question whether the psychotherapist-patient privilege applies in group and family therapy situations. Section 1012 of the Evidence Code defines a confidential communication between patient and psychotherapist to include information transmitted between a patient and

²⁰ These limitations would not apply to the professionals now covered by Section 1014.5.

²¹ See California State Personnel Board, Specification, Psychiatric Social Worker (rev. 1973).

²² See Welf. & Inst. Code § 5601.

²³ See 1968 Cal. Stats. ch. 1375, § 3.

²⁴ Evidence Code Section 1014 was amended in 1969 to make clear that a psychological corporation is covered and again in 1972 to cover a licensed clinical social workers corporation.

²⁵ See Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code, enacted by 1972 Cal. Stats. ch. 1318, § 1.

psychotherapist "in confidence" and 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 those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." Although these statutory exceptions would seem to include other patients present at group or family therapy treatment,²⁶ the language might be narrowly construed to make information disclosed at a group or family therapy session not privileged.

In light of the frequent use of group and family therapy, it is important that these forms of treatment be covered by the psychotherapist-patient privilege. Group and family therapy are now used more and more in such important areas as marriage and family problems, juvenile delinquency, and alcoholism. It is a growing and promising form of psychotherapeutic aid and should be encouraged and protected by the privilege.²⁷ The policy considerations underlying the privilege dictate that it encompass communications made in the course of group and family therapy. Psychotherapy, including group and family therapy, requires the candid revelation of matters that may be not only 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 or family therapy because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.²⁸

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-privilege protects against disclosure of communications made during group and family therapy. It

²⁶ Cf. *Crosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (privilege covers all relevant communications by intimate family members of patient to psychotherapist and to psychiatric personnel, including secretaries, who take histories for the purpose of recording statements for the use of psychotherapist).

²⁷ See, e.g., Note, *Group Therapy and Privileged Communications*, 43 Ind. L.J. 93 (1967); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609 (1964).

²⁸ See also Meyer & Smith, *A Crisis in Group Therapy*, 32 *American Psychologist* 638 (1977).

should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group and family therapy. Thus, communications made in the course of group or family therapy would be within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons.

Information Provided in Confidence by Third Person

The patient's parents or relatives or other persons may have information the psychotherapist needs in order to diagnose the patient's condition or to provide treatment. The needed information may be information concerning the behavior of the patient,²⁹ information concerning the person providing the information, or another kind of information. In some cases, further disclosure of the needed information would be detrimental to the person having the information, and the person may be unwilling to disclose the needed information to the psychotherapist unless the person can be protected against further disclosure.

Section 1012 of the Evidence Code should be amended to make clear that the psychotherapist-patient privilege covers information reasonably necessary to the diagnosis or treatment of the patient that is disclosed by another person to the psychotherapist in confidence. This rule is consistent with existing law.³⁰ To protect against further disclosure of the information, the person disclosing the information should be made a joint holder of the privilege.³¹ The right of the person making the disclosure to claim the privilege is, of course, subject to the various exceptions to the privilege³² and to the Evidence Code provision relating to

²⁹ See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior).

³⁰ See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior were within perview of psychotherapist-patient privilege and therefore privileged). No judicial decision has been found indicating whether the privilege extends to nonfamily communications. See *Grosslight v. Superior Court*, *supra* at 508 n.5, 140 Cal. Rptr. at 281 n.5 ("[w]e do not here determine whether the section 1014 privilege extends to nonfamily communications").

³¹ See Evid. Code § 912(b) (waiver of the right of one joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege).

³² See Evid. Code §§ 1016 (patient-litigant exemption), 1017 (court-appointed psychotherapist), 1018 (crime or tort exception), 1019 (parties claiming through deceased patient), 1020 (breach of duty arising out of psychotherapist-patient

waiver of the privilege.³³

Application of Privilege in Criminal Proceedings

Section 1028 of the Evidence Code makes the psychotherapist-patient privilege applicable in criminal proceedings where the psychotherapist is a psychiatrist or psychologist but inapplicable in criminal proceedings where the psychotherapist is a clinical social worker, school psychologist, or marriage, family, and child counselor.³⁴ The basis for this distinction is not clear. A patient consulting a psychotherapist expects to receive the benefit of the privilege regardless of the type of psychotherapist consulted; Section 1028 frustrates this expectation in the case of criminal proceedings.

The major effect of Section 1028 is to deny the privilege to patients who consult clinical social workers and marriage, family, and child counselors while preserving the privilege for precisely the same types of communications by patients who consult psychiatrists and psychologists. Section 1028 may also discourage potential patients from seeking treatment for mental and emotional disorders for fear of disclosure of communications in criminal proceedings. This is particularly important in drug addiction cases, but it is important in other cases as well.

Society has an interest in protecting innocent victims from injury by criminal activity, but Section 1028 is not essential to protect this interest; it is adequately protected by two other exceptions to the privilege. Evidence Code Section 1027 denies the privilege where a child under 16 is the victim of a crime and disclosure would be in the best interests of the child. Evidence Code Section 1024 denies the privilege where the patient is dangerous to himself or herself or to others. In addition, the psychotherapist may be personally liable for failure to exercise due care to disclose

relationship), 1021 (intention of deceased patient concerning writing affecting property interest), 1022 (validity of writing affecting property interest), 1023 (proceeding to determine sanity of criminal defendant), 1024 (patient dangerous to himself or others), 1025 (proceeding to establish competence), 1026 (required report), 1027 (patient child under 16 who is victim of crime).

³³ See Evid. Code § 912.

³⁴ Section 1028 provides that, "[u]nless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding."

the communication where disclosure is essential to avert danger to others.³⁵

The Commission believes that the harm caused by Section 1028 far outweighs any benefits to society that it provides. The provision should be repealed.

Proposed Legislation

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

An act to amend Sections 1010, 1012, and 1014 of, to add Section 1010.5 to, and to repeal Section 1028 of, the Evidence Code, relating to the psychotherapist-patient privilege.

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

Evidence Code § 1010 (amended)

SECTION 1. 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 ;

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code ;, or a person employed by a nonprofit community agency who is authorized to practice psychology under the provisions of subdivision (d) of Section 2909 of the Business and Professions Code, or a person licensed or certified as a psychologist under the laws of another state or nation.

(c) 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, ~~when he~~ is while engaged in applied psychotherapy of a nonmedical nature.

³⁵ Tarasoff v. Regents of University of California, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.

(e) A person licensed as a marriage, family and child counselor under Chapter 4 (commencing with Section 17800) of Part 3, Division 5 7 of the Business and Professions Code.

(f) A person licensed as a licensed educational psychologist under Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code.

(g) A state employee serving as a psychiatric social worker in a mental health facility of the State of California, while engaged in applied psychotherapy of a nonmedical nature.

(h) A public employee having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a city or county mental health facility operated as a part of the approved county Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.

(i) A person having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a mental health facility operated under contract with a city or county as part of the approved county Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.

Comment. Subdivision (b) of Section 1010 is amended to recognize the possibility of treatment of a patient by a psychologist employed by a nonprofit community agency (see subdivision (d) of Section 2909 of the Business and Professions Code) or a psychologist licensed or certified in another state or nation. Where the psychologist is licensed or certified in another state or nation, the treatment may take place in California (see Section 2912 of the Business and Professions Code) or in the other state or nation.

Subdivision (f) is added to include a licensed educational psychologist as a psychotherapist for the purpose of the privilege.

This addition complements subdivision (d) (school psychologist). For the qualifications for a licensed educational psychologist, see Bus. & Prof. Code § 17862. See also Section 1014.5 and Civil Code Section 25.9(d).

Subdivisions (g)-(i) are added to include a psychiatric social worker as a psychotherapist for the purpose of the privilege. The prior law had been construed in *Belmont v. State Personnel Board*, 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974), as not including a confidential communication by a patient to a psychiatric social worker within the protection of the psychotherapist-patient privilege. The addition of subdivisions (g)-(i) is based on functional similarities between presently privileged professionals and psychiatric social workers. See generally Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050 (1973). See also Section 1014.5. Subdivisions (h) and (i) bring within the privilege patients of those psychiatric social workers who work in mental health facilities that have been approved as a part of the county Short-Doyle Plan and by the State Department of Health for funding under the Short-Doyle program. See Welf. & Inst. Code §§ 5703.1, 5705. See also Welf. & Inst. Code § 5751 (Director of Health to establish standards of education and experience for professional, administrative, and technical personnel employed in mental health services). See also Section 1014.5 and Civil Code Section 25.9(d).

Evidence Code § 1010.5 (added)

SEC. 2. Section 1010.5 is added to the Evidence Code, to read:

1010.5. The relationship of a psychotherapist and patient shall exist between the following corporations and the patients to whom they render professional services, as well as between such patients and psychotherapists employed by such corporations to render services to such patients:

(a) A medical corporation as defined in Article 17 (commencing with Section 2500) of Chapter 5 of Division 2 of the Business and Professions Code.

(b) A psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(c) A licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code.

(d) A marriage, family or child counseling corporation as defined in Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code.

Comment. Section 1010.5 is added to continue the second paragraph of Section 1014(c) with the exception of the definition of "persons" which is not continued. See Section 1014 and Comment thereto. Subdivisions (a) and (d) are new; they make clear the application of the psychotherapist-patient privilege to types of professional corporations not previously covered.

Evidence Code § 1012 (amended)

SEC. 3. Section 1012 of the Evidence Code is amended to read:

1012. (a) 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~~ *the* 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 those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, *or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family*, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

(b) *As used in this article, "confidential communication between patient and psychotherapist" includes information reasonably necessary for the diagnosis or treatment of the patient by the psychotherapist that is*

disclosed by another person to the psychotherapist in confidence by a means which, so far as the person is aware, discloses the information to no third persons other than those described in subdivision (a). With respect to information so disclosed, the person disclosing the information is a joint holder of the privilege under this article.

Comment. Section 1012 is amended to make clear that the scope of the section embraces marriage counseling, family counseling, and other forms of group or family therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons. The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evid. Code § 912(c) and (d). The waiver of the privilege by one of the patients as to that patient's communications does not affect the right of any other patient in group or family therapy to claim the privilege with respect to such other patient's own confidential communications. See Evid. Code § 912(b).

Subdivision (b) is a new provision that makes clear that the psychotherapist-patient privilege protects disclosures made by parents or other third persons to the psychotherapist where made in confidence and reasonably necessary for the diagnosis or treatment of the patient by the psychotherapist. The subdivision is consistent with prior law. See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior were within purview of psychotherapist-patient privilege and therefore privileged). There was no judicial decision under prior law whether the privilege extended to nonfamily communications. See *Grosslight v. Superior Court*, *supra* at 508 n.5, 140 Cal. Rptr. at 281 n.5 ("[w]e do not here determine whether the section 1014 privilege extends to nonfamily communications"). The communication protected by subdivision (b) may concern the behavior of the patient as in *Grosslight*, may be information concerning the person making the communication, or may be any other relevant information. The protection provided by subdivision (b) is necessary because further disclosure of the needed information might be detrimental to the person having the information, and full

disclosure to the psychotherapist might not be made absent this protection. For this reason, the person disclosing the information is made a joint holder of the privilege. See Section 912(b) (waiver of the right of one joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege). The right of the person making the disclosure to claim the privilege is, of course, subject to the exceptions provided in this article and to subdivisions (c) and (d) of Section 912. It should be noted that protection is provided under subdivision (a) of Section 1012 for disclosures by the psychotherapist to the person making the communication described in subdivision (b). Moreover, disclosure to persons to whom disclosure is permitted under subdivision (a) of Section 1012 without loss of the privilege does not cause loss of the privilege provided under subdivision (b).

Evidence Code § 1014 (amended)

SEC. 4. Section 1014 of the Evidence Code is amended to read:

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he *such person* is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2095) of Chapter 6.6 of Division 2 of the Business and Professions Code or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between such patients and psychotherapists employed by

such corporations to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, associations and other groups and entities.

Comment. The last paragraph of Section 1014(a), with the exception of the definition of "persons," is continued in Section 1010.5. "Person" is defined in Section 175 to include a partnership, corporation, association, and other organizations.

Evidence Code § 1028 (repealed)

SEC. 5. Section 1028 of the Evidence Code is repealed.

1028. Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding.

Comment. Former Section 1028 is not continued.