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1/11/68

Memorandum 68-22

Subject: Study 63 - Evidence Code

As a part of the continuing review of published commentary on the new Evidence Code, we bring to your attention the attached article: Alexander, California's New Evidence Code: Changes in the Law of Privileged Communications Relating to Psychotherapy, 1 San Fernando Valley Law Review 56 (1967).

The article does not suggest that any changes are needed in the Evidence Code. The article is merely a statement of what the code provides.

Respectfully submitted,

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Executive Secretary

## California's New Evidence Code: Changes in the Law of Privileged Communications Relating to Psychotherapy

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Generally speaking, the result of adoption of the California Evidence Code, effective January 1, 1967, has been to clarify and expand the area in which communications relating to psychotherapy are privileged and therefore inadmissible in evidence.

### Prior Law

Before the Evidence Code, a rather illogical double classification existed.

If an expert had an M.D. degree, as in the case of a psychiatrist, the physician-patient privilege defined by former section 1881(4) of the Code of Civil Procedure applied. This protected only against disclosure in civil—not criminal—actions, and covered only "information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient . . . ."

If the expert held a non-medical degree such as a master's or Ph.D. in psychology, he came under section 2904 of the Business and Professions Code, enacted in 1957, which provided that—

[C]onfidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.

As between attorney and client, section 1881(2) of the Code of Civil Procedure barred from disclosure "any communication made by the client to him, or his advice given thereon in the course of professional employment . . . ."

Somewhat belatedly, the Legislature amended section 2904 in 1965

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## Privileged Communications

by adding after "psychologist and client" the words "and psychiatrist and patient," so that for a little more than a year before the Evidence Code took effect, communications to a psychiatrist had as much protection as if made to a psychologist.

The fact remains, however, that until this year both professions have been treated like stepchildren or junior siblings—relegated to hand-me-down legislation which was designed for someone else.

## Today's Psychotherapist-Patient Privilege

Now we have legislation applying to experts involved with mental or emotional problems under the heading, "Psychotherapist-Patient Privilege," in sections 1010-26 of the Evidence Code.

The Code<sup>1</sup> defines "psychotherapist" as:

- (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 certified as a psychologist under . . . the Business and Professions Code.<sup>2</sup>

The use of the phrase "any state or nation" protects a communication made to an M.D. practicing psychiatry outside of California, as well as a communication in California to such an expert who has been called in from another state or nation. This parallels the definition of physician<sup>3</sup> which is used for purposes of the physician-patient relationship.

A reasonable, but mistaken, belief that the expert is authorized to practice medicine, or that he devotes a substantial portion of his time to psychiatry, will not prevent the privilege from attaching. As to a psychologist, however, the opposite is true. He must be certified in order for the privilege to attach; thus, if the patient misunderstands the framed documents so impressively displayed on the office walls and reveals intimate, personal information about himself to a *non*-certified psychologist, it would seem that there is no privilege and that the risk of the mistake is on the patient.<sup>4</sup>

1. West's annotated California Evidence Code (1960) [hereinafter referred to as Evid. C.] § 1010.

2. West's annotated California Business and Professions Code (1962) [hereinafter referred to as Bus. & Prof. C.] Ch. 6.6, Div. 2, § 2906.

3. Evid. C. § 900.

4. Section 2903, Business and Professions Code, defining "psychologist" was not repealed when the Evidence Code took effect, and it may be inferred that some persons are practicing psychology within the broad definition of section 2903.5 of that code without benefit of certificate.

The definition of "patient"<sup>5</sup> includes one "who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." This broadens the definition, as compared to that of "patient" for purposes of the physician privilege,<sup>6</sup> in order to encourage persons to be examined in connection with research projects by guaranteeing that their disclosures will be kept confidential.<sup>7</sup>

Essential to the psychotherapist privilege, then, is the definition of "confidential communication."<sup>8</sup>

[I]nformation, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes advice given by the psychotherapist in the course of that relationship.

The phrase, "so far as the patient is aware," eliminates the old eavesdropper exception. Also, information of the kind under discussion is "presumed to have been made in confidence,"<sup>9</sup> and the opponent of the claim of privilege has the burden of proving that it was not.<sup>10</sup>

The exclusionary provision of the psychotherapist privilege allows the patient to refuse to disclose, and to prevent another from disclosing, a confidential communication if the privilege is claimed by one authorized or required to do so.<sup>11</sup>

The major change effected by this legislation is that the psychotherapist privilege applies in criminal proceedings, while neither the old nor the present physician-patient privilege has such a broad scope.<sup>12</sup>

5. Evid. C. § 1011.

6. *Id.* § 991.

7. Comment. Report and recommendation of the California Law Revision Commission, January 1965 on Evid. C. § 1014.

8. Evid. C. § 1012.

9. *Id.* § 917.

10. Participants in counseling by group therapy are each "present to further the interest of the [other patients] in the consultation or examination," and that such group participation does not destroy the confidential status of the disclosures." [Opinion of Los Angeles County Counsel Rendered to Deputy Director, Department of Mental Health (Nov. 1, 1966), quoted in *Metropolitan News*, Dec. 5, 1966.]

11. Evid. C. § 1014.

12. The same distinction prevails in civil actions for damages arising out of a patient's criminal conduct. For discussion of the reasons, see Assembly Committee Comment on Evid. C. § 1014.

## Privileged Communications

### Who May or Must Claim the Privilege

The privilege under consideration may be claimed by the "holder," who is defined as the patient, his guardian<sup>13</sup> or conservator if he has one, or his personal representative if he is deceased.<sup>14</sup> This last provision may change California law by now permitting an executor or administrator to waive the privilege where it would benefit the patient's estate.<sup>15</sup>

If the psychotherapist is present at the time of attempted disclosure, he is *required* to claim the privilege.<sup>16</sup> He is *excused* only if, when disclosure is in issue, there is no holder in existence or the psychotherapist is otherwise instructed by a person authorized to permit disclosure.<sup>17</sup>

### Exceptions

Most of the 11 exceptions to the psychotherapist privilege codified in sections 1016 through 1026 fall into three main classifications:

1. The patient himself has raised the issue of his mental or emotional condition in litigation.<sup>18</sup>
2. Recognition of the privilege would facilitate concealment of information which, for overriding reasons of social importance, ought to be revealed.<sup>19</sup>
3. Situations involving communications by, or the intent of, a deceased patient which are pertinent to deeds, wills, or other writings purporting to affect an interest in property.<sup>20</sup>

Finally, if rival parties all claim through one deceased patient, the privilege does not apply.<sup>21</sup> Nor does it apply to information which either patient or psychotherapist must report to a public employee or record in a public office if such report or record is open to public inspection.<sup>22</sup>

13. Evid. C. § 1014(a).

14. *Id.* § 1013.

15. See Commission Comment on Evid. C. § 993. Under Evid. C. § 1014(b) the claim may be interposed by any person authorized by the holder.

16. Evid. C. § 1015.

17. *Id.* § 1014(c).

18. *Id.* § 1016-17, 1023 and 1025.

19. *Id.* § 1018, 1020 and 1024.

20. *Id.* § 1021-22.

21. *Id.* § 1019.

22. *Id.* § 1026.

### Waiver

Waiver of the right to suppress information under the psychotherapist privilege is covered, along with four other privileges, in general terms.<sup>23</sup> The principal methods of waiver are: contractual waiver in advance; failure to claim privilege; making statements in the known presence of unnecessary third parties; and voluntary disclosure to such a third party.<sup>24</sup>

The Evidence Code recognizes three exceptions which keep a privilege under circumstances in which it would otherwise be waived:

1. Where two or more persons are joint holders of certain privileges, including the psychotherapist privilege, waiver by one holder does not preclude assertion by another.<sup>25</sup>
2. A disclosure that is itself privileged, as when a patient tells his lawyer what he has already told his psychotherapist.<sup>26</sup>
3. Disclosure in confidence when reasonably necessary for accomplishment of the purpose for which the expert was consulted—*e.g.*, description of a patient's ailment by a doctor to a pharmacist in connection with prescribing and dispensing drugs to the patient.<sup>27</sup>

23. *Id.* § 912(a).

24. See WITKIN, CALIFORNIA EVIDENCE § 783-85 (2d ed. 1966).

25. Evid. C. § 912(b).

26. § 912(c) and Senate Committee Comment.

27. Here § 912(d) may protect the privilege where prior cases refused to recognize it. See Senate Judiciary Committee Comment on § 912(d), note 24, *op. cit.* § 786(b).