

First Supplement to Memorandum 68-76

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

Attached is a revised recommendation that consolidates (1) the recommendation (previously approved for printing) on the marital privilege revisions and (2) the tentative recommendation on the psychotherapist-patient privilege revisions.

I have been informally advised that the Committee on the Administration of Justice of the State Bar has approved the marital privilege revisions.

The following comments relate to the tentative recommendation on the psychotherapist-patient privilege revisions.

General reaction

All persons commenting on the tentative recommendation thought that the change was a desirable one but, except for Professor Sherry (who concluded that the tentative recommendation "presents no problems in construction or meaning"; Exhibit V), the commentators generally were unable to see that the proposed legislation accomplished the desired objective.

Typical of the comments was that of Jack T. Swafford (Exhibit I):

The objective is, of course, a desirable one, but I question whether the surgery to Section 1012 of the Evidence Code is sufficient to achieve the objective.

I have always tended to think of myself as having some ability to construe statutes, but I must confess that the proposed change seems to be merely a change in words without any change in meaning, and perhaps even results in a narrowing of the privilege.

The District Attorney of San Mateo County (Exhibit IV) suggests that the question of whether or not a school psychologist could claim the privilege may be of interest to the Commission and forwarded an exchange of confusing correspondence on the point. (We discuss this later in this supplement.)

Suggested revisions

Fred Kilbride (Exhibit II) suggests two revisions in the proposed legislation (page 3 of recommendation):

- (1) Instead of deleting "or examination" insert "or therapy."

This would be an improvement, but the other suggestions should also be considered before any revisions are made.

- (2) A sentence should be added to place the burden of showing lack of secrecy in group psychotherapy on the party who is seeking to avail himself of the information so disclosed. Evidence Code Section 917 provides:

917. Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

In view of Section 917, the staff does not believe any change is needed to meet this suggestion.

Jack T. Swafford (Exhibit I) suggests the following revisions:

- (1) Change the phrase "the purpose for which the psychotherapist is consulted" to read "the purpose for which the psychotherapist has been consulted." This, he believes, would meet the objection that group therapy sessions might not be considered consultations. He also suggests "it might improve the section generally to refer to 'a purpose' rather than to 'the purpose.'"

- (2) Change "those who are present to further the interest of the patient in the consultation" to read "those who are present at a consultation to further the interest of the patient therein."

Mr. Swafford also comments:

I would also like to mention that it seems to me that arguably even as amended the section still would not apply to a communication made by one patient at a group therapy session to one or more other patients at that session. This is because the section basically applies only to information "transmitted between a patient and his psychotherapist". This is particularly a problem if a group therapy session is not a "consultation" and must ground its privileged character in the second situation, i.e., as a disclosure to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose "for which the psychotherapist is consulted". It seems to me that if this language is read in light of the basic requirement (i.e., "transmitted between a patient and his psychotherapist"), a substantial question still exists as to whether such a statement by the patient to such third person is within the privilege.

* * * * *

Finally, if my understanding of group therapy is not correct, and there are occasions when group therapy occurs outside the presence of the psychotherapist, then, of course, any information transmitted at such a session is not transmitted "between a patient and his psychotherapist"; and Section 1012 does not cover the situation at all.

What revisions, if any, does the Commission wish to make to the proposed legislation?

In connection with any revisions, your attention is directed to Evidence Code Section 1011 which provides:

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits 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 or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

Mr. Cassman (Exhibit III) suggests the need for "substantive amendments to existing laws to set forth the nature of the privilege, to protect a patient who is injured by a wrongful or intentional breach of the privilege." This, of course, is much more than a matter of evidence and is covered, insofar as the Evidence Code is concerned, by Section 1020 which makes the privilege inapplicable as to any issue of breach of the psychotherapist-patient relationship.

School psychologists

Evidence Code Section 1010 defines "psychotherapist." The section reads:

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.

The word "licensed" was substituted for "certified" in subdivision (b) by a 1967 amendment that was made in connection with a revision of the law relating to psychologists.

Exhibit IV (District Attorney of San Mateo) points out the confusion that exists under the present law. School psychologists are given a credential by the State Board of Education that authorizes them to serve as such. They do not need a license under Chapter 6.6 (licensed psychologist) referred to in Section 1010 because they obtain their authority to practice from the State Board of Education. Hence, because they are not licensed (they are specifically exempt) under the chapter to which reference is made in Evidence Code Section 1010(b), they do not have the privilege even though they are engaged in rendering psychological services that would otherwise require a license under that chapter. It may be that additional groups should be included in the psychotherapist-patient privilege. Nevertheless, we suggest that school psychologists be included in the privilege since it is fairly easy to draft a clear provision that picks up the persons who are school psychologists and excludes others.

We have included an amendment to Section 1010 in the attached tentative recommendation, together with a Comment, to indicate the revisions that would be needed to cover school psychologists.

We also suggest that the recommendation indicate that the Commission plans to study, when time permits, whether the psychotherapist-patient privilege should be extended to additional groups that provide psychological or psychiatric treatment.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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August 8, 1968

John H. DeMouilly
Executive Secretary
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Gentlemen:

I have reviewed your tentative recommendation dated July 25, 1968 relating to the psychotherapist-patient privilege. The objective is, of course, a desirable one, but I question whether the surgery to Section 1012 of the Evidence Code is sufficient to achieve the objective.

I have always tended to think of myself as having some ability to construe statutes, but I must confess that the proposed change seems to be merely a change in words without any change in meaning, and perhaps even results in a narrowing of the privilege.

If we assume that the psychotherapist is present during the course of a group therapy session, and if we assume further that a group therapy session is a consultation, then I see no difference between (1) the accomplishment of the purpose of the consultation and (2) the accomplishment of the purpose for which the psychotherapist is consulted. As a matter of fact, the former may be broader in that it clearly includes the purpose of both the psychotherapist and the patient, while the latter would seem to be limited to the purpose of the patient.

If, as appears to be the case, the fear is that group therapy sessions might not be considered consultations, then I would suggest an additional change in language. The phrase "the purpose for which the psychotherapist is consulted" should be revised to state "the purpose for which the psychotherapist has been [or was] consulted". (Incidentally,

John H. DeMouilly
Page 2
August 8, 1968

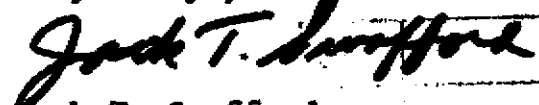
it might improve the section generally to refer to "a purpose" rather than to "the purpose".)

I would also like to mention that it seems to me that arguably even as amended the section still would not apply to a communication made by one patient at a group therapy session to one or more other patients at that session. This is because the section basically applies only to information "transmitted between a patient and his psychotherapist". This is particularly a problem if a group therapy session is not a "consultation" and must ground its privileged character in the second situation, i.e., as a disclosure to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose "for which the psychotherapist is consulted". It seems to me that if this language is read in light of the basic requirement (i.e., "transmitted between a patient and his psychotherapist"), a substantial question still exists as to whether such a statement by the patient to such third person is within the privilege.

It also seems to me that the section might be improved generally by changing the phrase "those who are present to further the interest of the patient in the consultation" so as to read "those who are present at a consultation to further the interest of the patient therein". This is the first reference in the section to a "consultation", and the use of the article "the" assumes that it has been referred to before.

Finally, if my understanding of group therapy is not correct, and there are occasions when group therapy occurs outside the presence of the psychotherapist, then, of course, any information transmitted at such a session is not transmitted "between a patient and his psychotherapist"; and Section 1012 does not cover the situation at all.

Very truly yours,



Jack T. Swafford
of BURRIS & LAGERLOF

FRED KILBRIDE

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August 9, 1968

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

Dear Mr. DeMouilly:

I should like to present to the Commission the following comment to the proposed revision of Section 1012 of the Evidence Code on the subject of clarifying the coverage of group therapy disclosures:

(1) I suggest that instead of merely striking out the words, "or examination" there be added by interlineation at that point the words, "or therapy". This wording would be completely clear, and the statute would not depend for its understanding on a quasi-statutory comment by the Commission.

(2) In order to have arrived at the point of sophistication necessary to prompt such a recommendation in the first place, the Commission must be aware that the very idea of psycho-therapy, let alone the comparatively new technique of group-psychotherapy, is looked on with a high degree of suspicion by some jurists. If the statute is to be applied uniformly and readily, it would be better to put the burden of showing lack of secrecy in group-psychotherapy on the party who is seeking to avail himself of the information so disclosed. This could be done by adding to the statute a short additional paragraph, perhaps in one sentence.

Although it reads well to note that the proposed deletion brings the enactment into similarity to Section 992, the Commission must understand that the group therapy approach to treatment is unknown in physical medicine. It is a technique peculiar to psychiatry and psychology, and the statement of the privilege may have to be more ample than is the case with the ordinary physician-patient privilege.

Respectfully submitted,


FRED KILBRIDE

FK/br

1st Supp. Memo 68-76

EXHIBIT III

LAW OFFICES
CASSMAN AND LACHINA

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August 7, 1968

California Law Revision Commission
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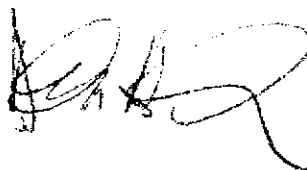
Gentlemen:

I am involved in a case in which a Psychologist allegedly breached his confidential duty to his patient. Briefly, the facts are as follows:

My client undertook individual therapy with a Psychologist at the same time her son was being treated by the same Psychologist under group therapy. In the course of the treatments with my client taped, recorded interviews were made. Subsequently, and without my client's knowledge or consent, the recorded interviews were played before a group therapy session which included my client's son. My client suffered serious mental disorders when she subsequently learned of these facts.

My review of California law has not indicated that any statutory duty exists, except as set forth in the Evidence Code. If this is so, is it not time to consider substantive amendments to existing laws to set forth the nature of the privilege, to protect a patient who is injured by a wrongful or intentional breach of the privilege.

Very truly yours,



AHC/e

1st Supp. Memo 68-76

EXHIBIT IV

COUNTY OF SAN MATEO

KEITH C. SORENSON, DISTRICT ATTORNEY

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COUNTY GOVERNMENT CENTER
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ROBERT E. CAREY
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JAMES M. PARMELEE
CHIEF CIVIL DEPUTY
A. L. LAMPORT
CHIEF INSPECTOR

August 19, 1968

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

Re: Psychotherapist-Patient Privilege

Dear Mr. DeMouilly:

We have examined with much interest the Commission's tentative recommendation relating to the psychotherapist-patient privilege.

From time to time, we had occasion to discuss the question of whether or not a school psychologist, as such, could claim this privilege, and if not, whether or not a school psychologist, who was also a licensed psychotherapist, could claim that privilege. We are enclosing copies of pertinent correspondence reflecting two different views. It is felt that perhaps the question itself may be of interest to the Commission in view of its present study.

You will observe, of course, that our conclusion that a school psychologist may not claim the privilege merely by virtue of his position as school psychologist, and that the fact of his being a licensed psychotherapist would not bestow the privilege if none otherwise existed.

Sincerely,

KEITH C. SORENSON
DISTRICT ATTORNEY

By: *James W. Foley*
James W. Foley, Deputy

JWF:sb
Encs.

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13 February 1968

Henry S. Reichenbach, M. D.
1740 Marco Polo Way
Burlingame, California

Re: School Psychologists

Dear Dr. Reichenbach:

This is in response to your letter of 31 January 1968 regarding school psychologists.

It is true, as pointed out by Mr. Foley, that §2904 of the Business & Professions Code has been repealed and that §§1010-1026 of the Evidence Code have been enacted to supersede prior law relating to the psychiatrist-and psychologist-patient privileges.

However, it seems to me that the language of §1011 of the Evidence Code is broad enough to cover a school student who is receiving psychological services. Section 1011 defines a "patient" as any person who consults a psychotherapist for the purpose of securing "preventive * * * treatment of his mental or emotional condition." It would seem to me that school psychological counselling involves emotional conditions and preventive services. Evidence Code §1010 defines "psychotherapist" as including both psychiatrist and psychologist.

I note that Mr. Foley states that the privilege belongs to the patient, not the psychologist. However, Evidence Code §1014 expressly permits the psychotherapist to claim privilege, unless the patient has previously waived the privilege. Also, Evidence Code §1015 directs the psychotherapist to claim privilege if disclosure is sought.

Finally, Evidence Code §1026 eliminated the psychotherapist-patient privilege if either the psychotherapist or the patient is required to report to a public employee, or if the information involved must be recorded in a public office in a record that is open to public inspection.

I am not sufficiently familiar with the reporting requirements of school psychologists to have any opinion as to whether §1026 applies. However, if it does not, it seems to me that the students or pupils are entitled to the benefit of the psychotherapist privilege.

Henry S. Richenbach, M. D.
12 February 1968
Page Two

In this connection, comments of the California Law Revision Commission relating to §1014 of the Evidence Code indicate a definite intent to maintain a privilege substantially equivalent to the old psychologist-client privilege found in §2904 of the Business & Professions Code. For example, the new psychotherapist privilege is available in criminal actions, as was §2904, whereas the regular physician-patient privilege is not.

If you are interested in the full comments of the California Law Review Commission, you can obtain the "California Evidence Code Manual" from the California Law Revision Commission, School of Law, Stanford University. The comments of the Commission on the psychotherapist-patient privilege are rather specific and extensive.

Very frankly, at this moment I doubt that further legislation is needed. It seems to me that the subject matter should be further pursued by the school system.

Sincerely yours,

cc.
Henry B. Bruyn, M. D.
Mr. James W. Foley
San Mateo County Medical Society.

Henry S. Richenbach

COUNTY OF SAN MATEO

KEITH C. SORENSON, DISTRICT ATTORNEY

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March 7, 1968

Bernard H. McIntosh, M.S.
Division of Spedal Services
San Bruno Park School District
500 Acacia Avenue
San Bruno, California 94066

Re: Pupil Personnel Employees - Confidentiality

Dear Mr. McIntosh:

We are writing to you at this time in accordance with our telephone conversation of March 6, 1968 in which it was agreed that this letter would be sent to you for the consideration of the Executive Board of the San Mateo County School Psychologists Association.

On February 29, 1968, Mrs. Dorothy B. Rouse of this office met with the School Psychologists Association for the purpose of discussing the meaning and content of a letter previously written by the undersigned deputy on the subject of whether or not a privilege exists as to statements made by an elementary school student in a conference with a school psychologist.

Following that meeting, we have reexamined our thinking and conclusions, and we have studied the law on this matter again, and we have conferred with Dr. Byron C. Curry, Deputy Superintendent of Schools. The result of this additional study and thought is that we find no reason to change the conclusion reached in the letter above mentioned. We do feel, however, that clarification of exactly what was intended to be conveyed in that letter is in order.

Perhaps it will aid this consideration if we begin with some general statements about what that letter was not intended to imply. Nothing therein implies, or is intended to imply, that if a privilege exists, the psychotherapist cannot claim it. It is obvious from the wording of §1015 of the Evidence Code that the opposite is true.

March 7, 1968

Our previous letter was not intended to extend to communications between a psychotherapist and a school psychologist. We note here without additional comment that if in such a communication the psychotherapist disclosed to the school psychologist confidential information concerning a patient of the psychotherapist, the privileged status of that initial information would not be lost by the mere fact of its disclosure to a school psychologist.

Nothing in our previous letter was intended to suggest that §1026 of the Evidence Code, concerning information required to be disclosed to a public agency, does or does not apply to communications between the student and the school psychologists which subsequently are reported to the school district by the psychologist. We are informed that this session of the legislature will consider the question of what is and what is not a public record, and it is likely that the legislature's decisions will aid in a determination of whether or not school records are public documents.

The precise question we attempted to answer in our previous letter is: Does a patient-psychotherapist privilege attach when a pupil in a school district confers with a school psychologist? Our conclusion was that it did not, and we further concluded that this would be true whether the school psychologist was or was not a licensed psychologist.

The crux of the matter is whether or not the student in the above circumstance may be said to be a "patient". If so, then clearly §1011 of the Evidence Code is applicable. But if not, then no privilege may be implied, in keeping with the expressed limitation contained in §911 of the Evidence Code to the effect that no information is privileged unless made so by statute.

It may be concluded as well, in keeping with §911 of the Evidence Code, that the mere fact that the school psychologist is a licensed psychologist does not, of itself, create a privilege.

Our conversations with Dr. Curry of the Superintendent of Schools Office reaffirmed that as he understands the work of the school psychologist, the pupil would not be a patient since the school psychologist is not employed to perform clinical work as such. He is, instead, employed to examine and/or consult with a pupil for the express purpose of informing the school

Bernard H. McIntosh, M.S.

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March 7, 1968

district involved of any problem areas he believes to be present.

Independently of Dr. Curry's opinion, we have reached the same conclusion. The pupil is not sent to the school psychologist for diagnosis or treatment of any psychological difficulty which may exist. Rather, he is sent for the purpose of having the school district informed to the end that the instructional environment may be altered, if such is indicated.

Accordingly, if a licensed psychologist employed by a school district as a school psychologist confers with a pupil of that district who, completely apart from the school contacts, had conferred with the licensed psychologist as a patient, a patient-psychotherapist privilege well might exist. But if it does, it exists by virtue of the patient-psychotherapist relationship acquired outside the school contact and not because of that contact.

We trust that the foregoing discussion will serve to explain our conclusion.

Sincerely,

KEITH C. SORENSON
DISTRICT ATTORNEY

JAMES W. FOLEY

By: James W. Foley, Deputy

JWF:sb

cc:

Byron C. Curry
Deputy County Supt.
of Schools

1st Supp. Memo 68-76 EXHIBIT V
UNIVERSITY OF CALIFORNIA, BERKELEY

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO



SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

September 4, 1968

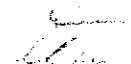
John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, Calif. 94305

Dear John:

I have received and read the Commission's tentative recommendation relating to a revision of the psychotherapist-patient privilege. It seems to me that the change proposed is a most desirable one and that it presents no problems in construction or meaning.

I think the proposed amendment ought to be adopted.

Cordially yours,


Arthur H. Sherry
Professor of Law
and Criminology

AHS:deb

#63

Revised September 15, 1968

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION
RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 4--Revisions of the Privileges Article (Sections 900-1070)

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

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.

RECOMMENDATION OF THE
CALIFORNIA LAW REVISION COMMISSION
relating to
THE EVIDENCE CODE

REVISIONS OF THE PRIVILEGES ARTICLE (SECTIONS 900-1070)

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 Evidence Code. Pursuant to this directive, the Commission has undertaken a continuing study of the new 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. LAW REVISION COMM'N REPORTS 1314 (1967); 9 CAL. LAW 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 to that proceeding without the prior consent of the witness spouse, unless the party calling the spouse does so in good faith without knowledge of the marital relationship. 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).

A multiplicity of parties in an action may lead to complications in the operation of the privilege of a spouse not to be called as a witness and the privilege of a spouse not to testify against his spouse. The privilege not to be called apparently authorizes the non-party spouse to refuse to take the stand for any party adverse to the party spouse even though the testimony sought would relate to a part of the case totally unconnected with the party spouse. As worded, the privilege is unconditional; it is violated by calling the spouse as a witness regardless of whether or not the testimony will be "against" the party 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 by any adverse party also may lead to complications where both spouses are parties to the proceeding. Where an 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 called to testify against the other. Evidence Code Section 972(a) provides an exception for litigation between spouses. These two Evidence Code provisions apparently eliminate the privilege not to be called and the privilege not to testify against the other spouse 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

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

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
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limited to criminal cases, the major part of the 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.

⁶ Apparently this privilege was not recognized in civil cases prior
to the 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 as a waivable
privilege rather than an absolute bar; the witness spouse was
often forced to take the stand before asserting the privilege.
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). In one case the
court held that it was not prejudicial to force the wife to
testify where she originally attempted to assert the spousal
privilege. People v. Wade, 53 Cal.2d 322, 1 Cal. Rptr. 683,
348 P.2d 116 (1959). Thus, the privilege 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 spousal privilege under Section 970 or 971 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.

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

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission has been advised by several correspondents that the article relating to the psychotherapist-patient privilege (Sections 1010-1026) is uncertain or deficient in two respects. First, the definition of "psychotherapist" (Section 1010) includes only psychiatrists (subdivision (a)) and licensed psychologists (subdivision (b)) and thereby excludes various persons, particularly certified school psychologists, whose activities should be covered by the privilege. Second, the application of the article and of the privilege to the increasingly common group-therapy situation is uncertain and should be clarified. The Commission has considered these suggestions and makes the following recommendations.

Section 1010

Section 1010 specifies two categories of persons as to whom the "psychotherapist" privilege pertains: (1) psychiatrists (subdivision (a)) and (2) "a person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code" (subdivision (b)). The reference in subdivision (b), of course, is to the Psychology Licensing Law (Sections 2900-2986 of the Business and Professions Code) which generally defines the practice of psychology and provides for the licensing of practitioners by the Board of Medical Examiners. That law, however, exempts from the licensing requirements various categories of professions whose members admittedly may engage in work or activities "of a psychological nature." See Sections 2908-2910 of the Business and Professions Code.

Thus, members of these professions who engage in work of a psychological nature may, but need not, hold licenses as psychologists.

This discrepancy between the coverage of the licensing law and Section 1010 inevitably raises the question whether subdivision (b) of Section 1010 is appropriate. It may well be that the "psychotherapist" privilege should extend to the therapeutic efforts of social workers, family counselors, and several other categories of persons now exempt from licensing as psychologists. Resolution of this general problem will require determination of several questions of public policy respecting the rendition of their services, as well as a reassessment of the general policy underlying the psychotherapist-patient privilege. The Commission plans to continue its study of the problem and to make such recommendations as may seem feasible and appropriate.

In one respect, Section 1010 seems clearly in need of broadening. Section 2909 of the Business and Professions Code specifically exempts school psychologists from licensing if (1) they hold a credential as such 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." The State Board of Education in turn issues credentials which authorize the holder to serve as a school psychologist if the holder has the qualifications specified by provisions of the Education Code and regulations of the Board. See Sections 13187-13199 of the Education Code. Thus, to be a certified school psychologist one must be found qualified to render psychotherapy by the State Board of Education and be doing so under the

direction and jurisdiction of a school district.

The Commission, therefore, recommends that Section 1010 be amended to include school psychologists certified by the State Board of Education.

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 "reasonably necessary for . . . the accomplishment of the purpose of the consultation or examination" would probably be construed to include group therapy treatment, the language might be narrowly construed to exclude such treatment. The language used in Section 1012 should be revised to conform to the language used in the comparable section relating to the physician-patient privilege (Section 992) by substituting "the purpose for which the psychotherapist is consulted" for "the purpose of the consultation or examination." This revision will foreclose the possibility that Section 1012 would be construed not to embrace group therapy. If the section were so revised, not all group therapy situations would be covered by the privilege. 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."

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 privilege. The policy considerations that require that there be a psychotherapist-patient privilege at all dictate that the privilege 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 recommended revision of Section 1012 should overcome this problem.

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 for any party adverse to his spouse even in multi-party litigation where the testimony sought would relate 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) both remain in the Evidence Code. 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 still 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 multi-party civil litigation, if a non-party spouse is called as a witness by a party other than the party spouse, 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.

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 ~~or~~ ; or

(c) A person who is serving as a school psychologist and who holds a school psychologist credential, a general pupil personnel services credential authorizing service as a school psychologist, or a standard designated services credential with a specialization in pupil personnel services authorizing service as a psychologist issued by the State Board of Education.

Comment. Section 1010 is amended to include school psychologists in the definition of "psychotherapists" whether or not they are licensed as psychologists under the Business and Professions Code and, therefore, already included by subdivision (b). The Psychology Licensing Law (Government Code Sections 2900-2986) specifically exempts school psychologists, while serving as such, from the licensing requirements of that law. See Government Code Sections 2909 and 2910. However, such psychologists are required to hold an appropriate credential issued by the State Board of Education and, to obtain the credential, must have the qualifications specified both by statute and regulations of the State Board of Education. See Sections 13187-13199 of the Education

Code. The three types of credentials specified in subdivision (c) are those types, issued either under former or existing law relating to the licensing of public school personnel, that authorize service as a school psychologist. See Sections 11753 and 13187 of the Education Code.

By referring to "a person who is serving as a school psychologist," subdivision (c) limits application of the subdivision to persons serving in that capacity and thereby excludes persons not acting in that capacity even though they may hold a school psychologist credential. Similarly, addition of certified school psychologists to the class of privileged "psychotherapists" does not specify or change the application of the psychotherapist-patient privilege to the activities of school psychologists. That application, of course, is determined by Sections 1011 (definition of "patient"), 1012 (definition of "confidential communication"), and 1016-1026 (exceptions to existence of the privilege), as well as Section 1010. Addition of subdivision (c), therefore, is limited in effect to placing certified school psychologists in the same category as psychiatrists and licensed psychologists insofar as the status of the psychotherapist is concerned.