

#63

10/25/68

Memorandum 68-107

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

Attached to this Memorandum is a copy of the tentative recommendation relating to the psychotherapist-patient privilege. We have distributed this to a number of persons who may be interested in it. We will forward the comments we receive from these persons with the supplement to this Memorandum.

If this tentative recommendation is approved for submission to the 1969 Legislature, we will combine it with the one relating to the marital privilege.

Respectfully submitted,

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STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 5--The Psychotherapist-Patient Privilege

CALIFORNIA LAW REVISION COMMISSION
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WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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.

TENTATIVE
RECOMMENDATION OF THE
CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Article 5--The Psychotherapist-Patient Privilege

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 law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others.¹

¹For further discussion, see 8 CAL. L. REVISION COMM'N REPORTS 1314 (1967); 9 CAL. L. REVISION COMM'N REPORTS 00 (1969).

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission has received a number of suggestions that the Evidence Code article relating to the psychotherapist-patient privilege (Sections 1010-1026) be revised to eliminate uncertainties or overcome deficiencies. Although these suggestions differ in detail, they make two significant criticisms of the existing provisions. First, it has been suggested that the definition of "psychotherapist" in Section 1010 is too narrow, for it includes only psychiatrists and licensed psychologists, thereby excluding various other highly qualified professional groups who may lawfully administer psychotherapy. Second, it has been urged that the application of the privilege to the increasingly common group therapy situation is uncertain and should be clarified.

With respect to privileges generally, the Commission has recognized that any extension of the scope of protection afforded confidential communication necessarily handicaps, at least to some extent, the court or jury in its effort to reach a just result. 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--so to speak--of relevant and perhaps cogent evidence. The Commission, therefore, generally takes the view that any extension of a privilege must be clearly warranted and must be supported by a distinct social policy in favor of facilitating the communications or revelations to which the privilege is extended. With respect to the psychotherapist-patient privilege, however, the Commission is persuaded that Sections 1010 and 1012 of the Evidence Code are unduly restrictive and therefore makes the following recommendations.

Section 1010

For the purposes of the psychotherapist-patient privilege, Section 1010 defines a "psychotherapist" as (a) a physician who specializes in psychiatry or (b) a person licensed as a psychologist under the Psychology Licensing Law (Business and Professions Code Sections 2900-2986). The Psychology Licensing Law, however, exempts from its requirements various professional groups whose members engage in work or activities of a psychological nature. See Bus. & Prof. Code §§ 2908-2910. Thus, some persons who may lawfully use psychotherapeutic techniques are not covered by the psychotherapist-patient privilege because they are neither psychiatrists nor licensed psychologists. Specifically, the Psychology Licensing Law exempts (1) school psychologists, (2) clinical social workers, and (3) marriage, family, and child counselors. See Bus. & Prof. Code §§ 2908, 2909.

This discrepancy between the persons who may lawfully practice psychotherapy and persons listed in Section 1010 of the Evidence Code inevitably raises the question whether the definition of "psychotherapist" in Section 1010 is sufficiently broad.² The Commission has reviewed the statutory and administrative regulations that relate to persons who render services of a psychological nature, as well as the nature of their practice, and has concluded that Section 1010 should be broadened to include the following groups.

²

Assembly Bill No. 1874 of the 1968 Regular Session would have extended the psychotherapist-patient privilege to clinical social workers and marriage, family, and child counselors. The bill died in the Assembly Committee on the Judiciary.

1. School psychologists. To be exempted from the Psychology Licensing Law, school psychologists must (1) hold an appropriate credential 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." See Business and Professions Code Section 2909. The qualifications of an applicant for a school psychologist's credential are specified by the Education Code and regulations of the Board, and include at least a master's degree and an approved internship. Such an applicant may or may not be a licensed psychologist, but if he is not he must have other prescribed qualifications. See Section 13196 of the Education Code and Section 6402 of Title 5 of the California Administrative Code. Thus, a school psychologist must establish his qualifications as such to the satisfaction of the State Board of Education and must be serving as a psychologist under the direction and jurisdiction of a school district. Nonetheless, under existing law, the question whether the psychotherapist privilege pertains to a school psychologist turns on the fortuity of whether or not he is licensed as a psychologist as well as being certified as a school psychologist.

The specialized services afforded by school psychologists entail problems of diagnosis of mental and emotional conditions that do not differ greatly from the services provided by psychologists who work in other settings. Moreover, determining the cause of a child's difficulties in school frequently depends on the candid revelation of the circumstances of the child, his parents, and others. Unless the child and his parents are assured that the necessary information can be held in confidence, they will be reluctant to

make the full disclosure upon which diagnosis and treatment depend.

Thus, in view of their technical qualifications and the nature and importance of the service rendered by them, it seems clear that certified school psychologists should be included in the group of persons to whom a privileged communication may be made.

2. Clinical social workers. Clinical social workers are licensed by the Social Worker and Marriage Counselor Qualifications Board. See Sections 9040-9051 of the Business and Professions Code. An applicant for such a license must have a master's degree from a school of social work and two years' experience in a hospital, clinic, or agency "in the use of psychosocial and psychotherapeutic methods and measures." See Business and Professions Code Section 9042 as amended by Chapter 1329 of the Statutes of 1968. Thus, such licensees are trained both academically and clinically in the use of psychotherapeutic techniques. They provide individual, marriage, family, and child counseling and often work collaboratively with psychologists and psychiatrists. Increasingly, they work independently in private practice. They make extensive use of applied psychotherapy. Indeed, the statutory definition of their function places particular emphasis on this aspect of their work. See Business and Professions Code Section 9049. This therapy, in turn, requires revelation of the most intimate details of the subject's life. Thus, it appears that the service rendered by licensed clinical social workers is not distinguishable from that provided by other psychotherapists and that such workers should be added to the group covered by the psychotherapist-patient privilege.

3. Marriage, family, and child counselors. Persons who undertake to afford marriage, family, or child counseling also are licensed by the Social Workers and Marriage Counselor Qualifications Board. See Business and Professions Code Sections 17800-17847. The minimum qualifications for a license include a master's degree in marriage counseling, social work, or one of the behavioral sciences, and at least two years of supervised clinical experience. See Business and Professions Code Section 17804. Although marriage, family, or child counseling is not defined in detail by statute, it is clear that the licensees are trained both academically and clinically in the use of psychotherapy. In addition, it is equally clear that professional amelioration of troubled marriages and unhappy homes entails the frank revelation of the intimate details of the family life. Unless the parties are assured that such information can be kept in utmost confidence, they cannot be expected to make the required disclosures. A need for the privacy and confidentiality of such communications is already recognized in the Conciliation Court Law (Code of Civil Procedure Sections 1730-1772).³ This assurance of confidentiality should also be available to persons who consult licensed counselors in other settings and for this reason such counselors should be added to the group covered by the psychotherapist privilege afforded by the Evidence Code.

In summary, the Commission believes that although extension of the privilege to cover communications to school psychologists, clinical social

³ All communications, verbal or written, from either of the parties to the judge, commissioner, or court-appointed counselor are expressly made subject to the privilege for official information conferred by Section 1040 of the Evidence Code. See Code of Civil Procedure Section 1747.

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workers, and marriage, family, and child counselors may operate to withhold relevant information, the interests of society will be better served if such professionals are able to assure their clients that the confidences of the client will be respected. The Commission is advised that, as a practical matter, these practitioners have difficulty in obtaining needed information due to the lack of privilege under existing law. Accordingly, the Commission recommends that confidential communications to them be placed upon the same footing as such communications to licensed psychologists.

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 "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.

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 psychotherapist-patient privilege. The policy considerations underlying the privilege dictate that it 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 Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-patient privilege protects against disclosure of communications made during group therapy. It should be

noted that if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, 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."

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

An act to amend Sections 1010 and 1012 of the Evidence Code, relating to evidence.

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

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; ~~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 ;

(c) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the State Board of Education;

(d) 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; or

(e) A person licensed as a marriage, family, and child counselor under Chapter 4 (commencing with Section 17300) of Part 3 of Division 7 of the Business and Professions Code.

Comment. Section 1010 is amended to include school psychologists, clinical social workers, and marriage, family, and child counselors within the definition of "psychotherapist." To be included under Section 1010, a school psychologist must hold an appropriate credential.

issued by the State Board of Education. See Sections 13187-13188, 13196 of the Education Code; Cal. Adm. Code, Tit. 5, subch. 10.1, group 7. The credential specified in subdivision (c) includes one issued under former law which is equivalent to the standard designated services credential with specialization in pupil personnel services authorizing service as a school psychologist. See Sections 11753 and 13187-13187.1 of the Education Code. A clinical social worker or marriage, family, and child counselor must have the appropriate license to be included under Section 1010.

Although the psychotherapist may render a broader scope of service, the privilege under this article covers confidential communications made in the course of diagnosis or treatment of a mental or emotional condition or an examination for purposes of psychiatric or psychological research. See Section 1011 and the Comment to that section. Thus, the privilege under this article covers individual diagnosis and treatment and such activities as marriage, family, and child counseling. See also Recommendations Relating to the Evidence Code: Number 5--The Psychotherapist-Patient Privilege, 9 Cal. L. Revision Notes Reports 000 (1969).

Sec. 2. Section 1012 of the Evidence Code is amended to read:

1012. 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 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, including other patients present at group therapy, 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 for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to add "including other patients present at group therapy" in order to foreclose the possibility that the section would be construed not to embrace group therapy. However, it should be noted that communications made in the course of group therapy are 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." The making of a communication that meets these two requirements in the course of group therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

The other amendments are technical and conform the language of Section 1012 to that of Section 992, the comparable section relating to the physician-patient privilege. Deletion of the words "or examination" makes no substantive change since "consultation" is broad enough to cover an examination. See Section 992. Substitution of "for which the psychotherapist is consulted" for "of the consultation or examination" adopts the language used in subdivision (d) of Section 912 and in Section 992.