

Memorandum 69-6

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

I have become aware of a series of sections--not previously called to the Commission's attention--which cause me to suggest that the legislation relating to the psychotherapist-patient privilege (which is included in the recommendation on Revision of the Privileges Article) not be submitted to the 1969 legislative session.

Sections 5328-5330 of the Welfare and Institutions Code (enacted Cal. Stats. 1967, Ch. 1667, amended by Cal. Stats. 1968, Ch. 1374)--which will become operative on July 1, 1969 (Cal. Stats. 1968, Ch. 989) --read:

5328. All information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), Division 6 (commencing with in Section 6000), or Division 7 (commencing with Section 7000) to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only:

(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings;

(b) When the physician in charge of the patient, with the approval of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family. No record may be released under this subdivision after six months have elapsed since the record was made;

(c) To the extent necessary to make claims on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled;

(d) If the recipient of services is a ward or conservatee, and his guardian or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

(e) For research, provided that the Director of Mental Hygiene designates by regulation, rules for the conduct of research. Such .. rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

.....
Date

As a condition of doing research concerning persons who have received services from(fill in the facility, agency or person) I,, agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.

I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

.....
Signed

(f) To the courts, as necessary to the administration of justice.

5329. Nothing in this chapter shall be construed to prohibit the compilation and publication of statistical data for use by government or researchers under standards set by the Director of Mental Hygiene.

5330. Any person may bring an action against an individual who has willfully and knowingly released confidential information or records concerning him in violation of the provisions of this chapter, for the greater of the following amounts:

(1) Five hundred dollars (\$500).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

Any person may, in accordance with the provisions of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin the release of confidential information or records in violation of the provisions of this chapter, and may in the same action seek damages as provided in this section.

It is not a prerequisite to an action under this section that plaintiff suffer or be threatened with actual damages.

Section 5328 has broad application. The provisions referred to in the introductory portion of the section are:

Division 5--Community Mental Health Services

Part 1. California Mental Health Act of 1967--deals primarily with involuntary treatment and commitment of mentally disordered or mentally retarded persons, including conservatorships for gravely disabled persons.

Part 2. The Short-Doyle Act--"This part is designed to encourage and to assist financially local governments in the establishment and development of mental health services, including services to the mentally retarded, through locally administered and locally controlled community mental health programs. It is furthermore designed to augment and promote the improvement and, if necessary, the expansion of already existing psychiatric services in general hospitals or clinics that help to conserve the mental health of the people of California."

Division 6--Admissions and Judicial Commitments

Division 7--Mental institutions (including private institutions and county and state institutions)

The most significant provision of the key section--Section 5328--is subdivision (f). This subdivision may be interpreted as merely a statement that Section 5328 has no application where the confidential information or records are sought to be disclosed in court. On the other hand, it is not unlikely that subdivision (f) creates, in substance, a "discretionary" privilege in judicial proceedings--i.e., the confidential information and records may be disclosed to "the courts" when "necessary to the administration of justice." In other words, such information and records are protected from disclosure in court if such disclosure is not necessary to prevent injustice. This privilege would be analogous to the so-called governmental official information privilege under Evidence Code Sections 1040-1042.

The extent and effect of the overlap of the psychotherapist-patient privilege under the Evidence Code and the privilege under Section 5328 is difficult to determine. It is clear, however, that Section 5328 does not merely cover a portion of the area covered by the Evidence Code. It is far broader because it apparently extends to any information and records obtained in the course of providing services under the statutory provisions listed above. In addition, Section 5328 deals with some of the vexing problems that were brought to our attention when we considered the comments on our tentative recommendation. (such as the problem of communications by members of the patient's family to the psychotherapist). It seems undesirable to tamper with the psychotherapist-patient privilege under the Evidence Code when it is apparent that legislation will be needed to eliminate the inconsistencies between the Evidence Code and Section 5328.

The staff believes that a promising approach to the problem described above might be (1) to redraft entirely the Evidence Code's psychotherapist-patient privilege to conform it to the substance of Section 5328 (including making the privilege a "discretionary" one), (2) to conform Section 5328 to the redrafted Evidence Code privilege, and (3) to extend the Evidence Code privilege not only to the licensed persons to whom it would be extended by our recommendation but also to persons engaged in psychotherapeutic activities under the supervision of one of the licensed persons. If the Commission decides to study this problem, we believe that a comprehensive research study should be prepared before the Commission undertakes to deal with the problem.

I regret that I must bring this problem to your attention at this late date. The printer should have the approved recommendation ready

to print immediately after our January meeting if the Commission determines to submit it to the 1969 Legislature in the form approved at the last meeting. In the event that the Commission determines to undertake a study to draft comprehensive legislation to eliminate the inconsistency between Section 5328 of the Welfare and Institutions Code and the Evidence Code privilege, we suggest that our recommendation to the 1969 Legislature be revised to delete the portion relating to the psychotherapist-patient privilege and to substitute the statement attached to this memorandum as Exhibit I.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission has received and considered suggestions that the article of the Evidence Code relating to the psychotherapist-patient privilege (Sections 1010-1026) be revised. In general, the suggested changes would eliminate uncertainties as to the coverage of the existing privilege or would extend the privilege to overcome apparent deficiencies that now exist in the protection afforded. The most significant suggestion is that the definition of "psychotherapist" in Section 1010, which presently includes only psychiatrists and licensed psychologists, should be broadened to include other professional persons who lawfully practice psychotherapy.

Sections 5328¹ and related sections² of the Welfare and Institutions Code--which will become operative on July 1, 1969³--apparently create a broad privilege which may overlap and be inconsistent with the psychotherapist-patient privilege under the Evidence Code. The Commission intends to make a study to determine the extent and effect of this inconsistency and to prepare a recommendation for any necessary legislation. This study may result in a recommendation that substantial revisions be made in the privilege provided by the Evidence Code and these revisions may be significant in determining such matters as the professional groups that should be covered by the privilege. For this reason, the Commission will defer recommending any revision of the psychotherapist-patient privilege until it has completed its study of Section 5328 of the Welfare and Institutions Code and related provisions.⁴

FOOTNOTES

1. This section provides:

5328. All information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000) to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only:

(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings;

(b) When the physician in charge of the patient, with the approval of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family. No record may be released under this subdivision after six months have elapsed since the record was made;

(c) To the extent necessary to make claims on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled;

(d) If the recipient of services is a ward or conservatee, and his guardian or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

(e) For research, provided that the Director of Mental Hygiene designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

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Date

As a condition of doing research concerning persons who have received services from..... (fill in the facility, agency or person) I,, agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.

I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

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Signed

(f) To the courts, as necessary to the administration of justice.

2. Welf. & Inst. Code §§ 5329, 5330.
3. See Cal. Stats. 1968, Ch. 989.
4. See, e.g., Code Civ. Proc. § 1747; Educ. Code § 10751; Welf. & Inst. Code § 10850.