

63

12/18/68

First Supplement to Memorandum 69-6

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

You will recall that several writers commenting on the tentative recommendation on the psychotherapist-patient privilege suggested that the exception to the privilege for cases where the patient "tenders" the issue of his mental or emotional condition creates serious problems in personal injury actions. The attached letter is somewhat related to this problem and, I suspect, the psychotherapist is objecting to disclosure of the privileged communication because the patient's attorney apparently has conceded that the patient's commencement of the personal injury action waives the privilege. The letter, together with the letters of Dr. Diamond and others, indicates that this problem may merit study by the Commission.

Respectfully submitted,

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Dear Sirs:

I read in the winter edition of the State Bar of California Reports that your Commission was soliciting comments on its tentative recommendation to extend the psychotherapist-patient privilege under the Evidence Code (§§ 1010, et seq.) to cover communications to certified school psychologists, licensed clinical social workers, and licensed marriage, family and child counselors.

It is my feeling that the psychotherapist-patient privilege, as it now stands, does not embody the goal that it set out to achieve, as stated in the Legislative Committee Comment to California Evidence Code §1014 (Assembly J, April 6, 1965):

"Unless a patient or research subject is assured that . . . information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends."

In a very real sense, confidentiality is at the heart of the psychotherapeutic relationship and secrets communicated pursuant to such a relationship become as much the property of the treating psychiatrist in being able to reach his patient as the property of the patient who discloses them pursuant to the promise of absolute confidentiality necessary for an effective psychotherapeutic relationship.

Therefore, in order to preserve this absolute confidentiality, the waiver of the privilege granted to the patient under §1016(a) of the Evidence Code should be modified to allow the therapist, in his own right, to refuse to disclose confidential information given to him in the course of a therapeutic relationship. It is well-settled that a patient may wish to disclose confidential aspects of his therapy for anti-social reasons grounded in his own neurosis. Additionally, since the patient is not privy to the therapist's independent judgment concerning the therapeutic relationship, the patient is not in a position to know that which he is disclosing.

I have recently had occasion to apply for a three-judge court pursuant to 15 U.S.C. §§ 2281 and 2284, to determine that the Constitutional rights of a psychotherapist would be adversely affected if he were compelled to disclose details of a therapeutic relationship, pursuant to a former patient's

SEVERSON, WERSON, BERKE & BULL

California Law Revision Commission
Page Three
December 11, 1968

waiver under §1016(a) of the Evidence Code. This motion has not yet been ruled upon; but since it has been filed and is therefore a matter of public record, I am taking the liberty of enclosing both the memorandum in support of the psychotherapist's position and his own affidavit, for your consideration.

I trust that an examination of the considerations raised by the enclosed papers will both demonstrate that a Constitutional right exists in this regard and encourage the California Law Revision Commission to bend every effort in aiding the Legislature to accomplish their expressed intent in having enacted the psychotherapist-patient privilege.

Very truly yours,



Kurt W. Melchior

KWM:jer

Enclosures

Note: We have not reproduced the material enclosed with Mr. Melchior's letter because it consists of 28 pages. If any commissioner wishes a copy of the material please advise us and we will have it reproduced for you.