#63 8/23/73

Memorandum 73-63

Subject: Study 63 - Evidence Code ("Erroneously Compelled" Disclosure of Privileged Information)

Attached to this memorandum are two copies of the tentative recommendation relating to erroneously ordered disclosure of privileged information. The comments received relating to this recommendation are few in number but can be characterized as generally favorable. Only Judge Jefferson opposes the recommendation (Exhibit I) and he does so on the ground that the law is clear enough as is and that

> to add the proposed paragraph to Section 919 gives the appellate courts an open invitation to follow the Kaplan case and decide that prior rules of evidence are not changed by the clearest kind of language in an Evidence Code section unless the Comment to that section declares that the intent of that section is to change a prior rule of evidence.

We merely note that the point is well taken but has been raised before and on balance the Commission decided that it was better to make the clarifying change.

The State Bar sent this tentative recommendation to 17 members of the Committee on Administration of Justice. Because of the time factor, the members were asked to respond as individuals. To date, seven have responded and all have been in favor of the recommendation. One member did suggest as a clarifying change that the phrase "by the presiding officer" in the third line of subdivision (b) of Section 919 be stricken. The staff does not agree that this change would make the provision more readable.

Mr. Edward Babic, a Long Beach attorney, sent the following comment to the Chairman of the California Trial Lawyers Association Committee on Law Revision:

> As to the Recommendation relative to the Erroneously Ordered Disclosure of Privileged Information, the consensus down here seems to be about 15 to 1 in favor of the recommendation.
>
> The only caveat is that the wording seems to give a green light to circumvent the doctrine of Res Judicata; or at least it seems to provide two opportunities to litigate the same issue through the use of a secondary collateral attack on the finding of a trial court.

The whole point to the recommendation is that a person erroneously compelled to disclose privileged information should not be required to refuse to disclose, risk citation for contempt, and seek review of the order to preserve his privilege. This does permit him to raise the issue more than once, but he can do so successfully only where an error has been made previously. In short, the "caveat" strikes at the very heart of the recommendation and, we believe, does not represent the better view.

Exhibits II and III approve what we have done but indicate more would be desirable. Exhibit II (yellow) suggests that a statutory procedure is needed for sealing any reporter's transcript which contains privileged information erroneously ordered to be disclosed. The staff has some doubt whether this subject would be within the present scope of our authority. In any event, it does not appear to be something that we can do easily in connection with the present recommendation. Do you wish to have us pursue the issue further?

Exhibit III (green) suggests a separate problem exists. Namely, that, in practice, health insurance carriers require disclosure of confidential communications at the risk of withholding payment for the claimed treatment. Such disclosure may constitute a waiver of the privilege under Evidence Code Section 912. Subdivision (d) of Section 912 does provide:

> A disclosure in confidence of a communication that is protected by a privilege provided by Section . . . 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the . . . physician, or psychotherapist was consulted, is not a waiver of the privilege.

It could be argued that disclosure for the purpose of supporting a claim for payment is a "disclosure . . . reasonably necessary for the accomplishment of the purpose for which the . . . physician or psychotherapist was consulted." However, we are unable to find any cases in point on this issue and the matter may be one which the Commission wishes to clarify. What is your desire?

We have attached two copies of the recommendation so that you may make any editorial revisions on one copy to be given to the staff at the September meeting. It is our hope that this recommendation may be approved for printing, with any necessary revisions, at that time.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 73-63

EXHIBIT I

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 625-3414

July 18, 1973

California Law Review Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I am writing to express my comments on the Commission's recommendation to amend Section 919 of the Evidence Code to deal with the problem of erroneously ordered disclosure of privileged information. I am opposed to the proposed amendment. I do not believe that the amendment is necessary nor desirable.

The amendment is designed to pay homage to an erroneous principle of statutory construction stated by Justice Mosk in the Kaplan case. I consider the Kaplan case indefensible in using as one justification that the Evidence Code did not intend to abolish or alter the Martin exclusionary rule because it was not so stated in any Comment to an Evidence Code section, while some code sections contained Comments to the effect that the section was designed to change a particular prior rule of evidence law.

The present Comment to Section 919 states quite clearly that a compelled revelation of privileged information due to an erroneous ruling of the presiding officer constitutes a "coerced disclosure" which does not waive the privilege under Evidence Code Section 912. To add the proposed paragraph to Section 919 gives the appellate courts an open invitation to follow the Kaplan case and decide that prior rules of evidence are not changed by the clearest kind of language in an Evidence Code section unless the Comment to that section declares that the intent of that section is to change a prior rule of evidence.

In my opinion, it is better that we do not lend sanction to the Kaplan opinion by making such an amendment as that proposed to Section 919.

Very truly yours,

Bernard S. Jefferson

BSJ:ks

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Very truly yours,

Bernard S. Jefferson

BSJ:ks

Memorandum 73-63

EXHIBIT II

SILBER & KIPPERMAN
ATTORNEYS AT LAW
802 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94133

MICHAEL D. SILBER
STEVEN M. KIPPERMAN

TELEPHONE: (415) 788-8970

June 26, 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO ERRONEOUSLY ORDERED DISCLOSURE OF PRIVILEGED INFORMATION

Dear Sirs:

I think the proposals in the above-entitled recommendation are all well and good, but I would suggest facing up to one additional problem which is obviously manifest which is not dealt with. I would suggest creating a specific statutory procedure for sealing any reporter's transcript of erroneously ordered disclosure of privileged information pending any final determination (by appeal or otherwise) of whether the disclosure was erroneously ordered. This could be done in a variety of ways -- either as an interim order in the case in which disclosure was ordered, in an independent proceeding, or by way of ancillary relief pending an appeal to name a few. But perhaps the actual sealing of the transcript is even the more important procedural remedy than the bald determination of whether disclosure was erroneously ordered. I think it should be dealt with by statute.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/jm

Memorandum 73-63

EXHIBIT III

MAURICE GROSSMAN, M. D.
659 CHANNING AVENUE
PALO ALTO, CALIFORNIA

MAILING ADDRESS
P. O. BOX 745
94302

July 21, 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Sirs:

Because of my interest and ongoing work concerned with privilege, with special attention to psychotherapist-patient privilege, your recommendations of April 1973 were brought to my attention. Psychiatrists especially, amongst psychotherapists, have been grateful to you for the initial inclusion of the 1000 series of sections in the California Code of Evidence.

To explain my role, may I include that I am chairman of task forces studying this problem both for the Northern California Psychiatric Society and the American Psychiatric Association. I have been a recognized active influence within the California Medical Association in their pursuit of protection for patients' confidentiality; and through them within the American Medical Association.

Erroneously ordered disclosure, the subject of your April 1973 recommendations, and its application to Sections 912 and 919, with the emphasis on "coercion" is vital to the medical profession from another, rather insidiously growing sector. Both the physician-patient and the psychotherapist-patient privilege may be entirely nullified by Section 912 by current developments. This is the growing reality that most medical treatment, and increasingly, psychiatric treatment is covered by and paid for through health insurance. Whenever a patient sees a physician,- medical, surgical, or psychiatric,- or is hospitalized, to claim reimbursement he is obligated to sign a waiver. Information demanded by the insurance carrier is demanded and must be supplied or payment is withheld.

All such reports usually carry a demand for diagnosis. In psychiatry this alone is a major revelation of confidential information. When psychiatrists have refused to give this based on documented "leaks" to employers and others, some companies have continued the demand with threat of non-payment of the patient's claim,- usually to the patient. This minimal demand is the exception.

Some companies, once they get any indication of psychiatric treatment, then follow up with a second detailed questionnaire (Exhibit A) about the patients' illnesses. The information demanded is even more sensitive. When refused , they inform the patient their claim will not be paid. It has advanced to the point where they are demanding full reports from hospitals, even in psychiatric illnesses,(Exhibit B).

It is even worse for low income groups. If they require more than two treatments a month, the Medi-Cal program insists on justification via a Treatment Authorization Request. They demand extremely destructive information before they will grant the prior authorization for the

ongoing treatment that the patient needs,(Exhibit C). If not complied with there will be a refusal for payment of treatment. If the details are not pathologic enough to some unknown reviewer, the request will be denied. Some insurance intermediaries have even demanded the right to photocopy the physicians' records. (Exhibit D).

In the past, patients who could not afford to pay for treatment were able to get medical, including psychiatric, care through county and state auspices. Others were treated by private physicians and charged what they could afford or not charged at all. (I am not implying that it was a better system, but that confidentiality could be protected,- either by the physician or the L-P-S act.) With the advent of insurance and government supplied payment for care, either through State-Federal aid for the low income and disabled groups, or by Social Security Administration machinery, all this has changed.

The current situation then is that few can get psychiatric care, and with few exceptions none can get medical care without being forced to give information that is sensitive and ordinarily confidential. The penalty if they do not agree to do so is that they will not get the financial benefits from the protection they had bought; or for many not able to get at all because without that prepaid protection they cannot afford the medical care under today's system of medical economics. This then constitutes coercion.

As the Commission recognized in supporting psychotherapist-patient privilege there are constitutional grounds for maintaining such privilege. This has been affirmed by th Proposed Federal Code of Evidence in Rule 5-04. In modifying Section 1016 of the California Code, the California Supreme Court reaffirmed this need and right. To have the economic practice vitiate this protection by the application of Section 912 based on a release of this demanded and reluctantly released information to a third party destroys the whole structure of protection.

May I respectfully request the Commission to consider this matter from two points of view. The first is that this practice of insurance reporting represents de facto coercion and would be akin to the problem of your April report. (Note that I.B.M. does not make such demands of their employees,Exhibit E.) In such case you might want to consider a further addition to Section 919 to cover this problem. The second, and more difficult conceptually, is to include the medical directors of insurance companies in the category of nurses, hospital personnel, physician consultants, who are essential elements of the treating situation, and are covered by the treating physicians' status as receivers of the confidence,- including their obligation ethically and legally to safeguard the confidence.

This latter, based on my experience with the views of the insurance industry might require stating explicitly in law that minimal information, required by actuarial departments or the employers who pay the premiums would not be considered " a significant part of the communication."

Your consideration and review of the above is truly appreciated.

Sincerely,

Maurice Grossman, M. D.
Clinical Professor, Psychiatry

MG:mtt
Enc.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE

RECOMMENDATION

relating to

Erroneously Ordered Disclosure of Privileged Information

April 1973

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

Important Note: 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. Comments should be sent to the Commission not later than August 15, 1973.

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. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative 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.

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

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MARC SANDSTROM
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HOWARD R. WILLIAMS
GEORGE H. MURPHY
Ex Officio

April 12, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

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.

This recommendation is submitted as a result of this continuous review. It deals with the effect of erroneously ordered disclosure of privileged information, a problem called to the Commission's attention by Judge Herbert S. Herlands of the Orange County Superior Court.

Respectfully submitted,
JOHN D. MILLER
Chairman

#63

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ERRONEOUSLY ORDERED DISCLOSURE OF
PRIVILEGED INFORMATION

Section 912 of the Evidence Code provides that the right to claim certain privileges[1] is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone."[2] Evidence Code Section 919 provides that evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if a "person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made . . . ."[3]

It seems clear from the quoted language that disclosure of privileged information is coerced where the privilege is properly claimed but disclosure is erroneously ordered by the trial judge or other presiding officer. The privilege, therefore, should not be deemed waived as to the information disclosed; and the privilege holder should not be required to refuse to disclose, face citation for contempt, and seek review of the erroneous order in order to preserve his privilege. Nevertheless, a pre-Evidence Code case, Markwell v. Sykes,[4] contains language indicating that the privilege

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1. This portion of Section 912 applies to the lawyer-client privilege, the privilege for confidential marital communications, the physician-patient privilege, the psychotherapist-patient privilege, the privilege of penitent, and the privilege of clergyman.

2. Emphasis added.

3. Emphasis added.

4. 173 Cal. App.2d 642, 649-650, 343 P.2d 769, 773-774 (1959).

is waived unless the holder of the privilege refuses to comply with the erroneous order and seeks immediate appellate review of the order.[5] The official Comments to the Evidence Code do not make any reference to the language found in the Markwell case. While the Commission considers this language to be dictum and that it does not "establish" the rule attributed to it, the Commission also believes that the law on this point should be certain and that any possibility that the omission to refer to the Markwell case in the Comments might be construed as preserving the rule attributed

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5. In a letter to the Law Revision Commission, dated December 18, 1972, Judge Herbert S. Herlands of the Orange County Superior Court wrote:

> It seems quite clear to me from the Code and Comments that an erroneous judicial order to disclose the privileged matter constitutes "coercion" and "requires" disclosure; that, contrary to Markwell, such a disclosure is not "public property", is not "irrevocable" and may be "recalled." It should not make any difference whether the coerced disclosure occurs in the "same" or a "prior" proceeding.
>
> From the vantage point of "law of the case", as that doctrine is applied in California, a decision of one trial judge is not, in the absence of statutes to the contrary, binding on another judge of the same court at a later hearing. For example, the law and motion judge may overrule a general demurrer to a complaint, but the trial judge may decide the complaint does not state a cause of action. What Markwell does (sub silentio) is create an exception to the foregoing general rule by making the order of the first judge binding on the litigants unless the party claiming the privilege obtains prompt appellate review of the erroneous order. Thus, Markwell seems to be in conflict not only with the Evidence Code but with the way in which California generally handles "law of the case."

to that case should be avoided.[6] Therefore, the Commission recommends that a new subdivision be added to Section 919 of the Evidence Code to provide in substance that, if an authorized person claimed the privilege (whether in the same or a prior proceeding) but nevertheless the trial judge or other presiding officer erroneously ordered that the privileged information be disclosed, neither the failure to refuse to disclose the information nor the failure to seek appellate review of the erroneous order indicates consent to the disclosure or constitutes a waiver of the privilege, and, under these circumstances, the disclosure is one made under coercion.[7]

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6. This type of omission was of great significance to the California Supreme Court in Kaplan v. Superior Court, 6 Cal.3d 150, 158-159, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-654 (1971):

> Each comment summarizes the effect of the section, advises whether it restates existing law or changes it, and cites the relevant statutes or judicial decisions in either event. In particular, in every instance in which a significant change in the law would be achieved by the code, the commission's comment spells out that effect in detail and cites the precise authorities which it repeals. [Footnote omitted.]
>
> In sharp contrast, neither the commission's background study nor its comment to any section of the Evidence Code discloses an intent to alter or abolish the Martin rule. Indeed, the commission nowhere even mentions, let alone "carefully weighs," that rule. In view of the commission's painstaking analysis of many evidentiary rules that are of far less importance and notoriety than Martin, its deafening silence on this point cannot be deemed the product of oversight. It can only mean the commission did not intend--and the code therefore does not accomplish--a change in the Martin rule. [Footnote omitted.]

7. This clarification represents sound public policy:

> Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously . . . .
>
> With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in

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

An act to amend Section 919 of the Evidence Code, relating to privileges.

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

Section 1. Section 919 of the Evidence Code is amended to read:

919. (a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

~~(a)~~ (1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

~~(b)~~ (2) The presiding officer did not exclude the privileged information as required by Section 916.

(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure

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the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. [Citations omitted.] However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); McCormick § 127; 8 Wigmore § 2270 (McNaughton Rev.1961), and the principle is equally sound when applied to other privileges. [Advisory Committee's Note to Rule 512 of the Federal Rules of Evidence.]

or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.

Comment. Subdivision (b) has been added to Section 919 to make clear that, after disclosure of privileged information has been erroneously required to be made by order of a trial court or other presiding officer, neither the failure to refuse to disclose nor the failure to challenge the order (by, for example, a petition for a writ of habeas corpus or other special writ or by an appeal from a contempt order) amounts to a waiver and the disclosure is one made under coercion for the purposes of Sections 912(a) and 919(a)(1). See Section 905 (defining "presiding officer"). The addition of subdivision (b) will preclude any possibility of a contrary interpretation of Sections 912 and 919 based on the language found in Markwell v. Sykes, 173 Cal. App.2d 642, 649-650, 343 P.2d 769, 773-774 (1959). See Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information, 11 Cal. L. Revision Comm'n Reports 0000 (1973).

The phrase "whether in the same or a prior proceeding" has been included in subdivision (b) to avoid any implication that might be drawn from the original Law Revision Commission Comment to Section 919 or from language found in Markwell v. Sykes, supra, that subdivision (a)(1) applies only where the privilege was claimed in a prior proceeding. The protection afforded by Section 919, of course, also applies where a claim of privilege is made at an earlier stage in the same proceeding and the presiding officer erroneously overruled the claim and ordered disclosure of the privileged information to be made.