

#63

5/31/74

Memorandum 74-34

Subject: Study 63 - Evidence (Physician-Patient Privilege)

Attached to this memorandum are two copies of a staff draft of a Tentative Recommendation Relating to the "Good Cause" Exception to the Physician-Patient Privilege. This tentative recommendation implements the Commission's decisions at the first May meeting. The staff hopes to send this tentative recommendation out for comment after the June meeting. Please make your suggested editorial revisions on one copy and give it to the staff at the June meeting.

Respectfully submitted,

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TENTATIVE RECOMMENDATION  
relating to  
THE "GOOD CAUSE" EXCEPTION TO THE  
PHYSICIAN-PATIENT PRIVILEGE

Section 994 of the Evidence Code provides a privilege which allows a patient "to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician."<sup>1</sup> The privilege is limited to communications made by the patient in confidence "for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition."

Many legal writers who have analyzed the origin and application of the physician-patient privilege find serious fault with it;<sup>2</sup> McCormick<sup>3</sup> and Wigmore<sup>4</sup> recommend that it be totally abandoned. The Commission, however, believes that the privilege should not be completely abandoned. The privilege does protect the interests of nonparties to an action (such as, for example, in malpractice actions<sup>5</sup>) and may prevent "fishing expeditions" into a party's medical history.

The most significant criticism of the privilege is that it allows the "suppression of useful truth."<sup>6</sup> In California, however, there are

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1. See definitions of "patient" (Evid. Code § 991) and "confidential communication between patient and physician" (Evid. Code § 992).
  2. See, e.g., writers cited in McCormick, Evidence 235 n.85 (2d ed. 1972).
  3. McCormick, Evidence § 105 at 228 (2d ed. 1972).
  4. 8 Wigmore, Evidence § 2380a at 832 (McNaughton rev. 1961).
  5. See, e.g., *Marcus v. Superior Court*, 18 Cal. App.3d 22, 95 Cal. Rptr. 545 (1971). Compare *Henard v. Superior Court*, 26 Cal. App.3d 129, 102 Cal. Rptr. 721 (1972).
  6. 8 Wigmore, Evidence § 2380a at 831 (McNaughton rev. 1961).

many exceptions to the privilege<sup>7</sup> which prevent its exercise in many situations which have outraged the critics.<sup>8</sup> Nevertheless, situations may still arise where the interest in finding the truth outweighs any legitimate interest in preventing disclosure of communications between

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7. See Evid. Code §§ 996 (so-called patient-litigant exception), 997 (services of physician sought or obtained to assist in crime or tort), 998 (criminal proceeding), 999 (criminal conduct in civil case), 1000 (parties claiming through deceased patient), 1001 (breach of duty arising out of physician-patient relationship), 1002 (intention of deceased patient concerning writing affecting property interest), 1003 (validity of writing affecting property interest), 1004 (commitment or similar proceeding), 1005 (proceeding to establish patient's competence), 1006 (required report), 1007 (proceeding to determine right, license, or privilege). See also Evid. Code § 912 (waiver of privilege).

8. For example, Wigmore writes:

Ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases--actions on policies of life insurance where the deceased's misrepresentations of his health are involved, actions for corporal injuries where the extent of the plaintiff's injury is at issue, and testamentary actions where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except as a tactical maneuver in litigation. [8 Wigmore, Evidence § 2380a at 831 (McNaughton rev. 1961).]

In California, absent a waiver of the privilege in the application for the insurance policy, it is unclear whether Evidence Code Section 996 (patient-litigant exception) makes the privilege inapplicable in the first class of cases referred to by Wigmore. See discussion of the similar but differently worded provision of the Uniform Rules of Evidence in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 Cal. L. Revision Comm'n Reports 201, 413 (1964). In the second class of cases, Evidence Code Section 996 would allow disclosure of the communication between the patient and physician, and Evidence Code Sections 1002 (intention of deceased patient concerning writing affecting property interest) and 1003 (validity of writing affecting property interest executed by deceased patient) would allow disclosure in the third class.

patient and physician.<sup>9</sup> Accordingly, the Commission recommends that a general exception to the physician-patient privilege be provided to permit the disclosure of communications relevant to an issue concerning the condition of a patient who is a party where the court is shown good cause for the disclosure.<sup>10</sup>

In a prior recommendation, the Commission pointed out the undesirability of retaining the "criminal conduct" exception to the physician-patient privilege provided by Evidence Code Section 999.<sup>11</sup> The Commission found the "criminal conduct" exception to be "burdensome and difficult to administer, unjustified, and unnecessary." Enactment of a "good cause" exception will make the "criminal conduct" exception unnecessary, and the Commission again recommends its elimination.

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9. See, e.g., Carlton v. Superior Court, 261 Cal. App.2d 282, 67 Cal. Rptr. 568 (1968), which held that, where the defendant denied the plaintiff's allegation that the defendant was intoxicated at the time of an accident, the intoxication issue was not "tendered" within the meaning of the patient-litigant exception (Evid. Code § 996).

10. Similar exceptions based on judicial discretion are provided in N.C. Gen. Stat. § 8-53 (1969) (in the court's "opinion," the disclosure is "necessary to a proper administration of justice") and Va. Code Ann. § 8-289.1 (Supp. 1973) ("in the exercise of sound discretion, [the court] deems such disclosure necessary to the proper administration of justice").

11. See Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 1147 (1973). This recommendation was withdrawn by the Commission after it met with substantial opposition because, by eliminating an exception to the privilege, it would have broadened the privilege and made unavailable information that might be essential in a particular case. This objection is overcome by the recommended "good cause" exception.

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

An act to amend Section 999 of the Evidence Code, relating to the physician-patient privilege.

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

Section 1. Section 999 of the Evidence Code is amended to read:

999. There is no privilege under this article ~~in a proceeding to recover damages on account of conduct of the patient which constitutes a crime~~ as to a communication relevant to an issue concerning the condition of a patient who is a party to the proceeding where good cause for the disclosure of the communication is shown to the court .

Comment. Section 999 is amended to provide an exception to the physician-patient privilege where good cause is shown for the disclosure of a relevant communication concerning the condition of a patient who is a party. See Recommendation Relating to the "Good Cause" Exception to the Physician-Patient Privilege, 12 Cal. L. Revision Comm'n Reports (1974). Section 999 permits the disclosure of communications between patient and physician where a need for such evidence is shown while at the same time protecting from disclosure the communications of patients who are not parties. Typically, patients who are not parties need the protection of the privilege in malpractice actions. See, e.g., Marcus v. Superior Court, 18 Cal. App.3d 22, 95 Cal. Rptr. 545 (1971). The requirement that good cause be shown for the disclosure permits the court to protect the defendant against a "fishing expedition" into his medical records. Compare Evid. Code § 996 (patient-litigant exception).

Formerly, Section 999 provided an exception only in a proceeding to recover damages arising out of the criminal conduct of the patient. This

"criminal conduct" exception has been eliminated as unnecessary in view of the "good cause" exception now provided by Section 999. Moreover, the "criminal conduct" exception was burdensome, difficult to administer, and ill designed to achieve the purpose of making needed evidence available. See Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 1147 (1973).