

Memorandum 74-56

Subject: Study 63.40 - "Good Cause" Exception to Physician-Patient Privilege

The Tentative Recommendation relating to the "Good Cause" Exception to the Physician-Patient Privilege was distributed for Comment. We received four letters in response to this distribution. All comment favorably on the tentative recommendation. In addition, the Chairman of the California Trial Lawyers Association Law Revision Commission Committee called me about the tentative recommendation; after discussing it with me, he stated he saw no problems with the tentative recommendation. We sent copies of the tentative recommendation to the State Bar for comment. However, if past experience is any guide, it will be sometime next year before we receive the comments of the State Bar. Although various other persons have orally indicated that they approve the tentative recommendation, I suspect that the absence of comment reflects either approval or no strong feeling one way or another about the tentative recommendation. I suspect that it will be only after the bill is introduced in 1975 that we will obtain any real reaction to the recommendation.

The staff recommends that the recommendation be approved for printing. We recommend, however, that the Comment on page 4 of the tentative recommendation be revised to read in part:

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). However, even in such malpractice actions, it sometimes may be possible to provide the necessary information without violating the privilege. See *Rudnick v. Superior Court*, 11 Cal.3d 924, 933 n.13, P.2d , Cal. Rptr. (1974).

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 exemption).

The Rudnick case was an action against a drug manufacturer where the plaintiff sought to discover from the defendant all its records of reports of adverse effects of the drug on other users. The footnote referred to in the revised Comment reads as follows:

13. Because the record indicates sporadic and unclear concern by the parties as to the discoverability of patients' names in the context of the physician-patient privilege, we note the following for the guidance of the trial court should it determine to exercise its discretion to protect an absentee holder of the privilege. "The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments." (City & County of S.F. v. Superior Court (1951) 37 Cal.2d 227, 232 [231 P.2d 26, 25 A.L.R.2d 1418].) Therefore if the disclosure of the patient's name reveals nothing of any communication concerning the patient's ailments, disclosure of the patient's name does not violate the privilege. (Ascherman v. Superior Court (1967) 254 Cal. App.2d 506 [62 Cal. Rptr. 547]. If, however, disclosure of the patient's name inevitably in the context of such disclosure reveals the confidential information, namely the ailments, then such disclosure violates the privilege. (Marcus v. Superior Court (1971) 18 Cal. App.3d 22 [95 Cal. Rptr. 545]; Costa v. Regents of the Univ. of California (1953) 116 Cal. App.2d 445, 463 [254 P.2d 85].) Conversely if the disclosure reveals the ailments but not the patient's identity, then such disclosure would appear not to violate the privilege.

Note that Mr. Merzon (Exhibit IV) suggests that the "party to the proceeding" limitation be omitted. He also suggests something along the lines of the staff suggested revision to the Comment, although he would add this to the text of the statute. We recommend that the statute not use the language he suggests since phrasing the proposed section in this way would create ambiguity in all the other exceptions which do not contain the "all or a portion of the communication" language he suggests. We think the reference to the Rudnick case is sufficient to deal with the matter.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



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

TELEPHONE
(213) 874-1234

August 30, 1974

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

I am writing to indicate my approval of the suggested amendment to Section 999 of the Evidence Code to provide an exception for the physician-patient privilege for relevant communications concerning the condition of a patient who is a party to the action where good cause for disclosure is shown to the trial court. The requirement of good cause should be a welcome addition in the eyes of those who dislike the concept of a fishing expedition of discovery as to a party's disclosures to his physician when such disclosures are seldom relevant to any issue in the case but, at the same time, provide a means of producing relevant communications when a party has not tendered an issue of his medical condition in the case.

What has happened to the proposed amendment to Sections 1561 and 1562 of the Evidence Code to bridge the gap between those sections and Section 1271? I certainly hope that you do not drop the proposals to amend these sections.

Sincerely yours

A handwritten signature in dark ink, appearing to read "Bernard S. Jefferson".

Bernard S. Jefferson

BSJ:ks

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Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear John:

I have read the draft of the Commission's tentative recommendation relating to a "Good Cause" Exception to the Physician-Patient Privilege. It seems to me that the tentative recommendation represents a very good resolution of the conflicting interests which exist with respect to the problem.

While I am writing I would also like to express my best wishes to you.

Sincerely,

Richard H. Wolford

Richard H. Wolford

RHW:ndb

Memo 74-56

EXHIBIT III

OFFICE OF
CITY ATTORNEY
CITY HALL
LOS ANGELES, CALIFORNIA 90012



BURT PINES
CITY ATTORNEY

August 27, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Gentlemen:

Your recent tentative recommendation relating to the "Good Cause" to the Physician-Patient Privilege has been studied by those in our office most likely to be concerned with such a revision. This is to advise you that although we have rarely seen this privilege used, it does seem that the proposed amendment would permit a physician to be more objective in his testimony and for this reason the amendment would be helpful.

Very truly yours,

BURT PINES, City Attorney

By

James A. Doherty
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August 8, 1974

John H. DeMouilly
California Law Revision Commission
School of Law
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Re: Tentative recommendation regarding good cause exception
to the physician/patient privilege

Dear Mr. DeMouilly:

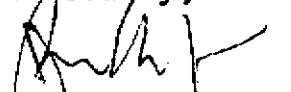
I have reviewed the tentative recommendation above
referenced and have the following comments.

As a general matter, I think it is a good idea to "loosen up" the privilege so long as appropriate discretion is left with the court to weigh the interests of protection vs. the interests of disclosure. I think, however, that the Commission might consider eliminating the "party to the proceeding" requirement of the proposed 999 exception. If good cause otherwise exists, why should the exception only apply to a party to the proceeding. Certainly the existing section does not limit the exception. Additionally, it might invite confusion regarding who is a "party" and what is a "proceeding." I feel that as long as good cause is required, the privilege ought to give way regardless of the patient's connection to the litigation.

Also, so as to make it clear that the court can protect part of a communication and permit disclosure of selected relevant portions if good cause is otherwise demonstrated, I would suggest that an appropriate revision be made.

Both my comments, if accepted by the Commission, could be accommodated by the following revision: "999. There is no privilege under this article as to so much of a communication as is relevant to an issue concerning the condition of a patient where good cause for the disclosure of all or a portion of the communication is shown to the court."

Sincerely,



JAMES B. MERZON

JBM:ljt

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE "GOOD CAUSE" EXCEPTION TO THE PHYSICIAN-PATIENT PRIVILEGE July 1974

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 September 9, 1974.

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 see it after it is in effect.

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."¹ 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."²

Many legal writers who have analyzed the origin and application of the physician-patient privilege find serious fault with it;³ McCormick⁴ and Wigmore⁵ recommend that it be totally abandoned. The Commission, however, believes that the privilege serves a desirable purpose in protecting the privacy of nonparties to an action (such as, for example, in malpractice actions⁶) and in curbing "fishing expeditions" into a party's medical history.

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1. See definitions of "patient" (Evid. Code § 991) and "confidential communication between patient and physician" (Evid. Code § 992).
 2. Evid. Code § 991 (defining "patient").
 3. See, e.g., writers cited in McCormick, Evidence 235 n.35 (2d ed. 1972).
 4. McCormick, Evidence § 105 at 228 (2d ed. 1972).
 5. 8 Wigmore, Evidence § 2380a at 832 (McNaughton rev. 1961).
 6. 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).

The most significant criticism of the privilege is that it allows the "suppression of useful truth."⁷ In California, however, there are many exceptions to the privilege⁸ which prevent its exercise in most of the situations which have outraged the critics.⁹ Nevertheless, situations may still arise where the interest in finding the truth outweighs any

7. 8 Wigmore, Evidence § 2380a at 831 (McNaughton rev. 1961).

8. See Evid. Code §§ 996 (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).

9. 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.

legitimate interest in preventing disclosure of communications between patient and physician.¹⁰ 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.¹¹

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 999.¹² 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.

10. 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).

11. Similar exceptions based on judicial discretion are provided in N.C. Gen. Stat. § 3-53 (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").

12. 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.

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).