#63.80 9/26/77

Memorandum 77-59

Subject: Study 63.80 - Evidence (Psychotherapist-Patient Privilege)

Background

In July, the Commission distributed for comment its tentative recommendation relating to the psychotherapist-patient privilege. A copy of the tentative recommendation is attached to this memorandum.

The tentative recommendation:

(1) Expands the scope of the privilege to cover patients of (a) psychologists licensed or certified in another state or nation, (b) licensed educational psychologists, and (c) psychiatric social workers.

(2) Makes clear that family and group therapy are included within the privilege.

(3) Repeals the exception for "criminal proceedings" (the application of which under existing law depends on the type of psychotherapist making or receiving the confidential communication).

(4) Makes technical revisions in the provisions relating to professional corporations.

We have received a number of letters commenting on the tentative recommendation. These are attached as exhibits to this memorandum. In addition, Dr. Arthur M. Bodin sent us a copy of the tentative recommendation on which were marked numerous suggested editorial and substantive revisions. We will note the significant ones at the appropriate place in this memorandum. Dr. Bodin also talked to the Executive Secretary for more than an hour about the tentative recommendation and other changes that might be made in the psychotherapist-patient privilege.

The purpose of this memorandum is to analyze the comments and other materials received concerning the tentative recommendation with the objective of making any necessary changes in the recommendation so it can be printed and submitted to the Legislature.

General Reaction

The tentative recommendation was approved by all persons who commented on it, but many of the persons submitting comments suggested additional revisions that would strengthen the privilege. Robert Siemer (Legal Counsel, Memorial Hospital Medical Center, Long Beach)

commented: "No criticisms. Reviewed and approved." Dr. Arthur M. Bodin called the Executive Secretary to advise that he approved of the tentative recommendation although he suggested some changes in language and believes that there are a number of other problems that should be considered. However, he indicated that (with one exception noted later) he felt that the reforms that would be made by the tentative recommendation were so important that they should not be jeopardized by including additional changes in existing law that might generate controversy. The other comments approving the tentative recommendation are attached to this memorandum and are not repeated at this point.

Herman Selvin (Exhibit 10) finds "nothing substantively wrong with the proposed revision" but he is concerned about the numerous cross-references over to other sections. Both the definition of psychotherapist (Section 1010) and the new section (Section 1010.5) relating to professional corporations contain many cross-references over to other statutory provisions, but this cannot be avoided. As Mr. Selvin notes, the Commission's staff will have to be alert to amendments to the statutes which are referred to so that appropriate conforming amendments can be made in Sections 1010 and 1010.5 if the provisions in the other statute are later amended and necessary conforming amendments are not made in Sections 1010 and 1010.5 at the same time.

Preliminary Part

We will, of course, conform the preliminary part of the recommendation to any revisions made in the proposed legislation. There were, however, several objections made to language used in the preliminary part. These are discussed below.

Exhibit 7 (Melchior) objects to the suggestion in the text of the preliminary part that psychiatrists serve the rich or upper middle class, whereas psychiatric social works draw their patients from the poor and lower middle class. He points out that many poor patients have access to Medi-Cal procedures, which favor physicians over others as medical service providers. The staff believes that this objection can be met by revising two portions of the preliminary part (revisions shown in strikeout and underscore):

(1) First complete sentence on page 4 of tentative recommendation, revise to read: "By excluding psychiatric social workers, the existing

privilege often works to ~~protect the rich and~~ deny the ~~poor~~ privilege to those of limited means who ~~must~~ rely on psychiatric social workers, not psychiatrists, for their psychotherapeutic aid."

(2) First sentence of third paragraph on page 6 of tentative recommendation, revise to read: "The major effect of Section 1028 is to deny the privilege to ~~the poor and lower middle class,~~ those of limited means who ~~must utilize~~ consult clinical social workers and family counselors, while preserving the privilege for precisely the same types of ~~communications~~ consultations by ~~the upper middle class and the rich,~~ those who can afford psychiatrists and psychologists.

Melchior (Exhibit 7) also objects to the last sentence of footnote 6 of the tentative recommendation, which the staff proposes be revised to read: "The Commission has consulted the proposed rules and notes ~~which reflect the most recent thinking in the field.~~ in preparing this recommendation.

Evidence Code § 1010 (amended) (page 8)

General reaction. The revisions proposed by the Commission in Section 1010 (defining "psychotherapist") were generally approved by the persons commenting on the tentative recommendation. However, a number of persons suggested further expansion of the definition of "psychotherapist."

Subdivision (a). Dr. Grossman (Exhibit 6) suggested that subdivision (a) be expanded to cover all medical doctors. This suggestion has previously been considered by the Commission and was rejected after much discussion.

Subdivision (b). Dr. Bodin made a number of suggestions. We will note his suggestions, but there is one that he considers important and urges be included in the recommendation. (He appreciates that it may not be desirable to attempt to deal with the other suggestions in the legislative proposal now being drafted.)

The one addition to the recommended legislation urged by Dr. Bodin deals with psychologists employed by nonprofit community agencies. Exhibit 11 sets out a suggested addition to the preliminary portion of the recommendation and proposed revision of subdivision (b) of Section 1010. The staff recommends that this be incorporated into the recommendation.

Dr. Bodin also notes (as did the Commission when it prepared the tentative recommendation) that the protection against a person fraudulently representing himself to be a psychotherapist is limited to medical doctors and does not extend to psychologists and other psychotherapists listed in Section 1010. The staff recommends that no change be made in the recommendation.

Expansion of definition generally. Peter D. Bogart (Exhibit 2) recommends that the definition of psychotherapist be expanded to include anyone engaged in any type of counseling, social work, or charitable work in any state or nation. There is some merit to his objection that some unprotected communications--such as a communication to a school nurse--perhaps should be protected; but, in view of the past history of the Commission's efforts to expand the scope of the privilege, it is the staff's view that the present draft goes as far as it should go at this time. Exhibit 1 (Rothman) apparently approves the recommendation, stating: "We urge that the Evidence Code provide for the broadest possible confidentiality privilege to be granted to each of the licensed therapist/patient situations, in order to fully implement the legislative intent to grant the patient the widest freedom of choice in the selection of therapists."

Psychological assistants and trainees. Dr. Bodin is concerned that the presence of a psychological assistant or trainee at a therapy session, where the presence is for training purposes, may result in loss of the privilege. A communication remains confidential under Section 1012 if made in confidence "by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted." The staff believes that existing law is unclear whether the presence of the "trainee" is the presence of a third person other than one permitted by Section 1012. The same problem exists in the case of the physician-patient privilege since a "trainee" may be present at the time the patient makes the communication. The staff believes that a clarifying provision should be added to Section 912 of the Evidence Code to indicate in substance that the presence of

an intern or trainee does not make a communication to a physician or psychotherapist not confidential, or amount to a waiver of the privilege, if such presence is a part of the intern's or trainee's educational program. We do not recommend that this change be made in the recommendation to be submitted to the 1978 Legislature; it would be an appropriate matter to consider in our overall review of the experience under the Evidence Code.

Nurses, clerks, secretaries, and record keepers. Several writers are concerned that the fact that nurses, secretaries, clerks, and record keepers have access to confidential records will result in the loss of the privilege. This is not true. Without presenting an extended discussion of the point, it is clear from the Comments to various sections of the Evidence Code privilege sections that these are persons to whom (under Section 1012) "disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted." See the Comments to Sections 912(d) and 952. Note also that the privilege protects against disclosure by eavesdroppers and other wrongful interceptors of confidential communications. See the Comment to Section 954 (lawyer-client privilege).

Psychiatric social workers. The addition of psychiatric social workers as psychotherapists for the purposes of the psychotherapist-patient privilege was generally approved. However, the staff and Dr. Bodin believe that the recommended provision--subdivision (g) of Section 1010 (pages 8 and 9 of tentative recommendation)--needs redrafting.

The staff suggests that subdivision (g) be split into three subdivisions to read:

> (g) A state employee serving as a psychiatric social worker in a mental health facility of the State of California, while engaged in applied psychotherapy of a nonmedical nature.
>
> (h) A public employee having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a city or county mental health facility operated as a part of the approved county Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.
>
> (i) A person having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a mental health facility operated under contract with a city or county as part of the approved county

> Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.

To conform to this revision, the following should be substituted for the last sentence of the Comment to Section 1010:

> Subdivisions (h) and (i) will bring within the privilege those psychiatric social workers who work in mental health facilities that have been approved as a part of the county Short-Doyle Plan and by the State Department of Health for funding under the Short-Doyle program. See Welf. & Inst. Code §§ 5703.1, 5705. See also Welf. & Inst. Code § 5751 (Director of Health to establish standards of education and experience for professional, administrative, and technical personnel employed in mental health services).

The present draft of the tentative recommendation uses as a test whether the mental health provider is entitled to bill Medi-Cal for his or her services. Physicians and licensed clinical psychologists are recognized "providers" under Medi-Cal while psychiatric social workers are not. However, some facilites that employ psychiatric social workers are entitled to bill Medi-Cal but others cannot. The revision eliminates this problem by abandoning the Medi-Cal billing authorization authority as a test and substituting the test whether the facility is approved for funding (90% state; 10% county) under the Short-Doyle Plan.

Dr. Bodin suggested that we use the test set out in Section 2909 of the Business and Professions Code--a nonprofit community agency that receives a minimum of 25 percent of its financial support from federal, state, and local governmental sources. This is a simpler test, but it does not provide the protection provided by the staff suggestion--the requirement of inclusion in the approved county Short-Doyle Plan, which plan is initially approved by the county board of supervisors, reviewed by the local mental health advisory board, and then reviewed by the State Department of Health.

Evidence Code § 1010.5 (new) (pages 9-10)

No objection was made to new Section 1010.5, relating to professional corporations.

We will follow the Legislature's actions concerning Senate Bill 629. This bill will permit a psychologist to practice psychology in the name of a medical corporation and a medical doctor to practice medicine

in the name of a psychological corporation. The latest version of the bill we have seen does not require any revision of Section 1010.5.

Evidence Code § 1012 (amended) (pages 10-11)

This section met with general approval. See Exhibit 6 (Dr. Grossman), pointing out the need for the revision of Section 1012 as proposed.

Dr. Bodin suggests that we not use the term "group therapy" to cover "family therapy" but refer to "group and family therapy" in the text of the preliminary part and in the Comment. We plan to make this revision when we revise the recommendation.

Several writers (Exhibits 6 and 7) express concern that one patient in group therapy may waive the privilege and thus make the communications of all patients in the group therapy not privileged. There is no problem if the other patient is present to claim the privilege. Subdivision (b) of Section 912 provides in part: "Where two or more persons are joint holders of a privilege provided by Section . . . 1014 (psychotherapist-patient privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege." This provision was intended to cover the case where two persons jointly consult the psychotherapist (as in family therapy) and to permit either to protect his or her communications from disclosure even though the other patient waives the privilege. The patient who waived the privilege can be prevented from disclosing the communication made by the patient who did not waive the privilege. It appears to the staff that the law is clear, but we would add the following sentence to the Comment to Section 1012: "The waiver of the privilege by one of the patients does not affect the right of any other patient in group or family therapy to claim the privilege with respect to that patient's confidential communications. See Evid. Code § 912(b)."

The result is not clear where the psychotherapist seeks to claim the privilege for the other patients who are not present to claim the privilege. See discussion under Section 1014.

Evidence Code § 1014 (amended) (pages 11-12)

There were no objections to the revision of this section. However, Exhibit 8 (Dr. Lifschutz) strongly urges that the psychotherapist be granted an independent privilege--a privilege that the psychotherapist

could claim even though the patient had waived the privilege. He draws an analogy to the clergyman-penitent privilege--the clergyman is granted an independent privilege which can be claimed by the clergyman even though the penitent has waived the separate privilege granted to the penitent. The staff does not believe this is a good analogy. The clergyman has a unique privilege based on historical tradition which was not disturbed when the Evidence Code was drafted. No such historical tradition exists with respect to the other professional privileges. It may be that a case can be made for granting the psychotherapist an independent privilege, but the staff does not believe that such a privilege should be included in the recommendation submitted to the 1978 Legislature. If the Commission desires, this is a matter that can be considered as a part of the overall review of experience under the Evidence Code. Exhibit 7 indicates that interested physicians would be pleased to present their views on this matter.

The persons expressing concern about a waiver of the privilege in a group or family therapy situation may be concerned about the right of the psychotherapist to claim the privilege. As previously noted, each patient in group or family therapy is protected by the privilege, which the patient has a right to claim, even though another patient has waived the privilege. However, it is not clear just how subdivision (c) of Section 1014 (claim by psychotherapist) will operate in the group therapy situation. Assume that there are five patients in a group therapy session. The psychiatrist is subsequently called to testify and one of the patients instructs him to disclose all of the communications made at the session. None of the other patients is present to claim the privilege. How should the court rule if the psychotherapist claims the privilege for the absent patients who have not waived the privilege? This is a general problem that exists with respect to the lawyer-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege. The staff believes that the problem is one that merits study and a clarifying amendment, but we do not believe that this amendment should be proposed in the recommendation to the 1978 Legislature. Instead, we suggest that this matter be given a priority for consideration when the Commission reviews the experience under the Evidence Code.

Evidence Code § 1028 (repealed) (page 12)

The repeal of Section 1028--which negates the privilege in a criminal proceeding if the psychotherapist is not a medical doctor or licensed psychologist--was approved by all commentators. Several (Exhibits 2 and 6) specifically approved this repeal. We received no comments from law enforcement agencies at whose instance this section originally was enacted.

Other Suggestions Not Relating to Tentative Recommendation

A number of other suggestions were made that do not relate to the tentative recommendation itself but relate to other revisions in the psychotherapist-patient privilege. These are discussed below.

Patient-litigant exception. A significant exception to the psychotherapist-patient privilege is the so-called patient-litigant exception. This exception is provided by Section 1016, which provides:

> 1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:
>
> (a) The patient;
>
> (b) Any party claiming through or under the patient;
>
> (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
>
> (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

In effect, the patient-litigant exception provides that the privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. The reason for the exception is stated in the Comment to Section 996 (physician-patient exception): "If the patient himself tenders the issue of his condition, he should not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege."

The Commission has reviewed the patient-litigant exception on prior occasions in light of reported instances where discovery of confidential communications to a psychotherapist was sought under circumstances where the value of the evidence sought was remote and it was claimed that the discovery proceeding was an effort to force the plaintiff to abandon his claim for damages. Dr. Grossman (Exhibit 6) reports that the 1970 case

to which he refers in his letter has not solved this problem as the Commission believed it would. See Exhibit 6 (gold pages) on pages 2-3. Exhibit 7 (Melchior) states: "Our greatest concern is with a matter which the Commission has not addressed, i.e., the patient-litigant exception." He reports that his group would be pleased to send a representative delegation of clinicians to discuss the problem in detail. The staff believes that this problem is one that should be reviewed by the Commission, but we recommend against attempting to deal with it in the recommendation to be submitted to the 1978 Legislature. Instead, we suggest that the staff begin to collect material and information concerning the problem with a view to preparing a comprehensive memorandum for consideration when the Commission begins its overall study of the experience under the Evidence Code. We would give this matter priority because we have received other communications over the years concerning this problem, and we believe that it merits study in the reasonably near future.

Waiver by submission of insurance claim. Another problem that has been the subject of several communications to the Commission over the years is one identified by Dr. Grossman (Exhibit 6)--waiver of privilege by submission of insurance claim. This too is a matter that should be given some priority in the Commission's study of experience under the Evidence Code. The matter is not urgent in view of the case referred to in Dr. Grossman's letter, but his suggestion that the holding in the case be codified may have merit.

Insurance payments for treatments by therapists. Exhibit 1 (Rothman) suggests that the Insurance Code be amended to require that insurance companies honor claims for therapy services when they are provided by any licensed therapist. This would be beyond the scope of the recommendation and is not within the scope of any authorized study.

Repeal exceptions to privilege. Mr. Bogart (Exhibit 2) suggests that Evidence Code Sections 1024-1027 (exceptions to the psychotherapist-patient privilege) be repealed. These are the exceptions for (1) patient dangerous to himself or others, (2) proceedings to establish competence, (3) public reports open to public inspection, and (4) child under 16 victim of crime. There is little possibility the the Legislature could be persuaded to repeal these sections even if the Commission concluded that their repeal was desirable.

Application of privilege to all proceedings. Mr. Bogart (Exhibit 2) suggests that the privilege be made applicable to all proceedings in court and before any administrative or regulatory agency. Section 910 provides that the privileges division applies to all "proceedings," and "proceeding" is defined in Section 901 to mean "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." Accordingly, the law now is as Mr. Bogart suggests it should be.

Repeal the Tarasoff rule. In Tarasoff v. Regents of the University of California, 17 Cal.3d 425 (1976), a psychiatrist was held liable for damages for failure to warn a third person of the potential danger of injury from the patient. Several commentators suggest that the Tarasoff rule be repealed. See Exhibit 4 (Fadem), Exhibit 7 (Melchior). This would be an appropriate matter for consideration by the Joint Legislative Committee on Tort Liability. Should the staff forward the relevant portions of the letters to Assemblyman Knox for his consideration in connection with that study?

Respectfully submitted,

John H. DeMoully
Executive Secretary

63.80

EXHIBIT 1

LAW OFFICES
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July 7, 1977

John H. De Moully,
Executive Secretary,
California Law Revision
Commission,
Stanford Law School,
Stanford, California 94305.

Re: Confidentiality for Patient/
Therapist Situation

Dear Mr. De Moully:

We urge that the Evidence Code provide for the broadest possible confidentiality privilege to be granted to each of the licensed therapist/patient situations, in order to fully implement the legislative intent to grant to the patient the widest freedom of choice in the selection of therapists.

We further urge that the Insurance Code (Section 10176) be amended to require insurance companies to honor claims for therapy services when they are provided for by any licensed therapist, for the same reasons. This can be accomplished by requiring that the Business and Profession Code, Section 2948, insofar as the Insurance Code is concerned, shall apply to all licensed therapists, whether they be social workers, or other licensed counselors.

Consumer-patients should have the freest choice of skills available to them for health services and as a means of helping to control health care costs.

Very truly yours,

VOGEL & ROTHMAN

Barney Rothman

BARNEY ROTHMAN

BR:pc

Peter D. Bogart

ATTORNEY AND COUNSELOR AT LAW

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July 11, 1977

California Law Revision Commission
Stanford Law School
Stanford CA 94305

Re: Psychotherapist-Patient Privilege.

Gentlemen:

Two comments relating to your tentative recommendation for revision of the psychotherapist-patient privilege.

1. The privilege, as presently constituted is a trap. A trap for the unwary, made worse by the fact that virtually all patients are emotionally less stable than the average person.

The trap is Evidence Code §1024-1027, which makes the privilege inapplicable if the patient is actually or potentially dangerous to any criminal proceeding and to crimes involving children. This is a contradiction in terms - if the perpetrator of an act is not a "danger" to himself or to others, there is no room for criminal proceedings in the first place. Thus, to all intents and purposes, the psychotherapist-patient privilege does not cover any criminal proceeding, notwithstanding the restrictive language, while §1024 appears to apply even to non-criminal juvenile proceedings.

While the tentative recommendation recognizes the inequity of §1028, the problem goes much deeper. I cannot imagine any psychotherapist who invites confidences cautioning the patient that "all confidences will be used in any criminal proceeding" - and unless such a Miranda-type warning is given, and clearly understood, the patient is viciously entrapped into "confiding", perhaps allowing or suffering hypnotic or truth-serum treatment. Once the already nervous, perhaps unstable, patient finds himself in criminal court and facing his purportedly "confidential" statements, the trap is sprung. Every practitioner has had numerous experiences with false "confessions" to the psychotherapist - plain bragging, attempts to gain sympathy, psychotic lying. The number of false convictions will indubitably increase considerably.

Moreover, it is seldom conceded that the horrendous rate of recidivists is largely attributable to police chicanery. We all have an ardent desire to "get even" for real or imaginary insults or trickery. Brooding behind bars certainly reinforces this basic human desire. Unless and until we are ready to shoot or lobotomise all persons convicted (rightly or wrongfully) of crime, the person entrapped or relying on false promises will inevitably seek to "get even" - and once there is a grudge against the psychotherapist

PDB:ss

who will be able to reach the hurt, embittered and vengeance-seeking ex - convict?

Society that can only "protect" itself by entrapping the guilty and innocent alike, is not worth living in.

I strongly advocate repeal of Sections 1024-1027 of the Evidence Code, and to make the psychotherapist privilege, like the more hallowed common-law privileges, applicable to all proceedings in court and before any administrative or regulatory agency.

2. The definitions of Ev. C. § 1010 are far too restrictive. In my opinion, the requirement of "licensing" is superfluous altogether, and the proposed additions of one who "is serving" as a psychiatric social worker omits one who has changed jobs since receiving the confidences. Should confidences reposed in a person who gives up his license (or is transferred by the State into a non-licensed position) be able to "spill it all" with impunity?

How is the patient to know whether his confidant is a "psychiatric social worker" or an ordinary "social worker" - inviting confidences? How is the child to know whether he speaks to the school psychologist or the school nurse or counselor? What is a "clinical social worker" as opposed to a county welfare "social worker" - and when is the clinical social worker "engaged in applied psychotherapy of a non-medical nature" (Ev. C. 1010 (c).) - and when is he engaged in "merely" going through the patient's past history for record-keeping purposes as opposed to therapeutic purposes?

To make the privilege meaningful at all - and especially to avoid making it a trap for the impecunious, Section 1010 should be amended to include all persons who come in contact with the patient, directly and indirectly - including the nurses, secretaries, typists and recordkeepers who may gain access to the patient's files in any manner, as follows:

1010. As used in this article , "psychotherapist" means:

Any person authorized, or reasonably believed by the patient to be authorized, to practice medicine, psychiatry, psychology, clinical social work, marriage counseling, family counseling, child counseling, psychiatric social work, social work and charitable work in any state or nation, and all nurses, secretaries, clerks and record keepers having access to any records maintained by such persons.

I submit that the present "trap" is worse than no privilege at all. Either we tell the "patient" that he speaks or allows to slip confidences at his peril, or we protect him with an ironclad privilege. In the first case, a patient is taught self-reliance, which is often preferable to the crutch of the social worker or psychiatrist.

The present system degrades the profession and degrades society; it makes not only the police but our courts into gaping traps for the unweary, who are taught disrespect for the law far too often anyway.

Sincerely yours,

PDB:aa

PETER D. BOGART

Memo 77-59 EXHIBIT 3

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

July 12, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

Re: REVISION OF PSYCHOTHERAPIST PRIVILEGE

While I am not convinced that psychotherapy has any benefits for society that justify the granting of the privilege to clients of psychotherapists, if the privilege is to be granted it should be available to persons without respect to social class. On this basis, I applaud the proposed changes in the Evidence Code.

Very truly yours,

Kenneth W. Graham, Jr.
Professor of Law

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Memo 77-59

EXHIBIT 4

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July 19, 1977

John De Moully, Esq.
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Re: Psychotherapist - Patient Privilege

Dear John:

In reviewing your tentative recommendation of June, 1977, I note the silence in regard to the Tarasoff vs. Regents of the University of California opinion, (1976), 17 C 3d 425.

From what awareness I have of the mode of treatment, its success is wholly dependent on the utmost candor of the patient.

As patients become aware of Tarasoff and fear possible disclosure by their psychotherapist, my feeling is that patients will hesitate to give full disclosure, thereby adversely affecting the rate of "cure".

It seems to me that the question for the Commission is:

"Will more good be done by

promoting treatment with absolute privilege; or

protecting against the occasional damage preventable by the therapist informing on the patient?"

Considering the state of mental health in the nation, it seems to me that passing up a chance to increase the efficacy of psychotherapy would be unfortunate.

Sincerely,

Jerrold A. Fadem
Fadem, Berger, McIntire & Norton

JAF/sw

WANDA UNDERHILL
2079 Market Street, No. 27
San Francisco, California 94114

Memo 77-59 EXHIBIT 5

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July 23, 1977

To: California Law Revision Commission
From: Wanda Underhill
Re: Revision of the Psychotherapist-Patient Privilege

Will the extension of the Scope of protected Confidential Communications handicap a court or jury in its fact finding efforts?

Privilege - Social Utility V. Social Detriment inherent in suppression of evidence

The human right of Confidentality is rooted in our Constitutions.

1010(b) Extending the privilege to include:
Psychologists licensed in other jurisdictions, licensed educational psychologists ← psychiatric social workers

- Will help to establish uniformity of psychological and social service standards.
- Including the privilege to corporations is a logical extension of the individual privilege.
- Extending the privilege to group and family therapy situations will eliminate any possible narrow construction of language to make a communication not privileged.

The changes in 1028 which make the privilege applicable to other types of therapists in a criminal proceeding will eliminate uneven administration of justice by providing therapists who serve the poor with the privilege.

WANDA UNDERHILL
2079 Market Street, No. 2
San Francisco, California 94114

The equal protection of the privilege in criminal proceedings is extended with the following exceptions; the privilege is denied,

1. Where a child under 16 is the victim of a crime and disclosure would be in the best interest of the child. (1027)

2. Where the patient is dangerous to himself or herself or to others.

And, an additional safeguard, the therapist may be personally liable for failure to exercise due care to disclose the communication where disclosure is essential to avert danger to others.

The extension of the privilege with safeguards is an excellent improvement in this area of the law. Better mental health care to the poor will probably be the result.

Wanda Underhill
July 23, 1977

Memo 77-59 EXHIBIT 6

6.3.80

MAURICE GROSSMAN, M. D.
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11 August 1977

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

Dear Mr. DeMoully:

It has just come to my attention that the Commission is preparing tentative recommendations for the revision of the Psychotherapist-Patient Privilege. It is most encouraging that the Commission's approach is to further the protection of patients within the framework of the law, based on experiences in the courts reflected in the literature.

It would be difficult to recall, but your files would probably contain my letter of July 21, 1973 on the subject of waivers of privilege. At that time the Commission was concerned with the general problem of diverse court decisions on waivers. I suggested consideration of a growing fact of life that most psychotherapy is covered by health insurance. Increasingly, insurance companies were demanding more and more substantial information before making payment. I considered this would be a breeding ground for attorneys to claim the privilege had been waived by prior disclosure. In your letter of September 26, 1973 you explained why it could not be considered at the time.

I have been alerted since that the issue was raised in the Superior Court of Yolo County in Blair vs. Blue Cross of Northern California. That court ruled there was no privilege,- in this case physician-patient privilege,- because of the disclosure to the insurance company. This was reversed by the Court of the Third Appellate District (3 Civil 15763, Super.Ct.No.32612, filed September 10, 1976) on the basis that information to the insurance company in today's climate is an integral part of the treatment. This recognition of a current fact truly needs codification by statute. Otherwise, in some courts, the whole protection of the psychotherapist-patient privilege ceases to exist for 90% of the patients.

While I am at it, may I comment on other aspects of experience with the rule.

Psychotherapist Definition (1010)

You have indicated a detailed study of Rule 504 of the proposed Federal Rules of Evidence that was dropped with the other privileges. The Supreme Court Advisory Committee recognized that nearly all physicians deal with the emotional problems of their patients as well as with their somatic complaints. Not infrequently only when their patients finally disclose upsetting details of their lives, dothey discover the real roots of their illness and clarify the needed treatment approach. To protect these psychotherapeutic functions Rule 504 declared all physicians licensed to practice were included. It did not limit it to psychiatrists. The rest of the rule and California's codes would limit it to communications in the emotional realm, whether as presenting symptoms or liable to cause emotional illness if disclosed.

Group and Family Therapy

Your position indicates your full awareness of the gap in protection of this growing body of patients. At the recent national meeting of the Group Therapy Association one panel addressed itself to the concern of subpoenas being issued to members of a group in therapy together. I know of one situation where one patient, acting out neurotic impulses reported significant material about another patient to a public office to create trouble for the latter patient. I would recommend you consider wording that indicates the communication to a third party that voids the privilege must be as a result of the group decision. If one patient makes such disclosure voluntarily about him or herself, there would be no privilege only in respect to information limited exclusively to that patient's communication about him or herself.

The problem of one patient demanding a waiver pf privilege when others in the group object should be covered in a legally binding agreement, prior to entering the group, that the patient waives such rights as a condition of accepting the group therapy.

This applies to family therapy also. The Illinois statutes exempting divorce and child custody cases from patient-litigant waiver of the privilege was designed to avoid the above complications and facilitate counselling and therapy to try to preserve the family.

The Patient-Litigant Exception (1016)

In re Lifschutz (1970,2Cal.3d. 415, 467 P.2d 557, 85 Cal. Rptr.829) the California Supreme Court affirmed the rights in the psychotherapist-patient privilege were firmly based on the U.S. and California Constitutions. In compromising with the legal tradition (not constitutional law) that the litigant has waived his privilege, they decreed disclosure must be limited and relevant to the issue in court.

Apart from the reality that 1016 places a patient in the position of foregoing a just claim and access to legal redress or sacrificing his health and well-being, subsequent efforts to rely on Lifschutz turned to a farce. In the absence of guidlines for applying the limitation decreed, in the cases of Dr. James Robertson and George Caesar, the appellate courts demanded full disclosure. Unaxplained was the acceptance of Robertson's case for a Supreme Court hearing (mooted), but a refusal of Caesar's. The latter tried to answer all questions but refused to give information that in his judgement would destroy his patient's mental health. He appealed as far as the U.S. Supreme Court. When it declined to hear his appeal he elected to go to jail rather than harm his patient.

In the appeal to the U.S. Supreme Court, joined by the American Psychiatric Association and other national groups concerned about treatment, emphasis was placed on Justice Shirley Hufstedler's dissent in the Ninth Circuit Court of Appeals decision (Caesar vs. Mountanos No. 74-2271, September 13, '76). Hufstedler, J. recognized the problem and delineated conditions whereby a court could get the needed information without violating the privilege unduly. In fact she recommended wording for amending Section 1016.

In previous presentations I have called attention to North Carolina law and Public Law 92-255, Section 408 (b)(2)(C) where analogous needs to protect confidentiality made exception for lawful, but limited disclosure. In testi-

mony before the U.S. Senate on Rule 504 I went into greater detail of the background for d monstrating communications during psychotherapy are largely unreliable for purposes of evidence (Hearings Comm. on Judiciary, 93rd 2d H.R. 5463, June 4-5,1974,pp.280-298).

In Criminal Case (1028)

The position of the Commission is the only logical one from the standpoint of experience with the problems seen constantly by social workers and school counsellors. From the experience of psychiatrists delving into the past of adults, we frequently encounter this story. While in school, they would have been involved in gang activity about which they began to feel guilty. They couldn't discuss it openly with their parents out of fear. They couldn't break away from their peer group. Only their confidence and trust in a school teacher, or counsellor led them to unburden themselves of their problem and fear. Only the sympathetic hearing and advice they received made the difference from leaving a way of crime and becoming stable individuals. Usually other problems and the fear of how close they had been to the brink brought them to need treatment later. In contrast, onehears tales of youngsters who were rebuffed or given a moralizing lecture that produced the opposite effect.

Obviously, a change in the law will not turn unfeeling counsellors into warm understanding friends. But the knowledge that the necessary confidences will be used against them will prevent youngsters from seeking out the help they want.

In social service, many marginal families have problems with drugs and perhaps theft. They are not going to truly open up for constructive counselling or therapy if they know their records can be used by law enforcement agencies. Too many D.A.'s are not above using such information to get convictions regardless of the harm they might be perpetuating into the next generation.

The opportunity for presenting these views is truly appreciated.

Respectfully yours,

Maurice Grossman, M.D.

Clinical Professor, Psychiatry
Stanford University School of Medicine

Formerly Chairman, Task Force on Confidentiality
as Related to Third Parties
American Psychiatric Association

63.80

Memo 77-59 EXHIBIT 7

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August 12, 1977

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

Ladies and Gentlemen:

The following comments relate to the Law Revision Commission's tentative recommendation relating to revision of the psychotherapist-patient privilege, dated June, 1977. The comments are made on my own behalf as an attorney long interested in the area of psychotherapy, with particular attention to privilege issues, and also on behalf of a group of leading psychiatrists in Northern California. Earlier this week, a meeting was arranged in which these psychiatrists, including the president, a past president, and another officer of the Northern California Psychiatric Society, as well as other physicians who have been involved in privilege questions, met with me to discuss the Commission's tentative recommendations and to agree on certain submissions which follow.

It had been our intention to submit these comments on behalf of the Northern California Psychiatric Society, but time did not permit their review by the Council of that society, its governing body; and therefore, these submissions are made on behalf of the individuals mentioned. Persons present at the meeting, in addition to myself, were Drs. Charles B. David (President of NCPS), Reed Brockbank, George R. Caesar, Linn Campbell and Joseph Lifschutz. Drs. Lifschutz and Caesar have, as the Commission may know, served time in jail for contempt of court due to their inability on the grounds of conscience to disclose information about their patients in the course of litigation. These cases were well publicized and are no doubt known to the Commission; both physicians were supported in their efforts by the Northern California Psychiatric Society. See In re Lifschutz, 2 C.3d 415; Caesar v. Mountanos, 542 F.2d 1064.

We commend the Law Revision Commission for its recommendations, and endorse every one of them. We do have certain reservations about the accompanying text, however, as well as further recommendations.

1. It is unfortunate that at several places, the text suggests that psychiatrists serve the rich or upper middle class, whereas social workers draw their patients from the poor and the lower middle class. We believe that such characterizations, which appear at pages 4 and 6 of the tentative recommendation, are based upon misconceptions and not upon knowledge of the actual social structure of the patient populations who are likely to consult either or both social workers or physicians. Without going into excessive detail, it should be sufficient to point out that many poor, lower and lower middle class persons have access to Medi-Cal payment procedures, which in their turn favor physicians over others as medical service providers. Whether or not the Commission may have thought that such characterizations might make the report more palatable to the Legislature as to urging the social workers' inclusion within the psychotherapist class for privilege purposes, the characterization (apart from being a cliche) is wrong and unfair, and suggests a class prejudice which is not true in fact. We would hope that this language could be deleted.

We do not thereby suggest anything other than that the privilege should be extended fully to social workers, as the Commission is recommending.

2. We disagree thoroughly with the suggestion in Footnote 6 that former proposed Federal Rule of Evidence 504, together with its notes, "reflect[ed] the most recent thinking in the field."

It is well known that limitations upon the psychotherapist-patient privilege, written into proposed Federal Rule 504, were strongly attacked by persons and groups interested in psychotherapy, including (we believe) the National Association for Mental Health, the Mental Health Law Center and others. While there were many things wrong with the original proposed Federal Rules of Evidence, causing Congress to refuse to approve them, one of the most controversial matters therein was the attempt by proponents of the Rules to lock all matters of privilege, including psychotherapist-patient privilege, into a rigid form which would not allow for the development of Constitutional perceptions of privacy in this area, as for instance in In re Lifschutz, supra. We believe that it was primarily because of their objections that the ultimately adopted Federal

Rules of Evidence did not include proposed Rule 504, but rather recognized that the matter of privileges is to continue development, at the Federal level, by the courts, under emerging Constitutional standards among other considerations.

It would be a great step backwards for the Law Revision Commission to enshrine the rejected Proposed Rule 504 in any text as an example of progressive "most recent thinking," whereas in fact it was exactly the opposite.

3. We support the concept that group and conjoint therapy should be specifically covered by the privilege, but call your attention to a serious problem that can arise in multi-patient therapy situations, and which has arisen in one specific case in which I participated, which I will describe. The issue concerns waiver by one of the patients over the objections of the other.

Mine was a case in which a psychotherapist was subpoenaed to give testimony in court (not a deposition) about a communication made by the female in a conjoint counseling session held by the therapist with the female and her male partner. The trial involved questions of personal relationships between this female and her partner. The male patient "waived" the privilege in open court whereas the female patient claimed the privilege. The matter at issue concerned alleged admissions by the female about the nonmarital status of the litigants--incidentally, a subject to which many persons other than the therapist had testified.

The court (Judge Kroninger) analogized the situation to the attorney-client relationship, in which as is well understood, waiver by one of several joint clients constitutes a waiver of privilege as to all. In my view that situation is in no way analogous; while the joint clients could not consult counsel professionally in confidence except for a common purpose, and the privilege would fail where the common purpose no longer existed because some of the members of the client group opposed others, the situation in group or conjoint therapy clearly is different. While there is interaction between the several patients, the principal interaction is between each patient (or the patients as a group) and the therapist. The matters of ethical compulsion, role model, expectations of privacy and similar constraints clearly apply separately between each patient and the therapist. In our view, as long as one member of the patient group claims the psythotherapist-patient privilege, the privilege should then be maintained as to all participants.

There may be problems about enforcing the privilege against other patients who are members of a therapy group, although these do not appear insuperable. A privilege is of course also available to prevent testimony by other lay persons such as spouses. But, whether or not the other patients should be precluded from testifying about the group session, the therapist certainly should be. Compelling his testimony much more severely invades a patient's privacy. As previously mentioned, a group patient interacts with the therapist on a level of trust and confidentiality similar to that of patients in individual consultation, and similarly debilitating results, in the medical sense, would follow from a compelled breach of that trust by the clinician.

In the case I cited, there was (as I observed and as her attorney later emphatically confirmed) a very bad psychological result for the patient from the compelled testimony of the therapist, although I am sure that the outcome of the case was in no way affected by the testimony which was clearly cumulative. We think such situations can be avoided, and little of consequence is lost to the fact finding process, by protecting the patient in a group or conjoint setting against "waiver" of privilege by another patient.

4. Our greatest concern is with a matter which the Commission has not addressed, i.e., the patient-litigant exception. This of course was the issue directly involved in the Lifschutz and Caesar cases. Given the language of §1016, doctors who feel that testimony compelled under that section would be medically damaging to patients and thus unethical for them to give, really have no argument to fall back on except the Constitutional one, which is for the present foreclosed in California both in the Federal and State courts under the Caesar and Lifschutz cases. We say "for the present," since we are clearly in an emerging area of Constitutional analysis and since we believe that the observations of Judge Hufstedler, concurring and dissenting in the Caesar case, will ultimately prove compelling.

It would greatly lengthen this letter, were we to attempt to describe for the Commission even a few of the many complex and distressing unreported situations in which §1016 has led to bad therapeutic results, or where the fear of disclosure of private and embarrassing material under §1016 has prevented patients either from seeking necessary treatment or from bringing meritorious litigation. These matters would clearly establish the great importance which a revision of §1016

holds for the well being of thousands of patients, and show that the subject urgently deserves the attention of a deliberative body such as the Law Revision Commission. We would be pleased to send a representative delegation of clinicians to meet with you for a discussion of this subject in depth.

It may be sufficient here, by way of introduction to point out that, leaving to one side the compelling reasons of psychodynamics which--by general psychiatric consensus--require assurance of absolute confidentiality as a means of making psychotherapy effective, the evidentiary fruits of the patient/litigant exception are usually illusory. It is our experience that a treating psychotherapist, simply and precisely because he is functioning as a healer rather than as a detective or diagnostician, often has very little of a factual nature to contribute to a forensic examination. The treating physician deals with "facts" as perceived from time to time by the patient (in addition to many other things, of course), rather than with objective, third party expert facts. It is common that patients misperceive, and thus misrepresent, reality to their therapist. Our experience in watching lawyers conduct deposition examinations of psychotherapists has left us convinced that these two disciplines pass as ships in the night, with attorneys assuming that the physicians are custodians of objective facts which will assist in determining the truth of various contested matters. However, to the physicians the questions are often meaningless or irrelevant, and clearly unmanageable, even if they are disposed to answer rather than to face jail.

Objective material such as etiology, diagnosis and prognosis are readily available to a diagnostician whether or not the patient attempts to mask his condition; and this is an additional reason why §1016 as presently written is thoroughly counterproductive not only from the psychiatric but also from the litigation perspective. We urge you to adopt, at least, the formulation that a treating psychotherapist cannot be examined on any matter concerning treatment in a case where the patient has brought third-party litigation against another in which he has put his emotional condition in issue, unless it is first established to the satisfaction of the court that an independent diagnostic examination of the patient was had and did not produce sufficient material to permit the opposing party to proceed.

5. At least one of our group believes strongly that the psychotherapist should be given an independent privilege, regardless of the desires of the patient, as is the case with

respect to the priest-penitent privilege. Some of the legal arguments for this proposition were made in In re Lifschutz, supra, and not really satisfactorily answered by the court; from the medical viewpoint, there is the additional and critically important element that patients can use waiver as a means of manipulating the therapeutic relationship for medically adverse purposes. This is a matter of medical expertise on which, again, the interested physicians would be pleased to meet with you and present their views.

6. Finally, we consider that there should be legislative repeal of the Tarasoff rule. See Tarasoff v. Regents of the University of California, 17 C.3d 425 (1976). While, strictly speaking, the Tarasoff rule is one of substantive law rather than of evidence, it would appear to be closely related to the subjects under discussion, both because it deals with disclosure of communications and because here, again, the psychodynamics of a third-party warning process are both unproductive to the potential victim and counterproductive as to the patient directly. The psychotherapist already has a privilege to disclose information in such circumstances under Evidence Code §1023, but as the Supreme Court noted in Tarasoff, there is a vast difference between a privilege to disclose and a duty to do so.

The bulk of the arguments against the Tarasoff rule is well presented in the concurring opinion of Justice Mosk and the dissent of Justice Clark, which seem compelling to us. We have had two or three "Tarasoff"-type cases (not litigation but counseling as to whether, how and to whom warnings should be given) since the decision came down, and these--while beyond the scope of this letter to describe--amply demonstrate the impossibility of working within the standards imposed under Tarasoff. Here again, we would be pleased to make appropriate representations directly to the Commission. It seems to us within the scope of its duties for the Commission to propose legislative repeal of Supreme Court decisions where the public interest would require it.

These additional comments are in no way intended to detract from the merits of the proposals in the Commission's draft, which, to repeat, we applaud and endorse.

Very truly yours,

Kurt W. Melchior

KWM:fst
cc: Charles B. David, M.D.
Reed Brockbank, M.D.
George R. Caesar, M.D.
Linn Campbell, M.D.
Joseph Lifschutz, M.D.

Memo 77-59 EXHIBIT 8

63.80

UNIVERSITY OF CALIFORNIA, BERKELEY

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HEALTH AND MEDICAL SCIENCES PROGRAM

ROOM 106 T-7
BERKELEY, CALIFORNIA 94720

August 12, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

This is written in response to your Tentative Recommendation relating to Revision of the Psychotherapist-Patient Privilege. For your information I am a psychoanalyst and psychiatrist and I was the principal figure in a confidentiality problem terminating in the California Supreme Court decision in April 1970, In re: Lifschutz 2 Cal 3d 415.

The need for complete confidentiality in psychotherapy is little understood. It is often equated with medical confidentiality, or the necessary confidentiality of the attorney-client relationship. In fact, the need for psychotherapeutic confidentiality goes beyond the others. The patient's communications are the very essence of the psychotherapeutic process itself. What the patient in psychotherapy ultimately reveals is always beyond what he expected to reveal when he entered treatment, and it is always material of which he was previously actually unconscious. Psychotherapy plumbs beneath conscious mental life to the unconscious motivational forces of illness and behavior. Without the real knowledge that these thoughts, feelings, and attitudes will remain privy to the therapist and patient, therapy cannot occur.

No other evidentiary privilege is as essential to the participants as the psychotherapist-patient privilege. One other privilege, however, is much stronger in California. It is the clergyman-penitent privilege, which grants to both parties an independent right to assert the privilege. I respectfully submit that psychotherapists should have this same right, independent of patients, to assert a privilege to prevent psychotherapeutic contents from being public. No patient when waiving his privilege does so without duress. Great psychological harm must result upon hearing in a courtroom what one has told a psychiatrist as a patient. I know of specific instances where that has, in fact, occurred.

The psychotherapist's independent privilege is not an absolute privilege. I see no objection to a psychiatrist breaking confidentiality in order to protect someone's life, for example.

In a footnote to the clergyman's privilege in the Evidence Code, the Law Revision Commission states that the law should not intrude into the relationship between

clergyman and patient. Rather such matters should be left to the denomination of which the clergyman is a member. I submit that these principles could have no better application than to the psychotherapist-patient relationship.

Yours sincerely,

Joseph E. Lifschutz, M.D.
Clinical Professor
Health and Medical Sciences Program

JEL/jfe

(Dictated but not signed.)

CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION
2365 WESTWOOD BLVD · LOS ANGELES, CALIFORNIA 90064 · (213) 475-6733

Memo 77-59 EXHIBIT 9

August 3, 1977

John Demoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. Demoully:

It was a pleasure talking with you last night. I am enclosing a copy of the Tentative Recommendation relating to Revision of the Psychotherapist-Patient Privilege, marked in red with suggestions I have for the Commission.

I would appreciate receiving eight additional copies for distribution to key psychologists from whom I can request letters of support.

In addition, I would appreciate receiving a list of the Commission members. Under separate cover I shall be sending a letter suggesting a new area for activity by the Commission, namely, generation of new proposals regarding restraining orders.

I shall look forward to receiving a copy of the final Recommendation relating to Revision of the Psychotherapist-Patient Privilege. Thank you.

Sincerely,

[Suggestions contained in marked copy of recommendation are set out in Memo 77-59 and marked copy of recommendation is not reproduced here.]

Arthur M. Bodin, Ph.D.
Past-President

AMB/sl

P.S. A copy of my letter to some leaders of psychology is enclosed.

Affiliated with the American Psychological Association

Past-
PLEASE REPLY TO OFFICE OF THE PRESIDENT:

ARTHUR M. BODIN, Ph.D.
555 MIDDLEFIELD ROAD, PALO ALTO, CALIFORNIA 94301
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Memo 77-59

EXHIBIT 10

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September 20, 1977

IN REPLY PLEASE REFER TO

Dear John:

1. I see nothing substantively wrong with the proposed revision of the psychotherapist-patient privilege; but, I find its format confusing and difficult to follow. This trouble, I believe, is caused by the constant cross-references to other sections, particularly definitional sections. Aren't there enough genera (or species) of the animal being dealt with, to permit one over-all definitional section, of course limiting the defined terms to their meaning as used in the relevant chapter. Subsequent sections need no more than to use the generic term or title used in the definitional section.

Even if such a definitional section were adopted, I would still be troubled by the hoary old problems arising out of amendments or repeals of sections referred to and the consequent effect upon current sections. I suppose here the Commission will have to embrace its original function of keeping the law straight by calling to the attention of the legislature this problem on an ad hoc basis and suggesting specific action on it at the time.

2. A basic, though on weight not a vital, objection to your and the UCC version of the "parol evidence rule" is that it makes "intent" an inescapable element and thereby cuts down materially the availability of summary judgment in contract cases. [Cf., e.g., Gale v. Wood, 112 Cal. App. 2d 650, 657.] Intent, after all, is a question of fact, and under the statutes in question, it is certainly a material question. I agree the "statute should accurately state the law;" perhaps, though, in the interests of some relief to clogged calendars the law ought to be changed.

Warm regards,

~~Herman F. Selvin~~

HFS:jw

John H. DeMoully, Esq.
Executive Secretary
California Law Revision
Stanford Law School
Stanford, CA 94305

EXHIBIT 11

ADD TO PRELIMINARY PART ON PAGE 3 FOLLOWING FOURTH LINE FROM TOP OF PAGE

Psychologists Employed by Nonprofit Community Agencies

Subdivision (d) of Section 2909 of the Business and Professions Code authorizes a nonprofit community agency which receives a minimum of 25 percent of its financial support from federal, state, and local governmental sources to employ unlicensed psychologists to provide psychological services to patients served by the agency. The unlicensed psychologist must be registered with the Psychology Examining Committee at the time of employment[1] and must possess an earned doctorate degree in psychology or in educational psychology or a doctorate degree deemed equivalent by regulation adopted by the committee. The degree must be obtained from the University of California, Stanford University, the University of Southern California, or from another educational institution approved by the committee as offering a comparable program. In addition, the person must have one year or more of professional experience of a type which the committee determines will competently and safely permit the person to engage in rendering psychological services. In view of these stringent requirements and the need to provide protection to persons who utilize the services of nonprofit community agencies for psychotherapeutic treatment, the Commission recommends that the scope of the privilege be extended to include patients of the psychologists described above.

1. The exemption from the licensing requirement is for a maximum of two years from the date of registration.

TO IMPLEMENT THE ABOVE RECOMMENDATION, SUBDIVISION (b) OF SECTION 1010 SHOULD BE REVISED AS FOLLOWS:

1010. As used in this article, "psychotherapist" means:

* * * * *

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions ~~Code;~~ Code, or a person employed by a nonprofit community agency who is authorized to practice psychology under the provisions of subdivision (d) of Section 2909 of the Business and Professions Code, or a person licensed or certified as a psychologist under the laws of another state or nation.

Comment. Subdivision (b) of Section 1010 is amended to recognize the possibility of treatment of a patient by a psychologist employed by a nonprofit community agency (see subdivision (d) of Section 2909 of the Business and Professions Code) or a psychologist licensed or certified in another state or nation (see Section 2912 of the Business and Professions Code).