

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

The Evidence Code

Number 4—Revision of the Privileges Article

November 1968

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

THE CALIFORNIA LAW REVISION COMMISSION

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* Mr. Ball resigned from the Commission in September 1968. No successor had been appointed as of the date of this report.

NOTE

This pamphlet begins on page 501. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

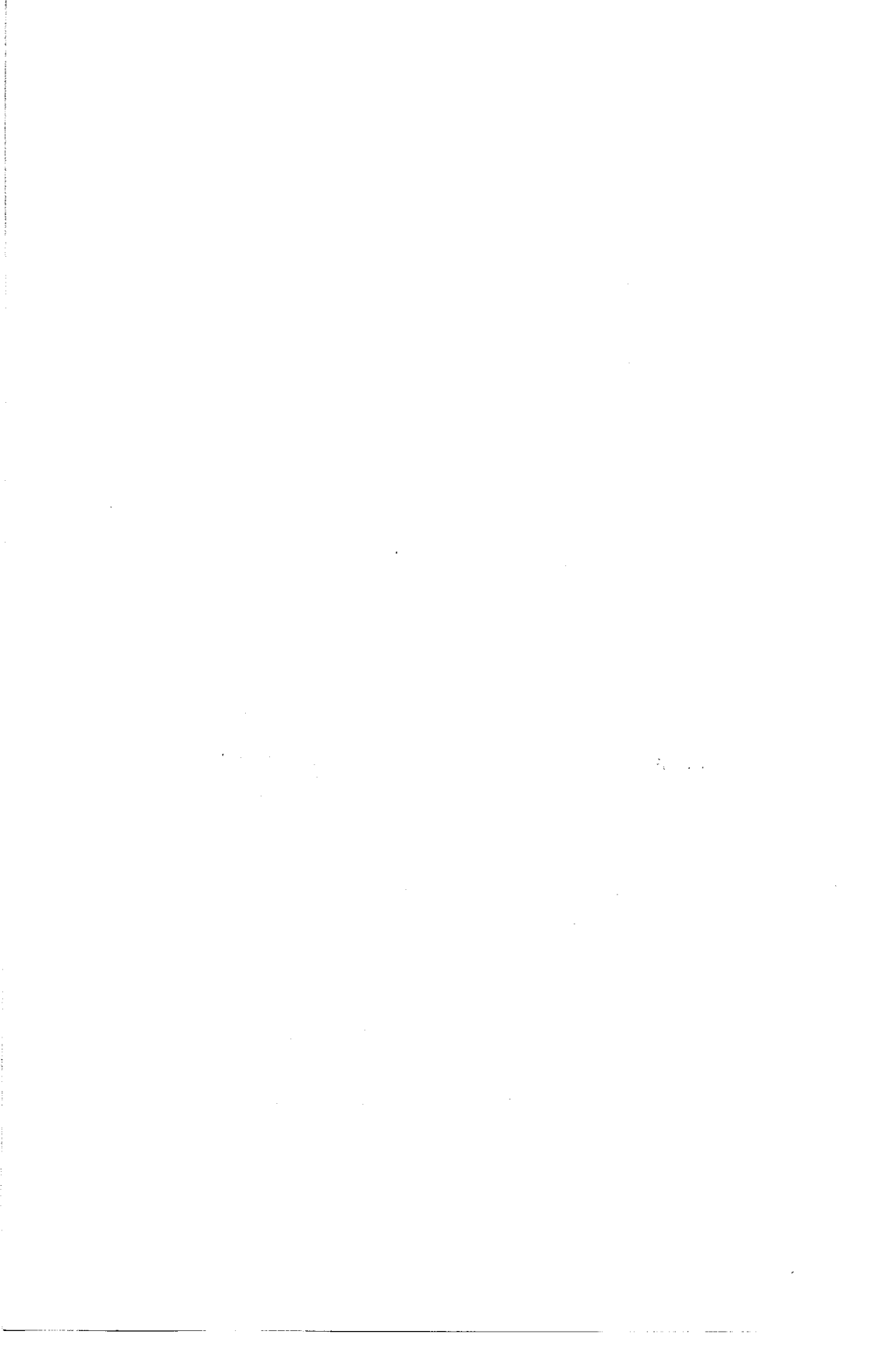
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Ex Officio

November 25, 1968

TO HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study the law of evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. This is the second recommendation made as a result of this continuous review. The first was submitted to the 1967 Legislature. See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101 (1967). See also Chapter 650 of the Statutes of 1967.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 4—Revision of the Privileges Article

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others.¹

MARITAL PRIVILEGE

The Commission has reviewed HEAFEY, CALIFORNIA TRIAL OBJECTIONS (Cal. Cont. Ed. Bar 1967) and has concluded that Sections 971 and 973 require revision to eliminate problems identified by Mr. Heafey. Accordingly, the Commission makes the following recommendations.

Section 971

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege *not to be called* as a witness by any adverse party unless the witness spouse consents or the adverse party has no knowledge of the marriage. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person *not to testify* against his spouse (Evidence Code Section 970).

In a multi-party action, the privilege of a married person not to be called as a witness may have undesirable consequences. The privilege not to be called apparently permits the married person to refuse to take the stand even though the testimony sought would relate to a part of the case totally unconnected with his spouse. As worded, the privilege is unconditional; it is violated by calling the married person as a witness whether or not the testimony will be "against" his spouse.

Edwin A. Heafey, Jr., has stated the problem as follows:

For example, if a plaintiff has causes of action against *A* and *B* but sues *A* alone, neither privilege can prevent the plaintiff from calling Mrs. *B* as a witness and obtaining her testimony on mat-

¹ For further discussion, see 8 CAL. L. REVISION COMM'N REPORTS 1314 (1967).

ters that are relevant to the cause of action against *A* and do not adversely affect *B*. However, if plaintiff joins *A* and *B* in the same action and wants to call Mrs. *B* for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party adverse to her spouse . . . and from questioning her by her privilege not to testify against her spouse²

The privilege not to be called as a witness also may lead to complications where both spouses are parties to the proceeding. Where an action is defended or prosecuted by a married person for the "immediate benefit" of his spouse or of himself and his spouse, Evidence Code Section 973(b) provides that either spouse may be required to testify against the other. Evidence Code Section 972(a) provides that either spouse may be required to testify in litigation between the spouses. Thus, the privilege not to be called and the privilege not to testify against the other spouse are not available in most cases in which both spouses are parties.³ However, where the spouses are co-plaintiffs or co-defendants and the action of each is not considered to be for the "immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case.⁴ Moreover, the adverse party apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.⁵

If the privilege of a spouse not to be called as a witness were limited to criminal cases,⁶ the significant problems identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against" the party spouse. Accordingly, the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.

² HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

³ See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

⁴ "[A]llowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship." HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.9 at 317 (Cal. Cont. Ed. Bar 1967).

⁵ *Id.* § 40.10 at 317.

⁶ Apparently this privilege was not recognized in civil cases before adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See *People v. Carmelo*, 94 Cal. App.2d 301, 210 P.2d 538 (1949); *People v. Moore*, 111 Cal. App. 632, 295 Pac. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury.

Section 973

Section 973(a) provides that a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under Section 970 (privilege not to be called) or 971 (privilege not to testify against spouse) in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation, the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges—including the privilege not to testify against the party spouse—are waived, despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.⁷ The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission has received suggestions that the Evidence Code article relating to the psychotherapist-patient privilege (Sections 1010–1026) be revised in the following respects:

(1) The definition of "psychotherapist" in Section 1010, which presently includes only psychiatrists and *licensed* psychologists, should be broadened to include other highly qualified professional persons who may lawfully practice psychotherapy.

(2) The application of the privilege to the increasingly common group therapy situation should be clarified.

The Commission recognizes that any extension of the scope of protection afforded confidential communications necessarily handicaps the court or jury in its effort to make a correct determination of the facts. Hence, the social utility of any new privilege or of any extension of an existing privilege must be weighed against the social detriment inherent in the calculated suppression of relevant evidence. Applying this criterion to the psychotherapist-patient privilege, the Commission is persuaded that the psychotherapist-patient privilege is unduly restricted and therefore makes the following recommendations.

Section 1010

For the purposes of the psychotherapist-patient privilege, Section 1010 defines a "psychotherapist" as (a) a physician who specializes in psychiatry or (b) a person licensed as a psychologist under the Psychology Licensing Law (Business and Professions Code Sections 2900–2986). The Psychology Licensing Law, however, exempts from its requirements various professional groups whose members engage in

⁷ See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

work or activities of a psychological nature. See BUS. & PROF. CODE §§ 2908-2910. Thus, some persons who may lawfully use psychotherapeutic techniques are not covered by the psychotherapist-patient privilege because they are neither psychiatrists nor *licensed* psychologists. Specifically, the Psychology Licensing Law exempts (1) school psychologists, (2) clinical social workers, and (3) marriage, family, and child counselors. See BUS. & PROF. CODE §§ 2908, 2909.

This discrepancy between the persons who may lawfully practice psychotherapy and persons listed in Section 1010 of the Evidence Code inevitably raises the question whether the definition of "psychotherapist" in Section 1010 is sufficiently broad.⁸ The Commission has reviewed the statutes and administrative regulations governing persons who render services of a psychological nature, as well as the nature of their practice, and has concluded that Section 1010 should be broadened to include the following groups.

1. **School psychologists.** To be exempted from the Psychology Licensing Law, school psychologists must (1) hold an appropriate credential issued by the State Board of Education, (2) engage in psychological activities "as part of the duties for which they were employed," and (3) perform such activities "solely within the confines of or under the jurisdiction of the organization in which they are employed." See BUS. & PROF. CODE § 2909. The qualifications of an applicant for a school psychologist's credential are specified by the Education Code and regulations of the Board, and include at least a master's degree and an approved internship. Such an applicant may or may not be a licensed psychologist, but if he is not he must have other prescribed qualifications. See EDUC. CODE § 13196; CAL. ADMIN. CODE, Tit. 5, § 6402. Thus, a school psychologist must establish his qualifications as such to the satisfaction of the State Board of Education and must be serving as a psychologist under the direction and jurisdiction of a school district.

The specialized services performed by school psychologists include the diagnosis and treatment of mental and emotional conditions similar to those diagnosed and treated by licensed psychologists. The determination of the cause of a child's difficulties in school frequently depends on the candid revelation of the circumstances of the child, his parents, and others. Thus, in view of their technical qualifications and the nature and importance of the service rendered by them, it seems clear that certificated school psychologists should be included in the group of persons to whom a privileged communication may be made.

2. **Clinical social workers.** Clinical social workers are licensed by the Social Worker and Marriage Counselor Qualifications Board. See BUS. & PROF. CODE §§ 9040-9051. An applicant for such a license must have a master's degree from a school of social work and two years' experience in a hospital, clinic, or agency "in the use of psychosocial and psychotherapeutic methods and measures." See BUS. & PROF. CODE § 9042. Licensed clinical social workers provide individual, marriage, family, and child counseling and often work collaboratively with psy-

⁸ Assembly Bill No. 1874 of the 1968 Regular Session would have extended the psychotherapist-patient privilege to clinical social workers and marriage, family, and child counselors. The bill died in the Assembly Committee on the Judiciary.

chologists and psychiatrists. Increasingly, they work independently in private practice. They make extensive use of applied psychotherapy. See BUS. & PROF. CODE § 9049. The therapy they provide in the course of their work requires the revelation of the most intimate details of the subject's life. The Commission has concluded that the social utility of this therapy justifies the extension of the protection of the psychotherapist-patient privilege to patients of clinical social workers.

3. *Marriage, family, and child counselors.* Persons who undertake to provide marriage, family, or child counseling also are licensed by the Social Workers and Marriage Counselor Qualifications Board. See BUS. & PROF. CODE §§ 17800-17847. The minimum qualifications for a license include a master's degree in marriage counseling, social work, or one of the behavioral sciences, and at least two years of supervised clinical experience. See BUS. & PROF. CODE § 17804. The diagnosis and treatment of problems connected with troubled marriages and unhappy homes entail the frank revelation of the intimate details of the family life. Unless the parties are assured that such information can be kept in utmost confidence, they cannot be expected to make the required disclosures. A need for the privacy and confidentiality of such communications is already recognized in the Conciliation Court Law (Code of Civil Procedure Sections 1730-1772).⁹ This assurance of confidentiality should also be available to persons who consult licensed counselors in other settings and for this reason the patients of such counselors should be added to those covered by the psychotherapist-patient privilege.

In summary, the Commission believes that—although extension of the privilege to cover communications to school psychologists, clinical social workers, and marriage, family, and child counselors may operate to withhold relevant information—the interests of society will be better served if such professionals are able to give assurance that the confidences necessary to their work will be respected. The Commission is advised that these practitioners have difficulty in obtaining needed information due to the lack of privilege under existing law. Accordingly, the Commission recommends that confidential communications to them be placed upon the same footing as similar communications to licensed psychologists. The protection afforded to such communications would, of course, be subject to the qualifications¹⁰ and exceptions¹¹ stated in the Evidence Code.

⁹ All communications, verbal or written, from either of the parties to the judge, commissioner, or court-appointed counselor are expressly made subject to the privilege for official information conferred by Section 1040 of the Evidence Code. See Code of Civil Procedure Section 1747.

¹⁰ See definitions of "patient" (Section 1011) and "confidential communication between patient and psychotherapist" (Section 1012).

¹¹ See EVIDENCE CODE §§ 1016 (so-called "patient-litigant exception"), 1017 (court-appointed psychotherapist), 1018 (services of psychotherapist sought or obtained to assist in crime or tort), 1019 (parties claiming through deceased patient), 1020 (breach of duty arising out of psychotherapist-patient relationship), 1021 (intention of deceased patient concerning writing affecting property interest), 1022 (validity of writing affecting property interest), 1023 (proceeding to determine sanity of criminal defendant), 1024 (patient dangerous to himself or others), 1025 (proceeding to establish competence), 1026 (required report). See also EVIDENCE CODE § 912 (waiver of privilege).

Section 1012

Section 1012 defines a "confidential communication between patient and psychotherapist" to include:

information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than . . . those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation or examination.

Although "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.

In the light of the frequent use of group therapy for the treatment of emotional and mental problems, it is important that this form of treatment be covered by the psychotherapist-patient privilege. The policy considerations underlying the privilege dictate that it encompass communications made in the course of group therapy. Psychotherapy, including group therapy, requires the candid revelation of matters that not only are intimate and embarrassing, but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group therapy treatment because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-patient privilege protects against disclosure of communications made during group therapy. It should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, communications made in the course of group therapy would be within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted."

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

An act to amend Sections 971, 973, 1010, and 1012 of the Evidence Code, relating to evidence.

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

Evidence Code Section 971 (amended)

SECTION 1. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a ~~party to a~~ *defendant in a criminal*

proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended to preclude the assertion by a married person of a privilege not to be called as a witness in a civil proceeding. As to any proceeding to which his spouse was a party, the former wording of Section 971 appeared to authorize a married person to refuse to take the stand when called by a party adverse to his spouse even in multi-party litigation where the testimony sought related to a part of the case wholly unconnected with the party spouse. See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. *Id.* § 40.10 at 317.

Elimination of the privilege *not to be called* in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege *not to testify* against one's spouse in any proceeding (Section 970) and the privilege for confidential marital communications (Section 980) are available in a civil proceeding. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case, the non-party spouse should be required to testify. If the testimony would be "against" the party spouse, the witness spouse may claim the privilege not to testify given by Section 970.

Evidence Code Section 973 (amended)

SEC. 2. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who ~~testifies in a proceeding to which his spouse is a party, or who~~ testifies *for or* against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment. Subdivision (a) of Section 973 is amended to eliminate a problem that arose in litigation involving more than two parties. In multi-party civil litigation, if a married person is called as a witness by a party other than his spouse in an action to which his spouse is a party, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the former wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges—including the privilege not to testify against the party spouse—were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.

Evidence Code Section 1010 (amended)

SEC. 3. Section 1010 of the Evidence Code is amended to read:

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

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry; or

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code; or

(c) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the State Board of Education;

(d) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professions Code; or

(e) A person licensed as a marriage, family, and child counselor under Chapter 4 (commencing with Section 17800) of Part 3 of Division 7 of the Business and Professions Code.

Comment. Section 1010 is amended to include school psychologists, clinical social workers, and marriage, family, and child counselors within the definition of "psychotherapist." To be included under Section 1010, a school psychologist must hold an appropriate credential issued by the State Board of Education. See EDUC. CODE §§ 13187-13188 and 13196; CAL. ADMIN. CODE, Tit. 5, subch. 18.1, group 7. The credential specified in subdivision (c) includes one issued under former law which is equivalent to the standard designated services credential with specialization in pupil personnel services authorizing service as a school psychologist. See EDUC. CODE §§ 11753 and 13187-13187.1. A clinical social worker or marriage, family, and child counselor must have the appropriate license to be included under Section 1010.

The privilege under this article covers confidential communications made in the course of diagnosis or treatment of a mental or emotional condition or an examination for purposes of psychiatric or psychological research. See Section 1011 and the *Comment* to that section. Thus, the privilege under this article covers individual diagnosis and treatment and such activities as marriage, family, and child counseling. See also *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article* (November 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 501 (1969).

Evidence Code Section 1012 (amended)

SEC. 4. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and 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 examination~~, *including other patients present at joint therapy*, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose ~~of the consultation or examination for which the psychotherapist is consulted~~, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to add "including other patients present at joint therapy" in order to foreclose the possibility that the section would be construed not to embrace marriage counseling, family counseling, and other forms of group therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

The other amendments are technical and conform the language of Section 1012 to that of Section 992, the comparable section relating to the physician-patient privilege. Deletion of the words "or examination" makes no substantive change since "consultation" is broad enough to cover an examination. See Section 992. Substitution of "for which the psychotherapist is consulted" for "of the consultation or examination" adopts the broader language used in subdivision (d) of Section 912 and in Section 992.

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