

EVIDENCE CODE

SECTION 1010-1027

1010. As used in this article, "psychotherapist" means a person who is, or is reasonably believed by the patient to be:

(a) A person 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 or her time to the practice of psychiatry.

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

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 4996) of Chapter 14 of Division 2 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.

(e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by Section 2913 of the Business and Professions Code, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician and surgeon certified in psychiatry, as specified in Section 4980.44 of the Business and Professions Code.

(g) A person registered as an associate clinical social worker who is under supervision as specified in Section 4996.23 of the Business and Professions Code.

(h) A person exempt from the Psychology Licensing Law pursuant to subdivision (d) of Section 2909 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in Section 2911 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, who is fulfilling his or her supervised practicum required by subparagraph (B) of paragraph (1) of subdivision (d) of Section 4980.36 of, or subdivision (c) of Section 4980.37 of, the Business and Professions Code and is supervised by a licensed psychologist, a board certified psychiatrist, a licensed clinical social worker, a licensed marriage and family therapist, or a licensed professional clinical counselor.

(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with Section 2838) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling

services as authorized pursuant to Section 6924 of the Family Code.

(n) A person licensed as a professional clinical counselor under Chapter 16 (commencing with Section 4999.10) of Division 2 of the Business and Professions Code.

(o) A person registered as a clinical counselor intern who is under the supervision of a licensed professional clinical counselor, a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician and surgeon certified in psychiatry, as specified in Sections 4999.42 to 4999.46, inclusive, of the Business and Professions Code.

(p) A clinical counselor trainee, as defined in subdivision (g) of Section 4999.12 of the Business and Professions Code, who is fulfilling his or her supervised practicum required by paragraph (3) of subdivision (c) of Section 4999.32 of, or paragraph (3) of subdivision (c) of Section 4999.33 of, the Business and Professions Code, and is supervised by a licensed psychologist, a board-certified psychiatrist, a licensed clinical social worker, a licensed marriage and family therapist, or a licensed professional clinical counselor.

1010.5. A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with Section 4986) of Chapter 13 of Division 2 of the Business and Professions Code, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of Section 1010.

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

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 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, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

1013. As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to

refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege.

(b) A person who is authorized to claim the privilege by the holder of the privilege.

(c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapist corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and Professions Code, a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, or a professional clinical counselor corporation as defined in Article 7 (commencing with Section 4999.123) of Chapter 16 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

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.

1017. (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

1027. There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
 - (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.
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EVIDENCE CODE

SECTION 911-920

911. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

913. (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at

issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

914. (a) The presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a court that he disclose such information. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it apply to hearings and investigations of the Industrial Accident Commission, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code. If no other statutory procedure is applicable, the procedure prescribed by Section 1991 of the Code of Civil Procedure shall be followed in seeking an order of a court that the person disclose the information claimed to be privileged.

915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

(1) The person from whom the information is sought is not a person authorized to claim the privilege; and

(2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

917. (a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

(c) For purposes of this section, "electronic" has the same meaning provided in Section 1633.2 of the Civil Code.

918. A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

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

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

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

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

920. Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.



Psychotherapist-Patient Privilege Your Special Relationship in the Law

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The Therapist
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Your relationship with your patient is privileged

California law recognizes 13 privileges. Seven of those privileges arise from special relationships: lawyer-client, husband-wife, physician-patient, psychotherapist-patient, clergyman-penitent, sexual assault victim-counselor, and domestic violence victim-counselor.¹ As a Licensed Marriage and Family Therapist, your communications with your clients are protected by the psychotherapist-patient privilege. Simply put, privilege is the right to withhold testimony. To better understand this law of evidence, look at its relationship to courtroom proceedings.

The people of the state of California are governed by the rule of law. The laws apply equally to everyone. If a wrong needs to be redressed, it will be in court. In order for a court to make an informed decision on the merits of the case, the judge and/or jury must hear from witnesses. A subpoena is a command to a witness to appear before a court and produce testimony. Testimony can be oral or in writing. The witness must produce the testimony or he or she will be held in contempt of court. Privilege is an exception to that rule. If the information comes from your privileged relationship, the information does not have to be released. There are only two circumstances in which you should release privileged information: pursuant to a written waiver of the psychotherapist-patient privilege signed by the patient or pursuant to a court order.

Receiving the Subpoena

When you receive a subpoena, you are receiving a command to appear before the court and produce testimony. It will be for records (a subpoena duces tecum), testimony at a deposition, or testimony at trial. A subpoena does not have to be signed by a judge. Many clinicians experience a great deal of anxiety when they receive a subpoena. In reality, receiving a subpoena should be accompanied by a sense of relief. A subpoena protects you. The subpoena is the first step in a clear process. When you receive a subpoena, do not panic. Specifically, do not try to avoid service. You can be properly served with a subpoena by mail, fax or delivery if you accept the subpoena delivered in this manner. If you ignore, destroy, or forget about the subpoena, you will only force service in person. It is better to deal with the subpoena early and professionally. You should be given at least five (5) days notice by the subpoena to appear.²

Responding to the Subpoena

Once you receive the subpoena, you must respond to it. Unless you have authorization that provides otherwise, it is your duty to assert the psychotherapist-patient privilege on behalf of your patient.³ That means you do not provide any information. The first person to contact is your patient. Tell him or her that you have received a subpoena and that the information sought is privileged. Ask him or her if he or she want to assert or waive the psychotherapist-patient privilege. Also ask for a release of confidentiality to talk to the patient's attorney. Make sure that the patient and his or her attorney agree on whether or not privilege is going to be asserted or waived. If the patient and attorney agree to assert the privilege, ask the attorney to file a motion to quash the subpoena. If the motion to quash is granted it will void the subpoena. If the patient and attorney agree to waive the privilege, have the patient put that waiver in writing for your files. Then, you can comply with the subpoena. Be careful, there is no such thing as a partial waiver. You cannot edit your files or your testimony at your patient's or anyone else's request. Make sure that your patient understands the pros and cons of having his or her entire record released.

If your patient decides to assert the privilege, the opposing attorney has the option of filing a motion to compel. A motion to compel is an adversarial hearing where the parties will argue whether or not privilege applies or if there is an exception to privilege in this case. Psychotherapist-patient privilege is a rule of evidence and therefore a judge can rule on it's applicability. After the hearing, the judge may order you to provide the testimony. Thus, you may receive a court order to produce written or oral testimony. Remember, a subpoena and a court order are two different things. A subpoena triggers the psychotherapist-patient privilege. A court order demands compliance. You

can receive a court order in writing signed by a judge, be given a copy of the minute order showing the order, or be ordered on the record in person while in court.

You may not know how to contact a former patient and his or her attorney. The subpoena may be for a client you had many years ago. If you do not have current contact information, you still have the duty to assert the psychotherapist-patient privilege. **Asserting the privilege is the default rule.** To make contact with a former client, contact the attorney who sent you the subpoena. Without divulging whether or not anyone is your former patient, simply ask the attorney for the contact information. The subpoenaing attorney will either have the contact information for the former client, or have the contact information for the former client's attorney. In the latter case, you would call the former client's attorney and garner the contact information from him or her.

Who Holds the Privilege?

The patient is the holder of the privilege when he or she has no guardian or conservator. If the patient has a guardian or conservator, then the guardian or conservator holds the privilege. If the patient is dead, the personal representative of the decedent holds the privilege.⁴ If your identified patient is a group, family, or couple you must receive a waiver from each and every member of the group before you can release any information. If your patient is a minor child, he or she holds the privilege. A minor's parents do not hold the privilege for the minor.⁵ The only time a parent could possibly hold the privilege for the minor is if the court has specifically appointed the parent as a guardian ad litem, as described below.

If your patient is a minor, you must assert the privilege on his or her behalf. If the minor has an attorney, the attorney can make the decision to waive or assert the privilege. A parent's attorney is not the child's attorney. Make sure it is the minor's counsel that makes the decision. If the child has a guardian ad litem (guardian for the purposes of litigation) then that person can make the decision to waive or assert the privilege. Be careful, while you may consider a parent a "guardian" of a child, this is not the legal requirement. The parent can only hold the privilege if he or she has been appointed as the guardian ad litem by the court. If the minor has no attorney and no guardian ad litem, then the court will make the determination for the child.

Remuneration

If you respond to a subpoena, the party that sent you the subpoena is responsible for reimbursing you for copying costs or your time. If you receive a subpoena for records and a copying service is available to come to your office and make copies, you will receive a \$15.00 fee.⁶ If you are called to testify at a deposition or court hearing, it will be as either a percipient witness or expert witness. A percipient witness provides testimony based on what they perceived with their senses. Examples are: a passenger who testifies they saw the light turn red or a therapist who testifies to what a client said. An expert witness testifies to what they observed AND to an opinion based upon those observations. An expert opinion is based on his or her special knowledge, skill, experience, training, or education.⁷ A mechanic who testifies that the carburetor caused the engine to stall and the therapist who testifies that threats were made out of anger, not a real intention to harm, are providing expert testimony. It is important to know what type of witness you are being called as because of the difference in remuneration. A percipient witness is reimbursed \$35.00 per day plus travel expenses. An expert witness is reimbursed for his or her time.⁸ You should agree upon the rate before your appearance and be sure you are paid in advance of your testimony.⁹

One suggestion in dealing with this issue is to address it with all of your patients as part of your disclosure statement. Written informed consent and disclosure statements are strongly recommended by one of California's leading psychotherapist defense attorneys.¹⁰ Clearly state that you are the treating therapist and **do not provide your services in contemplation of legal proceedings.** However, if you do respond to any subpoena on behalf of the patient, the patient will be billed accordingly. That way, if it takes you an hour to prepare, copy, and mail records, you receive your hourly fee—not fifteen dollars. Again, if you are called to testify in court about "what the patient said in session" and you give up an entire day you will be reimbursed your daily fee—not thirty-five dollars and mileage. Many therapists find themselves frustrated when looking at canceling a day's appointments and losing needed income. Having patients agree to this clause in advance in your disclosure statement or in a separate document helps avoid that problem.

Improper Dual Forensic Role

Avoid an improper dual forensic role. Consider having an office policy that states you do not release any information outside of session, however you do respond to subpoena's as required by law. This type of policy helps you avoid a situation where a patient asks you to write a letter to a judge, talk to an attorney, or write a letter to an attorney. Polices avoid personalities. This means the only way information leaves your office is: 1. if the patient requests a copy of his or her records; 2. pursuant to a release of confidentiality in non-legal matters; 3. or pursuant to a

subpoena and a waiver in a legal matter; or 4. pursuant to a court order. This policy will help you maintain an important boundary—do not become your patient's legal advocate.

An improper dual forensic role normally refers to a treating therapist who then also acts as an evaluator, mediator, or arbiter. For example, you should not be a child's treating therapist and the child's custody evaluator. To maintain your clinical objectivity, you should avoid becoming an advocate for your client. You risk losing objectivity if you become enmeshed with one party or that party's attorney. Remember, attorneys never act alone. They exist in "pairs or packs." Imagine that you have a very sympathetic mother for a client. You agree to talk to her attorney after she signs a release. The attorney hears what he wants to hear after talking to you. He talks to mom and she hears what she wants to hear. Then she colors it in the most damaging way to hurt father the next time they have a fight. Father, very upset, calls his attorney. Now father's attorney calls you and is extremely hostile and threatening. The classic "telephone game" of miscommunication can cause you great loss of time and peace of mind. Avoiding the improper forensic dual role helps you avoid such losses.

Exceptions to Privilege

There are times when privilege does not apply. You, however, do not make these decisions. Your duty is to assert the privilege unless otherwise authorized. This information is being provided for your complete understanding of the process and circumstances. Do not simply comply with a subpoena and fail to assert the privilege because you think there is an applicable exception. Assert the privilege and wait to see if the court rules on whether an exception applies. Likely, the most common exception you will see is when the patient tenders his or her mental or emotional condition.¹¹ If a patient puts his or her mental or emotional condition at issue, all mental health records become relevant. You, like many others, may ask why. What does someone's long-standing clinical depression have to do with an auto accident? What does childhood abuse have to do with a work related injury? The short answer is one word: damages. Your patient is alleging emotional distress as damage. He or she is, in effect, arguing that the auto accident or the injury at work has caused his or her depression or anxiety. In reality, he or she has had those symptoms for a long time. This exception to privilege ensures that the driver at fault in an auto accident is not paying for the expenses of treating clinical depression that had nothing to do with the accident. It keeps workers compensation from paying for the PTSD resulting from childhood abuse that has nothing to do with a worksite injury. This exception helps keep people honest and reduces the abuse of the legal process. There are twelve other statutory exceptions to privilege,¹² and they may be addressed in future articles. In each case, the legislature or court has made a policy decision that free use of the information is more compelling than protecting the therapeutic relationship. Again, whether or not the case your patient is involved in meets one of those standards is for a court to decide, not you as a therapist.

Your Testimony

Ultimately, you may be called to testify. When a subpoena has been served and the waiver of the psychotherapist-patient privilege has been given in writing, most cases will settle. Some cases settle after the records are reviewed. Other cases settle after depositions are taken. A very small number of civil cases actually go to court. If you are a witness in one of those cases, remember who you are. You are the objective clinician. Once you are on the stand you have no duty but to tell the truth. Your testimony may help or hinder your patient's case. It should not matter to you. You have no duty to protect or advocate for your patient from the stand. Answer the questions asked with a yes or no if possible. If it is not possible to answer with a yes or no, be as succinct as possible. Always tell the truth. Do not volunteer information. If you do not understand a question, say so. If you do not know the answer to a question, say so. You are under no obligation to be a "star witness" or impress anyone. If you feel the questioning is incomplete or unfair, do not try to argue with the attorney or give a five-minute monologue where a yes or no will do. The other attorney will have a chance to ask you clarifying questions. If there is an attempt to challenge your credentials or discredit you, do not become defensive, merely respond to the questions and remember it is just part of the process.

If you have any questions about any of these steps and you are a member of the Association, you can call CAMFT for a consultation. It is important that you are well-versed in the law of privilege and your professional duties in light of it because the attorneys for the parties do not care about you or your license. An attorney's only duty is to his or her client. An attorney will be a zealous advocate for his or her client and will do what he or she needs to do to win. That may mean sweet talking or threatening a therapist into releasing information that shouldn't be released. Don't be fooled or frightened into making a mistake.

1 The law recognizes a total of 13 privileges at this time. See, generally, Cal. Evidence Code Division 8, Chapter 4.

2 Cal. Code of Civil Procedure §1985.3(b)(3)

3 Cal. Evidence Code §1015

- 4 Cal. Evidence Code §1013
- 5 In re Daniel C.H. (1990) 220 Cal.App.3d 814
- 6 Cal. Evidence Code §1563(b)(6)
- 7 Cal. Evidence Code §720
- 8 Cal. Code of Civil Procedure §2034(i)(2)
- 9 Id
- 10 Brandt Caudill, Jr., Esq., "The Hidden Issue of Informed Consent"
- 11 Cal. Evidence Code §1016
- 12 See Cal. Evidence Code §1017 to 1027 and Cal. Penal Code §11171(b)

This article appeared in the January 2001 issue of The California Therapist, the publication of the California Association of Marriage and Family Therapists, headquartered in San Diego, California. This article is intended to provide guidelines for addressing difficult legal dilemmas. It is not intended to address every situation that could potentially arise, nor is it intended to be a substitute for independent legal advice or consultation. When using such information as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained herein.

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