Limitations On California Professional Privileges: Waiver Principles And The Policies They Promote

Evidentiary privileges protecting the confidentiality of communications between a professional and layperson have existed in one form or another since the Elizabethan era.[1] Despite the continuity of their existence, professional privileges have never enjoyed the unqualified approval of the legal community. Unlike those rules of evidence which exclude irrelevant or unreliable information, professional privileges bar the admission of evidence which is likely to be both relevant and highly reliable.[2] Their detractors argue that the privileges keep out too much truth for too little reason.[3] To their proponents, however, the privileges serve two interests important enough to outweigh the burden they place on the fact-finding process.[4] First, privileges protect the confidentiality essential to certain professional

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[1] *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE].

[2] *Cf.* CAL. EVID. CODE § 910, Law Rev. Comm'n Comment (West 1968); E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 72 at 152 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[3] *See* McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 447-48 (1938). Perhaps the most severe critic of the privileges was Jeremy Bentham, who denounced the attorney-client privilege as devoid of any social worth, being valuable only to the guilty to construct a false claim or defense. J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), 7 THE WORKS OF JEREMY BENTHAM 473-75, 477, 479 (Bowring ed. 1842).

[4] The importance of full disclosure as part of California's legal tradition is evidenced by the legislature's enactment in 1957 of a set of discovery statutes even more liberal than the federal rules upon which they were modeled. CAL. STAT. 1957, ch. 1904 (codified at CAL. CODE CIV. P. §§ 2016-36 (West 1967)). As noted by the California Supreme Court in Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 572, 354 P.2d 637, 650, 7 Cal. Rptr. 109, 122 (1960), "[o]nly strong public policies weigh against disclosure." The confidentiality of professional communications has been accorded substantial weight in this balancing process. Further, it is not clear how great an obstruction to the adjudicative process privileges actually create. A survey conducted by the *Yale Law Journal* reveals that of 149 jurists and practitioners interviewed, only five believed that justice was significantly harmed by the rules of privilege. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1245 (1962) [hereinafter cited as *Functional Overlap Between the Lawyer and Other Professionals*].

relationships and thus foster those relationships.[5] Second, they protect the basic human "right to be let alone."[6]

The California Evidence Code describes the professional privileges in sweeping terms.[7] Yet, the privileges are not absolute. In an effort to reconcile interests in confidentiality with the needs of litigants, the legislature has created a number of exceptions which limit their operation.[8] The statutory exceptions identify circumstances in which the privileges never attach. Waiver, by contrast, applies to situations in which an existing privilege is destroyed by the voluntary act of its holder. Through waiver, the courts have been able to refine further the balance sought by the legislature with "the finer touch of the specific solution."[9] Waiver doctrines have evolved to enable courts to achieve results consonant with considerations of policy and fairness on the facts of a particular case.[10] Although waiver imparts necessary flexibility to the statutory law of privileged communications, it is also a major souce of pitfalls for the practicing attorney.

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[5] 8 WIGMORE, *supra* note 1, § § 2285, 2291.

[6] Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956) [hereinafter cited as *Louisell*].

[7] CAL. EVID. CODE § 954 (attorney-client), § 994 (physician-patient) and § 1014 (psychotherapist-patient) (West 1968). The California Evidence Code establishes additional privileges to protect priest-penitent and spousal communications. For a discussion of these privileges, see respectively, Comment, *Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege*, this volume, and Comment, *The Marital Testimony and Communications Privilege: Improvements and Uncertainties in California and Federal Courts*, this volume [hereinafter cited as *The Marital Testimony and Communications Privilege*]. This article discusses professional privileges in California. Federal privileges are governed by 28 U.S.C. FED. R. EVID. 501 (1975), which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

For a discussion of when the California privileges may apply in federal court, see *The Marital Testimony and Communications Privilege*, *supra* this note, discussing the application of the analogous marital privilege rule in federal courts.

[8] CAL. EVID. CODE § § 956-62 (attorney-client), § § 996-1007 (physician-patient) and § § 1016-26 (psychotherapist-patient) (West 1968 & Supp. 1976).

[9] MCCORMICK (2d ed.), *supra* note 2, § 77 at 159.

[10] Gardner, *Principles of Waiver: Attorney-Client Privilege*, 35 CAL. ST. B. J. 262 (1960). McCormick, who approves the development of liberalized waiver doctrines as mitigating the obstruction privileges pose the fact-finding process, advocates even greater flexibility. He suggests that the determination of privilege, in certain instances, should be a matter of judicial discretion. MCCORMICK (2d ed.), *supra* note 2, § 87 at 176-77.

This article evaluates the principles of waiver which the California courts have developed in dealing with the attorney-client, physician-patient and psychotherapist-patient privileges. Section I discusses the rationales and history of the three privileges. Section II describes the California statutory privileges, the requirements common to the three privileges and the exceptions made to the operation of each. Section III categorizes the forms of waiver, focusing on the major problems each presents.

I. RATIONALES SUPPORTING THE PRIVILEGES

A. GENERAL PRINCIPLES

As society's attitudes toward the professions and individual privacy interests have evolved, the policies supporting the privileges have changed. In the Elizabethan era, the privileges were predicated on the honor of the practitioner, who swore to preserve the confidences of his client or patient.[11] As the professions broadened their membership and the judicial process shifted from a contest of honor to one of fact, protecting professional honor declined as a justification for the privileges.[12] By the eighteenth century, however, the courts had articulated a new rationale, that of encouraging the professional relationship, to support their continued recognition.[13]

Fostering the professional relationship remains the most frequently articulated rationale for the existence of the privileges. Both the common law[14] and the California Evidence Code[15] reflect

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[11] 8 WIGMORE, *supra* note 1, § 2286. Both attorneys and physicians claimed a privilege predicated on their respective professional oaths. In Duchess of Kingston's Trial, 20 How. St. Trials 355 (1776), however, Lord Mansfield expressly disaffirmed the existence of a physician-patient privilege based on the physician's oath to preserve inviolate the confidences of his patient. He distinguished a physician's ethical obligation not to disclose his patient's confidences to the world at large from his obligation in a court of law:

> If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.

Id. at 573.

[12] *See* 8 WIGMORE, *supra* note 1, § 2290.

[13] *Id.* § § 2290, 2291 & 2380(a).

[14] The view that confidentiality must be protected in order to encourage certain professional relationships is implicit in the elements Wigmore regards as essential to recognition of a privilege. He lists the following four conditions as necessary to the establishment of a privilege:

> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community

a belief that certain professional relationships cannot be effective unless the parties are assured that what they say to each other will be protected from subsequent disclosure. An attorney cannot adequately serve his client unless he knows all the facts, including those damaging to his client.[16] If the client cannot be assured the protections of the privilege, he probably will not be fully candid. Similarly, for the therapy to be of value, a psychotherapist must create an atmosphere in which his patient feels free to disclose his innermost thoughts.

In protecting the confidentiality of certain communications, the privileges also serve to safeguard the layperson's basic right to be let alone.[17] The common law did not find this right to be of sufficient societal value to justify recognition of the privileges on that ground alone.[18] In recent years, however, society has attached increasing importance to an individual's privacy interests,[19] elevating them, at times, to constitutional status.[20] The law of privileged communications has participated in this trend. While promotion of the professional relationship remains the primary rationale for the statutory privileges, recent cases have suggested that in certain situations the layperson's interest in privacy may provide a more meaningful focus for defining the protection offered by the privileges.[21]

> ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. § 2285 at 527.

[15] CAL. EVID. CODE § 910, Law Rev. Comm'n Comment (West 1968).

[16] A client may believe facts to be detrimental which are, in fact, helpful to his case. His inability to weigh such facts in light of applicable legal principles increases the need for full disclosure to his attorney. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4-5 (1975).

[17] *See Louisell, supra* note 6; MCCORMICK (2d ed.), *supra* note 2, § 77.

[18] *Cf.* MCCORMICK (2d ed.), *supra* note 2, § 77.

[19] The recognition and development of a common law right to privacy, invasion of which serves as the basis for civil liability, illustrates this trend. For discussion of this right, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

[20] *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Stanley v. Georgia, 394 U.S. 557 (1969); City-of-Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). Increasing societal interest in individual privacy led California to add a right to privacy to its Constitution in 1972:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

CAL. CONST., art. I. § 1 (West Supp. 1976).

[21] Roberts v. Superior Court, 9 Cal. 3d 330, 337, 508 P.2d 309, 313, 107 Cal. Rptr. 309, 313 (1973); *In re* Lifschutz, 2 Cal. 3d 415, 423, 431-32, 467 P.2d 557, 561, 567-68, 85 Cal. Rptr. 829, 833, 839-40 (1970); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951).

The strength of these rationales varies with the nature of the professional relationship and the particular communication at issue. To the extent that one or the other of the rationales appears particularly applicable, confidentiality acquires different weight, shifting the balance between recognizing the privilege and compelling disclosure to the courts. Particularly in the waiver context, the strength of the rationales may largely determine the strength of the privilege itself.[22] The following discussion explores in greater detail the two rationales as they apply to each of the professional relationships.

B. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege rests on a concern for promoting candor in attorney-client consultations.[23] Unless an attorney knows all of the facts, the advice he gives a client will be of little, if any, value. Less than full disclosure by the client may produce trial delays and surprises, improperly conducted lawsuits and much useless litigation. An attorney cannot adequately represent the legal interests of a client who, fearing that his attorney may be compelled to reveal what is told him, suppresses facts he believes to be unfavorable. The attorney-client privilege is rooted in the need to allay this fear and, in so doing, to promote complete disclosure within the attorney-client relationship.[24]

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[22] Although the balancing process is properly a legislative function, the courts are sensitive to it in interpreting statutory privileges. The waiver doctrines which the courts developed to circumvent the privileges in will contests illustrate this sensitivity. Will contests created special problems for the court. Although privileges generally survive the death of the holder, the testimony of the testator's attorney or attending physician is usually the most reliable, if not the only source of information regarding the testator's capacity or intention when he made the will. In addition, it appears unlikely that the testator would be deterred from making full disclosures to his physician or attorney by the prospect that after his death their discussions would be disclosed. Any humiliation which might follow from disclosure normally dies with the testator. The need for probative evidence, when combined with the general inapplicability of the usual policies which support recognition of the privileges, led the courts to devise waiver fictions to curtail the operation of at least the attorney-client privilege in will contest cases. Estate of Nelson, 132 Cal. 182, 64 P. 294 (1901). In Estate of Dominici, 151 Cal. 181, 186, 90 P. 448, 450 (1907), the court refused to recognize the privilege, flatly stating that the reason for the privilege ceases to exist in will contests and "with the reason, the rule of privilege itself ceases." The legislature has now resolved the courts' dilemma, creating statutory exceptions to the privileges when the capacity or intention of the testator are at issue. CAL. EVID. CODE §§ 959-61 (attorney-client), §§ 1002-03 (physician-patient) and §§ 1021-22 (psychotherapist-patient) (West 1968).

[23] 8 WIGMORE, *supra* note 1, §§ 2290-91.

[24] As the California Supreme Court noted in City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951):

> The privilege is given on the grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and en-

The rationale that confidentiality must be protected to foster the professional relationship has been the primary justification for the attorney-client privilege. Widespread approval of this rationale explains why the attorney-client privilege has been consistently the strongest of the privileges. The privilege has not been without its critics, though, one of whom contended "[i]ts benefits are all indirect and speculative; its obstruction . . . plain and concrete."[25] But even those commentators whose support of the privilege is most grudging concede that the attorney-client privilege is well-rooted in custom and unlikely to falter in the near future.[62] The obvious good sense and applicability of the traditional rationale to the attorney-client relationship has preempted any need to examine the privacy interests a client might have at stake within that relationship. Since communications with an attorney enjoy wide protection, it is unlikely that even a well-articulated notion of privacy will add anything to the present broad sweep of protection.

C. THE PHYSICIAN-PATIENT PRIVILEGE

The common law has never recognized a physician-patient privilege as such.[27] In 1851 the California legislature departed from this common law position. The new statutory privilege derived support from the same need to encourage full disclosure which had long been used to justify the attorney-client privilege.[28] The early commentators adopted the view that adequate diagnosis and treatment re-

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> forcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. . . . [U]nless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts." (Morgan, *Foreword*, AM. LAW INST. CODE OF EVIDENCE, pp. 25-26.)

In the criminal context, the attorney-client privilege acquires constitutional force. Without its protection, the criminal defendant would have to choose between two constitutionally guaranteed rights, that of effective assistance of counsel and that of the privilege against self-incrimination. *See Functional Overlap Between the Lawyer and Other Professionals, supra* note 10, at 1236-37.

[25] 8 WIGMORE, *supra* note 1, § 2291 at 554.

[26] *Id.*; MCCORMICK (2d ed.), *supra* note 2, § 87.

[27] Duchess of Kingston's Trial, 20 How. St. Trials 355, 573 (1776). The early common law protected both attorney-client and physician-patient communications. The privilege belonged to the practitioner and was predicated on the concept of honor among gentlemen. As this rationale lost favor, communications between physicians and their patients lost privileged status. *See* text accompanying notes 11 and 12, *supra.*

[28] Ch. 5, § 398, CAL. STAT. 1851 (codified at CAL. CODE CIV. P. § 1881 (1872)). In establishing its physician-patient privilege, California followed the lead of the New York legislature which in 1828 had enacted the first physician-patient privilege statute. Ch. 7, § 73, N.Y. REV. STAT. (1828), now codified in

quire an atmosphere in which the patient feels free to disclose to his physician all facts which may bear on his illness or injury. Without the protection of the physician-patient privilege, its proponents argued, the profession itself would suffer.[29]

Cogent as this rationale is in the context of the attorney-client privilege, it loses much of its force when applied to physician-patient communications. A patient consulting his doctor is concerned about becoming well. The thought of some later disclosure of his statements in a courtroom rarely becomes a motivating factor in what he chooses to tell or not to tell his physician. The protection the privileges afford confidentiality seems much less necessary to promote full disclosure by a patient to his physician than it is to promote disclosure in the attorney-client context where litigation is often contemplated.[30] Additionally, fear of such disclosure will not likely deter those seeking medical assistance. The insufficiency of this rationale led both Wigmore and McCormick to oppose the physician-patient privilege. In their view, the injury to justice which results from recognizing the privilege outweighs any theoretical injury to the professional relationship which disclosure of physician-patient communications may cause.[31]

Despite the weak support offered by the traditional rationale,

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N.Y. CIV. PRAC. LAW AND RULES § 4504 (McKinney 1963). The New York Commissioners of Revision advanced the following justification for the new privilege:

> The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, and to prepare the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense.

3 N.Y. REV. STAT 737 (1836). Although the California legislature did not expressly adopt any rationale for its physician-patient privilege, its endorsement of the New York view may be implied from its reliance on the language and reasoning of the New York Legislature. *Cf.* McCrae v. Erickson, 1 Cal. App. 326, 82 P. 209 (2d Dist. 1905).

[29] MCCORMICK (2d ed.), *supra* note 2, § 98; 8 WIGMORE, *supra* note 1, §§ 2380, 2380(a).

[30] As noted in 8 WIGMORE, *supra* note 1, § 2380(a) at 831:

> ...[T]he services of an attorney are sought primarily for aid in litigation, ... while those of the physician are sought for physical cure; that hence the rendering of that legal advice would result directly and surely in the disclosure of the client's admissions if the attorney's privilege did not exist, while the physician's curative aid can be and commonly is rendered irrespective of making disclosure; ....The function of the two professions being entirely distinct, the moral effect upon them of the absence of the privilege is different.

[31] 8 WIGMORE, *supra* note 1, § 2380(a); MCCORMICK (2d ed.), *supra* note 2, § § 98, 105. They attribute the continued vitality of the privilege to the medical profession's desire to maintain its honor and esteem on a par with that of the legal profession.

both California courts and its legislature have continued to recognize the physician-patient privilege. In adopting the California Evidence Code, the legislature actually strengthened the privilege in several respects.[32] A probable although unarticulated reason that the privilege continues to be recognized and expanded is the increasing importance society attaches to individual privacy interests. The physician-patient privilege may not be necessary to promote full disclosure by the patient, but it does protect him from the humiliation that would result if disclosure of the intimate details of his treatment could be compelled.[33] In a period of expanding government activity, violating confidentiality in this setting seems particularly repugnant. By expanding the privilege, the legislature perhaps has recognized that this relationship is one into which the public should not intrude absent compelling needs. California courts may soon give express recognition to the patient's privacy interests as a justification for the privilege, [34] and, in so doing, answer many of the criticisms which presently surround the physician-patient privilege. Articulation of these interests should also bring into sharper focus those factors which determine when the privilege should apply.

D. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Although a relative latecomer to the law of privileged communi-

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[32] The Code expanded the privilege to include any person reasonably believed by the patient to be authorized to practice medicine in any state or nation, to give protection to communications in the course of diagnosis as well as treatment, and to encompass within its protection communications to any third person reasonably necessary to the transmission of information or the accomplishment of the purpose for which the physician was consulted. CAL. EVID. CODE §§ 990, 992 (West 1968).

[33] While some commentators deprecate the protection the privilege extends patients' privacy interests (*e.g.*, MCCORMICK (2d ed.), *supra* note 2, § 98 at 213), the California courts have adopted the position that the "whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments." City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951). *Cf.* Green v. Superior Court, 220 Cal. App. 2d 121, 125, 33 Cal. Rptr. 604, 606 (3d Dist. 1963). The legislature has not expressly adopted a privacy rationale to support the physician-patient privilege. In enacting the Public Records Act, however, it did give express recognition to the privacy interests inherent in medical records, excluding from its disclosure provisions "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." CAL. GOV'T CODE § 6254(c) (West Supp. 1976).

[34] By viewing the "purpose" of the privilege as protecting the patient from the humiliation disclosure might bring, the California courts have already taken a step in this direction. In the context of psychotherapist-patient communications, a constitutional right of privacy has been found in the federal Bill of Rights. *In re* Lifschutz, 2 Cal. 3d at 431-32, 467 P.2d at 567-68, 85 Cal. Rptr. at 839-40. Discussion of the ramifications this decision might have on the physician-patient privilege is beyond the scope of this article. For a discussion of the potential impact the state guarantee of privacy might have on the privileges (CAL. CONST., art. I § 1 (West Supp. 1976)), *see* note 41 *infra*.

cations,[35] the psychotherapist-patient privilege affords the patient's confidences broader protection than does the analogous physician-patient privilege.[36] Several factors explain its greater strength. Some commentators theorize that because a psychotherapist's testimony tends to be more subjective and less reliable than that of a physician, there is less need for disclosure of psychotherapist-patient communications.[37] Others focus on the patient's significantly greater stake in confidentiality in a psychotherapist-patient relationship than in an ordinary physician-patient relationship. As the California Supreme Court, sitting en banc, noted in the case of *In re Lifschutz:*

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.[38]

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[35] The psychotherapist-patient privilege as such did not exist in California before the enactment of the Evidence Code in 1966. Traditionally, psychotherapist-patient relationships gained limited protection from the physician-patient privilege, but that protection was available only to psychiatrists, who are licensed physicians. In 1957 the California legislature responded by creating an evidentiary privilege analogous to the attorney-client privilege which protected communications between psychologists and their patients. Ch. 2320, § 1, CAL. STAT. 1957. That privilege gave psychologist-patient communications greater protection than that accorded psychiatrist-patient communications under the physician-patient privilege. In 1965 the legislature responded to this inequity by amending the psychologist-patient privilege to include psychiatrists. Ch. 553, § 1, CAL. STAT. 1965. The Evidence Code has eliminated much of the confusion by creating a separate psychotherapist-patient privilege. CAL. EVID. CODE §§ 1010-26 (West 1968 & Supp. 1976). The privilege originally applied only to psychiatrists and psychologists (CAL. EVID. CODE § 1010 (West 1968)), but was later extended to include licensed marriage, family and child counselors (CAL. EVID. CODE § 1010 (West Supp. 1976)). For a general discussion of this development, see Louisell & Sinclair, *Reflections on the Law of Privileged Communications: The Psychotherapist-Patient Privilege in Perspective,* 59 CALIF. L. REV. 30, 34-35 (1971) [hereinafter cited as Louisell & Sinclair, *The Psychotherapist-Patient Privilege in Perspective*], and *In re* Lifschutz, 2 Cal. 3d 415, 422 n.3, 467 P.2d 557, 560-61 n.3, 85 Cal. Rptr. 829, 832-33 n.3 (1970).

[36] CAL. EVID. CODE § 1014, Law Rev. Comm'n Comment (West 1968).

[37] *See* R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS 157 (1966) [hereinafter cited as SLOVENKO]; *A State Statute to Provide A Psychotherapist-Patient Privilege,* 4 HARV. J. LEGIS. 307, 313 (1967), which notes:

> The material adduced in psychoanalysis is often based upon unrealities or fantasies; it would seem to have little value in a judicial proceeding unless accompanied by an expert explanation. Even with such explanation the material may still not lend itself to an objective evaluation by an inexpert jury.

[38] 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839, quoting M. GUTTMACHER *et al.*, PSYCHIATRY AND THE LAW 272 (1952).

A patient is more likely to withhold information essential to effective treatment from his psychotherapist than from his physician, and the least threat to confidentiality may be sufficient to inhibit the relationship. Since full disclosure is essential to the success of the psychotherapeutic treatment, the need to encourage an atmosphere of trust and openness is great.[39] The traditional rationale, that of fostering the professional relationship, thus strongly supports the existence of the psychotherapist-patient privilege.

The special nature of psychotherapy, however, has led the California Supreme Court to find additional support for the privilege in the patient's right of privacy. In the *Lifschutz* case, the court suggested that the patient's interest[40] in keeping confidential communications from public purview deserves constitutional protection[41] as being within one of the zones of privacy articulated by the United

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[39]The growing importance of the psychotherapeutic relationship and the need for confidentiality in that relationship has been expressly recognized by the courts. The California Supreme Court stated in *In re* Lifschutz, 2 Cal. 3d at 421-22, 467 P.2d at 560-61, 85 Cal. Rptr. at 832-33:

> We recognize the growing importance of the psychiatric profession in our modern, ultracomplex society. The swiftness of change — economic, cultural, and moral — produces accelerated tensions in our society, and the potential for relief of such emotional disturbances offered by psychotherapy undoubtedly establishes it as a profession essential to the preservation of societal health and well-being. Furthermore, a growing consensus throughout the country, reflected in a trend of legislative enactments, acknowledges that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy. California has embraced this view through the enactment of a broad, protective psychotherapist-patient privilege.

See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMMITTEE ON PSYCHIATRY AND THE LAW, CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS IN THE PRACTICE OF PSYCHIATRY 93 (2d ed. 1966); Guttmacher & Wiehofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32, 34 (1952).

[40]Petitioner contended that, as a psychiatrist, he had a constitutional right, independent of the patient's, to an absolute privilege. 2 Cal. 3d at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834. Ultimately, the court rejected his argument. For a general discussion of this aspect of the case, see Suarez & Hunt, *The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In re Lifschutz*, 1 U.C.L.A.-ALASKA L. REV. 2, 14-15 (1971), and Louisell & Sinclair, *The Psychotherapist-Patient Privilege in Perspective, supra* note 35, at 46-51.

[41]2 Cal. 3d at 431-32, 467 P.2d at 567-68, 85 Cal. Rptr. at 839-40. *In re Lifschutz* was decided prior to the amendment of article I, section 1 of the California Constitution which added a right to privacy to the state constitution. *See* note 20 *supra*. It is unclear whether this amendment provides additional, broader protection for privileged communications. In Ravin v. State, 537 P.2d 494 (Alaska 1975), the Alaska Supreme Court faced a challenged invasion of the privacy argued to be guaranteed by both the U.S. and Alaska Constitutions. In a concurring opinion, Justice Boochever, joined by Justice Connor, made the following observation regarding the state constitutional right of privacy:

> Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly

States Supreme Court in *Griswold v. Connecticut*.[42] On the facts present in *Lifschutz*, the court found that the patient's right of privacy was outweighed by the "substantial"[43] state interest in hearing a psychiatrist's testimony when the patient has placed his mental condition in issue.[44] However, the case is significant in its recognition that psychotherapist-patient communications will receive constitutional protection in most settings.

These intimations of constitutional protection reflect the importance of the psychotherapeutic patient's privacy interests. Disclosure of the mere fact of therapy can severely damage the patient's standing in the community.[45] Vulnerability and potential embarrassment often accompany the disclosures the patient makes to his psychotherapist. Unwarranted intrusions into the confidences of that relationship violate a basic human right to be let alone and shatter the justifiable expectations of confidentiality most persons who seek psychiatric treatment have.

II. STATUTORY DEFINITION OF PRIVILEGES

Privileges do not protect all communications between a layperson and professional. The California Evidence Code establishes certain requirements which must be satisfied before a professional privilege will attach. It also creates explicit exceptions to the operation of the privileges.

> providing for a right of privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.

Id. at 514-15. Whether the California Supreme Court will adopt an analogous position remains an open question. In White v. Davis, 13 Cal. 3d 757, 773-74, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975), the Court suggests that the state constitutional amendment might be limited to instances of "government snooping." Arguably, a subpoena to one's psychiatrist is a form of government snooping. In the context of the privileges, however, the better approach would seem to be to focus on the balance between the privacy interests the privileges protect and the state's interest in ensuring the fairness of its trials, relying on the California guarantee of privacy to elevate the standard of review to a level which will preserve the individual's rights from unwarranted invasion.

[42] 381 U.S. 479 (1965).

[43] 2 Cal. 3d at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840.

[44] For a general discussion of waiver by placing in issue, codified at CAL. EVID. CODE § 1016 (West 1968), see text accompanying notes 174 through 219 *infra*. In holding that section 1016 was not an intolerable invasion of the patient's privacy interests, the *Lifschutz* court also stressed the patient's ultimate control over the operation of the exception (2 Cal. 3d at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840), raising questions whether, absent such control, other statutory exceptions would be upheld.

[45] *See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1050-51 (1974) [hereinafter cited as *Fleming & Maximov*]; SLOVENKO, *supra* note 37, who observed at 188:

> Unlike the patient suffering an organic illness, the person in psycho-

A. REQUIREMENTS FOR THE EXISTENCE OF THE PRIVILEGE

The legislature has conditioned the attachment of the privileges upon the satisfaction of three broad requirements: (1) the communication must be confidential; (2) it must be made to a practitioner whom the layperson reasonably believes to be licensed; and (3) it must be made in the course of the professional relationship.

The privileges exist to protect the layperson's privacy interests and to promote the professional relationship by encouraging full disclosure. Since neither of these ends will be served unless the communication itself is confidential, the privileges attach only to "confidential communications."[46] The common law required some evidence that the layperson intended the communication to be confidential at the time he made it. This intention could be demonstrated by the claimant's own statements or inferred from the circumstances in which the communication was made.[47] Under the California Evidence Code, a presumption of confidentiality attaches to any communication made in the course of an attorney-client, physician-patient or psychotherapist-patient relationship.[48] If he is to defeat the privilege, the party seeking disclosure must demonstrate that the circumstances under which the communication was made are inconsistent with this presumption of confidentiality.

No presumption attaches to communications made in the "ostensible"[49] presence of third persons. The mere fact that a stranger to the communication was within earshot suggests that the parties did not intend the communication to be confidential. However, if the claimant can show that the third person was present to further the interest of the layperson or was reasonably necessary to the purpose of the consultation, the communication will be protected.[50]

> therapy by and large visits his psychiatrist with the same secrecy that a man goes to a bawdy house.

[46] CAL. EVID. CODE § 954 (attorney-client), § 994 (physician-patient) and § 1014 (psychotherapist-patient) (West 1968).

[47] 8 WIGMORE, *supra* note 1, §§ 2311, 2381; MCCORMICK (2d ed.), *supra* note 2, §§ 91, 101. As a practical matter, the burden is not particularly onerous. The client or patient is not required to show that he actually requested secrecy, only that the circumstances under which he made his communication were consistent with his allegation of confidentiality. *See* 8 WIGMORE, *supra* note 2, § 2311.

[48] CAL. EVID. CODE § 917 (West 1968).

[49] People v. Poulin, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623, 630 (1st Dist. 1972).

[50] CAL. EVID. CODE § 952 (attorney-client), § 992 (physician-patient) and § 1012 (psychotherapist-patient) (West 1968). Once the presence of third persons has destroyed the presumption of confidentiality, the burden shifts to the claimant to establish that the communication was intended to be confidential. *See* People v. Poulin, 27 Cal. App. 3d 54, 103 Cal. Rptr. 623 (1st Dist. 1972). Prior to the adoption of the Evidence Code, the privilege extended only to persons whose presence was reasonably necessary to accomplish the purpose of the

The professional privileges were originally restricted to communications between a layperson and practitioner actually licensed to practice law or medicine.[51] That rule unfairly penalized the individual who had been deceived about the professional status of the practitioner he consulted. As a result, the modern trend has been to extend the privileges to situations in which the layperson reasonably believes he is consulting a licensed practitioner, whether or not that person is actually licensed to practice.[52] The California Evidence Code is in accord with this trend and with minor exceptions protects communications with practitioners reasonably believed to be licensed in the state of California or authorized to practice in any other state or nation.[53]

The privileges are also restricted to communications made "in the course of the professional relationship."[54] The attorney-client privilege attaches to consultations made "for the purposes of retaining the lawyer or securing legal service or advice from him in his professional capacity."[55] The physician-patient and psychotherapist-patient privileges attach to any consultation or examination for the purposes of diagnosis or treatment of a physical, mental or emotional

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consultation. This category included such persons as stenographers and nurses, but did not include parents or spouses. Today, however, the presence of third persons does not destroy the confidentiality of the communication as long as they are present to further the interests of the claimant. CAL. EVID. CODE § 952, Law Rev. Comm'n Comment (West 1968); Comment, *Attorney-Client Privilege in California*, 10 STAN. L. REV. 297, 308 (1958).

[51] 8 WIGMORE, *supra* note 1, § 2300. Former California Code of Civil Procedure section 1881 limited the physician-patient privilege to communications made to a physician licensed by the state of California. No such requirement was imposed on attorney-client consultations.

[52] *See generally* 8 WIGMORE, *supra* note 1, § 2302 & n.1 at 584.

[53] CAL. EVID. CODE § 950 (attorney-client) and § 990 (physician-patient) (West 1968). Although the same standard is applied to psychiatrists, psychologists and clinical social workers must actually be licensed in California under the Business & Professions Code. *Id.* § 1010 (Supp. 1976). *See generally* Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050 (1973).

[54] CAL. EVID. CODE § 952 (attorney-client), § 992 (physician-patient) and § 1012 (psychotherapist-patient) (West 1968).

[55] *Id.* § 951. Thus, a person may discuss his problems with an attorney during an initial interview without fear of disclosure even though no employment follows. Estate of DuPont, 60 Cal. App. 2d 276, 288, 140 P.2d 866, 872 (1st Dist. 1943). He may not expect the same protection, however, when he asks an attorney to perform an act which could be performed by anyone or discusses with him matters not related to the purposes of his professional employment or status as an attorney. Solon v. Lichtenstein, 39 Cal. 2d 75, 244 P.2d 907 (1952). When the client directs his attorney to act as an attesting witness to his will, for example, the attorney is not acting in his professional capacity and may later be asked to attest the signature and the capacity of the testator to make a will. As Wigmore notes, the lawyer "cannot be an attesting witness and yet not attest when the time comes." 8 WIGMORE, *supra* note 1, § 2315 at 616. Although the earlier

condition.[56] The psychotherapist-patient privilege further extends to examinations for the purposes of scientific research on mental or emotional problems.[57]

B. THE HOLDER OF THE PRIVILEGE

The statutes define the holder of the privilege as the patient or client, his guardian or conservator, or his authorized representative if he is deceased.[58] Professional privileges protect the interests of the layperson, not those of the practitioner.[59] The holder has total authority over the exercise of the privilege. Although others may claim the privilege on his behalf,[60] only he may waive it. The practitioner may neither disclose a privileged communication without the holder's consent,[61] nor refuse to testify to such a communication if the holder has consented to disclosure.[62]

A professional privilege may be held jointly. Where two or more persons employ the same counsel and discuss their common concern in the presence of each other and that counsel, the attorney-client privilege protects their communication from subsequent disclosure. One holder may not assert the privilege against the other,[63] but either may assert it against third parties.[64] Waiver by one joint holder does not affect the right of any other holder to claim the privilege in other

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cases held that the client who directed his attorney to attest his will had waived the privilege for any matter pertaining to its validity (*In re* Estate of Mullin, 110 Cal. 252, 42 P. 645 (1895); *In re* Estate of Wax, 106 Cal. 343, 39 P. 624 (1895)), California Evidence Code section 959 limits the matters about which the lawyer may be asked to information which he received in his capacity as attesting witness.

[56]CAL. EVID. CODE §§ 991, 1011 (West 1968). Under former California Code of Civil Procedure section 1881(4), the physician-patient privilege was limited to consultations for treatment only. The Evidence Code expanded the scope of the privilege to include diagnosis as well. As noted in the Comment to section 991:

> Persons do not ordinarily consult physicians from idle curiosity . . . They may seek diagnosis from one physician in contemplation of seeking treatment from another. Communications made under such circumstances are as deserving of protection as are communications made to a treating physician.

[57]CAL. EVID. CODE § 1011 (West 1968).

[58]*Id.* § 953 (attorney-client), § 993 (physician-patient) and § 1013 (psychotherapist-patient).

[59]People v. Dubrin, 232 Cal. App. 2d 674, 680, 43 Cal. Rptr. 60, 64 (2d Dist. 1965); Rigolfi v. Superior Court, 215 Cal. App. 2d 497, 501, 30 Cal. Rptr. 317, 320 (1st Dist. 1963).

[60]CAL. EVID. CODE § 954(b) (attorney-client), § 994(b) (physician-patient) and § 1014(b) (psychotherapist-patient) (West 1968). *See* text accompanying notes 70 through 72 *infra.*

[61]People v. Atkinson, 40 Cal. 284 (1870).

[62]People v. Riordan, 79 Cal. App. 488, 498, 250 P. 190, 194 (2d Dist. 1926).

[63]CAL. EVID. CODE. § 962 (West 1968).

[64]*Id.* § 912(b).

proceedings to which he is a party.[65]

Professional privileges survive the death of the holder in most circumstances. Authority to exercise the privilege against strangers to the estate passes to the personal representative of the decedent.[66] The privilege may not be asserted, however, in cases involving disputes over the administration of an estate.[67] Persons in privity with the estate, whether claiming by testate or intestate succession or claiming rights acquired through an *inter vivos* transaction, claim through the estate rather than adversely. Consequently, in an action to which only those in privity with the estate are parties, the privilege may not be asserted.[68] As with joint holders, any such claimant retains the right through the decedent's personal representative to assert the privilege against strangers to the estate.[69]

C. WHO MAY ASSERT THE PRIVILEGE

In most judicial proceedings, the holder or his attorney acting as his agent asserts the privilege. If the holder is not present or is not a party to the proceeding in which disclosure is sought, the practitioner is required to assert the privilege on behalf of the holder.[70] If no person authorized to claim the privilege is present, the presiding

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[65] *Id.*; People v. Kor, 129 Cal. App. 2d 436, 444, 277 P.2d 94, 99 (2d Dist. 1954).

[66] The personal representative has the authority both to claim and to waive the privilege as necessary to protect the interests of the estate. CAL. EVID. CODE § 953(c) (attorney-client), § 993(c) (physician-patient) and § 1013(c) (psychotherapist-patient) (West 1968).

[67] CAL. EVID. CODE § 957 (attorney-client), § 1000 (physician-patient) and § 1019 (psychotherapist-patient) (West 1968). *See generally* Annot., 2 A.L.R.2d 645 (1948); Annot., 66 A.L.R.2d 1302 (1959).

[68] CAL. EVID. CODE § 957, Law Rev. Comm'n Comment (West 1968). This exception originally applied only to parties claiming by testate or intestate succession. A claimant by *inter vivos* transaction was deemed to be a stranger to the estate. In a dispute over the administration of the estate, those whose rights were acquired through testate or intestate succession could assert the privilege against him. Smith v. Smith, 173 Cal. 725, 161 P. 495 (1916); Paley v. Superior Court, 137 Cal. App. 2d 450, 290 P.2d 617 (2d Dist. 1955). The premise for the exception, that the decedent would want the communication disclosed in litigation between the claimants in order to effectuate the proper distribution of his estate, is also applicable to *inter vivos* claimants to the estate. In recognition of this fact, the exception was expanded with the enactment of the Evidence Code to include all parties claiming to have a testate, intestate or *inter vivos* interest in the estate. CAL. EVID. CODE § 957, Law Rev. Comm'n Comment (West 1968); Comment, *Posthumous Privilege in California*, 8 U.C.L.A.L. REV. 606, 621 (1961).

[69] CAL. EVID. CODE § 953(c) (attorney-client), § 993(c) (physician-patient) and § 1013(c) (psychotherapist-patient) (West 1968).

[70] California Evidence Code sections 955 (attorney-client), 995 (physician-patient) and 1015 (psychotherapist-patient) impose this duty on practitioners. In addition, their ethical canons impose on them a duty to preserve the confidentialtiy of the professional relationship. *See* PRINCIPLES OF MEDICAL ETHICS § 9 (1957) *and* the Hippocratic Oath; ABA CANONS OF PROFESSIONAL ETHICS NO. 4.

officer is charged with the responsibility to prevent disclosure.[71] His failure to do so, however, is not deemed a waiver of the privilege, and the holder retains his right to invoke the privilege in any subsequent proceeding.[72]

D. EFFECT OF ASSERTING THE PRIVILEGE

Professional privileges may be invoked in any proceeding "in which, pursuant to law, testimony can be compelled to be given."[73] No presumption attaches to invocation of a privilege, nor may the fact finder draw an adverse inference from its assertion.[74] Further, the presiding officer and counsel may not comment on exercise of a privilege, as it relates either to the credibility of the witness or to any other matter at issue in the proceeding.[75]

When a privilege has been asserted, the presiding officer must rule on the admissibility of such evidence on the basis of the facts before him. He may not compel disclosure of the allegedly privileged information, in open court or *in camera*, to facilitate his determination.[76] Although an *in camera* proceeding would result in only a limited disclosure, the prevailing view is that any disclosure at all vitiates the confidences the privileges were designed to protect.[77]

E. EXCEPTIONS TO THE PRIVILEGES

The compelling need for full disclosure of relevant information in judicial proceedings demands that the privileges be restricted within the boundaries set by their legitimate purposes. In an effort to circumscribe their operation accordingly, the legislature has established a number of exceptions to the privileges.[78] These exceptions arise

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[71] CAL. EVID. CODE § 916(a) (West 1968).

[72] *Id.* § 919(b). *See* People v. Kor. 129 Cal. App. 2d 436, 277 P.2d 94 (2d Dist. 1954); People v. Abair, 102 Cal. App. 2d 765, 228 P.2d 336 (4th Dist. 1951).

[73] CAL. EVID. CODE §§ 901, 910 (West 1968).

[74] *Id.* § 913(a).

[75] *Id. See* People v. Wilkes, 44 Cal. 2d 679, 284 P.2d 481 (1955).

[76] CAL. EVID. CODE § 915(a) (West 1968).

[77] *See* Carlton v. Superior Court, 261 Cal. App. 2d 282, 292-93, 67 Cal. Rptr. 568, 574-75 (2d Dist. 1968), supporting prohibition of *in camera* inspections. *But see In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), in which the court suggested that *in camera* inspections may be necessary to separate that evidence which is directly relevant to the condition placed in issue from that which retains its privileged status. *See* note 205, *infra*.

[78] CAL. EVID. CODE §§ 956-62 (attorney-client), §§ 996-1007 (physician-patient) and §§ 1016-26 (psychotherapist-patient) (West 1968 & Supp. 1976). Of these, only some are true exceptions. Others, such as the patient-litigant exceptions to the physician-patient and psychotherapist-patient privileges (*Id.* §§ 996, 1016) and the exceptions which apply when the practitioner's breach is at issue (*Id.* §§ 958, 1001, 1020) represent codifications of judicially developed waiver doctrines and will be considered as part of the general discussion of waiver. *See* text accompanying notes 174 through 214 *infra*.

in circumstances where the legislature has sensed a special need for the successful prosecution of a court action or where the consultation was made for anti-social purposes. In such circumstances, the privilege never attaches. The exceptions to the three professional privileges are not identical. All of the exceptions, however, can be categorized as applicable to communications of three general types: (1) consultations made in furtherance of a crime or tort; (2) communications to be used in criminal or other disciplinary proceedings; and (3) communications to be used in commitment or incompetency proceedings.[79]

1. *IN FURTHERANCE OF CRIME, FRAUD OR OTHER TORT*[80]

The privileges do not apply when a layperson seeks the advice of a practitioner to aid in the commission of a crime or fraud.[81] For example, when a physician conspires with his patient to violate the law by selling him narcotics under the counter, the physician-patient privilege will not protect the confidentiality of that communication.[82] Conspiracies to perpetrate a crime or fraud are not within the realm of professional relationships which the legislature desire to foster. A more difficult problem is presented when the practitioner refuses to participate in the conspiracy. Suppose, for example, that the layperson sought professional advice to aid in the commission of a criminal act, but the practitioner declined to lend his assistance. Counseling against anti-social conduct would seem to be a legitimate function of an attorney, psychotherapist or even a physician. By its terms, however, the crime or fraud exception applies in this situation just as it does to an actual conspiracy between the

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[79] A fourth category of exceptions may be found in California Evidence Code sections 960-61, 1002-03 and 1021-22 which render the privileges inoperative in a contest over the validity of a writing concerning a property interest. These exceptions are considered in their historical context at note 22 *supra*.

[80] For an excellent in-depth discussion of the crime or tort exception, see Comment, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730 (1963) [hereinafter cited as *The Future Crime or Tort Exception*]; also Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A.J. 708 (1961); MCCORMICK (2d ed.), *supra* note 2, § 95; 8 WIGMORE, *supra* note 1, §§ 2298-99.

[81] CAL. EVID. CODE § 956 (attorney-client), § 997 (physician-patient) and § 1018 (psychotherapist-patient) (West 1968). The existence of a wrongful purpose may be difficult to establish. California Evidence Code section 915 provides that a court may not compel disclosure of a privileged communication to determine whether or not the privilege should apply. Yet, the best evidence to prove that professional advice was sought in furtherance of a crime or fraud is usually the communication itself. The courts have resolved this dilemma by requiring the opponent of the privilege to make a prima facie showing, independent of the privileged communication, that the wrongful purpose existed at the time the consultation took place.

[82] *Cf.* Abbott v. Superior Court, 78 Cal. App. 2d 19, 177 P.2d 317 (1st Dist. 1947).

layperson and practitioner.[83]

The crime or tort exception to the physician-patient and psychotherapist-patient privileges is broader in several respects than the corresponding exception to the attorney-client privilege. It is not limited to the commission of crime or fraud, but extends to the commission of all torts.[84] Further, it applies not only to consultations in which advice is sought to aid in the future commission of a wrongful act, but also to communications in which advice is sought to avoid detection after the completion of such an act.[85]

2. *CRIMINAL OR OTHER DISCIPLINARY PROCEEDINGS*

The physician-patient privilege does not protect communications relevant to an issue in a criminal[86] or other disciplinary proceeding.[87] The criminal or disciplinary proceeding exception should be distinguished from the crime or tort exception discussed in the preceding subsection. A patient who goes to his physician for treatment of gunshot wounds is not seeking medical assistance for a wrongful purpose within the definition of the crime or tort exception. If the gunshot wounds are relevant to an issue in a criminal proceeding,

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[83] CAL. EVID. CODE § 956 (attorney-client), § 997 (physician-patient) and § 1018 (psychotherapist-patient) (West 1968). When the practitioner does not succeed in diverting the layperson from his wrongful purpose, society's interest in the prevention of crime may warrant the operation of the exception. For a discussion of the ethical problems which this situation raises for the practitioner, see *The Future Crime or Tort Exception*, *supra* note 80, at 732-33. When the practitioner does succeed in dissuading his client from pursuit of his wrongful purpose, however, the privilege should apply. For example, in an action for custody of the parties' minor child, one parent's psychotherapist-patient communications should not be discoverable to show unrealized criminal propensities. No California cases have been found which discuss this point. Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943 (1927), and Williams v. Williams, 108 S.W.2d 297 (Tex. Civ. App. 1937), hold that if the criminal act was not actually committed, the exception should not apply.

[84] CAL. EVID. CODE §§ 997, 1018 (West 1968). Former Uniform Rule 26(2) expanded the exception to the attorney-client privilege to include consultations in furtherance of tortious, as well as criminal or fraudulent, conduct. California has not adopted this position on the theory that to do so would open up "too large an area of nullification of the privilege, and, in view of the wide variety of torts and the technical character of many, [present] . . . difficult problems for an attorney consulting with his client." B. WITKIN, CALIFORNIA EVIDENCE § 420 at 470, *quoted with approval in* Nowell v. Superior Court, 223 Cal. App. 2d 652, 658, 36 Cal. Rptr. 21, 25 (2d Dist. 1963).

[85] CAL. EVID. CODE §§ 997, 1018 (West 1968).

[86] *Id.* § 998. Under former section 999 of the California Evidence Code, the physician-patient privilege could not be invoked in a civil action to recover damages for conduct which constitutes a crime if the tortfeasor has actually been arrested or has criminal charges pending against him. *See* Carlton v. Superior Court, 261 Cal. App. 2d 282, 67 Cal. Rptr. 568 (2d Dist. 1968). As amended in 1976, this section excepts from the privilege any "communication concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure is shown."

[87] CAL. EVID. CODE § 1007 (West 1968).

however, the physician can be compelled to testify.[88]

The attorney-client privilege is not similarly qualified. An exception for communications relevant to an issue in a criminal proceeding would destroy the confidentiality of the attorney-client relationship in the very context in which full and candid disclosure is most necessary, that of preparing a defense to a criminal action. The comparable exception to the psychotherapist-patient privilege is limited to communications with clinical social workers.[89]

3. INCOMPETENCY AND COMMITMENT PROCEEDINGS

The physician-patient privilege similarly may not be invoked in commitment proceedings.[90] The psychotherapist-patient privilege may be asserted in such proceedings unless the psychotherapist has reasonable cause to believe that the patient is dangerous to himself or to others.[91] Although patients with anti-social drives should be encouraged to make full disclosures to their psychotherapists, the legislature has determined that the danger to society posed by these patients outweighs the benefits of confidentiality to the treatment of such persons.[92]

Neither the physician-patient nor the psychotherapist-patient privilege applies in proceedings brought by or on behalf of a patient to establish his mental competency.[93] The legislature rationalizes this exception on the theory that the patient, if competent, would desire the admission of evidence relevant to his competency in a proceeding purportedly brought on his own behalf.[94]

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[88] *See Id.* § 998.

[89] California Evidence Code section 1028 provides that communications relevant to an issue in a criminal proceeding are privileged only if made to a psychiatrist or psychologist. The legislature offers no explanation for this distinction. If, as the California Supreme Court intimated in *In re Lifschutz*, the psychotherapist-patient privilege rests on constitutional underpinnings (*see* text accompanying notes 49 through 41 *supra*), this distinction might not withstand an attack under the equal protection or due process clauses of the United States Constitution.

The broader exception to the physician-patient privilege is perhaps but another example of the disfavor with which many courts and commentators view the physician-patient privilege. Even if the privacy rationale for the physician-patient privilege is given express endorsement (*see* text accompanying notes 27 through 34 *supra*), the courts are unlikely to find that the privacy interests of the perpetrator of a crime or tort outweigh society's need to protect its citizens.

[90] CAL. EVID. CODE § 1004 (West 1968).

[91] *Id.* § 1024.

[92] *Id.*, Law Rev. Comm'n Comment. For a critical evaluation of this rationale, see *Fleming & Maximov, supra* note 45, and Comment, *The Dangerous Patient Exception: The Creation of a Dangerous Precedent*, this volume.

[93] CAL. EVID. CODE § 1005 (physician-patient) and § 1025 (psychotherapist-patient) (West 1968).

[94] *Id.* § 1005, Law Rev. Comm'n Comment, incorporated by reference in the Comment to section 1025 of the Evidence Code. Neither this argument nor the

In each of the above-described situations, the communication never becomes privileged. The layperson can have no legitimate expectation that his conversation will remain confidential. The communication itself and the circumstances in which disclosure is sought determine the absence of privilege. Waiver is conceptually different from a true exception. Waiver occurs when the holder by his own act causes the loss of an existing privilege. Some statutory exceptions are in fact codified forms of waiver and are discussed in this article in the context of the applicable waiver doctrines.[95]

III. PRINCIPLES OF WAIVER

Evidence Code section 912 provides that the holder who "has consented" to disclosure of "a significant part of a privileged communication" waives the privilege.[96] The consent may be express or it may be implied from the holder's conduct. In either instance, the holder must have acted "without coercion."[97] The statute does not require, however, that the holder have known or intended waiver to be the consequence of his actions. If he voluntarily performed an act upon which consent to disclosure may be predicated, waiver occurs regardless of the holder's subjective intent to preserve the confidentiality of the privileged communication.[98]

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state's interest, in its traditional role of *parens patriae*, appear to be sufficiently compelling to justify this limitation of the psychotherapist-patient privilege. The patient who regards his communications with his psychiatrist as intensely personal may well wish to prevent their disclosure. Even if the outcome of the competency proceeding is a judicial declaration of his competence, the disclosures have been compelled against his will and his privacy interests invaded. For a critical evaluation of the institution of incompetency proceedings and the way the California legislature has accommodated these competing interests, see Comment, *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U.C.D.L. REV. 457 (1974).

[95] *See* text accompanying notes 174 through 214 *infra*.

[96] This section provides that the privilege:

> . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

CAL. EVID. CODE § 912(a) (West 1968).

[97] *Id.*

[98] Waiver in the context of professional privileges thus differs from waiver in other contexts, where it has generally been defined as follows:

> Waiver is the intentional relinquishment of a known right; it is the expression of an intention not to insist upon what the law affords. It is consensual in its nature; the intention may be inferred from conduct, and the knowledge may be actual or constructive, but both knowledge and intent are essential elements.

Prosser, *The Making of a Contract of Insurance In Minnesota*, 17 MIN. L. REV. 567, 594-95 (1933). Speaking of waiver in the context of the professional privi-

Few problems arise when the holder expressly consents to disclosure of a privileged communication. The terms of the consent provide the terms of the waiver, and the problem becomes largely one of contract law.[99] When waiver is implied from the holder's conduct, however, both the existence and the extent of the waiver pose difficult problems of judicial interpretation. Theoretically, the holder's conduct serves as the basis for an implied consent to disclosure, from which the court in turn may imply the terms and scope of the waiver. The holder's conduct acquires meaning, however, only when it is viewed in relationship to the rationale for the privilege and the conflicting need for the otherwise privileged information in a particular fact setting. In articulating this relationship, the court will often evaluate the claim of privilege in light of three factors: (1) conduct by the holder which indicates that he does not value the confidentiality of the communication; (2) exploitation of the privilege to prevent disclosure of facts that may be harmful to the holder's case while using other privileged information to his advantage; and (3) the unavailability of relevant evidence from other sources. One or more of these factors are present in almost every case in which courts have found waiver.

For analytical convenience, the conduct most likely to result in a finding of implied waiver and the circumstances in which it occurs

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leges, Wigmore notes:

> A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield. . . .

8 WIGMORE, *supra* note 1, § 2388 at 855.

[99] Most cases involving express waivers arise in the context of insurance litigation. Express provisions authorizing disclosure of medical records normally appear in applications for health or life insurance and, in some instances, in the policies themselves. Although courts generally uphold these provisions (*see* Torbenson v. Family Life Insurance Co., 163 Cal. App. 2d 401, 329 P.2d 596 (3d Dist. 1958)), they tend to construe them narrowly. Equitable considerations prompt this rule of strict construction. While the court was unwilling in Turner v. Redwood Mutual Life Association, 13 Cal. App. 2d 573, 57 P.2d 222 (4th Dist. 1936), *noted in* 25 CALIF. L. REV. 108, to declare such provisions void as against public policy, it employed essentially a contract law analysis in defining the scope of the waiver. *Accord*, Roberts v. Superior Court, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973). One evidentiary problem which apparently has not been litigated is whether, once the insured has signed this consent, he will be deemed under the provisions of Evidence Code section 912(a) to have consented to disclosure of "a significant part of the communication," and therefore to have waived the privilege for all subsequent purposes, even if the insurer never examines the records. Such a construction can be avoided if the consent is viewed as one conditioned on the insurance company's subsequent decision to investigate those records. Given the widespread use of these clauses by insurance companies, such construction seems necessary to preserve the integrity of the physician-patient privilege.

can be divided into three general categories: (a) voluntary disclosure of confidential communications; (b) failure to assert the privilege in a timely fashion; and (c) placing in issue privileged information. The following sections discuss the characteristics of each of these forms of waiver, the justifications which support them, and the scope of the waiver which results.

A. WAIVER BY VOLUNTARY DISCLOSURE

When the holder of a privilege voluntarily discloses a significant part of a privileged communication, he waives the privilege attached to that communication.[100] Waiver follows as a necessary consequence of his action and does not depend on his subjective intention to preserve the privilege. From his voluntary act of disclosing a part of the privileged communication, the courts infer his consent to disclosure of the entire communication.[101] They do so for two reasons. First, any person who voluntarily discusses a privileged communication, whether with a neighbor or on the witness stand, indicates by his action that he does not place a premium on the confidentiality the privileges are designed to promote. If the holder attaches little importance to confidentiality, the courts will normally conclude that the purposes of the privilege would not be well served by according continued protection to that communication.[102] Second, a holder should not be allowed to abuse the judicial process by disclosing as much of the communication as he pleases and then interpose the privilege to shield from disclosure material unfavorable to his case.[103] He must elect to disclose or to withhold the entirety of the communication. A holder will be found to have waived the privilege if he (1) discloses a significant part of the privileged communication and (2) does so voluntarily.

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[100] CAL. EVID. CODE § 912(a) (West 1968). The disclosure may have been made in court (*see* Agnew v. Superior Court, 156 Cal. App. 2d 838, 320 P.2d 158 (2d Dist. 1958); People v. Ottenstror, 127 Cal. App. 2d 104, 273 P.2d 289 (2d Dist. 1954)) or out of court (*see* Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542 (1915); Estate of Visaxis, 95 Cal. App. 617, 273 P. 165 (2d Dist. 1928)).

[101] MCCORMICK (2d ed.), *supra* note 2, § 93 at 194.

[102] This policy is the same as that which underlies the requirement that the communication be intended to be confidential before the privilege will attach. *See* text accompanying notes 46 through 50 *supra*. Although the holding in Green v. Superior Court, 220 Cal. App. 2d 121, 33 Cal. Rptr. 604 (3d Dist. 1963), is of questionable validity because the present physician-patient privilege protects communications to necessary third persons (*see* CAL. EVID. CODE § 912(d) (West 1968)), the court observed, in finding disclosures "to a miscellany of drug clerks" waived the privilege, that ". . . it may be seriously doubted whether this patient ever contemplated that her disclosures were in confidence and by the express language of the statute confidence is the sine qua non of privilege." *Id.* at 127, 33 Cal. Rptr. at 607.

[103] 8 WIGMORE, *supra* note 1, § 2327.

1. DISCLOSURE OF A SIGNIFICANT PART OF A PRIVILEGED COMMUNICATION

The holder of the privilege must have disclosed a part of the actual communication for waiver to result.[104] Professional privileges attach, not to the subject matter of the communication, but to the communication itself.[105] A party who has related the facts surrounding a traffic accident to his attorney does not waive his attorney-client privilege merely by retelling those facts from the witness stand. The facts themselves are not part of the privileged communication.[106] If, in the course of relating those facts, he makes specific reference to a conference with his attorney by saying, "as I told my attorney, the plaintiff did run that light," waiver occurs.[107] In this instance, the disclosure goes to the privileged communication itself. Although there is some authority to the contrary,[108] the same rule applies in the physician-patient context.[109] The patient who merely discusses his ailments with a neighbor does not lose the protection of the privilege. He must go further and reveal the professional opinion of his physician or the details of his treatment before waiver will result.[110]

The holder who discloses part of a privileged communication does not lose the privilege unless his disclosure is of a "significant part"[111] of that communication. A party who reveals that he consulted a psychotherapist without stating the purposes of the consultation does not waive the privilege,[112] nor does a party who merely dis-

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[104] CAL. EVID. CODE § 912(a) (West 1968).

[105] *Cf.* People *ex rel* Department of Public Works v. Donovan, 57 Cal. 2d 346, 469 P.2d 1, 19 Cal. Rptr. 473 (1962).

[106] *See* San Francisco Unified School District v. Superior Court, 55 Cal. 2d 451, 359 P.2d 925, 11 Cal. Rptr. 373 (1961).

[107] *See* People v. Dubrin, 232 Cal. App. 2d 674, 43 Cal. Rptr. 60 (2d Dist. 1965).

[108] Wigmore argues that the patient who discusses his ailment with a friend should be deemed to have waived the physician-patient privilege attached to all professional communications concerning that ailment. Discussion of one's ailments he believes betrays a lack of concern for the confidentiality of the professional communications and should result in waiver. 8 WIGMORE, *supra* note 1, § 2389(5). Although his argument recognizes the close relationship between the patient's sensitivity about his condition and the privacy interests the physician-patient privilege is designed to protect (*see* text accompanying notes 27 through 34, *supra*), it does not adequately distinguish between the humiliation to which the patient subjects himself when he reveals the fact of his ailment to a friend and that to which he would be subjected if the entirety of the consultation, the extent of his illness, or the potentially embarrassing details of its treatment were publicly disclosed.

[109] Estate of Visaxis, 95 Cal. App. 617, 622-24, 273 P. 165, 167-68 (2d Dist. 1928) (dictum).

[110] *Id.*; *see* 8 WIGMORE, *supra* note 1, § 2389.

[111] CAL. EVID. CODE § 912(a) (West 1968).

[112] People v. Perry, 7 Cal. 3d 756, 783, 499 P.2d 129, 146, 103 Cal. Rptr. 161, 178 (1972); *In re* Lifschutz, 2 Cal. 3d 415, 430, 467 P.2d 557, 566-67, 85 Cal. Rptr. 829, 838-39 (1970). Similarly, in Roberts v. Superior Court, 9 Cal. 3d

closes that certain matters were not discussed at a given consultation.[113] The more extensive the disclosure becomes, the more difficulty the court encounters in determining its significance. In making its determination, the court evaluates such factors as the holder's role in making the communication relevant to an issue in the proceeding;[114] indications by the holder that he does not value the confidentiality of the communication,[115] and the availability of other evidence on the same subject.[116]

Even when the holder has disclosed a significant part of the privileged communication, he may not have waived the privilege. If the disclosure was made in the course of another privileged communication, as where a husband relates to his wife a conversation with his attorney, the privilege continues to exist.[117] Similarly, disclosures made to persons to whom such disclosure is reasonably necessary to the purposes of the consultation do not result in waiver.[118] A patient who gives a prescription to his pharmacist, for example, does not waive his physician-patient privilege.[119] Such a disclosure is not deemed a voluntary disclosure of a significant part of a privileged communication, but instead a disclosure reasonably necessary to further the professional relationship the privilege promotes.[120]

330, 340-41, 508 P.2d 309, 315-16, 107 Cal. Rptr. 309, 315-16 (1973), the California Supreme Court held that a patient who testified to the general purposes for which she had consulted a psychotherapist in order to satisfy the court that those communications fell outside the scope of the patient-litigant exception had not disclosed a sufficient part of the communication to waive the privilege.

[113] People v. Perry, 7 Cal. 3d 756, 783, 499 P.2d 129, 146, 103 Cal. Rptr. 161, 178 (1972) (dictum). Insofar as disclosure of what was not discussed defines by negative inference what was discussed, such disclosures may be appropriately characterized as a non-significant disclosure of a privileged communication. In People v. Hall, 55 Cal. App. 2d 343, 356-57, 130 P.2d 733, 740 (2d Dist. 1942), the court adopted the view that disclosures that certain things were not discussed does not amount to disclosure of privileged information at all, thereby precluding inquiry into their "significance."

[114] People v. Morris, 20 Cal. App. 3d 659, 97 Cal. Rptr. 817 (1st Dist. 1971).

[115] Green v. Superior Court, 220 Cal. App. 2d 121, 33 Cal. Rptr. 604 (3d Dist. 1963).

[116] *Id.*; Seeger v. Odell, 64 Cal. App. 2d 397, 148 P.2d 901 (2d Dist. 1944).

[117] CAL. EVID. CODE § 912(c) (West 1968).

[118] *Id.* § 912(d).

[119] *Id.* § 912, Law Rev. Comm'n Comment, *disapproving any holding to the contrary in* Green v. Superior Court, 220 Cal. App. 2d 121, 33 Cal. Rptr. 604 (3d Dist. 1963). The *Green* court held that the physician-patient privilege did not extend to pharmacists. Thus, the pharmacist could be compelled to reveal information concerning the nature of the drugs dispensed by prescription.

[120] California courts have interpreted liberally the "reasonably necessary" requirement, extending the privilege to disclosures well beyond the scope of the immediate purposes of the consultation. In Rudnick v. Superior Court, 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974), *noted in* 27 HAST. L.J. 99 (1975), the California Supreme Court suggested that disclosures to a drug company by a physician concerning his patient's adverse reaction to one of its products may fall within the "reasonably necessary" language of California Evi-

2. VOLUNTARY ACT OF DISCLOSURE

When the holder has disclosed a significant part of a privileged communication, the courts look to the circumstances in which the disclosure was made to determine if it was made "without coercion" as required by section 912(a) of the Evidence Code. Whether made to a third person in an elevator or during direct examination at trial,[121] disclosure which is the result of a voluntary, affirmative act of the holder will waive the privilege. When the disclosure is made outside the courtroom, the courts predicate their finding of waiver primarily on the fact that the holder has indicated by his actions that he does not value the confidentiality of the communication.[122] In the litigation setting, they are more concerned that the holder not be allowed to use the privilege as both a sword and a shield in derogation of the fairness essential to the judicial process.[123]

The voluntary disclosure need not be made by the holder.[124] Waiver may also occur when disclosure is made by the practitioner or by a necessary third party to whom the privileged information has been communicated. Since only the holder may waive the privilege,[125] disclosure by another person will constitute a waiver only when it is made with the express or implied consent of the holder.[126] Such consent will be implied when the person making the disclosure does so in his capacity as an agent for the holder. Thus, in *Klang v. Shell Oil Company*,[127] disclosure to a police officer by plaintiff's attorney of statements made to him about how the accident had occurred was deemed to waive the attorney-client privilege. The court found that consent to disclosure could be inferred from the fact that

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dence Code section 912(d). If so, disclosure to the drug company does not waive the privilege. The drug company is then entitled to claim the privilege on the patient's behalf in any proceeding to which he is not a party. If, however, the disclosure to the drug company is not found to be reasonably necessary to treatment of the patient, the patient will be deemed to have waived the privilege if he expressly or impliedly consented to the disclosure. If the non-necessary disclosure was made without the patient's consent, there can be no waiver and the patient may claim the privilege in any subsequent proceeding to which he is a party. *Id.* at 932-33, 523 P.2d at 650, 114 Cal. Rptr. at 610.

[121] For a discussion of the court's attitude towards the voluntariness of a disclosure made during cross-examination, see text accompanying notes 139 through 147 *infra*.

[122] *See* note 102 *supra*.

[123] *Cf.* People v. Dubrin, 232 Cal. App. 2d 674, 680, 43 Cal. Rptr. 60, 64 (2d Dist. 1965).

[124] Rudnick v. Superior Court, 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974), *noted in* 27 HAST. L.J. 99 (1975).

[125] People v. Dubrin, 232 Cal. App. 2d at 680, 43 Cal. Rptr. at 64; Abbott v. Superior Court, 78 Cal. App. 2d 19, 21, 177 P.2d 317, 318 (1st Dist. 1947).

[126] *E.g.*, Rudnick v. Superior Court, 11 Cal. 3d at 932, 523 P.2d at 650, 114 Cal. Rptr. at 610.

[127] 17 Cal. App. 3d 933, 95 Cal. Rptr. 265 (2d Dist. 1971).

the attorney had made the disclosures for his client's benefit to avoid the issuance of a traffic citation. Having impliedly consented to voluntary disclosure to a third person, plaintiff could be examined about those statements in a subsequent personal injury action.[128]

The same principles apply when an individual discloses a significant part of a privileged communication in a judicial proceeding. His affirmative act in taking the stand and testifying under direct examination to a privileged communication provides the requisite voluntary act from which consent to disclosure will be inferred.[129] The same voluntary act will be found where disclosure is made in an affidavit[130] or deposition.[131] Having waived the privilege by disclosing a portion of the communication, the holder can be compelled to testify to the entire communication.[132] His attorney, physician or psychotherapist may also be called to corroborate his testimony.[133] Once the holder has waived the privilege, neither he nor the practitioner may assert it in the same or any subsequent proceeding.[134]

In some jurisdictions, a party who calls a practitioner as a witness automatically waives any privilege attached to his communications with that practitioner.[135] California courts continue to enforce the privilege as long as the practitioner does not reveal a significant portion of the privileged communication during his testimony.[136] If the practitioner testifies to facts learned by him outside of his professional employment, no waiver results.[137] If the holder elicits testimony from him about a privileged matter, however, he will be deemed to have consented to full disclosure of that privileged matter.[138]

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[128] *Id.* at 938, 95 Cal. Rptr. at 268.

[129] People v. Ottenstror, 127 Cal. App. 2d 104, 110, 273 P.2d 289, 293 (2d Dist. 1954); Rose v. Crawford, 37 Cal. App. 664, 667, 174 P. 69, 70 (1st Dist. 1918).

[130] Rose v. Crawford, 37 Cal. App. at 667, 174 P. at 70. *Cf.* People v. Morris, 20 Cal. App. 3d 659, 97 Cal. Rptr. 817 (1st Dist. 1971) (disclosures made in a petition for habeus corpus formed the basis for a later action for perjury).

[131] Merritt v. Superior Court, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970).

[132] 8 WIGMORE, *supra* note 1, § 2327.

[133] Agnew v. Superior Court, 156 Cal. App. 2d 838, 841, 320 P.2d 158, 160 (2d Dist. 1958); People v. Ottenstror, 127 Cal. App. 2d at 110, 273 P.2d at 203.

[134] American Mutual Liability Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 598, 113 Cal. Rptr. 561, 575 (3d Dist. 1974); People v. Garaux, 34 Cal. App. 3d 611, 110 Cal. Rptr. 561 (4th Dist. 1973); Agnew v. Superior Court, 156 Cal. App. 2d 838, 320 P.2d 158 (2d Dist. 1958).

[135] *See* MCCORMICK (2d ed.), *supra* note 2, § 93 at 195.

[136] *See, e.g., In re* Lifschutz, 2 Cal. 3d 415, 407 P.2d 557, 85 Cal. Rptr. 829 (1970).

[137] MCCORMICK (2d ed.), *supra* note 2, § 92 at 195-96.

[138] People v. Dubrin, 232 Cal. App. 2d 674, 43 Cal. Rptr. 60 (2d Dist. 1965).

B. WAIVER BY FAILURE TO ASSERT

A party who fails to object when disclosure of a privileged communication is sought by the adverse party waives his privilege[139] in much the same manner as does the party who testifies voluntarily to that communication.[140] The two situations differ because in the first instance the holder actively consents to disclosure while in the second he merely acquiesces in the disclosure. A voluntary act by the holder underlies the finding of waiver, however, whether the holder initiates the disclosure or simply allows it to take place. Rather than allowing the disclosure to occur, the holder can assert the privilege before the testimony is given or the documents produced. If he fails to do so, California courts will find an implied consent to disclosure in his voluntary "act" of silence.[141]

Some courts hold that, when the disclosure is made without objection during cross-examination, there can be no waiver. They reason that a witness under compulsion to testify is not acting voluntarily.[142] California courts, however, follow the rule, endorsed by McCormick,[143] that failure to assert the privilege during cross-examination constitutes a complete waiver.[144] Although the witness was compelled to testify, he had an opportunity to assert the privilege. By failing to do so, he voluntarily waived the privilege.

The two rationales which support a finding of waiver by failure to assert are essentially the same as those which underlie waiver by voluntary disclosure. In failing to object, the holder demonstrates by his silence that he does not value the confidentiality of the communication. If he evinces no desire to protect that confidentiality, the reason for the privilege loses its vitality, and the courts will not enforce it.[145] Secondly, the holder should not be allowed to abuse the judicial process by disclosing as much as he chooses while with-

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[139] Lissak v. Crocker Estate Co., 119 Cal. 442, 51 P. 688 (1897); Clyne v. Brock, 82 Cal. App. 2d 958, 188 P.2d 263 (3d Dist. 1947).

[140] Agnew v. Superior Court, 156 Cal. App. 2d 838, 320 P.2d 158 (2d Dist. 1958); People v. Ottenstror, 127 Cal. App. 104, 273 P.2d 289 (2d Dist. 1954). *See* text accompanying notes 100 through 138 *supra*.

[141] People v. Perry, 7 Cal. 3d 756, 783, 499 P.2d 129, 146, 103 Cal. Rptr. 161, 178 (1972); Lissak v. Crocker Estate Co., 119 Cal. at 446, 51 P. at 689; Wheelock v. Godfrey, 100 Cal. 578, 587, 35 P. 317, 320 (1893).

[142] Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1943); Harpman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937); Seaboard Air Line Ry. v. Parker, 65 Fla. 543, 62 So. 589 (1913).

[143] MCCORMICK (2d ed.), *supra* note 2, §§ 93 at 195 and 103 at 220-21.

[144] Julrik Production Inc. v. Chester, 38 Cal. App. 3d 807, 811, 113 Cal. Rptr. 527, 529 (2d Dist. 1974). *But cf.* People v. Kor, 129 Cal. App. 2d 436, 445, 277 P.2d 94, 99 (2d Dist. 1954). The two cases may be reconciled. The disclosures Kor made were not of a sufficiently significant part of the communication to constitute implied consent to examination of his attorney, who did assert the privilege when asked about communications with Kor.

[145] Lissak v. Crocker Estate Co., 119 Cal. at 446, 51 P. at 689.

holding other relevant facts which may be damaging to his case. In fairness to the adverse party, the holder must elect to waive the privilege or to preserve it by objecting at the time the information is sought. He cannot evaluate the impact of the evidence and then, when it proves unfavorable to his case, move to strike it.[146] Nor can he consent to disclosure of a portion of the privileged communication and assert the privilege with respect to the remainder. Having impliedly consented to partial disclosure by failing to object, he must in fairness disclose the entire communication.[147]

1. WHAT IS A TIMELY ASSERTION?

To preserve the privilege when disclosure is sought by an adverse party, the holder must assert it at the first opportunity he has to do so.[148] Identifying "the first opportunity" can be more difficult than it appears in the abstract. Essentially, "the first opportunity" arises upon the fulfillment of two conditions: (1) the holder is present and has the legal standing to assert the privilege; and (2) disclosure of a significant part of the privileged communication is sought.[149]

The holder or his attorney, acting as agent, must be present and have an opportunity to assert the privilege. If he is not a party to the proceeding, he may have no knowledge that disclosure is being sought. Even if he is aware of the disclosure, as a non-party he has no standing to object.[150] Under the circumstances, the holder cannot assert the privilege and will not be deemed to have waived it in a future proceeding to which he is a party.[151] There has been no act of voluntary acquiescence.

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[146] *Id.*; Wheelock v. Godfrey, 100 Cal. at 588, 35 P. at 320.

[147] Julrik Productions Inc. v. Chester, 38 Cal. App. 3d at 811, 113 Cal. Rptr. at 529; Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d 405, 414, 72 Cal. Rptr. 74, 79 (4th Dist. 1968), *quoting* 8 WIGMORE, *supra* note 1, § 2327 at 636:

> There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.

[148] Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d at 413-14,72 Cal. Rptr. at 78-79; Clyne v. Brock, 82 Cal. App. 2d 958, 965, 188 P.2d 263, 267 (3d Dist. 1947).

[149] *See* CAL. EVID. CODE § 912(a) (West 1968).

[150] People v. Abair, 102 Cal. App. 2d 765, 772, 228 P.2d 336, 340-41 (4th Dist. 1951).

[151] *Id.* A holder may make a special appearance to contest the disclosure of privileged information, as was done in American Mutual Liability Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (3d Dist. 1974), but the courts do not require such an appearance. To do so would unduly burden the holder of the privilege and the judicial process itself.

An attorney, physician or psychotherapist is under a duty to assert the privilege on behalf of the holder whenever he is present and disclosure of a privileged communication is sought.[152] The practitioner does not, however, have the analogous independent right to waive the privilege. He may do do only with the holder's consent.[153] If he does disclose a privileged communication without the consent of the holder, no waiver will result.

The decision in *Roberts v. Superior Court*,[154] illustrates the principles of waiver in this context. In that case the California Supreme Court held that the plaintiff did not lose her psychotherapist-patient privilege when copies of her psychotherapist's records were produced without her consent by other physicians. The records retained their privileged status when transmitted to plaintiff's treating physicians because that disclosure was reasonably necessary to the diagnosis and treatment of her injuries. Subsequent disclosure by those physicians did not waive the privilege because the plaintiff had previously asserted the privilege through her psychotherapist's refusal to comply with the subpoena duces tecum directed to him.[155]

In *Roberts* the unauthorized disclosure was made in the face of an express assertion of the privilege. More often when a practitioner has disclosed a privileged communication, the presence or absence of the holder's consent is difficult to discern. When the holder is not present but his attorney is, the courts will imply consent from the attorney's failure to act since the attorney has been retained to protect his client's legal interests, including those related to the confidentiality of privileged communications.[156] When disclosure is made by a physician outside the presence of the holder, a similar relationship does not exist between the practitioner and layperson. *Roberts* suggests that the authority to consent to disclosure will not be imputed to the physician from the relationship itself and that there can be no waiver.[157]

The "first opportunity" is also defined by the extent of the disclosure. Waiver results when a significant part of the communication is disclosed without objection.[158] Until disclosure reaches that level,

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[152] CAL. EVID. CODE § 955 (attorney client), § 995 (physician-patient) and § 1015 (psychotherapist-patient) (West 1968).

[153] *E.g.*, Roberts v. Superior Court, 9 Cal. 3d 330, 341, 508 P.2d 309, 316, 107 Cal. Rptr. 309, 316 (1973).

[154] 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973).

[155] *Id.* at 341-42, 508 P.2d at 316, 107 Cal. Rptr. at 316.

[156] Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d at 413, 72 Cal. Rptr. at 78.

[157] 9 Cal. 3d at 341, 508 P.2d at 316, 107 Cal. Rptr. at 316.

[158] CAL. EVID. CODE § 912(a) (West 1968). See discussion of what constitutes disclosure of a significant part of a privileged communication in text accompanying notes 114 through 120 *supra*.

there is no danger of waiver and, consequently, no need to assert the privilege. Thus, a witness asked on cross-examination whether he had consulted Dr. Jones, a psychotherapist, may answer without waiving the privilege since he would not thereby disclose a significant part of the communication.[159] The waiver threshhold and, therefore, the first opportunity to assert has not been reached. If, however, the witness is asked why he consulted Dr. Jones, he must assert the privilege in order to preserve it. His answer would disclose a significant part of the communication. The first opportunity to assert arises when the witness' answer would require such a disclosure. The privilege must be asserted before that answer is given.[160]

2. *PRESERVATION OF THE PRIVILEGE WHEN CONFIDENTIAL COMMUNICATIONS ARE USED TO REFRESH MEMORY*

Substantial ambiguities surround the use of privileged documents by a witness to refresh his recollection. California Evidence Code section 771 grants an adverse party the right to inspect any writing the witness uses to refresh his memory and to cross-examine the witness about that writing. It also accords the adverse party the right to introduce into evidence any portions of the document pertinent to the witness' testimony.[161] The inspection provisions enable the adverse party to establish on cross-examination the extent and accuracy of the witness' independent recollection and the weight which should be given to his testimony. If a claim of privilege is asserted with respect to documents used to refresh memory, the policies which support section 771 collide with those which support the privilege statutes. California courts have not wholly resolved this tension.[162] Several appellate courts have suggested that a claim of

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[159] *See In re* Lifschutz, 2 Cal. 3d at 430, 467 P.2d at 567, 85 Cal.Rptr. at 839.

[160] Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d at 414, 72 Cal. Rptr. at 78. Where disclosure is sought by oral testimony, either in deposition or at trial, objection must be made at the time questions eliciting disclosure of a significant part of a privileged communication are propounded. If privileged statements are contained in an affidavit filed by the opposing party, objection to the affidavit or a motion to strike the portions claimed to be privileged must be made at the hearing on the motion in support of which the affidavit was filed. Cope v. Cope, 230 Cal. App. 2d 218, 235, 40 Cal. Rptr. 917, 927 (1st Dist. 1964). If privileged documents are sought by motion or subpoena, compliance must be refused and objection made at the adversary hearing at which the moving party seeks to compel production. Roberts v. Superior Court, 9 Cal. 3d at 342, 508 P.2d at 316, 107 Cal. Rptr. at 316. Having failed to assert the privilege during discovery, a party may not claim error for the first time on appeal. People v. Poulin, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623, 629-30 (1st Dist. 1972).

[161] CAL. EVID. CODE § 771(b) (West 1968).

[162] For discussion of a proposed legislative resolution of the conflict, see Comment, *Evidence Code Section 771: Conflict with Privileged Communications*, 6 PAC. L.J. 612 (1975).

privilege, if valid, should override the inspection provisions of section 771.[163] At the same time, they have avoided addressing the conflict by applying waiver doctrines liberally in such cases.[164]

A few general rules may be extrapolated from the refreshing recollection cases. First, a witness may review a document and then testify to his current, but refreshed, recollection of the events in question without waiving the privilege with respect to that document.[165] His testimony is addressed to a subject matter which may be the subject of a privileged communication, but it discloses nothing about the communication itself. Second, if he is asked to identify the documents he used to refresh his recollection—whether a letter or memorandum, to whom sent, date and so on—he has not made a disclosure of a significant part of the communication and therefore does not waive the privilege. If, however, he is asked to describe the contents of such documents, he will waive the privilege unless he asserts it at that moment.[166] The threshhold "first opportunity" at which the privilege must be asserted or waived arises at that point because an answer to the question would necessarily result in a disclosure of a significant part of the communication.

Determining the point at which a witness who testifies to events about which his memory has been refreshed begins to testify about the privileged communication itself rather than a subject addressed in that communication can be difficult. This difficulty is illustrated by *Kerns Construction Co. v. Superior Court*[167] and *Sullivan v. Superior Court.*[168] On facts which appear to be analogous, the ap-

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[163] Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972). Although finding a waiver of the privilege, the courts in People v. Aiken, 19 Cal. App. 3d 685, 97 Cal. Rptr. 251 (2d Dist. 1971), and Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (4th Dist. 1968), suggested that if a privilege existed it should be enforced. *But see* Bailey v. Meister Bran, Inc., 57 F.R.D. 11, 13 (1973) for a federal court's treatment of the issue. In *Bailey*, the court reasoned:

> To adopt such an exception would be to ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection. This factor, coupled with the intent to relinquish the privilege shown by their use for this purpose, convinces the court that plaintiff should be held to have waived the attorney-client privilege as to the documents in question.

[164] *See* Mize v. Atchison, Topeka & Santa Fe Ry., 46 Cal. App. 3d 436, 120 Cal. Rptr. 787 (2d Dist. 1975); People v. Aiken, 19 Cal. App. 3d 685, 97 Cal. Rptr. 251 (2d Dist. 1971); Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (4th Dist. 1968).

[165] Mize v. Atchison, Topeka & Santa Fe Ry., 46 Cal. App. 3d at 449, 120 Cal. Rptr. at 796.

[166] Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d at 414, 72 Cal. Rptr. at 78.

[167] 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (4th Dist. 1968).

[168] 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972).

pellate court found waiver of the privilege in the first case but not in the second.

In *Kerns*, an employee of the defendant gas company prepared several investigation and accident reports in connection with an explosion which gave rise to the personal injury lawsuit. He reviewed these reports prior to the taking of his deposition and referred to them during the deposition. Although he did not testify verbatim from the reports and "the record . . . does not reflect what part of the testimony given was independent of any references he made to the papers and documents,"[169] the witness did testify that he could not have given testimony without reference to them. The reports themselves were specifically identified and marked for identification by the reporter taking the deposition. The attorneys for the gas company did not assert a claim of attorney-client privilege with respect to those reports until the opposing counsel sought, at the close of the deposition, to have the reports appended to the deposition and copies made available to counsel.[170] The court held that assertion of the privilege at the time physical production of the reports was sought was not sufficiently timely to preserve the privilege. In finding waiver, the court emphasized the unconscionability of allowing a party to furnish a report to a witness who admits having almost no memory apart from the report and then to prevent disclosure of the report itself.[171]

The court found no waiver, however, on the analogous facts of the *Sullivan* case. There plaintiff reviewed a transcript of a tape-recorded conference with her attorney. In deposition, she testified to her current recollection of events surrounding the automobile accident which was the subject of the action. She also testified that she had used the transcript to refresh her memory of those events. When defendant then demanded production of the transcript, plaintiff refused to produce it on the ground of attorney-client privilege. Her objection was sustained.[172]

In upholding the privilege, the *Sullivan* court attempted to distinguish *Kerns*. It did so, however, without articulating the significant difference between the two cases. It pointed out that the witness in *Kerns* had testified at deposition from the privileged reports without objection. In contrast, the *Sullivan* plaintiff re-

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[169] 266 Cal. App. 2d at 408, 72 Cal. Rptr. at 75.

[170] *Id.* at 408-09, 72 Cal. Rptr. at 75. The court held that the reports, prepared by a company employee in the ordinary course of business expressly for the use of the company's attorneys and intended to be confidential, were within the scope of the corporation's attorney-client privilege. *Id.* at 411-12, 72 Cal. Rptr. at 77-78.

[171] *Id.* at 414, 72 Cal. Rptr. at 79.

[172] 29 Cal. App. 3d at 74, 105 Cal. Rptr. at 248.

freshed her memory prior to the deposition and asserted the privilege when demand was made to produce the transcript.[173] Had the testimony in *Kerns* been elicited under the past recollection recorded exception to the hearsay rule, as it properly should have been, such a distinction would be a meaningful one. If the proper foundation for the past recollection recorded exception had been laid and the witness had read from the report itself, there is little doubt that he would have disclosed a significant part of the communication and would, thus, have waived the privilege.

Since that foundation was not laid, *Kerns* must be treated, like *Sullivan*, as a case of present memory refreshed. In both cases, the testimony represented the witness' current memory rather than a direct recitation of the contents of a privileged document. In both cases, the privilege was asserted when production of the document used to refresh memory was demanded. In one case, assertion of the privilege was timely. In the other, it was not. In *Kerns*, the witness, although not reading verbatim from the reports, testified about the reports themselves rather than the events discussed in the reports. Because his memory of the events was predicated almost exclusively on the reports, his testimony constituted a disclosure of a significant part of the privileged communication. By so testifying without objection, he waived the privilege. The *Sullivan* plaintiff, on the other hand, had an independent recollection of the events surrounding the accident and testified to that independent recollection, which had been refreshed to some extent by a review of the privileged transcript. She testified to a matter which was coincidentally addressed in a privileged communication. She did not testify about the communication itself. Therefore, the first opportunity to assert the privilege did not arise until she was asked specifically about the transcript.

C. LOSS OF PRIVILEGE BY PLACING THE PRIVILEGED MATTER IN ISSUE

The holder who in the course of litigation places a privileged matter in issue waives his right to assert the privileged status of any communication pertinent to that matter.[174] He may waive the privilege by placing in issue either the communication itself or a matter about which he consulted the practitioner, if adequate resolution of that matter demands access to the privileged communication. The patient or client who sues his physician, psychotherapist or attorney

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[173] *Id.* at 72, 105 Cal. Rptr. at 246.

[174] *See* MCCORMICK (2d ed.), *supra* note 2, § § 93, 103. In the context of the physician-patient and psychotherapist-patient privileges, this judicially developed waiver doctrine is codified as a patient-litigant exception. CAL. EVID. CODE § § 996, 1016 (West 1968). It may, however, usefully be characterized as the legislative embodiment of a common law waiver doctrine.

for malpractice places communications with that person directly in issue and, in doing so, loses the protection of the privilege.[175] The plaintiff who sues to recover damages for personal injuries has ostensibly raised only the issue of his physical condition. If that condition has been the subject of physician-patient communications, however, he loses the privilege attached to those communications.[176]

Waiver by placing in issue does not depend on actual disclosure of privileged information. Although the holder frequently discloses such information in placing a privileged matter in issue, the voluntary act required by California Evidence Code section 912(a) consists entirely in his decision to raise or not to raise the particular issue.[177] That decision must be an affirmative one.[178] A defendant under compulsion to answer a properly filed complaint does not place in issue a privileged communication when he denies allegations pertinent to that communication.[179] A contrary rule would allow third parties to maneuver the holder of a privilege into a position in which his only choice is to waive the privilege or suffer a default judgment. The law, however, imposes no duty on a defendant to counter an allegation with an affirmative defense. Pleading an affirmative defense may provide grounds for waiver. For example, the criminal defendant who pleads not guilty by reason of insanity waives his psychotherapist-patient privilege.[180] Waiver by placing in issue can also occur when the holder raises the issue in a counterclaim[181] or, of course, in his own complaint.

Two justifications may be advanced for making loss of the privilege the cost of litigating a privileged matter. When the holder places privileged information in issue, he indicates that he values the out-

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[175] In California this result is achieved by statute. CAL. EVID. CODE §§ 958, 1001, 1020 (West 1968). These sections except from the privileges communications which are relevant to an issue of breach, by practitioner or layperson, of a duty arising out of the professional relationship. These exceptions go beyond the situation in which the layperson has placed the communication in issue by alleging the breach himself. They include the situation of the practitioner who alleges breach by the layperson. Under traditional waiver doctrines, the practitioner would not be able to initiate loss of the privilege since he is not its holder.

[177] CAL. EVID. CODE § 996 (West 1968); San Francisco Unified School District v. Superior Court, 55 Cal. 2d 451, 359 P.2d 925, 11 Cal. Rptr. 373; City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951) (dictum); Philips v. Powell, 210 Cal. 39, 290 P. 441 (1930).

[177] *Cf.* CAL. EVID. CODE § 996, 1016 (West 1968); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Merritt v. Superior Court, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970).

[178] B. WITKIN, CALIFORNIA EVIDENCE (2d ed. 1974 Supp.) § 852.

[179] His denial is considered a mere joinder in issue, an insufficiently affirmative act to warrant a finding of waiver. Carlton v. Superior Court, 261 Cal. App. 2d 282, 289-90, 67 Cal. Rptr. 568, 573 (2d Dist. 1968).

[180] CAL. EVID. CODE § 1014, Law Rev. Comm'n Comment (West 1968).

[181] Little v. Superior Court, 260 Cal. App. 2d 311, 67 Cal. Rptr. 77 (2d Dist. 1968).

come of the lawsuit more than he does confidentiality. The weight his privacy interests would otherwise be given is accordingly diminished.[182] The primary justification, however, lies in the need to insure substantial fairness between the parties.[183] When the holder chooses to litigate a privileged matter, he should not be allowed to block access to the evidence which is most highly probative of the issue he himself has raised. A contrary rule would be "to permit the plaintiff to litigate and to deny the defendant the right to defend."[184]

As previously explained,[185] the function of the three professional relationships and the interests their corresponding privileges protect are not identical. The differences are particularly significant in understanding when a professional privilege may be lost by placing in issue the communication it protects. In both the physician-patient and psychotherapist-patient contexts, the legislature has codified a broad "patient-litigant exception" which the opponent of the privilege may invoke when the patient has placed his physical or mental condition in issue.[186] In the attorney-client context, on the other hand, only a common law waiver doctrine exists. This doctrine requires that the client place the communication, as distinct from the subject matter of the consultation, in issue before he will be found to have lost the privilege.[187]

The following subsections discuss waiver by placing in issue as it operates in the context of each of the three professional privileges.

1. PATIENT-LITIGANT EXCEPTION TO THE PHYSICIAN-PATIENT PRIVILEGE

When a patient places his physical condition in issue, he may not assert the physician-patient privilege to prevent discovery of communications pertaining to that condition.[188] The plaintiff who com-

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[182] City & County of San Francisco v. Superior Court, 37 Cal. 2d at 232, 231 P.2d at 28. *See* 8 WIGMORE, *supra* note 1, § 2389(1) at 855.

[183] Merritt v. Superior Court, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970). *See* American Mutual Liability Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (3d Dist. 1974); 8 WIGMORE, *supra* note 1, § 2388.

[184] Merritt v. Superior Court, 9 Cal. App. 3d at 727, 88 Cal. Rptr. at 340.

[185] *See* text accompanying notes 11 through 45 *supra*.

[186] CAL. EVID. CODE §§ 996, 1016 (West 1968). These "exceptions" are discussed in the text accompanying notes 188 through 214 *infra*.

[187] *See* text accompanying notes 215 through 219 *infra*.

[188] California Evidence Code section 996 provides:

> There is no privilege under this article as to a communication relevant to an issue concerning the 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

mences a personal injury action loses the privilege when he files the complaint, even though he has not disclosed privileged information and does not intend to rely on it at trial.[189] By placing his physical condition in issue, he creates a need for evidence probative of that condition. Waiver results to satisfy that need.[190]

In any personal injury action, the court can require the plaintiff to submit to examination by a physician of the defendant's choosing.[191] This procedure does not usurp the function of the patient-litigant exception. An examination by defendant's physician will reveal the plaintiff's condition at the time of trial. Several years may have elapsed, however, since the injury occurred. The patient-litigant exception enables the defendant to discover evidence probative of plaintiff's condition immediately following the injury. To make examination by defendant's physician the exclusive source of information concerning the plaintiff's physical condition may appear to protect the privacy of the plaintiff's relationship with his own physician. If the plaintiff is completely honest with the defense physician, however, he will disclose the same facts concerning his injury that he revealed to his own physician. If he does not disclose all of those facts, the defendant has a right to know of the discrepancy to protect himself from fraud.

Although the patient loses the physician-patient privilege when he places in issue the condition about which he consulted the physician, such consultations, if undergone at the direction of his attorney, can derive independent protection from the attorney-client privilege.[192]

(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.

See generally Annot., 21 A.L.R.3d 912 (1968).

[189] *See* San Francisco Unified School District v. Superior Court, 55 Cal. 2d 451, 369 P.2d 925, 11 Cal. Rptr. 373 (1961); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Philips v. Powell, 210 Cal. 39, 290 P. 441 (1930). This rule comports with California's liberal discovery statutes and enables the defendant to prepare his case adequately in advance of trial. One commentator, proceeding on the theory that a waiver for one purpose is a waiver for all purposes, has criticized this rule as subjecting privileged information to subsequent discovery even if the suit is dropped. Comment, *Evidence: Waiver of Physician-Patient Privilege*, 51 MINN. L. REV. 575, 580 (1967) (criticizing the implications of Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966)). California has narrowed this rule by treating it as an exception. Thus, in California the privileged information cannot be used in any other proceeding unless actual disclosure took place in the first.

[190] *See* CAL. EVID. CODE § 996, Law Rev. Comm'n Comment (West 1968). *Cf.* Merritt v. Superior Court, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970).

[191] CAL. CODE CIV. P. § 2032 (West 1967).

[192] The attorney-client privilege protects disclosures to third persons "to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted," including disclosures to physicians for the purpose of transmitting such information to the attorney. CAL. EVID. CODE § 952 & Law Rev. Comm'n Comment (West 1968). When a physician or psycho-

When the attorney orders the consultation to aid in preparing for litigation, the physician's diagnosis is viewed as a communication primarily between the attorney and his client. The physician becomes merely an agent, a translator who interprets for the attorney the information the client wishes to convey.[193] The attorney-client privilege is not waived, even with respect to the physician-patient consultations it protects, simply because the client places in issue his physical condition.[194] Of course, if the physician testifies about the conclusions he drew from that consultation, waiver by voluntary disclosure or failure to assert will result.[195]

2. *PATIENT-LITIGANT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE*

California Evidence Code section 1016 establishes a patient-litigant exception to the psychotherapist-patient privilege.[196] Its language echoes that of the comparable exception to the physician-patient privilege. The special nature of psychotherapy, however, has produced a more refined judicial interpretation of the exception to the psychotherapist-patient privilege. When a patient places his physical, as distinct from his mental, condition in issue, both the condition and the relevant communications are easily ascertained. Communications made to an obstetrician about one's pregnancy are not likely to be sought in an action in which the patient has placed her broken arm in

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therapist serves in a dual capacity, as treating physician and as a consultant to his attorney, the protection afforded his consultation varies with his role at the time of the communication. Only knowledge derived from communications solely for the purpose of attorney consultations will be protected by the privilege. People v. Lines, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 725 (1975).

[193] City & County of San Francisco v. Superior Court, 37 Cal. 2d at 237, 231 P.2d at 30; Sanders v. Superior Court, 34 Cal. App. 3d 270, 109 Cal. Rptr. 770 (2d Dist. 1973); CAL. EVID. CODE § 952, Law Rev. Comm'n Comment (West 1968).

[194] People v. Lines, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 725 (1975), *disaffirming any contrary holding in* People v. Aiken, 19 Cal. App. 3d 685, 97 Cal. Rptr. 251 (2d Dist. 1971).

[195] People v. Lines, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 725 (1975) (held error to admit testimony relating to consultation undergone at the direction of defendant's attorney when the attorney had not called the psychotherapist as a witness on the defendant's behalf).

[196] Section 1016 of the California Evidence Code provides:

> 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.

issue. The mental condition about which a patient consults a psychotherapist, however, is less capable of precise definition. It may therefore be relevant to a wide range of issues. At the same time, the patient's interest in the privacy of his psychotherapeutic consultations is substantial. Two recent decisions of the California Supreme Court suggest that, as the connection between the communications sought and the condition placed in issue becomes more remote, the patient's privacy interests demand more careful judicial scrutiny of the psychotherapeutic patient-litigant exception.

In the first of these decisions, *In re Lifschutz*,[197] plaintiff sued for "physical injuries, pain, suffering and severe mental and emotional distress,"[198] resulting from defendant's alleged assault. During discovery, he revealed that ten years prior to the alleged assault he had received psychiatric treatment from Dr. Lifschutz. In an effort to connect plaintiff's emotional distress with a pre-existing psychiatric condition, defendant subpoenaed Dr. Lifschutz for deposition and requested him to produce plaintiff's medical records. At deposition, Dr. Lifschutz refused to answer defendant's questions on the ground that the information was privileged.[199]

Defendant contended that plaintiff had waived his psychotherapist-patient privilege by seeking damages for mental and emotional distress. As a matter of statutory construction, defendant's argument appears to be accurate. Evidence Code section 1016 provides that "there is no privilege under this article as to a communication relevant to an issue concerning the mental condition of the patient if such issue has been tendered by . . . the patient."[200] Section 210 of the Code defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[201] When emotional distress is alleged, evidence of pre-existing emotional difficulties is relevant to both the issue of causation and that of damages.

The court, however, rejected this argument. It held that the patient-litigant exception requires disclosure of only those matters "directly relevant"[202] to the mental condition the patient has placed

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[197] 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (en banc).

[198] 2 Cal. 3d at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.

[199] Because the case came up on Dr. Lifschutz' petition for habeus corpus, he was technically the plaintiff in the action. For the purposes of the present discussion, references to plaintiff are to the real party in interest, plaintiff in the action in which discovery of Dr. Lifschutz' records originally was sought.

[200] CAL. EVID. CODE § 1016 (West 1968), reprinted *supra* note 196.

[201] *Id.* § 210.

[202] 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839. The court does not define exactly what the term "direct relevance" means. In reaching its conclusion that the patient-litigant exception requires disclosure only of those communications directly relevant to a condition the patient has placed in issue, the court relies on law developed in the context of the physician-patient privilege.

in issue. In reaching this conclusion, the court emphasized the significance of the patient's interests in the confidentiality of communications with his psychotherapist. These interests, the court stated, have "deeper roots than the California statute and draw . . . sustenance from our constitutional heritage."[203] Unlike the patient who pleads not guilty by reason of insanity, thereby putting his entire mental condition in issue, the patient who merely alleges emotional distress retains an interest in the privacy of his psychotherapeutic communications. Further, communications concerning psychiatric treatment received ten years earlier, although of some relevance, do not seem necessary to adequate resolution of the emotional distress claim.

The direct relevance test promulgated in *Lifschutz* limits both the applicability and the scope of the patient-litigant exception. When the patient has raised in general terms the issue of his mental condition, as he does in seeking damages for mental distress, he must demonstrate that it is "reasonably probable"[204] that the communication sought is not directly relevant to that condition. To do so, the court suggests, he may have to limit the scope of his mental distress claims or explain generally the object of his psychotherapy. If he makes this showing, the privilege will be preserved. Even if the court finds some parts of the communications directly relevant to the condition in issue, the patient can still assert the privilege to defeat discovery of the remainder. Protective orders may be granted to safeguard those parts of the communications which the trial court does not find directly relevant to the issue the patient has raised.[205]

Never in that context, however, has the patient been given the opportunity to limit the scope of his mental distress claims or to explain the object of his medical consultations to demonstrate the irrelevancy of the communications sought. Even in the context of the psychotherapist-patient privilege, the court suggests that such measures would be unnecessary if the "patient's pleadings clearly demonstrate that his entire mental condition is being placed in issue and that records of past psychotherapy will clearly be relevant." *Id.* at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842, *affirming In re* Cathey, 55 Cal. 2d 679, 361 P.2d 426, 12 Cal. Rptr. 762 (1961). The direct relevance test thus includes as a factor the extent to which the patient has diminished his interests in the privacy of his psychotherapeutic consultations by directly pleading his mental condition as an issue in the case. The more tenuous the connection between the communications sought and the condition plead, the less the patient may be said to have placed them in issue. The privacy interests he retains in this instance demand judicial review of the communications' relevance to the issue he has raised. It is not clear whether the patient who clearly places in issue the condition about which he consulted a psychotherapist retains enough of his privacy interests to warrant *in camera* review of his records to shield from discovery those portions whose relevance to the condition raised is less than direct.

[203] 2 Cal. 3d at 431-32, 467 P.2d at 567, 85 Cal. Rptr. at 839.

[204] *Id.* at 437, 467 P.2d at 571, 85 Cal. Rptr. at 843.

[205] *Id.* The court noted that:

> [a]lthough ordinarily a patient cannot be required to disclose privileged information . . . , because the privileged status of psychotherapeutic communications under the patient-litigant exception depend

The *Lifschutz* plaintiff expressly placed his mental condition in issue by alleging emotional distress. The court, therefore, did not have to decide whether a plaintiff who raises his mental condition only by implication also waives his psychotherapist-patient privilege. For example, a patient with a history of hypochondria may sue to recover for back injuries allegedly sustained in an automobile collision. Although he seeks damages only for the physical injuries he claims to have suffered, arguably he has made his mental condition in the action by putting the cause and severity of his back condition in issue.

In *Roberts v. Superior Court*,[206] the court faced a modified version of this question. The plaintiff had brought a personal injury action alleging that she was "sick, sore, lame and disabled"[207] as a result of an accident caused by defendant's negligence. Several years prior to the accident, plaintiff had been hospitalized for an overdose of pills. Following her hospitalization, she complained of intermittent back pain which one physician diagnosed as "cervical strain, with tenderness out of proportion to the clinical findings."[208] Defendant argued that the pain for which the plaintiff sought recovery had a mental component which exaggerated whatever discomfort a normal patient might have suffered as a result of the accident. To prove this claim, he sought to discover the records of plaintiff's psychiatrist.

The court conceded that any physical injury is likely to have a "mental component."[209] It was unwilling to conclude, however, that

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> upon the content of the communication, a patient may have to reveal some information about a communication to enable the trial judge to pass on his claim of irrelevancy. Upon such revelation, the trial judge should take necessary precautions to protect the confidentiality of these communications; for example, he might routinely permit such disclosure to be made *ex parte* in his chambers. . . .

Id. California Evidence Code section 915 normally prohibits *in camera* proceedings to determine the existence of a privilege. *See* Carlton v. Superior Court, 261 Cal. App. 2d 282, 67 Cal. Rptr. 568 (2d Dist. 1968) *and* text accompanying notes 76 and 77 *supra*. In this circumstance, however, the *in camera* proceeding is being used, not to infringe the privilege, but to facilitate a ruling on the scope and applicability of an exception. Such a procedure reconciles the patient's interests in privacy with the substantial state interest in insuring the fairness of its judicial proceedings. This limited inspection apparently has not been utilized in other situations in which it would have a similar, salutary effect. *See* text accompanying notes 90 through 94 *supra* (incompetency and commitment proceedings). Nor has it been used in the context of the physician-patient privilege. If a patient's interest in the privacy of his consultations with his physician is judicially recognized, *in camera* inspections may also be employed to rule on the applicability of the patient-litigant exception to particular physician-patient communications.

[206] 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973) (en banc).

[207] *Id.* at 333, 508 P.2d at 310, 107 Cal. Rptr. at 310.

[208] *Id.* at 334, 508 P.2d at 311, 107 Cal. Rptr. at 311.

[209] *Id.* at 339, 508 P.2d at 314, 107 Cal. Rptr. at 314.

the general allegations of being "sick, sore, lame and disabled" specifically raised the issue of plaintiff's mental condition:

> [I]n such a case as this where there is no specific mental condition of the plaintiff at issue, and discovery of the privileged communications is sought merely upon speculation that there may be a "connection" between the patient's past psychiatric treatment and some "mental component" of his present injury, those communications should remain protected by the privilege.[210]

Plaintiff's perception of pain was generally at issue in the action. Although her medical records indicated that the back pains she complained of were greater than the clinical findings warranted, the physician who had made the notation had not expressly concluded that she suffered from a mental condition which exaggerated her perception of pain. The court was unwilling to find a causal connection between her psychological condition and her perception of pain, when her own physicians had not unequivocally reached that conclusion.[211]

Since the plaintiff in *Roberts* had not specifically raised the issue of her mental condition, the court placed the initial burden on the opponent of the privilege to establish that it was "reasonably probable that the psychotherapeutic communications sought . . . are directly relevant to a specific mental condition voluntarily placed at issue in the litigation by the plaintiff."[212] Had plaintiff's medical records expressly stated that her physical condition was of psychological origin, defendant might have sustained this burden. Presumably the burden would then have shifted to the plaintiff to demonstrate, under the *Lifschutz* test, that her communications with her psychotherapist were not directly relevant to an issue she could be deemed to have raised.

Roberts and *Lifschutz* suggest that the substantial privacy interests protected by the psychotherapist-patient privilege command two levels of review when the patient-litigant exception is invoked. When the patient has not by express allegation placed his mental condition in issue, the opponent of the privilege has the initial burden. He must demonstrate to a reasonable probability that the communication sought is directly relevant to a material issue tendered by the patient. Once he satisfied this burden, it shifts, as it does when the patient expressly pleads his mental condition, to the patient. The patient must then come forward with proof that the communication is not directly relevant to the condition in issue if he is to preserve the privilege.

One commentator has criticized the implications of the *Roberts*

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[210] *Id.*

[211] *Id.* at 338-39, 508 P.2d at 314, 107 Cal. Rptr. at 314.

[212] *Id.* at 339, 508 P.2d at 315, 107 Cal. Rptr. at 315.

decision, arguing that the patient-litigant exception should apply only when the patient has specifically tendered the issue of his mental condition.[213] Under Evidence Code section 915, however, the opponent of the privilege cannot gain access to presumptively privileged communications to demonstrate that they are directly relevant to an issue implicit in the patient's pleadings. He must make this showing through the use of independent evidence before the burden will shift to the plaintiff to demonstrate, under the *Lifschutz* test, the reasonable probability that the communications are not directly relevant to an issue in the action. The patient whose mental condition has been shown to be implicit in the issues he has raised can have no greater claim to the privacy of his psychotherapeutic communications than the patient who has made a standardized allegation of emotional distress. If those communications are in fact directly relevant to an issue implicit in his pleadings, the same need to discover them exists. If the communications are not directly relevant, the protective measures and procedural safeguards outlined in *Lifschutz* should adequately protect the patient's privacy interests.[214]

3. *WAIVER BY PLACING IN ISSUE ATTORNEY-CLIENT COMMUNICATIONS*

The legislature has not established a client-litigant exception to the attorney-client privilege. Waiver by placing attorney-client communications in issue remains a judicial doctrine. Only when the client has raised an issue which cannot be resolved adequately without resort to privileged information will the courts find waiver of the attorney-client privilege.[215] As a practical matter, this rarely occurs unless the

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[213] Comment, *Evidence: Psychotherapist-Patient Privilege*, 62 CALIF. L. REV. 604, 609-10 (1974). The personal injury plaintiff who alleges that he has suffered a physical injury, however, impliedly alleges that the injury is not merely the manifestation of a mental condition. So, too, by alleging that the defendant caused his physical injury, he impliedly alleges that his mental condition was not in fact the causative force. Whether or not his pleadings specifically place a mental condition in issue, the same need for evidence probative of his condition and its cause which underlies the patient-litigant exception exists. He should not be allowed, *pro forma*, to defeat all possibility of discovery of his psychotherapeutic communications.

[214] The patient who is required to make a *Lifschutz* showing of irrelevance does suffer a limited invasion of his privacy. This intrusion, however, seems justified in view of the state's substantial interest in ensuring fairness between its litigants when one has placed a privileged communication in issue. Although the patient has not expressly tendered in issue his mental condition, if that condition is, under the procedures outlined in the text, demonstrably relevant to an issue which he has expressly raised, his privacy interests seem on a par with those of the patient who has alleged emotional distress. To require him to explain in general terms the object of his psychotherapy, or to delineate more clearly his allegations, does not seem an overbroad intrusion into that privacy.

[215] People v. Lines, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975), *reaffirming* City & County of San Francisco v. Superior Court, 27 Cal. 2d 227,

client has placed his attorney's conduct or state of mind, and thus the communications themselves, in issue.[216]

The nature of the attorney-client relationship, together with the interests the privilege protects, explains the legislature's reluctance to expand this doctrine by establishing a generalized client-litigant exception. When a patient places his health in issue, a jury may evaluate his claim by looking to one of two principal sources. They can take the party at his word, or they can turn to the expert testimony of his physician or psychotherapist. When a client's "legal condition" is in issue, however, sufficient and more valuable evidence usually lies in the independent documentation of the events which precipitated his visit to an attorney. The need for evidence probative of the condition placed in issue is thus less acute. Further, the attorney-client privilege exists, in part, to aid in litigation. If a client waived the privilege merely by placing in issue a matter about which he consulted an attorney, his confidences could be preserved only by forgoing litigation. A client-litigant exception analogous to the patient-litigant exceptions would thus swallow the attorney-client privilege.

In many instances waiver by placing in issue attorney-client communications might as easily be predicated on the voluntary disclosure of a significant part of those communications. Assume, for example, that a party who fails to register certain securities is sued for damages resulting from their sale. By way of defense, he alleges that he acted in reliance on his counsel's advice that the securities could be sold without registration. By placing in issue the opinion of his legal counsel, defendant waives his attorney-client privilege for all communications pertaining to that opinion.[217] The statement that his counsel had advised him that the securities could be sold without registration also qualifies as a voluntary disclosure of a significant part of their communications.

Waiver by placing in issue depends on the need for probative evidence the client creates by deciding to litigate a privileged matter. Waiver by voluntary disclosure, on the other hand, requires actual disclosure of a significant part of the privileged communication. The distinction may be important during the discovery phases of an

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231 P.2d 26 (1951) *and disaffirming any contrary holding in* People v. Aiken, 19 Cal. App. 3d 685, 97 Cal. Rptr. 251 (2d Dist. 1971).

[216] *E.g.*, American Mutual Liability Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (3d Dist. 1974); Merritt v. Superior Court, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970); People v. Dubrin, 232 Cal. App. 2d 674, 43 Cal. Rptr. 60 (2d Dist. 1965).

[217] The Federal District Court for the Southern District of New York so held in a case based on facts similar to those in this hypothetical. Garfinkle v. Arcata National Corp., 19 F.R. Serv. 2d 147 (1974). *See* MCCORMICK (2d ed.), *supra* note 2, § 93 at 195.

action when the client has placed a privileged matter in issue without disclosing enough of the communication to warrant a finding of waiver by voluntary disclosure. In *Merritt v. Superior Court*,[218] for example, the plaintiff brought an action against his insurer for bad faith failure to settle a claim within policy limits. The court expressly declined to find that a plaintiff who brings an action for bad faith refusal to settle a personal injury claim a fortiori waives his attorney-client privilege with respect to the prior action. Instead, it found a waiver in the fact that the plaintiff had alleged that the company's conduct had so confused his attorneys as to disable them from making a settlement offer. In upholding the trial court's order to compel answers to interrogatories concerning the conduct of plaintiff's attorneys in preparing and evaluating the settlement potential of the prior case, the court said:

> It is obvious both from the issues framed and the contents of the deposition of plaintiff's prior counsel that plaintiff would rely heavily upon evidence to be given by his said counsel and that he would be using his prior counsel to prove matter which they could only have learned in the course of their employment. Thus it was not merely the initiation of the lawsuit but rather the manner of its prosecution which constituted the waiver.[219]

Although disclosure of privileged communications had not yet been made, it was evident that the plaintiff intended to make them. The insurance company's right to defend compelled an immediate finding of waiver. To force the company to wait until disclosure was made at trial would unfairly impede the judicial process without promoting the purposes of the privilege.

D. SCOPE OF THE WAIVER

The voluntary act which produces the waiver defines the scope of that waiver. If the holder produces a portion of a privileged document or fails to object to testimony about a privileged conversation, the adverse party may compel disclosure of the remainder of the document or conversation about the same matter.[220] Once the holder has disclosed or consented to disclosure of a significant part of a privileged communication, the adverse party may discover or compel testimony about all other communications relating to that privileged matter. If a party, for example, introduces part of his correspondence with an attorney, he can be compelled to produce all

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[218] 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist.1970).
[219] *Id.* at 730, 88 Cal. Rptr. at 342.
[220] 8 WIGMORE, *supra* note 1, § 2327. *Accord*, American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 432 (1972); Int'l Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177, 185-86 (1973).

correspondence with that attorney on the same subject.[221] He cannot be compelled, however, to produce the portions of the correspondence which relate to matters other than those about which the disclosure was made.[222] Thus, if the correspondence discussed both the party's pending divorce and the drafting of a business lease, but the disclosure was limited to portions of the correspondence which discuss the business lease, only those portions relating to the lease lose the protection of the privilege. The adverse party may also discover, of course, any relevant portions of the correspondence which discuss matters outside the scope of the professional relationship, since such matters are not protected by the privilege.[223]

When the holder places in issue a privileged matter, the resulting waiver is often more extensive than that which occurs when he voluntarily discloses or fails to object to disclosure of a privileged communication. Nevertheless, the same principles operate in each of the three waiver contexts. A party who brings an action to recover damages for an alleged back injury places in issue the medical opinions he has received concerning that injury. Consequently, he waives his physician-patient privilege with respect to all communications relating to the treatment of his back by any physician at any time in the past.[224] Had he placed in issue only the treatment received from a single physician during a specified period of time, the waiver would be limited to communications with the named physician during the identified period. In the same manner, the act of disclosure in the contexts of waiver by voluntary disclosure and failure to assert defines the privileged matter subject to waiver, and, hence, its scope.

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[221] 8 WIGMORE, *supra* note 1, § 2327 at 638. *See* Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 46 (1974), which suggests, however, that waiver should be construed more narrowly when disclosure is made in the course of settlement negotiations. Questions of waiver in such contexts, the court concluded, must be considered in light of the public benefit derived from encouraging and facilitating such settlements. Waiver should, therefore, be limited to the actual disclosures made. *Id.* at 45. *See* Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 42 (1973).

[222] MCCORMICK (2d ed.), *supra* note 2, § 93 at 195 n.17.

[223] Solon v. Lichtenstein, 39 Cal. 2d 75, 80, 244 P.2d 907, 910 (1952).

[224] The waiver extends to treatment before the injury alleged because, although the holder has technically placed in issue only the condition of his back subsequent to the injury, the defendant is entitled to discover the existence of any pre-existing condition which may bear on the issue of causation and reduce or eliminate any award against him. *See, e.g.*, Moreno v. New Guadalupe Mining Co., 35 Cal. App. 744, 170 P. 1088 (1st Dist. 1917). The more substantial privacy interests of the psychotherapeutic patient command a slightly different result when dealing with mental conditions and consultations which are not specifically placed in issue. *See* text accompanying notes 196 through 214 *supra*.

IV. CONCLUSION

Professional privileges are designed to promote free exchange of information within the professional relationship and to protect the individual's legitimate interests in privacy. These ends must be balanced against the need for fully informed decision-making in the judicial process. Waiver doctrines constitute a judicial and sometimes legislative enunciation of the circumstances in which continued protection of the confidentiality of professional communications is unwarranted. They give the courts the flexibility necessary to insure the continued vitality of the professional privileges without the inequities inherent in a statutory scheme of absolute privilege and equally absolute exceptions.

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