

CAMFT's 2017



Fall Symposium

at the HILTON ANAHEIM

www.camft.org/fs17

FRIDAY, OCTOBER 27, 2017 | 9:00 A.M. – 4:30 P.M. (6 CE HOURS)

“Fun with Subpoenas!”

Presented by David Jensen, JD,
CAMFT Staff Attorney

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Fun with Subpoenas!



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CAMFT STAFF
ATTORNEY**

The Psychotherapist-Patient Privilege



- **Good morning/Agenda:**
 - Why?
 - Types of Privileges
 - Types of Subpoenas
 - Service of Subpoenas
 - Asserting the Psychotherapist-Patient Privilege

The Psychotherapist-Patient Privilege



- Good morning/Agenda:
 - The Psychotherapist-Patient Privilege
 - ✦ “The Privilege”
 - Testifying as a Witness
 - HIPAA and Subpoenas
 - Final Thoughts

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WHY?

The Psychotherapist-Patient Privilege



- Five Reasons:

- S
- P
- L
- D
- R

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**TYPES OF
PRIVILEGES**

The Psychotherapist-Patient Privilege



- Types of Privileges:



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- What is a Privilege?

- A privilege is a restriction on one's ability to testify during legal proceedings, but ...

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- Other Privileges:
 - The attorney-client privilege
 - The physician-patient privilege
 - The (spousal) privilege
 - The clergy-penitent privilege

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**TYPES OF
SUBPOENAS**

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- Types of Subpoenas:



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- Types of Subpoenas:
 - Civil Subpoena for Personal Appearance
 - Civil Subpoena for Personal Appearance and Production of Documents at Trial or Hearing

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- Types of Subpoenas:
 - Deposition Subpoena for Production of Business Records
 - Deposition Subpoena for Personal Appearance
 - Deposition Subpoena for Personal Appearance and Production of Documents

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- Types of Subpoenas:
 - Subpoena Criminal/Juvenile
 - The Worker's Compensation Subpoena

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- Confronting the “Beast”:



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**SERVICE OF
SUBPOENAS**

The Psychotherapist-Patient Privilege



- Service of Subpoenas:



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- The Service of Subpoenas
 - Personal service is required, except for the Criminal/Juvenile one
 - Your right as a witness!
 - You could waive your right, however
 - But, did you *really* waive your right?

The Psychotherapist-Patient Privilege



- Key Citations Regarding Personal Service:
 - The “Deposition” subpoenas = California Code of Civil Procedure § 2020.220(b)

The Psychotherapist-Patient Privilege



- Key Citations Regarding Personal Service:
 - The “Personal Appearance” subpoenas = California Code of Civil Procedure § 1987(a)

The Psychotherapist-Patient Privilege



- Key Citations Regarding Personal Service:
 - The “Criminal/Juvenile” subpoena = California Penal Code § 1328d
 - Note: this subpoena can be served by mail, but you must “acknowledge” it (date of birth + driver’s license #)

The Psychotherapist-Patient Privilege



- *In re Edward Abrams* (1980) 108 Cal.App.3d 685:
 - “Substitute service” on doctor’s attorney does not equal personal service
 - California law requires “strict statutory compliance” with these rules because proper service how the court acquires jurisdiction over the witness

The Psychotherapist-Patient Privilege



- *In re Edward Abrams* (1980) 108 Cal.App.3d 685:
 - Disobeying a subpoena is serious!
 - Personal service = actual delivery of the papers in person, but, if the witness is fleeing, the papers can be thrown at the witness while telling him or her what the papers are

The Psychotherapist-Patient Privilege



- *In re Edward Abrams* (1980) 108 Cal.App.3d 685:
 - The papers can be placed under the windshield wipers of a retreating automobile

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- *Chapman v. Superior Court* (1968) 261 Cal.App.2d 194:
 - Service on doctor's receptionist was not personal service

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- *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829:
 - Service on your husband or your wife at your home is not personal service

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- **Buildings and Vessels:**
 - A court can order a sheriff to break and enter a building or vessel to serve a subpoena
 - ✦ CCP § 1988

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- **Live in a Gated Community?**
 - Guards at gated communities must allow a peace officer or licensed process server, upon proper identification, access for the purpose of serving a subpoena
 - ✦ California CCP § 415.21

The Psychotherapist-Patient Privilege



- “Go with the Flow” or “Rock the Boat”?
 - Assume a subpoena was left in your office while you were on vacation:
 - ✦ What could you do?
 - ✦ What should you do?
 - ✦ What do you have to do?

The Psychotherapist-Patient Privilege



- Practical Applications in Subpoenas:
 - You’ve been served!

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ASSERTING THE PRIVILEGE

The Psychotherapist-Patient Privilege



- Asserting the Privilege:



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- Assume Proper Service and Proper Preparation:
 - 1. Call CAMFT
 - 2. Call your malpractice carrier

The Psychotherapist-Patient Privilege



- Assume Proper Service and Proper Preparation:
 - 3. Call your patient
 - 4. Possibly, even get a written authorization to talk with the patient's attorney

The Psychotherapist-Patient Privilege



- The Million-Dollar Question:
 - Is the patient waiving or asserting the psychotherapist-patient privilege?
 - ✦ Waiving the privilege?
 - ✦ Asserting the privilege?

The Psychotherapist-Patient Privilege



- Let's get it right!
 - A psychotherapist who received or made a communication subject to the privilege ... *shall claim the privilege* whenever he is present when the communication is sought to be disclosed
 - ✦ California Evidence Code § 1015

The Psychotherapist-Patient Privilege



- **Be Superman or Wonder Woman!**
 - If the lawyer or patient “leaves you hanging,”
ASSERT the privilege!
 - *Inabnit v. Berkson* (1988) 199 Cal. App. 3d 1230
says “The failure of the plaintiff to take any
action whatsoever to claim the psychotherapist-
patient privilege constituted a waiver of the
privilege.”

The Psychotherapist-Patient Privilege



- **The Good News!**
 - No person may be held in CONTEMPT for
failing to disclose information claimed to
be privileged unless he or she has failed to
comply with an order of a court ...
 - ✦ California Evidence Code § 914(b)

The Psychotherapist-Patient Privilege



- The Scope of the Privilege:
 - The PPP may be asserted in *all* legal proceedings in which testimony may be compelled
 - ✦ California Evidence Code §§ 901, 910

The Psychotherapist-Patient Privilege



- Asserting the Privilege:
 - In court
 - ✦ See Handout, Page ____
 - Out of court
 - ✦ See Handout, Page ____

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THE PSYCHOTHERAPIST- PATIENT PRIVILEGE

The Psychotherapist-Patient Privilege



- The Basic Rule:



Key Terms, Principles, and Concepts



- **The Fundamental Rule:**

- Absent a **WAIVER**, or an **EXCEPTION** to the privilege, a **PATIENT**, whether or not a party to a legal proceeding, has a privilege to refuse to disclose, and to prevent others from disclosing, a **CONFIDENTIAL COMMUNICATION** between the **PATIENT** and the **PSYCHOTHERAPIST**

- ✦ California Evidence Code § 1014

Key Terms, Principles, and Concepts



- **The Concept of Patient:**

- 3 Ways of Becoming a Patient:
 - ✦ For consultation purposes
 - ✦ Examination for treatment
 - ✦ Examination for scientific purposes

Key Terms, Principles, and Concepts



- Let's Learn from the Lawyers:
 - "The attorney-client privilege attaches to confidential communications made during an initial consultation regardless of whether the attorney is actually retained"
 - ✦ *People v. Canfield* (1974) 12 C.3d 699

Key Terms, Principles, and Concepts



- Privilege and Dependent Children:
 - The PPP applies to confidential communications between a dependent child and the child's therapist
 - ✦ *In re Mark* (2001) 94 Cal.App.4th 573

Key Terms, Principles, and Concepts



- **Collaterals are Not Patients:**
 - Collaterals *assist* or *further* the patient's therapy

Key Terms, Principles, and Concepts



- **Good Uses of Collaterals:**
 - To educate you
 - To be educated by you
 - To support the patient emotionally

Key Terms, Principles, and Concepts



- Important Case:

- Agreeing to pay for son's therapy and periodically meeting with the therapist to *assist* in son's therapy was not enough to establish a legal duty owed to father by the therapist

- ✦ *Schwarz v. Regents of the University of California* (1991) 226 Cal.App.3d 140

Key Terms, Principles, and Concepts



- You Won't Believe this Case!

- *Smith v. Pust* (1993) 19 Cal.App.4th 263
 - ✦ Is there a genuine professional relationship between the therapist and the person claiming to be a patient?
 - ✦ What was the intent and purpose of the work?
The end and aim of the work?
 - ✦ But, what a story ...

Key Terms, Principles, and Concepts



- *Smith v. Pust:*

- Key facts:

- ✦ No signed patient forms by husband
 - ✦ Therapy addressed wife's own personal issues
 - ✦ Any advice husband received was "incidental" to wife's work

Key Terms, Principles, and Concepts



- The Concept of **Psychotherapist:**

- Someone who is, or is reasonably believed by the patient to be, a psychotherapist
 - ✦ California Evidence Code § 1010
 - The usual suspects: psychiatrists, psychologists, LCSWs, MFTs, LPCCs, and the unlicensed folks working towards licensure

Key Terms, Principles, and Concepts



- The Concept of **Confidential Communications:**

- A complex definition!

Key Terms, Principles, and Concepts



- Confidential Communications:

- Information
 - ✦ Transmitted between patient and psychotherapist
 - ✦ Made within the course of that relationship
 - ✦ Made in confidence

Key Terms, Principles, and Concepts



- **Confidential Communications:**
 - Made by a means, which so far as the patient is aware, discloses the information to no third persons other than someone ...

Key Terms, Principles, and Concepts



- **Confidential Communications:**
 - Present to further the interests of the patient,
 - Necessary to transmit the information, or
 - Necessary to help accomplish the purpose of the therapy

Key Terms, Principles, and Concepts



- A Very Important Case:
 - Wife's presence at husband's examination rendered husband's communications with his physician non-confidential and not privileged, in light of a lack of any evidence that wife's presence was reasonably necessary for physician's diagnosis and treatment
 - ✦ *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139

Key Terms, Principles, and Concepts



- Is a Patient's Name Privileged?
 - A court order requiring a doctor to identify his or her psychiatric patients intrudes into an area protected by the physician-patient confidentiality and the constitutional right to privacy; must be no other less intrusive means of accomplishing the result
 - ✦ *Akkerman v. Mecta Corporation* (2007) 152 CA4th 1094

Key Terms, Principles, and Concepts



- What About Group Therapy?
 - The presence of other participants in a group therapy session provides comfort and facilitates treatment. Hence, these communications are necessary to help accomplish the purpose for which the psychotherapist was consulted
 - ✦ *Farrell v. Superior Court* (1988) 203 Cal.App.3d 521

Key Terms, Principles, and Concepts



- What About Privilege and Family Members?
 - Information crucial to effective treatment and therapy may have to come from a patient's family members. To this extent, communications between the patient's family and a psychotherapist are privileged
 - ✦ *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502

Key Terms, Principles, and Concepts



- **What About Emails or Text Messages?**
 - So long as they are premised on the confidential relationship, electronic communications do not lose their status as privileged communications
 - ✦ California Evidence Code § 917(b)

Key Terms, Principles, and Concepts



- ***Caveat!***
 - But, emails sent by a client from her employer's computer to her attorney regarding possible legal action against the employer were not "confidential communications" and protected by the attorney-client privilege
 - ✦ *Holmes v. Petrovitch* (2011) 191 Cal.App. 4th 1047

Key Terms, Principles, and Concepts



- But, We are in Discovery!
 - The psychotherapist-patient privilege applies to discovery as well as trial
 - ✦ *In re Tabatha* (1996) 45 Cal.App.4th 1159

Key Terms, Principles, and Concepts



- The Concept of **Waiving the Privilege:**
 - Patient must voluntarily abandon the secrecy of the information that the privilege protects
 - ✦ California Evidence Code § 912(a)

Key Terms, Principles, and Concepts



- 3 Ways of “Voluntarily Abandoning”:
 - 1. The “It is OK” way
 - 2. The “Oops” way
 - 3. The “Trade-Off” way
 - ✦ The Patient-Litigant exception is probably the most common way of “trading” one’s privilege for a hoped-for benefit

Key Terms, Principles, and Concepts



- Who can Waive the Privilege?
 - LMFTs must “confirm” who the holder of privilege is?
 - ✦ CAMFT Ethical Standard 8.6
 - Holder = patient; guardian or conservator of the patient, if patient has one; personal representative, if the patient is dead

Key Terms, Principles, and Concepts



- Minors and Waiving the Privilege:
 - The *In Re Daniel* Problem
 - ✦ *In re Daniel C.H.* 220 Cal.App3d 820
 - Not as broad as some lawyers believe ...

Key Terms, Principles, and Concepts



- The Significance of the Case:
 - Brings Health & Safety Code § 123115 into the courtroom!

Key Terms, Principles, and Concepts



- The “123115 Discretion”:
 - Allows you to withhold information from parents –and their representatives- if you believe disclosing would have a detrimental effect on
 - ✦ The professional relationship or
 - ✦ Result in physical or emotional harm to the minor

Key Terms, Principles, and Concepts



- What Type of Legal Proceeding?
 - 1. A civil lawsuit for injuries and damages of a psychiatric nature
 - ✦ Will need a guardian or a guardian ad lite, which could be mom or dad

Key Terms, Principles, and Concepts



- What Type of Legal Proceeding?
- 2. A family court custody or visitation proceeding =
 - Has minor's counsel been appointed?
 - Could be the parent or parents ...
 - Could be the minor himself or herself ...

Key Terms, Principles, and Concepts



- What Type of Legal Proceeding?
 - 3. A juvenile court proceeding = is the minor "of sufficient age and maturity"?
 - ✦ The 12 years of age presumption

Key Terms, Principles, and Concepts



- *In re Joseph Lifschutz* (1970) 2 Cal.3d 415:
 - Dr. Lifschutz = psychiatrist
 - Patient = victim of an assault.
 - Patient sues, alleging “physical injuries, pain, suffering, and severe mental and emotional distress.”

Key Terms, Principles, and Concepts



- At His Deposition Dr. Lifschutz:
 - 1. Refused to acknowledge that the plaintiff was his patient
 - 2. Refused to answer questions about the patient
 - 3. Refused to turn over records pertaining to his patient
- Dr. Lifschutz = “absolute patient privacy”

Key Terms, Principles, and Concepts



- Facts:
 - Defendant = motion to compel
 - The Superior Court then *ordered* Dr. Lifschutz to answer questions and turn over records

Key Terms, Principles, and Concepts



- The Terms of the Order:
 - The witness is ordered to answer questions and disclose records.
 - This matter will be continued for 30 days during which time Dr. Lifschutz will comply with this order.
 - Motion for sanctions and attorney's fees denied."

Key Terms, Principles, and Concepts



- Facts:

- But, Dr. Lifschutz
“remained resolute in his
refusal to respond or
release records.”

Key Terms, Principles, and Concepts



- Facts:

- Lifschutz was found in contempt and imprisoned.
- The California Supreme Court reviewed his case.
- He remained in jail until the case ended or he agreed to comply with the order.

Key Terms, Principles, and Concepts



- Three Points of Law from *Lifschutz*:
 - 1. A psychotherapist may NOT assert his patient's privilege with respect to a communication if the privilege has been *waived* or if the communication falls within the statutory *exceptions* to the privilege.

Key Terms, Principles, and Concepts



- Three Points of Law from *Lifschutz*:
 - 2. The mere admission of the existence of the (therapist-patient) relationship does not constitute a disclosure of a “significant part of the communication” to waive the privilege.

Key Terms, Principles, and Concepts



- Key Points of Law from *Lifschutz*:
 - 3. The patient-litigant exception allows only a LIMITED INQUIRY into the confidences of the psychotherapist-patient relationship,
 - ✦ Compels disclosure of only those matters DIRECTLY RELEVANT to the ... specific emotional or mental condition the patient has voluntarily disclosed

Key Terms, Principles, and Concepts



- Participation and Progress:
 - The PPP does not preclude a psychotherapist from giving “carefully circumscribed information” to accomplish the informational gathering goal of therapy
 - ✦ *In re Kristine* (2001) 94 Cal.App.4th 521

Key Terms, Principles, and Concepts



- What About an Allegation of Pain & Suffering?

- An allegation of pain & suffering does not constitute the tendering of a patient's mental or emotional condition.

- ✦ *Roberts v. Superior Court* (1973) 9.Cal3d 330

Key Terms, Principles, and Concepts



- What About an Allegation of Pain & Suffering?

- The mere exchange of records among health care providers does not constitute a waiver of the PPP

Key Terms, Principles, and Concepts



- What About an Allegation of Pain & Suffering?
 - A signed authorization that does not specifically mention an individual's mental or emotional condition is not a waiver of the PPP

The Psychotherapist-Patient Privilege



- The Rectitude of the Triangle:



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TESTIFYING AS A WITNESS

The Psychotherapist-Patient Privilege



- Relax, and Tell the Story ...:

What's your story?



The Psychotherapist-Patient Privilege



- **Three Types of Witnesses:**

- 1. A Percipient or Fact witness:

- ✦ Sensory information: “Saw” or “heard”

The Psychotherapist-Patient Privilege



- **Three Types of Witnesses:**

- 1. A Percipient or Fact witness:

- ✦ The mere reading of words or symbols from a treating record, but no opinion about diagnosis, prognosis, or treatment justification = statutory witness fee only

- California Government Code § 68093

The Psychotherapist-Patient Privilege



- Three Types of Witnesses:
- 1. A Percipient or Fact witness:
 - Civil actions = \$35 for the whole day and \$0.20 per mile, both ways

The Psychotherapist-Patient Privilege



- Three Types of Witnesses:
- 2. A Retained Expert:
 - ✦ Will give an opinion about a practitioner's compliance, or lack of compliance, with the standard of care
 - ✦ You must agree to be this kind of a witness!

The Psychotherapist-Patient Privilege



- **Three Types of Witnesses:**

- **3. The Treating-Expert:**

- ✦ Yes, you are an expert!
 - ✦ So, what is your expert rate?

The Psychotherapist-Patient Privilege



- **Money and Treating-Expert Witnesses:**

- **Must be paid your expert rate if asked to give:**

- ✦ 1. Your opinion about the patient
 - ✦ 2. Factual testimony about the patient's diagnosis, past or present, or prognosis
 - ✦ 3. Your reasons for a treatment decision
 - California Government Code § 2034.430(b)

The Psychotherapist-Patient Privilege



- **Money and Treating-Expert Witnesses:**
 - You likely will not get paid as a “treating-expert” in Juvenile or Criminal Court cases!
 - Your hourly or daily fee must be paid for any time spent by you from the time specified in the deposition until you are dismissed, even if the lawyer is late

The Psychotherapist-Patient Privilege



- **Money and Treating-Expert Witnesses:**
 - Payment must accompany the subpoena or be paid at the commencement of the proceeding
 - You must demand your compensation!

The Psychotherapist-Patient Privilege



- **Money and Treating-Expert Witnesses:**
 - If the questioning of you takes longer than anticipated, you must send the party who subpoenaed you an itemized statement and the subpoenaing party is supposed to pay you within 5 days of receiving such statement
 - ✦ California Government Code § 68092.5(a); CCP § 2034.450

The Psychotherapist-Patient Privilege



- **Percipient or Treating-Expert Witness?**
 - Did you smell alcohol on father's breath when he came to pick up his child from therapy?
 - Is your patient depressed?
 - Will your patient recover from his depression?

The Psychotherapist-Patient Privilege



- Random Thoughts on Testifying:
 - “Dentistry without _____!”
 - Deposition or trial?
 - Whose lawyer wants to talk beforehand?
 - What kind of witness will you be?

The Psychotherapist-Patient Privilege



- Random Thoughts on Testifying:
 - Don’t be a double-agent!
 - The power of the dependent clause!
 - If you don’t know, you don’t know, don’t guess!
 - Don’t allow the lawyer to misquote you!
 - Appearance matters!

The Psychotherapist-Patient Privilege



- Legal Maneuvers to be Aware of:
 - Patient's attorney may bring a
 - ✦ Motion to quash the subpoena
 - ✦ Motion for a protective order

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**HIPAA AND
SUBPOENAS**

The Psychotherapist-Patient Privilege



- But, HIPAA Says ...
 - A covered entity **may disclose** protected health information in the course of a judicial or administrative proceeding ...
 - To me, still looking for a waiver of the privilege by the patient or a court order

Fun with Subpoenas!



**REVIEW AND FINAL
THOUGHTS**

The Psychotherapist-Patient Privilege



- Review:
 - There is no privilege because this is an administrative subpoena from the BBS
 - There is no privilege because Mr. Smith, although meeting with you, never paid you for any sessions
 - There is no privilege because your patient told his co-workers about his depression

The Psychotherapist-Patient Privilege



- Review:
 - There is no privilege because the patient told his wife about his depression.
 - You cannot assert the privilege; you're only a therapist!
 - I'm subpoenaing you as a percipient witness, but want to question you about your treatment decisions about the patient

The Psychotherapist-Patient Privilege



- Final Thoughts:
 - Privilege created or destroyed?
 - The million dollar question: is the patient waiving or asserting the psychotherapist-patient privilege?
 - You have rights too!