

## The Devil's Advocate

First there was Dr. Lifschutz, now there is Dr. Caesar, whose Brutus has stabbed him — perhaps inconclusively — in the California courts. There must be something in the northern California milieu that breeds idiosyncratic iconoclasm.

Dr. Caesar is the latest Californian to assert squatters' rights and to stake out a claim to the psychiatrist-patient privilege, and although thus far he has only one dissenting opinion to support his cause,<sup>1</sup> APA has joined the Northern California Society in backing his appeal to the United States Supreme Court.<sup>2</sup> The doctor appears to be claiming the privilege for himself or for himself in behalf of his patient and likens his relationship to his patient to that of priest and penitent.

To many psychiatrists who have lent their ears, Caesar deserves praise and his deeds will live long after him. Disregarding history and the express limitation in the Hippocratic Oath regarding disclosures compelled by law, some psychiatrists now claim that it is their prerogative to determine the ambits of privilege and the conditions of disclosure. Apparently, Dr. Caesar on his own, rather than the patient's counsel, initially raised the issue of privilege when his deposition was being taken.

First of all, it should be remembered that at common law there was no physician-patient privilege and that except for an imaginative Illinois decision<sup>3</sup> the case law is all to the effect that the privilege belongs to the patient, not to the physician, and that its ambit is purely statutory.<sup>4</sup> Moreover, customarily, statutes and decisions recognize that the patient in various ways may waive the privilege, and that when he does so, the physician has no choice but to testify or to suffer the penalties of contempt.<sup>5</sup> One of the most recent legislative considerations of the problem resulted in the elimination of a proposed psychotherapist-patient privilege in the new Federal Rules and relegated the matter to the law of the state where the federal court is sitting.<sup>6</sup> Perhaps then current presidential claims of "executive privilege" were responsible for that result.

The rule that the patient waives privilege when he institutes suit and places his mental or emotional condition in issue is the existing law in many if not most states, including California.<sup>7</sup> The conclusion is that it would be unfair to the party the patient sues if he were deprived access to relevant medical evidence bearing upon the issue the patient raises, and that, further, fraudulent claims could be asserted and disproof would be difficult if not impossible. The patient's alternative, if he does not want disclosure, is either not to sue or to limit his claim for damages. The notion is that he should not be permitted to have his cake and eat it too.

The state's interest in a fair administration of justice and averting fraud in litigation is not a minor one — particularly in California. Competing interests, such as the patient's right to privacy, although not negligible, lose their force when the patient himself deliberately "goes public" and sues for mental pain and anguish. It should be noted that there is case law to the effect that the lawyer-client privilege does not apply when the client communicates a fixed intention to commit a serious crime or fraud.<sup>8</sup> Human life and public safety then outweigh the needs of the lawyer-client relationship. In this connection, it should be further noted that in the *Tarasoff*<sup>9</sup> situation, presumably a lawyer would be subject to the same "duty to warn" that was imposed upon the psychologist or psychiatrist at the student health service. The value of human life and safety outweighs the value of maintaining confidentiality when there is reason to know

life is imperiled.

Some psychiatrists are urging that the psychiatrist-patient privilege be coterminous with that of lawyer-client or priest-penitent. One may accept that claim on the basis that the need for confidentiality is just as great. The next step, however, is unprecedented in that it also was asserted in *Lifschutz*<sup>10</sup> and perhaps by implication in *Caesar* that the privilege is that of the psychiatrist, or jointly the psychiatrist and patient, even though such is not the case in other comparable privileged relationships.

There also is the larger picture of the power struggle for privileged status. Newspaper reporters, social workers, psychologists, marriage counsellors, and police, among others, all assert a need for a privilege of nondisclosure. In some cases, there may be a suspicion that such claims are prompted by ambition to achieve professional status and recognition. Why should lawyers, doctors, and the clergy have a monopoly of the perquisites of professional office? The answer, of course, is that such recognition comes at the expense of a fair administration of justice, which is one of the primary objectives of a civilized society. The problem has been viewed as one calling for the limitation, not the extension of privilege. For many years, legal scholars have urged the reduction or elimination of confidentiality and privilege, because of their great concern for access to relevant facts.<sup>11</sup>

The politics of the problem regarding privilege and confidentiality also is complicated by the failure of non-lawyers to appreciate that the law rarely "goes whole hog" in the extension of rights, privileges, duties, and liabilities. The essence of law is compromise, and its immediate objective is to resolve a particular dispute in an orderly way. Ordinarily, this objective is achieved by adjusting competing interests in accordance with the prevailing values of the given time and place.<sup>12</sup> Whether the immediate issue be abortion, obscenity, privacy, malpractice liability, or something else, the right which is recognized or the correlative duty which is imposed is not absolute but qualified and limited.

Because psychiatric patients have a sound and legitimate claim to confidentiality and privilege and can justify it with arguments as compelling as those of client or penitent, by case law or statute, there is a good chance of achieving parity. Arguments that the privilege belongs to the psychiatrist, lawyer, or clergyman, however, will fall on the deaf ears of Romans or Americans. Moreover, the *Lifschutz* implementation of the evidentiary rule as to relevance is a significant protection for the patient and a notable achievement for the profession. Judge Shirley Hufstедler's dissent and the argument that the patient's right to privacy outweighs the state's compelling interest in the administration of justice probably will not be persuasive in a fact situation involving what traditionally has been regarded as a waiver of privilege because the litigant-patient deliberately chose to place in issue his mental status. Such a voluntary exposure to public litigation involves about as much privacy as Lady Godiva's ride. The law probably will render unto *Caesar* what was *Lifschutz's* due.

Another issue, however, is raised in the APA brief for the Supreme Court. It is urged that a distinction be made between treating and diagnostic psychiatrists regarding privileged communications. The APA's position is that communications made during a diagnostic psychiatric examination are not ones made in the course of treatment and hence are subject to the rules of waiver and disclosure, but that complete confidentiality should be maintained as to communications between a treating psychiatrist and his patient.<sup>13</sup> In her dissent, Judge Hufstедler suggested that under the *Lifschutz* rule the treating psychiatrist be required to testify only as to the fact of treatment, its time, length, cost, and the ultimate diagnosis, unless the party seeking disclosure showed a compelling need for additional testimony. She also criticized the *Lifschutz* rule of relevancy as "not sufficiently sensitive" to the patient's right of privacy so as to overcome constitutional objection. It should be noted that Dr. Caesar, at the time of his deposition, no longer was treating the patient, and that after he declined to answer questions, his former patient was examined by another psychiatrist "for evaluation for trial purposes."

The distinction between a treating and diagnostic psychiatrist as to compelled testimony makes sense in terms of the nature of on-going relationships and the need for continuing trust and confidence. The diagnostic psychiatrist has no such standing. Difficulties exist, however, with the APA proposal. The privacy which is to be protected may be doubly invaded by the diagnostic interview if a full mental status examination is given and the patient's personal history is revealed. It is by no means certain that the *Lifschutz* rule as to relevancy would apply to the same extent that it does to the treating psychiatrist situation. Moreover, from the standpoint of the other litigant and the court, relevant information bearing upon the issues raised by the patient may be communicated to the treating psychiatrist but not to the diagnostic psychiatrist, and under the APA dichotomy the former would be insulated from disclosure. In other words, relevant facts may be excluded from the fact-finder's consideration. Finally, if the proposed distinction is accepted and a patient is required to submit to a diagnostic interview, potential problems arise with reference to still another privilege — the privilege against self-incrimination. The latter problem, however, already exists under the compulsory physician and psychiatric examinations and discovery procedure of most states,<sup>14</sup> and would not be compounded by the suggested distinction.

If *certiorari* is granted by the Supreme Court, Caesar's salad should provide ample food for thought.

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### References

- 1 This commentary is based on the report by Margaret McDonald in the *Psychiatric News*, vol. XII, No. 2, pp. 1, 18-19, January 21, 1977, and not upon a reading of the court decisions. The case of *Caesar v. Mountanos* has been heard and lost in the California superior court, state supreme court, U.S. district court, and U.S. Court of Appeals for the Ninth Circuit. Judge Shirley Hufstедler, a distinguished jurist, dissented in the Circuit Court decision.
- 2 *Ibid.* The appeal is by application for a writ of *certiorari*, and such application may be granted if it is decided that the Supreme Court should hear the case. However, no inference as to merits is to be drawn from a refusal to grant the writ.
- 3 See *Binder v. Ruvel*, Civil Docket 52C2535, Circuit Court of Cook County, Ill., June 24, 1952; reported in JAMA 150:1241 (1952), and discussed in Northwestern L. Rev. 47:384 (1952). It is interesting to note that subsequently the Illinois legislature enacted a privilege statute which although containing the usual patient-litigant exception otherwise, in the case of divorce cases, extended the privilege to both the psychiatrist and patient. See Beigler JS: The 1971 Amendment of the Illinois Statute on Confidentiality: A new development in privilege. Am J Psychiatry 129:311 (1972).
- 4 See Slovenko R: Psychiatry and Law. Ch 4, Privileged communications (1974).
- 5 *Ibid.*
- 6 Rule 504 of the proposed Federal Rules of Evidence contained the psychotherapist-patient privilege which eventually was deleted by Congress.
- 7 See California Evidence Code § 1016 to the effect that "there is no privilege under this article as to communications relevant to an issue concerning the mental or emotional condition of the patient if such an issue has been tendered by . . . the patient . . ." by filing a lawsuit.
- 8 See Fisch EL: New York Evidence, § 528, and cases there cited (1965).
- 9 See the discussion and report on the *Tarasoff* case and California legislation by Margaret McDonald in the *Psychiatric News*, Vol. XII, No. 2, pp. 1, 24-25, January 21, 1977.
- 10 In *Lifschutz* it is clear that the psychiatrist was asserting the claim of privilege for himself, whereas in *Caesar*, although apparently the psychiatrist initiated the claim of privilege, it may have been on behalf of the patient.
- 11 See discussion in Fisch EL: New York Evidence, Ch 16 (1965).
- 12 See Foster H: The relation and correlation of freedom and security, W Va L Rev 58:325 (1956).
- 13 See *Psychiatric News*, Vol. XII, No. 2, p. 19, January 21, 1977.
- 14 For example, see N.Y. C.P.L.R. § 3121.