PSYCHOTHERAPIST/PATIENT PRIVILEGE
PART DEUX

In the last newsletter, we explored some of the basics of privilege, trying to place our new Privilege Statute (RCW 5.06.060(9)) into some broader perspective. I'd like to continue that discussion here. In order to really understand privilege, we must always bear in mind that these particular laws reflect an ongoing tension between two strongly held beliefs about professional privacy and the interests of justice.

On one side of this tug-of-war you will find the therapist, physician or lawyer who says, "My patient (or client) needs to be sure that what they tell me will not be forced out of me in some court. If they can't be secure in that, they will withhold information vital to permit me to treat (or serve) them." This sentiment was eloquently stated in a 1970 decision by the California Supreme Court. The case was quite interesting, as it involved psychiatrist Joseph Lifschutz, who absolutely *refused* to reveal certain disclosures by a psychiatric client made ten years earlier. Because Dr. Lifschutz' patient was claiming emotional damages arising from an assault, the judge reasoned that you couldn't raise your mental condition and seek monetary damages for emotional injury, while at the same time blocking exploration into your therapy or counseling history. (Think a person wrongfully fired based on age discrimination who seeks some compensation in court for their depression, which they claim was caused by the conduct of their employer. Is it right to prevent the employer from finding out that this person treated for depression for three years before they were even hired?) The judge reasoned that Dr. Lifschutz had to talk about what was disclosed if his patient was now seeking damages for emotional distress.

Dr. Lifschutz was a stubborn and brave guy. The judge said, "Give them your records." He said, "No!" The judge found him in contempt and threw him in jail. The case was heard on a rare expedited basis by the California Supreme Court on the psychiatrist's petition to get out of jail. In ruling that ten year old therapy records were probably too remote, and therefore not that relevant to the present claim, the opinion used this language which I suspect the readers of this column will find rather stirring:

"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 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.."

Dr. Lifschutz was released. The therapeutic community threw its collective hat in the air, cheering. Yet, there remains a group on the sideline, grumbling. These are the legal-types - the judges and lawyers who believe that every time information is withheld from a judge or jury, there is a great chance that a miscarriage of justice may occur. Few expressed this contrarian view as well as our great constitutional contrarian, U.S. Supreme Court Justice Antonin Scalia.

Some 13 years ago, the Supreme Court had occasion to determine if there should be a

therapist-patient privilege in the federal courts. For reasons too technical to describe in this column, state legislatures in Olympia, Salem, Sacramento or Little Rock pass the laws describing privilege in the state's own courts. However, in the parallel world of *federal* courts, it is the Supreme Court which is the ultimate arbiter of these procedural concerns. The case of *Jaffee v. Redmond* was the vehicle for the Court's consideration of therapist privilege. There, a Chicago area police officer, Mary Lou Redmond, shot and killed a man she thought was carrying a weapon. Approaching his body, she saw that he was unarmed. His family sued her and the police department for violating his civil rights (hence the suit in federal court). Mary Lou had been in therapy for a number of months after the incident and when Jaffee's lawyer learned of this, he served the therapist with a subpoena. She claimed privilege. Nobody had ever decided whether there was a therapist-patient privilege in federal courts. The Supreme Court, noting that every single state recognizes such a privilege, had no trouble applying this rule of evidence to federal courts. Well, that's not true. *Somebody* had trouble with the decision.

In his dissent, Scalia makes his own case for limiting (if not eliminating) the notion of privilege, *particularly* a therapists' privilege. He also proved, I believe, beyond doubt, that he has never enjoyed his own psychotherapeutic experience, as he wrote:

"The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling *(note that the therapist was an M.S.W. and was not engaging in psychoanalysis....but I digress*). It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and probative evidence - or at least every one categorical enough to achieve its announced policy objective."

Not satisfied with this simply-stated notion, Scalia felt impelled to continue, "When is it, one wonders, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, among others, parents, siblings, best friends and bartenders - none of whom was awarded a privilege against testifying in court. Ask the average citizen: would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege." (There goes Nino Scalia trying to twist as many noses as he can.)

Setting aside for the moment, the sillier portions of his opinion, Scalia expresses clearly and succinctly the reason why people object to any privilege - and certainly the extension of the privilege. Yet law is endlessly fascinating - if only as a reflection of changing societal mores. There was a time, not so very long ago, that the only relationships that were blessed with the protection of privilege were the physician/patient; lawyer/client; priest/penitent and husband/wife relationships. That such protection, over the past 30 years has extended, with nary a peep of objection (save for an occasional U.S. Supreme Court justice, of course), demonstrates how deeply the role of the therapist - particularly the master's level therapist - has embedded itself into the psyche of our society and the people who reflect that psyche in the rules which govern our conduct.