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BOOK REVIEW

Psychotherapy and Confidentiality: Testimonial Privileged Communication, Breach of Confidentiality, and Reporting Duties. By Ralph Slovenko. Springfield, Illinois Charles C. Thomas, 1998. Pp. 640. Hard Cover. $29.95

Reviewed by **Alan W. Scheflin***

Now that the Industrial Revolution has stepped aside for the dawning of the Information Age, the acquisition, possession, and adroit use of private material is the new currency, as collectable and tradable as antique art. Preservation of confidences and secrets, in an era that demands revelation, mandates a complete re-evaluation of the moral and legal lines that bind professional therapists, attorneys, and members of the clergy. E-mail, cell phones, fax machines, computers, and the Internet attest to the importance of information in the new millennial society. Though not that ambitious, this book is a welcome introduction to the intricate world of confidences and secrets. Slovenko concentrates mostly on the legal obligations imposed on therapists, but he does offer important references to similar issues for lawyers and members of the clergy.

Slovenko's voice is worth hearing. He brings a depth of scholarship and a lifetime of experience to his subject. His writing is crisp, informative, and mercifully lacks either the high moral tone of a person selling his own theory or the convoluted arguments of a person performing an exegesis on

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arcane codes and texts. In short, the book is very readable and delightfully peppered with humorous stories, anecdotes, cases, and clippings that accentuate the points under consideration. Given the length of the book, there are many points that are in fact considered.

The book is divided into six parts. Part I, consisting of five chapters, unravels the concept of Testimonial Privileged Communication. Slovenko notes that privileges in general violate the fundamental rule that courts of law are entitled to everyone's evidence. By way of court proceedings or pre-trial discovery, judges have the right to receive all relevant evidence. California Evidence Code section 911(b) memorializes this universal idea by stating that "No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." Privileges, whether created by judges or legislators, permit relevant information from being disclosed to courts. Because privileges inhibit the receipt of important information, they are narrowly construed. Discovery statutes, by contrast, because they produce material evidence for courts, are liberally construed.

The attorney-client privilege has been recognized for centuries and it is the oldest privilege respected by law. As the Ninth Circuit Court of Appeals noted in *United States v. Bauer*:[1]

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." The defining principle behind this privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. That purpose "requires that clients be free to 'make full disclosure to their attorneys of past wrongdoings.'" The attorney-client privilege has deep roots in this country's historical jurisprudence: The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of

1. 132 F.3d 504 (9th Cir. 1997) (citations omitted).

> persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.[2]

The essence of the privilege was well stated by the California Supreme Court in *Verdelli v. Gray's Harbor Commercial Co.*,[3] "a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose."[4]

The psychotherapist-patient privilege is at the other end of the evolutionary scale. As Slovenko points out, the privilege first appeared in Georgia in 1959. Prior to that time, some therapists were covered under the variety of physician-patient privileges adopted by some states. This latter privilege was highly porous, however, and therapists complained that it lacked sufficient protection for patient secrets. Slovenko describes the historical developments that led to the creation of the psychotherapist-patient privilege culminating in the acceptance of the privilege by all fifty states, and by the United States Supreme Court's extension of the privilege to social workers in *Jaffee v. Redmond*.[5]

Part II, in nine chapters, describes a variety of Psychotherapy and Privilege Problems, such as divorce matters, child custody battles, criminal cases, commitment issues, record keeping guidelines, and group therapy complications. Therapists seeking an easy access route to legal thinking will be benefited by the clear presentation provided. Indeed, the book works best as an introduction for mental health specialists without legal training. Reading through these chapters reinforced my belief that graduate psychology departments and medical schools should have mandatory courses on ethical and forensic issues. It no longer is possible to practice psychotherapy apart from an understanding of ethical limitations and legal obligations.[6]

Part III, a short section of only two chapters covers Termination of the Privilege. One chapter concerns waiver of the privilege. It takes us on an engrossing journey from the

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2. *Id.*
3. 47 P. 364, 366 (1897).
4. *Id.*
5. 518 U.S. 1 (1996).
6. *See* GEORGE J. ALEXANDER AND ALAN W. SCHEFLIN, LAW AND MENTAL DISORDER (1998).

medical privilege, through the clergy privilege, and into discussions of fascinating recent legal controversies such as the Claus von Bulow trial and the O.J. Simpson case. The other chapter deals with the self-defense exception to the professional privileges. It too has its share of legal drama with discussions of the infamous Bean-Bayog case at Harvard, the James Earl Ray assassination of Martin Luther King, Jr. case, and the Patty Hearst case. Slovenko adds excitement to these matters because his discussions are not of the legal principles involved, but rather the tough strategic choices attorneys and therapists must make behind the scenes.

Part IV moves the reader more deeply into the process of Psychotherapy and Confidentiality. Separating out the distinctions between privilege and confidentiality is not easy, as law students annually learn in courses on ethics and evidence. The importance of confidentiality dates back centuries before the creation of the first legal privilege. The Hippocratic Oath, which still regulates the behavior of healers after twenty five centuries, states that "Whatsoever things I shall see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be raised abroad, I will keep silence thereon, counting such things to be as holy secrets."

The relationship between confidentiality and privilege is well presented by Robert Simon and Robert Sadoff:[7]

> Confidentiality refers to the right of a patient to have communications spoken or written in confidence not disclosed to outside parties without implied or expressed authorization. Privilege—or, more accurately, *testimonial privilege*—can be viewed as a derivation of the right of confidentiality. Testimonial privilege is a statutorily created rule of evidence that permits the patient as holder of the privilege the right to prevent the psychiatrist to whom confidential information was given from disclosing it in a judicial proceeding.[8]

Simon and Sadoff note four sources of authority in the law for safeguarding confidential information given to professionals: (1) professional licensure laws and/or

7. ROBERT I. SIMON AND ROBERT L. SADOFF, PSYCHIATRIC MALPRACTICE: CASES AND COMMENTS FOR CLINICIANS 75 (1992).

8. *Id.*

confidentiality or privilege statutes, (2) the ethical codes of the various professions, (3) case law protection of confidential information, and (4) the constitutional right to privacy. At various points in this book, Slovenko touches base with each of these foundations.

A case not cited by Slovenko suggests the interesting interplay between privilege and confidentiality. In *State v. Beatty*,[9] an impoverished mental patient confides to her psychiatrist that she has committed a robbery to pay for food for herself and a sick friend. Her psychiatrist called Crime Stoppers with enough indirect information to allow the police to make an arrest. The Missouri Court of Appeals held that no privilege was involved because the telephone call did not constitute "testimony." The court was sympathetic to the patient, but it provided her no remedy:

> That does not mean that we condone or approve of the disclosure made in this case. The primary public policy behind the physician-patient privilege statute is to inspire confidence in the patient so as to encourage him to make full and frank disclosures to his medical advisers as to his symptoms and condition so that the physician may properly treat his patient .... It seems to us that if a physician, minister, priest, rabbi or attorney can employ the subterfuge of an anonymous phone call to defeat the confidentiality mandate[]..., then the public policy purpose of the statute is meaningless. However, determining public policy purposes of the statute is a matter for the legislature, not the courts. If the legislature sees fit to modify the confidentiality statute so as to prohibit physicians, spiritual advisers or attorneys from revealing to any other person, except under court order, confidential communications they have received from their patient, penitents and clients, it has a right to do so; but, until it does, the only prohibition dictated by the statute is that they cannot testify in a court proceeding regarding such confidential communication. We leave for another day the question of whether revelations of the type made in this case by Dr. Butts are an ethical violation on his part, as that question is not before us.

Missouri changed its privilege statute, but the patient would

9. 770 S.W.2d 387 (Mo. 1989).

have been no better off under the new provision, which eliminated the privilege "when such information pertains to a criminal act."[10]

Slovenko provides an extensive examination of California's *Tarasoff* case, including pictures of the unfortunate victim and her killer. His discussion leads him into the thickets of "foreseeability" theory and also California's unique "direct victim" theory created in *Molien v. Kaiser Foundation Hospital*.[11] Slovenko's research falters, however, in his discussion of post-*Molien* developments by failing to report some crucial later court rulings. In fact, "very few plaintiffs are successful in demonstrating that they are 'direct victims.'"[12] In a thorough review of every case decided after *Molien*, a California Court of Appeals, in *Bro v. Glaser*,[13] acknowledged that plaintiffs usually lose the argument that they are "direct victims." *Bro* noted that to be a direct victim, plaintiff must show (1) a preexisting, consensual relationship between the plaintiff and the defendant, and (2) that defendant's conduct was sufficiently outrageous to trigger, as a matter of public policy, an obligation to compensate plaintiff.

In regard to medical and psychotherapy cases, the Court of Appeals correctly noted in *Martinez v. County of Los Angeles*,[14] that when the plaintiff is *not* the doctor's patient, "courts have not extended the *Molien* direct-victim cause of action . . . ."[15]

After *Bro* was decided, the "direct victim" issue again arose in *Underwood v. Croy*.[16] In this case, a wife had been seeing a licensed therapist. One day, the wife never came home, leaving her husband and two minor children to worry about what happened to her. The husband discovered that the wife and therapist were having an affair, and that the affair was the reason the wife walked out. The court had no difficulty holding that the husband and minor children were

10. MO. REV. STAT. § 337.636(2) (1997).

11. 616 P.2d 813 (1980).

12. DANIEL BROWN, ALAN W. SCHEFLIN, AND CORYDON HAMMOND, MEMORY, TRAUMA TREATMENT, AND THE LAW (1998).

13. 27 Cal. Rptr. 2d 894 (Ct. App. 1994).

14. 231 Cal. Rptr. 96 (Ct. App. 1996).

15. *Id.*

16. 30 Cal. Rptr. 2d 504 (Ct. App. 1994) (ordered not published by the California Supreme Court).

not "direct victims."

In its analysis, the *Underwood* court provided the clue to analyzing the California cases by noting that the old foreseeability approach, which had been popular with judges and juries in the 1970s, has now been replaced with a "duty" analysis that must be made by the courts. Clearly, California judges shifted the power to decide these cases from juries to themselves. It has always been clear in the law that juries decide issues of foreseeability, whereas judges decide questions involving to whom a duty may be owed. By holding that "direct victim" questions are a matter of duty, not foreseeability, California judges made it clear they did not want the law extended beyond those to whom some contractual duty or undertaking already existed. As the trial judge in the *Underwood* case sagely observed:

> The bottom line is that the question of duty, a matter of law, is an issue of public policy. Our appellate courts may wish to extend public policy to find a duty of care is owed by a marriage counselor to his patient's various relatives when his sexual exploitation of the patient destroys the marriage which he was retained to help preserve. Such is not the law under existing authority.[17]

In an extremely difficult emotional case, *Schwarz v. Regents of the University of California*,[18] a California Court of Appeals held that a father could not sue a psychotherapist on a direct-victim theory where the father had retained the therapist to treat his son but the therapist instead "facilitated and concealed" the mother's removal of the child to England. Even though the father had participated in counseling sessions with the therapist to improve family communications, the court held that the son was the only patient. The court further noted that the existence of a contract between the father and the caregiver for the caregiver to provide treatment for a child does not "impose on the caregiver a duty of care owed to the parent."

California's *Smith v. Pust*,[19] case involved a therapist who had sexual intercourse with a patient. The patient's husband was held not to be a patient, and was also held not to be a "direct victim" despite his attendance at some therapy

17. *Id.*
18. 276 Cal. Rptr. 470 (Ct. App. 1990).
19. 23 Cal. Rptr. 2d 364 (Ct. App. 1993).

sessions.

After the extended treatment of potential harm to third persons, Slovenko shifts to briefer discussions of (1) therapy with important public figures, (2) teaching and publishing case material, (3) special problems of working with children and with hospital staff, (4) references, referrals, and responses to nonmedical third parties, (5) collecting fees, and (6) consent to release information. This material is well referenced for the curious reader searching additional source material, and the topics easily hold one's attention.

Part V contains three chapters on record keeping and accountability. Strangely, Slovenko never locks horns with the major debate in this area—how extensive should psychological or psychiatric records be kept? Some authorities insist that full documentation is necessary for the integrity of the patient.

> The single most important step that a psychiatrist can take to limit the risk of exposure to a malpractice claim is to maintain adequate patient evaluation and treatment records .... Poor or absent record keeping may be the result of a defensive fear that treatment notes could be used against the psychiatrist in court.[20]

Others claim that fewer records mean fewer lawsuits. According to Dr. Lifschutz, "The vulnerability of records to subpoena has for many years affected the record-keeping of psychiatrists. I keep practically no records—just keep the information in my head. Once a patient leaves there usually just isn't any written record."[21] A third voice suggests that records be kept defensively to anticipate lawsuits and pen in defenses to them. In this litigious climate, with hundreds of lawsuits brought against therapists, which path is the wisest? Which path best serves the patient?

Fireworks fly in the final section, Evidential Value of Therapist Versus Forensic Expert Testimony. Few subjects are more controversial, especially after the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[22] Throughout the book, Slovenko's roots in the False Memory Syndrome Foundation were largely

20. *See* ROBERT I. SIMON, CLINICAL PSYCHIATRY AND THE LAW 39 (2d ed. 1992).

21. Stephen, *Keeping a Patient's Secrets*, S.F. CHRON., Aug. 6, 1973, at 17.

22. 509 U.S. 579 (1993).

kept in check, though an occasional reference to what he calls "the recovered memory" controversy erupts in the text. In this section, Slovenko fails to cover up this perspective. Interestingly, after quoting the Ethical Guidelines for the Practice of Forensic Psychiatry of the American Academy of Psychiatry and the Law (AAPL) insistence on "honesty and striving for objectivity," Slovenko almost exclusively cites the literature favoring the false memory view, and he ignores the massive literature on the other side. He generally cites and describes cases raising false memory or repressed memory issues with a slant favoring his own pre-existing beliefs, and he fails to cite substantial evidence contrary to his perspective. For example, he makes the wildly inaccurate observation that "recollections of childhood traumata that come up for the first time in therapy are not credible evidence of actual events"[23] Slovenko fails to mention that every study in the world directly related to repressed memory, has shown the phenomena to be real. Not a single scientific study anywhere supports his view.[24]

Slovenko himself has raised a new threat to the integrity of confidentiality in his argument that therapists should be "detectives" before believing their patients.[25] In all fairness, he does discuss my critical response to this position.[26] The reader may decide which viewpoint is more acceptable.

An additional threat to the protection of confidences is the poor empirical base for the argument that people only confide in therapists because they know their secrets will be kept. Is it true that the mental health, legal, and clerical

23. RALPH SLOVENKO, PSYCHOTHERAPY AND CONFIDENTIALITY: TESTIMONIAL PRIVILEGED COMMUNICATION, BREACH OF CONFIDENTIALITY 530 (1998).

24. *See* Daniel Brown, Alan W. Scheflin, and Charles L. Whitfield, *Recovered Memories: The Current Weight of the Evidence in Science and in the Courts*, JOURNAL OF PSYCHIATRY & LAW (April 1999). Assessing the entire literature, not just one side of the debate, the authors reject Slovenko's position on the grounds that it lacks scientific support. *Id.* Their book received AAPL's highest award—the 1999 Manfred S. Guttmacher Award, co-sponsored by the American Psychiatric Association.

25. Ralph Slovenko, *"I'm Not a Detective" in "Revival of Memory,"* presented at a Conference on Law, Science and Society sponsored by the American Bar Association in Detroit, Michigan (April 29, 1995).

26. *See* Alan W. Scheflin, *Narrative Truth, Historical Truth and Forensic Truth*, *in* THE MENTAL HEALTH PRACTITIONER AND THE LAW: A COMPREHENSIVE HANDBOOK 299-328 (1998).

professions could not function without confidentiality? When patients or clients visit professionals, do they really know about the principles of confidentiality? Are they aware of the exceptions that require or permit professionals to reveal information? These questions motivated some researchers to study whether confidentiality was essential to therapy. Shuman & Weiner surveyed lay persons, and others, and concluded that most people who seek mental health help do not know about the privilege, and ninety-three percent of the people surveyed reported that even if no privilege existed, they would seek professional help for "serious emotional problems."[27] They present strong arguments supporting the abolition of the psychotherapist-patient privilege based upon the public's lack of awareness of the privilege, but they do not address one significant question: can therapists do their work as effectively if they know that nothing will remain confidential?

> So many exceptions exist to privilege that is often considered illusory. The main exceptions involve involuntary hospitalization proceedings, court-ordered examinations, criminal proceedings involving the patient, will contests, child custody disputes, child abuse proceedings, a legally required report, and the patient-litigant exception by which the patient raises his or her mental or emotional condition as an element of a claim or defense in a legal proceeding.[28]

In California, psychologists routinely hand out to their patients during the first session a "Miranda" warning list of fifteen to twenty situations in which confidences may be violated. Patients do not appear to have been stifled in their self-revelations. Should confidentiality be further limited?

Every state, and the federal system, recognizes a psychotherapist-patient privilege. When the issue was addressed in the *Jaffee* case by the United States Supreme Court, only Justice Scalia voted to reject the privilege. Justice Scalia's argument against the psychotherapist privilege is centered on his belief that only therapists have been given this protection from revealing the secrets of

27. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982).

28. ROBERT I. SIMON, CLINICAL PSYCHIATRY AND THE LAW 58 (2d ed. 1992).

others. In a crucial passage he states:

> When is it, one must wonder, 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, inter alios, 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.[29]

Interested readers will certainly profit from reading Slovenko's excellent book. Indeed, the issues it discusses, in our modern age of information trafficking, make this book essential reading. I know of no better introduction to the scope of the controversies covered within its pages.

29. Jaffee v. Redmond, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting).

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