

T. v. Superior Court (a Petition for Writ of Prohibition)

The Concept Behind This Petition

My client was a dentist who administered anesthesia to a 9-year old boy, who then had a heart attack and died in the dentist chair. Incident caused dentist to have an emotional breakdown, and she sought help from a psychiatrist.

Boy's parents sued the dentist for wrongful death. During discovery, parents sought report of dentist's meeting with psychiatrist. Dentist objected, claiming doctor-patient privilege. But trial court ordered release of report to plaintiffs. Dentist sought my help.

Appeal? Not allowed. This was only a discovery order, not a final judgment. Only possible remedy was an extraordinary writ (mandate) from the appellate court.

I faced two major hurdles.

First, appellate courts grant very few writ petitions. Most are summarily denied, without hearing or opinion. I needed to distinguish my case from the pack.

Second, I needed the writ (or at least a stay) in a hurry - before the deadline set by trial court for release of the report.

What to Watch For When Reading This Petition

Judges don't like to be yelled at, and I generally avoid putting anything in my briefs that looks like yelling. But this case was different. We needed *immediate* relief, and I needed to yell this out - right on *the cover*. I'm yelling to the appellate *court clerk* just as much as the law clerks and Justices: "Don't put me at the bottom of your stack of petitions! Get someone to look at me *now*."

The *Summary of This Petition* is crucial. It is designed to catch the attention of the appellate court's "writ clerk" and make this petition stand out from the pack. It must be very short, accurate, persuasive - and understandable on its own without the need to read any other document or part of the petition.

The *Petition* alleges facts that are supported by exhibits that are cited and attached. This is essential. You cannot expect the appellate court just to take your word for an allegation. You must provide them with the raw evidence that they can see to verify what you say happened.

Sometimes you will want to allege what happened at the trial court hearing on a motion. Attach a transcript of the hearing to confirm this. If the transcript has not yet been prepared by

the court reporter, attach a declaration from the trial attorney saying what happened, with a note saying that the transcript will be filed with the appellate court when it is ready.

The *Memorandum of Points & Authorities* includes just enough law to support the Petition - and no more. Keep it short. If you need a lengthy legal discussion to make your case, the Petition will probably be denied.

The Petition was successful. The appellate court issued the requested writ.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MARIANNE T., D.M.D.

Petitioner

vs.

SUPERIOR COURT OF THE
COUNTY OF SAN MATEO *

Respondent

EUGENE SHIMSHOCK &
NICOLE SHIMSHOCK

Real Parties in Interest

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No. _____

San Mateo County Superior Court
No. 400614

URGENT!
IMMEDIATE STAY REQUESTED.
STAY NEEDED TODAY,
DECEMBER 24, 1997

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE
RELIEF
(TO PREVENT RELEASE OF CONFIDENTIAL REPORT OF PSYCHOTHERAPIST)

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

WITH REQUEST FOR IMMEDIATE STAY

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A SUMMARY OF THIS PETITION

Dentist Marianne T._____ was assisting another dentist by administering anesthetics to a young patient, Benjamin Shimshock, when Benjamin suffered cardiac arrest and died. Dr. T._____ was seriously affected by this incident, both emotionally and psychologically, and she began seeing Dr. B_____ ¹ for diagnosis and treatment.

Benjamin's parents then filed suit against Dr. T._____ for the wrongful death of Benjamin, and their attorney (Mr. Carcione) sought to depose Dr. T._____. Dr. T._____’s attorneys sought to temporarily postpone the deposition, submitting to the court - under seal for *in camera* inspection - reports from Dr. B_____. Mr. Carcione strenuously objected to any postponement.

The court appointed retired judge Harrington as discovery referee in this case. Judge Harrington recommended that the court appoint Dr. Marvin Firestone as an expert to review Dr. B_____’s records, to examine Dr. T._____, and to report back to Judge Harrington with recommendations. Dr. T._____ would be ordered to cooperate with Dr. Firestone and to submit to his examination. Dr. Firestone would be ordered to keep his report confidential, although Judge Harrington would retain the power to order its disclosure. The court signed the order recommended by Judge Harrington.

Dr. T._____ did as ordered, submitting to examination by Dr. Firestone. Dr. B_____ spoke to Dr. Firestone and allowed him to review the records. Both Dr. T._____ and Dr. Firestone assumed that - as Judge Harrington’s order indicated - Dr. Firestone’s report to Judge Harrington would remain confidential and would not be disclosed to Mr. Carcione.

Dr. Firestone submitted a written report to Judge Harrington. The report sets out, in detail, what Dr. B_____ told Dr. Firestone, what Dr. B_____’s records show, and what Dr.

¹ Dr. B_____’s full name appears in the exhibits filed in this Court “under seal.”

T._____ said to Dr. Firestone during his examination of her.

Based on his findings, Dr. Firestone recommended that the deposition of Dr. T._____ take place no earlier than January 15, 1998, that Judge Harrington be present and order Plaintiffs' attorney not to engage in abusive conduct, that Dr. B._____ be present, that the deposition not be video-taped, that Dr. T._____ be allowed a recess when emotionally distraught, and that no session last more than 2 hours.

Dr. T._____ 's attorneys informed Judge Harrington that these conditions were satisfactory to Dr. T._____, and that she would submit to a deposition under them. Much to the shock of Dr. T._____ and her attorneys, however, Judge Harrington then informed Arthur Curley (one of Dr. T._____ 's attorney) that he intended to release a copy of Dr. Firestone's report to Mr. Carcione, on or after Wednesday, December 24, 1997.

This petition seeks to stop that disclosure.

Dr. Firestone's report is protected by the psychotherapist-patient privilege. Both the Legislature and our courts have held that this privilege protects extremely confidential information: the intimate secrets of the mind, which would never be disclosed for diagnosis or treatment if the patient believed that they would later be disclosed to outsiders. As shown in the attached Memorandum of Points and Authorities, this privilege applies to Dr. Firestone's report, and Dr. T._____ has done nothing to waive the privilege.

We are filing Dr. B._____ 's reports and Dr. Firestone's report in this Court under seal. In this Petition and the attached Memorandum of Points and Authorities, we will not discuss the contents of those reports (except to mention Dr. Firestone's recommendations to Judge Harrington, which are not confidential) or base our arguments on those contents, for this might be unfair to Plaintiffs, who have not seen those reports, and might also be construed as a waiver

of the privilege. We request the Court to examine those reports, *in camera*, and decide for itself whether those reports contain confidential and privileged material, and whether they show that disclosure of the reports might cause irreparable injury to the life or health of Dr. T._____.

This matter is urgent. This petition is being filed on Wednesday, December 24, 1997, and Judge Harrington might release the report at any moment. Therefore, we respectfully urge the Court to issue its **stay** to Judge Harrington **today**, as early as possible.

THE PETITION

1. On June 26, 1996, Petitioner Dr. T._____ was a licensed dentist working in the County of San Mateo. On that day, she assisted another dentist (Dr. Michael Njo) by giving anesthetics to a patient, Benjamin Shimshock. During that procedure, Benjamin suffered cardiac arrest and never recovered.

2. On May 27, 1997, Benjamin's parents (Eugene and Nicole Shimshock) filed suit in Respondent Superior Court for San Mateo County, No. 400614, against Petitioner Dr. T._____, Dr. Njo, and their business entities, alleging wrongful death of Benjamin. A copy of that complaint is attached as Exhibit A. A copy of Dr. T._____’s answer is attached as Exhibit B.

3. On June 20, 1997, plaintiffs’ attorney (Mr. Joseph W. Carcione, Jr.) served a deposition notice on Dr. T._____, a copy of which is attached as Exhibit C. An exchange of letters between counsel followed.

4. On September 5, 1997, Mr. Carcione filed a motion to compel Dr. T._____ to provide a deposition. That motion is attached as Exhibit D. Attached to the motion are copies of the prior correspondence between counsel mentioned above. Dr. T._____’s opposition to the motion is attached as Exhibit E, and Mr. Carcione’s reply is attached as Exhibit F.

5. On September 5, 1997, Dr. T._____’s attorneys filed an *ex parte* application for an order staying the deposition. That application is attached hereto as Exhibit G. At page 3, it states that “subsequent to the events that gave rise to this lawsuit, defendant began treatment for a medical

condition that will interfere with her ability to give testimony at a deposition. More specific information concerning the nature and extent of the condition and treatment cannot be disclosed in this application due to the attorney-client and physician-patient privileges.” Attached to that application was a diagnostic evaluation prepared by Dr. B_____, filed as a confidential document (which was not served on Mr. Carcione). Dr. B_____ is the psychotherapist who has been treating Dr. T._____, and her declaration describes Dr. T._____’s physical and mental condition since the death of Benjamin Shimshock. A copy of that declaration is filed with this Court, under seal, as “Under Seal Exhibit 1.”

6. On October 16, 1997, Dr. T._____’s attorneys filed a motion for protective order *continuing* the deposition “on the grounds that defendant is unable to participate in a meaningful oral deposition due to a medical condition that is currently being treated.” A copy of that motion is attached as Exhibit H. Attached to that motion was a Declaration of Dr. B_____, filed as a confidential document, further describing Dr. T._____’s physical and mental condition. A copy of that declaration is filed with this Court, under seal, as Under Seal Exhibit 2. Mr. Carcione filed an opposition to the motion (attached hereto as Exhibit I), and Dr. T._____’s attorneys filed a reply (attached hereto as Exhibit J).

7. On September 26, 1997, Respondent Superior Court (per Judge Linda M. Gemello) appointed retired judge Walter Harrington to act on behalf of said Court as discovery referee in this case.

8. On October 7, 1997, Judge Harrington held a hearing on this dispute. A transcript of that hearing is attached as Exhibit K.

9. On October 8, 1997, Dr. T._____’s attorneys sent a letter to Judge Harrington (attached as Exhibit L), Mr. Carcione sent two letters in response on October 9 (attached as Exhibits M and N), and Dr. T._____’s attorneys sent a further letter on October 10 (attached as Exhibit O).

10. On October 13, Judge Harrington sent a reply to Dr. T._____’s attorney (attached as Exhibit P) giving counsel until October 21 “to provide legal authority as to how an order may be made based upon evidence which is not made available to the other party” and directing counsel “to submit further documentary medical evidence, under seal, providing as much information as possible as to the extent and probable duration of Dr. T._____’s disability, and with more detail as to her present overall condition.” Judge Harrington also stated, “As an alternative, the court might be required to appoint a neutral medical expert to evaluate your client’s present state of health, an expensive and time consuming process but a procedure authorized by Evidence Code §730.”

11. The October 21 deadline was extended, and counsel for each side sent further correspondence to Judge Harrington. Dr. T._____’s attorneys sent a letter dated October 20, a copy of which is attached as Exhibit Q. Attached to that letter is a further report by Dr. B_____, filed under seal.² A copy of that report is filed with this Court, under seal, as Under Seal Exhibit _____

² “Although ordinarily a patient cannot be required to disclose privileged information in order to claim the privilege (Evid. Code. s 915, subd. (a)), because the privileged status of psychotherapeutic communications under the patient-litigant exception depends 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.” *In re*

3. Mr. Carcione responded with a letter of October 23, a copy of which is attached as Exhibit R. Dr. T. _____'s attorneys filed a further letter dated November 4, a copy of which is attached as Exhibit S. Attached to that letter is a further report by Dr. B _____, filed under seal. A copy of that report is filed with this Court, under seal, as Under Seal Exhibit 4. Mr. Carcione responded with 2 further letters of November 6, attached as Exhibits T and U.

12. On November 12, 1997, Judge Harrington issued a report, recommending that the Superior Court issue an order appointing Dr. Marvin Firestone, a psychiatrist, to interview Dr. T. _____, to review Dr. B _____'s medical records regarding Dr. T. _____, and perform psychological testing on Dr. T. _____. Judge Harrington's recommendations were accepted by the Superior Court, and his proposed order was signed by the court. A copy of that order is attached as Exhibit V.

Judge Harrington's findings include the following:

Defendant Dr. T. _____ claims to be presently disabled as a result of an illness for which she is receiving treatment. From the three declarations of her treating physician heretofore submitted to the court and the referee in camera (and under seal) the referee finds by a preponderance of the evidence that there is some medical basis for such claim, and, further, that a present release of the treating physician's opinions and observations relative to the nature and extent of the said defendant's medical condition and treatment therapy therefor to the other parties to the case, even with a protective order would, in substantial probability, be psychiatrically and medically dangerous to the said defendant.

Judge Harrington recommended the appointment of Dr. Firestone, and stated:

The expert shall be afforded full access to the records and reports of the said defendant's treating psychiatrist, including or other physicians, including consultations, and may perform such reasonable examinations of the defendant, including interviews, as may be necessary and appropriate in that expert's discretion to carry out the purposes of the appointment. The said defendant, her physicians, and her counsel are directed to cooperate with, and at all reasonable times to make themselves available to the expert for such purposes.

Judge Harrington then ordered Dr. Firestone to keep his report confidential:

The expert shall report on his or her findings to the referee and the court only, and shall not disclose the contents of the interviews, examinations, records or reports to anyone other than the discovery referee or judge of the court, except as may be ordered by the referee or any judge of the court.

13. Dr. T._____ fully complied with the court's order that she cooperate with Dr. Firestone. She did so, however, on the assumption that the confidentiality of her communications with Dr. B_____ would *continue* in her communications about same topics with Dr. Firestone, and that Dr. Firestone would not disclose anything concerning this matter to anyone other than Judge Harrington - and especially not to Mr. Carcione.

14. On December 18, 1997, Dr. Firestone sent a letter to Judge Harrington reporting his findings. Dr. Firestone marked his letter "CONFIDENTIAL". A copy of that letter is filed with this Court under seal, as Under Seal Exhibit 4.

15. Dr. Firestone's letter to Judge Harrington contains highly confidential information and findings regarding Dr. T._____ 's medical, psychological, and personal history and present condition. If this is released to the public - and especially to Mr. Carcione - this would seriously endanger Dr. T._____ 's health and life and undermine Dr. B_____ 's efforts to treat her properly.

16. Dr. Firestone's letter to Judge Harrington also includes the following recommendations:

Recommendations: Based upon the perceived threat by Dr. T._____, after discussion of various options with her treating psychiatrist and considering the rights of plaintiffs to discovery, it is my recommendation that any discovery deposition proceed by

incorporating the following precautions and safeguards:

1. that the deposition be in your presence;
2. that video taping not be utilized;
3. that the deposition process be limited to no more than one to two hours during any one sitting;
4. that the plaintiffs' attorney be admonished to refrain from being provocative during his questioning (e.g., avoiding words such as "murderer", "child killer", or the like;
5. that Dr. B_____, the declarant's psychiatrist, be present with Dr. T._____ at deposition;
6. that the defendant be allowed recesses, if she becomes emotionally distraught; and
7. that the deposition not take place before January 15, 1998.

Dr. T._____ is prepared to submit to the deposition under these conditions, and her attorneys have so informed Judge Harrington.

17. On December , 1997, Judge Harrington orally advised Mr. Arthur Curley, one of Dr. T._____ 's attorneys, that he intended to release to Mr. Carcione a copy of Dr. Firestone's report.³ When Mr. Curley protested that the report was confidential and its release to Mr. Carcione would endanger Dr. T._____ 's life and health, Judge Harrington said that he would nevertheless release the report to Mr. Carcione. Judge Harrington gave Dr. T._____ 's attorneys until Tuesday, December 23, 1997, to submit a proposed "protective order" which would restrict Mr. Carcione's use of Dr. Firestone's report, but **Judge Harrington made it clear to Mr.**

Curley that he would in any event release the report to Mr. Carcione soon after the

³ The Superior Court's order of November 12, 1997, adopted the findings and recommendations of Judge Harrington. See Exhibit V. Those recommendations, in paragraph 3, include the following:

The expert shall report on his or her findings to the referee and the court only, and shall not disclose the contents of the interviews, examinations, records or reports to anyone other than the discovery referee or judge of the court, *except as may be ordered by the referee* or any judge of the court.

Thus, the Superior Court's order allows Judge Harrington - on his own, without further order of the Superior Court - to order release Dr. Firestone's report as he sees fit.

December 23 deadline expired. See the attached Declaration of Arthur W. Curley.

18. On December 23, 1997, Dr. T. _____'s attorneys sent a letter to Judge Harrington informing him that Dr. Firestone's recommendations were satisfactory to Dr. T. _____ and that if they were adopted by the court, Dr. T. _____ would comply with them. A copy of that letter is attached as Exhibit W.

19. There is a serious danger that, if Dr. Firestone's report is released to Mr. Carcione, it will "find its way" into other hands - despite any "protective order" that might be entered by Judge Harrington. See the attached Declaration of Arthur W. Curley.

20. Petitioner has no adequate remedy at law and will suffer serious dangers to her life and health, unless this Court issues the requested relief. See the attached Declaration of Dr. B. _____, filed with this Court under seal.

21. This petition is being filed with this Court during the morning of Wednesday, December 24, 1997. At any moment, Judge Harrington might release Dr. Firestone's report to Mr. Carcione. For this reason, it is urgent and essential that this Court immediately (today) issue a stay ordering Judge Harrington not to release Dr. Firestone's report to Mr. Carcione until this Court finally disposes of this matter.

WHEREFORE, Petitioner prays:

(1) That this Court issue a stay ordering Respondent Court not to release Dr. Firestone's report to Mr. Carcione (or any other attorney for plaintiffs), until this Court finally disposes of this matter,

(2) That this Court issue its peremptory writ in the first instance, or issue its alternative writ ordering Respondent Court to show cause why this Court should not issue a peremptory writ of mandate barring Respondent Court from releasing Dr. Firestone's report to Mr. Carcione (or any other attorney for plaintiffs), (3) That this Court issue its peremptory writ barring Respondent Court from releasing Dr. Firestone's report to Mr. Carcione (or any other attorney for plaintiffs),

(4) for costs of this proceeding, and

(5) for such other relief as this Court deems just and proper.

Myron Moskovitz

Arthur W. Curley
Kathleen J. Moorhead
Bradley, Curley & Asiano, P.C.

Attorneys for Petitioner

Date: December 23, 1997

by: _____
Myron Moskovitz

VERIFICATION

I, Dr. T._____, declare:

I am the petitioner in this action. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and know the contents thereof. I know the same to be true based on my own knowledge or information available to petitioner, except as to the matters which are therein stated on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of December, 1997, in _____, California.

Dr. T._____

MEMORANDUM OF POINTS & AUTHORITIES

I. DR. FIRESTONE'S REPORT IS PRIVILEGED.

A. The Psychotherapist-Patient Privilege Is Very Broad.

California has recognized the psychotherapist-patient privilege in Evidence Code §1014, which provides in part:

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. * * * *

The importance and breadth of this privilege were stressed by the Senate Judiciary Committee which recommended the statute. The Committees' report on the bill is published in West's Annotated Codes, Ev. Code §1014, "Comment" and quoted in *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, 507. The Committee stated:

This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege. * * * * A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends. The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if

psychiatrists are able to assure patients that their confidences will be protected. * * * *
The psychotherapist-patient privilege applies in all proceedings.

This view of the purpose of the privilege was confirmed by our Supreme Court in *In re Lifschutz* (1970) 2 Cal.3d 415, 422:

[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.

And in *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 337, the Supreme Court held that “because of the potential encroachment upon the constitutionally protected rights of privacy by the compelled disclosure of confidential communications between the patient and his psychotherapist (cf. *Griswold v. Connecticut*, 381 U.S. 479), trial courts should carefully control compelled disclosures in this area. Thus, the psychotherapist-patient privilege is to be liberally construed in favor of the patient.” See also *Huelter v. Superior Court* (1978) 87 Cal.App.3d 544, 547; *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485, 492.

B. The Privilege Applies to Dr. T._____’s Claim That Dr. Firestone’s Report Must Not Be Disclosed to Plaintiffs’ Counsel.

Dr. T._____ is a “patient” who is entitled to claim the privilege. Evidence Code §1011 defines “patient”:

As used in this article, “patient” means a person who consults a psychotherapist or submits to an examination by a psychotherapist *for the purpose of securing a diagnosis* or preventive, palliative, *or curative treatment* of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems. [Emphasis added.]

Dr. T._____ saw Dr. B_____ for both diagnosis and curative treatment of her mental and emotional condition, and she saw Dr. Firestone for diagnosis of that condition. Therefore, Dr. T._____ is a “patient” under §1011.

And it is also clear that Dr. Firestone's report contains confidential material. Evidence Code §1012 explains what communications between patient and psychotherapist are confidential:

As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted*, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship. [Emphasis added.]

This statute encompasses Dr. Firestone's report in two ways.

First, the report contains information which Dr. Firestone gathered from Dr. T. _____ during the course of his examining her, in confidence. While Dr. Firestone was not Dr. T. _____'s regular psychotherapist for *treatment* purposes, he was one of her two psychotherapists for *diagnostic* purposes. As mentioned above, Evidence Code §1011 provides that one is a "patient" for purposes of the privilege when one sees a psychotherapist for *either* diagnostic *or* curative treatment purposes.

Second, Dr. Firestone specifically states in his report that he reviewed Dr. _____'s records and spoke to her about Dr. T. _____, and that he based his report in part on that confidential information. Thus - according to the language of §1012 emphasized above - even if Dr. Firestone were not considered Dr. T. _____'s treating psychotherapist, the information contained in his report would still be privileged, because it includes information from the person who *was* the main psychotherapist who treated Dr. T. _____. The "purpose for which the psychotherapist is consulted" was relief from the symptoms resulting from the circumstances of Benjamin Shimshock's death, and Dr. B. _____'s transmission of the confidential information to Dr. Firestone was necessary to accomplish that very purpose, because Dr. Firestone's report to

Judge Harrington would likely result in protecting Dr. T. _____ from harm which could result to her from being deposed too soon and with adequate safeguards.

II. DR. T _____ HAS NOT WAIVED THE PRIVILEGE.

In the court below, Plaintiffs' attorney has claimed that Dr. T. _____ has *waived* the privilege, because she requested the court to delay the deposition because of her emotional condition. Plaintiffs have invoked Evidence Code §1016, which provides:

§1016. Exception: Patient-litigant exception

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.

This exception has no application here.

First, it should be noted that this exception is narrowly construed. "For policy reasons, the psychotherapist-patient privilege is broadly construed in favor of the patient *and exceptions to the privilege are narrowly construed.*" *People v. Castro* (1994) 30 Cal.App.4th 390, 397 (emphasis added). See also *People v. Stritzinger* (1983) 34 Cal.3d 505, 511, 513.

Second, Dr. T. _____ has not "tendered" an "issue" in this lawsuit relating to her mental or emotional condition.

As the title of §1016 indicates, this section was intended to adopt the "patient-litigant" exception to the psychotherapist-patient privilege, whereby the patient is a party to lawsuit and raises her mental or emotional condition *as a substantive issue in the lawsuit*, not as to mere *procedural* issues. This exception usually arises where the patient is a plaintiff who claims damages for mental or emotional distress.

§1016 says that the privilege is waived "if such issue has been tendered." What constitutes tendering an "issue"? Code of Civil Procedure §588 provides as follows:

§588. Issues Defined, and the Different Kinds

Issues arise *upon the pleadings* when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact. [Emphasis added.]

By its express terms, “issues” arise “upon the pleadings.” Code of Civil Procedure §422.10 says that the “pleadings” allowed in civil actions are the complaint, the answer, the demurrer, and the cross-complaint.

In the present case, the only pleadings filed are a complaint and an answer - and neither document includes any allegation regarding Dr. T. _____’s mental or emotional condition. Therefore, by its express terms, Evidence Code §1016 does not bar Dr. T. _____’s assertion of her privilege here.

This result is consistent with the Supreme Court’s holding in *In re Lifschutz* (1970) 2 Cal.3d 415, 435: “Under Evidence Code section 1016 disclosure can be compelled only with respect to those mental conditions the patient-litigant has ‘disclose[d] . . . by bringing the action in which they are in issue. . . .’” Emphasis added. See also *Britt v. Superior Court* (1978) 20 Cal.3d 844, 863-864. Dr. T. _____ has brought no action. In addition, her answer raises no issue regarding her mental condition.

Finally, we note that Dr. T. _____ was *compelled* to submit to examination by Dr. Firestone. Judge Harrington’s order states:

The expert shall be afforded full access to the records and reports of the said defendant’s treating psychiatrist, including or other physicians, including consultations, and may perform such reasonable examinations of the defendant, including interviews, as may be necessary and appropriate in that expert’s discretion to carry out the purposes of the appointment. *The said defendant, her physicians, and her counsel are directed to cooperate with, and at all reasonable times to make themselves available to the expert for such purposes.* [Exhibit V, attached; emphasis added.]

Under these circumstances, there was no voluntary waiver of the privilege.

III. DR. T_____ HAS NO ADEQUATE REMEDY AT LAW.

The Superior Court's order of November 12, 1997, adopted the findings and recommendations of Judge Harrington. See Exhibit V. Those recommendations, in paragraph 3, include the following:

The expert shall report on his or her findings to the referee and the court only, and shall not disclose the contents of the interviews, examinations, records or reports to anyone other than the discovery referee or judge of the court, *except as may be ordered by the referee* or any judge of the court.

Thus, the Superior Court's order allows Judge Harrington - on his own, without further order of the Superior Court - to order release Dr. Firestone's report as he sees fit.

IV. THIS CASE IS APPROPRIATE FOR AN EXTRAORDINARY WRIT.

As shown above, Dr. Firestone's report is privileged. Our Supreme Court has established a basic principle that "there can be no discovery of matter which is privileged." *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 929.

"The writ of mandate is a proper remedy for the review of discovery orders." *Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 599.

In *City of Alhambra v. Superior Court* (1980) 110 Cal.App.3d 513, 517, the court stated:

[P]retrial review of discovery orders by means of extraordinary writ is generally disfavored. The aggrieved party normally must raise the issue on appeal following a final judgment. [Citations.] *An exception to this general rule exists, however, where the objection raised is that the information sought is protected from disclosure by a statutory privilege, since redress after disclosure would, of course, be impossible.* [Emphasis added.]

This exception applies in the instant case.

**V. DISCLOSURE OF DR. FIRESTONE'S REPORT SHOULD BE STAYED PENDING
RESOLUTION OF THIS PETITION.**

A stay is appropriate to maintain the *status quo*, pending resolution of a writ petition.

Luhdorff v. Superior Court (1985) 166 Cal.App.3d 485, 488.

As shown by the attached Declaration of Arthur Curley, Judge Harrington intends to release Dr. Firestone's report to Mr. Carcione as soon as the December 23 deadline expires. That deadline has now expired, and it is urgent that this Court issue a stay maintaining the *status quo*, pending its resolution of this petition.

CONCLUSION

As our Supreme Court has noted,

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. [*In re Lifschutz* (1970) 2 Cal.3d 415, 436-437.]⁴

This high confidence will be undermined in the extreme if Dr. Firestone's report is released to opposing counsel. In addition, as Dr. T. _____ has acceded to Dr. Firestone's recommendation that she be deposed as early as January 15, 1998, release of the report would serve no legitimate interest.

While a trial court generally has discretion over discovery matters, that discretion was abused here. Judge Harrington should be ordered not to release Dr. Firestone's report to plaintiffs' counsel.

Respectfully submitted,

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Date: December 23, 1997

by: _____
Myron Moskovitz

⁴ The United States Supreme Court expressed almost identical sentiments in *Jaffee v. Redmond* (1996) ___ U.S. ___, 116 S.Ct. 1923, 1928, 135 L.Ed.2d 337.