

ORANGE COUNTY PSYCHOLOGICAL ASSOCIATION (OCPA)

AND

CALIFORNIA ASSOCIATION OF PSYCHOLOGY PROVIDERS (CAPP)

By Stephen E. Berger, Ph.D., ABPP

I appreciate this opportunity to inform new members and remind others of the long history of joint projects between OCPA and CAPP. For two decades the two organizations have been working together for the benefit of psychologists. The two associations first came into contact in 1987, but let's backtrack in time.

Hospital Privileges, OCPA, CAPP

In 1978, the California Legislature enacted Health and Safety Code Section 1316.5 that established that Clinical Psychologists could be on the staff of a hospital. In 1980, the Legislature modified the Statute and stated explicitly that a hospital could not discriminate against the Clinical Psychologists on its staff. Unfortunately, the Department of Health Services (DHS) enacted Regulations in 1983 that negated the non-discriminatory language of the Statute by only permitting a medical physician to make a patient's diagnosis and treatment plan.

Consequently, in 1984 CAPP filed suit against DHS. CAPP won a decisive ruling at the Trial Court. Half a year later, organized medicine filed suit appealing CAPP's victory against DHS – DHS had not appealed, in fact, DHS had already complied with the Court Order. Subsequently, the Appellate Court ruled that the non-discriminatory provision of the Statute does not come into play until a medical physician determined that the mental patient did not have an organic mental disorder and/or that the disorder was not amenable to organic treatment.

Needless to say, CAPP appealed this ruling to the California Supreme Court (*CAPP v. Rank*). At that point in time, Dr. Stephen Berger was the Chair of OCPA's Hospital Practice Committee. He was also one of the 8 psychologist plaintiffs (along with the organization CAPP) in the law suit.¹ The odds of getting the California Supreme Court to accept a case for review are said to be 1 in 10. A call went out to request letters to the Court asking the Court to accept the case for review. On a Sunday afternoon, OCPA members Drs. Berger, Rofsky, Trevitt and Rosenberg met and drafted a letter to the Court on behalf of OCPA. OCPA had raised sufficient funds that we were able to obtain the legal counsel of Mr. Richard Sherman of the powerful law firm of Irell and Manella who put the final touches to the letter. The letter was considered to be so well written that CPA asked if it could be adapted to be their letter. We readily cooperated. We can identify 7 different points that we made in the letter that appear in the final favorable ruling by the California Supreme Court.

Once the Court accepted the case for review there were multiple strategy decisions on the road to the final legal briefs and oral argument at the Court. Because OCPA had been so successful in its fund raising efforts, Mr. Sherman remained available to consult with CAPP's attorney, Ms. Michele Licht, including a critical phone conference on a Sunday prior to an important conference call the next day that included APA and the Washington DC attorneys. As you know, we won. For more details on these events as well as how OCPA implemented *CAPP v. Rank* you are referred to: Berger, S.E. *CAPP v. RANK: MORE OF THE INSIDE STORY, The Independent Practitioner*, 1992, 12, 54-57. If you are not able to access the article, send Dr. Berger an e-mail, and he can e-mail you a copy: steveabpp@aol.com.

¹ The other individual plaintiffs were: Drs. Stuart Wilson, Larry Blum, Gary Bodner, Corey Fox, A. Steven Frankel, Lisa Pomeroy, Carlton Purviance. Dr..s Wilson and Blum, along with Dr. Berger were and still are Orange County Psychologists.

Protecting Patient Confidentiality

A couple of years ago, we were contacted on a Tuesday by the Orange County Public Defender's Office regarding Proposition 36. That Proposition provides for psychological treatment for people convicted of non-violent drug offenses rather than sending them to jail. A conflict developed between the Probation Department (represented by the Orange County District Attorney's Office) and the Orange County Health Care Agency (represented by the Public Defender's office). Needless to say, Probation wanted access to treatment notes of the treating psychotherapist. Within just a couple of days of our being contacted, OCPA joined with the California Association of Psychology Providers (CAPP) in lending our support to the Health Care Agency in order to protect the confidentiality of treatment notes. This Tuesday contact had been just 2 days before a regularly scheduled OCPA Board meeting! The Board acted quickly to appoint a three-person committee empowered to act for OCPA, in concert with CAPP, in communicating our joint position that the confidentiality of the treatment sessions of these individuals should be protected.

During these few days, we contacted the APA Practice Directorate and were supplied with legal documents that helped in the Public Defender's Office negotiations with the District Attorney's Office. We were also assisted by Dr. Frankel (mentioned above) who provided us with the United States Supreme Court ruling in *Jaffe v. Redmond* that affirmed that psychotherapy communications are privileged not only in State Court (see California Evidence Code) but are also protected in federal court by virtue of the Court's interpretation of the Federal Rules of Evidence in the *Jaffee* case. **Thus, by Friday of that same week**, OCPA along with CAPP, was able to provide documents and arguments that the Public Defender's Office was able to use with the DA's office. We are happy to report to you that the DA's Office agreed that the confidentiality of treatment notes would be protected. We believe that incursions into the confidentiality of psychotherapy must be resisted whenever they occur. If you want a copy of the California Evidence Code as it relates to the Confidentiality of Psychotherapist-Patient Communications, or if you want a copy of the *Jaffee v. Redmond* US Supreme Court ruling, contact Dr. Berger. He also does a power point presentation of the case.

Resisting NHIC

As many of you know, when you treat a patient with Medicare coverage, your bill does not go to Medicare, it goes to a fiscal intermediary. The Medicare fiscal intermediary for our geographic area changed a few years ago from TransAmerica to National Health Insurance Company (NHIC). This company had been conducting (post-payment) audits of psychologists' Medicare cases, invariably resulting in demands for **refunds** of many thousands of dollars from the psychologists. OCPA and CAPP became aware of one especially egregious case. In this case, the psychologist working for NHIC concluded that none of the 30 audited cases met "medical necessity" criteria. In this audit process, it was therefore extrapolated that based on the results of those 30 cases, that refunds were demanded for all 101 cases the psychologist had conducted during that time period. Thus the psychologist had to refund \$59,000 or else interest would have accrued immediately at 13 ¾%! The psychologist spent over \$20,000 on legal fees for a Fair Hearing. At the Hearing, the Hearing Officer (also paid by NHIC) determined that there was medical necessity in every case. However, psychologists working for NHIC invented a policy that a Diagnostic Interview (90801) could not be done on the same day as neuropsychological testing (96117 – a billing code that has since been changed). According to this new, made up policy, it would be ok to do general psychological testing (96110) on the same day as a 90801, but not neuropsychological testing (96117)! That invented policy allowed NHIC to keep 1/3 of the \$59,000 of the psychologist's money.

APA contributed \$10,000 toward legal fees. CAPP picked up the rest of the legal fees for an Administrative Law Hearing. OCPA made a small financial contribution to the legal fees also thus putting OCPA squarely behind the psychologist (the NHIC reviewer is from Orange County – no, she is not a dues paying member of OCPA – now there's a surprise). The Hearing was conducted in Oakland. The Administrative Law Judge ruled completely in favor of the psychologist. NHIC did not reject nor did it appeal the Judge's ruling. (You are aware, I assume, that an administrative body such as the BOP - and NHIC is considered to be an administrative agency - can reject a

ruling by an Administrative Law Judge and simply continue to agree with itself.) Dr. Berger of OCPA served as CAPP's expert witness at the Hearing. He testified on a Monday. The next day, NHIC sent a letter to Dr. Berger indicating that it was auditing two of his cases. Happy ending - he got paid for both.

Once More Into the Breech Rode the ...

As many of you are aware, and all of you should be aware, just a couple of summer's ago, the Appellate Court for the Los Angeles area made a truly bizarre ruling that significantly modified *Tarasoff* and the Duty to Warn and Protect. In a case known as *Ewing v. Goldstein*, the Trial Court ruled that Dr. Goldstein (an MFT) was immune from liability because the Duty to Warn and Protect arises when a patient communicates to a psychotherapist a credible threat of serious bodily injury to an identifiable or reasonably identifiable other or others and the threat in this case was communicated to Dr. Goldstein by the patient's father, not the adult patient. The Appellate Court ruled that this ruling was in error.

The Trial Court relied upon the wording in the Civil Code that makes psychotherapists immune from liability if they learn from a patient that the patient has made a credible threat of serious bodily injury to an identifiable or reasonably identifiable other or others, and the therapist notifies the police and makes reasonable effort to notify the potential victim(s). Since Dr. Goldstein had not learned of the threat from the adult patient (a police officer) but had learned of this from the patient's father, it would appear to most (if not all of us) that this did not invoke the Duty to Warn and Protect (*Tarasoff* warning). However, this Appellate Court ruled that the words of the Civil Code: "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims" actually mean: **where the patient or a patient's family member** ... Imagine stupid us not realizing that: "where the patient has communicated" actually means, and should be read as: patient or patient's family member.

Several entities including CAPP sent letters to the California Supreme Court urging the Court to review this case. To our knowledge, OCPA was the only County Psychological Association that wrote the Court such a letter. Unfortunately, the Court did not accept the case for review, so this is the law now throughout California. And if you are not troubled enough by this new duty (to assess the credibility of communications you receive from family members – whom you may have never met and may be talking with over the telephone, e-mail, fax, note left at your office) try this: In what Dr. Berger likes to refer to as the infamous Footnote #10 to the decision, the Appellate Court brazenly informs us that it is not going to tell us whether the Duty to Warn and Protect arises if we received such communications about the patient's mental state from non-family members. Dr. Berger has no doubt as to what the Court would conclude in that instance. Similar to Dr. Berger, the attorneys for the Los Angeles County Department of Mental Health (DMH) also noticed Footnote #10 and concluded that the Court would rule that such communications **do** invoke the Duty. However, few people discuss Footnote #10 when discussing this case. Dr. Berger and his attorney son, Michael, wrote an article on this for AAP (Association for the Advancement of Psychology – our national PAC: DUTY TO WARN EXPANDED BY CALIFORNIA COURT by Stephen E. Berger, Ph.D., and Michael A. Berger, J.D. *AAP Advance*. For copies of the article, the *Ewing* case, the Civil Code, the DMH Memo, OCPA's letter to the Court or CAPP's letter, contact Dr. Berger.

I hope these 4 vignettes give you good background information on the effective and valuable working relationship that OCPA and CAPP have maintained over the years. I hope you also see what unique organizations they both are, and how fortunate we are in Orange County to have OCPA as well as CAPP in our neighborhood. At the moment, OCPA members Drs. Laudati, Schwartz and Slosar serve on the CAPP Board with Dr. Berger.