#63.70 1/27/76

Memorandum 76-18

Subject: Study 63.70 - Evidence (Psychotherapist-Patient Privilege)

BACKGROUND

One of the Commission's nonpriority projects is a review of experience under the Evidence Code and a comparison of the provisions of the Federal Rules of Evidence to determine whether any changes in the Evidence Code are desirable. The Commission retained Professor Friedenthal as its consultant on this topic. A copy of his background study is attached.

This memorandum is concerned only with the psychotherapist-patient privilege. This is one area of the Evidence Code that is in need of consideration on a priority basis. We have received a number of communications concerning claimed deficiencies, and several law review articles have been published pointing out suggested revisions.

We will consider only that portion of Professor Friedenthal's study that concerns the psychotherapist-patient privilege at this time. However, it is important that you read the short forward to the study (pages 1-2) so you will understand the approach taken by the consultant. He took this approach at the suggestion of the Executive Secretary, who wanted to avoid having a background study consisting of hundreds of pages. It is recognized that futher research by the staff may be necessary on particular matters should the Commission determine that some change in existing law may be desirable.

This memorandum will not duplicate the discussion in Professor Friedenthal's study. We will, however, point up the various problems

that exist or may exist with respect to the existing statute. In one case, the staff takes a different view than Professor Friedenthal. In each case, we will refer to the pertinent portion of the study. The text of each section of the California Evidence Code is set out in the text of the memorandum. The text of the comparable provision of the federal rules and the advisory committee comment is set out as Exhibit VI attached.

THE CASE FOR THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The case for the psychotherapist-patient privilege has been made, and made well, by numerous legal scholars. It is enough here to briefly reiterate the thinking which led to the enactment of the privilege in California.

The standard test for the legitimacy of a privilege is the one devised by Professor Wigmore. The test has four parts, as follows:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The California Law Revision Commission concluded that each of these requirements is met in the case of the psychotherapist-patient relationship. In sum, the conclusion was this--treatment of the mentally ill is too important, and the assurance of confidentiality too central

to it, to risk jeopardizing the whole because of the relevance of some patients' statements to some legal proceedings.

A further argument in favor of confidentiality, and not noted by the Law Revision Commission, is the fact that the revelations of a patient to his therapist are for the most part not of such a nature as to be useful as evidence.

> Although absolutely necessary in treatment, data from free-association, or fantasies, or memories, are not reliable for use in court as they mostly represent the way the person experience an event, and not how the event occured. They are not "facts". Psychic reality is not the same as actual reality . . . As the material revealed in psychotherapy does not deal with reality of the outer world, it would make poor, yet prejudicial evidence. [Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175, 194 (1960).]

This argues that the benefit to be gained for the correct disposal of litigation, under Wigmore's fourth test, may indeed be slight, thus strengthening the argument to preserve the confidentiality of the communications.

The ultimate recommendation of the Law Revision Commission called for a privilege which would cover a psychotherapist who is a psychiatrist or clinical psychologist. With this brief history now in focus, we can proceed to examine each section of the California Statute.

ANALYSIS OF PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE

Section 1010. Definition of "Psychotherapist"

The staff recommends that Section 1010 be amended to read as follows:

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry ~~;~~ .

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code ~~;~~ .

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professions Code, when ~~he~~ such person is engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.

(e) A person licensed as a marriage, family and child counselor under Chapter 4 (commencing with Section 17800) of Part 3, Division 5 of the Business and Professions Code.

(f) A person licensed as a licensed educational psychologist under Chapter 4 (commencing with Section 17800) of Part 3, Division 5 of the Business and Professions Code.

(g) A person who is serving as a psychiatric social worker in a mental health services facility of the State of California, or a person who is serving as a psychiatric social worker with substantially the same qualifications and duties as a state psychiatric social worker in a mental health services facility provided by the county or qualifying for reimbursement under the California medical assistance program under Section 14021 of the Welfare and Institutions Code, or under Title XVIII of the Federal Social Security Act and regulations thereunder, when such person is engaged in applied psychotherapy of a nonmedical nature.

Comment on suggested amendments. Subdivision (f) is added to include within the definition of psychotherapist a licensed educational psychologist. Enacted in 1970, Article 5 (commencing with Section 17860) of Chapter 4 of Part 3, Division 5 of the Business and Professions Code provides for the licensing of licensed educational psychologists who may engage in private practice and provide substantially the same services as school psychologists which already are included within the definition of psychotherapist under subdivision (d). See Bus. & Prof. Code § 17861. In fact, the qualifications for a licensed educational psychologist are more stringent than a school psychologist, the licensed educational psychologist being required to have three years of

full-time experience as a credentialed school psychologist in the public schools or experience which the examining board deems equivalent. See Bus. & Prof. Code § 17862. [For the text of Bus. & Prof. Code §§ 17861 and 17862, see Exhibit I attached.]

Subdivision (g) is added to include a psychiatric social worker engaged in applied psychotherapy of a nonmedical nature within the definition of psychotherapist. By excluding psychiatric social workers, the existing privilege statute often works to protect the rich and deny the poor, who must rely on psychiatric social workers, not psychiatrists, for their psychotherapeutic aid. The subdivision is narrowly drawn to include only those psychiatric social workers who have substantially the same qualifications and duties as a state psychiatric social worker. [See Exhibit II for the specifications for Psychiatric Social Worker for the State of California.] The definition is further limited to those psychiatric social workers who work in state or county mental health services facilities or in mental health services facilities qualifying for reimbursement under the California medical assistance program or under Title XVIII of the Federal Social Security Act. For a justification of extending the privilege to include confidential communications to psychiatric social workers, see Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Cal. L. Rev. 1050 (1973)[copy of this article attached]. For a case holding that the psychotherapist-patient privilege does not now apply to psychiatric social workers, see Belmont v. State Personnel Bd., 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974). [Copy attached as Exhibit III.] Insofar as this case reveals the problem of the relationship of the privilege to the duty of the public employee to

comply with regulations of the employing public entity to disclose information to the employee's superiors, the same problem arose in connection with the school psychologist under the psychotherapist-patient privilege and has, as far as I can determine, been satisfactorily worked out.

Out-of-state psychotherapist. Additional policy issues are raised by Section 1010. The first noteworthy point is the matter of the out-of-state psychotherapist. Under subdivision (a), a psychiatrist licensed, or reasonably believed to be licensed, in any state or nation, qualifies as a "psychotherapist. By way of contrast, the persons described in the remaining subdivisions--psychologists, clinical social workers, school psychologists, marriage counselors, and the like, licensed in other jurisdictions would not qualify as psychotherapists. Several reasons might be advanced for the distinction. California is unwilling to rely on the quality of the licensing procedures of her sister states; it is felt that it is not necessary for California to foster the psychotherapeutic relationship in other states; the extension to professionals licensed in other states would make the statute difficult to draft and administer. The validity of the first two reasons is doubtful in light of Section 2912 of the Business and Professions Code which provides:

> 2912. Nothing in this chapter shall be construed to restrict or prevent a person who is licensed or certified as a psychologist in another state or territory of the United States or in a foreign country or province from offering psychological services in this state for a period not to exceed 30 days in any calendar year.

The proposed Federal Rules of Evidence include within the privilege medical doctors and psychologists. The definition of psychotherapist included "a person licensed or certified as a psychologist under the

laws of any state or nation." Notwithstanding this provision of the proposed federal rules, the staff recommends against any similar revision of subdivisions (b) and following of Section 1010. It is difficult enough to define the persons to be embraced under those subdivisions when only persons practicing in California are taken into consideration.

Medical practitioners generally. A second, and major issue, is the definition of the psychotherapist in Section 1010(a) as one licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry. This definition excludes the general practitioner who does not devote a substantial portion of his time to psychiatric practice.

The proposed federal rule differs. The federal counterpart to Section 1010(a) reads "a person authorized to practice medicine in any state or nation . . . , while engaged in the diagnosis or treatment of a mental or emotional condition . . . ." The comments to the proposed federal rule state:

> The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions . . . in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry.

The Law Revision Commission has addressed and rejected the idea of incorporating the general practitioner while engaged in psychotherapy under the provisions of the statute. The Commission noted that the general practitioner ordinarily has not had special training in psychotherapy, and is presumably not as competent in this area as the psychotherapeutic specialist. The Commission went on to point out that the general practitioner will ordinarily deal with less serious cases. The Commission also noted the lack of any evidence that the general practitioner had been hindered in any way because communications between him

and his patients were not protected by a psychotherapist-patient privilege. Finally, from the standpoint of judicial administration, it would be difficult to determine just when a physician is acting as a psychotherapist and when he is not.

Though the comments to the federal rule suggests otherwise, it is likely that the federal rule would in fact have severe difficulties in its administration. It is certainly an easier question to determine whether a doctor devotes a substantial amount of time to psychotherapy than it is to decide in a particular case whether or not a doctor was engaged in psychotherapy. In the latter case, the word of the doctor would often be all that would be available to decide the question.

Take this example of how the rule might operate. If the family doctor inquires, "How did you sprain your ankle?" and the response is, "While walking my mistress home from a date.", the response is not privileged. If the family doctor asks, "Why are you depressed?" and the patient says, "Because I just murdered my mistress.", the patient's statement is privileged. See Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 Geo. L.J. 61, 70 (1973).

The administrative problem then, presents one strong reason for not extending the privilege to the general practitioner when engaged in psychotherapy. In addition, the pull to extend the privilege is not in fact so strong. The general practitioner will only occasionally find himself taking on the role of psychotherapist, and it could well be argued it is a role he best leave to those with specialized training. A look at Wigmore's four tests, and some thinking about public policy lead to the conclusion that the decision to exclude the physician remains the better practical solution.

Professor Friedenthal reaches the opposite conclusion. He would alter the California section in line with the federal rule. See Study at pages 28-29 (item 1).

Section 1011. Definition of "Patient"

> 1011. 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.

Scientific research provision. Section 1011 defines "patient" to include a person who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

The drafters of the proposed federal rule chose not to include a person submitting to examination for scientific purposes. However, 42 U.S.C. 242(a)(2), as amended by the Drug Abuse and Control Act of 1970, P.L. 91-513, authorizes the Secretary of Health, Education and Welfare to withhold the identity of persons who are the subjects of research on the use and effect of drugs.

The decision to include those who submit to examination for scientific purposes seems a wise one. It promotes a desired goal--volunteers for research--from which the community clearly benefits. Further, there is no reason to believe that communications divulged under test circumstances would be any less embarrassing to the individuals involved. Finally, this logically seems a case where the deterrent argument is strong. The benefits derived by those volunteering for research are small, and the threat of having confidential communications exposed might well be sufficient to keep many away who might otherwise volunteer.

Drug addiction. The drafters of the proposed federal rule revised the phrase "his mental or emotional condition" to read: "a mental or emotional condition, including drug addiction," stating:

> The clarification of mental or emotional condition as including drug addiction is consistent with current approaches to drug abuse problems. See, e.g., the definition of "drug dependent person" in 42 U.S.C. 201(q), added by the Drug Abuse Prevention and Control Act of 1970, P.L. 91-513.

Is such an addition desirable? If so, since the phrase "mental or emotional condition" is used in other sections, the staff suggests that an additional sentence be added to Section 1011 to read: "For the purposes of this article, mental or emotional condition, includes drug addiction."

Section 1012. Definition of "Confidential Communication"

The staff recommends that Section 1012 be amended to read as follows:

> 1012. 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, including other patients present at joint therapy, 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.

> *Comment.* Section 1012 is amended to add "including other patients present at joint therapy" in order to preclude the possibility that the section would be construed not to embrace marriage counseling, family counseling, and other forms of group therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

A bill to make this clarifying addition was passed in 1969 but was vetoed by the Governor. (The bill contained other controversial provisions to be mentioned later.) The bill was recommended by the Commission. The Commission justified the revision in its recommendation as follows:

> Although "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.
>
> In the light of the frequent use of group therapy for the treatment of emotional and mental problems, it is important that this form of treatment be covered by the psychotherapist-patient privilege. The policy considerations underlying the privilege dictate that it encompass communications made in the course of group therapy. Psychotherapy, including group therapy, requires the candid revelation of matters that not only are intimate and embarrassing, but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group therapy treatment because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.
>
> The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-patient privilege protects against disclosure of communications made during group therapy. It should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, communications made in the course of group therapy would be within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted."

The proposed federal rule contains language that may have been intended to deal with joint therapy although it is not clear that that is the reason the language was included in the federal rule. If the federal language were to be used, either in addition to or as an alternative to the language suggested by the staff above, the relevant portion of Section 1012 would be revised to read:

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 [, including other patients present at joint therapy], or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist was consulted, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Section 1013. "Holder of the privilege" defined

1013. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

We have no matters to raise in connection with this section.

Section 1014. Psychotherapist-patient privilege

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; or

(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 is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6C of Division 2 of the Business and Professions Code or a licensed clinical social worker corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division [illegible] of the Business and Professions Code, and the patient to whom it renders professional services, as well as between such patients and psychotherapists employed by such corporations to render services to such patients. The word "person" as used in this subdivision includes partnerships, corporations, associations * * * and other groups and entities.

We have no matters to raise in connection with this section.

Section 1015. When psychotherapist required to claim privilege

> 1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

We have no matters to raise in connection with this section.

For a discussion of comparable rule provision, see Study on page 30, item 3.

Section 1016. Exception: Patient-litigant exception

> 1016. 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.

Over a period of years, the Commission has received a number of communications that contended that a defendant in a personal injury case sometimes used the patient-litigant exception to the psychotherapist-patient privilege to go after embarrassing information that had no relevance to the personal injury action in an attempt to discourage the plaintiff from going forward with his action. The Commission never seriously considered these suggestions but planned to consider them when it reviewed the experience under the Evidence Code at the time the comparable provisions of the Federal Rules of Evidence were considered. The staff believes that no revision of Section 1016 is needed. A 1970 case, In re Lifshutz, 2 Cal.3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), has considered the issue of the proper balance between protection of the confidential communications and the necessity for disclosure to get at

the truth in litigated cases and provides the needed guidelines. The case is outlined in an extract (set out as Exhibit IV) from a paper by Robert Plattner prepared as directed research for Professor Friedenthal. A related point, also discussed in the extract set out as Exhibit IV, is whether the existence of the psychotherapeutic relationship itself should be privileged. The privilege presently protects only the confidential communications, not the existence of the relationship. However, as Mr. Plattner points out in his paper, In re Lifshutz may provide protection, for example, against an effort to discover this information where it is not relevant to an issue in the personal injury action. The staff recommends no revision in the statute to provide protection beyond confidential communications.

Other Exceptions

Other exceptions are provided by Sections 1017-1027. We have no problems with these exceptions. It should be noted, however, that they are broader exceptions than are found in the comparable federal rule. The text of Sections 1017-1027 is set out below. For a discussion of these exceptions and the narrower federal exceptions, see Study on pages 30-32, items 4, 5.

§ 1017. **Exception: Court-appointed psychotherapist.** There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his mental or emotional condition. [1965 ch 299 § 2, 1967 ch 650 § 6.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 795.*

§ 1018. **Exception: Crime or tort.** There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 797.*

§ 1019. **Exception: Parties claiming through deceased patient.** There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 797.*

§ 1020. **Exception: Breach of duty arising out of psychotherapist-patient relationship.** There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice §§ 41:56, 264:78; Witkin Evidence p 797.*

§ 1021. **Exception: Intention of deceased patient concerning writing affecting property interest.** There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 797.*

§ 1022. **Exception: Validity of writing affecting property interest.** There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 797.*

§ 1023. **Exception: Proceeding to determine sanity of criminal defendant.** There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Witkin Evidence pp 797, 798.*

§ 1024. **Exception: Patient dangerous to himself or others.** There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 798.*

§ 1025. **Exception: Proceeding to establish competence.** There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 796.*

§ 1026. **Exception: Required report.** There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection. [1965 ch 299 § 2.] *Cal Jur 2d Witn § 67; Cal Practice § 41:56; Witkin Evidence p 797.*

§ 1027. **Exception: Patient under 16 is victim of crime.** There is no privilege under this article if all of the following circumstances exist:

(a) The patient is a child under the age of 16.

(b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child. [1970 ch 1396 § 3, ch 1397 § 3.] *Cal Jur 2d Witn § 67.*

Section 1028. Privilege in criminal proceeding

1028. Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding.

The staff recommends that Section 1028 be repealed. Under this section, communications made to psychiatrists and clinical psychologists are privileged in criminal proceedings, while those made to clinical social workers, school psychologists, and marriage counselors are not. A number of years ago, the Commission proposed to extend the scope of the

privilege to confidential communications to the latter three groups, and the bill passed the Legislature. It was vetoed by the Governor. It was strongly opposed by law enforcement officers who objected to the privilege applying in criminal proceedings, but the Commission refused to amend the bill to limit the privilege to civil proceedings. The Commission believed that it was more important to encourage potential patients to seek treatment for mental and emotional disorders and was convinced that fear of disclosure of communications in criminal proceedings would discourage them from doing so. On balance, the Commission believed that the benefits to society of having treatment far outweighed the benefits to society of having the conviction of patients more certain by making their communications to their psychotherapists admissible in criminal proceedings. This is especially important in drug addiction cases but it is important in other cases as well. Society is adequately protected by two other exceptions to the privilege: Section 1027 (no privilege where child under 16 is victim of a crime and disclosure in best interests of child) and Section 1024 (patient dangerous to himself or others). In addition, the psychotherapist is personally liable for failure to exercise due care to disclose the communication where disclosure is essential to avert danger to others. Tarasoff v. Regents of University of California, 13 Cal.3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974). For further discussion, see Study on page 29 (last paragraph on page).

More important, the effect of the section is to deny the privilege to the poor and lower-middle class and allow it with respect to precisely the same kind of information to the upper-middle class and the rich. It is also claimed the section discriminates against psychotherapists on a sexual basis since it is claimed that the great majority of

clinical social workers are women. Both these points are well developed in the letter from Professor Kaplan of Stanford Law School, which is attached as Exhibit V.

The staff considers the repeal of Section 1028 a matter of great practical importance and strongly recommends the repeal of this section.

Waiver

The Commission has received communications indicating a growing concern that disclosures made to obtain coverage on medical insurance or for Medi-Cal program coverage may amount to a waiver of the physician-patient and psychotherapist-patient privilege. The same problem is presented by waivers or disclosures made pursuant to applications for life insurance. The staff proposes to discuss these problems in connection with its discussion (in a subsequent Memorandum) of Evidence Code Section 912. We merely note the matter now so you will not assume we have overlooked it.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 76-18 EXHIBIT I

LICENSED EDUCATIONAL PSYCHOLOGISTS

§ 17861. Professional functions authorized

A licensed educational psychologist shall be authorized to perform any of the following professional functions pertaining to academic learning processes or the educational system or both:

(a) Educational evaluation, diagnosis, and test interpretation limited to assessment of academic ability, learning patterns, achievement, motivation, and personality factors directly related to academic learning problems.

(b) Counseling services for children or adults for amelioration of academic learning problems.

(c) Educational consultation, research, and direct educational services.
(Added by Stats.1970, c. 1305, p. 2420, § 5.)

§ 17862. Qualifications for license

A person who desires a license under this article shall meet all of the following qualifications:

(a) He shall possess at least a master's degree in psychology, educational psychology, school psychology, or counseling and guidance, or a degree deemed equivalent by the board under regulations duly adopted under this article. Such degree or training shall be obtained from educational institutions approved by the board according to the regulations duly adopted under this article.

(b) He shall be at least * * * 18 years of age.

(c) He shall be of good moral character.

(d) * * * He shall have successfully completed 60 semester hours of postgraduate work devoted to pupil personnel services or have experience deemed equivalent by the board in regulations duly adopted under this chapter.

* * * (e) He shall furnish proof of three years of full-time experience as a credentialed school psychologist in the public schools or experience which the board deems equivalent. If the applicant provides proof of having completed one year's internship working full time as a school psychologist intern in the public schools in an accredited internship program, one year's experience shall be credited toward this requirement.

* * * (f) He shall furnish written statements from two sponsors having personal knowledge of his professional competence. These statements shall include a description of the applicant's functioning and evaluation of his professional competencies, and statements relating to the moral character of the applicant. The sponsor of this applicant shall be qualified to be a licensed educational psychologist under this article.

* * * (g) He shall be examined by the board with respect to the professional functions authorized by this article.

* * * (h) He shall have at least one year of supervised professional experience in an accredited school psychology program, or under the direction of a licensed psychologist, or such suitable alternative experience as determined by the board in regulations duly adopted under this chapter.

Memo 76-18 EXHIBIT II

CALIFORNIA STATE PERSONNEL BOARD

specification

SCHEMATIC CODE: XP30
CLASS CODE: 9870
ESTABLISHED: 1931
REVISED: 7/25/73
TITLE CHANGED: 11/4/65

PSYCHIATRIC SOCIAL WORKER

Definition:

Under general direction, in a clinic, institution, or an assigned district, to do responsible psychiatric social work with and on behalf of mentally and emotionally disturbed or developmentally disabled persons and their relatives; and to do other work as required.

Typical Tasks:

Provides assistance to patients and relatives in locating and taking advantage of available treatment, casework, and community services; interprets the social aspects of mental disturbances to relatives, interested persons, and community agencies; prepares socio-psychiatric case history information for use in diagnosis and participates in diagnostic formulations; acquaints medical, nursing, and other staff with the social service role in patient treatment and works as a team member with other treatment disciplines; provides casework and group work treatment for patients; assists program staff in evaluating patients' readiness for release; determines the home and community circumstances preliminary to patients' release from hospital care; locates, evaluates, and makes recommendations regarding family-care (foster) homes; locates and approves employment opportunities for patients; counsels patients, relatives, family caretakers, employers, and others on matters related to the patients' welfare; determines patients' need for further hospital care and initiates steps to return patients for such care; evaluates patients' community behavior to insure community protection; may manage a small field office; may serve in the absence of a higher level supervisor; assists with, or conducts, community social work programs such as recreation programs; provides emergency protective social services at night and on weekends and holidays as required; participates in research projects; participates in education and consulting services for furthering mental health; prepares verbal, written, and statistical reports; participates in meetings, committees, and conferences.

Minimum Qualifications:

Education: Completion of a master's degree program from an accredited school of social work, approved by the Council on Social Work Education. (Candidates who are enrolled in the final academic year of graduate work will be admitted to the examination, but they will not be appointed until they have completed the required education.)

and

Knowledges and abilities:

Knowledge of: principles, procedures, techniques, trends, and literature of social work with particular reference to psychiatric social work; social aspects of mental and emotional disturbances and mental deficiency; principles of mental health education; community organization principles; scope and activities of public and private health and welfare agencies; characteristics of mental and emotional disturbances and mental deficiency; current trends in mental hygiene, public health and public welfare, and Federal and State programs in these fields.

Ability to: utilize and apply effectively the required technical knowledges; establish and maintain the confidence and cooperation of persons contacted in the work; secure accurate social data and record such data systematically; write clear, accurate, and concise reports and interpret statistical data; find homes for and place and supervise family-care patients; locate jobs for and plan and supervise patients in protected employment; analyze situations accurately and take effective action; speak and write effectively.

and

Special personal characteristics: An objective and sympathetic understanding of the mentally and emotionally disturbed or developmentally disabled; willingness to work at night, and at irregular hours; tolerance; tact; and emotional stability.

Monthly Compensation: Range A $959 1007 1058 1111 1166

Range R One step above all rates in the base salary range(s) for the class except the maximum step where it may be one or two steps above the maximum rate.

Work Week Group: 4A

Note: Salary information for this class was correct on 7/27/73, but does not include any changes reflected in the July 1, 1973, Salary Adjustment Program.

[Civ. No. 31718. First Dist., Div. One. Jan. 3, 1974.]

JOSEPHINE BELMONT et al., Plaintiffs and Appellants, v. STATE PERSONNEL BOARD, Defendant and Respondent; DEPARTMENT OF SOCIAL WELFARE et al., Real Parties in Interest and Respondents.

SUMMARY

Two psychiatric social workers employed by the State Department of Social Welfare were suspended from their employment and salary for five days for their willful disobedience of a department order calling on them to furnish written information concerning welfare recipients whose cases were handled by them for the purpose of preparing the information for electronic data processing in accordance with the Intergovernmental Welfare Management and Information Systems Act (Welf. & Inst. Code, §§ 11025-11035). Successive reviews by the State Personnel Board, and the superior court on a petition for writ of mandate upheld the order of suspension. (Superior Court of the City and County of San Francisco, No. 638635, Clayton Horn, Judge.)

The Court of Appeal affirmed, rejecting the employees' contention that the order was unlawful in that it invaded the welfare recipients' right of privacy, and that the employees were therefore justified in disobeying the order. The court stated that, assuming a conflict between the employees' allegiance to a social workers' code of ethics and their duties and as employees of the state, they are legally bound to fulfill the duties of their employment or suffer disciplinary action. (Opinion by Elkington, J., with Molinari, P. J., and Sims, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) **Witnesses § 59 — Privileged Relationships and Communications — Psychotherapist and Patient.**—Psychiatric social workers employed by the State Department of Social Welfare are not covered by the psychotherapist-patient privileges against nondisclosure of confidential communications created by Evid. Code, § 1014.

(2) **Public Officers § 50—Duties.**—Psychiatric social workers employed by the State Department of Social Welfare are, assuming a conflict between their allegiance to a "social workers' code of ethics" and their duties as employees of the state, legally bound to fulfill the duties of their employment or suffer disciplinary action.

(3a, 3b) **Civil Service § 10—Discharge, Demotion, Suspension and Dismissal—Grounds—Disobedience of Lawful Order.**—An order of the State Department of Social Welfare calling on the psychiatric social workers employed by it to furnish written information concerning each of the welfare recipients whose cases they handled, for the purpose of preparing the information for electronic data processing in conformance with the Intergovernmental Welfare Management and Information Systems Act (Welf. & Inst. Code, §§ 11025-11035), is a lawful order and does not constitute an invasion of the welfare recipients' right of privacy, and the willful disobedience of the order by two psychiatric social workers was grounds for suspension.

(4) **Civil Service § 10—Discharge, Demotion, Suspension and Dismissal—Grounds.**—An order of the State Department of Social Welfare calling on psychiatric social workers employed by it to furnish written information concerning welfare recipients for the purpose of preparing the information for electronic data processing is a lawful order, and it was no defense to the suspension of two psychiatric social workers who disobeyed such order that the welfare recipients were not asked for permission to use the pertinent information, or told that they need not supply it, or advised that it would be fed into the computer system. There could be no reasonable objection to use of the information by the department and related county and federal welfare agencies with, or without, the consent or knowledge of the welfare recipients.

(5) **Civil Service § 10—Discharge, Demotion, Suspension and Dismissal —Grounds.**—An order of the State Department of Social Welfare calling on psychiatric social workers employed by it to furnish written information concerning welfare recipients for the purpose of electronic data processing is a lawful order, and two social workers who disobeyed the order could not justify their disobedience on the ground that computer storage of the data, or some of it, was unnecessary, and to that extent encroached on the welfare recipient's right of privacy. The department was not legally or constitutionally restricted to the use of such information as is necessary to its functioning; some relevancy to the agency's administrative functions would reasonably be sufficient.

(6) **Civil Service § 10—Discharge, Demotion, Suspension and Dismissal —Grounds.**—Two psychiatric social workers could not defend their refusal to obey an order of the State Department of Social Welfare requiring them to furnish written information concerning welfare recipients for electronic data processing on the ground that inadequate steps were taken to insure privacy of the data to the detriment of the welfare recipients, inasmuch as that complaint concerned administrative decisions, the responsibility for which is placed by statute in the director of the department.

(7) **Civil Service § 10—Discharge, Demotion, Suspension and Dismissal —Grounds.**—Two psychiatric social workers suspended for refusal to obey an order of the State Department of Social Welfare requiring them to furnish written information concerning welfare recipients for electronic data processing, could not defend their refusal on the grounds that they had no control over the subsequent dissemination or distribution of the information and could not therefore protect welfare recipients' right of privacy, since such control over the department's records was not any part of their duties and the department was free to place that responsibility elsewhere.

COUNSEL

Charles C. Marson and Peter E. Sheehan for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General, and Charlton G. Holland, Deputy Attorney General, for Real Parties in Interest and Respondents and for Defendant and Respondent.

OPINION

ELKINGTON, J.—Appellants Josephine Belmont and Glenda Pawsey were civil service "psychiatric social workers" employed by the state's Department of Social Welfare (hereafter the "Department"). They worked with mentally and emotionally disturbed persons who in one form or another were receiving aid or assistance under division 9 (§§ 10000-18909, inclusive, entitled "Public Social Services") of the Welfare and Institutions Code.

Prior to 1969 the Department's information and records concerning these welfare recipients were kept in a somewhat random fashion; some appear to have been recorded at various places in the Department's books and records, while some seem to have existed only in the minds and memories or personal memoranda of the psychiatric social workers employed by the Department.

In 1969 the Legislature adopted the "Intergovernmental Welfare Management and Information Systems Act." It was codified as sections 11025-11035, inclusive, of the Welfare and Institutions Code. Its purpose was the development of a welfare management information system to be integrated with county and state welfare agencies and with the federal Department of Health, Education, and Welfare. (§ 11028.) The act called upon the Department "to simplify and reduce the cost of welfare administration by developing efficient, highly automated processes for determining eligibility and making aid payments. . . ." (§ 11026.) These automated processes were required to make "maximum use of *electronic data processing*" thereby, among other things, to "Eliminate unnecessary functions and forms and consolidate redundant information," "Permit the most efficient collection, storage and retrieval of information," and "Eliminate all possible causes of error made in the eligibility determination and aid payment process." (Italics added; § 11027.)

Some months before the effective date of the act, and apparently to speedily and efficiently give effect to its provisions, the Department called upon its psychiatric social workers to furnish written information concerning each of the welfare recipients of their respective case loads. This information, as indicated, was already in the possession of the Department. The purpose was to prepare the information for *electronic data processing*.

Alone among the Department's psychiatric social workers, appellants Belmont and Pawsey refused to obey the Department's order. They were thereafter suspended from their employment and salary for five days for "willful disobedience" under the authority of Government Code section

19572, subdivision (o). Successive reviews by the State Personnel Board (hereafter the "Board"), and the superior court on a petition for writ of mandate, upheld the Department's order of suspension.

The instant appeal is taken from the superior court's judgment denying relief.

It seems proper at this point to dispose of some preliminary considerations and to place the issues in a proper perspective.

Appellants insist that a special professional relationship exists between themselves and their "clients" entitling them to assume an adversary position toward their employer, the State of California, defending "the rights of their clients." They speak of a social worker's "code of ethics" designed to "protect those clients who come into professional contact with the social worker," to which they owe a higher duty of obedience than to their employer. And they argue that the Department's order tends to "seriously undercut the relationship between the patient and the psychiatric social worker," a relationship which they strongly suggest is covered by the psychotherapist-patient privilege against nondisclosure, created by Evidence Code section 1014.

There can, of course, be no reasonable objection to appellants' election to describe the persons with whom they work as their "clients." But, nevertheless, the term neither connotes nor confirms the special legal relationship suggested by appellants. More appropriately, the handicapped persons are "clients" of the state and its Department of Social Welfare acting through its employees, psychiatric and other social workers. A commonly accepted definition of the term is "a person served by or utilizing the services of a social agency or a public institution." (Webster's New Internat. Dict. (3d ed.).)

(1) Reference to Evidence Code sections 1010-1014 readily discloses that appellants are in no way endowed with the "privilege to refuse to disclose, and to prevent another [party] from disclosing, a confidential communication between patient and psychotherapist."

(2) And as we shall now point out assuming, arguendo, a conflict between appellants' allegiance to a code of ethics and their duties as employees of the state, they are legally bound to fulfill the duties of their employment, or suffer disciplinary action.

A frequently repeated truism of our law is that "activities [of public] employees may not be allowed to disrupt or impair the public service. . . ." (*Board of Education* v. *Swan*, 41 Cal.2d 546, 556 [261 P.2d 261]

[cert. den. 347 U.S. 937 (98 L.Ed. 1087, 74 S.Ct. 627)], overruled on unrelated point, *Bekiaris* v. *Board of Education*, 6 Cal.3d 575, 587, fn. 7 [100 Cal.Rptr. 16, 493 P.2d 480]; *Morrison* v. *State Board of Education*, 1 Cal.3d 214, 222 [82 Cal.Rptr. 175, 461 P.2d 375]; *Blake* v. *State Personnel Board*, 25 Cal.App.3d 541, 552 [102 Cal.Rptr. 50].) It is therefore essential to the public service that its employees obey all *lawful orders* given them in the course of their employment. (See Gov. Code, § 19572, subd. (o); *Board of Education* v. *Swan*, *supra*, p. 556; *Hingsbergen* v. *State Personnel Bd.*, 240 Cal.App.2d 914, 920-922 [50 Cal.Rptr. 59].) Of course, a public employee may not himself, in "good faith" and without penalty, determine whether such a lawful order shall be obeyed, for nothing would seem better calculated to "disrupt and impair the public service." And when " 'an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that . . . his conduct [is] subject to the law . . . .' " (*Gilmore* v. *Personnel Board*, 161 Cal.App.2d 439, 449 [326 P.2d 874].)

So without further consideration of any assumed special "client" relationship, or statutory privilege, or higher duty of allegiance to a "code of ethics," we enter upon our inquiry. The basic question before us, as it was before the Department, the Board, and then the superior court, is simply whether the Department's order to its psychiatric social workers was a *lawful order*.

In 1965 the Legislature created the "Department of Social Welfare" to be managed by a "Director" who was given broad power, among other things, to formulate and adopt policies, regulations, orders and standards implementing the "public social service" statutes of California. (See Welf. & Inst. Code, §§ 10550-10554.) The order here under dispute was promulgated by the Director pursuant to that authority.

Appellants appear to concede that the subject information of this case was properly in the possession of the Department, and could properly be used by "authorized persons" including such persons in the related county and federal welfare agencies.

Instead, they state: "[T]he issue is whether the collection and storage of data by government in a *computerized data bank is [on the facts of this case]*, an invasion of the privacy of the persons whom the data concerns." (Italics added.) They argue that the Department's order requiring them to participate in such an invasion of privacy contrary to the Fourth Amendment, is unlawful and therefore need not be obeyed.

Principal reliance is placed by appellants on the case of *Parrish* v. *Civil*

Service Commission, 66 Cal.2d 260 [57 Cal.Rptr. 623, 425 P.2d 223]. But there a social worker was held to have been wrongfully penalized for refusing to participate in an *unlawful activity*, an early morning "bed check" of the homes of welfare recipients, in clear violation of the Fourth Amendment. *Parrish* v. *Civil Service Commission* is authority for the proposition that a state employee may properly refuse to obey an *unlawful order*, a point which is here wholly undisputed.

(3a) We proceed with our analysis whether the Department's order, here at issue, was a lawful order required to be obeyed by its employees.

The "facts" of this case upon which appellants rely in their defense of "constitutional unlawfulness" of the Department's order are, for the purpose of this appeal, disclosed by their "offer of proof" which was rejected by the Board. The Board ruled, as did the superior court, that considered as true the offer of proof stated no defense to the Department's charge of willful disobedience.

The somewhat extensive offer of proof may reasonably be broken down into four divisions.

(4) It is first asserted that the subject welfare recipients were not asked for permission to use the pertinent information, or told that they need not supply it, or advised that it would be fed into the computer system. It is conceded that no "directly applicable" authority is to be found supporting appellants' claim that obtaining, storing, and using the information under these circumstances is unlawful. The persons with whom appellants work are, as indicated, receiving welfare aid from the state. The data was obviously sought by the Department from its psychiatric social workers pursuant to its duty to administer such aid efficiently and effectively. There could be no reasonable objection to its use by the Department and related county and federal welfare agencies with, or without, the consent or knowledge of the welfare recipients. This proffered evidence would establish neither unlawfulness nor constitutional impropriety in the Department's order.

(5) Appellants also offered to prove that computer storage of the data, or some of it, by the Department was "unnecessary." Such a determination is best left to the agency charged by law with making it. But in any event, we observe no reason why the Department is legally or constitutionally restricted to the use of such information as is *necessary* to its functioning; some *relevancy* to the agency's administrative functions would reasonably be sufficient.

(6) The third area of appellants' offer of proof may be summarized

as follows: (1) inadequate steps are taken to ensure privacy of the data; (2) persons with access to the data are not known with "certainty"; (3) some "authorized" persons have "little or no use for such sensitive information," while (4) others "have access to more information than necessary"; (5) more security could be had "with the expenditure of relatively little time, money, and effort"; and (6) "The Department either did not consider or rejected several very practical and relatively inexpensive methods of improving the security" of the data processing system.

Many of these complaints concern administrative decisions, the responsibility for which is placed by statute in the Director of the Department. To the extent that they relate to the right of privacy of the welfare recipients, that right was and is the concern of Welfare and Institutions Code section 10850.

Section 10850, as in effect at the time with which we are concerned, provided in part as follows: "[A]ll applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of such public social service; . . .

"[N]o person shall publish or disclose or permit or cause to be published or disclosed any list of persons receiving public social services. Except for purposes directly connected with the administration of public social services, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient. Any violation of this paragraph is a misdemeanor.

"The department may make rules and regulations governing the custody, use and preservation of all records, papers, files and communications pertaining to the administration of the laws relating to public social services. The rules and regulations shall be binding on all departments, officials and employees of the state, or of any political subdivision of the state and may provide for giving information to or exchanging information with agencies, public or private, which are engaged in planning, providing or securing social services for or in behalf of recipients or applicants, and for making case records available for research purposes, provided, that such research will not result in the disclosure of the identity of applicants for or recipients of public social services.

"Any person, including every public officer and employee, who knowingly secures or possesses, other than in the course of official duty, an official list or a list compiled from official sources, published or disclosed in violation of this section, of persons who have applied for or who have been granted any form of public social services for which state or federal funds are made available to the counties is guilty of a misdemeanor."

We are of the opinion that Welfare and Institutions Code section 10850 (since 1969 amended in substantially similar form), imposing criminal sanctions for its breach, adequately protected the right of privacy of the welfare recipients served by the state's psychiatric social workers. No constitutional breach by the Department of that right was established by this segment of the offer of proof.

We observe that the sanctions of section 10850 are equally operative with respect to county welfare agencies and also, that a similar statute safeguards the security of such information in the hands of the Department of Health, Education and Welfare. (See 42 U.S.C. § 1306.)

(7) The fourth and remaining assertion of the offer of proof is that: "Once the information concerning appellants' clients has been supplied to the Department's [electronic data processing] system, appellants have no control over its dissemination or distribution."

It does not appear, nor do appellants even contend, that "control" over the Department's records is any part of the duties of psychiatric social workers. The Department is obviously free to place that responsibility elsewhere.

(3b) From all of the foregoing it follows that the Department's and the Legislature's purpose to make "maximum use of electronic data processing" in the handling and storage of welfare recipient information under the facts embraced by appellants' offer of proof, flouted neither the "right of privacy" nor other Fourth Amendment principle.

Appellants having, as a matter of law, willfully refused to obey a lawful order of the Department, the judgment of the superior court will be affirmed.

Affirmed.

Molinari, P. J., and Sims, J., concurred.

EXHIBIT IV

THE LIFSCHUTZ CASE

[Extract from paper prepared by Robert Plattner, May 26, 1975, Stanford Law School.]

The second important question raised by 1012 is whether the very existence of the psychotherapeutic relationship should itself be privileged. It has been noted that "unlike the patient suffering from an organic illness, a person in psychotherapy, by and large, visits his psychiatrist with the same secrecy that a man goes to a bawdy house."[19] If the privilege covers only the content of a communication and not the fact of a relationship, the identity of a treating psychiatrist can be elicited under a discovery demand. This could then be used to frighten the patient, despite assurances from his attorney, into thinking that the very private disclosures he has made to his psychotherapist will be revealed in open court. There is simply no way of telling the number of cases which patients have dropped or failed to initiate for fear of disclosure.[20]

An argument can be made then, that unlike other privileged relationships, the very existence of the psychotherapist-patient relationship should be kept confidential. There is language in the 1970 case of In Re Lifshutz, 85 Cal. Rptr. 829, 467 P.2d 557[21], which indicates that the court, without change in the law, might in fact consider such information privileged. As we shall see, the question we are presently addressing is part of the larger question faced

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19. Slovenko, supra note 4, at 175

20. See Slovenko, Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope, 23 Catholic U.L.R. 649 (1974)

21. In Re Lifshutz, 85 Cal. Rptr. 829, 467 P.2d 557, 2 Cal.3d 415 (1970) at 467 P.2d 566

by the Supreme Court of California in Lifschutz - the core issue of the proper balance between protection for confidential communications and the necessity for disclosure to get at the truth in litigated cases. The Lifschutz case provides the most valuable guidance available as to the balance which now exists, as interpreted by the court, in California.

VI. LIFSCHUTZ AND SECTION 1016

Lifschutz focuses primarily on Section 1016 of the Code, which creates an exception in the privilege as to communications relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by the patient himself, or by those claiming through him. The thinking behind this exception is evident; the patient should not be able to use the privilege as a sword as well as a shield. The critical issue is how closely the court will guard the confidentiality of the psychotherapist-patient privilege in the face of this exception. In Lifschutz, the court answered this question at length.

Among the important pronouncements by the court in Lifschutz were the following:

(1) Under a properly limited interpretation the patient-litigant exception to the psychotherapist-patient privilege does not unconstitutionally infringe the right of privacy.

(2) Because of the potential invasion of a patient's constitutional interests, trial courts should properly and carefully control compelled disclosures of psychotherapeutic patients.

(3) The patient-litigant exception allows only a limited inquiry into the confidences of a psychotherapist-patient privilege, compelling disclosure of only those matters directly relevant to the nature of the specific conditions the patient has tendered as issues in his pleading or in discovery inquiries.

(4) The "automatic" waiver of the patient-litigant exception is to be construed not as a complete waiver but as a limited waiver concomitant with purposes of the exception.

(5) The burden rests upon the patient initially to submit some showing that a given confidential communication is not directly related to the issue he has tendered to the court.

(6) Even when confidential information falls within the patient-litigant exception, trial courts may utilize the protective measures at their disposal to avoid unwarranted intrusions into the psychotherapeutic relationship.

(7) The patient or psychotherapist, during discovery, may apply to the court for a protective order to limit the scope of the inquiry or to regulate the procedure of the inquiry so as to best preserve the rights of the patient.

The court obviously recognized the social and moral importance of the protection of important confidential communications, and has struck a highly desirable balance between that need and the need for information for fair and accurate litigation.

The patient, as we were discussing earlier, may in fact be forced to disclose the existence of a psychotherapeutic relationship, and he will in fact bear the burden initially to show that a given communication is not directly relevant, but he will have a number of safeguards he may employ.

The exception will include only those communications "directly relevant" to the issues tendered by the patient. The court suggests that necessary disclosures could be made ex parte in the judge's chambers.[22] Further, under Code of Civil Procedure § 2019(b), a court can issue an order to protect a party

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22. In Re Lifschutz, 2 Cal.3d 415 at 437, 467 P.2d 557 at 571, 85 Cal. Rptr. 829 at 843.

from "annoyance, embarrassment or oppression". Finally, a court retains discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice.[23] In Roberts v. Supreme Court of Butte County,[24] for example, the Supreme Court held that the mental or emotional condition of the plaintiff was not put in issue by her allegations of physical injury, even though those ailments began around the time of her hospitalization for an overdose of pills. The Court prohibited the discovery of the psychotherapist's reports.

The Lifschutz decision is a sound one, both theoretically and practically. It provides a valuable guideline for striking the balance between the need for information and the need for confidentiality.[25] It is hoped that trial judges will follow the spirit as well as the letter of the Lifschutz decision, for the protections to the patient offered in Lifschutz very much depend on a sensitive understanding of the competing interests by the judge.

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23. Cal. Evidence Code § 352

24. Roberts v. Supreme Court of Butte County, 9 Cal.3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973)

25. For other comments on Lifschutz, see Suarez and Hunt, The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In Re Lifschutz, 1 U.C.L.A. - Alaska L.R. 2 (1971), Louisell and Sinclair, Reflections on the Law of Privileged Communications - The Psychotherapist-Patient Privilege in Perspective, 59 Cal. L.R. 30 (1971)

Memo 76-15 EXHIBIT V

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

May 23, 1975

Mr. John H. DeMoully
Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear John,

Here is a copy of the letter I sent to Otto Kaus. Secondly, I want to write you concerning Section 1028 of the Evidence Code. Essentially, that section says that in a criminal case the psychotherapist privilege is restricted solely to psychiatrists and psychologists and is denied to clinical social workers. To my mind this rule is not only indefensible, it is discriminatory in an especially unpleasant way. First of all, I think you can find no one to deny that the kind of psychotherapy performed by licensed clinical social workers is precisely the same as that performed by psychologists and psychiatrists short only of two differences which, though practically important, are irrelevant to our concern (psychiatrists can both prescribe drugs and commit to a mental institution).

More significant, perhaps, this difference in treatment between the clinical social worker on the one hand and the psychiatrist and psychologist on the other, operates to discriminate in two very important ways. First of all, although they perform basically the same types of psychotherapy, the clinical social worker is much more often working in either a mental health center, family service agency, or other agency. It is undeniable that these agencies tend to get those who simply cannot afford the more expensive therapy provided by the psychiatrist and to a lesser extent the psychologist. As a result, for the most part, the effect of the section in question is to deny the privilege to the poor and lower-middle class and allow it with respect to precisely the same kind of information to the upper-middle class and the rich.

I cannot also resist pointing out that there is another discrimination inherent in Section 1023. There is no doubt that the great majority of psychiatrists and psychologists practicing are men and the great majority of social workers are women. I admit that we have a caste system among our

EC	
[illegible]	

mental health professionals, but it strikes me as extremely unwise for the law to reinforce this through the use of the privilege area.

Of course, what I say with respect to the clinical social worker is applicable just as well to the school psychologist and the marriage family and child counselor--though, the inference of sexual discrimination is clearly not as great with respect to these latter two categories. In any event, the purposes of the psychotherapist privilege are not met if in the most important area of its application, it is simply denied to all but the most high status--and expensive--of the mental health professionals. I do hope that the Law Revision Commission will devote some time and energy to erasing this unfortunate inequality.

Yours very truly,

John Kaplan
Professor of Law

JK:rpt

FEDERAL RULES OF EVIDENCE

Rule 504. Psychotherapist-Patient Privilege

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for Hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by Order of Judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an Element of Claim or Defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

ADVISORY COMMITTEE'S NOTE

The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to

avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exceptions from the statutory privilege, the following may be enumerated: communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. California Evidence Code §§ 990-1007. For other illustrative statutes see Ill.Rev. Stat.1967, c. 51, § 5.1; N.Y.C.P.L.R. § 4504; N.C.Gen.Stat.1953, § 8-53. Moreover, the possibility of compelling gratuitious disclosure by the physician is foreclosed by his standing to raise the question of relevancy. See Note on "Official Information" Privilege following Rule 509, *infra*.

The doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient. While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw.U.L.Rev. 384 (1952), when legislatures began moving into the field.

The case for the privilege is convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960):

"Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

A much more extended exposition of the case for the privilege is made in Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L.Rev. 175, 184 (1960), quoted extensively in the careful Tentative Recommendation and Study Relating to the Uniform Rules of Evidence (Article V. Privileges), Cal.Law Rev. Comm'n, 417 (1964). The conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied.

Illustrative statutes are California Evidence Code §§ 1010-1026; Ga.Code § 38-418 (1961 Supp.); Conn.Gen.Stat., § 52-146a (1960 Supp.); Ill.Rev.Stat. 1967, c. 51, § 5.2.

While many of the statutes simply place the communications on the same basis as those between attorney and client, 8 Wigmore § 2286, n. 23 (McNaughton Rev.1961), basic differences between the two relationships forbid resorting to attorney-client save as a helpful point of departure. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn.B.J. 175,182 (1962).

Subdivision (a). (1) The definition of patient does not include a person submitting to examination for scientific purposes. Cf. California Evidence Code § 1101. Attention is directed to 42 U.S.C. 242a(g)(2), as amended by the Drug Abuse and Control Act of 1970, P.L. 91-513, authorizing the secretary of health, education, and welfare to withhold the identity of persons who are the subjects of research on the use and effect of drugs. The rule would leave this provision in full force. See Rule 501.

(2) The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions, including drug addiction, in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry. The requirement that the psychologist be in fact licensed, and not merely be believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories. Cal. Law Rev. Comm'n, *supra*, at pp. 434-437.

The clarification of mental or emotional condition as including drug addiction is consistent with current approaches to drug abuse problems. See, e.g., the definition of "drug dependent person" in 42 U.S.C. 201(q), added by the Drug Abuse Prevention and Control Act of 1970, P.L. 91-513.

(3) Confidential communication is defined in terms conformable with those of the lawyer-client privilege, Rule 503(a)(4), *supra*, with changes appropriate to the difference in circumstance.

Subdivisions (b) and (c). The lawyer-client rule is drawn upon for the phrasing of the general rule of privilege and the determination of those who may claim it. See Rule 503(b) and (c).

The specific inclusion of communications made for the diagnosis and treatment of drug addiction recognizes the continuing contemporary concern with rehabilitation of drug dependent persons and is designed to implement that policy by encouraging persons in need thereof to seek assistance. The provision is in harmony with congressional actions in this area. See 42 U.S.C. § 260, providing for voluntary hospitalization of addicts or persons with drug dependence problems and prohibiting use of evidence of admission or treatment in any proceeding against him, and 42 U.S.C. § 3419 providing that in voluntary or involuntary commitment of addicts the results of any hearing, examination, test, or procedure used to determine addiction shall not be used against the patient in any criminal proceeding.

Subdivision (d). The exceptions differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, Louisell, The Psychologist in Today's Legal World: Part II, 41 Minn.L.Rev. 731, 746 (1957), the committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn.B.J. 175 (1962). These three exceptions are incorporated in the present rule.

(1) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(2) In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The rule thus conforms with the provisions of 18 U.S.C. § 4244 that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt and of 42 U.S.C. § 3420 that a physician conducting an examination in a drug addiction commitment proceeding is a competent and compellable witness.

(3) By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. Similar considerations prevail after the patient's death.

Comments

UNDERPRIVILEGED COMMUNICATIONS: EXTENSION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE TO PATIENTS OF PSYCHIATRIC SOCIAL WORKERS

The law of evidence in most jurisdictions contains a highly significant limitation: communications from a client who consults a private psychiatrist for treatment of mental or emotional illness are privileged, while similar communications from a client to a psychiatric social worker are not privileged. This state of affairs stems from the failure of most evidence codes to provide testimonial immunity for psychiatric social workers who, as the mainstay of the staffs of most public mental health facilities, are virtually the "poor man's psychiatrist."

This Comment analyzes some of the consequences that result from the failure to provide statutory privilege to psychiatric social workers and proposes a number of legal theories courts could use to create or extend the privilege. Section I discusses in detail some of the problems that denial of this privilege creates for both patients and psychiatric social workers. Section II examines the traditional test for determining whether a relationship merits the protection of privilege, and applies it to the psychiatric social worker-patient relationship. Section III advances an argument based on functional similarities between presently privileged professionals and psychiatric social workers. Section IV proposes an argument based on agency principles. Section V discusses the problem from an equal protection perspective, and Section VI proposes an argument based on equitable considerations.

I

THE NEED FOR A PRIVILEGE

The poor rely primarily upon public and charitable facilities for medical, dental, and psychiatric services.[1] Because of the severe shortage of psychologists and psychiatrists,[2] welfare departments and

1. Davidson, *Government's Role in the Economy: Implications for the Relief of Poverty*, 48 J. URBAN L. 1, 36 (1970).

2. COMMUNITY COLLEGE MENTAL HEALTH WORKER PROJECT, ROLES AND FUNCTIONS FOR DIFFERENT LEVELS OF MENTAL HEALTH WORKERS 1 (1969). Some figures will give an indication of the shortage. Over 500,000 school-age children suffer from serious mental illness; less than .5 percent receive adequate care. In a recent year, 40 percent of the qualified applicants of all ages who requested help at outpa-

most public mental health programs cannot provide a fully trained psychiatrist or clinical psychologist for every indigent patient requiring treatment for emotional or mental illness.[3] Yet the need for these services is acute. Mental illness ranks with heart disease and cancer as one of the nation's three greatest health problems.[4] And although the incidence of mental disorders is highest among low-income groups, they receive the least attention.[5]

In response to the great demand for services, mental health agencies have found it necessary to expand the size of their staffs. Since adequate numbers of psychiatrists and clinical psychologists are not available for such assignments, the new positions are frequently filled by psychiatric social workers,[6] particularly in government supported institutions, where the staffing problem is most severe.[7]

Psychiatric social workers are mental health professionals who have received advanced training in the behavioral sciences,[8] but who

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tient psychiatric clinics were put on waiting lists for a period exceeding one year. Weihofen, *Mental Health Services for the Poor*, 54 CALIF. L. REV. 920, 921 (1966) [hereinafter cited as Weihofen].

3. Wittman, *Utilization of Personnel with Various Levels of Training: Implications for Professional Development*, in TRENDS IN SOCIAL WORK 191 (Nat'l Ass'n of Soc. Workers 1966).

4. Weihofen, *supra* note 2, at 920.

5. B. BERELSON & G. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 639 (1964).

6. By 1960 all states employed psychiatric social workers in mental health programs. U.S. DEP'T OF HEALTH EDUCATION AND WELFARE, HEALTH MANPOWER SOURCE BOOK—MEDICAL AND PSYCHIATRIC SOCIAL WORKERS 28 (1960). By 1967, psychiatric social workers in outpatient clinics were already working more hours per week than psychiatrists and clinical psychologists combined. NATIONAL INSTITUTE OF MENTAL HEALTH, DATA ON STAFF AND MAN-HOURS, OUTPATIENT PSYCHIATRIC CLINICS IN THE UNITED STATES 6-16 (1967).

7. More than 90 percent of all psychiatric social workers are employed by a state-supported facility. NATIONAL ASSOCIATION OF SOCIAL WORKERS, PSYCHIATRIC SOCIAL WORKERS AND MENTAL HEALTH 21 (1960) [hereinafter cited as NAT'L ASS'N OF SOCIAL WORKERS].

8. *Cf.* Calif. Personnel Bd., *Psychiatric Social Worker* 1 (1969) (job description) [hereinafter cited as Calif. Personnel Bd.]. The academic degree that most psychiatric social workers possess is a master's degree. Nationally, 80 percent of psychiatric social workers in public mental health programs have a master's degree or Ph.D. U.S. DEP'T OF HEALTH EDUCATION AND WELFARE, HEALTH MANPOWER SOURCE BOOK, MEDICAL AND PSYCHIATRIC SOCIAL WORKERS 42 (1960). A typical university curriculum for a student preparing for a career as a psychiatric social worker includes courses in the following subjects: developmental psychology; individual, family, and small group practice; psychodynamics and psychopathology; human development and pathology; medical and psychiatric casework; mental health and rehabilitation program planning. UNIVERSITY OF CALIFORNIA (BERKELEY), ANNOUNCEMENT OF THE SCHOOL OF SOCIAL WELFARE 19-22 (1972).

Although other social workers, such as intake workers or caseworkers, may at times deal with intimate and highly personal information, the need for a privilege for

lack the medical background of a psychiatrist. In many instances they perform the same functions as psychiatrists and psychologists.[9] Nevertheless, patients treated by psychiatric social workers do not enjoy the confidentiality privilege that applies to the psychiatrist-patient relationship.[10]

As almost all state legislatures have recognized in enacting statutory privileges for physicians and psychiatrists,[11] successful therapy

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such communications is not as acute as that for communications to psychiatric social workers who work directly with emotionally disturbed patients. These other categories of social worker are not dealt with in this Comment.

9. Many writers describe the work of psychiatric social workers as psychotherapy. *E.g.* R. GRINKER, H. MACGREGOR, K. SELAN, A. KLEIN, & J. KOHRMAN, PSYCHIATRIC SOCIAL WORK 112-32 (1961); J. ALVES, CONFIDENTIALITY IN SOCIAL WORK 97 (1959) [hereinafter cited as ALVES]; *cf.* Calif. Personnel Bd., *supra* note 8, at 1-2. Psychiatric social workers and supervisors of social worker training programs state that the services performed by psychiatric social workers and the techniques utilized by them are indistinguishable from those of psychiatrists and clinical psychologists. *E.g.*, Interview with Professor Robert Wasser, School of Social Welfare, University of California, in Berkeley, California, March 1, 1973 [hereinafter cited as Wasser]. In many respects, the question is one of semantics; some would limit the use of the word "psychotherapy" to characterize the work of a medically trained psychiatrist or clinical psychologist. Questions of semantics aside, four propositions are relatively undisputed:

(1) Psychiatric social workers work directly with patients in solving their mental and emotional problems. *Id.*; *see* note 7 *supra*.
(2) In doing so they delve into intimate personal material in a way that requires confidence in order for success to be possible. *Id.*; *see* note 12-16 *infra*.
(3) Their academic training involves extensive study in psychological theory and clinical techniques. *See* note 8 *supra*.
(4) Numerically, they constitute the most significant professional class employed in mental health centers, devoting more hours per week to caring for patients than psychiatrists and psychologists, particularly in clinics that deal with indigents. *See* note 6 *supra*.

10. Many state agencies that provide social services for the poor have adopted confidentiality regulations, sometimes spurred by the requirements of federal funding. Generally, these have failed to command much respect from the courts, which have felt free to ignore or circumvent them when the occasion demanded. *E.g.*, Bell v. Bankers Life & Cas. Co., 327 Ill. App. 321, 64 N.E.2d 204 (1945). For a discussion of the devices used by courts to evade confidentiality requirements that fell short of being full-fledged privilege statutes, see ALVES, *supra* note 9, at 78 *et seq.*; Lo Gatto, *Privileged Communication and the Social Worker*, 8 CATH. LAW. 5 (1962).

11. Statutes providing privilege to the therapist-patient relationship are summarized in Comment, *Privileged Communications: A Case By Case Approach*, 23 MAINE L. REV. 443, 448-50 (1971). Of the 50 states and District of Columbia, 12 lack a privilege for physicians. Psychiatrists ordinarily receive protection under physician statutes, although five states have a separate psychiatrist privilege. (Four of these five are among the 12 states which do not have a privilege for physicians generally.)

All but 15 states and the District of Columbia have a psychologist privilege. Four have statutes conferring privilege upon marriage counselors. One state (New York) provides privilege for certified social workers. California provides privilege for licensed clinical social workers, but not for psychiatric social workers in general.

For a summary of states which have privilege for other relationships, such as clergyman-penitent, see 8 J. WIGMORE, EVIDENCE §§ 2285-2396. (McNaughton rev. 1961).

requires a strong bond of confidentiality.[12] "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 sins, and his shame."[13] Thus, any intimation that information disclosed to the psychotherapist might not be held in confidence can gravely threaten the therapeutic value of the counseling relationship.

> Most patients who undergo psychiatry know that complete candor will be expected of them, and that they cannot get help except on that condition . . . . It would be too much to expect them to [comply with this requirement] if they knew that all they say . . . may be revealed to the whole world.[14]

The threat to the therapeutic value of this relationship is especially great in the treatment of patients from low income groups. These patients tend to be more distrustful of authority figures than their wealthier counterparts.[15] As a result, they generally are more likely to resist psychotherapy,[16] having learned from bitter experience to be wary of official figures who profess to be anxious to "help" them.[17]

The absence of privilege not only jeopardizes the possibility of effective treatment for the patient; it can also deter others from seeking attention.[18] Already there have been numerous cases in which a social worker's testimony has led to criminal sanctions against his client.[19]

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12. *E.g.*, the Legislative Comment accompanying CAL. EVID. CODE § 1014 (West 1968) states:

> Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life . . . . Unless a patient . . . 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 . . . depend.

The Comment adds that the authors had heard reliable reports that patients had refused treatment because of doubts about confidentiality. The authors expressed concern that disturbed individuals, if untreated, might pose a threat to the safety of others. CAL. EVID. CODE § 1014, Legislative Comment (West 1968).

13. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952).

14. *Id.*

15. R. WALD, LAW AND POVERTY: 1965, 6-46 (1965); Rosenheim, *Privilege, Confidentiality, and Juvenile Offenders*, 11 WAYNE L. REV. 660, 669 (1965) [hereinafter cited as Rosenheim].

16. *E.g.*, Weihofen, *supra* note 2, at 925: "Psychiatr[ic care may be] a status symbol in Hollywood, but it [is] . . . a disgrace in Watts . . . ."

17. *Cf.* Gorman, *Psychiatry and Public Policy*, 122 AM. J. OF PSYCHIATRY 55, 58 (1965).

18. *Cf.* Goldstein & Katz, *Psychiatrist-Patient Privilege: The G.A.P. Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 733, 734 (1961) [hereinafter cited as Goldstein & Katz]; Noble, *Protecting the Public's Privacy in Computerized Health and Welfare Information Systems*, 16 SOCIAL WORK 35, 37 (1971) [hereinafter cited as Noble]. This deterrence phenomenon has been noted in judicial opinions, *e.g.*, Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

19. *See, e.g.*, State v. Plummer, 5 Conn. Cir. 35, 241 A.2d 198 (1967), a

As it becomes known that under certain circumstances the therapist can be compelled to divulge information revealed to him during therapy, prospective clients will become reluctant to seek professional help for mental and emotional problems.

A limitation on privileged communications also creates a significant strain for the psychotherapist who is called to the witness stand. The psychiatric social worker, like the psychiatrist and psychologist, owes allegiance to a professional code of ethics that stresses the importance of preserving the trust of his patients.[20] Requiring him publicly to breach a professional confidence places him in a cross-fire of conflicting demands. The courts demand disclosure while his professional values insist upon secrecy. As a result, when confidentiality has not been protected, mental health professionals called as witnesses have been known to refuse to testify,[21] to fabricate,[22] to have "memory lapses" on the witness stand,[23] or to keep two sets of records.[24]

The denial of privilege also affects the economics of national health care planning. In recent years, the soaring costs of health care have tended to place many forms of medical service beyond the reach

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prosecution for lascivious carriage brought on the basis of information provided by state welfare authorities to the police. Rappeport, *Psychiatrist-Patient Privilege*, 23 MD. L. REV. 39, 46 (1963), describes two unreported cases. In one, the court permitted out-of-state lawyers to view Maryland hospital records. As a result a mother lost custody of her children when the lawyer was able to produce a description in court of her deranged conduct, even though she was then well and saner than her husband, who got the children. In the other case, a minister had his confessions of a college-age love affair—thought to be at least in part fantasy—paraded before his parishioners.

These risks are duly noted by prospective patients. The California Law Revision Commission commented: "[We have] been advised that proper psychotherapy often is denied a patient solely because he will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told." 1965 CAL. LAW REV. COMM'N. 195.

20. Mary Richmond, the founder of social work, wrote: "In the whole range of professional contacts there is no more confidential relation than that which exists between the social worker and the person or family receiving treatment." M. RICHMOND, WHAT IS SOCIAL CASE WORK 29 (1922). *See also* NATIONAL WELFARE ASSEMBLY, CONFIDENTIALITY IN SOCIAL SERVICE TO INDIVIDUALS 5, 40 (1958).

21. *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970); Binder v. Ruvell, Civ. Docket No. 52C2535 (Cir. Ct. Cook County, Ill., June 24, 1952) (reprinted in 150 A.M.A.J. 1241 (1952)). *See* COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, 3 N.Y. REV. STAT. 737 (1836) (quoted in 8 J. WIGMORE, EVIDENCE § 2380 (a), at 829 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE]; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 196 (1960).

22. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 627-29 (1963). *See* note 23 *infra*.

23. Interview with psychiatric social worker section, Bayview Mental Health Center, San Francisco, California, on April 24, 1973.

24. *Id. Cf.* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45 92, 96 (1960) [hereinafter cited as G.A.P.].

of growing numbers of middle- and low-income families.[25] To counter this trend, paramedical specialists, who perform limited functions formerly performed by physicians or psychiatrists, increasingly are being employed in many medical fields, including mental health.[26] Some of the nontherapeutic functions now performed by certain psychiatric social workers, such as preparation of preadmission diagnostic work-ups in a clinic or hospital,[27] are clearly paramedical in nature. Many of these paramedical functions require the psychiatric social worker to process information that should be held in confidence. Public acceptance of the psychiatric social worker will be imperiled, however, if a patient's communications with him cannot enjoy the same degree of legal protection as those with the psychiatrist or clinical psychologist. Without privilege, the psychiatric social worker will be regarded by his patients as a second-class practitioner, well-meaning and sincere, perhaps, but incapable of protecting their interests. Under such circumstances they will naturally be unable to place full confidence in him. To the extent that this results, the movement to make health care more widely available through utilization of paraprofessionals will be adversely affected.

A second, related development—the team approach to health care—is similarly jeopardized when psychiatric social workers are denied privilege. Mental health facilities, like those of other medical specialties, increasingly have been using an approach in which teams of specialists from many fields coordinate their expertise in the treatment of the patient.[28] This technique makes possible more efficient treatment and results in a higher standard of health care.[29] In many mental health clinics, these integrated teams include psychiatric social workers.[30] However, of all the team members—clinical psychologists, psy-

25. REPORT OF THE NAT'L ADVISORY COMM'N ON HEALTH MANPOWER 15-32 (1967); Gorman, *Psychiatry and Public Policy*, 122 AM. J. OF PSYCHIATRY 55, 57 (1965).

26. Forgotson, Roemer, and Newman, *Innovations in the Organization of Health Services: Inhibitive vs. Permissive Regulation*, 1967 WASH. U.L.Q. 400, 400-01 (1967). *See* U.S. DEP'T OF HEALTH EDUCATION AND WELFARE, HEALTH MANPOWER SOURCE BOOK 21—ALLIED HEALTH MANPOWER SUPPLY AND REQUIREMENTS: 1950-1980 at 9 (1970); NAT'L COMM'N ON COMMUNITY HEALTH SERVICES, HEALTH IS A COMMUNITY AFFAIR 22 (1967).

27. *See* A. FINK, C. ANDERSON, & M. CONOVER, THE FIELD OF SOCIAL WORK 235-37 (1968) [hereinafter cited as A. FINK]; CALIF. DEP'T OF MENTAL HYGIENE, PROFESSIONAL SOCIAL WORKERS IN MENTAL HEALTH PROGRAMS 4-71 [hereinafter cited as CALIF. DEP'T OF MENTAL HYGIENE].

28. Goldstein & Katz, *supra* note 18, at 735.

29. Judicial notice of this practice, acknowledging its positive effect on efficiency, was taken in Wyatt v. Stickney, 325 F. Supp. 781, 783 (M.D. Ala. 1971).

30. "Psychiatric social workers are a key group participating in every phase of the department's program—treatment, rehabilitation, training, [and] research . . . ." CALIF. DEP'T OF MENTAL HYGIENE, *supra* note 27, at 1.

chiatrists, physicians, and psychiatric social workers—only the social worker lacks privilege. This omission creates a weak link that effectively neutralizes the protection afforded communications to the other professionals; the nonprivileged social worker can become a conduit through which otherwise privileged information can flow.[31] This leak threatens the successful application of team treatment techniques.

Thus, it is evident that the failure to provide a statutory privilege[32] for communications to psychiatric social workers creates serious problems. The remainder of this Comment reviews the various legal grounds that can be used by the courts to extend the privilege to psychiatric social workers.

II

The Traditional Test for Extending Privilege

Privilege is typically a matter of statutory creation.[33] On appropriate occasions, however, courts have been willing to create privileges in the absence of a statute.[34] Wigmore developed the classic test for determining when a relationship merits the protection of confidentiality:[35]

(1) The communication must have been imparted in confidence that it would not be disclosed to others.

(2) The preservation of secrecy must be essential to the success of the relationship.

(3) The relationship must be one that society wishes to foster and protect.

(4) Any injury to the relationship caused by disclosure must out-

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"As an active contributor to diagnostic procedures, planning, and treatment [the psychiatric social worker is] a professional partner of other specialists—psychiatrists, nonpsychiatric physicians, psychologists . . . ." *Id.* at 2.

"Within the clinic, the psychiatric social worker maintains direct contact with the other team members to insure close interdisciplinary communication." Nat'l. Ass'n of Social Workers, *supra* note 7, at 17.

31. *See* material cited note 19 *supra*. *Cf.* Lewis, *Confidentiality in the Community Mental Health Center*, 37 Am. J. Orthopsychiatry 946, 948 (1967).

32. The problem can be readily solved by legislative action, and in the long run this would be the best solution. This could be accomplished by simply adding "or psychiatric social worker" to the statute providing privilege to psychotherapists. If greater narrowness is desired, the qualification, "when performing psychotherapy of a nonmedical nature," could be added. *See* Cal. Evid. Code § 1010(c) (West Supp. 1973).

33. *E.g.*, Cal. Evid. Code § 911 (West 1966). *Cf.* 8 Wigmore, *supra* note 21, § 2286(2), at 532.

34. *E.g.*, Binder v. Ruvell, Civ. Docket No. 52C2535 (Circ. Ct. Cook County, Ill., June 24, 1952) (reprinted in 150 A.M.A.J. 1241 (1552)); *Re* Kryschuk and Zulynik, 14 D.L.R.2d 676, 677 (Police Magis. Ct., Sask. 1958).

35. 8 Wigmore, *supra* note 21, § 2285, at 527.

weigh the expected benefit to be derived from compelling disclosure.

In jurisdictions lacking privilege statutes, courts have consistently referred to these criteria when deciding whether to grant or deny privilege in specific instances.[36] The test has been rigorously applied; in a majority of the cases, courts have held that the criteria, particularly the fourth, were not satisfied.[37] Of the handful of cases in which a privilege has been judicially extended in this manner, however, at least two involved members of the counseling and therapeutic professions.[38] And the commentators have concluded that therapy, when conducted by responsible, licensed professionals, is a relationship that satisfies Wigmore's criteria.[39]

In applying Wigmore's test to the relationship between a psychiatric social worker and his client, it is evident that all the requirements are met. Communications between a psychiatric social worker and his patients are imparted in the expectation of deepest confidence. The authorities agree that therapy requires complete candor of the patient, who must reveal compulsions, fantasies, fears, obsessions, and guilt feelings of such a private nature that he probably has never revealed them before, even to his closest friends.[40] No one would make revelations of this nature without the expectation that they would be held in confidence.

Also, preservation of confidentiality is essential to the success of the relationship. Without the security of a strong foundation of trust, the client will be unwilling, sometimes unable, to cooperate with his therapist in bringing to the surface painful repressed material, or in participating uninhibitedly in therapeutic measures designed to hasten his recovery.[41]

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36. *E.g.*, Falsone v. United States, 205 F.2d 734, 740 (5th Cir. 1953); State v. Smythe, 25 Wash. 2d 161, 168, 169 P.2d 706, 710 (1946).

37. *E.g.*, State v. Smythe, 25 Wash. 2d 161, 169-70, 169 P.2d 706, 711 (1946).

38. *See* cases cited note 34 *supra*.

39. *E.g.*, Louisell & Sinclair, *The Supreme Court of California 1969-1970, Foreword: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30, 52 (1971) [hereinafter cited as Louisell & Sinclair]; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-99 (1960).

40. In fact, the success of a psychiatric social worker is often measured by the extent to which he obtains a flow of private thoughts and feelings. *Cf.* Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 521 (1963).

41. *E.g.*, Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955): "In regard to mental patients, the policy behind such [privilege] statutes is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a [psychotherapist] must have his patient's confidence or he cannot help him." *See also* notes 39 *supra* & 100 *infra*.

Moreover, successful therapy is so critically needed in our anxiety-ridden society that there can be little doubt that the injury that can result from disclosure outweighs the burden a privilege would impose on the courts' fact-finding machinery.[42] This conclusion has already been reached by the legislatures of a large majority of states which have granted the privilege to psychiatrists and psychologists.[43] When psychiatric social workers provide the same socially useful service as is now provided by these other professionals,[44] the state's failure to enact comparable legal protections for the benefit of their patients risks severe impairment of their ability to provide service.

One concern that might arise if the courts grant privilege to psychiatric social workers is that unqualified, self-appointed "therapists"—faith healers, meditators, and the like—might launch demands for recognition.[45] This does not present an insurmountable problem, however. In enacting privilege statutes legislatures have consistently distinguished between professions that have achieved some form of official state recognition or control,[46] such as through licensing laws or establishment of a state occupational category, and those that have not. Since most psychiatric social workers are employed in state facilities,[47] and are thus subject to state control and supervision, privilege could be provided for those psychiatric social workers but withheld from marginal groups which are not recognized or regulated by the state.

Consequently, on the basis of the four classic criteria, and with the understanding that privilege can be limited to recognized, licensed professionals, the courts should grant the privilege of confidentiality to psychiatric social workers.

III

Extension Based on Functional Similarities

Therapy is a clinical function. It can be performed by members of a number of professional groups—psychiatrists, clinical psycholo-

42. G.A.P. *supra* note 24, at 93, 95; *Louisell & Sinclair, supra* note 39, at 53. *See also* note 100 *infra*.

43. *See* note 11 *supra*.

44. *See* text accompanying note 9 *supra*.

45. Reportedly, the reason the drafters of the Uniform Rules of Evidence did not choose to extend privilege to "family counseling and that sort of thing" is that "we can not open the door . . . to uncontrolled groups." Comment, *Functional Overlap Between the Lawyer and Other Professionals*, 71 YALE L.J. 1226, 1241 n.99 (1962).

46. Geiser & Rheingold, *Psychology and the Legal Process: Testimonial Privileged Communications*, 19 AM. PSYCHOLOGIST, 831, 834-35 (1967) [hereinafter cited as Geiser & Rheingold]; 1964 CAL. LAW REV. COMM'N, 437-38; Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 733-35 (1957).

47. *See* note 7 *supra*.

gists, and family physicians—who have the privilege of confidentiality in a majority of American jurisdictions.[48] Since it is the therapeutic function that the law of privilege is designed to protect, rather than any particular set of favored individuals, there is little justification for extending privileged status to these groups but not to psychiatric social workers, when the job specifications of the latter also include administering therapy to psychologically disturbed people.[49]

Functional considerations are not unknown to the law. Indeed, they figured prominently in the deliberations of at least one group charged with drafting legislation relating to medical privilege. When the revisers of the California Evidence Code extended the psychotherapist privilege, first to psychologists, then to licensed clinical social workers, they were influenced by the conviction that it would be illogical and invidious to provide privilege to one group but to deny it to another performing essentially the same function.[50]

A functional approach is not too technical to serve as a guide for judicial decision-making, nor need it burden the courts with a flood of litigation. On the contrary, courts have always been ready to look behind an individual's nominal title in order to determine whether the function he was actually performing warranted the protection of privilege. Courts have refused to permit a physician or attorney to invoke privilege when it was clear that he was not really performing medical or legal services. For example, courts have denied privilege to a lawyer who was in reality serving as a tax consultant or general business advisor.[51] On the other hand, courts have granted privilege when the function performed, while outside the normal range of a professional's duties, was nonetheless entitled to privilege on some other ground.[52]

An additional reason for extending privilege to patients of psychiatric social workers is the need, discussed earlier, to work toward a more rational system of manpower allocation in the field of public health.[53]

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48. *See* note 11 *supra*. Communications with clergymen, when acting as counselors, are also often privileged.

49. *See* notes 8, 9 *supra*.

50. Interview with Prof. Sho Sato, Professor of Law, University of California, past Vice Chairman, California Law Revision Commission, in Berkeley, California, Sept. 22, 1972.

51. Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954); R.C.A. v. Rowland Corp., 18 F.R.D. 440 (N.D. Ill. 1955); *In re* Fisher, 51 F.2d 424, 425 (S.D.N.Y. 1934).

52. Simrin v. Simrin, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (2d Dist. 1965) involved a rabbi who performed marriage counseling. His work was held not to fall under the state's priest-penitent privilege statute, which limited coverage to confessions, but was nonetheless granted privileged status by virtue of its confidential nature as counseling. There was no statute providing privilege for counselors generally.

53. Recent thinking in this area urges that the health professions be viewed as a matrix in which duties and responsibilities are allocated on the basis of actual

Where psychiatric social workers are urgently needed to perform essential functions, courts should not hesitate to invoke the doctrine of functional identities in order to supply them with the legal safeguards necessary to perform those functions effectively. Failure to do so impedes the attainment of a rational delivery system for mental health care, one which maximizes the effectiveness of each practitioner by assigning duties in accordance with functional capacity rather than categorical title.

IV

Agency Considerations

Under conventional agency principles, communications directed to the assistant or agent of a physician are privileged to the extent they would have been had they been directed to the physician himself.[54] Thus, courts in many jurisdictions have expanded the privilege to encompass communications made to nurses and attendants when they work under the direction or supervision of a physician,[55] to medical interns when they take medical histories of patients,[56] and, in a slightly different context, to lay draft counselors when they perform counseling services in a center under the direction of a clergyman.[57]

Similarly, communications from patients to psychiatric social workers administering therapy under the direction of a supervisor covered by the privilege should also be privileged under this rule. Many psychiatric social workers interview patients and family members in order to help determine which patients are to be admitted to mental health facilities and which are ready to be discharged.[58] In doing so, they usually answer to the physician in charge of admitting and

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capacity for performing specific tasks—measured by training, experience, and demonstrated capacity—rather than by possession of a nominal title. Forgotson, Bradley, & Ballenger, *Health Services for the Poor—the Manpower Problem: Innovations and the Law*, 1970 Wisc. L. Rev. 756, 767 [hereinafter cited as Forgotson, Bradley & Ballenger.]

54. *See* cases cited notes 55-56 *infra*. This rule finds support in the treatises, *e.g.*, 8 Wigmore, *supra* note 21, at § 2382; model codes, *see* Uniform Rules of Evidence rule 27 (1953); Model Code of Evidence rule 221(c) ii (1942); and the evidence codes of many states, *e.g.*, Cal. Evid. Code § 1012 (West Supp. 1973).

55. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969); Ostrowski v. Mockridge, 242 Minn. 265, 65 N.W.2d 185 (1954); Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 143 So. 483 (1932). *Contra*, Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

56. Franklin Life Ins. Co. v. William J. Champion & Co., 353 F.2d 919 (6th Cir. 1965).

57. *In re* Grand Jury Subpoena for Gordon Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

58. Calif. Dept. of Mental Hygiene, *supra* note 27, at 1-4; Rosenheim, *supra* note 15, at 666.

discharging patients. Other psychiatric social workers work directly with patients in outpatient clinics, in consultation with a director who is a psychiatrist.[59] In both cases, communications received by the social worker should be privileged under the agency principle.[60] Of course, psychiatric social workers who practice independently would not receive privilege under this rule, and some social workers might qualify for privilege in connection with some of their duties but not others.

V

EQUAL PROTECTION

Denial of privilege to patients of psychiatric social workers may even attain constitutional dimension under the guarantee of equal protection. In general, courts have gone to great lengths to ensure that citizens receive fair and even-handed treatment from the government.[61] Although the scope of equal protection review has been limited to some extent by certain decisions,[62] recent Supreme Court opinions have reaffirmed the vitality of this important constitutional principle.[63]

A. Compelling State Interest

Patients who use community and welfare services for treatment of mental or emotional problems do so primarily because they are poor.[64] At these facilities they ordinarily find themselves directed to the care of a psychiatric social worker,[65] with the consequent threat of com-

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59. A. FINK, *supra* note 27, at 235. The increased flexibility and range afforded by agency principles is something on which the high-powered but overworked modern physician increasingly has come to rely. Today's highly trained medical specialist would feel enormously handicapped if, in order to protect the legal rights of his patients, he found it necessary personally to take charge of all aspects of their care. *E.g.*, Eureka-Maryland Assur. Co. v. Gray, 121 F.2d 104 (D.C. Cir.), *cert. denied*, 314 U.S. 613 (1941). As was discussed earlier, delegation and the team approach have proven effective and efficient means of dealing with community health problems. Where psychiatric social workers play a vital role in the treatment of patients, they too are entitled to this protection.

60. In similar circumstances, hospital records compiled by staff members for use by the hospital's physicians were held to be confidential. O'Donnell v. O'Donnell, 142 Neb. 706, 712, 7 N.W.2d 647, 650 (1943).

61. *See* cases cited notes 69-73 *infra*.

62. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

63. San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278 (1973).

64. *See* note 1 *supra* & note 67 *infra*. Indeed, the great majority of these treatment facilities apply a financial test in screening prospective patients. An applicant who can afford private treatment is not accepted; or, a sliding fee scale is used which favors the destitute and encourages those who can afford private treatment to go elsewhere. Wasser, *supra* note 7.

65. *See* notes 6 & 7 *supra*.

pelled disclosure. A patient who can afford to engage the services of a private psychiatrist or clinical psychologist, however, does not run the risk that the confidences he reveals will be divulged.[66] Thus, the ability to pay is the major determinant of the extent to which a patient in therapy receives assurance of confidential treatment.[67] A significant form of protection is linked to the financial status of the patient.[68]

Classifications based on wealth occupy a disfavored place in equal protection law[69] and have been struck down in such contexts as criminal justice,[70] sentencing procedure,[71] and the right to vote.[72] Recent state court cases have even applied equal protection scrutiny to medical practices that imposed a greater burden upon indigents than others.[73]

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66. *See* note 11 *supra*.

67. The financial test that is frequently required at public treatment centers, [see note 64 *supra*] insures a very close correspondence between the class of all indigent mental patients and those who receive treatment from psychiatric social workers. For a recent discussion of the requirement of a close "fit" or correlation between the classes affected, see San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1288-94 (1973).

In general, "[t]he kinds of care provided in psychiatric facilities is a function of the socio-economic level of the patient. The private psychiatrist is most likely to treat the most prosperous; state facilities, the working class." A. HOLLINGSHEAD & F. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS: A COMPARATIVE STUDY 276-78 (1958). *See also* note 1 *supra*.

68. And, the loss of protection is absolute, rather than merely relative. *See* San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1288-92 (1973). Patients who cannot afford a very expensive commodity—private psychiatry—are denied the benefit of privilege while those who can are accorded the full protection of the law.

69. *E.g.*, San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278 (1973) and cases cited notes 70-72 *infra*. For a broad discussion of this doctrine, *see generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1121-24 (1969) [hereinafter cited as *Developments in the Law*]; *cf.* Michelson, *The Supreme Court, 1968 Term—Foreword*, 83 HARV. L. REV. 7, 17 (1969).

70. Douglas v. California, 372 U.S. 353 (1963); Griffin v. United States, 351 U.S. 12 (1956).

71. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

72. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

73. In New York City v. Wyman, 66 Misc. 2d 402, 321 N.Y.S.2d 695 (Sup. Ct. N.Y Co. 1971), the court struck down a regulation that required indigent women on Medicare who desired an abortion to first prove that an abortion was medically indicated; other women not on Medicare were not required to prove this. The court held the requirement discriminatory in that it tended to deprive low-income women of an opportunity freely available to others. Although this case was subsequently reversed, 30 N.Y.2d 537, 330 N.Y.S.2d 385, 281 N.E.2d 180 (1972), the decision is reported in a memorandum opinion and the grounds for reversal are uncertain. Schulman v. New York City Health and Hospital Corp., 70 Misc. 1093, 335 N.Y.S.2d 343 (Sup. Ct. 1972), another recent case, arose out of a requirement by the health department that abortion certificates bear the name of the patient. Finding that the city had no compelling reason for the requirement, the court struck down the regulation as an invasion of the patient's right to privacy, a violation of her patient-physician

The Supreme Court recently discussed poverty as a suspect classification in *San Antonio Independent School District v. Rodriguez*.[74] The Court had before it a claim that Texas' scheme for raising revenues for school districts unconstitutionally discriminated against residents of poor districts. Although after lengthy consideration the Court decided that the Texas plan did not discriminate against the poor, it seemed to leave intact the principle that wealth may be a suspect classification.[75] After reviewing past cases involving indigency, the Court developed a twofold test.[76] First, it must appear that the classification singles out a clearly defined group that by reason of its impecunity is unable to pay for a valuable benefit. Second, as a result of the classification, the group must sustain absolute deprivation of a meaningful opportunity to enjoy the benefit.

Both requirements are met in the case of indigent patients of psychiatric social workers. The poor have no realistic access to private psychiatry;[77] and those who receive care at the hands of psychiatric social workers are denied the benefit of privilege.[78] Other traditional indicia of a suspect classification are also very much in evidence in the case of poor persons who suffer from mental illness. They are "saddled with disabilities," "politically powerless," in need of protection from an unconcerned majority,[79] and subject to community stigma.[80] Thus, legislative action that allocates health care benefits in a manner which discriminates against this class should be constitutionally suspect.

Moreover, the interests invaded when privilege is denied—privacy,[81] the right to equal treatment at trial,[82] and, perhaps, access to

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privilege, and a violation of equal protection inasmuch as it placed an extra burden of stigma on single and married women who obtained the operation. Thus, courts have already begun to recognize the principle advanced here—that unequal medical regulations that encroach on important personal rights may violate equal protection.

74. 93 S. Ct. 1278 (1973).

75. *Id.* at 1288-94; *see also id.* at 1311 (Stewart, J., concurring).

76. *Id.* at 1290.

77. *See* notes 1, 67 & 68 *supra*.

78. *See* note 11 *supra*.

79. 93 S. Ct. 1278, at 1294.

80. *Id.* at 1333-36 (Marshall, J., dissenting).

81. Griswold v. Connecticut, 381 U.S. 479 (1965). In *In re* Lifschutz, 2 Cal. 3d 415, 431-32, 85 Cal. Rptr. 829, 839, 467 P.2d 557, 567 (1970) the California Supreme Court, citing *Griswold*, warned of the potential for encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between the patient and his psychotherapist.

Where a privilege statute exists, it provides evidence of a public policy in favor of confidentiality. This makes obtaining a civil remedy for invasion of privacy easier for patients injured by out-of-court disclosures and thus helps guarantee that such disclosures will occur less often. Goldstein & Katz, *supra* note 18, at 734 n.4. *Cf.* Racine v. Morris, 201 N.Y. 240, 94 N.E. 864 (1911). The principle of *Racine*—that legislatively created duties may give rise to a private cause of action—has been fol-

lowed in cases involving medical disclosures, *e.g.*, Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. 1944), *aff'd* 269 App. Div. 970, 58 N.Y.S.2d 359 (1945). Out-of-court disclosures by medical personnel are more common than one might think. *See* Erickson & Gilbertson, *Case Records in the Mental Hospital*, in ON RECORD 391, 408-09 (S. Wheeler ed. 1969).

82. *See* cases cited notes 70 & 71 *supra*. *Cf.* San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1288 (1972). It is established that courts will not tolerate wealth-based classifications that impose unequal burdens on the rich and the poor at trial. Yet this is precisely what occurs when the law permits testimony from the therapist of the poor while forbidding it from the therapist of the well-to-do. Without privilege, of course, many patients will confide very little in their therapist. The therapeutic encounter becomes a guarded, defensive transaction in which the patient gains little (unless the therapist deceives the patient as to the degree of protection provided, *see* Section VI *infra*.). Patients who through naiveté or desperation reveal damaging material to the therapist lose the opportunity at trial to stand on an equal footing with those who can obtain private treatment. The testimony of a therapist can be utterly devastating. Even where a party is ultimately successful in court, permitting his therapist to testify against his wishes can do great damage:

(1) Revelation in a public trial that an individual has undergone psychotherapy can be harmful in itself; recall the Sen. Eagleton affair during the 1972 presidential campaign. Many employers hesitate to hire persons with a history of mental illness, and on a social level, loss of friendships and community esteem can follow public revelation that a person has suffered episodes of mental or emotional derangement.

(2) The range of psychiatric testimony, like that of psychiatric inquiry, can be extremely broad.

> Current . . . practice defines mental illness as something that can have its roots in the patient's earliest years, show its signs throughout the course of his life, and invade almost every sector of his current activity. No segment of his past or present [is] beyond the jurisdiction of psychiatric assessment . . . . While many kinds of organizations maintain records of their members, in almost all of these some . . . attributes can be included only indirectly, being officially irrelevant. But since [psychotherapists] have a legitimate claim to deal with the 'whole person,' they officially recognize no limits to what they consider relevant.

Erieson & Gilbertson, *supra* note 81 at 390. Thus the individual is subject to testimony that can range over great areas of his life.

(3) Not only does the psychiatric record consider the patient's whole life; it selects and chooses events in a way that ordinary records do not. Acts of deviancy challenge the observer to reassess the character of the people responsible for them. A friend is exposed as a homosexual; suddenly past events, chance remarks, and mannerisms begin to stand out; we begin to restructure our impression of the individual. A politician is shot: the next day the newspapers are full of accounts interpreting the background of the would-be assassin. A famous author commits suicide; in the public discussion that follows, a new person emerges. The psychiatric record essentially does the same thing—it "builds a case." The record "is not regularly used, however, to record occasions when the patient showed capacity to cope honorably and effectively with difficult life situations. Nor is the case record typically used to provide a rough average or sampling of [a patient's] past conduct. One of its purposes is to show the ways in which the patient is 'sick' . . . and this is done by extracting from his whole life course a list of those incidents that have or might have had symptomatic significance." *Id.* at 402-03. It is evident that the public revelation of this kind of selectively gathered and interpreted evidence, couched in impressive-sounding scientific terminology, has the capacity of causing the patient irremediable harm. That this risk is imposed on the indigent patients of public mental health facilities but not on the patients of private therapists constitutes an inequity of no small proportions.

medical care[83]—are fundamental.[84] This combination—discrimination on the basis of a suspect class, together with encroachment on fundamental personal interests—generally has failed to withstand constitutional scrutiny unless a compelling state interest can be shown.[85]

It is likely that whatever interests the state might advance to justify a privilege for communications to psychiatrists while withholding it from communications to psychiatric social workers would prove inadequate to support this differential treatment. State health and

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83. While the Supreme Court has never held that health care is a fundamental interest, it has implied that it would hold to be fundamental any commodity that is a prerequisite to the exercise of a fundamental interest, when denial means complete inability to exercise the interest, and when doing so would not open the floodgates. San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1298-99 (1973). In *Rodriguez* the Court found the nexus between education and certain constitutionally protected liberties to be insufficiently close to warrant invoking strict scrutiny; and it is conceivable that it might come to the same conclusion with respect to health care. However, the case for education was weakened by the relative character of the benefit provided and the imperfect correlation between financial status and the amount of funding made available to "poor" districts, factors that are not present here. *Id.* at 1288-94.

Arguing along lines similar to those suggested by the "nexus" theory, commentators have urged that health care be recognized as a fundamental right. *See, e.g.*, Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 420 (1966). Similarly, mental health is a prerequisite to the full exercise of virtually all our most cherished liberties. The right to marry, to vote, to participate in the political process—hope of fully enjoying any of these is denied to emotionally ill patients who cannot secure effective care. Thus, a national commission has urged that medical care be accorded the status of a civil right. NAT'L COMM'N ON COMMUNITY HEALTH SERVICES, HEALTH IS A COMMUNITY AFFAIR 17-37 (1966). Other legal commentaries on medical subjects agree, *e.g.*, Forgotson, Bradley, & Balienger, *supra* note 53, at 767.

Other authorities believe that effective health care, if not an absolute right, is at least a conditional one: where the state has undertaken to offer treatment, it must accept responsibility for supplying the minimal conditions necessary for making the treatment reasonably effective. Professor David Louisell, a widely respected authority on medical privilege and confidential communications, believes that psychotherapy and privilege are so inseparable that one necessarily implies the other: "The patient's right of confidential communication to his psychodiagnostician . . . is a function of his right to obtain such services. If he has a right to obtain such services, he has a correlative right to the essential confidentiality of communication." Louisell, *The Psychotherapist in Today's Legal World*, 41 MINN. L. REV. 731, 744 (1957). A recent decision by a federal circuit court announced a right to adequate rehabilitation for mentally ill patients housed in state facilities. It found that the state, having assumed the responsibility of providing services, could not maintain patients in a state of limbo for long periods of time without providing effective treatment. The opinion spoke of a constitutional right to receive "such individual habilitation as [would] give each of [the patients] a realistic opportunity to lead a more useful and meaningful life . . . ." Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972).

84. For a discussion of the fundamental-interest doctrine, *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336-42 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). *Cf. Developments in the Law*, *supra* note 69, at 1120-21.

85. *See generally Developments in the Law*, *supra* note 69, at 1124.

welfare administrators might urge, for example, that they should be free to compile and circulate reports concerning patients without the trouble and expense of ensuring confidential handling of the records of those undergoing therapy. A mere saving in administrative efficiency, however, has been held not to constitute a compelling state interest when essential personal freedoms were at stake.[86] And, as a practical matter, this suggestion makes little sense since the relatively slight administrative gain is clearly outweighed by the potential damage to the entire therapeutic program that could result from one or two well-publicized exposures.[87]

Alternatively, the state might allege that it is necessary to treat as nonconfidential mental health data gathered from public treatment centers in order to facilitate research into the causes and conditions of mental illness, delinquency, and marital discord. This interest, however, could be served by a narrowly drawn research clause,[88] permitting the state to carry out research without forfeiting the substantial benefits of privilege, particularly that of protection against disclosure in court. In addition, most, if not all, legitimate research purposes can be served by supplying data in anonymous form, or, where individualized data are essential, by the use of coded records.[89]

Another possible state interest is protection of the state fisc. It could be argued that in order to remove violators from the welfare rolls, social workers must be able to report violations of eligibility rules when these come to their attention during therapy. Protection of the state fisc, however, has likewise failed to prevail in cases involving fundamental personal rights.[90] Moreover, withholding the confidentiality privilege is not necessary to protect the state's interest; other, more effective, means are available for discovering and verifying eligibility violations than depending on leads developed in the course of therapy.[91] Thus, while the interest might have some legitimacy when applied to ordinary caseworkers or intake workers,[92] its importance is

86. Shapiro v. Thompson, 394 U.S. 618 (1969). When deprivation of an important right is threatened, the state must be ready to bear the burden of a less onerous but higher-cost alternative. Carrington v. Rash, 380 U.S. 89, 95 (1965).

87. Goldstein & Katz, *supra* note 18, at 733; note 19 *supra*.

88. *See, e.g.*, CAL. EVID. CODE § 1011 (West 1968). *Cf.* Griffin v. Medical Soc'y, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Sup. Ct. 1939). For an exposition of the "less onerous alternative" doctrine, *see, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960).

89. A. MILLER, THE ASSAULT ON PRIVACY 239-57 (1971). California, for example, has instituted a number of such measures designed to protect the privacy of research subjects. *See* Noble, *supra* note 18, at 38-39.

90. Shapiro v. Thompson, 394 U.S. 618 (1969); Douglas v. California, 372 U.S. 353 (1963).

91. For example, home visits, periodic use of questionnaires, and cross-checking with the I.R.S. and other agencies are possible alternatives.

92. *See* note 2 *supra*.

outweighed by countervailing interests in the case of psychiatric social workers.

A further state interest, discussed earlier,[93] is the desire to discourage the practice of psychotherapy by charlatans and well-meaning but unqualified amateurs. It could be argued that extending privilege to an additional class makes it more difficult to resist subsequent claims by new groups for privileged status. As was observed, however, this purpose can be served by drawing the line to include only groups whose legitimacy has received state recognition through licensing statutes or the establishment of a state job category.[94] With state control and supervision the danger of quackery would be minimal, and a ready means for resisting premature claims by new groups would be available.

Given the impressive array of reasons favoring extension of the privilege to patients of psychiatric social workers, the relative insubstantiality of the interests the state seeks to protect, and the manner in which the statutory scheme discriminates against a suspect class, it is unlikely that the state will be able to satisfy the compelling interest standard required to justify the inequity currently perpetrated by most privilege statutes.

B. The Rationality Test

Even if the courts do not apply the compelling interest standard of equal protection review, however, withholding the privilege of confidentiality from patients of psychiatric social workers probably cannot survive under the less stringent rational basis test.[95]

Under the rational basis standard, legitimate reform measures need not solve every aspect of a problem.[96] Nor is a statute void if it might possibly fail to achieve its desired effect.[97] Nevertheless, a claim that a classification is rational may be defeated by showing that the classification cannot further the purpose underlying the legislation.[98]

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93. *See* text accompanying notes 45-47 *supra*.

94. *Id.*

95. *I.e.*, a reasonable relationship must exist between the purpose of the legislation and the classification provided by the statute. *E.g.*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

96. San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1299-1300 (1973); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

97. Roschen v. Ward, 279 U.S. 337, 339 (1929).

98. *E.g.*, Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Weber v. Aetna Cas. & Ins. Co., 406 U.S. 164, 172 (1972); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Morey v. Doud, 354 U.S. 457, 467-68 (1957). *See Developments in the Law—Equal Protection*, *supra* note 69, at 1083. *Cf.* Comment, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 151-54 (1972) for an excellent discussion of legislatively mandated goals.

Thus the limitation on the therapist-patient privilege could be found irrational, since the failure to recognize a psychiatric social worker-patient privilege is inconsistent with the policies behind the therapy privilege statutes[99] and legislation establishing mental health programs for the poor. The purpose of privilege statutes is to facilitate success in treatment.[100] Since medical authorities universally recognize that breaching a patient's confidence virtually eliminates any hope of improving his condition through therapy,[101] any measure that requires the disclosure of confidential communications for the sake of efficiency or some other extrinsic value jeopardizes the entire therapeutic program.

Moreover, extending a greater degree of protection to private patients than to indigents not only fails to achieve the legislative goals, it is invidious as well. One common definition of a rational classification is "one which includes all persons who are similarly situated with respect to the purpose of the law."[102] If privilege statutes exist in order to encourage the free flow of thoughts and feelings essential for the therapeutic relationship,[103] there is no rational justification for assuming that this need is less in the case of indigent patients. On the contrary, it is generally recognized that the need for trust and confidence is greatest in dealing with the poor.[104]

Thus, the classification suffers from lack of rationality in two key respects. It fails to promote its legislative objective and it draws a distinction between the wealthy and the poor that is arbitrary and counterproductive.

VI

EQUITABLE CONSIDERATIONS: REASONABLE BELIEF AND PRIVILEGE BY ESTOPPEL

The government owes a duty to those in its care to ensure that

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99. *See* text accompanying notes 12-14 *supra*.

100. *E.g.*, C. MCCORMICK, EVIDENCE 213 (2d ed. E. Cleary ed. 1972) states this as the rule with respect to physicians generally. As to psychotherapy:

> Although it is recognized that the granting of a 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.

CAL. EVID. CODE § 1014, at 232, *Legisl. Comment* (West 1968). Accordingly, many states have enacted statutes providing privilege to many professions whose members perform a similar function, *e.g.*, psychiatrists, psychologists, clergymen, and school counselors. *See* note 11 *supra*. The state's interest in providing effective mental health treatment is also evident from its huge investment in personnel and physical facilities. *See* notes 4-6 *supra* and accompanying text.

101. *See* notes 12-14 *supra*.

102. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

103. *See* text accompanying note 13 *supra*.

104. *See* notes 15-17 *supra*.

their constitutional rights are not violated as a result of the intimidating disparity between their own power and that of their governmental custodians.[106] The state must take particular care when it is dealing with persons who by reason of their poverty, lack of education, and unfamiliarity with bureaucratic structures cannot be expected effectively to understand and protect their own interests.

Poor people are ordinarily not familiar with the subtle differences among psychiatrists, clinical psychologists, licensed clinical social workers, and psychiatric social workers.[106]

The state job specifications of psychiatric social workers set out duties[107] that cannot be carried out successfully without first establishing a confidential relationship with the client. Indeed, psychiatric social workers are required by their professional code to provide an atmosphere of trust.[108] Thus, it is inevitable that many patients of state-employed psychiatric social workers will receive the impression, from nonverbal clues and suggestions if not from overt assurances,[109] that their communications will be held in confidence. When state agencies hire psychiatric social workers knowing of their professional commitment to confidentiality, and when they assign them duties which require such confidentiality to be performed successfully,[110] the state must assume a share of responsibility for fostering in the minds of many unsophisticated patients the belief that communications to the therapist will remain private.

Given the state's responsibility for creating this impression, it would be inconsistent and inequitable for the state to assert, in a criminal proceeding, for example, that privilege does not exist.[111] Accordingly, even if patients of psychiatric social workers cannot claim privilege as a matter of right, courts should invoke their broad equitable powers and refuse to countenance such assertions.[112]

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105. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 457-72 (1966).

106. These categories may be meaningful to the well-educated clientele of private psychotherapists, but their implications are not readily perceived and appreciated by the poor and the ill-educated. Consequently, they are frequently unaware of the differences these distinctions entail with respect to their rights under the law of evidence. Interview with Bernard Diamond, Psychiatrist, Professor of Law and Criminology, University of California, in Berkeley, California, January 4, 1973.

107. *See* notes 8, 9 *supra*.

108. *See* note 20 *supra*.

109. The social worker often expressly assures the patient that his communications will be held in confidence. J. ALVES, *supra* note 9, at 92. Even without overt assurances, many patients will assume that their communications will be held confidential. Geiser & Rheingold, *supra* note 46, at 836.

110. *See* text accompanying notes 12-17 *supra*.

111. *Cf.* Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907).

112. At one time, it was widely believed that the government could not be estopped by acts of its agents. *See, e.g.*, Federal Crop Insurance Corp. v. Merrill, 332

The importance of protecting patients' legitimate expectations of privacy has been acknowledged by a number of jurisdictions. In these states, statutory provisions afford privilege to persons who, though technically not entitled to privilege, reasonably believed they were consulting an authorized medical practitioner. For example, the California Evidence Code provides for protection of persons who consult an individual reasonably believed to be a psychiatrist or physician.[113] Voluminous case law from many jurisdictions supports this rule,[114] as do many of the model codes.[115] Thus, whenever patients are led to believe that the person with whom they are dealing is a psychiatrist, they should be able to claim privilege when their mistake is a reasonable inference from the circumstances or manner in which they are treated.[116]

CONCLUSION

Many writers oppose the creation of new privileges on the ground that they inhibit the ability of courts to ascertain the truth.[117] Truth,

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U.S. 380 (1947). In all likelihood the former reluctance of courts to consider estoppel against the government rested on an unstated belief that the state treasury should not be bled in order to redeem an erroneous promise extended by a public official. In the present situation, though, financial considerations are not especially prominent; the government suffers little financial harm if it should decide to honor the expectations of privacy developed by indigent patients as a result of the therapeutic encounter. A further ground of distinction lies in the fact that in *Merrill* the government's agent acted "wrongly" toward both the government, in misrepresenting its position, and toward the farmer, in inducing him to rely on nonexistent forms of protection. Here, however, it is the government that has acted wrongly toward both parties. It has furnished a situation in which the patient is deluded into believing that he will be dealt with confidentially. And it has placed the social worker in the position of having to represent that he can provide the patient with a security that in actuality he cannot guarantee. Thus the equities in both respects—financial cost and fair play—lie more strongly in favor of estoppel here than they did in *Merrill*. In similar situations, modern courts have upheld claims of estoppel when the necessary elements of deception and detriment were present. They have been particularly sympathetic to claims in which public officers have acted, as they have here, in the exercise of a power or duty expressly conferred upon them by statute. *E.g.*, United States v. Certain Parcels of Land, 131 F. Supp. 65, 74 (S.D. Cal. 1955) and cases cited therein.

113. CAL. EVID. CODE § 1010 (West Supp. 1973). Other states have similar provisions, *e.g.*, ILL. REV. STAT. ch. 51 § 5.2 (West Supp. 1973).

114. *E.g.*, People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956); Ballard v. Yellow Cab Co., 20 Wash. 2d 67, 145 P.2d 1019 (1944); People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886).

115. UNIFORM RULES OF EVIDENCE rule 27 (1953); MODEL CODE OF EVIDENCE rule 220(b) (1942).

116. Seemingly, these statutes would only protect a patient who believed that his therapist was a psychiatrist, *i.e.*, cases where the patient's error is a mistake of fact. Mistakes of law, where the patient knows his therapist is a psychiatric social worker but thinks psychiatric social workers have privilege, would fall outside this rule, although there seems to be no reason in logic or policy for this distinction.

117. *E.g.*, C. MCCORMICK, EVIDENCE 159 (2d ed. E. Cleary ed. 1972).

however, may be pursued at too great a cost.[118] The recent growth in the number of legislatively created privileges reflects society's belief that certain relationships are so important that they must remain inviolate even in the face of demands by the judicial system.

The relationship between a psychiatric social worker and his patient, while currently unprotected by legislation, is such a relationship. It is in the best interest of society that it be protected. Legislatures should act in this critical area. Until they do, existing legal doctrines may be used to provide remedies where they are needed.

Richard Delgado

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118. Pearse v. Morse, 1 De G. & Sm. 28-29, 16 L.J. Ch. 153 (1846).

ANALYSIS OF DIFFERENCES BETWEEN THE FEDERAL RULES OF EVIDENCE AND THE CALIFORNIA EVIDENCE CODE*

*This study was prepared for the California Law Revision Commission by Professor Jack Friedenthal. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CONTENTS

FOREWORD

The following is a detailed analysis of the differences in wording between the newly adopted federal rules of evidence and the California Evidence Code. Because the wording of the comparable provisions is different in every instance, the analysis, to be of sensible length, necessarily ignores a large number of differences which would appear to have no practical significance. Furthermore, the analysis often does not quote or repeat in full the sections and rules discussed. It assumes that the reader has available both the state Evidence Code and the federal evidence rules. Frequently, references are made to actions taken by the House and Senate Committees on the Judiciary or by the House-Senate Conference Committee regarding the federal provisions. To avoid repetition of formal citations, all such references, unless otherwise specifically indicated, appear after the appropriate federal rule in the pamphlet entitled, "Federal Rules of Evidence for United States Courts and Magistrates with Notes by the Federal Judicial Center, Pertinent Advisory Committee Notes and Relevant Legislative History and An Appendix of Deleted and Superseded Materials," published by the West Publishing Company of St. Paul, Minnesota, and dated 1975.

It should be noted that the analysis is focused on differences between the state and federal rules as written and therefore does not normally criticize the substance of the provisions when no conflict exists. Even when a clear conflict does exist the analysis is limited to a discussion of the differences. No attempt has been made to explore every argument or consideration regarding each problem or to go into the way in which courts have construed or misconstrued various provisions. It is generally assumed that when the comprehensive California Evidence Code was being considered basic differences of policy, as documented in well-known articles and treatises, were thoroughly discussed and positions on controversial matters taken only after due deliberation. The fact that a federal rule adopts a different position than a California counterpart has not been considered, by itself, to raise serious questions as to the propriety of the California decision. Only when the federal rule, by its terms or by the reasoning upon which it is based, sheds new light on a problem must the California decision receive de novo consideration.

The analysis is organized according to the California Evidence Code, that is, the various provisions are considered in the order they appear in the California Code, no matter where the relevant federal provisions are to be found in the Federal Rules.

DIVISIONS 1 & 2. PRELIMINARY PROVISIONS; WORDS AND PHRASES DEFINED

The first two divisions of the California Evidence Code generally have no federal counterparts. Division 1 simply gives some basic rules of construction regarding such matters as tenses, genders, singular and plural, etc. Division 2 defines basic words used in various places throughout the code. Sometimes these definitions are crucial to understanding the substantive aspects of the state statutes, such as the definitions in §§ 150 and 225 of "hearsay evidence" and "statement." The federal rules are organized differently. The definitions of "hearsay" and "statement" for example, appear in Rule 801, the basic rule on hearsay, and the only rule to which these definitions are pertinent.

For purposes of analysis, whenever definitions differ between federal and state provisions, the differences are discussed in connection with the particular substantive rules of evidence which are affected.

DIVISION 3. GENERAL PROVISIONS

Chapter 2. Province of Court and Jury

California Evidence Code §§ 310-312 generally discuss what matters are to be decided by the court as a matter of law and what matters are to be determined by the trier of fact. The Federal Rules of Evidence do not contain similar provisions. Although there is no harm in placing such provisions in the Evidence Code, they would seem more appropriate in the Civil Procedure Code. (Decisions on preliminary facts relating to the admissibility of evidence are not treated here but in separate sections discussed below.)

Chapter 4. Admitting and Excluding Evidence

Article 1. General Provisions--Basic rules of relevancy in California are governed by § 210 which defines "relevant evidence" and §§ 350-352, which define what is and what is not admissible. Their

counterparts are Federal Rules 401-403, which are identical in substance. Evidence Code §§ 353-356 deal with special problems such as the effect of erroneous rulings of the trial court on the admission or exclusion of evidence, and the admissibility of evidence for a limited purpose. These same matters are covered by Federal Rules 103, 105, and 106, which again are practically identical in substance with the following exceptions:

1. When evidence has been excluded, and the ruling challenged, both Federal Rule 103(a) (2) and California Evidence Code § 354 provide that the ruling will not be overturned unless at the time of the ruling the court was made aware of the substance of the evidence involved by means of an offer of proof. However, unlike the federal rule, § 354(c) of the California statute exempts from this requirement any situation in which the evidence was sought by questions asked during cross or recross-examination. The reason for this exemption is unclear. It is true, of course, that on cross-examination, unlike direct, the questioner may not know the answers to the questions asked, but it is difficult to see why this should be allowed to interfere with the basic purpose of § 354 to permit a subsequent court to see just what information was excluded. Even if the trial court was incorrect in excluding the evidence, if the information was of trivial significance, the case should not be reversed or a new trial ordered. Without such information appellate courts have little choice but to overturn any decision in which excluded evidence might conceivably have altered the outcome. There seems little reason why a party should have to make an offer of proof with regard to direct examination and not to cross-examination. In either case, an appellate court is in the same difficult position if it does not have before it the substance of the evidence excluded.

The matter is complicated by the fact that it is not always clear what is examination versus cross-examination. Under California Evidence Code § 776, for example, one party can call to the witness stand an opposing party who may then be examined "as if under cross-examination." (Emphasis added.) Suppose the trial court improperly upholds an objection to an examining party's question in such a situation. Is an offer of proof unnecessary to preserve the matter for appeal because this is cross-examination? Or do the words "as if" mean that the examination is

to be treated as direct examination except for the technique of questioning, in which case § 354 would require an offer of proof.

Given these uncertainties of application, plus any clear justification for a special exemption, § 354(c) should be eliminated.

2. Section 354(b) exempts from the offer-of-proof requirement situations in which "the rulings of the court make compliance * * * futile." The chief purpose of this exemption is to avoid the necessity of multiple objections when it is clear from prior rulings that evidence will not be admitted and the reasons therefor are clear. For example, if the court rules out any evidence on an issue, on the ground that the issue is not material to the case, a party should not have to make an offer of proof on the matter with regard to the testimony of each and every witness. However, the language of § 354(b) seems inappropriate to its purpose. Use of the word "futile" indicates that an offer of proof is unnecessary if it is clear that the evidence would be rejected at trial. This has nothing to do with the major purpose of the offer of proof, to provide a proper record for decision on motion for new trial or appeal. Federal Rule 102(a) (2) handles the situation by exempting from the offer-of-proof requirement situations where the substance of the evidence is apparent from the context within which the questions were asked.

The federal rule is preferable and should be substituted for § 354(b). Even the federal wording is somewhat uncertain and should be clarified to ensure that what is required is a clear record to be available on subsequent challenge.

3. Federal Rules 102(c) and (d) have no California counterparts. Section (c) admonishes courts in jury cases to avoid presenting inadmissible evidence to the jury, suggesting that offers of proof be made outside of the hearing of the jurors. The matter is so obvious that no specific California statute is required.

Rule 102(d) permits parties, on challenge to rulings on evidence, to assert "plain errors affecting substantial rights" even though they were not brought to the attention of the judge who made the rulings. Such an escape clause probably should be included in the California Evidence Code to avoid miscarriages of justice. Admittedly, the matter is a difficult one; the presence of such an "escape" induces litigants

on appeal to raise all sorts of matters that should have been but were not raised below. One must count on courts to restrict the operation of such a clause only to grievous situations.

Article 2. Preliminary Determinations on Admissibility of Evidence--California Evidence Code §§ 400-406 govern the determination of preliminary fact questions upon which admissibility of evidence depends. Federal Rule 104 deals with the same matters, but in a much less detailed manner.

1. The California Code divides preliminary questions into two basic types, those to be determined solely by the judge as a matter of law and never brought to the attention of a jury, and those in which a court decision admitting the evidence may be "second-guessed" by the jury. In the latter category, defined in § 403, are situations, and only situations, in which the preliminary question governs whether the evidence is relevant, or whether a witness has personal knowledge of the subject of his testimony, or whether a proferred writing is authentic, or, finally, whether a person made a statement or engaged in conduct when that statement or conduct is the evidence sought to be introduced. With regard to these, and only these matters, the court not only must make its own decision on admissibility, but then, if the evidence is admitted, the court "may, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proferred evidence unless the jury finds that the preliminary fact does exist."

Federal Rule 104 has no provisions of this type. Rule 104(a) merely states that preliminary questions concerning the admissibility of evidence shall be determined by the court. However, Federal Rule 104(e), which is nearly identical in wording to § 406 of the California Code, specifically permits a party to introduce before a jury, evidence relevant to the weight of evidence or to a witness's credibility. Since all of the preliminary questions within § 403 relate to the weight or credibility of evidence, the same evidence which is presented to a California jury will also be admissible before a federal jury. The difference is that in the federal court no specific instructions are mandated as they are under § 403. Suppose for example that a trial judge determines that a witness has first-hand knowledge of the matters to which he testifies,

but the jury disagrees. In California the jury normally will be told that it must ignore the testimony; in federal court, the jury may give the testimony less weight because of its hearsay nature, but the jury will not be ordered to disregard it.

Although Federal Rule 104 takes the orthodox view that is generally, but not universally applied in most courts, see McCormick, Evidence § 53 (2d ed. 1972), the California approach is not irrational or unjustified. If it has any drawback, it is the difficulty that an attorney has in deciding the nature of the preliminary facts involved in a particular situation. See generally the official comments to § 403 and 405 which discuss the various types of situations in which the jury is and is not instructed as to preliminary fact determinations.

Unless courts and attorneys are shown to have had substantial difficulty in applying the current California rules, however, there seems little reason for altering them. In this regard see Kaus, All Power to the Jury--California's Democratic Evidence Code, 4 Loyola L. Rev. 233 (1971), a scholarly analysis, severely criticizing the California provisions.

2. Federal Rule 104(d), which has no state counterpart, provides that an accused does not, by testifying on a preliminary matter, subject himself to cross-examination on other issues in the case. This is of substantial importance, since it allows an accused to give such testimony without waiver of the right to self-incrimination.

The matter may sufficiently be covered by California Evidence Code § 773(a) which limits the scope of cross-examination to matters brought up during direct examination. To some extent, a broader scope of cross-examination in the particular situation may be unconstitutional, see United States v. Simmons, 390 U.S. 377 (1968). Nevertheless even though Federal Rule 611(b) generally limits the scope of cross-examination, as does § 773(a), promulgation of Rule 104(d) was thought necessary to clarify and protect the right of a criminal defendant with regard to testimony on preliminary matters. It would seem useful and appropriate for California to adopt a similar special provision.

3. Federal Rule 104(a) states that when a court makes a decision on a preliminary fact for evidence purposes, the court is not bound by the rules of evidence (except for the rules of privilege). Courts,

including California courts, traditionally have relied on affidavits and other forms of hearsay to make all types of legal decisions. However, with respect to preliminary decisions on the admissibility of evidence, California has frequently been cited as a classic example of a state that does not permit use of otherwise inadmissible evidence. In 1962, the California Law Revision Commission in its Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Article VIII. Hearsay Evidence, pp. 468-471, discussed the matter at some length and recommended adoption of a clause similar to that now adopted in Federal Rule 104(a). Indeed the Advisory Committee to the Federal Rules relied heavily on the California Study in adopting 104(a). Yet the California legislature rejected such a clause in the California Evidence Code. This position should be reexamined since it goes against the views of virtually every commentator who has considered the matter. See, e.g., McCormick, Evidence p. 122 n.91 (2d ed. 1972).

Chapter 5. Weight of Evidence

California Evidence Code §§ 410-413 govern the weight to be given various types of evidence. Such provisions are normally thought to involve matters of civil procedure rather than of evidence and hence are not contained in the Federal Evidence Rules. There is no particular reason, however, for repeal of any of these provisions which basically state matters of simple logic.

DIVISION 4. JUDICIAL NOTICE

California's judicial notice statutes, Evidence Code §§ 450-460, are based on Rule 9 of the Uniform Rules of Evidence, adopted in a number of states. The federal approach to judicial notice differs in several ways from the California provisions.

1. The federal rule, Rule 201, is specifically limited only to adjudicative facts, i.e., those which would otherwise be presented to a trier of fact for decision. So-called "legislative" facts, i.e., facts upon which the court determines the applicable law, are not included. These "facts" are usually put forth by lawyers in briefs to convince the court to adopt a particular legal principle. The California code does not distinguish between legislative and adjudicative facts. Second, the

federal rule does not include judicial notice of foreign or domestic law or regulations, whereas California law expressly includes these matters.

Neither of these differences is sufficient to justify alteration of the California provisions. Discussion of the determination of legislative facts is largely academic in the context of California law which permits judicial notice only of indisputable facts. If a judge believes a fact to be indisputable, legal determinations will be made accordingly, whether or not it is said that the fact is "judicially noted." If the judge thinks the fact is disputable, judicial notice would be improper. Under federal rules judicial notice of law or regulations is considered to be a matter for procedural, not evidentiary rules. Indeed, Federal Rule of Civil Procedure 44.1 specifically deals with the manner of proving the law of a foreign country. Since lawyers in California have become accustomed to treating judicial notice of law as "evidence," there seems little reason to shift these provisions to the Code of Civil Procedure.

2. California Evidence Code § 457 requires the court, on request, to instruct the jury to accept as a fact any matter judicially noted. Federal Rule 201(g) does so only in civil cases; in criminal cases the court must tell the jury that it may "but is not required to accept as conclusive" judicially noted facts. This limitation in criminal cases was added by the House Committee on the Judiciary which felt that a mandatory requirement in criminal cases was in violation of the spirit of the 6th Amendment right to trial by jury. Arguably, it is like a directed verdict of guilt which is not permitted.

California should not accept the federal version for two reasons. First, the federal rule is illogical; the notion that the right to jury trial requires an instruction to a jury that it can properly ignore indisputable facts is ridiculous. A jury <u>can</u> do so, but there is no reason to put an official stamp of approval on it. Secondly, the rule is written so as to permit the prosecutor as well as the defendant to obtain such an instruction. A finding of guilt based on jury rejection of an indisputable fact which would have required acquittal is not only absurd, but contrary to the spirit of both federal and state constitutions.

DIVISION 5. BURDEN OF PROOF AND PRESUMPTIONS

Division 5 of the Evidence Code deals extensively with burden of proof and presumptions. The Federal rules do not touch on burden of proof and mention presumptions only to state that in the absence of a specific statute or rule to the contrary, they shall be considered only to shift the burden of producing evidence and not the burden of persuasion. The California code in §§ 603 and 604 defines the criteria for two different types of presumptions and in Article 3 (§§ 630-646) and Article 4 (§§ 660-669) lists specific presumptions that fall into the categories.

Federal Rule 302 specifically provides that state rules of presumption shall apply in federal cases to which state law is applicable, thus recognizing the justification for local regulation. Given the careful definitions and examples in Division 5, the Evidence Code should not be altered to adopt the more general federal rule providing a "presumption" as to the type of presumption.

DIVISION 6. WITNESSES

Chapters 1 & 2. Competency and Requirements of Oath

Federal Rules on competency and requirements of taking an oath generally parallel California rules, except:

1. California Evidence Code § 701 holds a witness disqualified if he cannot express himself directly or through an interpreter so as to be understood or if he is incapable of understanding the duty to tell the truth. There is no comparable federal rule. However, evidence of such witnesses could be, and undoubtedly should be excluded under the general provision (Rule 403, cf. California Evidence Code § 352) for avoiding evidence that wastes time or is unduly prejudicial. There seems no reason to alter the California rule.

2. California Evidence Code § 703 permits a judge to testify in a trial over which he presides, if, but only if, it is agreed upon by all parties, in advance of his being called. If any party objects to his being called, the judge must declare a mistrial and order the case transferred to another judge.

Under Federal Rule 605 a judge is incompetent to testify in a trial over which he presides. This rule seems preferable to the California

provision, despite all of the latter's safeguards. If the testimony relates to highly controversial matters, the judge, on his own, should disqualify himself. But if he does not, a party and his attorney will be very reluctant to refuse permission, even though such refusal would result in a trial before a different judge. The first judge would still be a witness and a party may fear that the testimony will be colored by the judge's feeling that his integrity has been questioned. The lawyer may fear that an objection to the judge's taking the stand may turn the judge against him in subsequent cases.

The only time when a presiding judge's testimony might be justifiable is when the issue first appears in the middle of trial, and is non-controversial. The testimony could then avoid the cost and delay of a new proceeding. But if the matter is non-controversial, so that the parties would not object, they may reach the identical result by stipulation. Even on what appears to be the simplest, most direct matter, an attorney could ask an improper question, or the judge as a witness could blurt out an inadmissible answer. The judge, acting as judge, would be in the undesirable position of having to rule on the propriety of his own testimony.

It is therefore recommended that the federal rule be adopted in place of present Evidence Code § 703.

3. Evidence Code § 704 permits a juror to testify to the panel on which he is sitting, if but only if it is agreed by all the parties in advance to his being called. Federal Rule 606(a) declares a juror incompetent to testify before the panel on which he is sitting.

The federal provision seems preferable. Although the dangers of prejudice are not as great when a juror testifies, as when the presiding judge does so, it is fundamentally unsound to allow jurors to be witnesses. One cannot expect a juror to be objective as to her own testimony; furthermore the deliberations cannot be as free and open as they should be. A party who refuses permission for a juror to testify may fear that the juror will be able to ascertain which party made such refusal and will be biased against the objecting party for impugning the juror's honesty. In almost any case in which all parties would be willing to permit juror testimony, undoubtedly on non-controversial facts, the purpose can be accomplished by stipulation.

California § 704 should be repealed and Federal Rule 606(a) adopted.

Chapter 3. Expert Witnesses

1. The California definition of an expert in Evidence Code § 720 generally parallels Federal Rule 702. Also the rules as to court appointed experts (California Evidence Code §§ 722(a), 730-733; Federal Rule 706) are consistent with one another, except that Rule 706(a) specifically requires a court appointed expert to advise the parties of any findings he makes and specifically allows the parties to take the expert's deposition. It would appear useful to amend California Evidence Code § 732 specifically to add similar provisions. Parties should automatically receive a copy of such an expert's findings in order to be able to deal with the expert's testimony at trial. The current discovery provisions in §§ 2016 and 2019 of the California Civil Procedure Code appear adequate to permit the taking of such an expert's deposition, but a specific clause allowing such a deposition would clear up any uncertainty that a court appointed witness is to be specially treated.

2. Evidence Code § 721(b) governs the cross-examination of an expert in regard to scientific, technical or professional publications. Such publications may be utilized only if the witness referred to or relied on such publication in forming his opinion or if the publication has itself been admitted into evidence.

This rule must be considered in light of the very limited hearsay exception for books of this type. Pursuant to Evidence Code § 1341, "historical works, books of science or art, and published maps or charts" are admissible only when offered to prove facts of general notoriety and interest. On the other hand Federal Rule 803(18) excepts from the hearsay rule statements in historical or scientific publications if "called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination," "and established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." There is no specific federal rule solely governing cross-examination of experts by use of publications because Rule 803(18) obviously allows any reliable work to be admitted into evidence and hence used for cross-examination.

Because California does not have a provision akin to Rule 803(18), cross-examination of experts based on authoritative statements in leading publications can be thwarted if the witness merely states that he

did not refer to the publication in forming his opinion. The restrictive view taken in Evidence Code § 721(b) resulted from fear that a zealous cross-examiner, if he could utilize statements in any scientific treatise, would be able to place unreliable or interested statements before the jurors who might then consider them for their truth, rather than for the limited purpose of deciding if the expert witness was or was not reliable. Certainly this danger can be overcome with less stringent methods. First, there seems little reason to prohibit cross-examination based on publications that the witness himself admits are authoritative and reliable, even though he did not refer to them. Secondly, if other experts establish the reliability of a particular authority there seems little reason to permit the witness to thwart his own cross-examination by his refusal to acknowledge the validity of the work.

There is no need to alter Evidence Code § 721(b) to achieve a more desirable result. If § 1341 is altered to conform to Federal Rule 803(18) to permit admission of reliable scientific treatises an an exception to the hearsay rule, then under the terms of § 721(b) such treatises can be used for cross-examination purposes.

It should be noted that such a change might be less dramatic than might first appear. Under the present law, if an expert is called by one side to give an opinion, it is arguable that passages from publications would not be barred if introduced solely to show what he relied upon as opposed to the truth of what they say. See California Evidence Code § 802 which permits an expert to "state on direct examination the reasons for his opinion and the matter * * * upon which it is based." If § 802 is read to permit introduction of publications and, if they are not excluded as unduly prejudicial, they would be in evidence and could be used to impeach any opposing expert under § 721(b).

Where a change in California law would have its most important effect is in a case in which the defending party wishes to challenge plaintiff's expert without the expense of calling an expert of its own. If it could induce plaintiff's expert on the stand to acknowledge the reliability of the publication sought to be used, or if the court could take judicial notice of the reliability, much time and expense could be saved. Such a new provision would be especially helpful in cases in

Municipal or Justice courts in which the sums involved cannot justify the cost of expert testimony. Further consideration of this matter is contained in the discussion of § 1341.

Chapter 5. Method and Scope of Examination

In general the federal rules governing examination of witnesses are in harmony with California Evidence Code provisions. The latter are detailed in spelling out such matters as the order of examination, the right to recall witnesses, and who is an adverse witness for cross-examination purposes, whereas the Federal Rules leave the matter up to the court. However, the California provisions are sufficiently flexible to obviate any practical differences. A few specific matters do require special consideration:

1. California Evidence Code § 770 provides that extrinsic evidence of a witness' statement inconsistent with his testimony is not admissible unless the witness has an opportunity, on the stand, to explain or deny it. This provision is parallel to Federal Rule 613(b) except that the latter specifically exempts from the rule admissions of a party-opponent, which can be introduced into evidence whether or not the party-opponent has taken the stand. It is obviously not the intent of § 770 to restrict introduction of such admissions when a party decides to testify and contradicts the admission. See California Evidence Code § 1220. For clarity, a new subdivision (c) should be added to § 770 exempting admissions of an opposing party.

2. California Evidence Code § 771 and Federal Rule 612 spell out the obligation of a party to produce any writing used to refresh a witness' memory. The provisions differ in several important respects:

(1) Under § 771(a), an adverse party has a right to inspect such a writing whether or not it was used to refresh the witness' memory before or during testimony. Federal Rule 612 provides a right of inspection only if the writing was used to refresh the witness' memory on the stand; production of writings used to refresh a witness' recollection prior to testimony is allowed only when the court "in its discretion determines [that production] * * * is necessary in the interests of justice."

The latter language was inserted by the House Committee on the Judiciary to avoid an automatic fishing expedition by one party into the papers of opposing counsel. This limitation makes practical sense since an attorney otherwise will feel obligated carefully to exclude from the file shown to a potential witness any documents which the opposing party has not seen and is not entitled to obtain through discovery.

The potential harm under § 771(a) is enhanced by what would appear to be a technical drafting error. Unlike Federal Rule 612 which governs writings used to refresh a witness' memory for the purpose of testifying," § 771(a) applies to any writing used to refresh a witness' memory "with respect to any matter about which he testifies." The California statute thus appears to require production of a document even though the witness had reviewed it months prior to his testimony and for an entirely different purpose.

It would thus seem appropriate to revise § 771(a) to conform with the relevant provisions of Federal Rule 612. In doing so, however, care should be taken to ensure preservation of the right of the defendant in a criminal case to compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in that witness' testimony. This right exists whether or not the written statement has been used to refresh the witness' recollection. See People v. Estrada, 54 Cal.2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960). A nearly identical federal provision is established by the so-called "Jencks" statute, 18 U.S.C. § 3500, and is referred to specifically in a special clause in Rule 612.

(2) Federal Rule 612 contains the following provision: "If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto." The California rule, on its face, requires the entire writing to be produced. It would seem appropriate to amend § 771 to add the quoted sentence. This provides protection for a party from unwarranted intrusion into matters having no bearing on the testimony.

(3) Under § 771, failure of a party to comply with a demand to produce a writing used to refresh a witness' testimony requires that the

testimony be stricken. (There is no penalty whatsoever, however, if the document is not reasonably procurable.) By way of contrast, Federal Rule 612 provides for the striking of testimony only if the prosecution in a criminal case "elects not to comply. Under any other circumstances, the court has discretion to "make any order justice requires."

If § 771 were to be amended as suggested in (1) and (2) above, the automatic penalty it now contains would not be inappropriate, and, indeed, is arguably preferable to the uncertainty of Federal Rule 612. But given the current language of § 771, the automatic striking of testimony seems particularly harsh since a party may wish to withhold documents solely because disclosure of matters contained therein, irrelevent to the witness' memory, may be embarrassing or prejudicial. Thus, if the remainder of § 771 is to be retained as is, the portion pertaining to the penalty for the failure to produce should be altered to provide the flexibility now contained in Federal Rule 612.

3. California Evidence Code § 775 provides, as does Federal Rule 614, that the court may call and interrogate witnesses. Federal Rule 614(b) goes on, however, specifically to permit the court to interrogate witnesses called by a party. Evidence Code § 775 is ambiguous. It permits the judge to interrogate witnesses called by the court "the same as if they had been produced by a party." It is unclear whether this clause assumes that the court has power to interrogate a witness called by a party, or whether it merely means that the court's scope of interrogation of witnesses it calls is limited to usual rules of examination by parties. Since it is common practice for the court to interrogate witnesses called by the parties in the interest of getting at the truth, a specific provision permitting such questioning should be included. Such a clause would fit well into Evidence Code § 765 which generally gives the court power "over the mode of interrogation of a witness" which itself could be read to permit examination by the judge. Adding such a provision to § 765 would automatically lift the ambiguity from § 775.

4. California Evidence Code § 777 allows the court to exclude witnesses from the courtroom when they are not subject to examination, except for parties. Federal Rule 615 is parallel except that it also prohibits exclusion of "a person whose presence is shown by a party to

be essential to the presentation of his cause. It is recommended that this clause be added as subsection (d) of Evidence Code § 777. It may well be that exclusion of such a person, e.g., an expert whose presence is imperative to aid in the evaluation of the testimony of an opponent's expert, would constitute an abuse of discretion under current § 777. Nevertheless, inclusion of the provision would eliminate doubt as to when exclusion of such witnesses is proper.

Chapter 6. Credibility

The California provisions regarding attacking and supporting credibility are generally quite similar to the federal rules. However, California Evidence Code § 780 which lists many of the grounds upon which credibility can be attacked or supported, has no federal counterpart. Similarly, there is no federal provision comparable to Evidence Code § 782 dealing with credibility of a complaining witness in a rape case, or to Evidence Code § 791 dealing with rehabilitation of a witness by use of prior consistent statements.

Provisions with important differences are as follows:

1. California Evidence Code § 787 prohibits for attack or support of credibility the use of specific instances of conduct relevant only to prove a trait of character (except for prior felony convictions). Federal Rule 608(b) is identical except that it permits the court, in its discretion, to admit on cross-examination of a witness specific incidents "(1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." The federal rule tends properly to balance the need for effective cross-examination with the dangers of using specific isolated incidents of improper conduct by limiting the evidence to matters involving truthfulness. The right to confront a witness with the fact that the witness previously lied may be vital, even though the witness was not under oath or convicted of perjury. The rule itself provides that the court may in its discretion keep out such evidence, underscoring the power already granted in § 352, the general relevancy provision, which gives the court such power over any item of otherwise admissible evidence. The question whether to alter the California law is a close one; on balance the federal rule seems preferable and § 787 should be amended to conform to it.

If § 787 is altered to permit limited inquiry into specific incidents, then an additional sentence included in Federal Rule 608(b) should also be added as follows, "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility." When a witness takes the stand, he cannot claim the privilege of self-incrimination as to matters about which he testified, thus defeating meaningful cross-examination. However, when cross-examination refers only to specific incidents as to the witness' credibility, it is too harsh to require a waiver of the privilege of self-incrimination, and it could result in grave abuse. A witness could be called solely with the thought in mind to trap him into admitting a prior criminal perjury. This is possible since a party can impeach his own witness. California Evidence Code § 785. If this safeguard is not adopted, then the admission of specific incidents regarding truthfulness should not be allowed.

2. California Evidence Code § 788 provides for impeachment by evidence of a prior conviction of a felony. Federal Rule 609(a) differs in that it allows (1) evidence of any conviction punishable by death or imprisonment for more than one year or (2) any conviction, regardless of the punishment, involving dishonesty or false statement.

There are many difficulties with the California provision. First, the "felony" designation is imprecise when related to convictions outside California. Suppose, for example, that another state designates all of its crimes as felonies? The federal designation in Rule 609(a)(1), related to the punishment, is preferable. It also appears to coincide generally with the definition of a felony in California. Thus, at the very least § 788 should be altered to substitute for the word felony a clause relating to the punishment available for the crime in question.

Both Federal Rule 609(a)(1) and Evidence Code § 788 are deficient, however, in not distinguishing the <u>type</u> of conduct. Why should <u>any</u> felony, even one not related to truth and veracity, be admissible to impeach a witness? The arguments for a different approach are well documented. California Law Revision Commission, Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence, Article IV. Witnesses, pp. 756-761 (1964). These arguments were rejected when

the new Evidence Code was adopted. The California courts have, however, made clear that the nature of the crime involved should be considered when the court decides whether the prejudicial effect of evidence of conviction outweighs its probative value. See Comment, 9 U. San Francisco L. Rev. 491, 504-508 (1975).

Federal Rule 609(a)(2) goes beyond Evidence Code § 788 to permit evidence of nonfelony convictions involving "dishonesty or false statement." There is evidence that 609(a)(2) is poorly drafted, and that what was meant was "dishonesty and false statement." Convictions of petty theft or minor crimes of violence evidently were not intended by Congress to be included, as opposed to matters such as perjury, false statement, criminal fraud, embezzlement, or other crimes involving some element of deceit, untruthfulness or falsification. See Conference Committee Report on Rule 609(a), H.R. 5463 in House Report No. 93-1597, U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess. No. 12A, p. 88 (January 15, 1975).

It would be proper to amend § 788 to permit evidence of conviction of nonfelonies, but limited to those involving elements of deceit or untruthfulness. These are more significant for meaningful impeachment than are felonies which do not involve such false statements. However, California should avoid two additional defects in the federal rule. First, admission of felony convictions are specifically made subject to a determination "that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant," whereas no similar provision exists for nonfelony convictions involving dishonesty or false statements. Second, the Conference Committee Report, cited above, makes clear that this balancing clause, even in its application to felony convictions, is directed to criminal cases when the defendant is the witness. The Conference Committee states that, in all other situations, admission is automatic and not subject to discretion of the court, which would seem to render inapplicable the general provision that allows rejection of any evidence when prejudice outweighs probative value. California should be careful in drafting its provisions not to arrive at a similar conclusion. The court should always have discretion, as it does with other types of evidence, to hold inadmissible convictions which, in context, would be more prejudicial than probative. See People

v. Beagle, 6 Cal.3d 756, 492 P.2d 1, 99 Cal. Rptr. 313 (1972), upholding such discretionary power in cases involving Evidence Code § 788.

3. The California Evidence Code has no counterpart to Federal Rule 609(b) which generally prohibits impeachment of a witness by use of a prior conviction if ten years have elapsed since either the time of the conviction or release of the witness from confinement. Under Rule 609(b) the court can admit the evidence even after the ten year period has elapsed if the proponent of the evidence gives the adverse party advance written notice of his intent to introduce it so that the adverse party can contest its use and if the court finds that the probative value of the evidence outweighs its prejudicial effect. Ironically, the federal rule was adopted from an original proposed version of California Evidence Code § 788 which was rejected. 7 Cal. Law Revision Commission, Reports, Recommendations, and Studies, pp. 142, 144 (1965).

The Federal provision does little more than put a somewhat heavier burden on the proponent of the evidence after the ten-year period has elapsed. California courts are now free to reject older convictions as being unduly prejudicial. In substance, little would be gained by adopting the provisions of Rule 609(b).

Federal Rule 609(d) also has no California counterpart. It allows evidence of juvenile adjudications to be used to impeach a witness, other than a defendant, in a criminal case. The evidence is admissible only if a conviction of the offense charged could have been used to attack the credibility of an adult and the evidence is necessary for a fair determination of the issue of guilt or innocence. The purpose of the rule is to permit exceptions to the prevailing view, followed in California (see Witkin, Evidence 1147 (1966)), that juvenile adjudications are not convictions and cannot be utilized in any situation. Need for such evidence exists where guilt or innocence may hinge on the testimony of a single prosecution witness whose past juvenile record of perjury, if admissible, casts grave doubt on what otherwise appears to be solid evidence of guilt.

However, in an atmosphere such as that in California, where juvenile records are generally inaccessible (see California Welfare and Institutions Code § 827), and where the juvenile adjudication is deemed not to be a criminal prosecution for any purpose in order to protect the

minor involved (see California Welfare and Institutions Code § 503), even such a limited rule would be unwieldy and unwise. Application would be spotty depending upon whether an attorney somehow learned of the witness' past record. Prosecutors would normally have an advantage since each would at least know about those juvenile matters handled by his office. Finally, in difficult cases, a good citizen with a bad juvenile record might find his past, carefully concealed up to that point, spread on the public record simply because, through no fault of his own, he witnessed a relevant occurrence and was subpoenaed to testify concerning it.

Unless and until the current notions of juvenile adjudications are altered, California should not adopt Federal Rule 609(d).

5. Federal Rule 609(e) provides that, although pendency of an appeal does not render evidence of a conviction inadmissible, the fact that an appeal is pending is admissible. California has no concomitant provision, but case law clearly provides that pendency of an appeal does not affect admissibility. See People v. Scrivens, 276 Cal. App.2d 429, 81 Cal. Rptr. 86 (1969). It seems unnecessary for California to codify the case law since the matter seems so obvious. The federal provision regarding the right to introduce the fact that an appeal has been taken is questionable. The filing of a notice of appeal is arguably irrelevant. The federal rule may even encourage frivolous, "temporary" appeals of prior convictions. No special California provision should be adopted.

6. California Evidence Code § 791 governs the admissibility of prior consistent statements of a witness to rehabilitate the witness after his credibility has been challenged. There is no comparable federal rule, and thus it appears that it is up to the federal court in each case to determine, under general rules of relevancy, when such rehabilitation is appropriate. The lack of a federal provision is surprising. Courts have traditionally limited use of prior consistent statements to situations in which a charge is made that the witness developed a plan or motive to give false testimony. See generally McCormick, Evidence 105-106 (2d ed. 1972). A statement made prior to the time the alleged plan or motive was formed, if consistent with testimony at trial, is powerful evidence that no such plan was formed or carried into effect. Some courts go further and admit a prior consistent statement of a witness to bolster his claim that he did not make a

prior inconsistent statement as claimed by the party who cross-examined him. The consistent statement must have been made at or near the time the alleged inconsistent statement was said to have been made.

Other than in these limited situations, courts have generally excluded prior consistent statements. It must be remembered that such statements are hearsay with regard to their truth; when admissible to rehabilitate a witness they are relevant only because they were made. Yet it is difficult, if not impossible, for jurors to ignore the truth of such statements and consider them only in context of whether a witness is or is not to be believed. Hence, as noted below, modern courts provide a hearsay exception for such statements once they are admitted to rehabilitate; thus, the statements can be considered not only as to credibility, but for their truth as well. This, of course, underscores the need for strict rules limiting admissibility. The fact that a witness has said something over and over again may delude a jury into believing it is true. In fact, there is very little evidentiary value to such repetition since it in no way guarantees that a witness is not lying or mistaken. If prior consistent statements were freely admissible, attorneys would encourage potential witnesses to repeat their stories to a broad range of acquaintances.

There is some indication that the lack of a federal rule governing admissibility of consistent statements was due to an oversight. Federal Rule 801(d)(1)(B) provides that prior consistent statements are not barred by the hearsay rule if they were made in a formal hearing subject to cross-examination and are offered to rebut a charge of "recent fabrication or improper influence or motive" on behalf of the witness to falsify his testimony. The quoted language is derived from the traditional rule regarding the admissibility of consistent statements for rehabilitation purposes. This strongly implies that drafters of the federal rules assumed that the traditional limits would apply. Otherwise why not make the hearsay exclusion apply to <u>any</u> statement made in a formal hearing subject to cross-examination and admitted to rehabilitate a witness? Certainly there is no reason whatsoever to grant a hearsay exclusion solely because the statement rebuts a charge of fabrication; there is nothing in such a statement that renders it any more immune to hearsay dangers than any other consistent statement.

The structure of the California provisions regarding consistent statements is substantially preferable to the federal rules. Section 791 governs when the statements are admissible for rehabilitation; § 1236 grants a hearsay exception for all statements that are admissible under § 791. Important differences between Federal Rule 801(d)(1)(B) and § 1236 regarding when such statements are admissible despite the hearsay rule are discussed later in the section on hearsay. There is some question, however, as to whether § 791 is not too liberal in admitting prior consistent statements. Section 791(b) adopts the traditional approach admitting statements to refute a change of recent fabrication or improper motive, if the statements were made prior to the alleged time the motive or decision to give false testimony was formed. However, § 791(a) goes somewhat beyond the traditional rule by permitting a consistent statement to be admitted if the witness' credibility has been attacked by a prior inconsistent statement and the consistent statement was made prior to the inconsistent statement. The argument is that the production of an inconsistent statement is, in itself, akin to a charge that the witness formed a motive to give false testimony and, therefore, § 791(a) is a mere extension of the general rule. This reasoning is very weak indeed. One can make inconsistent statements, and often does, without having formed a plan or motive to give false testimony. A good examiner, on deposition, invariably will be able to push a witness to say things that will prove inconsistent with his subsequent testimony at trial. It is a rare witness who gives the exact same story twice. As noted above, in most situations, the value of a consistent statement is minor at best. After all, the witness has testified directly on the matters at issue and has been subject to cross-examination and re-direct.

In sum, then, the existence of § 791 covering consistent statements is preferable to the federal situation where there is no rule at all. On the other hand, § 791(a) should be reconsidered with an eye to its repeal.

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

The California Evidence Code contains a number of general provisions governing opinion testimony of lay and expert witnesses that parallel federal evidence rules governing the same matters. The California code contains two general provisions not covered in the federal

rules, § 803 dealing with opinions based on improper matter and § 804 dealing with expert opinions based on the opinion or statement of someone other than the witness. These two sections are basicially procedural and do not conflict with any policy as set out in the federal rules. California also has a number of specific provisions, regarding certain types of opinion that have no parallel in the federal rules. Chapter 1, Article 2 (§§ 810-822) contains special provisions for evidence of valuation in condemnation cases; and Chapter 1, Article 3 (§ 870) deals with opinion on the question of insanity. In addition, Chapter 2 (§§ 890-897) incorporates the Uniform Act on Blood Tests to Determine Paternity. Each of these sections has obviously been the subject of detailed, specialized study and the advent of the federal evidence rules is no reason for alteration.

There is only one significant inconsistency between the California and federal provisions on opinion. Evidence Code § 800 allows opinion of a lay witness "as is permitted by law, including but not limited to an opinion" that is (a) based on first hand knowledge, and (b) "helpful to a clear understanding of his testimony." (Emphasis added.) Federal Rule 701 flatly limits lay opinions to those which are (a) based on first hand knowledge and (b) "helpful to a clear understanding of his testimony or the determination of a fact in issue." (Emphasis added.)

The open ended nature of the California provision is somewhat matched by the additional words in "(b)" of the federal rule. Even so, there are differences. Conceivably a lay witness in California could, in a proper case, give an opinion not entirely based on his first hand knowledge, whereas this would not be permitted under Federal Rule 701. For example, California courts permit a witness to testify as to the value of his own real property, see Witkin, California Evidence § 403 (1966). Such an opinion often will be based, at least in part, on statements of real estate brokers or others rather than solely on the witness' own perceptions.

The California rule seems preferable to Federal Rule 701. The court should have flexibility to accept lay opinion whenever its probative value outweights undue prejudice.

DIVISION 8. PRIVILEGES

[Analysis of Differences Between Division 8 of the California Evidence Code and the Proposed Federal Rules on Privileges Rejected by Congress]

The provisions regarding privileges in the Proposed Federal Rules of Evidence as approved by the Supreme Court, were rejected by Congress for two reasons. First, many of the legislators believed that promulgation of privilege rules was beyond the power of the rule makers and that the rules should be developed on a case by case basis. Second, specific proposed regulations on privilege were subjected to severe adverse criticism for their substantive content. See, e.g., Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673 (1975). It is important to keep the latter in mind when considering whether or not California should adopt the federal proposals.

Chapters 1-3: Definitions and General Provisions

California Evidence Code §§ 900-905, 910-920, govern details of privilege not involved with the substance of the privileges themselves (e.g., waiver, instructions, error in overruling claim, etc.). Some of the same ground is covered by Proposed Federal Rules 501, 511-513. California provisions reach beyond the scope of the proposed federal rules but there are no significant inconsistencies.

Chapter 4. Particular Privileges

Articles 1 and 2. Self-Incrimination. California Evidence Code §§ 930 and 940 provide that, to the extent the federal and state constitutions require, there shall be a privilege of an accused not to take the stand and a privilege against self-incrimination. There is no comparable federal proposal; one is not needed. Sections 930 and 940 obviously do no harm.

Article 3. Attorney-Client Privilege. California Evidence Code §§ 950-962 deal with the attorney-client privilege. Proposed Federal Rule 503 covers the same ground. There are a few differences as follows:

1. Section 955 requires an attorney to claim the privilege on behalf of an absent holder of the privilege, unless the holder of the privilege has instructed the lawyer to permit disclosure. Proposed Federal Rule 503(c) says only that the attorney "may" claim the privilege on behalf of the client. The Advisory Committee's Note to Rule 503(c) states that it is assumed that professional ethics will require the attorney to claim the privilege "except under the most unusual circumstances." The California provision is preferable; it should be up to the holder of the privilege, not the attorney, to determine when "unusual circumstances" exist.

2. Section 952 specifically includes within the scope of the privilege the legal opinion formed by the attorney and the advice given by him or her to the client. Federal Rule 503(b) is not clear, particularly with respect to the legal opinion formed by the attorney, since only "communications" are protected. As a practical matter, an attorney's opinion is not subject to pretrial discovery, see Federal Rule of Civil Procedure 26(b)(3), and it is highly unlikely that a federal court would order the attorney to take the stand to reveal legal opinions relevant to a client's case, whether or not they involve communications. Nevertheless, if opinions are to be within the privilege, the California provision is preferable to the federal rule.

3. Sections 960 and 961 of the California Code have no federal counterparts. They except from the privilege any communication relevant to the intent of a deceased client with respect to the client's deed, will, or other writing purporting to affect an interest in property or any communication respecting the validity of such a deed, will, or other writing. The position taken by the legislature in adopting these two provisions is that the intentions of a deceased person should be given effect and that the privilege, when claimed by the client's successor-in-interest who may benefit personally, should not apply. In all probability the client would not have wanted the privilege to apply in such cases. See McCormick, Evidence § 94 (2d ed. 1972). There appears to be no justification for the elimination of §§ 960 and 961.

Article 4. Privilege Not to Testify Against Spouse. California Evidence Code §§ 970-973 deal with the privilege of one spouse not to testify or take the stand against another. Proposed Federal Rule 505 covers the same general material, but there are major differences.

1. Sections 970 and 971 give the privilege to the spouse who would otherwise be required to testify. The federal proposal gives the privilege to the spouse who is the party. The state provisions are clearly preferable in this regard. The only purpose of this privilege is to preserve marital harmony. Without the privilege the witness-spouse is placed in a very difficult position because he or she may be expected to lie to assist the party-spouse. If, however, the witness-spouse is willing to take the stand and testify, the situation between the spouses is such as to require no protection. To allow a party to keep the witness from testifying will simply be a ploy to avoid justice.

2. Sections 970 and 971 apply to "any proceeding." The proposed federal rule applies only to criminal actions. Here again the state rule is preferable. If, as it must be, the purpose of the privilege is to safeguard marital harmony, requiring a spouse to testify in a civil case which could cost the party-spouse a large judgment or in an administrative hearing that could result in loss of an important license might be just as damaging as testimony in a simple misdemeanor or perhaps even in a felony case.

3. Section 971 specifically prohibits a party from calling to the stand the spouse of an opposing party without first obtaining the consent of the desired witness. There is no federal counterpart. Proposed Federal Rule 513(b) does provide that cases should be conducted in such a way to permit privileges to be claimed without knowledge of the jury. Section 971 is sensible and should be retained.

Article 5. Marital Communications Privilege. California Evidence Code §§ 980-987 provide a typical privilege for confidential communications between spouses. The proposed federal rules deliberately omitted this privilege. See the Advisory Committee's Note to Proposed Federal Rule of Evidence 505(a) which states as its sole rationale, the following:

> "The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 Wigmore §§ 2228, 2241 (McNaughton Rev. 1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of

contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and most exclusively verbal in nature, quite unlike marriage."

This rationale seems remarkably short and naive, particularly in light of the fact that Proposed Rule 505 would have provided a privilege not to take the stand only in criminal cases. On the other hand, it should be noted that the law has not recognized a parent-child privilege, a friend-to-friend privilege, or an employer-employee privilege, even though they involve relationships similar to the spousal situation.

On balance elimination of the time-honored husband-wife communication privilege would not seem warranted.

Article 6. Physician-Patient Privilege. California Evidence Code §§ 990-1007 provide a somewhat limited privilege for confidential communications between a patient and his or her doctor. The Proposed Federal Evidence Rules do not provide this traditional privilege although, as noted below, proposed Rule 504 provides a specific psychotherapist-patient privilege. The reasons for omitting a physician-patient privilege are set forth in the Advisory Committee's Note to Proposed Federal Rule 504 as follows:

"The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated; communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. California Evidence Code §§ 990-1007."

The description of the California privilege is generally an accurate one, which means that the few situations in which the privilege

applies essentially are arbitrary or within the broad discretion of the trial court. For example, under California Evidence Code § 999, as recently amended, there is no privilege in a civil action for damages based on conduct of the patient if the trial court finds that good cause exists for disclosure.

The purpose of a doctor-patient privilege is to safeguard the relationship in order that a person will not be inhibited from consulting and confiding in a doctor. Once the law provides very broad exceptions such as those permitted under California law, that safeguard is effectively destroyed. The only counterargument possible is that the general public does not realize how weak, and exception-riddled the privilege is. Therefore, people continue to consult physicians in the false belief that their confidences are secure. If the privilege was abandoned entirely, even this false delusion would be destroyed.

Given the current state of the physician-patient privilege in California, a strong argument can be made that it should be abandoned entirely. Not long ago the California Law Revision Commission suggested a new statute in which the application of the privilege in all cases would have been placed in the discretion of the trial judge on a case-by-case basis, depending on the nature of the case, the value of the evidence, and the need for protection. This proposal, like newly amended § 999, has the drawback of uncertainty, making preparation for trial more difficult, but it would be an improvement over the current scheme containing a laundry list of exceptions.

Article 7. Psychotherapist-Patient Privilege. California Evidence Code §§ 1010-1028 provide a comprehensive privilege for communications between a psychotherapist and his or her patient. Proposed Federal Rule 504 would have established a similar privilege for use in federal courts but with a number of important differences.

1. Under § 1010(a) "psychotherapist" includes a medical doctor who devotes a substantial portion of his time to the practice of psychiatry. Proposed Federal Rule 504(a)(2) on the other hand, defines a "psychotherapist" as a medical doctor who is engaged in the diagnosis or treatment of a mental or emotional condition. Thus, communications to a general practitioner, who occasionally engages in psychiatric treatment, would be covered by the federal rule whenever he is so engaged, whereas

it would not be covered under § 1010(a) because of the sporadic nature of his psychiatric practice.

On the surface, at least, the federal proposal seems preferable. If psychiatric counseling is to be covered by privilege, the general nature of the doctor's practice seems irrelevant. On the other hand, the California rule does provide a safeguard against unjustified claims of privilege by doctors who are willing to state that almost every type of medical treatment involves a coordinate need for supportive emotional counseling. On balance, however, it appears that the California section should be altered in line with the federal proposal. When a claim of privilege is raised a court can reasonably be expected to be able to determine whether or not the communications sought to be introduced were in fact transmitted for treatment of a mental or emotional condition. The same question will come up even under the current statute with respect to a doctor who devotes a substantial amount but not all of his practice to the treatment of mental disorders.

2. Section 1010 not only covers doctors of medicine but licensed psychologists, clinical social workers, school psychologists, and marriage and family counselors. Proposed Federal Rule 504(a) covers only medical doctors and licensed psychologists. As first enacted in 1965, § 1010 was identical in coverage to the proposed federal rule. Subsequent amendments, obviously given full consideration by the legislature, expanded the scope to include others. In light of this history, there is no reason now to reassess the California statute merely because the federal rule is more tightly drawn.

It is interesting to note that at the same time that the amendments were made expanding the scope of the privilege in California, another section, § 1028, was added stating that there is no privilege in criminal cases except for communications made to medical doctors and licensed psychologists. This limitation is questionable but understandable. A marriage counselor is thought of quite differently than is a psychologist when it comes to criminal admissions. Yet if there is to be a privilege to encourage persons to seek assistance, logically there is no reason why such a line should be drawn. Obviously the legislature compromised; it expanded the scope of the privilege to include a greater array of professionals, but it wasn't willing to go all the way when detection of criminal activity is involved.

3. Section 1015 requires the psychotherapist to claim the privilege on behalf of an absent patient. Proposed Federal Rule 504(c) states that he "may" do so. As is true of the same situation involving the attorney-client privilege, the California rule is preferable. In the ordinary situation, a psychotherapist ought not to be able to decide whether to disclose privileged information. Ultimately the choice to disclose or not to disclose should be made solely by the patient, even if the psychotherapist believes that disclosure is in the patient's best interest.

4. California includes many exceptions to the privilege that are not contained in the proposed federal rule. These are the same general exceptions that apply to other communication privileges. It is important to note that the proposed federal rules do include many of these exceptions in rules regarding other privileges but do not do so with respect to the psychotherapist-patient privilege because of the fragile nature of the relationship that arguably commands complete, or nearly complete, security.

The California exceptions not included in the federal proposal include: § 1018 (services sought to commit or escape detection from the commission of a crime or tort); § 1019 (issues involving parties all of whom claim through a deceased patient); § 1020 (breach of duty by psychiatrist or patient growing out of the relationship); § 1021 (intent of deceased patient with respect to his deed, will, or other writing purporting to affect an interest in property); § 1022 (validity of a deed, will, or writing purporting to affect an interest in property); and § 1026 (matters which the psychiatrist or patient must report to a public employee if the report is open to public inspection).

It is difficult to evaluate the special need for protection of the psychiatrist-patient relationship with respect to these exceptions. Undoubtedly, many psychiatrists would take the position that the fear of revelation, even after death of the patient, will drive away many potential patients who desperately need psychological help. On the other hand, the need for security after death or regarding matters in public reports is questionable and the California provisions cannot be said to be unreasonable. More difficult is § 1018 relating to consultation for the purpose of committing a crime or tort or to escape detection for

committing a crime or tort. Arguably there is a special need for protection when a person sees a psychiatrist regarding these matters that does not exist when he communicates with his spouse or his lawyer. [It must be noted that an entirely different exception applies when the patient appears dangerous to himself or others. See the discussion of § 1024 below.]

Both the exception in § 1018 and the exception in § 1020 for suits between the psychiatrist and the patient raise difficult questions of where to draw the line between the need for protection and disclosure. It cannot be said, however, that inclusion of these exceptions is irrational or inappropriate.

5. The California code also contains a number of exceptions to the psychiatrist-patient privilege specifically related to mental competency that differ from their counterparts in Proposed Federal Rule 504.

(1) Proposed Federal Rule 504(d)(1) provides an exception in proceedings to hospitalize the patient "if the psychotherapist, during the course of diagnosis or treatment has determined that the patient is in need of hospitalization." California's rule does not go so far in giving leeway to the psychotherapist. Under § 1024 the psychotherapist has the right to disclose a communication only if the patient appears dangerous to himself or others. The fact that a patient who is not dangerous would be better off in a hospital does not itself permit disclosure.

The California provision seems preferable in an enlightened society that ascribes increased dignity and legal rights to those who are mentally and emotionally ill. In commenting on the federal proposal, the Advisory Committee takes the position that disclosure by the therapist in whom the patient has already manifested confidence is not likely to damage the relationship. This seems extremely naive. One would guess that many emotionally disturbed patients would avoid seeking help if they thought that the result would be forced hospitalization, particularly if they knew that their own statements to the psychotherapist would be used to show the need for incarceration.

(2) Proposed Federal Rule 504(d)(3) provides an exception whenever the patient relies upon his or her mental or emotional condition as an element of a "claim or defense" in any proceeding. A similar exception

is provided by §§ 1016, 1023 and 1025 of the California code. However the latter may go somewhat further than the federal proposal, depending on the extent to which "claim or defense" is to be given technical interpretations. For example, § 1025 quite appropriately provides an exception to the privilege in a proceeding brought by the patient to establish his or her competency. Such an action probably would qualify as a "claim" under the federal proposal but the matter is not clear. The California provisions are preferable because they avoid ambiguity. However, § 1016 which provides a general exception whenever the patient tenders his or her mental competency as an issue in a proceeding, would seem to make §§ 1023 and 1025 unnecessary. Indeed the official Comment to § 1023 specifically so states. Perhaps § 1016 should be amended clearly to include the substance of §§ 1023 and 1025 so that two of the three overlapping provisions can be eliminated.

(3) California Evidence Code § 1027 excludes from the privilege situations in which the patient is under 16 years of age, has been the victim of a crime, and in which the psychiatrist believes that disclosure is in the best interest of the patient. There is no federal counterpart to this section which was added to the code in 1970. Essentially the situations falling within this section involve incest or rape and are combined with intimidation of the child to a degree that requires disclosure if treatment is to be effective. Experience showed the provision to be necessary and obviously it should be retained.

Article 8. Clergyman-Penitent Privileges. California Evidence Code §§ 1030-1034 provide privileges for communications to clergymen by members of their church or organization. Proposed Federal Rule 506 covers the same general material. One important difference is that, under California law, both the "penitent" and the clergyman have a privilege. This is different from all the other communication privileges in which only the communicator, and not the professional, holds the privilege. Thus, even if a person demands that a clergyman reveal the person's confidential communication, the clergyman can refuse to do so. The proposed federal rule does not provide the clergyman with such a separate privilege.

Preference between the federal proposal and the state law depends on how one feels about the obligations a clergyman has to his religious

tenets. Unlike the lawyer, doctor, or psychiatrist, the clergyman has obligations which go beyond the welfare of the person with whom he deals. Even though, on balance, one might prefer the federal rule, the California solution is a legitimate one. It is also a practical one since it is unlikely that a court would fine or jail a clergyman for contempt for failing to reveal a confidence, when disclosure is prohibited by the clergyman's religious beliefs.

Another possible difference between the California provision and the proposed federal rule involves the scope of the privilege. The federal proposal protects any confidential communication made "to a clergyman in his professional character as spiritual adviser." California § 1032 protects a communication if the clergyman is "authorized or accustomed" to hear it and, if "under the discipline, tenets of his church, denomination, or organization," he has a duty to keep it secret. Arguably, a case could arise in which a person reveals to his clergyman, in his capacity as spiritual adviser, a matter which the latter is not required to keep secret under formal tenets of his church. Obviously, such a communication is within the spirit of the privilege and should not be subject to an order of disclosure. However, to avoid technical arguments as to the meaning of § 1032, California should consider amending it to adopt the simpler language of the proposed federal rule.

Article 9. Official Information and Identity of Informer. California Evidence Code §§ 1040-1042 spell out privileges for certain types of government information. The substance of these sections are covered in Proposed Federal Rules 502, 509, and 510. There are a number of important differences as follows:

1. Section 1040(b) provides that a public entity has the privilege not to disclose and to prevent disclosure of certain material, including material protected by a federal or state statute. However, the law gives no privilege to the person who supplied the information. By way of contrast Rule 502 would also allow the person or organization who supplied the information to claim the privilege.

This aspect of the federal rule should be incorporated into § 1040. In other words, if a state official fails in his duty to claim the privilege for a report or return which is by law to be held in confidence, the person or organization who filed the return should be able to step in to claim the privilege and prevent disclosure.

2. Section 1040(b) covers material privileged by statute and other official information when the necessity for disclosure in the interest of justice is outweighed by the need for confidentiality. Unlike its counterpart, Rule 509, it does not mention "secrets of state" that invoke national defense or international relations. Since protection of state secrets exists by virtue of federal common law pursuant to federal constitutional powers governing international relations and war, see United States v. Reynolds, 345 U.S. (1953), the state courts would likely be required to grant such a privilege by virtue of the Supremacy Clause of the Constitution. For consistency and clarity, the limited federal state secrets privilege should be included in § 1040(b).

3. California (§ 1040(b)(2)) and federal (Proposed Rule 509(a)(2)) privileges for "official information" are generally consistent with one another with respect to coverage. However, substantial doubt exists as to the validity of any privilege for "official information" in the absence of a specific statute covering particular information. More than any other provision, the proposal to grant such a general privilege aroused the ire of Congress and engendered doubts about all of the proposed federal evidence rules. Some of the sting of the California provision is removed by § 1042 which provides that in a criminal case, when a claim of the official information privilege is upheld, the court must find against the government on any issue to which the information is material. This caveat applies to substantive issues at trial but not to preliminary questions regarding evidence when the names of informants are involved. Proposed Federal Rule 509(e) is not as strong as § 1042 since it merely provides that the court should make whatever rulings against the government are required in the interests of justice. On the other hand, 509(e) refers to all cases in which the government is a party, not just to criminal matters.

On balance, California should eliminate its very general, "discretionary" official information privilege. In criticizing the California section, a leading commentator states:

> "Situations where a true need for protection against disclosure exists are often covered by such standard privileges as attorney-client or in particular cases by specific statutory privileges. In addition, the often unrealized standing of governmental agencies to raise questions of relevancy in the broad sense affords insulation against forcing truly unwarranted disclosure. The difficulty of

obtaining governmental information is a matter of common knowledge, and the creation of an added obstacle in the form of a privilege so broad in terms and uncertain of application can scarcely be defended." McCormick, Evidence, p. 231 (2d ed. 1972).

If the California privilege is retained, the safeguard of § 1042 should also be retained but it should be expanded to apply to civil actions in which the government is a party. In an open society the loss of a lawsuit (if that should result), is a small price to pay for the government's right to withhold information vital to a case. Such a penalty also ensures that the privilege will not be invoked lightly.

4. Section 1041 provides a governmental privilege for the identity of an informer. Unlike Proposed Federal Rule 510(a), the California privilege is not automatic but applies only if disclosure is forbidden by a federal or state statute or if the court determines that the need for secrecy outweighs the necessity for disclosure. The provisions of § 1042 discussed above also apply to the discretionary exclusion of an informer's identity under § 1041.

The California statute is preferable to the proposed federal rule. There is no reason for granting an absolute privilege if the interests of justice are not served thereby. Furthermore, the government should be prepared to pay a penalty for invoking such a privilege. Most of the time the identity of an informer will not be relevant to the issues; hence no penalty will be involved. But if the non-government party would otherwise suffer because evidence is unavailable, the remedial approach of § 1042 should be followed in civil as well as in criminal proceedings.

Articles 10 and 11. Political Vote and Trade Secrets. The privileges provided with regard to voting and trade secrets in California Evidence Code §§ 1050 and 1060 are substantively identical to Proposed Federal Rules 507 and 508.

Chapter 5. Immunity of Newsman From Citations of Contempt

Section 1070 of the California Evidence Code provides a limited privilege for newsmen in that they cannot be held in contempt of court for failing to reveal their news sources. The proposed federal rules do not contain anything regarding this subject matter.

The California statute has been the subject of close detailed scrutiny. It has been amended three times since first promulgated in 1965. There is no special reason to alter the section now merely because a similar privilege was not included in the proposed federal rules.

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Chapter 1. Evidence of Character, Habit, or Custom

In general, California Evidence Code provisions on character and habit are substantially the same as provisions of the federal rules. The California sections are awkwardly written however. Section 1100 purports to establish a general rule as to what evidence may be utilized to prove character, but §§ 1101-1103 contain such major exceptions that there is little left of the basic rule. Federal Rule 405 is more satisfactory in simply setting forth what types of evidence are available for specific purposes. The California situation is seriously confused by the unnecessarily complicated drafting of §§ 1100-1103.

Another example of poor drafting in this chapter involves § 1104 which states that, except where a specific statute otherwise provides, evidence of character traits for care or skill is inadmissible to show conduct on a specific occasion. This provision is inserted despite the fact that § 1101(a) specifically states that, in the absence of statute, evidence of any character trait is inadmissible to show conduct on a specific occasion. The problem is compounded by the fact that § 1101(b) and (c) make clear that evidence is prohibited under § 1101(a) only when introduced to show conduct on the specific occasion in conformity with the trait and not when the purpose is to prove something else such as motive or knowledge or to impeach a witness. Unfortunately § 1104 does not contain clauses similar to §§ 1101(b) and (c), although it seems obvious that the same rules were intended to apply to traits of skill and care as to any others. The entire chapter, §§ 1101-1105 should be reviewed with the idea of simplifying the sections and eliminating repetition and uncertainty.

The substantive differences between the California and federal provisions are as follows:

1. Evidence Code §§ 1102 and 1103 permit a defendant in a criminal case to introduce evidence of his own character or of the character of the alleged victim of the crime. If defendant does so, the prosecution may rebut the evidence. Obviously, the character or traits of character involved must be relevant to the case. See generally 7 California Law Revision Commission, Reports, Recommendations and Studies 212-213 (1965). However §§ 1102-1103 do not specifically so state. Federal Rules 404(a)(1) and (a)(2) refer to a "pertinent" trait of character. Addition of words such as "pertinent" or "otherwise relevant" to the California sections could avoid confusion, although the intent of the provisions as written is obvious.

2. California specifically prohibits defendant's introduction of evidence regarding the sexual conduct of an alleged rape victim, other than conduct with defendant, to show consent at the time of the alleged rape. California Evidence Code § 1103(2). There is no comparable federal rule. Since the California section was added in 1974 after specific consideration by the legislature, there is no reason to alter it merely because it was not adopted in the federal rules.

3. Under Evidence Code § 1103, when the defendant in a criminal case introduces evidence of the character of the alleged victim, or when the prosecution rebuts such evidence, they may utilize evidence of specific instances of conduct as well as opinion evidence or evidence of reputation. This is to be contrasted with § 1102 which limits evidence as to defendant's own character to opinion and evidence of reputation. Federal Rule 405 limits evidence as to the character of the victim as well as to the character of the defendant to opinion evidence and evidence of reputation, and thus does not permit evidence of specific acts.

The general prohibition against using specific acts of conduct to prove character are two-fold. First, there is great danger in generalizing from a few specific occurrences. For example, the fact that a person appears obviously drunk on three occasions does not necessarily show a general trait of intemperance; indeed, to the contrary, it could mean that he is so unused to liquor that he becomes obviously inebriated on those rare occasions when he imbibes. Second, a specific prior act of a party may so offend a juror's senses, that the juror will turn against that party whatever the facts in the specific case. When the

character involved is that of a party, particularly a criminal defendant, the prejudice could be overwhelming. Thus both the California and the federal courts prohibit such evidence unless the party raises the issue himself and then generally prevent the use of specific acts except on cross-examination of the witness to test the basis for his opinion or his knowledge of reputation. Although the latter exception is significant, it does not permit independent evidence that certain acts have in fact occurred.

When dealing with a victim of crime, the danger of prejudice to a defendant by showing his prior misconduct is eliminated. Thus there is less reason to be concerned about evidence of specific acts. Nevertheless, if the victim is alive and testifying, defense counsel may turn the trial into a trial of the victim in the hope that a jury will so detest the victim that it will exonerate the defendant. This danger has specifically been recognized in rape cases in California in § 1103(2) as noted above. (There, however, the law goes further and bars any evidence of general sexual activity, including opinion and reputation.) It should be noted that the victim of a crime has no say in whether, and to what extent, his reputation is placed in issue. Unlike a defendant, who may keep the issue out altogether, the victim's reputation is at the will of others. To help protect victims from an "assault" in the courtroom, it would seem wise to amend § 1103 to conform to Federal Rule 405 by limiting character evidence to opinion and reputation.

4. Federal Rule 404(a)(2), in addition to allowing a prosecutor to rebut character evidence of a victim introduced by the defendant, also permits the prosecutor to introduce "evidence of a character trait of peacefulness of the victim . . . in a homicide case to rebut evidence that the victim was the first aggressor. The California code does not contain the latter provision and would not allow such evidence unless defendant has first specifically raised the issue of the victim's character. Since the alleged victim is deceased, the prosecution is often hard pressed to counter testimony of self-defense by defendant, at least if the latter is the only living eyewitness. The federal rule balances the need for the evidence against the limited prejudice that such evidence could have and comes down on the side of admissibility. Although it is not a matter of great moment, the federal rule does seem to be

preferable. However, if the California code is to be altered, it would seem wise to limit evidence available for proving at least this aspect of the victim's character to opinion evidence or evidence of reputation. Otherwise a prosecutor will be tempted to paint the victim as a saint by dredging up every act of "peace" in which the victim was involved.

Chapter 2. Other Evidence Affected or Excluded by Extrinsic Policies

Federal Rules 407 through 411, plus Rule 606(b), make certain items of evidence inadmissible for reasons of policy. California Evidence Code §§ 1150-1158 deal with all of these matters plus a number of others. In particular, §§ 1156-1157.5 render inadmissible certain records of medical committees formed to research, investigate, and evaluate matters relating to patient care generally, with the purpose of improving the quality of care and reducing morbidity or mortality. The federal rules do not deal with these matters, but that presents no reason for dispensing with the current state sections. The reasons for the sections are obvious and stem from the same types of policy considerations which justify similar decisions regarding other types of evidentiary material.

The major inconsistencies between federal and state provisions are as follows:

1. Evidence Code § 1150(a) states that upon inquiry into the validity of a verdict, any otherwise admissible evidence may be used to show improper conduct or events occurring within or without the jury room, but no evidence can be used to show what influenced any individual juror to assent or dissent from a verdict. Section 1150(b) says that nothing in the Evidence Code affects the competence of a juror to give evidence to support or impeach a verdict. The only California statute to govern the latter is Civil Procedure Code § 657(2) which specifically permits affidavits of any juror to prove that the jury resorted to methods of chance.

Federal Rule 606(b) deals only with the competency of juror testimony and not with the question of what facts can or cannot be proved as set forth in Evidence Code § 1150(a). Although the latter is couched in terms of evidence, it is in fact a matter of civil procedure, in effect delineating the grounds for a new trial based on jury misconduct.

Federal Rule 606(b) permits juror testimony only to show "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

Evidence Code § 1150(b) merely avoids the difficult oft-debated question of what juror testimony will be permitted to attack a verdict. See Note, Impeachment of Jury Verdicts, 53 Marq. L. Rev. 258 (1970); Notes, Impeachment of Jury Verdicts by Jurors: A Proposal, 1969 U. Ill. L. Forum 388. However, in 1969 the Supreme Court of California dealt with the question in People v. Hutchinson, 71 Cal.2d 342, 78 Cal. Rptr. 196, 455 P.2d 132, and decided that juror testimony would henceforth be permissible as a means of setting forth evidence allowed under § 1150(a) to impeach a verdict. There is nothing in the decision that requires alteration of § 1150(b) and it seems better simply to leave matters as they are. If § 1150(b) is to be changed to incorporate a rule as to juror testimony, it should follow the decision in People v. Hutchinson rather than the narrower limitations of Federal Rule 606(b). The latter would not even permit jurors to testify that a verdict was arrived at by chance methods, which is the one area where, as we have seen, a California statute has specifically permitted the use of juror affidavits as proof.

Evidence Code § 1150(a) may or may not be wise. There is some question, for example, why a non-juror should not be able to state, if he has competent evidence on the matter, that a juror's decision in a case was based solely on racial prejudice. Affidavits or testimony of jurors on these matters is quite a different thing; jurors must be protected from post-verdict harassment leading them to make statements of personal bias or prejudice which, unlike testimony as to acts or events, usually cannot be verified or refuted by others. In any event, § 1150(a) should be reworded and transferred to Chapter 7, Article 2 of the Civil Procedure Code dealing with new trials and the vacation of judgments.

2. Evidence Code § 1151 is almost identical to Rule 407 in excluding evidence of subsequent remedial measures taken after an event to prove negligence or culpable conduct in connection with the event. The federal rule, however, adds a last sentence, not present in the California Code, as follows: "This rule does not require the exclusion of

evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

It seems clear that Evidence Code § 1151 is similarly not intended to exclude evidence of remedial measures for these purposes. However, the statement that such evidence is inadmissible to show "culpable conduct," if read broadly, could raise a question about the matter, and it would seem proper to add the sentence quoted from the federal rule to § 1151. Similar statements of clarification appear elsewhere in the California Evidence Code, see, e.g., § 1101(b).

3. Evidence Code §§ 1152 and 1154 make inadmissible to prove liability or non-liability evidence of offers to compromise and partial payments made in an attempt to compromise disputed claims. In general Federal Rule 408 arrives at the same result. However, the federal rule does not make inadmissible evidence of any offer to pay or any payment, or any acceptance of payment if neither liability nor the amount claimed has been disputed. The California rules do not have such a broad exception; under § 1152(b)(1), evidence of partial payment of a claim without any challenge as to liability may be admitted to show the validity of the claim, but that's all.

The California formulation is preferable to the federal rule. There is great difficulty in knowing when liability or amount are in dispute. For example, a plaintiff with a clear claim for $1000 may nevertheless express a willingness to accept $500 from the outset, even before defendant has had an opportunity to contest validity, merely to avoid the time, trouble, and bad publicity that a lawsuit could engender. Similarly a defendant may offer to settle a small claim, even before investigating the facts, just to avoid expense. In neither case should these offers be admitted on the issue of liability; yet the federal rule would not appear to exclude them.

However, California § 1152(b)(1) itself is of questionable validity. A person may pay a portion of a claim, without any overt challenge to its validity, in the hope that the opposing party will be satisfied, thus avoiding the expense and bad publicity of a trial. If the person making payment knows how to "play the game, he will formally dispute the claim at the same time that he pays; if he is unsophisticated,

however, and fails to challenge the claim's validity, the fact of the payment will be admissible against him if the opposing party sues for an additional amount.

Therefore, Evidence Code §§ 1152 and 1154 should not be altered to conform to Rule 408; § 1152(b)(1) should be eliminated.

4. Evidence Code § 1152 not only excludes evidence of compromise and offers to compromise disputed claims, but also payments or offers to pay arising from humanitarian motives. Thus, voluntary payment of hospital expenses of a child hit by a car, cannot be used to establish the culpability of the person who pays. Section 1152 goes on also to exclude as evidence "any conduct or statements made in negotiation thereof." The policy behind this clause is to allow parties to talk freely to one another during compromise negotiations. In jurisdictions without such a rule, negotiators must talk in hypothetical terms in order to avoid admissions which could be used later in court should settlement negotiations fail.

Federal Rule 408, which deals with settlement negotiations, also excludes statements made during those negotiations. But Rule 408 does not deal with payments or offers to pay arising from humanitarian motives. That is dealt with in Rule 409. Under 409, evidence of payments or offers to pay are not admissible; but factual statements made during the course of the dealings are not excluded as they are under the California code.

Although it is a close question, the California provision should probably be retained. It is true that protection of statements of those who voluntarily pay or promise to pay are different in quality from statements made during negotiations. Nevertheless, in both situations the conduct of the parties is to be encouraged. In the heat of anguish, an innocent automobile driver who has struck down a pedestrian may tell a hospital official, "It was all my fault" during the course of agreeing to pay for the injured person's medical care. Unlike statements made in formal negotiation, statements of volunteers are likely to be made by the individual himself, without aid of any attorney, thus maximizing the need for protection. The same policy which underlies the inadmissibility of the voluntary payment or offer to pay, also covers statements made at the time such payments are promised or negotiated.

5. Evidence Code § 1153 and Federal Rule 410 both make inadmissible offers to plead guilty or withdrawn pleas of guilty to a crime. There are, however, several important differences between the two provisions.

(1) The federal rule expressly includes offers to plead nolo contendere; the California provision does not. This seems peculiar indeed, since the very essence of a nolo plea in California is the fact that it cannot be admitted in a subsequent civil action that is based upon the acts on which the criminal charge was based. California Penal Code § 1016(3). Surely Evidence Code § 1153 should be amended to exclude as evidence offers to plead or withdrawn pleas of nolo contendere.

(2) Evidence Code § 1153 states that the evidence is inadmissible "in any action or in any proceeding of any nature," whereas Federal Rule 410 states that the evidence is inadmissible in a case or proceeding against the person who made the plea or offer. Here again the federal rule seems preferable. The policy behind the exclusion of evidence is to encourage compromise and to made feasible the withdrawal of an unwise plea. The policy only is relevant to protect the defendant. Thus it seems unnecessary and unwise to exclude the evidence when it is not used against defendant. This is particularly true since § 1153 (like Rule 410) covers offers to plead to crimes other than the one charged. For example, if X, to avoid a trial on a charge of armed robbery, offers to plead guilty to an unrelated burglary with which Z is charged, it seems proper to allow Z to introduce X's offer in an effort to show Z's innocence. To be sure, there may be some embarassment for X (although in the case of a withdrawn plea of guilty the matter is already on the public record). The court may, in its discretion, exclude such evidence in circumstances where prejudice to X would outweigh its value to Z; but there should not be an automatic exclusion as now exists under § 1153.

(3) Federal Rule 410 applies the rule of exclusion not only to offers to plead guilty or nolo, but to "evidence of conduct or statements made in compromise negotiations." Evidence Code § 1153 does not exclude such statements. This is surprising in light of the fact that § 1152 makes inadmissible statements or conduct made in negotiations in civil actions. The strong policy favoring compromise is the same in criminal and civil cases. If statements made during negotiation are admissible, negotiators must talk in hypotheticals, e.g., "Suppose we

admit for a minute, that defendant entered V's building; the real question is how much did he take." A straightforward statement can be very harmful e.g., "We all agree defendant broke into V's building. Now lets get down to the real question of whether he took enough money to make his crime a felony as charged." There is little doubt that the federal rule regarding statements and conduct during negotiations is preferable to the California provision and that the latter should be amended. It should be noted that the federal rule also includes language making clear that voluntary statements made in open court in connection with pleas or offers to plead may be utilized for impeachment purposes or in a subsequent prosecution of the declarant for perjury. Although arguably such statements are not part of compromise negotiations, the matter should not be left in doubt. If Evidence Code § 1153 is to be amended to accord with the federal rule, all of the federal language should be included.

6. Evidence Code § 1155 excludes evidence that a person was insured for harm caused to another when offered to prove negligence or other wrongdoing. Federal Rule 411 differs in that it excludes evidence that a person was or was not insured in order to prove that the person acted or did not act wrongfully.

Section 1155 is the better rule. There are strong reasons for excluding evidence that defendant is insured to show his liability. The probative value of such evidence is, at best, extremely weak; the prejudice is great, since a jury may be induced to find for plaintiff solely on the ground that defendant, personally, will not be hurt by an adverse judgment.

On the other hand, there is no undue prejudice to plaintiff when defendant introduces evidence that he is insured in order to dispute liability or wrong doing. The evidence may have substantial probative value. For example, in a hit and run case, evidence that defendant was insured against any harm he caused would tend to support defendant's claim that he did not realize that he had hit anyone.

Section 1153 should remain as it is.

DIVISION 10. HEARSAY EVIDENCE

Chapter 1. General Provisions

1. The general definition of hearsay in the California Evidence Code (§§ 225, 1200) is virtually identical to the definition in Federal Rule 801 but with two major exceptions as follows:

(1) Federal Rule 801(d)(1) states that certain prior inconsistent statements used to impeach a witness and prior consitent statements used to rehabilitate a witness are not hearsay, and may be admitted for the truth of the matters asserted.

(2) Federal Rule 801(d)(2) states that an admission of a party-opponent, including certain statements of other persons which were authorized or adopted by the party-opponent are not hearsay.

In California, these matters are considered to be hearsay but are nevertheless admissible under broadly stated exceptions to the hearsay rule, §§ 1220-1227, 1235-1236. In fact, the California provisions are wider in scope than are the federal; thus despite characterization of such evidence as not hearsay, less is admissible under federal rules.

For convenience, these differences in scope between the federal and state rules will be considered in the discussion of the California exceptions to the hearsay rule. It is sufficient to note here that there is no reason whatsoever for California to adopt the federal approach and to consider the listed items as not being hearsay.

It is worth noting another technical difference between Federal Rule 801(a) and California Evidence Code § 225. The latter defines a statement as an oral or written "verbal expression" or nonverbal conduct intended as a substitute for oral or written verbal expression, whereas Federal Rule 801(a) defines a statement as an oral or written "assertion" or nonverbal conduct intended as an assertion. The California rule appears less precise and has been challenged on that ground. See Letter of March 27, 1975 from John Kaplan to the Honorable Otto M. Kaus (a copy of which was sent by Professor Kaplan to the California Law Revision Commission). From a practical point of view, the difference in language appears immaterial; thus there seems no necessity for altering § 225.

2. Section 1200(b) provides that hearsay is inadmissible "except as provided by law." This permits exceptions to the hearsay rule by

statute or by judicial decision. By way of contrast, Federal Rule 802 permits exceptions only by formal rule of the Supreme Court or by Act of Congress. However, the federal rules provide for substantial flexibility through two "catchall" provisions allowing admission of evidence that does not fall within any of the specific exceptions to the hearsay rule. See Rules 803(24) and 804(b)(5). California has no such "catchall" rules. Thus it seems wise to retain the traditional power of the courts to create new exceptions as circumstances warrant.

3. Other general provisions regarding hearsay evidence are virtually identical in substance in federal and California law. One minor difference exists between California § 1203 and its counterpart, Federal Rule 806. Both provide that a hearsay declarant may be called and cross-examined by the party against whom the statement was used. (The Federal Rule covers prior statements of a witness and admissions of an adverse party even though they are not defined as hearsay under the federal scheme.) However, § 1203 specifies that when the statement was made, authorized, or adopted by the party against whom it was used, the section does not apply. This prohibits a lawyer from leading his own client on the stand. Undoubtedly the same result would obtain in federal courts under the flexible federal rule governing leading questions, Federal Rule 611(c). See Advisory Committee Note on Federal Rule 611(c) which states that normally an attorney should not be permitted to lead his own client, regardless of who called the client to the stand.

Chapter 2. Exceptions to the Hearsay Rule

Article 1. Confessions and Admissions. As previously noted, under Federal Rule 801(d)(2) admissions by a party-opponent are not considered hearsay. Under California law, §§ 1220-1227, admissions are excepted from the operation of the hearsay rule. The same language is used in the state and federal provisions and the results are identical with only the following exceptions:

1. California Evidence Code § 1222(a) permits admission of a hearsay statement by a non-party declarant against a party who authorized the declarant to made the statement. Section 1222(b), which has no direct federal counterpart, goes on, however, to say that the evidence is admissible only if the proponent has or will be able to offer evidence sufficient to sustain a finding that the declarant was in fact

authorized. This provision seems unnecessary and redundant in light of Evidence Code §§ 403 and 405 which speak generally of when and before whom preliminary facts are to be proven. The particular matter is covered by § 403(1) dealing with situations where relevance depends upon the existence of a preliminary fact; Section 403 has identical requirements as § 1222(b). Federal Rule 104(b) is generally identical with § 403(1).

2. Federal Rule 801(d)(2)(D) allows admission into evidence against a party a statement of that party's agent or employee made during the existence of the agency or employment, "concerning a matter within the scope of his agency or employment." Thus, this provision would permit introduction of the statement of a party's truck driver regarding an accident with the truck, even though the driver was hired to drive and not to make statements. Such an extension, beyond the traditional rule which allowed only authorized statements, makes sense for several reasons. First, the statement is that of a person directly involved and therefore likely to be of importance. Second, the motive of the agent to lie to his employer's detriment is curbed by the fact that a principal or employer has a substantial hold over those who work for him (hence the requirement that the agency must exist at the time the statement is made). Third, if the agent slants his statement in favor of the employer it will not be used, for only an opposing party can introduce an admission.

The California Evidence Code follows a somewhat different pattern from Federal Rule 801(d)(2)(D). Under § 1224, if a party's liability is vicarious, i.e. based on the liability of another, then statements of the person who is primarily liable can come in against the party, even though no agency relationship exists. For example, if A borrows B's car and runs into C, B may be liable to C as the owner of the vehicle. Section 1224 would permit statements of A to be used against B in an action brought against B, even though A is not B's agent.

Somewhat similarly, in three specific situations when a person as plaintiff is suing on behalf of or in the shoes of someone else, statements by the person whose rights are involved can be used against the plaintiff, even though no agency relation exists. Thus § 1225 allows statements of a party's predecessor in interest in property, if made

when he held the property, to be admitted against the party. Section 1226 allows the statement of a minor child to come in against a parent in an action brought by the parent for injury to the child. Finally, § 1227 permits introduction of a statement of a deceased declarant to come in against the plaintiff in an action for declarant's wrongful death.

The propriety of the California scheme is questionable, for without even the safeguard brought about by the agency relationship, there seems little justification for a special exception for these types of hearsay. First, a special California exception is unnecessary if the statements were against declarant's interest when made. Such statements would come in under the broad exception for declarations against interest, § 1230, which is justified by the fact that people do not usually make untrue statements which they perceive to be personally detrimental. Second, in the absence of normal safeguards, the most dangerous types of hearsay are admissible under the California code. For example, a disgruntled employee, fired because of his accident record, has nothing to lose by blaming any specific accident on his former employer, both to obtain revenge against the employer and to help vindicate himself. Such a statement will be admissible against the employer under § 1224 if the accident occurred prior to the time the employee was discharged. A similar situation would occur if the borrower of a car, to exonerate himself, tells the police that an accident was due not to his poor driving but to improper maintenance by the owner.

The only justification for admission of such statements is the fact that they have been made by a person with first hand knowledge of the facts. But if that alone justified a hearsay exception, there would be little need for a general hearsay rule. It should be noted that unlike a direct admission of a party, which is admissible because the party (or his legal representative) will be present at trial and can and will take steps directly to correct or explain the admission, a statement by a non-agent witness cannot be refuted in the same way. The party who in most cases was not present when the critical events occurred will not be able himself to explain the declaration, and the declarant may be unavailable. Furthermore, the declarant may not have the same motive as does a party to protect the party's interests.

Although serious dangers of deliberate misrepresentations do not exist with regard to matters covered in §§ 1225-1227, the reliability of the statements is in no way assured simply by the fact that they were made by individuals whose personal interests were involved. One wonders why these provisions were not written in general terms to cover all cases in which statements were made by a predecessor in interest at the time he held the interest or by persons for whose injuries suit has been brought by another. If an exception is to be made, it should cover all such cases. One of the primary reasons for including §§ 1225-1227 was to equalize the situation caused by § 1224. If suit is brought by one executor against another, it would be grossly unfair to permit only the plaintiff executor to introduce statements of defendant's decedent and not to afford defendant the same rights with regard to plaintiff's decedent. See the official Comments to §§ 1225-1227 in the California Evidence Code. If § 1224 were repealed, the justification for §§ 1225-1227 would be greatly diminished.

Given the broad range of hearsay exceptions for declarations against interest, and for excited and contemporaneous utterances that exist in California, neither the exception in § 1224 nor those in §§ 1225-1227 can be justified either on grounds that they involve statements likely to be accurate or that there is great necessity for such statements despite the hearsay hazards. The sections should be repealed in favor of a provision akin to Federal Rule 801(d)(2)(D).

It should be noted that the California Supreme Court in Markley v. Beagle, 66 Cal.2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967), took a very restrictive view of § 1224, holding it inapplicable to situations where an employer is sued on the basis of the acts of an employee. The court decided that § 1224 should be interpreted in the same manner as the prior code provision it replaced. This decision has been the subject of substantial criticism. See, e.g., Harvey, Are an Employee's Admissions Admissible Against His Employer, 3 Santa Clara Lawyer 59 (1967). Given this interpretation, the California law fails to permit introduction of any employee's statement as an admission of the employer unless the employee was specifically authorized to make statements. See Evidence Code § 1222. This heightens the need for adoption in California of a clarifying provision akin to Federal Rule 801(d)(2)(D).

3. Evidence Code § 1223(a) and Federal Rule 801(d)(2)(E) permit a statement of one co-conspirator, made in furtherance of the conspiracy, to come in against another co-conspirator. Section 1223(b), which has no federal counterpart, specifically admits such a statement even if made prior to the time that the party against whom it is used had joined the conspiracy. The California provision thus takes the position that one who enters a conspiracy adopts or ratifies all that has gone on before. Although such an interpretation pushes the concept of agency authorization to the extreme, there seems little reason to eliminate § 1223(b), if for no other reason than the fact that the statements involved, since they must be designed to further the conspiracy, are not hearsay statements under California's definition, but examples of non-assertive conduct whose admissibility will turn solely on questions of relevancy. See the official Comment to California Evidence Code § 1200.

4. Section 1223(c) requires that statements of co-conspirators be admitted only if evidence has been or will be introduced which is sufficient to justify a finding that the declarant was a member of an existing conspiracy at the time the statement was made. Here again, this provision is unnecessary and redundant in light of §§ 403 and 405 which govern the details of primary preliminary facts. Section 403(1) would seem amply to cover the matter.

Article 2. Declarations Against Interest. California Evidence Code § 1230 provides a hearsay exception for declarations against interest if the declarant is unavailable as a witness. It is quite similar in substance to Federal Rule 804(b)(3). The differences are as follows:

1. Section 1230 includes statements which could subject the declarant to hatred, ridicule, or social disgrace in the community. The initial version of Federal Rule 804(b)(3) contained a similar provision but it was deleted by the House Committee on the Judiciary on the ground that such statements lack sufficient guarantees of reliability. The Senate Committee on the Judiciary accepted the deletion, but appeared to do so reluctantly, noting considerable support for the California-type formulation.

There is no reason for alteration of § 1230. Under the section the court must decide if the nature of the foreseeable detriment of making the statement is such that a reasonable man would not have made it

unless it were true. If the embarrassment is sufficient to justify such a standard, the statement should be admitted. The courts are capable of making such decisions. See In re Weber, 11 Cal.3d 703, 523 P.2d 229, 114 Cal. Rptr. 429 (1974)(showing held insufficient). See generally, McCormick, Evidence pp. 674-675 (2d ed. 1972).

2. Federal Rule 804(b)(3) includes a caveat, not present in § 1230, as follows: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." This clause appears designed primarily to combat an easy-to-make, false assertion that, "I heard someone else confess," as a means of casting a reasonable doubt on the guilt of an accused. Interestingly enough, this problem does not as much involve a hearsay danger as it does the reliability of the witness who is on the stand and subject to cross-examination as to whether the statement was in fact made and as to the precise circumstances. The federal proviso seems overly cautious and California should not adopt it; the court has ample power to exclude any such statement if the circumstances indicate that it is untrustworthy. See generally, McCormick, Evidence p. 674 (2d ed. 1972).

Article 3. Prior Statements of Witnesses. As previously noted, Federal Rule 801(d)(1) deems certain prior inconsistent and consistent statements of witnesses as not being hearsay. California simply provides hearsay exceptions for such statements. There are, however, substantial differences between the scope of the statements covered by Federal Rule 801(d)(1) and those covered by the comparable California provisions, Evidence Code §§ 1235-1236.

1. Under § 1235 any prior inconsistent statement of a witness used to impeach his testimony (which under Evidence Code § 770 is permitted only if the party who called the witness has or will have an opportunity to present the statement to the witness for purposes of explanation) may not only be admitted to show that the witness is unreliable, but also for the truth of the matter asserted. First, it is unreasonable to expect a jury to utilize such a statement solely for purposes of impeachment and not to be impressed with its content. Secondly, the presence of the witness helps guarantee accuracy since he can be cross-examined regarding his statement. Third, there is reason to believe

that statements made closer in time to the events to which they relate are likely to be more accurate than statements made later including those made under oath at trial. The chief practical effect of permitting such statements to come in for their truth is that they will assist a party in avoiding a directed verdict when his sole or major witness takes the stand and suddenly refutes all that he has said before trial.

Federal Rule 801(d)(1)(A) is identical to § 1235 with one vital exception. A prior inconsistent statement may come in for the truth only if it was made under oath at a trial, or hearsay, or in a deposition; otherwise it can only be used to impeach. It is interesting to note that the Advisory Committee on the federal rules originally adopted the California formulation which was then accepted by the Supreme Court. The rule was changed to its present form by Congress.

The chief problem with § 1235 occurs in the so-called "sandbagging" case in which one party calls to the stand a witness whom the party knows will testify that he has no information on the issues, only for the purpose of placing before the jury an "inconsistent" statement of the witness regarding the facts. This is particularly disturbing when used by a prosecutor in a criminal case. The matter is not serious if the witness admits making the statement and can be cross-examined thereon; but, if the witness denies both knowing the facts and making the statement, the opposing party is deprived of effective cross-examination.

Despite the dangers of "sandbagging," § 1235 is preferable to Federal Rule 801(d)(1)(A). In the vast majority of cases cross-examination of the declarant will be available and there is no reason to copy the narrower federal provision. Even in the rare case when the witness denies both knowledge of the facts and the making of the statement, prejudice can be controlled. For example, the trial judge can prohibit extrinsic proof of the contents of such a statement if the possibility of undue prejudice appears substantial.

Perhaps California should consider one minor change in § 770(b) to eliminate the possibility that an injustice could occur before the court could react. Under § 770(b), and hence under § 1235, a prior inconsistent statement of a witness is admissible even though the witness is not on the stand so long as the witness has not yet been excused from

giving further testimony. It would seem sound to limit § 770(b) to state that when a witness denies knowledge of events, a prior statement of the witness which is inconsistent with his testimony solely because it discusses these events, cannot be admitted until the witness has had an opportunity to testify as to whether or not he made the statement and, if so, to explain it. This would ensure that the substance of such an inconsistent statement would not be "sneaked in" before the court had an opportunity, based on all the evidence, to decide if its admission would be unduly prejudicial.

2. Evidence Code § 1236 is the counterpart of § 1235 with respect to prior consistent statements of a witness which are admissible under Evidence Code § 791 to rehabilitate the witness. Federal Rule 301(d)(1) covers such statements and provides the same limitations on their exclusion from hearsay as for prior inconsistent statements. As is true in regard to § 1235, the California rule is preferable. If anything, there is less potential harm in allowing the exception in § 1236 because the witness has already been subject to thorough cross-examination and impeachment regarding direct testimony consistent with the statement. (It should be recalled that Evidence Code § 791 has no federal counterpart. However, reading §§ 791 and 1236 together, the state provisions prove quite similar to Federal Rule 801(d)(1) as to when a prior consistent statement may be utilized despite its hearsay aspects. Both systems permit use of such statements only after the witness has been impeached with regard to his testimony on the subject matter of the statements.)

3. California Evidence Code § 1237 deals with past recollection recorded. Its federal counterpart, Rule 803(5), is simpler in form, but generally the same in substance. The only significant difference is that § 1237(a)(2) requires that the record must be "made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made," whereas Rule 803(5) requires only that the statement must be "shown to have been made or adopted by the witness." Thus, under the federal rule if X makes a recorded statement, to which Y later assents, the exception could apply if all other conditions were met regarding either X or Y, whereas in California, the statement is admissible only

if the requirements are met with regard to X. Thus if X is dead, the statement would not be admissible despite the fact that Y was actually present when X made the statement, assented to it immediately thereafter, and is quite clear and willing to testify that it accurately reflected the facts as Y saw them shortly before X's statement was recorded.

California Evidence Code § 1237(a) should be amended to include recorded statements of others adopted by a witness, provided all other requirements of § 1237 are met.

4. California Evidence Code § 1238 provides an exception for a prior identification by a witness of a person as one who participated in a crime or other occurrence. There is no federal counterpart to this rule. The House of Representatives included such a provision under its version of Rule 801(d)(1) involving prior statements of witnesses. The Senate bill did not contain such a provision because the Senate Judiciary Committee felt that a criminal defendant should not be convicted solely on the basis of such evidence. The House-Senate Conference Committee adopted the Senate version.

The action of the Conference Committee seems misguided. First, the question of what and how much evidence is sufficient to convict a criminal defendant should not govern what is or is not admissible. Second, even if criminal cases should be exempt, evidence of prior identification of individuals in civil actions should not also be eliminated. Finally, one must recognize that the evidence often will be admissible under another exception. For example, if the witness' prior identification was recorded, as it often would be in important situations such as identification in formal police lineups, the prior recollection recorded exception would apply whenever the witness at trial was unable to remember sufficiently to make the identification in court. Or if the witness makes a different identification, then the prior identification will qualify as a prior inconsistent statement.

On the merits, inclusion of a hearsay exception for a prior identification made when fresh in the memory of a witness as required by Evidence Code § 1238(b), and only after the witness testifies as to its accuracy when made as required by Evidence Code § 1238(c), seems logical and appropriate. Memories of faces tend to fade more rapidly than

memories of events. Futhermore, personal appearances change and, indeed, can be deliberately altered at the time of trial. Thus, the rejection of a federal rule permitting a hearsay exception for a prior identification should not induce California to alter or repeal Evidence Code § 1235.

Article 4. Spontaneous, Contemporaneous and Dying Declarations.

1. California Evidence Code § 1240 provides an exception for spontaneous statements. Federal Rule 803(2) provides what appears to be an identical exception, although it is couched in different terms. The only possible difference is that the federal rule only requires that the statement relate to a startling event or condition whereas in California the statement must "narrate, describe, or explain" the act, condition, or event. Thus, if a person is injured in a certain manner, the spontaneous excited statement of a witness that "She's the third person hurt that way this month," arguably, might not fall under the California provision although it would come under the federal rule. However, inclusion of the word "explain" under the § 1240 seems adequate to give sufficient flexibility to the courts to admit spontaneous statements when otherwise appropriate; hence no alteration is needed.

2. Section 1241 provides an exception for a statement of a declarant "offered to explain, qualify, or make understandable conduct of the declarant," if the statement was made while declarant was engaged in such conduct. The federal counterpart, Rule 803(1) is substantially broader. It provides an exception for any statement of a declarant made either while declarant was perceiving an event or condition or immediately thereafter.

The federal provision, although generally accepted in only a minority of jurisdictions, is in line with modern thinking regarding spontaneous and contemporaneous utterances. See McCormick, Evidence § 298 (2d ed. 1972). California goes half way by accepting some "unexcited utterances" but not others. Why a contemporaneous utterance that explains declarant's conduct is permitted when a statement describing ongoing conduct of another person is not, is not at all clear. California should adopt the modern rule as embodied in Federal Rule 803(1) and alter § 1241 accordingly.

3. California Evidence Code § 1242 and Federal Rule 804(b)(2) provide hearsay exceptions for certain statements under belief of impending death. Several differences exist between the two provisions. The California rule is a bit broader than the federal rule in that with respect to criminal cases the federal rule applies only to prosecutions for homicide whereas the state rule is unlimited. However, the federal rule is much broader with respect to civil actions since the statement can be utilized even when declarant survives, whereas in California the statement is permitted only if death occurs. Use of such a statement in federal courts is cut back, however, by the requirement that declarant be unavailable at the time of trial.

Limitations on the use of dying declarations are arbitrary, reflecting doubt as to the justification for any hearsay exception for such statements. Once an exception is made, however, there is little reason to restrict its scope solely to homicide cases. For an excellent discussion see McCormick, Evidence, ch. 28 (2d ed. 1972). Moreover, the safeguard to truth of such declarations, the fear of lying at the time of death, exists when the declarant believes death is imminent and is unrelated to his ultimate survival. Thus California Evidence Code § 1242 should not be cut back to eliminate criminal cases other than homicide, but should be expanded to permit statements made under a belief of impending death, even though death does not occur. It is unnecessary to require that declarant be unavailable at the time of trial, as does Federal Rule 804(b)(2), in order for the exception to operate. If the declarant is available, then he can be called and subjected to full examination on the matter and it is of far less consequence whether or not the statement is admitted. The court may always keep out such a statement on the ground that its value is outweighed by possible prejudicial aspects.

Article 5. Statements of Mental or Physical State. 1. California Evidence Code § 1250 provides a hearsay exception for statements regarding declarant's present state of mind or physical state when declarant's state of mind or physical state is an issue in the case or when the statement is offered to prove or explain acts or conduct of defendant. Federal Rule 803(3) permits such statements but without specifying the purposes for which they can be utilized. Both the California and

Federal provisions specifically exclude statements of memory or belief offered to prove the facts remembered or believed.

From a practical point of view the provisions are identical in substance. One must recall that the Federal Rules already contain a very broad contemporaneous utterance exception (Rule 803(1)) which, arguably, makes 803(3) unnecessary and thus accounts for its broad wording. The limitations in California § 1250 simply refer to the relevancy of such statements and reflect a fear that the law adopted in the famous case of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300 (1892), might be applied too broadly. The question raised by Hillmon is whether a statement by one person, X, "I am going to Cripple Creek with Y," can be utilized to show not only that X went to Cripple Creek, but that Y did so as well. Obviously the declarant's stated interest is relevant as to his own actions in regard thereto; but such a statement cannot logically be used to prove the acts of another. That Rule 803(3) was not intended to interfere with the normal rules of relevancy of such statements is clear. In approving Rule 803(3) the House Committee on the Judiciary specifically cited Hillmon and noted that the rule should not permit statements of intent to prove conduct of someone other than declarant.

2. California Evidence Code § 1251 permits statements of a declarant's past physical or mental state only if such physical or mental state is in issue and provided declarant is unavailable as a witness at trial. The hearsay dangers are substantially enhanced when a declarant describes past as opposed to present symptoms, for declarant's memory of previous sufferings may be faulty and those to whom the statement is made cannot observe declarant's actions to see if they are consistent with the stated symptoms. The counterpart federal rule, 803(4), provides an exception for past physical or mental symptoms only when made for and pertinent to medical diagnosis or treatment.

In one aspect, the federal rule is broader than § 1251 since a statement of an absent eyewitness made to a doctor for diagnostic purposes could have relevance to a case despite the fact that the declarant's own physical condition was not in issue. For example, in a case by X against his employer, E, for negligently controlling radioactive materials, statements of X's fellow employee, Y, who died of

radiation poisoning, to Y's doctor could be of great significance. Such evidence is held to be admissible in many jurisdictions since one is likely to tell the truth to the best of his ability when consulting a physician for diagnosis or treatment of his own ailments. It would seem appropriate, therefore, to amend Evidence Code § 1251 to permit statements of a person's past mental or physical symptoms or sensations made to a doctor for purposes of diagnosis or treatment, even though such physical or mental condition is not in issue.

On the other hand, § 1251 is broader than the federal rule which, unlike § 1251, does not include a blanket exception for statements of past mental or physical symptoms or sensations when the state of mind or the physical symptoms are in issue. This raises a question whether the current provisions of § 1251 should be retained. These provisions are quite modest; they require the declarant to be unavailable, and, under § 1252, such declarations are inadmissible if circumstances indicate the declarations are not trustworthy.

On the surface, at least, current § 1251 appears reasonable. When a person's physical or mental condition is in issue and that person is unavailable, the need for the evidence, if otherwise trustworthy, outweighs the hearsay dangers. There is, however, an underlying problem in that "in issue" is not a precise term. In some cases, the definition clearly applies; for example, when one sues on the basis of an intentional tort, evidence of intent is appropriate. But rarely, if ever, will such evidence not be in the form of an admission of a party or a predecessor in interest of a party and thus admissible on other grounds. Consider a more complicated case. P Corporation sues D, a physician, for slander, alleging that D falsely told employees of P that processes in P's plant seriously endangered their health, thus causing several of them to leave their jobs. One such employee, now living abroad, recently wrote a letter to a friend, stating, "I quit my job with P solely because after talking to D, I feared for my health." Is such evidence admissible under § 1251? Is the employee's mental state "in issue"? Section 1251 specifically excludes the evidence if it is offered to prove any fact other than state of mind, emotion, or physical sensation. If the evidence comes in solely to show that the employee feared for his health, it could be argued that his mental state was in issue. But the

statement would not be admissible to show publication, i.e., that the employee heard D's words. That would have to be proved independently. Furthermore, and more fundamental, it is unclear if the statement could be admitted to show why the employee quit. If one takes the position that it is only an inference from the employee's state of mind (fear for health) that he quit for that reason, then state of mind is not an issue itself but only used as circumstantial evidence of another fact that is in issue. The official Comment to § 1251 reads, "If the past mental or physical state is to be used merely as circumstantial evidence of some other fact, * * * the statement is inadmissible hearsay."

It may be that the value of the evidence to be admitted justifies court determination, on a case-by-case basis, of when the statute does or does not apply. But the uncertainty as to application raises a serious question as to whether § 1251 should be scrapped entirely in favor of Federal Rule 803(4). Of course, it must be emphasized that the Federal Rules contain two catchall exceptions, Rule 803(24) and Rule 804(5), that permit the courts to admit hearsay not falling within specified exceptions. Those provisions would seem particularly appropriate for admission of statements of past state of mind or physical condition in appropriate cases. Unless California provisions are amended to include such catchall clauses, arguably the current language of § 1251 referring to matters "in issue" should not be eliminated.

3. As mentioned above, California Evidence Code § 1252, which has no federal counterpart, simply gives the court power to exclude hearsay statements regarding physical or mental condition when circumstances indicate they lack trustworthiness. Such a provision is superfluous in light of general provisions for exclusion of evidence; however, it emphasizes the need for caution on the part of courts regarding the evidence in question and arguably should not be altered or repealed.

Article 6. Statements Relating to Wills and to Claims Against Estates. 1. California Evidence Code § 1260 provides a hearsay exception for a statement by declarant as to whether or not he has made, revoked, or identified his will. There is no federal counterpart. Without this special exception, the evidence would be barred under § 1250 which, as previously noted, "does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." A great many courts, however, have found a special exception

for statements regarding an individual's will. See McCormick, Evidence pp. 702-703 (2d ed. 1972). In the long run, such an exception assists in carrying out testators' intentions and thus should be retained. Normally, there is little danger that a person will deliberately make a false or misleading statement concerning his own will. The lack of a federal provision may be due, in part, to the fact that ordinary will contests usually do not reach federal courts.

2. California Evidence Code § 1261 provides an exception for a statement of a decedent in an action against his estate. The purpose is to help balance the fact that the plaintiff can give live testimony whereas the decedent cannot. Historically the method of controlling this "injustice" was to invoke a "dead man" statute which prohibited testimony by the living party. Such a limitation was ridiculous and has been rejected under the modern codes, but § 1261 helps to soften the blow by permitting hearsay statements of the deceased. The section specifically provides that the statement must have been "made upon the personal knowledge of the declarant at a time when the matter had recently been perceived by him and when his recollection was clear." Furthermore, § 1261(b) holds such a statement to be inadmissible if circumstances indicate it is untrustworthy.

There is no federal rule comparable to § 1261. Initially, a proposed Rule 804(b)(2) would have permitted any statement of an absent declarant's recent perception not in contemplation of litigation, regardless of who were the parties or the nature of the litigation. The provision was deleted by the House Committee on the Judiciary because it permitted too broad an exception to the hearsay rule. A more limited rule akin to § 1261 apparently was never considered.

There is no question that § 1261 permits admission of self-serving, unreliable hearsay assertions of the most dangerous type. There is, however, something to the unfairness argument when one of the parties is deceased and the other is not. The initial decision to include § 1261 took these matters into consideration. The federal rules provide no additional insight into the problem and hence do not dictate a repeal.

Article 7. Business Records. California Evidence Code Sections 1270-1272, taken together with § 250, which defines a "writing," establish a traditional broad hearsay exception for records or absence of

records of a business or calling, whether or not operated for profit. The sections are in substance identical to Federal Rules 803(6) and 803(7).

Article 8. Official Records and Writings. 1. California Evidence Code § 1280 provides an exception for an official record identical to the exception for an ordinary business record under § 1271 except that the custodian or other qualified witness need not testify as to the mode and preparation of an official record as a prerequisite to admission, whereas such testimony is required for an ordinary business record. The federal counterpart to § 1280, Rule 803(8), appears more restrictive. It permits records "setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law."

The state rule, despite its more general terms seems clearly to cover all matters covered by parts (A) and (B) of the federal rule. The caveat in part (B) of the federal rule regarding police officers and other law enforcement officials creates an ambiguity when read in connection with Rule 803(6) dealing with ordinary business records. The latter does not contain a similar caveat and would clearly seem to permit reports by such officers of their own observations. Yet some doubt must be cast on the scope of 803(6), since the House of Representatives engaged in an elaborate discussion of the evils of utilizing police reports against an accused when voting to insert the caveat in Rule 803(8). Since the justification for treating police reports differently from other business records is weak, the current language in § 1280 is preferable to that of the federal rule and avoids creating an ambiguity in respect to § 1271.

Section 1280 does not specifically mention official investigations as does part (C) of Federal Rule 803(8). If a strict analysis is observed, the record of an investigation could not be introduced under the state rule if the decision relied in any way on testimony or information obtained from persons who did not have an official obligation

routinely to report their observations. Section 1280(c) merely states that "the sources of information and method and time of preparation [of the official record] must be . . . such as to indicate its trustworthiness." But the official Comments to § 1280 seem to require that the sources have the same duty to report as is required under § 1271. Furthermore, sections 1282 and 1283, discussed below, indicate that findings of fact by government investigators may not automatically be excepted from the hearsay rule, regardless of the sources of information. It would seem useful, therefore, to clear up any uncertainty by adding a clause which provides for the introduction of factual findings of official investigations whenever the circumstances indicate that the findings are trustworthy, regardless of whether all persons who gave testimony during the course of such an investigation had a routine duty to report their observations. Moreover, there is no reason automatically to prohibit the use of such findings against the accused in criminal cases as is done under the federal provision. Courts can be expected to scrutinize the record in such situations to ensure that the accused is not unfairly prejudiced by admission of such evidence.

2. Sections 1281, regarding records of vital statistics, and 1284, pertaining to statements of the absence of a public record, are the same in substance, as Federal Rules 803(9) and 803(10). Sections 1282 and 1283, however, which govern findings by federal officials that a person is alive or dead or that he is offically missing, or captured by a hostile force, or interned in a foreign country, have no federal counterparts other than Rule 803(8)(C) regarding the results of official investigations. There is no special reason for altering these sections except that they would automatically be included in a more general clause accepting the factual findings of official investigations.

Article 9. Former Testimony. California Evidence Code §§ 1290-1292 provide a hearsay exception for certain testimony given in prior proceedings. Federal Rule 804(b)(1) deals with the same subject matter, but is much simpler in form. There are several significant substantive differences between the California and federal provisons as follows:

1. Evidence Code § 1290 defines former testimony to include formal testimony under oath in agency adjudications and arbitration proceedings as well as in court cases and depositions. Federal Rule 804(b)(1) does

not specifically include agency hearings and arbitration proceedings. There seems little reason not to include all former testimony, formally given, regardless of the nature of the proceedings, provided other safeguards are met. Therefore, § 1290 should be left as is.

2. Section 1291(a)(1) provides a hearsay exception for former testimony against a person who offered the testimony in the prior proceeding or against that person's successor in interest. No other safeguard is required. Federal Rule 804(b)(1) does not except any former testimony unless the person against whom it is offered or a predecessor in interest "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The federal rule is preferable. A person who offers testimony in a prior case may have had entirely different motives than when faced with that evidence at a later time. The use of such evidence against a successor in interest who was not present when the testimony was taken seems particularly inappropriate without such a safeguard.

It should be noted that whenever former testimony of any other type is offered in California, the person against whom it was offered, whether or not a party to the original proceeding, is protected by a rule requiring that the person himself or some party to the original proceeding has had appropriate opportunity and motive and interest to cross-examine the declarant similar to the current motive and interest of the person against whom the evidence is sought to be introduced. See California Evidence Code §§ 1291(a)(2), 1292(a)(3).

Section 1291(a)(1) should be amended accordingly.

3. Section 1292 admits former testimony (assuming other conditions are met) against persons who were neither parties not successors in interest of parties in the initial proceeding when declarant's testimony was taken. Federal Rule 804(b)(1) is confined to persons who were parties to the first proceeding or their successors in interest. The House Committee on the Judiciary eliminated broader language akin to that in § 1292.

As the leading writers on the subject have noted, see McCormick, Evidence § 261 (2d ed. 1972), the federal-type limitations on former testimony are absurd in light of far more liberal rules permitting exceptions for other types of hearsay with far fewer safeguards. The

crucial factor should not be whether a person was "in privity" with a party to a former proceeding, but whether the person against whom the testimony is now sought to be used is protected by the fact that at the time the testimony was given there was adequate opportunity and proper motive and interest for full examination of the declarant.

Since § 1292 contains the proper safeguards, it would be improper to alter § 1292 to exclude testimony even against persons who were neither parties nor successors to parties to the initial proceedings.

4. Section 1292, which permits former testimony against those not parties to the initial proceeding, limits use of such testimony to civil cases. See § 1292(a)(2). This appears inconsistent with § 1291(a)(1) which permits former testimony introduced by a current party's predecessor in interest to come in against the current party in criminal as well as in civil proceedings. For this purpose, no logical distinction can be made between persons who were not present at the time the testimony was taken. Being a "successor-in-interest" provides no special security from unfairness. The matter is particularly grievous in California because, as already noted, § 1291(a)(1) does not have the usually required safeguards of adequate examination.

Federal Rule 804(b)(1), which allows former testimony only against parties to the original proceedings and their successors, limits use against successors to civil actions.

The question whether criminal actions should or should not be included is a difficult one. The inability of a criminal defendant ever to confront a witness whose testimony, given in a former proceeding to which defendant was not a party, is a serious detriment. On the other hand, one might want to grant the exception for application only in those cases in which the nature of the examination provided full and adequate protection of defendant's rights and where justice would not be served by exclusion. On balance, the exception statutes probably should not prohibit use of former testimony in criminal proceedings.

It is important to note that no matter how the issue of use in criminal cases is resolved, §§ 1291(a)(1) and 1292(a)(2) should be harmonized, and § 1291(a)(1) should be amended to require appropriate safeguards.

Article 10. Judgments. 1. California Evidence Code § 1300 excepts from the hearsay rule a final judgment adjudging a person guilty of a

crime punishable as a felony to prove any fact essential to the judgment. However, the ex ception is confined to civil actions. Federal Rule 803(22) is similar with the following differences:

(1) Section 1300 refers to a crime punishable as a felony, whereas Rule 803(22) refers to a crime punishable by death or imprisonment in excess of one year. The federal rule, which conforms to California's definition of a felony, is preferable. A crime committed in another jurisdiction may be deemed a "felony" even though it is not regarded as serious and the authorized punishment is far less than what would qualify as a felony in California. This problem is not unique to this section. Perhaps it could be solved by defining "felony," when committed elsewhere, as a crime that could be a felony in California.

(2) Federal Rule 803(22) is not confined to civil cases as is § 1300. The federal rule excludes use by the prosecution of convictions against persons other than the accused. Otherwise, however, convictions can be admitted in criminal cases. The federal rule, with its limitation regarding use by the prosecution of convictions against third persons, is preferable. First it may be important for a criminal defendant to be able to utilize the exception, for example, to show that another person has been convicted of the crime for which he is being tried. Second, there is no reason that the prosecutor should not be permitted to use defendant's own prior conviction. Defendant had representation and the strongest of motives to obtain an acquittal. And the standard of conviction, beyond a reasonable doubt, adds reliability to the judgment. [It must be remembered that such a rule does not permit introduction of every prior conviction of every defendant. Only in a relatively rare situation when a fact that must have been decided in a prior case is relevant to the present action, can such a conviction be admitted, and only then when the value of the evidence outweighs its obvious prejudicial nature.]

Evidence Code § 1300 should be amended to conform to Federal Rule 803(22).

2. California Evidence Code §§ 1301 and 1302 have no federal counterparts. They provide that certain judgments in civil cases may be introduced to prove certain facts essential to those judgments. Basically the cases involve actions for indemnity or warranty for the

amount of a judgment, and actions based on vicarious liability when in a prior suit the primary tortfeasor has been held liable.

The policy behind these sections are strongly related to principles of collateral estoppel. Unfortunately, there are substantial hearsay dangers that raise serious questions about the wisdom of §§ 1301 and 1302. For example, suppose a plaintiff sues and obtains a large judgment against a servant, who is insolvent. Plaintiff in a subsequent suit against the servant's employer may introduce the judgment obtained against the servant to prove the latter's liability. Yet the servant may have had little motive and no money with which to put up a defense. Indeed, even a judgment by default would be admissible under the section.

Under § 1300 regarding criminal convictions, only felony convictions are admissible. By way of contrast §§ 1301 and 1302 provide no similar guarantee as to the importance of the first action. Moreover, the reasonable doubt standard is inapplicable in civil cases, so the decision in the first suit may have been a close one. In states such as California, as many as three of the twelve jurors could even have voted for the losing party.

Perhaps if §§ 1301 and 1302 are to be retained, clauses should be added permitting the opposing party to introduce evidence that the decision was not unanimous.

It is important to note that any analysis of § 1302 must take into consideration the case of Markley v. Beagle, 66 Cal.2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967), already discussed in connection with Evidence Code §§ 1224-1227. That decision interpreted § 1224 not to apply to cases of vicarious liability in employer-employee situations. The court took the position that the new evidence code sections were designed only to carry forth the law as it had previously existed under what had been former Section 1851 of Code of Civil Procedure. Since § 1302 also derives from former Section 1851 (see Comment to § 1302), its application is in doubt in any case in which an employee is sued on the basis of acts of an employee and a judgment against the employee is sought to be introduced. At the very least § 1302 should be rewritten to clarify the law. If § 1302 is to be retained, there seems little reason not to apply the section to the employer-employee situation.

Article 11. Family History. 1. California Evidence Code §§ 1310 and 1311 provide a hearsay exception for certain statements concerning a person's family history. The sections are nearly identical to Federal Rule 804(b)(4) with one exception. Under the federal rule a statement by one person regarding the family history of another is admissible if the declarant is related to the person whose history is involved or was so intimately associated with the latter's family as to be likely to have accurate information concerning the matter declared. Section 1311(a)(2)(i) and (ii) provide an additional requirement, when the declarant is not related to the person whose history is involved. In that case the declarant's information must have been received from that other person or from someone related to him or be based upon repute in that other person's family.

This additional requirement seems unwarranted and unnecessary. It will often be difficult, if not impossible, to show the source of an absent declarant's information. Yet, when it can be proved that a close relationship existed between declarant and the family of the person whose history is involved, it can often be fairly assumed that defendant had access to accurate information.

It should also be noted that § 1311(b), for which there is no federal counterpart, highlights the power of the court to exclude unreliable evidence by providing that statements of family history are inadmissible if made under circumstances indicating a lack of trustworthiness. Given this safeguard, § 1311(a)(2)(i) and (ii) should be repealed.

2. California Evidence Code §§ 1312-1316 provide hearsay exceptions for family history for entries in family and church records, reputations in the family or community, and for marriage, baptismal and similar certificates. Federal Rules 803(11), (12), (13), and (19) provide nearly identical exceptions. There is, however, one wording difference that affects these sections as well as those involving statements of family history. The federal rules consistently add the word "adoption" to the list of matters included in family history, whereas the California provisions do not. The difference is probably unimportant since both federal and state provisions include "ancestry." However, the matter is clouded by a concluding clause in California §§ 1312 and 1313 allowing evidence of another "similar fact of the family history of

a member of the family by blood or marriage." (Emphasis added.) The other sections, e.g., §§ 1310, 1311, 1315, and 1316, refer only to another "similar fact of family history." Elimination of the words "by blood or marriage" at the end of §§ 1312 and 1313 would seem wise.

Another minor difference is that Federal Rule 803(19) permits community reputation to be admitted concerning a person's "birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact," whereas its California counterpart, § 1314, permits such evidence only regarding a person's "date or fact of birth, marriage, divorce, or death." The federal rule seems preferable. If community reputation, although admittedly a weak source of information, is available to help prove a key question of ancestry, and the circumstances are such as to indicate its reliability, it should be received into evidence.

Article 12. Reputation Concerning Community History, Property Interests, and Character. California Evidence Code §§ 1320-1324 provide hearsay exceptions for reputation concerning facts of public notoriety and of a person's character. Federal Rules 803(20) and (21) cover much of the same ground. There is no federal counterpart to California § 1321 permitting evidence of reputation concerning public interest in property in the community. Nor is there a federal provision akin to § 1323 providing an exception for a statement of an absent declarant, who had sufficient knowledge of the facts, regarding the boundary of land. The latter seems questionable since there is no special guarantee that such a flat hearsay declaration is trustworthy. However, such an exception apparently has long been a part of the California law of evidence (see Comment to § 1323), and the section itself requires exclusion of the statement if it appears untrustworthy.

Article 13. Dispositive Instruments and Ancient Writings. California Evidence Code §§ 1330, 1331, and 1600 deal with exceptions for dispositive instruments and ancient writings. Their federal counterparts are Federal Rules 803(14), (15), and (16). There is only one major difference. Federal Rule 803(16) defines an "ancient" document as one more than 20 years old. Section 1331 defines such a document as one more than 30 years old and adds the requirement that the statement sought to be introduced must generally have been acted upon as true by persons having an interest.

Although one could debate whether twenty or thirty years is more appropriate, there seems little reason to alter § 1331 in that respect. The additional requirement of the state provision is a valuable safeguard and should be retained.

Article 14. Commercial, Scientific, and Similar Publications. California Evidence Code §§ 1340 and 1341 deal with commercial and scientific publications as do Federal Rules 803(17) and (18). As already noted in the discussion of § 721(b) regarding cross-examination of experts, California § 1341 is far more restrictive than is Federal Rule 803(18) regarding admission of learned publications. Indeed § 1341 only permits use of books to prove facts of general notoriety and interest. By way of contrast, the federal rule provides a hearsay exception for any statement in any book, periodical or pamphlet established as reliable by expert testimony or judicial notice, if called to the attention of an expert witness during cross-examination or relied upon by him during direct examination.

Obviously there would be substantial danger of admitting untrustworthy evidence if any statement in a document purporting to be reliable were to be admissible in spite of the hearsay rule. On the other hand, the use of such statements, when the general reliability of their source is established, is justified at least when, as required by the federal rule, the statements are called to the attention of an expert who is testifying in the case.

Such evidence is valuable in situations where the amount in controversy is limited or where one party has limited assets and is hard pressed to obtain a battery of experts to match those of his opponent. It would seem appropriate therefore to amend § 1341 to adopt a provision akin to Federal Rule 803(18). In doing so, California should also adopt the sentence in 803(18) providing that admissible statements from books and other documents shall be read to the trier of fact but shall not be received as exhibits. This keeps the jury from giving undue weight to such statements during the course of its deliberations. For a detailed discussion of the pros and cons of various hearsay exceptions for scientific and literary works, see McCormick, Evidence § 321 (2d ed. 1972).

Additional Exceptions in Federal Rules Not Contained in the California Evidence Code. 1. Federal Rule 803(23) provides a hearsay exception for any judgment to prove facts relating to "personal, family, or

general history, or boundaries, essential to the judgment if the same would be provable by evidence of reputation." The argument in favor of such an exception is that a judgment is as good as reputation. However, there is considerable doubt as to the evidentiary value of a judgment in a civil case, particularly based upon defendant's default. Even if litigated, the level of the burden of proof in civil cases (plus the non-unanimous verdict, where permitted) does not give strong guarantees of reliability particularly because there is no assurance that the case was tried or defended with vigor.

On the whole it would not seem wise for California to adopt a rule akin to Federal Rule 803(23).

2. Federal Rules 803(24) and 804(b)(5) provide special omnibus exceptions for statements not covered by one of the specific hearsay exceptions but "having equivalent circumstantial guarantees of trustworthiness," if admission is in the interest of justice and "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."

Lawyers have long recognized the arbitrary nature of the hearsay exceptions. From time to time suggestions have been made to do away with the hearsay rule entirely and to leave the admissibility of hearsay to the discretion of the court. Federal Rules 803(24) and 804(b)(5) provide a step in that direction. These rules are subject to challenge on two grounds. First, they give the court considerable power to admit untrustworthy evidence. For example, some California hearsay exceptions have no circumstantial guarantees of trustworthiness. See, for example, the prior discussion of § 1224. Adoption of provisions like Federal Rules 803(24) and 804(b)(5) would, at least theoretically, permit the court to admit any hearsay statement since any statement has "equivalent circumstantial guarantees of trustworthiness" as one admitted under § 1224. Second, because the standards of admission under these federal rules are so uncertain, attorneys will not be able to plan cases adequately. For example, a lawyer's entire stategy may depend on whether a crucial hearsay declaration will or will not be received. Indeed some cases which heretofore would not have been filled would be brought with the hope that the only evidence, statements of a deceased witness

clearly inadmissible under prior evidence law, would now be received. This drawback of uncertainty has been considered and dealt with in Rules 803(24) and 804(b)(5), which provide that the rules cannot be invoked unless the proponent informed the adverse party of his intention to do so sufficiently in advance of trial to permit the adverse party to meet the evidence. This does not completely solve the problem, however. Informing the opposing side is, of course, important. But even when all persons interested are informed, they still want, and may need to know whether the court will admit the evidence. Thus what is needed is a provision for a pre-trial decision as to whether the standards of the hearsay exception have been met.

On balance it would seem desirable to add to the California code a provision permitting introduction of hearsay evidence not falling within a specific exception, but only if the court, on motion of the proponent before trial, determines that the evidence is vital to the case and has sufficient guarantees of trustworthiness to justify its admission. Failure of the proponent to move the matter in time to permit the opposing party to meet the evidence should be a ground for refusal to grant relief.

As was noted at the outset of the hearsay material, the California scheme does not prohibit court-made hearsay exceptions in addition to those created by statute. However, although a court might feel impelled to admit reliable hearsay on a case by case basis, the court would often be extremely reluctant to establish an entire new exception just to permit admission of an item of evidence in a case before it. Therefore, a new provision, as suggested above, would seem useful and appropriate.

DIVISION 11. WRITINGS

Chapter 1. Authentication and Proof of Writings

1. California Evidence Code §§ 1400-1402 and §§ 1410-1421 are the general provisions that establish a requirement of authentication and set forth the means by which authentication can be accomplished. The federal counterpart is Rule 901.

(1) One interesting difference is the fact that Federal Rule 901 refers to all items sought to be introduced into evidence whereas the California provisions apply only to "writings" which are defined in

Evidence Code § 250 as any recorded method of communication or representation. The matter is probably of no consequence. Any real evidence which is not within the definition of a "writing" would nevertheless not be admitted without sufficient authentication, for otherwise it would be irrelevant.

(2) A second difference is that Federal Rule 901 has no provision akin to § 1402 which deals with altered writings, requiring the proponent to explain the alteration before the writing can be admitted. Again the difference is trivial, although conceivably in a few cases, writings will be held inadmissible in California whereas they would have been admitted in federal courts. If a writing is otherwise authenticated, an apparent alteration would seem more appropriately to go to the weight of evidence, not to admissibility.

(3) Federal Rule 901(b)(1) through (b)(10) gives a series of non-exclusive illustrations of how authentication can be accomplished. California Evidence Code §§ 1410-1421 provide a very similar, non-exclusive list. The federal rule specifically deals with voice identification, telephone conversations, and evidence regarding a process or system, whereas the state provisions do not mention these matters. Since these provisions merely involve a common-sense approach, and are non-exclusive, there seems little reason for their adoption in the California code.

(4) Federal Rule 901(b)(8) does provide for authentication of a document over 20 years old by showing its age and that its condition and location are consistent with authenticity. There is no comparable California statute. It is questionable if the showing suitable for the federal rule would satisfy California authentication requirements in the absence of a specific provision, although clearly it would not take much additional evidence to do so. There seems little reason to add a new section to the California code. Age alone seems a weak and unsatisfactory basis for authenticity; the matter can be left to the California courts for an item by item determination on all the information available.

2. California Evidence Code §§ 1450-1454 deal with certain presumptions of authenticity that derive from official and offically acknowledged writings. Federal Rule 902(1)-(4), (8), (10) appears to cover

identical ground. However, Federal Rule 902, unlike the California code, also covers publications issued by public authority, newspapers and periodicals, commercial paper, and trade inscriptions. The latter avoids ridiculous cases such as Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954), in which the label on a can of peas was held unacceptable to authenticate the peas as a product of the compnay whose name appeared on the label.

The failure of California to have provisions for self-authentication of such items is unimportant so long as the courts are willing to make sensible decisions based upon circumstantial evidence. Even if it would otherwise be desirable, it would be impossible to foresee and forge a statute for every particular type of item that might give rise to technical problems of authentication.

Chapter 2. Secondary Evidence of Writings

Article 1. Best Evidence Rule. Both California (Evidence Code § 1500) and federal courts (Rule 1002) have a so-called "best evidence" rule. There are, however, several substantial differences.

1. Section 1500 holds that "the writing itself" is normally the only thing admissible to prove its contents. But the section does not define "the writing itself," nor is a definition to be found in Division 2 of the Evidence Code which is confined to the definition of specific terms. By way of contrast, Federal Rule 1001 defines an "original" as any writing or recording "or any counterpart intended to have the same effect by a person executing or issuing it." A computer printout sheet giving stored data is specifically defined as an "original." In California a problem arises in a situation where a person prepares two copies of a contract, one of which signs and the other of which is signed by the other party to the agreement. At trial the plaintiff who seeks to establish the existence of a contract attempts to introduce the document which bears only his signature. Is that the "writing itself" or must he introduce the document bearing the signature of the defendant? The federal rule leaves no ambiguity. The proffered document qualifies as an original. Arguably the California code should be amended to define "writing itself" consistent with an "original" as defined in Federal Rule 1001(3). (However, see the discussion in 2., immediately below.)

2. Federal Rule 1001(4) defines as a "duplicate" a counterpart of the original "produced by the same impression as the original, or from the same matrix, or by means of photography * * * or by * * * re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Federal Rule 1003 then provides that a duplicate is admissible just as is an original unless there is a question of the authenticity of the original or when circumstances whow admission of the duplicate to be unjust.

California has no comparable provision. If it did it would obviate a need for further definition of "the writing itself" as discussed above. Furthermore, such a rule would recognize the realities of today's world where record-keeping has advanced substantially over times when a shopkeeper neatly filed away each original invoice. There seems little doubt that California should adopt a provision encompassing the provisions of Federal Rule 1003. (It should be noted, as discussed below, §§ 1550 and 1551 of the California code do go part way in admitting certain photocopies as if they were originals. However, these sections are limited in scope.)

3. Federal Rules 1004-1007 govern the admissibility of evidence other than an original or duplicate to prove the contents of a writing. The comparable California provisions are contained in §§ 1501-1510. There are a number of important difference.

(1) California follows the so-called "second best" evidence rule, while the federal courts do not. Thus in federal courts if no original can be found after diligent search, any evidence of the contents of the document is admissible, even though a duplicate or other copy exists. In California, however, under § 1505, testimony as to the contents of a writing is not admissible, even if the original cannot be found, if the proponent has a copy of the original. The idea is that a copy of a writing is likely to be more reliable than testimony as to the contents. The failure to distinguish among various copies (e.g., a recent photocopy is more reliable than an older one done in longhand) tends to weaken the argument.

When initially deciding upon which rule to follow, the legislature must have considered the deep split of authority on the matter. See generally McCormick, Evidence § 241 (2d ed. 1972). Therefore, there is

no special reason now to alter the initial decision, although the details as to its operation should be reviewed if California adopts a provision like Federal Rule 1003, as suggested above.

(2) California § 1510, for which there is no federal counterpart, permits a copy of a writing to be introduced into evidence if the writing itself has been produced at the hearing and made available for inspection by the other party. The provision is sensible. If the original is physically present, it can be compared with the copy to assure that they are identical. However, the original can then be returned to the custodian's files; it need not be tied up during the court proceedings.

(3) Federal Rule 1007 provides that secondary evidence of the contents of a writing, recording, or photograph can be introduced, without concern for the best evidence rule, if the testimony is that of the party against whom the evidence is to be offered, or if such party made a written admission of such contents. This provision is sensible. The dangers protected against by the best evidence rule are inapplicable to conscious admissions by an opposing party on the stand or in writing before trial. The matter is not of great significance; nevertheless California should consider adopting a similar provision.

Article 2. Official Writings and Recorded Writings. California Evidence Code §§ 1530-1532 deal with copies of recorded documents and of documents in custody of a public entity. The sections appear to intertwine problems of authentication and best evidence. To the extent that the best evidence rule is involved, §§ 1530-1531 seem to cover the same ground as is contained in §§ 1506 and 1507. The comment to § 1530 acknowledges that it deals not only with authentication and best evidence, but also overcomes hearsay problems by permitting introduction of a writing based upon a certification of a custodian that the copy is correct copy of the original.

Although there is nothing wrong with a simple set of sections covering all aspects of admissibility of public documents, the placement of §§ 1530-1532 in the Evidence Code is extremely awkward. Instead of their current location as Article 2 of Chapter 2, which sandwiches them between Articles 1 and 3, dealing solely with the best evidence rule, the sections should constitute a special chapter of their own, with a

suitable title designed to show just what the sections are designed to do. Overlapping, and hence confusing, provisions regarding authenticity should be eliminated.

Article 3. Photographic Copies. California Evidence Code § 1550 provides an exception to the best evidence rule for photocopies or photoreproductions of any document, if the copy was made and kept in the ordinary course of business. Section 1551 provides a similar exception for any photocopy or photoreproduction of a document, since lost or destroyed, if the person in charge of making the copy, at the time it was made, attached to it a certificate that it is a correct copy of the original.

The provisions are a step in the right direction. They do not go as far as Federal Rule 1003, however, which would admit these documents, and all others like them, as "duplicates," even though the original is available and not produced. As noted previously, it would be highly desirable for California to adopt Rule 1003 in which case it might wish to consider elimination of §§ 1550 and 1551 as unnecessary.

Article 4. Production of Business Records. California Evidence Code §§ 1560-1566 provide a detailed procedure whereby a party can subpoena copies of business records to be deposited in court in a sealed envelope, accompanied by an affidavit of the custodian. The documents can then be offered into evidence on the basis of the affidavit and will not be barred either by rules regarding authentication or best evidence. Of course the affidavit must aver that the affiant is the custodian, that the copy is a true copy, and that the original records were prepared in the ordinary course of business at or near the time of the events recorded.

There is no comparable federal procedure. The provisions do have a noble purpose; they permit introduction of records over which there is no dispute, without the necessity of requiring the custodian to attend and bring the original records with him. There is certainly no reason to eliminate the provisions, which make sense, merely because the federal rules do not have a comparable set of provisions. The California rules are cumbersome, however. For example, it is not clear if the party who demands the records is entitled to see them prior to the trial or hearing when they are to be introduced. A party can be in difficulty

if a key document, upon which he was counting heavily, has not been sent. Any defects in the operation of the procedure should, of course, be eliminated.

Chapter 3. Official Writings Affecting Property

California Evidence Code §§ 1600-1605 deal with copies of recorded documents affecting property interests. They not only overcome best evidence problems, but problems of hearsay and authentication as well. These sections are consistent with and overlap the more general sections governing admissibility of publicly recorded documents. In most cases the same matters are covered by federal provisions scattered throughout the rules. For example, § 1600, the basic provision, reads very much like Federal Rule 803(14). There is no reason to repeal or alter the California provisions. However, their placement in the code should be reconsidered to ensure that attorneys understand just what the provisions are designed to do.