Memo 65-1

1/8/65

Memorandum 65-1

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code)

As reported in the round robin letter of December 22, 1964, the Assembly Interim Committee on Judiciary held a hearing on the Evidence Code on December 16 and 17. This memorandum presents several questions that were raised at that hearing as well as a few other problems. Attached to this memorandum are the following exhibits:

I. Statement of State Bar Committee to Assembly Committee (yellow pages)

II. Amendment of Labor Code Section 5708 (green page)

III. Statement of Dr. Anderson to Assembly Committee (pink pages)

IV. Amendment of Evidence Code Section 1156 (buff page)

V. Letter from Judge Philbrick McCoy (blue page)

The following matters should be considered by the Commission:

Section 120

Mr. Bobby (of the Office of Administrative Procedure) expressed concern over the broad definition of "civil action" in Section 120. Because the definition includes all "proceedings", he is fearful that the Evidence Code might be considered applicable to administrative proceedings.

We explained to Mr. Bobby that Section 300 makes the Evidence Code applicable only in court proceedings; but he would like to have Section 120 amended to read:

120. "Civil action" includes all actions and court proceedings other than a criminal action.

We think that the revision can be made without changing the substance of the code.

Section 455

Section 455 was revised in substance at the last meeting to provide that

the judge must afford each party an opportunity to present relevant information "before the close of the taking of evidence". We have changed the quoted words to read as follows: "before the jury is instructed or before the cause is submitted for decision by the court". We made the change because in many cases the court does not take evidence. On law and motion matters, motions for new trial, review of administrative records, etc., the court's decision may be influenced by matters that are subject to judicial notice, but the court does not take evidence. A requirement tied to the close of evidence would be unworkable in such cases.

The crucial time in any case is the time when the court must decide the question to which the matter to be judicially noticed is relevant, whether that time be the time for ruling on demurrer, the time for formulating instructions to the jury, the time for ruling on a motion for new trial, etc. Is the substituted language satisfactory?

Section 780

The Commission should consider whether the rule stated in Section 780 should be "except as otherwise provided by law" or "except as otherwise provided by statute". The matter was raised once previously when there was a minimum quorum of 4 Commissioners; and since one of those present indicated opposition, the matter was not further considered.

The question is whether the courts should be able to create additional exclusionary rules to exclude evidence relating to credibility that is relevant (§ 350) and of substantial probative value (§ 352) and is not cumulative or prejudicial or excessively time-consuming (§ 352). Section 780 is now out of harmony with the general scheme of the Evidence Code (and of the URE upon which it is based), for both systems of law are predicated on the abolition of all

common law exclusionary rules of evidence. URE Rule 7; EVIDENCE CODE §§ 350, 351. We have permitted the courts to work out common law rules of admissibility in some cases, but this does not depart from the underlying principle. Section 780, however, is inconsistent.

The comment that we have published to this section contains the following discussion:

> There is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral". The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.
>
> The effect of Section 780 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.
>
> There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such evidence is admissible. This represents a change in the present law. See People v. Methvin, 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

The foregoing discussion would be accurate if the word "statute" were substituted for "law"; but as the section stands, the discussion is incorrect, for by use of the word "law" we have retained all common-law exclusionary rules relating to the credibility of witnesses, including the rule prohibiting impeachment on a collateral matter and the rule prohibiting impeachment by character evidence in the form of opinion.

Section 788

The Assembly Committee voiced strong objection to the impeachment rule stated in Section 788. The term "dishonesty" was considered too imprecise to be of any value. Mr. B. E. Witkin, who spoke generally in glowing terms concerning the Evidence Code, also objected to the lack of precision in this language. The concern was that trial judges would be unable to apply the standard with precision, that appeals would be generated, and that cases decided erroneously against the prosecution would be lost without appellate review. It is unlikely that Section 788 would be approved by the Committee in its present form unless the district attorneys and Office of the Attorney General change their position on this section.

Several alternatives are available:

1. Limit the nature of the crimes involved to crimes involving deception or false statement (as previously recommended).

2. Broaden the crimes permitted to be shown to any felony.

3. Couple either of the preceding rules to a rule forbidding the impeachment of a criminal defendant with evidence of prior convictions unless the defendant himself has introduced evidence of his good character (as recommended in Tentative Recommendation).

Sections 788, 1153, and 1230

Mr. Powers, speaking for the District Attorneys' Association, suggests that the Code leave uncodified several recent decisions so that the courts will have time to work out the harsh aspects of the rules declared in these cases. One is Perez (preliminary showing of conviction required before defendant asked if convicted); another is Quinn (withdrawn plea of guilty); and the last is Spriggs (declaration against penal interest).

Sections 804 and 1203

As these sections were originally conceived, subdivision (b) was intended to preclude a party from cross-examining one of his own witnesses concerning a matter covered in his direct examination merely because another party used an opinion or hearsay statement of that witness relating to the matter. Subdivision (b)(3) of Section 1204 used the language, "This section is not applicable if the declarant is . . . a witness who has testified in the action concerning the subject matter of the statement," to accomplish this. The underscored words were deleted at the last meeting; and the deletion now leaves the sections open to the construction that a party may cross-examine his own witness concerning a matter within the scope of the direct examination when another party later introduces a statement or opinion of the witness concerning the matter. When a party's expert is impeached by inconsistent opinions, the party appears to be permitted by the present version to rehabilitate his witness by leading him through a cross-examination.

For example, P calls expert witness E, who gives his opinion concerning a particular matter. D does not examine E concerning an opinion relating to one facet of the entire problem that is somewhat inconsistent with E's present opinion; and E is not excused as a witness. D then calls witness W who gives his opinion, relying in part on the prior opinion of E. Because E did not testify concerning the prior opinion, P may recall E and cross-examine him concerning it. The same situation might arise with regard to hearsay under Section 1203.

The present version, therefore, seems somewhat inconsistent with the policy expressed in Section 770, which permits a party to conceal a prior inconsistent statement from a witness if the witness is not excused. Under Sections 804 and

1203, the party who does so may find that the introduction of the opinion or statement has turned the witness into his own witness.

Restoration of the words "subject matter of the" would avoid this problem.

Section 914

The IAC objects to the curtailment of its contempt power.

It also objected to making any provisions of the Evidence Code applicable in IAC proceedings.

After some correspondence on the matter, Chairman Beard indicated that the amendment to Labor Code Section 5708 that appears in Exhibit II would be acceptable. The amendment would restore to the IAC its right to overrule a claim of privilege and to hold a witness in contempt without first obtaining a court order. Both Mr. Willson and Senator Grunsky took the view that the contempt power of the IAC should not be limited by the Evidence Code. The amendment would also make the following sections of the Evidence Code inapplicable to IAC proceedings: Section 1153 (withdrawn plea of guilty)[but Penal Code provisions would still be applicable]; Section 1156 (in-hospital medical staff committee's records); 1560-1566 (special best evidence rule exception for hospital records); 1282 (official finding of presumed death); 1283 (official report that person is missing, captured, or the like).

The Staff recommends that the amendment to Labor Code Section 5708 be approved.

Sections 1010-1026

Dr. Anderson objected to several sections in the article relating to the psychotherapist-patient privilege. See Exhibit III (pink pages) attached. He would exclude psychologists. He would eliminate the exceptions for plotting

crimes (1018) and officially required information (1026). He would also like to have a less detailed statute.

We recommend no change. Excluding psychologists does not appear feasible in the light of the recent enactment of their privilege equivalent the lawyer-client privilege. The problem raised with information required to be reported lies with the laws requiring such reports, not with the exception here. The exception for crimes applies to all of the communication privileges (except clergyman-penitent); and we don't think Dr. Anderson fully appreciates that the person urging the exception must establish the purpose of the communication before it can be revealed. Loss of detail in the statute would create a false simplicity--it would simply not answer the problem.

Section 1156

Judge McCoy has written to us suggesting an amendment to Evidence Code Section 1156 to deal with the following case: The plaintiff seeks inspection of survey reports by members of the hospital staff to the Infectious Diseases Committee of the defendant hospital to the effect that one or more patients, other than the plaintiff, had been stricken with a staphylococcus infection during their stays in the hospital. These reports were made pursuant to hospital regulations, and presumably without the knowledge or consent of the patients involved. They simply reflected a fact shown on the records of the particular patients. Judge McCoy believes that however much the plaintiff may otherwise be entitled to discover the frequency of such prior inspections, the plaintiff should not be entitled to obtain the names of the other patients. He believes that the amendment set out as Exhibit IV (buff page) will take care of the problem. (The amendment was drafted by the staff after correspondence with Judge McCoy.)

In his letter of December 22 (attached as Exhibit V - blue page), Judge McCoy suggests an additional amendment to Section 1156. The staff has no objection to this additional amendment.

Section 1261

When the Commission altered the wording of the trustworthiness requirement in Section 1252, it instructed the staff to change all similar sections. At the last meeting the fact that Section 1261 had not been changed was mentioned but no action was taken to change it. It was suggested that a strict trustworthiness requirement might be desirable in Section 1261 in view of past objections to this aspect of the recommendation to repeal the Dead Man Statute. But is there any substantial reason for the difference between Section 1261 (b) and the provisions of Sections 1252, 1260(b), 1310(b), 1311(b), and 1323? As the sections are now worded, apparently if neither the proponent nor the opponent of the evidence can produce any indication of the trustworthiness or lack of trustworthiness of the particular statement, the statements are admissible under all of the cited sections except Section 1261, and the statement is inadmissible under Section 1261. This seems to weight the scales somewhat against the estate.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

MEMO 65-1

EXHIBIT I

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December
14th
1964

OUR FILE NUMBER

921,499-30

The Honorable George A. Willson, Chairman
Assembly Interim Committee on Judiciary
State Capitol
Sacramento, California

Dear Mr. Willson:

On behalf of the California State Bar Committee on Evidence, I wish to express our appreciation of your invitation to present the views of the Committee to your Committee with respect to the proposed Evidence Code, prepared by the California Law Revision Commission. Unfortunately, pressing professional commitments and personal involvements make it impossible for me to attend the Committee hearing on December 16 and 17 and I am taking this means of communication in lieu of a personal appearance. Lawrence C. Baker, Esq. of the San Francisco Bar, presently vice chairman and formerly chairman of the State Bar Committee, will appear in person and be in a position to respond to points of inquiry which may arise.

As you know, the Board of Governors of the California State Bar have not taken action with respect to the proposed Evidence Code. In addition, it should be pointed out that the final report of the Committee on the proposed Evidence Code is still in the process of preparation. Thus, while my comments may be taken as representative of the views of the State Bar Committee, they should not be considered to be the final or definitive statement of the State Bar Committee's position. With this preface, I shall address myself to the specific questions put in your letter of November 25, 1964 to the State Bar of California.

Need For An Evidence Code

The existing statutory provisions relating to the law of evidence which appear in Part IV of the Code of Civil Procedure are in substantially the same form as when first enacted in 1872. For the most part, development of the law of evidence has depended upon judicial decisions with legislative modification being fragmentary and relatively infrequent. As a consequence, there are numerous obscurities, gaps and inconsistencies in the law of evidence as it exists in California today.

This situation gives rise to three principal considerations which require an affirmative answer to the question whether there is need for an evidence code. First, codification of existing decisional law and recodification of existing statutory law will provide a concise, authoritative statement of the California law of evidence where none exists today. This objective is of singular importance in an area of the law where the speedy and accurate determination of points at issue plays a significant role in the efficient administration of justice. Second, such codification and recodification will result in the clarification of existing law by eliminating gaps, obscurities and inconsistencies, an objective unlikely of attainment in the necessarily slow and sporadic development of decisional law. Third, while it is not proposed by codification and such recodification to work substantial changes in the existing California law of evidence, there are important areas as to which interested groups concur that change is necessary and important. In the absence of a comprehensive code, such change is difficult to accomplish, because the existing statutory provisions are neither comprehensive nor cohesive and such change can best be accomplished by integration into a consistent statement of the whole law of evidence.

This is not to say that there are not arguments against such codification and recodification. First, concern is expressed in some quarters that it may introduce an undesirable rigidity into the law of evidence. However, except in those areas where the law of evidence is based primarily on considerations of public policy which are best left to the Legislature, the proposed code reserves to the courts room for further development and clarification of the law of evidence.

Second, concern is also expressed that an evidence code will proliferate evidence problems in the courts by raising new questions of construction and application of the code provisions. While there may be some intensification of judicial concern with the law of evidence for a period of time, such concern will itself accelerate the development and clarification of the law in this important area. Third, concern is expressed that an evidence code may introduce impractical and academic concepts into the law of evidence. In this regard, all must concur that such changes in the law of evidence as are adopted should be tested against the experience and judgment of trial lawyers and judges. As will be subsequently noted, it is believed that the present proposal of the Law Revision Commission does meet this test.

A subsidiary question also exists as to the desirability of a separate evidence code as distinguished from revision of Part IV of the Code of Civil Procedure. Three considerations dictate an affirmative answer to this question. First, Part IV of the Code of Civil Procedure contains a number of provisions which do not deal with the law of evidence and which can best be left as an integral part of that code. Second, the law of evidence is, of course, applicable not only to civil but also to criminal proceedings. Third, the objective of a concise and authoritative statement of the California law of evidence can best be accomplished through a separate code.

On balance then, it would seem clear that an evidence code codifying and clarifying existing law is desirable and necessary and that a relatively few but nevertheless significant changes in the law of evidence can be most effectively accomplished by such an evidence code.

Desirability of the Proposed Evidence Code

Throughout the seven or eight-year study which has resulted in the Law Revision Commission recommendation of the proposed Evidence Code, the Commission has assiduously sought to obtain the cooperation of the bar, the judiciary and other interested groups in submitting constructive comment and criticism. Without in any way minimizing the most important and significant role of the Law Revision Commission and its staff, it is appropriate to

emphasize that the proposed Evidence Code is the result of the continuing interchange of views between the Commission and many persons and organizations possessing expertise in the law of evidence. As a consequence, the proposed Evidence Code comes as close to representing the consensus of informed and knowledgeable groups and persons as is possible. So far as is known to the State Bar Committee, the general reaction of the persons and organizations that have made a careful study of the proposed code is favorable.

Throughout the years the Commission has been most receptive to the views of the State Bar Committee and this receptivity has continued up to the present time. As recently as November 3, 1964, as a result of a recent reexamination and reevaluation of the proposed Evidence Code as it was then drafted, the State Bar Committee submitted 62 separate comments to the Commission. At its November meeting, the Commission acted favorably upon approximately 80% of these comments, including substantially all of which were regarded by the State Bar Committee as being of major importance. Of the remainder, the Commission's reasons for not accepting the State Bar Committee's views are persuasive in many instances. Consequently, there are very few areas in which there remains any difference of opinion between the State Bar Committee and the Law Revision Commission. Thus, the inquiry whether the code presently proposed by the Commission is generally what is needed is answered in the affirmative.

Debatable Provisions of the Proposed Evidence Code

The Law Revision Commission undoubtedly has or will summarize for the Committee the significant changes in existing law which are included in the proposed Evidence Code. Since the State Bar Committee concurs with the views of the Law Revision Commission as to the great majority of such changes, no comment will be made on them at this time. In a few instances, some difference of views between the Commission and the Committee remains to be resolved but it is anticipated that this may be accomplished at the January meeting of the Commission. Consequently, comment on such differences would be premature at this time.

However, there are three changes which have occasioned substantial debate within the State Bar Committee

and as to which there remains some difference of views within the Committee. The bar at large may react in like manner and it is therefore appropriate to point these changes out to your Committee at this time.

1. Admissibility of Confession or Admission of Criminal Defendant.

Under existing law, the court has discretion in a criminal trial whether to hear evidence as to the admissibility of the confession or admission of a criminal defendant out of the presence of the jury. The proposed Evidence Code (Section 402(b)) requires that the court do so in all instances. Moreover, under existing law, the court's determination of the question of admissibility is preliminary and the ultimate determination whether the conditions of admissibility have been satisfied and whether the confession or admission should be disregarded is left with the jury. The proposed Evidence Code would make the court's determination of this question of admissibility final, leaving to the jury the question of the weight to be given the confession or admission in the light of such evidence as may be introduced on that question (Section 409).

The Commission reasons that these changes will protect the rights of the criminal defendant by requiring the court to determine whether a confession or admission was voluntary without permitting the jury to hear evidence (both of the voluntariness of the confession or admission and the confession or admission itself) which may be highly prejudicial. Some members of the State Bar Committee believe that the criminal defendant should have the option of having the jury hear and finally determine the question of admissibility.

2. Spontaneous and Dying Declarations.

A similar difference of views exists as to the treatment of the question of admissibility of spontaneous and dying declarations. Under existing law, the court's determination of this question is preliminary and the final determination is with the jury. Proposed Evidence Code

(Section 405) would eliminate the jury's "second crack" at this question. While the majority of the State Bar Committee concur with this change, some members regard it as undesirable because the effect of evidence as to spontaneous and dying declarations may be very strong and the question of their admissibility may be very close.

3. Presumptions Not Evidence.

Under existing law, presumptions are evidence and the trier of fact is required even to weigh one presumption against another. This rule has been much critized and is contrary to that employed in the federal courts and many state jurisdictions. The proposed Evidence Code (Section 600) expressly declares that presumptions are not evidence.

The proposed Evidence Code (Section 600) defines a presumption as an assumption of fact that the law requires to be made from another fact or group or facts. As so defined, a presumption has importance as it affects the burden of proof or the burden of producing evidence. So far as evidentiary effect is concerned, the proposed Evidence Code (Section 600) makes it clear that an inference (a deduction of fact) may be drawn when it follows logically and reasonably from another fact or facts.

Difficulty arises only because existing law recognizes some presumptions which are not logically and reasonably based on fact and yet are not treated as conclusive presumptions. The most noteworthy example is the presumption of "due care." A majority of the State Bar Committee believe that this "presumption" is not really a presumption at all but is an expression of policy which is already recognized in the assignment of the burden of proof to the party claiming the absence of due care. Under this view, the effect of treating the "presumption of due care" as evidence is to add, illogically, an unmeasurable but significant quantity to the burden of proof. A minority of the Committee are of the view that treating the "presumption of due care" as evidence prevents injustice when the party charged with failure to exercise due care is unavailable or unable to testify.

* * * *

#7 - The Hon. George A. Willson, Chairman - 12/14/64

The State Bar Committee is aware that the adoption of an evidence code is a legislative undertaking of substantial magnitude. Subject to the approval of the Board of Governors, the State Bar Committee will welcome the opportunity to assist in this undertaking in such ways as your Committee may deem appropriate.

Very truly yours,

Philip F. Westbrook

Philip F. Westbrook, Jr.
Chairman, State Bar Committee on Evidence

EXHIBIT II

SEC. 137.5. Section 5708 of the Labor Code is amended to read as follows:

5708. (a) All hearings and investigations before the commission, panel, a commissioner, or a referee, are governed by this division and by the rules of practice and procedure adopted by the commission. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.

(b) Except as provided in subdivision (c), the Evidence Code does not apply to the hearings and investigations described in subdivision (a).

(c) The rules of privilege provided by Division 8 (commencing with Section 900) of the Evidence Code shall be recognized in such hearings and investigations to the extent they are required by Division 8 to be recognized, but subdivision (b) of Section 914 of the Evidence Code does not apply in such hearings and investigations.

Memo 65-1 EXHIBIT III

December 15, 1964

Assembly California Legislature
Assembly Interim Committee on Judiciary
George A. Willson, Chairman

Gentlemen:

Thank you for the opportunity to appear before your committee, and comment on the new evidence code proposed by the California Law Revision Commission (Preprint Senate Bill #1).

I am Samuel T. D. Anderson, M.D. of San Rafael, California, Chairman of the Committee on Legal Aspects of Psychiatry, Northern California Psychiatric Society. I wish to restrict my comments to Division 8, "Privileges", Article 6, Physician-Patient Privilege, and Article 7, Psychotherapist-Patient Privilege.

1. First I will comment on the need:

(a) The commission's proposals generally are a great improvement over existing statutes, and would serve a presently unfulfilled need in the legal aspect of psychiatric care, for confidential communication.

(b) Confidentiality is an integral part of the basic nature of professional relationships, whether they be legal, medical or clergical. This need is especially critical in psychotherapy, where the development and the maintenance of trust and faith between patient and therapist, is the basis of all therapeutic process.

(c) The increasing complexity of society makes confidentiality increasingly difficult. The privacy of life is constantly reduced by the encroaching requirements for detailed records, information and identification. Fifty years ago a woman could lie about her age with impunity; today such an act may violate state statutes, compromise Social Security rights, and invite the suspicion of the Department of Internal Revenue.

(d) In our over-populated, over-organized, over-anxious world, the human soul needs some secure privacy inaccessible to the incessant probings of the agents of society. Such confidentiality might leave freedom to harbor bad thoughts and to plot crimes, but it also fosters freedom to grow, to be spontaneous--to be human.

(e) The major practical problems of loss of confidentiality are not related to felony criminal proceedings, but to the complications of civil and misdemeanor proceedings. The powers of subpoena of medical information include all records and information, and do not exclude the more sensitive and personal areas of psychiatric information. While irrelevant information is not admissible in court as evidence, written records which contain relevant and irrelevant material are available to agents such as Investigators, the District Attorney, Hearing Officers, etc.

(f) In a civil suit for damages incurred in an automobile accident, for instance, the whole of the medical record can be subpoenaed whether or not the material in it is pertinent or relevant to a specific injury. The Medical records of a patient in psychotherapy in such a situation may include very personal information such as a statement by the patient that they are obsessed with perverse sexual ideas. This can produce embarrassment and serious injury with no benefit to anyone.

(g) For these reasons, we feel that it is mandatory to separate the issue of general medical information from that information involved in and related to psychotherapy--as has been done by the California Law Revision Commission.

2. Second, I will comment on specific provisions of Division 8 of Articles 6 and 7:

(a) In general, the language of Article 6 and 7, although precise and specific, is difficult to read, difficult to comprehend and does not form a clear concept which can remain in the mind as an easily identified road mark. This is an extremely important point because unless a law is comprehensible, it is not applicable. Articles 6 and 7 are unacceptable from this practical standpoint. By contrast the recent (1961) "Connecticut Statute" is a model of clarity, comprehensibility, and simplicity.

My personal observations of the application of the Welfare and Institutions code in the last ten years are of continuous misunderstanding and confusion, with resultant poor and inept disposition of many cases, because not even the attorneys or the courts can comprehend the code. The code has many excellent provisions, features, protections, etc., because it lacks directness, clarity and comprehensibility, the good features are of no effective practical value.

We suggest that Article 6 and 7 should be re-written. An alternate or complementary suggestion would be to include an introductory note or commentary--a general statement of the articles, without the prolix form presently used.

(b) Section 1010--definition of "psychotherapist". This is too broad and general. We feel psychologists should not be included, because this confuses further an already new and uncertain term in the legal arena.

We feel the term "psychiatrist" is more applicable, cogent and meaningful than "psychotherapist" for the purpose of Division 8. The definition should be limited to "licensed physicians who devote a substantial portion of their time to the practice of psychiatry."

(c) Section 1018. Conspiracy or collusion between a patient or therapist for illegal purposes has never occurred to my recollection. It is unlikely this section would protect society, and it could produce serious complications. It could be used for "fishing expeditions" which are harmful and destructive to the overall aim of reasonable confidentiality.

Patients frequently have ideas of malicious or criminal intent which are part of fantasy life: yet if subject to a "fishing expedition" the usual content of fantasy may sound like a criminal plot. For instance, if a patient says: "Doc, can you give me a bunch of pills that would kill off my mother-in-law", he may be expressing a normal fantasy, or he could be seeking aid to commit a crime.

The nature of psychotherapy is such that Section 1018 is ill advised and defeats the general aim of Division 8.

(d) Section 1026. Exception regarding public information. This is too broad and general. One of the major problems we now have is with public agents seeking information. Often patients are very disturbed when they find that as part of their security clearance the investigating agency requires information from their psychiatrist.

Air Force Pilots often will not seek psychiatric care in the Service. They know that their service medical record is in actuality not confidential, due to conditions similar to this proposed section 1026.

The result is not the prevention of injury or accident, but the interference with measures which might result in injury or accident.

The tragedy is that the information obtained by measures such as Section 1026 "for the public good" is in general very useless and irrelevant, and the harm done by the investigating process is irreparable.

S.T.D. Anderson, M.D.
Chairman,
Committee on Legal Aspects
of Psychiatry, Northern
California Psychiatric Society

EXHIBIT IV

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written reports of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to the Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions ~~(b)~~ and (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) ~~(b)~~ This section does not affect the admissibility in evidence of the original medical records of any patient.

(d) ~~(c)~~ This section does not exclude evidence which is relevant evidence in a criminal action.

EXHIBIT V

CHAMBERS OF
The Superior Court
LOS ANGELES 12, CALIFORNIA
PHILBRICK McCOY, JUDGE

December 22, 1964

John H. DeMoully, Esq.
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

Thank you very much for your letter of December 8. Perhaps the best way to clarify the matter which we have been discussing would be by amendment to Section 1156 (which continues in effect Section 1936.1 of the Code of Civil Procedure). Your proposed amendment to that section seems to cover the situation.

Since we are considering the possibility of an amendment to Section 1156 of the proposed Evidence Code, it occurs to me to call your attention to the provision of present Section 1936.1 C.C.P. that "the written reports of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery proceedings)". I am wondering what your guess is as to the intent of the Legislature in making the material described subject only to those two sections, in view of the fact that the information contained in the records of in-hospital medical staff committees is more usually called by a motion under Section 2031 C.C.P. seeking an order for the production of documents or by written interrogatories under Section 2030 C.C.P. Possibly the proposed section should be further amended to provide that such material is subject to the provisions of Section 2016 through 2036 of the Code of Civil Procedure, relating to discovery proceedings.

I shall be glad to hear from you further on this matter, and will appreciate in any event your keeping me posted as to the progress of this proposed amendment.

Sincerely,

Philbrick McCoy

PMcC:lll