

#63(L)

5/12/66

Fifth Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code (Comments on Tentative Recommendation)

In January 1966, we distributed a tentative recommendation on the Evidence Code to various interested persons for comment. We requested comments not later than July 1, 1966. We attach a copy of the tentative recommendation. In this memorandum we consider the comments we have received to date:

Richard H. Perry. A letter from Mr. Perry was attached as Exhibit I to the Second Supplement to Memorandum 66-21. One of the comments he made is set out below:

I would like to express doubt as to the suggested revision of the Evidence Code by addition of Section 414 thereto. The proposed Section 414 states an obvious truism, i.e. that the statutes are applicable only insofar as no constitutional right is violated. However, the constitutional inhibitions thus far have pertained solely to criminal cases.

Frankly, it appears to me that it would be more direct to provide that nothing in Sections 412 or 413 authorizes any instruction or comment with respect to the failure of a defendant in a criminal action to testify. Such a specific declaration would appear to directly reflect the intent of the proposed Section 414.

We do not believe that it is possible to anticipate what view the United States Supreme Court will ultimately take of instructions and comment on the failure of a person other than a criminal defendant to testify. Hence, we do not believe that we can draft a substantive rule in Section 414 and we believe that it should be retained as set out in the tentative recommendation.

Northern Section of State Bar Committee. Attached as Exhibit I (pink pages) is the report of the Northern Section of the State Bar Committee on Evidence concerning our tentative recommendation. You will note that the Northern Section approves the tentative recommendation except that a

possible clarifying addition to Sections 1093 and 1127 of the Penal Code (pages 28-30 of the tentative recommendation) is suggested. The primary risk of adding the suggested language to the two Penal Code sections is that it might cause confusion as to the meaning of other Penal Code sections not containing a similar provision. One reason, I think, that we added Section 414 (a similar provision) to the Evidence Code in the tentative recommendation was that the Comments to Sections 412 and 413 did not indicate that comment on the defendant's refusal to testify was prohibited by the United States Constitution. (The United States Supreme Court decided this matter after the Comments were finally revised.) On the other hand, the Comments to Penal Code Sections 1093 and 1127 will indicate that the right to comment is restricted by the United States Constitution and this may make the addition of the suggested language unnecessary. In this connection, it should be kept in mind that the Comments to these sections will undoubtedly be printed under the sections in the annotated code. Even if the Comments are not available, it will be clear from the legislative history (by comparing the present section with the amended section) that the provision authorizing comment on the defendant's failure to testify was deleted by legislative action. We are not persuaded that the suggested change in Penal Code Sections 1093 and 1127 is necessary or desirable.

Dr. E. F. Galioni. Attached as Exhibit II (yellow page) is a letter from Dr. Galioni. He states that he approves the suggested changes in the code insofar as they relate to the psychotherapist-patient privilege.

Professor Chadbourn. Professor Chadbourn reviewed the tentative recommendation and made the following comment concerning the revision of Section 403:

It seems to me that § 403(c)(1) and § 403(c)(2) are dealing with such different matters that, whereas "on request shall" should be eliminated from (1), "shall" in (2) should remain as is. My thought is that (2) is just a special instance of the general power of the judge to direct a verdict or finding when reasonable minds cannot differ, and it seems to me that this should be a matter of duty rather than discretion. (1) is, of course, a different kind of animal.

(We did not reproduce the entire letter since you saw it before when we considered the suggestion of Judge Kaus on Sections 403-405 of the Evidence Code.)

See page 10 of the tentative recommendation for the proposed amendment of Section 403. Possibly subdivision (c) should be revised to read:

(c) If the court admits the proffered evidence under this section, the court:

(1) May, ~~and on request shall~~, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) May, and on request shall, instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Changes shown by strikeout and underscore are from the subdivision as contained in the Evidence Code.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

Fifth Supp.  
Memo. 66-21

EXHIBIT I

HELLER, EHRMAN, WHITE & MCAULIFFE

ATTORNEYS

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May 9, 1966

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California Law Revision Commission  
30 Crothers Hall  
Stanford, University  
Stanford, California

Re: Revision of the Evidence Code

Gentlemen:

I take this means of advising you that all of the proposed revisions to the Evidence Code set forth in your recommendation of January 1, 1966 have been approved by the Northern Section of the State Bar Committee on the Evidence Code.

However, we do make one suggestion:

Sections 1097 and 1127 of the Penal Code are revised to eliminate language authorizing unconstitutional comment on a criminal defendant's refusal to testify. The revision removes constitutional objections to these sections. However, it might be advisable to subject the remaining provisions of Sections 1907 and 1127 to a limitation such as that in Section 414 of the Evidence Code. Both Section 1097 and Section 1127 contain language to the effect that the judge may . . .

"make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case...."

These words could be read as authorizing unconstitutional comment, and we suggest that in both sections the quoted

language be modified by a provision reading:

"subject to any limitations provided by the  
Constitution of the United States or the  
State of California."

Very truly yours,

*Lawrence C. Baker*  
LAWRENCE C. BAKER

LCB/dr

cc: Mr. Philip F. Westbrook, Jr.

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF MENTAL HYGIENE

1800 FIFTH STREET  
SACRAMENTO 95814

March 25, 1966

California Law Revision Commission  
30 Crothers Hall  
Stanford, California 94305

Gentlemen:

Re: Revision of The Evidence Code

I have reviewed the Tentative Recommendation dated January 1, 1966 relating to the Revision of the Evidence Code. Specifically, as it pertains to my professional interests, I have limited myself to the following areas in the Tentative Recommendation:

Page 7, Item 8  
Page 8, Item 9

Page 24, Section 10  
Page 25, Section 11  
Page 26, Section 12

In review, I find that these recommendations and suggested changes in the Code are reasonable and would protect the psychotherapist-patient relationship. I am, therefore, in agreement with the recommended changes.

Sincerely,

*E. F. Salioni, M.D.*  
E. F. Salioni, M.D.

Deputy Director  
Division of State Services