#63 3/16/73

Memorandum 73-28

Subject: Study 63 - Evidence (Physician-Patient Privilege)

At the January 1973 meeting, the staff presented for Commission consideration the case of Fontes v. Superior Court. See Memorandum 73-10 (copy attached). You should read that memorandum at this point; we do not repeat the discussion here. At the staff's suggestion, action on this case was deferred since a rehearing had been granted.

The opinion on rehearing is attached. (You will note that on rehearing the Court was able to avoid dealing with the Section 999 problem.) The indication in the opinion that Commission consideration of Section 999 of the Evidence Code is needed has been supplemented by a personal letter to me from Justice Kaus. In fact, Justice Kaus has indicated he is willing to attend and plans to attend the Commission meeting when this matter is discussed to contribute whatever he can to the solution of the problem.

On the legislative front, Senate Bill 113 (Exhibit II) has been introduced. When asked by a Senate Judiciary Committee counsel whether the Commission had reviewed the problem, I reported that the Commission had decided to wait until the case was final before considering it. The bill does nothing to deal with the possible constitutional problems that may exist with respect to Section 999 and would for all practical purposes eliminate the exception.

Consideration should be given to repealing the physician-patient privilege. See the discussion from the Advisory Committee Note to the Federal Rules of E Evidence set out as Exhibit I. The Federal Rules contain no physician-patient privilege, but they do contain a psychotherapist-patient privilege. The [illegible]

repeal of the privilege would avoid the need for judicial hearings to determine whether a particular exception (and there are many exceptions) to the physician-patient privilege exists in a particular case. If the privilege were repealed, consideration should be given to including some provision for protection of privacy in pretrial discovery proceedings since relevancy (which is sufficient protection at trial) would not preclude pretrial discovery of medical information.

If the Commission decides to retain the physician-patient privilege, the question is what revisions, if any, should be made in the Evidence Code provisions dealing with this privilege. Justice Kaus, who is very familiar with the problem, will be at the meeting and may be able to provide suggestions as to the nature of the revisions, if any, that should be made.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

FEDERAL RULES OF EVIDENCE

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 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. 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 gratuitous 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 Cal.Evidence Code §§ 1010–1026; Ga.Code § 38–418 (1961 Supp.); Conn.Gen.Stat., § 52–146a (1968 Supp.); Ill. Rev.Stat.1967, c. 51, § 5.2.

Memo 73-28 EXHIBIT II

SENATE BILL No. 113

Introduced by Senator Grunsky

January 29, 1973

An act to amend Section 999 of the Evidence Code, relating to privileges.

LEGISLATIVE COUNSEL'S DIGEST

SB 113, as introduced, Grunsky. Physician-patient privilege.

Modifies exception to physician-patient privilege in proceeding to recover damages on account of conduct of patient constituting a crime, by requiring the patient to be convicted, as defined, by final judgment, before the exception arises.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 999 of the Evidence Code is amended to read:

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime, *and the patient has been, by final judgment, convicted of the crime.*

A plea or verdict of guilty or a conviction of a crime following a plea of nolo contendere is a conviction within the meaning of this section. For purposes of this section, a person is convicted of a crime even though an order granting probation is made suspending the imposition of sentence, and a subsequent order is made under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment.

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Not for Publication.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN GONZALEZ FONTES,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

Juan Francisco Salas,

Real Party in Interest.

2nd Civil No. 40813

L.A.S.Ct. No. EA C 9711

ON REHEARING

JUAN FRANCISCO SALAS,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

John Gonzalez Fontes,

Real Party in Interest.

2nd Civil No. 40860

L.A.S.Ct. No. EA C 9711

ON REHEARING

In Fontes v. Superior Court, writ of mandate granted with directions.

In Salas v. Superior Court, writ of mandate denied.

In this matter we filed an opinion on November 9, 1972. We granted a rehearing. The matter was orally argued and resubmitted. We have reconsidered and have reached the conclusion that the principles announced in Oceanside Union School Dist. v. Superior Court, 58 Cal.2d 180, 185, footnote 4, would probably have been better served, had we never granted the alternative writs.

The basic facts are stated in our previous opinion and need not be set forth. In that opinion we proceeded on the assumption that Fontes' eyesight was to be an issue in the case. A reexamination of the record, after reconsideration following the oral argument, convinces us that Salas had not shown that under the admitted facts of this case, any such issue is legitimately in the case.

As far as we can tell at this point there appears to be no doubt that the fire truck went

through a red light. The only factual issue appears to be whether a siren was sounded or, if so, when that was done with relation to the point of time when the truck entered the intersection.

It is, of course, possible that some issue with respect to Fontes' eyesight may develop. All we can say is that at this time it does not appear with sufficient clarity that the respondent court abused its discretion in denying physical examinations of Fontes.

Fontes' own petition raises issues concerning the applicability of section 999 of the Evidence Code to this case. It seems fair to say that neither side even considered that section until our former opinion was filed. When we granted the rehearing, we did so principally to consider certain constitutional objections to section 999. However, during our discussions, other problems cropped up.

Some of the difficulties with section 999 were explained in the former opinion. They seem to derive from the probability that the jusitification for the section contained in the Law Revision Commission comment is an afterthought. Not all of us, however,

now necessarily feel that way. Some of us are of the view that the application of the section should and could be restricted to such relevant medical evidence as would be admissible in a criminal trial for the crimes which are the basis for the civil charge. Other members of this court feel that regardless of its wisdom, section 999 neither can, nor should be so restricted in application by judicial decision.[1/]

Full literal application of section 999 obviously invites invasions of privacy which may be quite unjustified by any real issue between the parties. We adverted to that potential in the former opinion. The Legislature may well wish to reconsider the section in the light of modern views concerning the right to privacy. We have reason to believe that our former opinion, even though withdrawn, may stimulate activity by the Law Revision Commission. Having in mind all these factors, we have decided that proper

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1/ If these remarks seem to indicate that we are unconstitutionally conducting ourselves, other than "as a 3-judge court" (Cal. Const., art. VI, § 3), be it remembered that during the deliberative phase of a court's work, a single justice not only may, but probably should, look at a legal problem from both sides.

judicial deference to legislative prerogatives indicates that we withhold our views on section 999, unless this case absolutely demands that we attempt to announce them.

It does not. Again we point to the absence of any showing that there is a genuine issue with respect to Fontes' eyesight under the admitted fact of this case. One may be lurking in the background and may still see the light of day before this case goes to trial. That, however, is for the future.

The fact remains, of course, that with respect to the medical records the respondent court did order an inspection. It is unfortunate that we do not know the reasoning behind the ruling. In view of the parties' failure to discuss section 999 until they read our former opinion, we very much doubt that the court relied on that section in ordering the inspection.

Under all the circumstances we think that the wisest course to pursue would be to grant Fontes' petition, directing the respondent court to reconsider its ruling in the light of the legal issues involved and - more important perhaps - the real

factual issues between the parties as they shall be made to appear.

Needless to say these essentially abortive proceedings in our court are without prejudice to any legal or factual contention of any party.

In Fontes v. Superior Court the petition for a writ of mandate is granted, said writ to command the respondent court to vacate its order of August 3, 1972, requiring production of petitioner's medical records.

In Salas v. Superior Court the petition for a writ of mandate is denied.

NOT FOR PUBLICATION.

KAUS, P.J.

We concur:

STEPHENS, J.

ASHBY, J.