

First Supplement to Memorandum 90-19

Subject: Priorities, New Topic Suggestions, and Schedule for Work

Attached to this supplementary memorandum are copies of eight letters we have received in recent days (along with the lawyers' statements referred to in the letters) suggesting the Commission study Evidence Code Section 352. That section provides:

352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The Commission's Comment to this section, enacted in 1965, states that the section expresses a rule recognized by statute and in several California decisions.

The letters complain that Alain Youell, a criminal defendant who they believe was wrongly charged with child molestation, was precluded from presenting evidence that would have exculpated him. Dr. Youell is a psychotherapist who had been treating the child; he sought to impeach the child's testimony with evidence that the child had previously been abused by the child's father and that the child's accusation of the psychotherapist was the consequence of the therapeutic process of "negative transference". The trial court precluded this evidence under authority of Section 352. This ruling was appealed as a violation of the defendant's sixth amendment due process right to put forth a defense. The Court of Appeal (in an unpublished opinion) disagreed, noting that the trial court could properly find that the probative value of the excluded evidence was outweighed by the possibility of confusion of the jurors, and that in any case the defendant managed to introduce sufficient evidence of negative transference so that, "The trial court's exclusion of this evidence, even if it was error, was harmless."

We understand that this case is not unique and that Section 352 is now being used extensively in criminal trials to limit evidence. This phenomenon is traceable to the 1982 passage of Proposition 8, an initiative measure known as "The Victims' Bill of Rights". Article 1, Section 28 of the California Constitution now provides in relevant part:

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

While this provision was intended to overcome the exclusionary rule and make admissible any evidence that might tend to convict the defendant, it is so broadly drafted that in effect it repeals the Evidence Code in criminal cases, subject to the specified exceptions. See, e.g., discussion in 1 B. Witkin, California Evidence §§ 7-9 (1986 & 1989 Supp.); *People v. Harris*, 47 Cal. 3d 1047, 1082, 767 P.2d 619, 255 Cal. Rptr. 352 (1989) ("The intent of the electorate that both judicially created and statutory rules restricting admission of relevant evidence in criminal cases be repealed except insofar as section 28(d) expressly preserves them is manifest.") See also *People v. Taylor*, 180 Cal. App. 3d 622, 632, 225 Cal. Rptr. 733 (1986) (citations omitted):

Section 28(d), according to the ballot argument in favor of Proposition 8, was intended to correct a perceived imbalance in favor of defendants in the rules regarding admissibility of evidence. There was no intent, however, to convict the innocent. Section 28(d) was not designed to liberalize the rules of admissibility only for evidence favorable to the prosecution while retaining restrictions on the admissibility of evidence tending to prove a defendant's innocence, but to ensure that those who are actually guilty do not escape conviction through restrictions on the admissibility of relevant evidence. If section 28(d) has the effect of admitting evidence favorable to defendant that would previously have been excluded, it is attributable to the plain language used by the drafters, and not to our construction of the provision.

The result of this development in the law is that Evidence Code Section 352, being one of the few means provided in Proposition 8 for excluding evidence, has become a major battleground in criminal proceedings as prosecution seeks to have the judge exercise discretion under the section to limit evidence tending to exculpate the defendant. See, e.g., *People v. Castro*, 38 Cal. 3d 301, 306, 696 P.2d 111, 211 Cal. Rptr. 719 (1985) ("The legislative and judicial history of sections 352 and 788, the circumstances under which article I, section 28, was enacted, the language of the enactment--concededly ambiguous--as well as certain policy considerations convince us that section 28 was not intended to abrogate the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matter--as, indeed, is provided by Evidence Code section 352.")

The only limits on the judge's authority under Section 352 are the United States Constitution and abuse of discretion. In *People v. Hall*, 41 Cal. 3d 826, 718 P.2d 99, 226 Cal.Rptr. 112 (1986), the judge excluded evidence presented by the defendant to show that a third party might have committed the crime, on the basis that the defendant failed to make a preliminary showing of "substantial probability" that the third party actually committed the crime. This was error. "The court's proper inquiry was limited to whether this evidence could raise a reasonable doubt as to defendant's guilt and then applying section 352." 41 Cal. 3d at 833. The *Hall* court, however, in dictum bearing on Dr. Youell's case, rejects the defendant's contention that his constitutional right to present a defense precludes any application whatever of section 352 to third-party culpability evidence, no matter how remote. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." 41 Cal. 3d at 834.

Also relevant to Dr. Youell's case is the recent Supreme Court opinion in *People v. Stoll*, 49 Cal. 3d 1136 (1989). In *Stoll* (a child abuse case), the defendants sought to introduce psychological evidence

showing that they were not the types of persons who would be likely to commit such crimes. The trial judge excluded the evidence and the Supreme Court reversed, holding that such character testimony may be introduced to raise a reasonable doubt as to a defendant's guilt of charged crimes. In a telling dissent, Chief Justice Lucas criticizes the court's opinion, stating that "we might reasonably hold that the trial court, without abusing its discretion, could have excluded the evidence as unduly prejudicial to the People under Evidence Code section 352, or that in any event no prejudice to defendant could have resulted from its exclusion." 49 Cal. 3d at 1164.

Thus, contrary to implications in the letters to the Commission concerning Dr. Youell, the judge's discretion under Section 352 is not absolute and there are limitations on the extent to which the judge can exclude relevant evidence under the section. The limits are not clear, however, and are evolving on a case by case basis.

Section 352 was enacted on recommendation of the Law Revision Commission, and the Commission retains authority to make further recommendations to the Legislature on this matter. Whether the Commission should jump into this fray is another question. The staff's advice is to stay clear. Section 352 is a key provision in the law on which enormous pressures are brought to bear. The cases seem to be working it out and there is a real risk that opening this matter up will only end up making things worse. Moreover, as a result of Proposition 8, Section 352 can be revised with respect to criminal matters only by a two-thirds majority of each house--extraordinarily difficult to achieve in a matter as intensely controversial as this.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Doug and Laurel McCall
340 Oakvue Road
Pleasant Hill, CA 94523

February 2, 1990

F. A. Plant, Ca. L.R.C. Chair
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N

FEB 07 1990

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Dear Mr. Plant:

We are very concerned, and are asking for your cooperation in amending Evidence Code Section 352.

There are very few things more horrendous than the act of child molestation, and the lifelong emotional and physical scars an abused child must bear. However, for the accused molester, they too are scarred for life, in addition to carrying the stigma in a society which will not tolerate or forgive. Therefore, we believe that any individual charged with this crime must be entitled to a fair trial and to their right to present all relevant evidence of significant probative value to their defense.

We cite, as an example, the case of Dr. Alain Youell. His case shows blatant abuse of Evidence Code Section 352. The court ignored the right of Dr. Youell to introduce his evidence on negative transference. Therefore, Dr. Youell could not prove why the child would make such horrendous accusations against him personally. The court also failed to give requested instructions to the District Attorney and jury. This case must be reversed, because Dr. Youell was denied his sixth amendment right to present a sound defense.

We are asking you, as an elected official, to do something concrete to change and amend Section 352 of the California Evidence Code so that all people accused will receive a fair trial.

Sincerely,

Doug & Laurel McCall
Doug and Laurel McCall

attachments

FEB 14 1990

R E C E I V E D

JIM QUARTIERI
1742 ADDISON ST.
BERKELEY, CA. 94703

Dear Chairman Plant,

I would like to bring to your attention the fact that Evidence Code Section 352, denies individuals their Sixth Amendment rights. At any judges discretion, it prevents defendants from presenting a proper defense. You know this, I know this, and so do judges, lawyers, and the hundreds of thousands of people in the therapy and child-related fields in California. But has anything been done to reverse or amend this code? No.

If a neighbor because of malice, can accuse someone of child molestation, and the accused cannot defend themselves, isn't that going against the entire system and ideal of justice? What on earth is happening in this country? Before long, there will be more innocent people in prisons, than guilty ones.

I remind you of the trial of Dr. Alain Youell, because of his precedent setting case. Enclosed are documents proving that he had no rights with which to defend himself. Many people have been accused and convicted, because of the blatant misuse of this Code, which began with Dr. Youell's trial three years ago.

I am asking you, as an elected official, to do something to correct this Code 352, immediately.

Awaiting reply from your research and steps you will take on this issue.

Thank you,

Jim Quartieri

FEB 16 1990

RECEIVED

Admin.

1st Supp. to Memo 90-19

2/09/1990

To Whom It May Concern:

We are deeply concerned for our future, besides having young children in our family we frequently baby sit for or entertain the other children in our neighborhood, sometimes overnight. As a result we feel this makes us highly vulnerable to the malice of being falsely accused of child molestation. We believe that Evidence Code Section 352, which allows the courts, at their discretion, to not allow records of treatment of patients with negative transference as evidence, denies us our sixth amendment right to defend ourselves if we are falsely accused. Evidence Code Section 352 is not right or proper and must be reversed. This code must be changed to the due process right of a defendant to a fair trial and to his or her right to present all relevant evidence of significant probative value to his or her defense.

We mention Dr. Alain Youells' case only because we feel it is a precedent setting case by which all persons, especially therapy related professionals are being tried today. His case shows blatant abuse of Evidence Code Section 352. The court ignored the right of Dr. Youell to introduce his evidence on negative transference. Therefore Dr. Youell could not prove why the child would make such horrendous accusations against him personally.

The court also failed to give requested instructions to the District Attorney and jury. This case must be reversed, so that we can not be put through the same traumatic and degrading experience that has shattered Dr. Youells' life, in the event that we should be falsely accused.

We are asking you as our elected official to do something concrete to change and/or amend Section 352 of the California Evidence Code so that all people accused will receive a fair trial.

Sincerely

Patricia Reuter

Beverly Schroeder
Matt SchroederChris Schroeder
Dr. Lee S. Schroeder

FEB 15 1990

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Lorraine E. Johnson, ART
2938 Soscol, Apt. 51
Napa, CA 94558

F. A. Plant, CA L.R.C. Chair
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Plant:

As a citizen in the health care field, I am deeply concerned for the future of professionals who work with children from dysfunctional families. They are highly vulnerable to the malice of being falsely accused of child molestation.

Evidence Code Section 352 which allows the courts, at their discretion, to declare the form of professional treatment rendered the client as not probative, denies those professionals their Sixth Amendment right to defend themselves when falsely accused. Evidence Code Section 352 is not proper and must be reversed. This code must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.

I mention Dr. Alain Youell's case because it is a precedent setting case by which vulnerable professionals, and divorce cases are being tried today. His case shows blatant abuse of Evidence Code Section 352. The court ignored the right of Dr. Youell to introduce his evidence on negative transference. Therefore, Dr. Youell could not prove why the child would make such horrendous accusations against him personally. The court also failed to give requested instructions to the District Attorney and jury. Therefore, the jury was left to make a decision without having all of the facts before them. This case must be reversed so citizens of the USA cannot be put in the same traumatic position that Dr. Youell has suffered if they should be falsely accused. Professionals have become afraid to work with highly dysfunctional clients because of Dr. Youell's case, and the seeming witch-hunt of the courts to satisfy public hysteria. THERE ARE INNOCENT PEOPLE IN PRISON BECAUSE OF SECTION 352.

I am asking you, as an elected official, to do something concrete to change and amend Section 352. It flies in the face of Supreme Court rulings. All people accused MUST receive a fair trial.

Expecting to hear from you,

Lorraine E. Johnson, ART
Lorraine E. Johnson, ART

CA LAW REV. COMM'N

FEB 20 1990

RECEIVED

Admin.

February 14, 1990
 Valentine's Day
 3257 Mt. Vista Dr.
 San Jose, CA 95127

Dear F. A. Plant, Ca. L.R.C. Chair,

I am deeply concerned for my future and that of all teachers, social workers, psychotherapists, and others who work with children from disturbed families. We are highly vulnerable to the malice of being falsely accused of child molestation. Two times in my career I have been falsely accused of doing or saying something which hurt children, and this is easily believed by one's superiors. They can't imagine "why" someone would falsely accuse another. Fortunately I have never gone to court or lost a job, but anyone could, when falsely accused.

I believe that Evidence Code Section 352 which allows the courts, at their discretion, to not allow the records of treatment of patients from dysfunctional families as evidence, denies me & others our sixth amendment right to defend ourselves if we are falsely accused. Evidence Code 352 is not just or proper and **MUST BE REVERSED!**

This code must be eliminated to allow the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.

I will mention the case of Dr. Alain Youell because it is a precedent-setting case by which vulnerable professionals are being tried today. His case shows blatant abuse of Evidence Code Section 352. The court ignored the right of Dr. Youell to introduce his evidence on negative transference. Therefore my friend Dr. Youell could not prove why the young adult would make such bizarre accusations against someone who was truly trying to help him. The court also failed to give requested instructions to the District Attorney and jury. This case must be REVERSED so I won't ever be put in the same traumatic position that this wonderful friend has suffered in case I were ever falsely accused.

I am requesting that you, as an elected official, do something definite, soon, to change and amend Section 352 of the California Evidence Code so that all people, even professionals, will be given a FAIR TRIAL. Please send me a reply, and act as soon as possible!

Very Sincerely,

-6-

Constance M. Cushing

Teacher & Citizen

Linda E. Katz
140 Flora Ave., #139
Walnut Creek, CA 94595

FEB 20 1990

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February 15, 1990

Dear State Representative, Elected Official, or Appointed Officer,

I am a licensed Marriage, Family, Child Therapist and am writing regarding Evidence Code Section 352. As a psychotherapist, I am deeply concerned that this code, should it be allowed to stand, would possibly prevent me from a proper trial should I ever be falsely accused by one of my clients. Code 352 allows the courts, at their discretion, to not allow a psychotherapist's records of treatment of the patient as evidence, thus, denying me as a psychotherapist my sixth amendment right to defend myself by producing case material as to reasons the patient might be falsely accusing me.

I believe that Evidence Code, Section 352, is not proper and ask your support in helping to reverse it. The Code should not stand in the way of me or any other psychotherapist when it comes to presenting all relevant evidence of significant probative value for one's defense.

I am familiar with the case of Dr. Alain Youell, in which Evidence Code Section 352 was used to prohibit his appropriate and proper defense. The result was that Dr. Youell was unable to present reasons for his patient's false accusations. This kind of situation leaves a psychotherapist in an extremely vulnerable situation.

I am asking you, as an elected official, to do something concrete to forward the changing and amending of Section 352 of the California Evidence Code so that anyone accused could receive a fair trial. Thank you for your help on this matter.

Sincerely,


Linda E. Katz

P.S.: I am attaching an attorney's letter regarding Dr. Youell and the misuse of Code 352 in his case as a concrete example of the current effect of that Code in the attempt to defend oneself.

FEB 20 1990 Admin.

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552A Valle Vista Ave.
Oakland CA 94610
2/16/90

Dear Elected or Appointed Official:

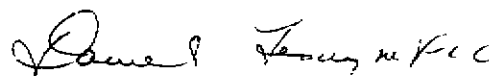
As a mental health professional, I am deeply concerned about the future of myself and my colleagues. Since many of us work with children who come from dysfunctional families, we are highly vulnerable to being falsely accused of child molestation. I believe that Evidence Code Section 352 which allows the courts, at their discretion, to not allow my records of treatment of patients from dysfunctional families as evidence, denies us our sixth amendment right to defend ourselves if we are falsely accused. Evidence Code, Section 352 is not proper and must be reversed.

This Code must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.

Enclosed you will find two attorneys' letters referring to the case of Dr. Alain Youell, who is currently serving time at San Quentin prison. I mention Dr. Youell's case because he is a most highly valued friend and colleague, and because his is a precedent-setting case by which vulnerable professionals are being tried today. His case shows the blatant abuse of Evidence Code Section 352. The court ignored the right of Dr. Youell to introduce his evidence of "negative transference" (see the enclosed letters for a discussion of this term). Therefore Dr. Youell could not present his case for why the child would make such horrendous accusations against him personally. The court also failed to give requested instructions to the District Attorney and jury. The procedures governing this case must be reversed so that we mental health professionals cannot be put in the same traumatic position that Dr. Youell has suffered through in case we should be accused.

I am asking you, as an elected or appointed official, to do something concrete to change and amend Section 352 of the California Evidence Code so that all people accused of child molestation will receive a more fair trial.

Sincerely,



Daniel S. Lesny, M.F.C.C.

FEB 21 1990

RECEIVED

February 17, 1990

Caren Haas
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Marylhurst, OR 97036

F. A. Plant, CA. L. R. C. Chair
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Plant:

I draw your attention to the case of People vs. Youell. As you can see from the enclosed papers, there were a number of miscarriages of justice in this case.

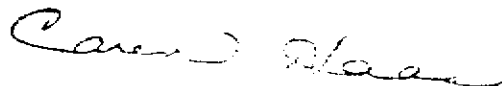
According to Section 352 of the Evidence Code, a wide latitude is given the judge in deciding upon the admissibility of evidence. In this case, and now in others, I understand such wide discretion has been exercised by the bench that the Sixth Amendment due process right has been violated and the defendant prevented from presenting a defense.

Since the judicial system does not seem to be regulating its own integrity in these sorts of cases, it falls to the legislators to amend the code toward just practice and congruence with the constitution.

Although I am no longer living in California, it is clear to me that any client I served in my clinical internship in graduate school, (I worked with families, children, and individuals) could accuse me of sexual abuse and, in the absence of any evidence, I too could be convicted with no chance to defend myself. Such an injustice could be perpetuated upon anyone as long as the abuse of the discretionary powers of the bench, given in the Evidence Code, is possible.

Please look into this matter for the protection of the rights of all citizens, and for the service of justice in all cases.

Sincerely,



Caren Haas

lej
enclosures

Dan Russo, ESQ
Patrick Clansy, ESQ

PATRICK E. CLANCY
GARRY T. ICHIKAWA

LAW OFFICES OF
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May 10, 1989

Friends of Alain Youell:

Psychiatrists, psychologists, MFCC's, LCSW's and divorcing spouses occupy positions which make them vulnerable to false accusations of child molestation. Further, the current trends in the manner in which trials are conducted are not allowing these individuals to present their defense when falsely accused. Judges are reluctant to allow any testimony beyond whether or not "you did it or didn't do it". In the case of a divorcing spouse, they are reluctant to hear evidence concerning interference with visitation and ongoing child custody disputes and in the case of therapists, they are reluctant to allow the background of the child and the child's dysfunctional family into evidence when a child has accused their therapist. That was the case in the case of the People of the State of California vs. Alain Youell.

The defense of Dr. Alain Youell was a defense referred to as negative transference. Negative transference was first defined by Freud. The classic example shown in the literature is the case in which a child has a negative relationship with a parent. The child over many years has built up hatred towards the parent and has internalized it. Through the process of internalization they have become disconnected with their emotions. The therapist works toward putting them in contact with their emotions. The emotion that they eventually come in contact with is their anger. The first individual that they direct this anger toward then becomes their therapist. In the case of Dr. Alain Youell he was treating a child who attempted suicide before coming to him. The child came from a dysfunctional family in which the father resented and hated the child because the child was conceived out of wedlock and the father had married only because of religious convictions. The father felt trapped in the marriage and took his anger out at his son. This went on over a number of years. The child, prior to being taken to Dr. Youell, also had negative feelings concerning sexuality. He was masturbating all of the time and had been taught that it was wrong. He attempted suicide because of his feeling concerning masturbation. The theory of the defense is that when the child came in contact with his negative feelings he directed them towards Dr. Youell. A precipitating emotional event occurred with the father of traumatic proportions which led to the false accusation of a molest. Most individuals have heard about transference, but not negative transference. The classic example that most people have heard about is a woman who does not love. Over years she has

Friends of Alain Youell
May 10, 1989
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suppressed her love and has not been able to love anyone. The therapist puts her in contact with her feelings so that she can love and of course who does she first love, her therapist. It is the same mental process only with a positive rather than a negative transference.

The courts are pressured for time and do not want to allow into evidence events which have occurred other than on the alleged day of the alleged molest. In the case of Alain Youell expert witnesses were allowed to testify that negative transference exists. However, the court would not allow the multitude of negative events which had occurred between the father and the son to be introduced to show the magnitude of the pent up hatred. The court excluded it under Evidence Code Section 352. This section says that relevant evidence can be excluded if the court finds that its probative value is outweighed by its prejudicial effect. By excluding this evidence Dr. Youell was prevented from presenting his entire defense. The case law in this area allows discretion with the court. There are only a few cases which govern this area. The Supreme Court of the United States has held that an accused is denied effective confrontation of witnesses when examinations on matters of motive for testimony favoring the prosecution is denied, when the jury might reasonably find that the subject matter of the examination would provide a motive for favoring the prosecution in testimony. *Delaware vs. VanArsdale* 475 U.S. 673 (1986). In the case of *Washington vs. Texas* (1967) 388 U.S. 14, the court held:

"The right to offer the testimony of a witness...is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it might decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."

The court's have allowed even obscure psychological theories when the prosecution wished to use them to establish a motive. In the case of *People vs. Phillips* (1981) 122 CA3d 69, 175 Cal.Rptr. 703, the prosecution presented expert opinion testimony of "Munchausen Syndrome By Proxy" in order to suggest a motive for the defendant murdering one of her two adopted children and wilfully endangering the life of the other by deliberately administering a sodium compound into their food. The Appellate Court, noting "the rules of evidence do not preclude innovation", upheld the admission of this novel evidence:

"In the absence of a motivational hypothesis, and in the light of other information which the jury had

Friends of Alain Youell
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Page Three

concerning her personality and character, the conduct described to appellant was incongruous and apparently inexplicable. As both parties recognized, Dr. Blinders testimony was designed to fill that gap. The evidence was thus relevant, and therefore admissible except as otherwise provided by statute. Appellant points to no statutory provision which would preclude the prosecutor from introducing otherwise admissible psychiatric testimony relevant to motivation on grounds that the defendant had placed his or her mental state in issue." Phillips, supra, 122 CA3d 69, 87.

Lastly, the courts have held that to exclude a defendant's defense based upon Evidence Code Section 352 is not proper and should be reversed. In the case of *People vs. Rider* (1978) 82 CA3d 543, the court stated: "In criminal cases, any evidence that tends to support or rebut the presumption of innocence is relevant", since "It is fundamental in our system of jurisprudence that all of the defendant's pertinent evidence should be considered by the trier of fact." The court went on to state: "Evidence Code Section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." In *Chambers vs. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the exclusion of evidence, vital to a defendant's defense, constituted denial of a fair trial and violation of the constitutional due process requirement. Reader, supra, p. 553. In the case of Dr. Alain Youell the court ignored the right of Dr. Youell to introduce his evidence on negative transference. The prosecution's argument was that the actual evidence of the negativism between the father and the son would "trash the family". The court excluded all evidence supporting the negative transference theory under the court's discretion.

Although few therapists are accused of child molestation of a patient they are in a vulnerable position. They already are dealing with people who have psychiatric problems. Some are working with children who have sexual disfunction problems. Others are working with children from extremely disfunctional families. All of these factors could contribute to a false accusation. For a court to be able to deny the therapist the ability to introduce his defense makes for very vulnerable therapists. In essence, what they are saying to the therapists is that you will be limited to saying "I didn't do it", but cannot give any of the background information on the child or the family which may have led to the false accusation.

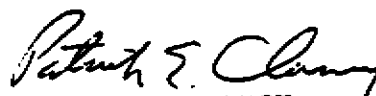
In terms of numbers the reluctance of the court to allow the background of the child into evidence has its greatest impact in cases involving child custody disputes. Parties quickly learn in

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Page Four

a child custody dispute that if one of them is accused of a molest or abuse, the child is given to the other parent while the matter is being investigated and tried. The custodial parent then has the opportunity to breakdown the bonds between the child and the non-custodial parent and to keep control over the situation. Accusations of physical and/or sexual abuse has become the number one favored method of obtaining child custody when child custody is disputed between the two parents. Therapists realize that years of fighting between the custodial parent and the non-custodial parent have an effect on the child. Statements made by a custodial parent reinforced over years that the non-custodial parent is "bad" have a toll on the child. Further, some parents are asking their child after each visitation with the non-custodial parent whether or not they have been touched. Months or even years of this type of negativism and questioning can lead to a false accusation. However, the courts are very reluctant to allow this evidence in at a trial. They do not want to take the time to show where the custodial parent has made negative statements about the non-custodial parent on 20 occasions, where the custodial parent has interfered with the visitation on 15 occasions, where the child has told of negative comments about the non-custodial parent on 30 occasions, etc. The courts seem to be allowing one question in this area. Did you accuse the non-custodial parent because the custodial parent told you to? If the answer is no, you are not allowed to proceed any further under Evidence Code Section 352, because undue consumption of time and the prejudicial value outweighs the probative value.

In conclusion, both therapists and divorcing spouses who are involved in child custody battles are extremely vulnerable to false accusations. The amount of time needed to go into the family dynamics of the child and the psychological makeup of the child is time consuming for the courts. However, unless the courts give us the time in which to present the defense, the truth will not come out. Therapist groups and divorced parent groups should seriously consider lobbying the State Legislature for amendment to the Evidence Code. A defendant should have the absolute right to present his defense especially in areas that are susceptible to false accusations. The court should not be allowed to exclude your defense within its discretion.

Sincerely yours,


PATRICK E. CLANCY

PEC/ad

DANIEL J. RUSSO
CERTIFIED CRIMINAL LAW SPECIALIST
DAVID WEINTRAUB
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RUSSO, WEINTRAUB & BELLIA
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 238-M

408 TENNESSEE STREET
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(707) 644-4004

AMY F. MORTON
SHEILA PAGE DUKE

June 2, 1989

Re: People v. Youell

TO WHOM IT MAY CONCERN:

Dr. Youell was denied a fair trial by the trial court's failure to allow Dr. Youell to present a defense.

In a nutshell, Dr. Youell wanted to present a defense of negative transference. Negative transference is a therapeutic tool that consists of the patient transferring to the therapist anger and hostility felt toward others. This was critical to Dr. Youell's defense because it explained why the alleged victim would make the outrageous allegations made against Dr. Youell.

The Court found that this material would not be admissible to show the alleged victim's motivation and ruled all evidence of the "factual basis" of the negative transference inadmissible.

Because of this ruling, Dr. Youell was denied the fundamental right to present evidence in his own behalf. This ruling flies in the face of two Supreme Court cases, Davis v. Alaska (1974) 415 U.S. 388 and Washington v. Texas (1967) 388 U.S. 14.

The final result of the trial court's action is to leave the appellate court to guess as to what effect Dr. Youell evidence would have had on the jury. Given the Court of Appeal's function, the result has been to uphold the trial court's ruling.

PEOPLE V. YOUELL
LEGAL ISSUES

The issues in this case are summarized in pages I, II, and III of the Opening Brief. Emphasis should be placed on the denial of due process rights by the court's ruling on negative transference and the failure to give requested instructions.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
)
 Plaintiff & Respondent,) Superior Court #
) 32930
 v.)
) No. A038158
)
 ALAIN YUELL,)
)
 Defendant & Appellant.)
)
)

APPELLANT'S OPENING BRIEF

On Appeal from the Judgment of the
Superior Court of California
County of Contra Costa

The Honorable Robert McGrath, Judge

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