#34(L) 12/18/63

First Supplement to Memorandum 63-57

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 27 and 27.5)

Attached are two letters received after Memorandum 63-57 was prepared:

Exhibit I (pink pages)--Comments of Dr. Bellamy on Rules 27 and 27.5.

Exhibit II (yellow pages)--Comments of Dr. Diamond on Rule 27.5.

Dr. Bellamy is in general agreement with Rules 27 and 27.5. He raises two questions:

(1) Should the physician be required to claim the privilege for the absent patient? See first page of Exhibit I (pink pages).

(2) Should an authorization for release of medical information be effective? See first page of Exhibit I.

Dr. Diamond seems to feel that the psychotherapists are in a position to insist on changes in Rule 27.5. He also states: "In general, it seems to me that you have tried to include too many rather unusual and remote situations in your proposed draft. As you well know, no law can cover all possible eventualities, and in trying to do so, one may only end up with confusion and ambiguous provisions which will be put to uses quite different from what they were intended." He questions whether the several psychiatric organizations in California would support the proposed rule in its present form. (This seems contrary to the other letters we received on the rule). He makes the following comments on Rule 27.5:

(1) He suggests that paragraph (4)(a)--services sought to enable patient to commit crime or tort--be deleted. See Exhibit II (yellow pages), page 1.

(2) He suggests that paragraph (4)(h)--psychotherapist appointed to act as psychotherapist for the patient by order of a court--be deleted. See Exhibit II, pages 1-2. Our revision of the language of this exception (suggested in Memorandum 63-57) will clarify the ambiguity he points out but will not meet his objection. The staff suggests that the comment be revised to indicate that a patient who is required to undergo psychotherapy as a condition of probation will have the benefit of the privilege unless the psychotherapist is appointed by the court. This addition seems desirable because Dr. Galioni (Exhibit IV--gold pages--Memorandum 63-57) made the same point.

(3) He suggests that paragraph (4)(j) be deleted. See Exhibit II, page 2.

(4) He suggests that if a defendant offers psychiatric evidence on his own behalf the privilege should not apply. See Exhitit II, page 2. The same suggestion was made by Professor Sherry.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

NORTHERN CALIFORNIA PSYCHIATRIC SOCIETY

a district branch
of the

American Psychiatric Association

December 13, 1963

John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California

Dear Mr. DeMoully:

I have read rule 27, Physician-Patient Privilege, pages 43-64 of the California Law Revision Commission, Preliminary Draft, dated January 1964. At a later date the matter may be taken before the Council of Northern California Psychiatry Society.

The changes recommended by the Commission are timely and advantageous in my opinion. The special needs of the psychotherapeutic situation for greater assurance of confidentiality are recognized and perhaps in time the physician may also obtain more protection against disclosure.

On page 45 of the report, the physician is made a holder of privilege in subdivision 2c, while in subdivision 3 of rule 27 it is proposed that the physician shall claim the privilege for the patient under certain circumstances.

The physician, then, will carry a specific duty of care and this increases the risk of claim against the physician for breach. This is not necessarily disadvantageous--it is not too much to ask of a professional practitioner that he carry certain responsibilities under the law. The physician's decision may be disputed. The judge settles such questions, when present, but it is not clear to me what might evolve when a judge is not presiding, as during a deposition. The physician may need legal counsel of his own if he is not in agreement with counsel present.

A somewhat related situation may arise when the patient has signed authorization for release of medical information, 1) under undue pressure to sign, or 2) without being fully appraised of the significance of signing such an authorization.

This has become a problem of some magnitude for students about to graduate from our Universities, and who are seeking employment, but who may have received treatment at the student health center while attending the University.

In addition, a subpoena for a record is issued occasionally although the grounds are doubtful or inadequate for the issuance of that subpoena.

Of course, any law may be subject to abuse and the changes as proposed by the commission should help this situation. I am raising the questions because of their importance to doctor, patient and to the law.

May I extend my appreciation to the California Law Revision Commission for a careful study and for the proposals made for changes in the law.

Very truly yours,

s/

William A. Bellamy, M.D., President
Northern California Psychiatric
Society

cc.

Bernard Diamond, M.D.
Samuel T. D. Anderson, M.D.
Joan Davidson, M.D.

EXHIBIT II

UNIVERSITY OF CALIFORNIA

School of Criminology
Berkeley 4, California

December 16, 1963

Mr. John H. DeMoully, Executive Secretary,
California Law Revision Commission,
Stanford University,
Stanford, California.

Dear Mr. DeMoully,

I have reviewed the draft of the proposals for revision of privileged communication law for psychotherapists and I approve the draft as a marked advance over the present inadequate law. However, I think that further changes may be in order as follows:

Paragraph 4(a) is very ambiguous and refers to such an extraordinary situation that I cannot see that it should be included at all. Nothing that has ever happened in the course of my 25 years practice pf psychotherapy has ever been of this nature and I have never heard of such an instance with any other psychiatrist; so I do not see the necessity of such a provision. I suspect that psychiatrists would resent this unusual exclusion and would look upon it as an opportunity of abuse by law enforcement agencies prying into their records on some kind of "fishing expedition" to see whether such an exception were applicable. Especially the "plan to commit a tort" exclusion could, I foresee create all sorts of muddled confusion. I do not like this paragraph at all, and would strongly oppose it.

Paragraph 4(h) p. 59 is, in my opinion undesirable. I can see why privilege would not hold for a court appointed psychiatrist who has made a purely diagnostic evaluation for purposes of testifying as to sanity, insanity, intent, etc. But your paragraph specifically states "to act as a psychotherapist". Such appointment could only occur in those cases where a court makes psychotherapy as a condition of probation, and even in this instance, I am not sure that the psychotherapist is literally "court-appointed". But assuming that he is, it would be unwise to eliminate privilege for the entire psychotherapy. Reports, containing selected information are usually provided the court, but therapy would be impossible if all records were made available to the court. In my experience, no difficulty has ensued from obtaining from my patients who are on probation their specific permission for the reports I send to the court or probation officer and I inform the patients as to their contents. But removing all privilege and opening up the full record would be very antitherapeutic and make such treatment impossible. However, if the court

appointed psychotherapist is concerned only with diagnosis and evaluation, specifically for a given legal purpose, then there would certainly be no objection to lack of privilege.

As to Paragraph 4(j) p. 60, as commented upon at the bottom of page 62, I do not think this is proper. If the patient, himself, is not directly charged with a criminal offense, I cannot see how such a patient should not have privilege for an alleged confession for which another person is being charged. This appears to me to be an unwarranted invasion of the privacy of psychotherapeutic treatment. Psychiatrists and other psychotherapists are not charged with police or detective duties nor should they be obligated to step forward and bring forth confidential information to be used in the trial of third parties to whom they have no professional relationship.

If the defendant, himself, were under trial and offers psychiatric evidence on his own behalf, he has clearly waived his privilege, and this is properly so. But the situation does occasionally arise where a patient does confess something or other of a criminal nature to a psychiatrist. Sometimes the crime is real enough, and sometimes only imagined by the patient. But he should not lose his privilege even if someone else is under trial. In actual practice, in such an instance I would bring strong pressure to bear upon my patient to remedy the situation by turning himself in to a law enforcement agency. But I would never be willing to expose my records against the patient's wishes, and I certainly would not be willing to appear in court and testify that the patient had made such a confession to me. Psychotherapists cannot, and must not, be used as police detectives without gross destruction of the confidential relationship upon which all psychotherapy is based. If such a loss of privilege, as you propose would actually occur and a psychiatrist would be forced to testify as to a confession it would do inestimable harm to the therapeutic relationship of all other patients of that therapist as well as other therapists and their patients.

Although the present privilege law for psychiatrists (as a physician) is very inadequate and apparently excludes privilege from criminal proceedings, I very much doubt that it would be interpreted to mean that there is no privilege when the criminal proceeding involves a defendant different than the patient.

In general, it seems to me that you have tried to include too many rather unusual and remote situations in your proposed draft. As you well know, no law can cover all possible eventualities, and in trying to do so, one may only end up with confusion and ambiguous provisions which will be put to uses quite different from what they were intended.

It is my guess that the several psychiatric organizations in California would not support your proposed revisions if the above paragraphs are retained. But if appropriate further revisions were made, I think that all psychiatrists in this state would give you their whole-hearted support.

Thank you for allowing me the opportunity to make these comments. I deeply appreciate it.

Sincerely yours,

Bernard L. Diamond, M.D.

cc: Dr. William Bellamy, President,
Northern California Psychiatric Society.