63(L) 4/22/66

Second Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code

Attached to this Supplement as Exhibits I and II are two letters we have received raising questions concerning the Evidence Code that should be considered by the Commission. In addition, a question relating to the possibility of a marriage counselor's privilege has also come to our attention. We present these matters here so that the Commission may decide whether any further revisions are needed in addition to those that we have already proposed to make in the Evidence Code.

Judicial notice

Richard H. Perry of San Francisco (Exhibit I) suggests that we add to Section 451 a requirement that judicial notice be taken "of all matters heretofore or hereafter judicially noticed by courts of last resort in this state." It is apparent from his letter that he is concerned with judicial notice of facts and not judicial notice of law. Facts that are subject to judicial notice are referred to in Section 451(f) and in subdivisions (g) and (h) of Section 452. Apparently, Mr. Perry would require a trial court to take judicial notice of any matter noticed by an appellate court even though the appellate court may have noticed the particular matter on the basis of data supplied to the court under Sections 452 and 453.

The matters of fact that the appellate courts have noticed in the past have been noticed under the general heading of "common knowledge." If the particular matter of common knowledge which was noticed in the past is "so universally known so that [it] cannot reasonably be the subject of dispute," the trial court is required to take notice of the same matter under Section 451. If the matter is not of such universal knowledge, the

trial court is still required to take notice of the matter under subdivisions (g) and (h) of Section 452 if a party so requests and furnishes the court with sufficient information to enable it to take judicial notice of the matter. Section 453.

Thus, a court can be required to take notice of any of the factual matters specified in Sections 451 and 452. Prior appellate decisions will establish whether a matter is within Section 451 or 452. If an appellate decision so establishes, therefore, the trial court can be required to take notice of the matter specified in the prior appellate opinion. The scheme contained in the Evidence Code seems to meet the problem already. It avoids requiring the trial court to take the initiative to determine obscure facts that may have been referred to in prior appellate opinions when the parties have not furnished the court with sufficient information to enable it to determine those facts. Accordingly, we do not recommend the revision suggested.

Marriage counselor's privilege

The March 29 issue of the Los Angeles Daily Journal contains the following paragraphs in an article reporting a talk by Justice Kaus before the Citrus Bar Association:

> Despite the desirability of the 1967 code there is an unfortunate by-product, he said. "No privilege will be recognized except those which are provided for in the code."
>
> He further explained how six months ago the 6th Appellate handed down a decision in Cimarron v. Cimarron, in which a rabbi didn't want to be called as a witness regarding information he'd obtained during their marriage counseling period. "Marriage counseling was thus recognized as privileged communication, but that will all go out of the window as of January 1, 1967. The new evidence code does not provide for the marriage counselor privilege."

The case is Simrin v. Simrin, 233 Cal. App.2d 90, 43 Cal. Rptr. 376 (1965), decided by the 5th district DCA. The case involved a post-divorce custody

proceeding in which the mother was seeking to have the custody of the children transferred from the father to herself. At the hearing in the trial court, the trial court ruled that a rabbi who had acted as a marriage counselor for the parties need not reveal conversations with them. The wife called the rabbi as a witness, but he declined to testify, not on the ground of privilege, but on the ground that he undertook marriage counseling with the husband and wife only after an express agreement that their communications to him would be confidential and that neither would call him as a witness in the event of a divorce action. The husband asserted the clergyman's privilege (CCP § 1881-3). The wife lost the decision at the trial court level and appealed.

The appellate court first held that the clergyman's privilege was inapplicable because "Section 1881, subdivision 3, is limited to confessions in the course of discipline enjoined by the church." The ground for the decision appears in the following passage:

> As to the agreement, appellant argues that to hold her to her bargain with the rabbi and with her husband is to sanction a contract to suppress evidence contrary to public policy. However, public policy also strongly favors procedures designed to preserve marriages, and counseling has become a promising means to that end. The two policies are here in conflict and we resolve the conflict by holding the parties to their agreement. If a husband or wife must speak guardedly for fear of making an admission that might be used in court, the purpose of counseling is frustrated. One should not be permitted, under cover of suppression of evidence, to repudiate an agreement so deeply affecting the marriage relationship. For the unwary spouse who speaks freely, repudiation would prove a trap; for the wily, a vehicle for making self-serving declarations.
>
> It is true, as appellant points out and as respondent concedes, there is no California case in point. But two analogies are close aboard. Since appellant stresses the trial or evidentiary aspects of the agreement, we note, first, the analogy to statements that are made in offer of compromise and to avoid or settle litigation, which are not admissible in evidence. Likewise, statements made to a counselor in an effort to save a marriage, as here, should not be admissible since they, too, are

made for the purpose of settling a dispute, to save a marriage and to prevent litigation. The other analogy is to proceedings in the conciliation court. Of them Mr. Witkin says in his work, California Evidence.(1958) section 477(b), page 533:

"Proceedings of Conciliation Court. The superior court sitting as a conciliation court conducts its proceedings in private . . ., and communications from parties to the judge, commissioner or counselor are deemed made 'in official confidence' under C.C.P. 1881 (5), supra, § 438. (C.C.P. 1747.)"

We do not equate a confidential communication made to a churchman acting as a marriage counselor, with a communication made in a judicial proceeding. The analogy holds nonetheless, since the purpose of making such communications confidential in each instance is to encourage the husband and wife to speak freely and to preserve the marriage. [233 Cal. App.2d at 95.]

It seems to us that the court's decision here was not based upon a marriage counselor's privilege. It was based upon the agreement of the parties. The court specifically enforced the agreement of the parties because of the policy considerations discussed.

The first question presented is whether the Evidence Code changes the pre-existing law. It was well settled in the prior cases that there were no privileges except those specified by statute.

It is also generally declared that no new or common law privilege can be recognized in the absence of express statutory provision. [WITKIN, CALIFORNIA EVIDENCE 446 (1958).]

Witkin's statement is supported by Green v. Superior Court, 220 Cal. App.2d 121, 33 Cal. Rptr. 604 (1963)(denying the existence of a pharmacist's privilege) and Tatkin v. Superior Court, 160 Cal. App.2d 745, 326 P.2d 201 (1958)(denying the existence of a privilege for the Los Angeles County Medical Association to suppress its membership admission records). Section 911 of the Evidence Code merely reiterates these holdings. The comment to Section 911 states that it merely codifies the existing law that privileges are not recognized in the absence of statute.

Simrin v. Simrin does not purport to depart from these decisions. It purports to be enforcing a contract and not creating a new privilege by

judicial action. It can be argued, therefore, that the Evidence Code does not change the rule stated in Simrin v. Simrin. The Evidence Code merely preserves the existing law that privileges are statutory. The Evidence Code does not prevent a court from enforcing a contract such as that which was involved in the Simrin case, for the enforceability of contracts (that are not contrary to public policy) is established by the various statutory provisions of the Civil Code. We think that this is the proper analysis of the Simrin case and that, technically, no new statute is necessary to preserve its rule.

The next question, however, is whether it is sufficiently clear that the Evidence Code does not affect the Simrin rule. It can be argued that the Simrin case recognized that privileges can be created by contract. The Evidence Code states that no privileges can be created except by statute. Therefore, the Evidence Code has repealed all contractually created privileges. It might be desirable to forestall such an argument by providing expressly that Section 911 does not prohibit the enforcement, as between the parties to the agreement, of a contract creating a privilege.

A disclaimer of this sort would avoid such questions as the applicability of the privilege in actions involving third parties, applicability of the privilege in actions between the parties not involving domestic relations, waiver, etc. It seems likely that as long as a privilege of this sort is based upon contract the courts will consider the equities between the parties in determining whether to permit specific enforcement of the contract. It seems likely, too, that if the concept of contractually created privileges is pushed too far, the courts will hold the contracts to be contrary to public policy and unenforceable. A disclaimer would permit the courts to work out the limits of contractually created privileges on a case by case basis.

As an alternative, it would be possible for the Commission to draft a marriage counselor's privilege. A major problem involved in such a solution would be the problem of defining a marriage counselor. Because of the difficulty in determining just who is a marriage counselor, we recommend against the creation of a new privilege of this sort. If the Commission desires such a privilege it must then determine whether such a privilege should be applicable in all proceedings or only in certain proceedings, what exceptions there should be to the privilege, and the manner in which such a privilege may be waived.

As another alternative, the Commission could decline to legislate until appellate decisions indicate that there is actually a problem.

Hearsay evidence--business records

Gerald Sokoloff (Exhibit II) suggests the addition of a specific exception for hospital bills that is similar to the exception appended to his letter.

It seems likely that hospital billings can be admitted without a testimonial foundation under the provisions of Sections 1998-1998.5 of the Code of Civil Procedure (recodified as Evidence Code §§ 1560-1566). These provisions were enacted in 1959 at the behest of the California Hospital Association to obviate the necessity for the custodian of hospital records to appear in compliance with an ordinary subpoena duces tecum to authenticate the hospital's records under the Business Records as Evidence Act. If these sections are inadequate, another section could be added to Article 4 (§§ 1560-1566) of Chapter 2 of Division 11 of the Evidence Code to specifically provide for the admissibility of hospital bills when supported by a certification of the nature specified in the New York law appended to Mr. Sokoloff's

letter, We believe, however, that such an addition is unnecessary. Local hospitals advise us that they usually comply with subpoenas by mailing the records with an attached certificate in compliance with Sections 1998 et seq. If billing records as well as medical records are wanted, the same procedure is followed. A personal appearance for authentication purposes is made only if the attorneys want a personal appearance. Most subpoenas, we are informed, are for deposition hearings, not for trial. Hence, the accuracy of the records can be checked and the determination whether the billing was for the accident in litigation or for some other cause can be made long in advance of trial. As a result, we are informed that the records usually go in at trial without a contest over the foundation. We do not know what the practice may be elsewhere in the state. But here, at least, the hospitals and practitioners indicate that Sections 1998 et seq. meet the problem.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

Memo 66-21

RICHARD H. PERRY
ATTORNEY AT LAW
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SAN FRANCISCO 4

TELEPHONES
YUKON 6-6370
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February 23, 1966

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

Attention: John H. DeMoully, Executive Secretary

Gentlemen:

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.

I should in addition like to comment on the Code pertaining to judicial notice. Our reviewing Courts have taken judicial notice of enumerable matters "of common knowledge," although such notice has not always been essential to the decision of the Court. Yet, it seems to me that it is reasonable to require trial Courts to take judicial notice of matters already judicially noticed by reviewing Courts, even though I have experienced some reluctance on the part of trial Courts so to do.

I should therefore like to suggest that Section 451 add a requirement that judicial notice must be taken "of all matters heretofore or hereafter judicially noticed by Courts of last resort in this State." Such a provision, I believe, is quite different from the scope of Section 451(a). Often the reviewing Court's

occasion to take judicial notice is in evaluating facts and commenting that it is a matter of common knowledge that a certain fact exists and that there is, for example, no evidence to support the judgment; or the Court having such fact in mind feels that the evidence is adequate to support the judgment. Semantically, however, whether or not the matter thus judicially noticed is "the decisional...law of this state" may be open to debate. For example, in Thomson v. Burgeson, 26 Cal.App.2d 235, the Court took judicial notice of the location and function of the uvula and soft palate; in Globe Cotton Oil Mills v. I.A.C., 54 Cal.App. 307, the Court judicially noticed that the loss of use of any organ or member of the body would constitute a permanent disability; in Hanson v. Luft, 58 Cal.2d 443, the Court judicially noted that an open fire of any sort presents greater hazard to a small child because of his lack of judgment and understanding than it does to an adult. While in one sense these matters may be obitur dictum they are nevertheless matters of which the Court unequivocally has taken judicial notice. There appears to be no sound reason why the inferior Courts are not required to take judicial notice of such matters should they be presented.

The opportunity to express comment with respect to the foregoing is sincerely appreciated.

Very truly yours,

Richard H. Perry

RHP:vmc

EXHIBIT II

Memo 66-21

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GERALD SOKOLOFF

GARBER AND SOKOLOFF
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526-2267

February 10, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Re: Evidence Code

Gentlemen:

I feel that a great deal of time is wasted in personal injury cases establishing the foundation and admitting bills. Could some method such as R4518, of the New York law be used.

Very truly yours,

GARBER AND SOKOLOFF

BY: Gerald Sokoloff
Gerald Sokoloff

GS:bf

Enclosures

R 4518. Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.