

#63.20-70

3/4/74

Memorandum 74-14

Subject: Study 63.20-70 - Evidence (Evidence Code Section 999)

Senate Bill 1534 was introduced by Senator Stevens to effectuate the Commission's recommendation relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege.

There is substantial opposition to this recommendation. The Board of Governors has not yet taken a position, but the State Bar Committee on Administration of Justice recommends that the State Bar oppose the recommendation. See Exhibit I attached. The California Trial Lawyers Association also opposes the recommendation. See also Exhibit II attached.

The opposition ignores the lack of logic for the exemption; instead, the opposition is based on an unwillingness to make privileged some evidence that is now available.

You will recall that the Commission decided not to eliminate entirely the physician-patient privilege because it agreed with Justice Kaus that the privilege should be available to protect nonparty patients in a malpractice action. The privilege would protect against discovery of the names of other patients treated by a physician to determine what the physician's normal practice was in a particular type of case. The staff believes that the privilege is justified to protect patients who are not parties. However, where the patient is the plaintiff, the privilege does not exist as to any "communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . the patient" or other party claiming by or through the patient. Evidence Code Section 996. Also the privilege does not apply in a criminal proceeding (Section 998) or in various other instances. There is, however, no general exception for the case where the

communication is relevant to an issue in the proceeding and the patient is a party to the proceeding. We think that such an exception should be substituted for the "criminal conduct" exception. By making such an exception, we would eliminate the need for the court to try the criminal action to determine whether the exception applies; instead, whether the exception applies would depend upon whether the communication is relevant to an issue in the proceeding. At the same time, nonparty patients would be protected against disclosure of their communications to their physicians. We think that this is sufficient protection and that the proposed exception would not inhibit communications between patients and their physicians.

Accordingly, we recommend that Section 999 be amended to read as follows:

999. Where the patient is a party to the proceeding, there is no privilege under this article in-a-proceeding-to-recover-damages-on account-of-conduct-of-the-patient-which-constitutes-a-crime as to a communication relevant to an issue concerning the condition of the patient .

If this proposal is satisfactory to the Commission, we will suggest that Senator Stevens amend Senate Bill 1534 as set out above and then set the bill for hearing.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Memorandum 74-14

EXHIBIT I

**MEMORANDUM**

We are using this informal note to enable us to give you quickly certain information. 1/16/74

Mr. DeMouilly:

Attached hereto is an Extract from the CAJ January, 1974, Report to the Board of Governors re two LRC proposals (Evid. Code 919 and 999).

The Board has concurred in the first recommendation and agreed to support the LRC proposal; the second item has been deferred for further consideration at the Board's February meeting.

W. B. Bades

THE STATE BAR OF CALIFORNIA

(2) Evid. Code 999 - "Criminal Conduct" Exception to the Physician-Patient Privilege.

Source: Law Revision Commission.

Section 999 of the Evidence Code provides that the physician-patient privilege is not applicable "in a proceeding to recover damages on account of conduct of the patient which constitutes a crime". The Law Revision Commission proposes the repeal of this section for the following reasons: (1) The exception is difficult to administer requiring a collateral criminal proceeding to determine whether the patient actually engaged in criminal conduct before the damage action can be tried; (2) the exception opens the door to invasions of the patient's privacy and invites extortionate settlements made to avoid embarrassing disclosures; (3) there is no satisfactory justification for the exception; (4) repeal of the exception will rarely prevent access to medical information needed in a damage action since the court has power under CCP 2032 to order the defendant to submit to physical examinations and other limitations and exceptions such as Evidence Code 996 (patient-litigant exception) will continue.

With minor dissent the Committee recommends the repeal of Evid. Code 999 be opposed. Although the exception has a very narrow application, i.e., only when the patient has committed a crime, the reasons advanced by the LRC for its repeal are not persuasive. The fact that the exception requires the judge to conduct a trial-within-a-trial to determine whether the conduct of the patient constitutes a crime ignores the fact that often a court must independently try a preliminary issue of fact to determine the admissibility of evidence, and the argument that the exception allows invasion of privacy and invites extortion simply is not true, at least in the experience of the members of the Committee, and can be protected by the use of Evid. Code 352 and appropriate protective orders.

Despite the fact that the exception may depend on the "fortuitous" circumstance of the defendant's criminal conduct, it is sometimes the only way that essential information concerning the defendant's medical history can be obtained. Section 996 does provide for an exception to the privilege when the communication is relevant but only when the issue has been "tendered" by the patient or a party claiming through him. The courts have held this exception does not apply when the defendant simply enters a general denial of the allegations and without Section 999, discovery of the patient's prior health condition would be virtually impossible.

The minority agree with the LRC reasoning that there is no justification for the "fortuitous" exception and would approve the repeal of Section 999.

In discussing this proposal, the Committee also considered the possibility of amending Section 996 to permit any party to secure facts otherwise protected by the privilege where another party asserts the existence of a physical or mental condition which, if true, might defeat or diminish a claim made against him. However, it was felt that any such amendment would in effect completely destroy the physician-patient privilege since the condition could be "raised" by the plaintiff in interrogatories or otherwise so as to require either an admission or denial.

Memo 74-14

EXHIBIT II

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

RONALD REAGAN, Governor

## DEPARTMENT OF HEALTH

714-744 P STREET

SACRAMENTO, CALIFORNIA 95814



February 25, 1974

FEB 25 1974

Honorable Robert S. Stevens  
State Senate  
State Capitol  
Sacramento, California 95814

Dear Senator Stevens:

**SENATE BILL 1534**

The Department of Health in administering the Medi-Cal program investigates providers and beneficiaries who violate laws and regulations. This includes beneficiaries who receive services to which they are not entitled - fraud. In some cases, it is necessary to introduce into evidence the physician's claim as proof of payment. Such records are privileged. By the repeal of Section 999 of the Evidence Code as proposed by Senate Bill 1534, such privileged records could be ruled inadmissible and such action would jeopardize our ability to affect recovery.

As a physician, I believe the confidentiality of the physician/patient relationship should be protected. However, I do not believe that the umbrella of protection should extend to the perpetuation and encouragement of fraud. Accordingly this department must oppose this legislative proposal.

Sincerely,

A handwritten signature in dark ink that reads 'William Mayer, M.D.'.

William Mayer, M.D.  
Director of Health