

December 5, 2006

Via Hand Delivery

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Hon. Presiding Justice Vaino Spencer
and Hon. Associate Justices
California Court of Appeal
Second Appellate District
Division 1
300 South Spring Street, 2nd Floor,
North Tower
Los Angeles, CA 90013

Re: *Bodell v. Superior Court*, Case No. B194880 – *Amicus Curiae* Letter of American Psychological Association and California Psychological Association in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief

Dear Presiding Justice Vaino and Associate Justices:

The American Psychological Association (“APA”) and the California Psychological Association (“CPA”) write to support the petition of Barton Webb Bodell for a writ of mandate, prohibition or other appropriate relief with respect to the November 7, 2006 order of the Superior Court for the County of Los Angeles in *Angarella v. Bodell*, Superior Court Case No. SC089096.

APA has been the principal professional association of psychologists in the United States since 1892. It has more than 150,000 members nationwide. CPA is a state affiliate of APA and has more than 3,600 members in California. APA and CPA members in clinical practice treat hundreds of thousands of patients each year. A central underpinning of the patient-therapist relationship is the preservation of confidentiality in communications between patient and therapist embodied in the psychotherapist-patient privilege. APA and CPA members are critically interested in legal rules and decisions that affect confidentiality in the patient-therapist relationship. APA and CPA are uniquely positioned to address this issue.

The Superior Court in this case ordered disclosure of psychotherapist-patient communications based on a finding that they were “directly relevant” to issues in the case. The appellate record leaves us with questions as to whether the requested psychotherapist-

patient communications are in fact directly relevant to issues in this case. However, APA and CPA do not write to address that issue. Rather, APA and CPA submit this letter to point out a more serious infirmity in the court's decision. By ordering disclosure of psychotherapist-patient communications based merely on a finding that they are "directly relevant" and without any reference to the psychotherapist-patient privilege in California, the court disregarded the carefully delineated rules prescribed by the California Legislature for preserving the confidentiality of patient-therapist communications. Those rules further the important public policy rationale of encouraging people to seek out and receive mental health counseling and treatment when needed.

In essence, the Superior Court decided to strike its own balance with respect to confidentiality at odds with what the Legislature has determined. The court's "directly relevant" standard improperly replaces the carefully delineated statutory scheme with a highly discretionary "catch-all" ground for overriding the psychotherapist-patient privilege. If left to stand, the trial court's decision would severely undermine the policies furthered by this statute – and the provision of mental health services in the State of California – by making it difficult for patients to have any confidence that their communications with psychotherapists would remain confidential. APA and CPA urge the Court to grant the petition for writ of mandate, prohibition or other appropriate relief.

I. Brief Background

While under the influence of alcohol, defendant/petitioner Barton Webb Bodell crashed his car into plaintiffs' home. Plaintiffs sued Bodell alleging that he was negligent and inflicted emotional distress on plaintiffs. Among other things, plaintiffs seek punitive damages. To support punitive damages, they seek to show that Bodell's actions were willful and wanton. (Compl. pp. 14-15, Ex. 4 to Supplemental Exhibits to Petition.) Although there is no dispute that Bodell was heavily intoxicated at the time of the accident and was criminally punished, plaintiffs seek to show, further, that Bodell had a history of alcoholism and alcohol abuse prior to the incident. Plaintiffs' briefing does not clearly explain how a history of alcoholism and alcohol abuse would bolster their claim for punitive damages.

To obtain information about Bodell's history of alcoholism and alcohol abuse, plaintiffs served subpoenas on two health care professionals who provided services to Bodell after the accident. One was a medical doctor, Stephen Patt. The other was a licensed California psychologist, Chet Wilson. The subpoenas broadly request all "medical records," "consultation reports" and other information relating to services provided to Bodell.

Bodell moved to quash both subpoenas. He argued, among other things, that his communications with his treating physician and psychologist are privileged under California

law. The court denied the motion. In a terse tentative ruling, which it adopted as its final ruling after a hearing, the court explained:

The information sought by the subpoenas is directly relevant to the issues in this case. The scope of the information sought in the medical records should be limited to alcoholism or problems with alcohol. The issue is particularly relevant given the defendant's position that he has no prior drinking problems.

(Petition, Ex. 1.) The court directed the parties to meet and confer regarding the manner in which records should be reviewed, preparation of redactions, and whether there should be a protective order. (*Ibid.*)

II. The Superior Court Disregarded California's Privilege Law in Ordering Disclosure of Confidential Psychotherapist-Patient Records¹

The California Legislature has carefully balanced the interests of patients in maintaining the confidentiality of their psychotherapy communications against the interests of disclosing information for various ends. That balance is reflected in California Evidence Sections 1010-1027, entitled the "Psychotherapist-Patient Privilege."

At its core, this statutory regime establishes that a patient "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist." (Evid. Code § 1014.) The privilege is critical to ensuring that patients seek out and receive treatment for mental health problems. (See *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 ["[c]onfidential communications between psychotherapist and patient are protected in order to encourage those who may pose a threat to themselves or to others, because of some mental or emotional disturbance, to seek professional assistance"]; *People v. John B.* (1987) 192 Cal.App.3d 1073, 1076 [same].)

The statute enumerates twelve – and only twelve – exceptions to the privilege. (*Id.* §§ 1010-1027.) Among these carefully crafted exceptions are situations where a patient seeks psychotherapy services to assist in committing a crime or tort (*id.* § 1018), a patient sues his or her psychotherapist in connection with the services rendered (*id.* § 1020), a psychotherapist has reasonable cause to believe a patient is dangerous to himself or others (*id.* § 1024), and a patient tenders his or her mental or emotional condition as an issue in the

¹ APA and CPA address only issues relating to the psychotherapist-patient privilege, applicable to the records of Mr. Wilson, the psychologist who treated Bodell. We do not address issues with respect to the subpoena served on Dr. Patt, the physician who treated Bodell.

litigation (*id.* § 1016). A patient also may waive the privilege. (Evid. Code §§ 1014 and 912.)

Courts repeatedly have emphasized that the privilege is to be applied broadly in favor of the patient. (See, e.g., *In re Lifschutz* (1970) 2 Cal.3d 415, 422 [California has enacted a “broad, protective psychotherapist-patient privilege”]; *Stritzinger, supra*, 34 Cal.3d at p. 511 [“for reasons of policy the psychotherapist-patient privilege has been broadly construed in favor of the patient”].) By like token, exceptions to the privilege must be applied narrowly. (See, e.g., *Stritzinger, supra*, 34 Cal.3d at p. 513 [“[w]e begin by recognizing our obligation to construe narrowly any exception to the psychotherapist-patient privilege: we must apply such an exception only when the patient’s case falls squarely within its ambit”].)

We are aware of only two limited circumstances in which courts have gone beyond the clearly delineated terms of the Evidence Code to direct disclosure of communications between a patient and his or her psychotherapist: (1) where another statute specifically provides an additional exception to the privilege (see *Stritzinger, supra*, 34 Cal.3d at pp. 511-512 [Child Abuse Reporting Act, Pen. Code §§ 11165 *et seq.*, includes an express exception to the psychotherapist-patient privilege]) and (2) where a defendant in a criminal trial has a Sixth Amendment Confrontation Clause right to obtain privileged psychotherapist records (see *People v. Hammon* (1997) 15 Cal.4th 1117, 1128 [disclosure of privileged psychotherapeutic communications may under some circumstances be permitted at a criminal trial, but not in any pretrial proceeding]). Absent one of these circumstances, discovery of psychotherapeutic records is permitted only if an enumerated exception, narrowly construed, applies or if the patient waived the privilege. (*Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 602.)

The Superior Court here disregarded the foregoing principles. Its cursory order directing disclosure of psychotherapist records states that the records are “directly relevant to the issues in this case.” We question on the facts of this case whether the records were “directly relevant” to issues in this case. Yet even apart from that issue, the court went astray in concluding that “direct relevance” permits disclosure of psychotherapist-patient records. It does not. Rather, such records are privileged, a point nowhere mentioned by the trial court, unless an exception applies. None of the twelve exceptions or other circumstances applies here.

In essence, the court decided to strike its own balance in favor of litigants seeking disclosure of psychotherapist-patient communications. But that balance already has been struck by the Legislature and makes clear that records may not be produced merely because they are “directly relevant.” Examining the public policy underpinnings of the psychotherapist-patient privilege, the Court in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 (Tobriner, J.), recognized that the privilege represents a “weigh[ing]” of

competing public interests. (*Id.* at p. 440.) Yet the Court made clear that it was “[t]he Legislature [that] has undertaken the difficult task of balancing the countervailing concerns.” (*Ibid.* [emphasis added]; accord *Lifschutz, supra*, 2 Cal.3d at p. 422 [“the Legislature . . . attempt[ed] to accommodate the conceded need of confidentiality in the psychotherapeutic process with general societal needs of access to information for the ascertainment of truth in litigation”] [emphasis added].) Once the Legislature has spoken, as it has here, “the office of the Judge is simply to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted, or to omit what has been inserted.” (Code Civ. Proc. § 1858.)

The Superior Court’s decision is all the more unsustainable given the clear structure of the psychotherapist-patient privilege statute. It defines key terms (Evid. Code §§ 1010-1012), identifies the holder of the privilege and when a psychotherapist must assert it (*id.* §§ 1013 and 1015), sets forth the privilege (*id.* § 1014), then enumerates the twelve exceptions (*id.* §§ 1016-1027). In a statute as clearly crafted as this, a court is not permitted to engraft additional exceptions, let alone the broad, catch-all exception that has been applied here. (See *In re Pardue’s Estate* (1937) 22 Cal.App.2d 178, 181 [“if a statute specifies one exception to a general rule, other exceptions or effects are excluded. . . . [T]he court is without power to supply an omission.”]; *People ex rel. Cranston v. Bonelli* (1971) 15 Cal.App.3d 129, 135 [“[t]his legislative enumeration of certain exceptions by necessary implication excludes all other exceptions”]).

The addition of a broad “directly relevant” exception not only goes beyond the statute’s clear terms, it would render much of the statute superfluous. For example, if the privilege could be breached whenever psychotherapeutic communications were directly relevant, there would be no need for the specific statutory exception where a patient has tendered his or her mental or emotional condition as an issue in the litigation (§ 1016). If the legislature had wanted to make psychotherapist-patient communications admissible whenever they were directly relevant in litigation, it could easily have so provided. Instead, it enacted a carefully designed statute that specifies the circumstances in which the privilege will be lost.

III. The Superior Court’s Order Will Adversely Affect the Delivery of Mental Health Services

If left to stand, the trial court’s order would seriously undermine the delivery of mental health services in the State of California. The underlying purpose of the psychotherapist-patient privilege is to encourage people to consult therapists and receive treatment and thereby improve overall conditions for everyone in society. (See *Stritzinger, supra*, 34 Cal.3d at p. 511; *John B., supra* 192 Cal.App.3d at p. 1076.)

Confidentiality is essential to the achievement of these goals. In its deliberations at the time of enactment of the psychotherapist-patient privilege, the Senate Committee on Judiciary explained:

A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. . . . Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.

(Sen. Judiciary Com. com. to Evid. Code § 1014, West's Ann. Evid. Code (1995) p. 333.)

The bedrock importance of confidentiality in the psychotherapist-patient communications was eloquently described in the following passage:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say – and all that the psychiatrist learns from what they say – may be revealed to the whole world from a witness stand.

(*Lifschutz, supra*, 2 Cal.3d at p. 431 [quoting M. Guttmacher et al., *Psychiatry and the Law* (1952) p. 272]; see also *Jaffee v. Redmond* (1996) 518 U.S. 1, 11 [“Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”].)

Researchers have found that fear of disclosure of therapeutic communications may cause patients to terminate the psychotherapeutic relationship prematurely and may deter people with mental or emotional problems from seeking needed treatment in the first place. (See, e.g., Miller & Thelen, *Knowledge and Belief About Confidentiality in Psychotherapy* (1986) 17 Prof. Psychol.: Res. & Prac. 15, 18; Schmid et al., *Confidentiality in Psychiatry: A Study of the Patient's View* (1983), 34 Hosp. & Community Psychiatry 353, 354; Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege* (1982) 60 N.C. L. Rev. 893, 926.)

Recognizing that honest and unfettered communication is a prerequisite for psychotherapy, the psychology profession imposes strong ethical obligations of confidentiality on its members. The APA's ethics code provides that psychologists "have a *primary obligation* and take reasonable precautions to protect confidential information" obtained in therapy and from other sources. (APA, Ethical Principles of Psychologists and Code of Conduct (2002) Standard 4.01 [emphasis added].)

The rule announced by the Superior Court here – that psychotherapy records must be disclosed when "directly relevant" to issues in a case – eviscerates the privilege and the public policy purposes underlying it. The threshold for establishing relevance, and even "direct relevance," is typically low. Courts routinely treat materials as relevant in the discovery context. (See *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790 [in light of the "liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery"].) Moreover, the highly discretionary nature of this standard means that patients could not meet with psychotherapists with any assurance that their communications would remain confidential. By adding this discretionary test to the carefully circumscribed statutory scheme, the Superior Court's decision directly undermines the policies served by the statute.

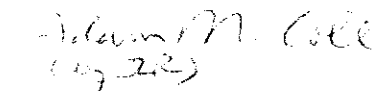
The approach adopted by the Superior Court would effectively create a new exception for "litigation." But that decidedly is *not* the balance the Legislature struck. Were the Superior Court's approach to apply, disclosure of confidential psychotherapy records would become a routine matter in litigation. The results for psychotherapeutic counseling and treatment would be disastrous.

IV. Conclusion

The Superior Court's decision is directly at odds with the well-settled statutory regime that has been in place in California for more than 40 years protecting the confidentiality of psychotherapist-patient communications. That regime does not permit disclosure of psychotherapeutic records based on a showing of "direct relevance." If sustained, the

decision below would inhibit psychotherapeutic counseling and treatment. APA and CPA therefore urge the Court to grant the petition for a writ of mandate, prohibition or other appropriate relief and set aside the Superior Court's decision.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Adam M. Cole" with a date "12/5/06" written below it.

Adam M. Cole

Heller Ehrman LLP

Counsel for American Psychological
Association and California Psychological
Association

PROOF OF SERVICE

I, Joanne Contino, declare as follows:

I am employed with the law firm of Heller Ehrman LLP, whose address is 333 South Hope Street, 39th Floor, Los Angeles, CA 90071. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years and I am not a party to this action.

On December 5, 2006, I served the following document(s):

**AMICUS CURIAE LETTER OF AMERICAN PSYCHOLOGICAL
ASSOCIATION AND CALIFORNIA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION
OR OTHER APPROPRIATE RELIEF**

on the interested parties in this action by placing true and correct copies thereof, enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL**: I am readily familiar with the business' practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Los Angeles, California.

☐ **BY FACSIMILE TRANSMISSION**: I transmitted such documents by facsimile as indicated above.

☐ **BY PERSONAL SERVICE**: I caused the document(s) to be delivered by hand as indicated above.

☐ **BY OVERNIGHT DELIVERY**: I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service as indicated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that this declaration is executed on December 5, 2006, at Los Angeles, California; and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.


Joanne Contino

SERVICE LIST

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