Case No. B 221965

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

MICHAEL MARQUEZ,

Petitioner,

v.

LOS ANGELES SUPERIOR COURT,

Respondent.

ESTATE OF PABLO GARCIA, et al.,

Real Parties in Interest.

COURT OF APPEAL - SECOND DIST.
FILED
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APPLICATION OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND CALIFORNIA PSYCHOLOGICAL ASSOCIATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER MICHAEL MARQUEZ' WRIT OF MANDATE; AND PROPOSED BRIEF

From January 27, 2010 Order Denying Motions to Quash Deposition Subpoena for Business Records and Deposition of Person Most Qualified Served Upon the Betty Ford Center
Los Angeles County Superior Court, Case No. NC052832
Honorable Joseph E. Di Loreto, Dept. H, Telephone: (562) 491-5938

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 7	Court of Appeal Case B 221965 - Div. 7
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: SAMSON R. ELSBERND (SBN 264598) WILKE, FLEUY, HOFFELT, GOULD & BIRNEY, LLP 400 CAPITOL MALL, 22ND FLOOR SACRAMENTO, CA 95814 TELEPHONE NO.: (916) 441-2430 FAX NO. *(Optional)*: (916) 442-6664 E-MAIL ADDRESS *(Optional)*: selsbernd@wilkefleury.com ATTORNEY FOR *(Name)*: Amicus Curiae: American Psychological Assn. & California Psychological Assn.	Superior Court Case NC052832 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: MICHAEL MARQUEZ RESPONDENT/REAL PARTY IN INTEREST: ESTATE OF PABLO GARCIA, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: Amicus Curiae: American Psychological Association and California Psychological Association

2. a. [ ] There are no interested entities or persons that must be listed in this Certificate under rule 8.208.

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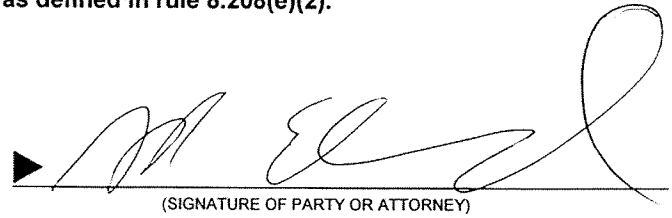
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(5)	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 18, 2010

SAMSON R. ELSBERND
(TYPE OR PRINT NAME)


(SIGNATURE OF PARTY OR ATTORNEY)

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ATTACHMENT 2

Amici Curiae hereby certifies that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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TO THE HONORABLE PRESIDING JUSTICE OF THIS COURT:

Pursuant to California Rule of Court rule 8.200, subdivision (c), *amici curiae* the AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) and the CALIFORNIA PSYCHOLOGICAL ASSOCIATION (CPA) (hereafter collectively referred to as "Applicants") request leave to file an *amici curiae* brief in this case in support of the position of Petitioner MICHAEL MARQUEZ for Writ of Mandate with respect to the order of the Superior Court for the County of Los Angeles in the above-captioned case.

APA has been the principal professional association of psychologists in the United States since 1892. It has more than 152,000 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.

This *amici brief* will assist the Court by outlining the statutory psychotherapist-patient privilege and discussing how the Superior Court's ruling will adversely affect the delivery of mental health services.

Applicants' counsel is familiar with the issues in this case and the scope of their presentation, and believes further argument is needed on the psychotherapist-patient privilege and the importance of confidentiality in the patient-therapist relationship, and respectfully and concurrently submits

its proposed brief, which is incorporated into this application for leave to file *amici curiae* brief, by reference.

Dated: March 19, 2010

Respectfully submitted,

By: _____

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Attorneys for Amici Curiae
AMERICAN PSYCHOLOGICAL ASSOCIATION and CALIFORNIA PSYCHOLOGICAL ASSOCIATION

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AMICI CURIAE BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND CALIFORNIA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER MICHAEL MARQUEZ' WRIT OF MANDATE

INTRODUCTION AND SUMMARY OF ARGUMENT

The American Psychological Association ("APA") and the California Psychological Association ("CPA") submit this *Amici Curiae* Brief in support of the petition of Petitioner Michael Marquez for a Writ of Mandate with respect to the order of the Superior Court for the County of Los Angeles in the above-captioned case.

APA has been the principal professional association of psychologists in the United States since 1892. It has more than 152,000 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 in the form of intake records. (See Exhibit 20 of Petitioner's Writ at pp. 314-15.) The intake records reflect confidential communications made by Mr. Marquez during the intake process to further his interest in consultation from the Betty Ford Center. Plaintiffs served subpoenas on the Betty Ford Clinic to obtain information about Mr. Marquez' history of alcoholism, and Mr. Marquez moved to quash the subpoena. After reviewing materials *in camera*, the trial court ordered production of the intake records. (See Exhibit 20 of Petitioner's Writ at pp. 314-15.) Intake records reflect the

in maintaining the confidentiality of their psychotherapy communications against the interests of disclosing information for various ends. That balance is reflected in California Evidence Code 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 ["Confidential 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.* §§ 1016-1027.) Among these carefully crafted exceptions are situations where: a patient tenders his or her mental or emotional condition as an issue in the litigation (*Id.* § 1016), 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), and a psychotherapist has reasonable cause to believe a patient is dangerous to himself or others. (*Id.* § 1024.) 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"].) The privilege protects the patient's Constitutional right to privacy (See Cal. Const., art. I, § 1), and exceptions to the privilege must be applied narrowly.

(See, e.g., *Stritzinger, supra,* 34 Cal.3d at p. 511, 513 ["We 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 waives the privilege. (*Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594,602.)

The Superior Court here disregarded the foregoing principles. None of the twelve exceptions (Evid. Code §§ 1016-1027) or other circumstances apply here. 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. The statute begins by defining significant terms, including "psychotherapist" (Evid. Code § 1010), "patient" (*Id.* at § 1011), "confidential communication between patient and

psychotherapist" (*Id.* at § 1012), and "holder of the privilege." (*Id.* at § 1013.) It then describes the manner for asserting the psychotherapist-patient privilege (*Id.* at § 1015), and delineates the privilege. (*Id.* § 1014.) The statute concludes by enumerating the twelve exceptions to the psychotherapist-patient privilege. (*Id.* §§ 1016-1027.) In a statute as clearly crafted as this, a court is not permitted to engraft additional exceptions. (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 586 ["A court may not extend waiver provisions beyond their existing statutory limits. Furthermore, courts may not add to statutory privileges except as required by federal and state constitutional law; nor may a court imply exceptions to existing statutory privileges"]; see also, maximum of statutory construction, *expressio unius est exclusio alterius* [if exemptions are specified in a statute, courts may not imply additional exemptions unless there is a clear legislative intent to the contrary].)

If courts are allowed to order discovery of information they deem "relevant" without regard to the statute's clear restrictions and limited exceptions, the statute would be rendered superfluous. Specifically, courts should not parse client intake communications into material it determines is directly related to treatment and communications related to case history relevant to the litigation. (See Exhibit 20 of Petitioner's Writ at pp. 314-15; see also, Evid. Code § 1012.) If the legislature had wanted to make psychotherapist-patient communications admissible whenever they were 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, and otherwise prevented discovery of relevant, but privileged, subject matter. (Code Civ. Proc. § 2017.010 ["Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter." [emphasis added]].); see also, *Manela v. Superior Court* (Cal.App.2d Dist. 2009) 177 Cal.App.4th 1139, 1146 [To the extent privilege applies, it bars discovery of even relevant information].)

B. THE SUPERIOR COURT'S ORDER WILL ADVERSELY AFFECT THE DELIVERY OF MENTAL HEALTH SERVICES BY DISCOURAGING THERAPEUTIC COMMUNICATIONS BETWEEN PSYCHOTHERAPISTS AND PATIENTS, A RELATIONSHIP THAT IS DEPENDENT UPON STATUTORILY PROTECTED CONFIDENTIALITY.

If left to stand, the trial court's order would seriously undermine the delivery of mental health services in the State of California.[1] 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.)

The bedrock importance of confidentiality in 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 Guttmacher, M., et al., *Psychiatry and the Law* (1952) p. 272.)

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[1] Sen. Com. on Judiciary com. to Evid. Code, § 1014, Deering's Ann. Evid. Code (2009 ed.) § 1014, p. 18 (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.)

In this case, Mr. Marquez' confidential communications during the intake process were made to further his interest in consultation at the Betty Ford Clinic, and therefore, are clearly subject to the broad privilege afforded by the statute. (See Evid Code § 1012 ["[C]onfidential communication between patient and psychotherapist means information ... transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted"].) Confidential therapeutic communications are at the core of the therapeutic relationship. Researchers have found that a lack of patient confidence in the confidentiality of their therapeutic communications may dissuade individuals suffering from mental and emotional problems from pursuing treatment, and may also result in patients ending the psychotherapist-patient relationship early. (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.)

The courts have also underscored the importance of the privilege. In *Jafee* v. *Redmond,* the Court explained:

> 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.

CERTIFICATE OF COMPLIANCE

I, Samson R. Elsbernd, an attorney duly admitted to practice before all courts of the State of California and a member of the law firm of Wilke, Fleury, Hoffelt, Gould & Birney, LLP, attorneys of record for *amici curiae* AMERICAN PSYCHOLOGICAL ASSOCIATION and CALIFORNIA PSYCHOLOGICAL ASSOCIATION, hereby certify that the attached brief complies with the form, size and length requirements of California Rules of Court rule 8.204(b) and (c) in that it was prepared in proportionally spaced type in Times New Roman 13-point, 1½ line spacing, and contains 2,456 words (including the headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) as measured by using the word count function of "Word 2003."

Dated: March 19, 2010

Respectfully submitted,

By: _____

Samson R. Elsbernd (SBN 264598)
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I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, Twenty-Second Floor, Sacramento, California 95814.

I hereby certify that on this 19th day of March, 2010, I caused an original and four copies of the **(1)** Application to File an *Amici Curiae* Brief on behalf of *Amici Curiae* AMERICAN PSYCHOLOGICAL ASSOCIATION and CALIFORNIA PSYCHOLOGICAL ASSOCIATION; and **(2)** *Amici Curiae* Brief on Behalf of *Amici Curiae* AMERICAN PSYCHOLOGICAL ASSOCIATION and CALIFORNIA PSYCHOLOGICAL ASSOCIATION, in Support of Petitioner Michael Marquez' Writ of Mandate to be filed with the clerk of the Court of Appeal.

I also caused the foregoing documents to be mailed via First Class Mail to the following recipients, with the following number of copies going to each: the Clerk of the Supreme Court of California, four copies; the Honorable Joseph E. Di Loreto, one copy; the Los Angeles Superior Court Clerk, one copy, and one copy to the each of the other parties listed below and not yet mentioned in the preceding paragraphs.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is

more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 19th, 2010, at Sacramento, California.

Diane Richey