

August 14, 1970

The Honorable David L. Bazelon
Chief Judge
United States Court of Appeals
Washington, D.C. 20001

Dear Dave,

Thank you for referring this material on the psychiatrist-patient privilege to my attention. It may be characteristic that lawyers will be immensely more tender about the legal than the medical privilege and visa versa. And the lawyers write the law! This is to say that I have and must expose my bias in favor of a more comprehensive medical privilege but I will try not to press that further at the moment.

The contending social interests are fairly obvious: the bringing in of all available evidence, by compulsion if necessary, for judicial ~~examination~~ on the one side; on the other that citizens with emotional problems be given every possible encouragement to obtaining competent and confidential counseling about them. The threat of divulging confidential information will deter a very large number of people compared to the number of instances where such information is of crucial importance in a judicial proceeding and I think the place where the balance lies should then be fairly obvious, namely, in the most liberal application of the privilege. Rule 5-04(b) is a defining restriction that, it seems to me, does all the necessary work of delimiting the area that should be subject to the privilege and I believe that there should then be a much more liberal definition of the group of counselors communications to which should be protected. We do after all want to encourage people to get counsel in dealing, for example, with marital problems if only because a certain number of violent crimes might be prevented by the readier availability of such advice. An attempt to give the privilege explicitly to marital counselors was defeated in the California Legislature last year. It seems to me preposterous that matter communicated to a gynecologist would not have the same privilege as to a psychiatrist but my suggestions on Rule 5-04 as here and attached do not go quite so far.

Part three has an ambiguity that should be cleared up namely that a communication is confidential if not intended by the communicant. Perhaps the reading might be "a communication is confidential unless the patient believes that it is intended to be disclosed etc." Medical and

over

August 14, 1970

psychiatric examinations are sometimes given under ambiguous circumstances and the benefit of the doubt should lie in favor of the privilege.

In another milieu the religious privilege served the same function that we should verify as having been inherited by another group of counselors. The belief of the patient that he is seeking and obtaining confidential advice on his mental and emotional problems from a licensed professional, rather than the guild-membership and preoccupation of that professional in something called "psychotherapy" ought to be controlling.

Sincerely yours,

Joshua Lederberg
Professor of Genetics

JL/rr