

**FAMILY LAW CLASH—
BEST INTERESTS OF THE CHILD VS.
PHYSICIAN-PATIENT OR PSYCHOTHERAPIST-PATIENT
PRIVILEGES AND PRIVACY**

By

**LYNETTE BERG-ROBE, J.D., M.A., CFLS and
CHRISTINE D. GILLE, J.D., M.B.A., CFLS**

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I. INTRODUCTION

A. Introduction – Clash Between Privilege and Best Interests of the Child

A parent's mental illness, substance abuse, alcoholism, and even some physical ailments, are extremely relevant in custody cases when determining the best interests of a child because the conditions may affect the child's health, safety and welfare. (**FC §3011.**) However, California public policy works to keep proof of many health issues out of reach of the opposing party and out of the courtroom under principles of confidentiality, privacy and privilege. Family law courtrooms regularly witness the clash between the obligation to ensure treatment privacy and the obligation to ensure safety for our children.

For the subset of family law attorneys who regularly deal with parent and child health issues as they affect custody, and for the majority, who timorously represent clients in this area once every few years, this article will present the relevant historical background, the current status of the law, and the basic time-tested strategies for competently handling disputed health issues as they affect ability to parent in custody cases.

7. *Family Law Clash—
Best Interests of the Child vs. Physician-Patient
or Psychotherapist-Patient Privileges and Privacy*

II. FAMILY COURT DILEMMA – OVERVIEW OF PHYSICIAN AND PSYCHOTHERAPIST PRIVILEGES

A. Identifying a Medical or Psychological Issue

It must first be remembered, merely having a physical or mental health condition does not make one a bad parent. As the California Supreme Court ultimately found, a father with full custody of two boys, who then became a quadriplegic, did not lose the boys to the out-of-state mom merely because of his physical tragedy. His medical condition, without more, was an insufficient reason to lose custody. (*In re Marriage of Carney* (1979) 24 Cal.3d 725.)

In a family law case with medical or mental health issues, the self-proclaimed “healthy” parent, who this article will call the “accuser,” typically wants to show that the “unhealthy” parent, who will be called the “accused,” has an inability to properly care for the children because of a debilitating condition. For the lawyer on either side to determine the credibility of the accuser’s claim, and the next steps in the case, the condition should be categorized either as physical or psychological, and whether substance abuse-related, or not.

1. Psychological Impairments

The allegations of poor parenting may arise out of an alleged mental health diagnosis.

a. Pre-existing Mental Health Conditions

Many such diagnoses will be known during the marriage, and the existence will not be hard to prove, such as bipolar with hallucinations, schizophrenia, or even poorly-handled ADHD. Medicines will have been purchased, witnesses will know of the condition’s effects, behaviors will have been witnessed, etc.

b. Personality Disorders

Personality disorders are psychological conditions that affect almost 10% of the U.S. population—including lawyers. These disorders are defined in the “DSM-5” (**Diagnostic and Statistical Manual of Mental Disorders** (American Psychiatric Association 5th ed. 2013)) and have been tracked for decades (*National Survey Tracks Prevalence of Personality Disorders in U.S. Population* (Oct. 18, 2007) Science News). Of the 10 or so recognized personality disorders (recognizing that the names for these disorders are changing over time), the ones most commonly seen in family law courts by judges and lawyers are narcissistic personality disorder (NPD), histrionic personality disorder (HPD), borderline personality disorder (BPD), obsessive compulsive disorder (OCD), paranoid personality disorder (PPD), and the unofficial disorder that presents as severe chronic depression,

sometimes called depressive personality disorder (DPD). Various schizoid disorders are dramatic, but not seen frequently.

Despite their inexact descriptions, personality disorders are known to commonly spark custody litigation. Children can be visibly affected by such a parent and these problems are seen frequently by our experienced child custody evaluators. At a past LACBA Child Custody Colloquium, one evaluator summarized children dealing with parental personality disorders anecdotally. He quipped that a frustrated teenage boy tried to describe his NPD Dad and his HPD mom thusly,

“It’s tough. My parents fight all the time. My dad is a selfish A-hole and my mom is a drama queen.”

TIP: Personality disorders may go undiagnosed, and are often more difficult for the accuser parent to prove than other conditions. Although lawyers who regularly represent high-conflict custody clients should be generally familiar with personality disorders and other psychological conditions, lawyers are not psychotherapists; should not “diagnose”; and should not let their untrained clients persuade them that based on a book or internet article, the other parent “is definitely a narcissist!” The lawyer should gather evidence on the *poor behaviors and their consequences to the children*, rather than focusing on the assumed diagnosis. In this way, the case is not thrown off by unproven symptoms and assumptions.

2. Drugs and Alcohol

a. Allegations of Substance Abuse in Custody

The accused parent may be abusing drugs or alcohol that allegedly hinder the accused parent’s ability to be safe and emotionally or physically present around the children.

The family code is particularly concerned with substance abuse. The court must make findings when there has been “habitual or continual . . . abuse” of alcohol or . . . controlled substances by either parent. (**FC §3011(d)**.) Once the issue is “brought to the attention of the court,” there must be findings on the record about all custody orders in these situations, “specific as to time, day, place, and manner of transfer of the child.” (**FC §3011(e)**.)

b. Drug and Alcohol Testing

Because of the emphasis on child safety in substance abuse situations, the California Legislature commissioned a full report on drug and alcohol testing in custody matters (**Judicial Council of Cal., AOC, Center for Families, Children & the Courts, Drug**

and Alcohol Testing in Child Custody Cases: Implementation of Family Code Section 3041.5—Final Report to the California Legislature (July 2007).)

Family Code section 3041.5 is an express statutory override of some of the privacy and privilege protections discussed elsewhere in this article. However, the threshold burden about the existence of an abuse problem is still on the accuser, and even with a positive test, the accused is allowed to prove he or she has custody and visitation rights based on the best interests of the child. Lawyers on both sides should carefully weigh the elements of this statute against their evidence.

c. Special Concern: Medical & Recreational Marijuana

The fact that the law allows the medical use of marijuana, and that marijuana usage is being decriminalized, does not mean that all users of marijuana are safe around children. Of course, if the child is **SAFE**, use of a substance itself will not cause restricted or modified custody. However, if the child can be proven to be **UNSAFE**, the mere fact that a substance is legal will be of little help for the accused in a well-structured evidentiary hearing on a custody restriction dispute.

Several recent cases have dealt with marijuana usage. In one 2015 juvenile dependency case, a father’s use of marijuana, and whether he was safe around the child, were the only two issues. Father lost custody at trial. Father’s appeal on grounds of insufficient evidence failed. “Substantial evidence” was shown of his drug use and its harm to the children, including a partial admission, a report by a paternal grandmother that father left the children home alone, failure to fulfill daily obligations, etc. The case is also worth study because it gives sourced definitions of substance abuse and medical history. (*In re Natalie A.* (2015) 243 Cal.App.4th 178.)

TIP: Dependency cases are extremely useful on selected issues in family law provided the attorney realizes and explains the differences in some of the statutory language on “unfit” parents, etc., which are dissimilar to the tests used in the family law “best interests” analysis.

3. Physical Impairments

In addition to situations similar to the *In re Marriage of Carney* case, *supra*, 24 Cal.3d 725, an alleged physical impairment affecting parenting may have also been caused by a recent brain injury, a chronic or progressing physical illness, or such conditions as poorly treated epilepsy, diabetic fainting, or a contagious blood disease. This article often refers to physical conditions as medical conditions.

4. Cross-complaints

Interestingly, in a significant minority of cases, usually extremely high-conflict, each parent accuses the other of being unable to fully parent, so both parents commonly allege medical or mental health impairments.

TIP: Lawyers who represent an accused parent should explore their case for three scenarios:

First, whether the accused is actually unsafe around the children and should have limited access;

Whether there is any proof that the problems are all in the *other* person's mind; and lastly,

Whether *both* of the parents might need help coping with their own and each other's medical or psychological conditions.

5. Children

Children's medical, mental health, and learning disability issues are commonly seen in family law. Of course, children have certain rights to treatment confidentiality, privacy rights, and importantly, the right not to have every detail of their own conditions become part of the permanent public record.

A section of this article is devoted to children, see section X. Children.

B. Eliminating Missteps in Proving Best Interests

The gist of this article, and California policy on the subject, is explained in the example sentence defining the word "accuser" in the **Oxford Dictionary** (oxforddictionaries.com):

"I dislike any law that puts the burden of proof on the accused rather than the accuser."

The accuser parent may reasonably believe that the accused parent should have limited contact or supervised contact with the minor children. Proving that the accused parent should have less than 50% time, despite state policy that both parents will have "frequent and continuing contact" with the children (**FC §3020(b)**), becomes the burden and primary goal of the accuser's lawyer.

1. No Automatic Subpoena Duces Tecum Power

Many family law attorneys have succumbed to the initial thought that if they simply accuse the other parent of any form of physical or mental illness in family court, then treatment records are fair game and subject to a business records subpoena. As will be explained below—this is not clever and definitely incorrect.

When those subpoenas are met with stiff resistance, not just by the accused litigant but by the medical or mental health providers themselves (as explained below), the costly business of trying to regroup begins, possibly too late for trial. Do not commit this error!

TIP: The reason this keeps occurring is because all too frequently, once third-party subpoenas are issued by the accuser's lawyer, the unthinking lawyer for the accused, without threats of protective orders or offers of restrictive stipulations, allows everything in, with no boundaries on time-period, insistence on keeping items out of the public record, no contact to the providers to make sure they are aware of and understand their confidentiality obligations, no offers of in camera or special master access, etc. This open-the-floodgates approach often occurs even when items to be produced are irrelevant, even off-topic but embarrassing. The fact that these subpoenas are against state policy on privacy and privilege often does not seem to enter the thoughts of the protecting lawyer. A lawyer coming in later may have no choice but to allow the waiver, with a greatly-restricted opportunity to correct the record or the damage. Again, do not commit this error!

2. No Automatic Right to Depose or Force Testimony

To attempt to gather evidence about the accused parent, the accuser parent's attorney may commonly commit another error by trying to depose psychotherapists, physicians, and other treatment providers, or attempt to force them to court to testify. Although there are rare occasions when these steps will be the right move, in California family law at least, the presumption is *against* unfettered testimony by providers of confidential medical and mental health services. Parents with joint custody can easily stop a child's therapist from testifying over their objection, and if minor's counsel is involved, that person holds the privilege, and will often stop a doctor or therapist from testifying if it is not deemed to be in the best interests of the child. (FC § 3151.)

For a pithy case on how far a psychotherapist went to protect a patient's records, see *In re Lifschutz* (1970) 2 Cal.3d 415, 467. Dr. Lifschutz was held in contempt for not testifying, expressly disobeying a court order.

3. *Accuser Parent's Attorney—Acknowledge the Clash and Prepare Properly*

The family law attorney for the accuser parent, forewarned of the clash in public policies between privilege and best interests, will refuse to naively attempt to bring in protected evidence. The consequences are too great:

Judicial scorn by experienced bench officers;

Unnecessary costs, even sanctions for the accuser client;

Loss of client confidence; and

Ultimate inability to prevail because no credible evidence was presented.

Instead, the accuser's attorney, seeking to prove an inability to parent by the accused party, and therefore inherent danger to the child, must create an early and aggressive evidence-gathering plan to make the accuser's case.

TIP: The accuser's attorney must explore the viability of the accuser's case early. These types of accusations are difficult and expensive to prove. If the child is not in danger, and especially if there is no non-privileged proof of the claims the client is making, a practical discussion with the accuser must be had as to the probable loss of the claim, and the possible harm to the accuser's reputation in court for bringing false accusations. In the absence of evidence such as lost work days, DUIs, DCFS reports, witness evidence, etc., a careful cross-exam of one's own client may be necessary to determine whether the accuser has a case, or worse, is the one who needs to be restricted from the children.

4. *Accused Parent's Attorney—Use the Protections but Also Help the Client*

On the other side, the attorney for the accused should:

Know when and how to block confidential records and testimony, including knowing when to seek protective orders;

Know when and how to partially release records to aid the client's bid for full-access parenting;

Know how to use admissible evidence to make the case.

5. *Use of Minor's Counsel and Evaluators—Help the Child—Assess the Risk*

When the attorney for either side has determined that the client, whether accuser or accused, wants what is best for the child, the decision to request a court appointment of someone who will look after the child's interests is easier to make. However, ethically speaking, when the client may lose some of his or her parental rights in the process, the decision to voluntarily bring in a minor's counsel or an evaluator must be made by a fully-informed client. Informed consent is discussed in more depth below.

C. National Overview—Putting Privilege vs. Best Interests in Perspective

1. *Ongoing National Controversy*

The clash between the best interests of children and the privileged nature of medical and psychotherapist treatment is a national conundrum in family law among the 50 states. The problem is not exclusive to California and every state wrestles with how to determine the proper approach. However, the answers to the problem vary from state to state—there is no single “correct” national solution!

2. *UCCJEA Issues*

Although the authors can find no existing case that addresses the controversy, it seems clear that this variance between states will eventually result in judicial intervention on the following set of interstate issues:

a. Initial Filing Decisions or Stipulations

Initial decisions will need to be made on choice of filing state, in light of the clash being discussed. This will be necessary only in the rare case that is legitimately jurisdiction-disputed, e.g., “no home state,” or emergency jurisdiction, under the national **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)** as implemented in California. (FC §§3400-3412, see especially FC §3407.)

b. Post-judgment New-state Custody Disputes

As those who practice in the interstate arena know, judges are frequently asked to determine choice of law and choice of jurisdiction. Post-judgment disputes involving medical or psychotherapeutic privilege issues may need to be bifurcated to have a preliminary resolution as to choice of law.

An example case would occur when the children have a new home state but the judgment proclaims that a certain state's law should be used for all future disputes. This hypothetical case would be directly impacted by the national controversy on privilege vs. best interests. A careful analysis by discerning attorneys would help determine whether a party wants to stipulate to the state that will favor the accused or accuser confidentiality position.

TIP: Lawyers should determine whether the two states in question differ on the privileges issue, and, barring stipulation, be able to inform the deciding court about the competing laws and other issues favoring one position or the other. Lawyers need to determine whether to fight for the new home state's law or to fight hard to retain the law from the previous state.

3. ***Federal Rules of Evidence (FRE)***

a. **Implied Support**

Under **Federal Rules of Evidence, rule 501**, as any recent law school graduate knows, there is *implied* support for the states' enactment of privilege protections, including physician-patient and psychotherapist-patient privilege statutes:

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But *in a civil case, state law governs privilege* regarding a claim or defense for which state law supplies the rule of decision. (Emphasis added.)

b. **Federal Case Law Only**

Although there is no **FRE** specifically creating a medical or psychotherapist privilege, federal case law has an evolving history of supporting personal privileges regarding special relationships and confidentiality. All privileges stem from earlier

priest/penitent, attorney/client privileges, and many cases cross-cite. Three famous United States Supreme Court examples have all been cited by California courts.

Griswold v. Connecticut (1965) 381 U.S. 479, found for marital privacy in the contraception cases, using the 14th Amendment. *Trammel v. U.S.* (1980) 445 U.S. 40, decided for privacy over unprotected discovery on the issue of spousal privilege regarding testimony on drug use. *Jaffee v. Redmond* (1996) 518 U.S. 1, a relatively recent case, enlarged and approved the psychotherapist/patient privilege.

c. State Applications of the FRE

Unlike California, many states have directly implemented the **FRE**. Still more have broadly applied the inferred federal approval—“state law governs privilege”—including California, as will be discussed below, and have long had physician-patient privilege statutes on the books. More recently, many states, including California, have statutorily extended the physician-patient privilege to the psychotherapist-patient relationship. Other states, without creating statutes, are implementing the holdings of federal case law, and are following the *Jaffee* line of cases.

In California, the statutes originate from the privacy rights of the California Constitution. (**Cal. Const., art. I, §1.**) These statutes are in place by state policy to encourage individuals to seek treatment and to be honest with their physicians and therapists, as discussed below.

D. The Inevitable National Controversy in Family Law

1. Family Law vs. Hidden Health Issues

The broad legal protections resulting in medical and psychotherapist privileges apply less perfectly in family law than to other areas of law. Hiding a parent’s health issues is, at first blush, contradictory to the public policy that supports the safety and well-being of children. Many would argue, and some states take the approach, that where children are concerned, there should be no secrets—custody proceedings require total transparency. California’s approach is to carve out partial solutions, rather than stripping the privilege from parents.

2. Varying Methods of Dealing with the Clash

All fifty states have some form of physician-patient and psychotherapist-patient privilege, whether by case law or statute, but there is substantial variety as to the strength and scope of the privileges when applied to child custody proceedings.

3. *Evidentiary Tenet*

A privilege is an evidentiary tenet that excludes what could otherwise be relevant evidence to promote a social policy. The psychotherapist-patient and physician-patient privileges protect confidential communications between a patient and his or her psychotherapist and/or physician to encourage patients to seek treatment and to be open and honest with their therapists and doctors so that they can be treated appropriately.

However, while some states like California preserve the privilege largely intact, other states virtually eliminate the privilege in deference to the best interests of the child. . (See *Atwood v. Atwood* (Ky. 1970) 550 S.W.2d 465 [When a party make an affirmative request for custody, it automatically waives the privilege.]; *Kirkley v. Kirkley* (La.App. 1991) 575 So.2d 509 [In a child custody proceeding, all evidence that goes to the fitness of a parent, including mental and physical health, may be introduced. A custody proceeding puts a party's mental condition into issue. The court may make protective orders to limit the disclosure.]; *In re Marriage of Kiister* (Kan. 1989) 777 P.2d 272 [The best interests of the children prevails over a party's right of confidentiality in child custody proceedings.]).

4. *International*

The competing-law issues addressed in this article also apply to clashes in law between nation states, however, international custody law is beyond the scope of this article.

III. CALIFORNIA: FULL-PROTECTION PRESUMPTIONS

A. Evidentiary Privacy, Protections, Privileges

1. *California's Strong Confidentiality Protections*

In contrast to many states, California's protectionist policy has resulted, even in family law, in tough-to-invade physician/patient confidentiality privileges. (**EvC §994.**) California's psychotherapist/patient confidentiality privileges are even more rigorous and far-reaching than in the medical arena. (**EvC §1014.**)

2. *Psychotherapist Privilege Especially Formidable*

It is important to distinguish between California's two patient-related privileges. Although similar, they are separate and distinct, and the psychotherapist/patient privilege is much wider in scope. The psychotherapist/patient privilege in California has been accorded special protection and case law shows that California courts favor even broader protection when compared to the physician/patient privilege.

3. Statutory Exceptions to Psychotherapist Privilege

In California, the psychotherapist/patient privilege exists in all proceedings, including criminal proceedings. (There are exceptions to the strict application of the privileges, as discussed throughout this article, such as a court-ordered custody evaluation (**FC §3110 et seq.**) and a court-ordered independent mental health exam under **Evidence Code section 1017.**)

4. Statutory Exceptions to Doctor/Patient Privilege

California's physician/patient privilege does not exist in criminal proceedings. In family law, the privilege exists, with exceptions for danger to self and others, tender, and waiver, as discussed throughout this article.

However, a narrow statutory exception to the privilege against revealing confidential records exists in a previously-discussed statute allowing drug and alcohol testing *after* a “judicial determination based on a preponderance of evidence.” (**FC §3041.5.**)

TIP: The statute says that a previous judicial conviction for illegal use is one form of acceptable proof before an order for testing may be made. However, the statute does not preclude the use of other evidence. Armed with only non-conviction evidence, most experienced custody lawyers do not go in separately for a judicial determination on the existence of “habitual use,” but show the non-privileged evidence of habitual substance abuse and ask for a ruling of same based on the low threshold burden of “preponderance.” In the same request, they then ask for testing orders to be made at the same hearing. Many judges are receptive to this approach, but there is no guarantee that the method will always work. Know the statute and bring the evidence!

B. Confidential Communications Protected

1. Confidential Communications Defined

The California evidentiary privileges protect “confidential communications” between a physician and patient and a psychotherapist and patient. “Confidential communications” between a patient and psychotherapist are defined as information received incident to the examination of the patient, transmitted between the patient and the psychotherapist, and “include[] a diagnosis and the advice given” during the course of the relationship. (**EvC §1012.**) Similar protection exists for patient-physician communications, including a diagnosis. (**EvC §992.**)

2. Assuring Patient Confidentiality for Healing

In creating the broad psychotherapist/patient confidential communications statutes, **Evidence Code sections 1012 and 1014**, the intent of the Legislature is seen in the Legislative History, which states that the “interests of society will be better served if psychotherapists would be able to assure patients that their confidences will be protected.” The intimate and sensitive nature of the communications involved in that relationship implicate constitutional (**Cal. Const., art. I, §1**), as well as statutory, rights of privacy. Further, the Legislature saw fit to create an expansive definition of “psychotherapist,” including psychiatrists, psychologists, clinical social workers, school psychologists, marriage and family therapists, interns, staff people, etc. (**EvC §1010.**) There is even a special provision to protect privileged communications between a patient and an educational psychologist. (**EvC §1010.5.**)

3. Penalties for Improper Disclosure of Privileged Records

In the past five years, inappropriate disclosure by professionals, including not just treating doctors and therapists, but lawyers, social workers, etc., has been spotlighted.

Ignat v. Yum! Brands, Inc. (2013) 214 Cal.App.4th 808 held that disclosure of private medical facts was found actionable.

However, in *Wang v Heck* (2012) 203 Cal.App.4th 677, a doctor who relied on a patient’s untruthful disclosure was protected under the litigation privilege when her report allowing the patient to drive resulted in the death of someone hit by the patient. Although this case has nothing to do with family law, it demonstrates how privileged information may become evidence. Here, the patient had “tendered” or put his condition into controversy. The issue of disclosure appears to be in flux.

IV. LOSING THE RIGHT TO CLAIM A PRIVILEGE

A. Introduction

The starting place in medical and therapeutic treatment cases is that there is a statutory privilege protecting confidential communications of the patient. However, a patient may, and in some cases must, lose the privilege if certain events occur, as discussed in this section.

1. Types of Acceptable Proof

As all experienced family law attorneys know, a great deal of medical and psychotherapeutic information is shared in family law.

a. Threshold Evidence

There are five common orders that require preliminary evidence of a medical or psychological problem alleged to be negatively impacting the best interests of the child. Before a court will make such orders, the attorney must present enough credible evidence that the court believes a further investigation is warranted. How to bring in evidence of a medical or psychological problem is discussed throughout this article. All of these tools may be stipulated to, so the need for an adjudicated order will only be necessary over the objection of one of the parties. The basic list:

Appointment of a custody evaluator. (**FC §3110 et seq.**) (Sometimes referred to by the more generic code for any court-appointed expert, **Evidence Code section 730.**)

Appointment of a minor's counsel. (**FC §3150 et seq.**)

Drug or alcohol testing. (**FC §3041.5.**)

Appointment of a professional (or non-professional) provider of supervised visitation, commonly called a "monitor." (**FC §§3200-3204, California Rules of Court ("CRC"), rule 5.20.**)

Appointment of an independent medical or psychological examiner. (**CCP §§2016, 2032.310, 2032.320.**)

b. Final Evidence

Final evidence may include all of the preliminary evidence used to receive the above court-ordered investigative tools, and all additional information received through the above tools or from other sources at the **Family Code section 217** evidentiary hearing or at trial:

Testimony, and often the written report, of previously-appointed evaluators, who may be any of the following: Child interviewer, Los Angeles County short-form evaluations called PPA-1 or PPA-2, so-called "brief focused" evaluations performed by private qualified evaluators, or a full child custody evaluation examining everything court-ordered or stipulated to be of concern. Sometimes full evaluations include psychological testing by the same or a different evaluator. (**FC §3010 et seq.**)

Testimony of any of several other experts, including sex abuse analysts, education specialists, autism spectrum experts, special needs evaluators, etc. These may be court-appointed or brought in by one of the parties under **Evidence Code section 730 et seq.**

Use of the report and testimony of a previously-appointed independent medical or psychological examiner, obtained by court order, upon proof and a meet and confer declaration (**CCP §§2016, 2032.310, 2032.320**). Note: Because sufficient evidence is often unavailable while the investigation is in its initial stages, this type of appointee is seen less in family law court than some of the other experts.

Evidence put on by minor's counsel, not as direct testimony, of course, but through their use of witnesses and documentary evidence. Their rights and responsibilities are framed by case law. (**FC §3150 et seq.** and **CRC, rule 5.240.**)

Child testimony under **Family Code section 3042**, as augmented by **California Rules of Court, rule 5.250**. Inexperienced attorneys, and many litigants, often rush to try to put the child on the stand. However, most experienced judicial officers have been known to use direct testimony of the child as a last resort, considering the harm that may occur due to retaliation, etc., if a child is later confronted by what he or she said in front of the accused parent.

TIP: There has been much written on this topic, so lawyers should tread lightly and do their homework before assuming any “mature” child should be put on the stand or otherwise made to testify. It may be important to remind oneself that a large majority of high-conflict litigants think their child is both brilliant and “mature for her age.”

DCFS reports as introduced via live testimony by the subpoenaed social worker. See appendix for a sample “827.10” form to obtain the report, but attorneys should remember that the reports are hearsay until introduced by the DCFS social worker.

“Exit orders,” called “custody orders” when issued by juvenile dependency court, are brought in by judicial notice (**EvC §451**), and prove previous detention of the children in dependency court. These orders are relevant at the threshold stage as well.

Police testimony, under **Penal Code section 11167(b)(1)**, is admissible in matters involving investigation of child abuse. There are other reasons for police testimony, including proof of violation of restraining orders, proof of neglect, etc. Police reports, 911 tapes, etc., must be authenticated by the officer, see herein.

Department of Motor Vehicles (DMV) records.

Criminal case evidence.

Authenticated drug and alcohol tests as previously ordered under **Family Code section 3041.5**.

Testimony of a special master, better known in family law as a “parenting coordinator.”

Testimony of the previously-appointed professional or non-professional monitor. (FC §§3200-3204, CRC, rule 5.20.)

Party admissions made on the stand, in previous declarations, or as brought in by witnesses.

Party or percipient witness testimony, which may have been initially introduced in declarations, regarding unsafe acts such as negligent parenting, reckless driving, etc., or proof of the opposite, such as perfect attendance at employment, proof of parenting classes, etc. (CRC, rule 5.113 et seq.)

Documentary evidence, properly authenticated at court or authenticated by stipulation. (This evidence may have been initially introduced as attachments to declarations, but remains part of the hearsay declaration until marked for identification then admitted into evidence with proper foundation. Because of busy court calendars, attorneys should not assume that the court is actually aware of the evidence if the issue will be decided on pleadings alone, and good strategy is to bring the materials to the attention of the court on hearing day as an offer of proof. Or, if the matter goes to trial or a **Family Code section 217** hearing, the attorney should lay the foundation and have the evidence properly authenticated, to properly preserve the record and prepare for closing argument.)

If, and only if, the issue has been tendered or a waiver (partial or full) of psychological or medical confidential information is in place, a person’s treating medical or psychotherapeutic professionals may be put on the stand. This article stands for the position that it is state policy not to put this type of evidence in the record except in rare cases, so a lawyer should do everything possible before jumping to this solution.

2. Intentional Planning by Lawyer

Some of the above sources of information use records and interviews from confidential sources. Essentially, having the minor’s counsel or the evaluator interview a therapist, for example, is a controlled release of confidential information.

How, why, and when this information comes in, when done properly, is the result of intentional planning. A thorough understanding of what and when to release, and whether that release is voluntary or mandatory, is important to the lawyer handling medical and mental health privilege issues for his or her family law clients as is discussed herein.

B. Danger to Self or Others

1. Tarasoff Warnings

Of course, an exception to the privilege is mandated when a psychotherapist has reasonable cause to believe that the patient is a danger to himself or to the person or property of others, and the disclosure of the confidential communication is necessary to prevent the threatened danger. (**EvC §1024**.) The psychotherapist must report the communication to the police, to the threatened person, or to others. This code section grew out of the *Tarasoff* case. (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425.) In that 1976 case, a patient told his psychologist of his intention to kill his girlfriend. The psychologist maintained the confidentiality and did not warn, and the patient later killed his girlfriend. In that case, the California Supreme Court held that the mental health professional had a “duty to warn” to protect the intended victim. Most jurisdictions throughout the United States have now adopted this rule, and locally, it is an exception to California’s general psychotherapist/patient privilege. (**EvC §1014**.)

2. Criminal Proceedings

As to the physician/patient privilege, as stated, this does not apply at all in criminal proceedings. (**EvC §998**.)

3. Plan to Commit a Crime

There is no privilege if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort, or to escape detection or arrest after the commission of a crime or a tort (**EvC §997**), but the newer psychotherapist privilege does apply in criminal proceedings.

4. Family Law Usage

These exceptions are almost never seen in family law, but in cases where one spouse has recently been on a “**5150** hold” (**W&IC §5150**), possibly showing him or her to be so dangerous, or so incompetent as to need a conservator or a guardian ad litem, this category of exception may be useful, and can be used to protect the children.

Once a *Tarasoff* warning is given, the danger issue has been tendered. (See California Supreme Court case, *People v. Wharton* (1991) 53 Cal.3d 522.)

TIP: Although most **5150** holds will not be *Tarasoff* warning cases, hospital stays often include a wealth of information that is not protected under the physician-patient privilege, which remember, is narrower than the psychotherapist-patient privilege. Do not

assume that an involuntary hospitalization is barred from all discovery in family law, especially if there has been overt behavior by the patient that has been witnessed by others. Be creative.

C. Tendering the Issue of Mental or Physical Illness

1. Definition of “Tendering”

“Tendering” is the giving up or admission of evidence in formal pleadings, and is a fairly common exception to the psychotherapist-patient and physician-patient privileges. (EvC §§996, 1016, 1023.)

2. Condition Placed at Issue

A litigant who puts his mental or emotional state at issue, in other words, when he voluntarily brings the issue to the attention of the court in formal pleadings, may not then claim a privilege protecting the underlying information. The trier of fact must have all information available to determine whether to grant the relief requested, and the opposing party has the right to receive the evidence that will be introduced at trial.

The classic example is from criminal law. “Not guilty by reason of insanity” clearly invites an examination of the defendant’s psychotherapeutic history. The issue is tendered. (*People v. Lines* (1975) 13 Cal.3d 500.)

a. Torts Example

Tort cases commonly include tendered medical and psychological issues. If a plaintiff in a boating accident claims, in addition to tendering the physical injury to her cut foot, that she now has a constant fear of drowning caused by the accident, her psychological records will be relevant and will come in.

Even in tort cases, however, the tendering is frequently limited to a specific number of years, or has other boundaries that will be put in place if requested to be stipulated or court-ordered. For instance, gynecological or dental records might be protected in the example case.

b. Tendering Health Issues in Family Law

In family law, only a few litigants have the need to formally tender their medical or psychological condition. This tendering in a declaration, or by admission, is usually done to show mitigation, recovery, or rebuttal to credible witness testimony, and may look like the following:

“I was under doctor’s care for severe depression, and my husband cared for the children while I was away for three months, but I am now able to care for the children.”

“Yes, I was arrested for having a psychotic breakdown and exhibiting strange behavior, and I was in the hospital under a 5150 hold, but I will show proof that the temporary condition that caused me to need hospitalization was caused by an allergy to new medications for my bipolar condition. This situation has been fixed.”

“I was bedridden with a flesh-eating virus, and asked my ex-wife to keep the kids safe while I recovered, but the children visited me, still have a very close bond with me, and I ask the court not to penalize the children or me for being forced to be separated for four months.

“Yes, I have a medical marijuana card that my wife has shown the court, and yes, I was arrested for drug possession in my teens, but I am no longer a teen, I use my marijuana responsibly for severe arthritis, my wife never protested my daily interactions with the children during marriage, I hold a full-time job, and I have no DUIs. I will also offer proper proof of my ability to fully and safely participate in all parental rights and responsibilities.”

TIP: “Need” is often a strategy call. Only if the reputation of the family law litigant is so tarnished by the accuser’s non-privilege-protected evidence, would the accused need to tender his or her medical or psychological condition.

c. Mere Denial Does Not Tender!

Importantly, a mere denial of a condition first brought up in the accuser’s papers does NOT automatically tender the mental or physical health issue.

“I deny Petitioner’s allegations that I was so depressed I could not care for the children.”

When the issue is not tendered, the burden remains on the accuser. There must be evidence before the court other than the accusation. That other evidence must first, prove that the person actually suffers from any such condition and secondly, that the condition threatens the health, safety, or welfare of a minor child.

TIP: Lawyers should remember that if the issue has not been tendered, the confidential records and testimony do not come in, as discussed above in II.B.1 and II.B.2.

D. Waiver of the Privilege

1. General Waiver Premise

As discussed below, it is also possible for a person to waive any of the privileges normally protecting confidential communications. (**EvC §912.**) A person may waive a privilege as to confidential communications if (1) a “significant part” of the communication protected by a privilege has been disclosed by any holder of the privilege without coercion or (2) the holder has consented to disclosure by any statement or other conduct of the holder indicating consent to the disclosure, including failing to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. This is an area explored thoroughly in case law.

2. May Medical or Psychotherapeutic Personnel Waive?

a. Must Assert Privilege on Behalf of Patient

By law, a psychotherapist must assert the privilege on behalf of the patient and must refuse to disclose any confidential communication. (**EvC §1015.**) Similarly, a physician must also assert physician-patient privilege on behalf of the patient, although there are more exceptions than there are with the psychotherapist-patient privilege. (**EvC §995.**) Mentioned earlier, the California Supreme Court said in *In re Lifschutz* (1970) 2 Cal.3d 415, 420, “[A] growing consensus throughout the country, reflected in a trend of legislative enactments, acknowledges that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy. California has embraced this view through the enactment of a broad, protective psychotherapist-patient privilege. In that case, the psychiatrist had asserted the privilege on behalf of the client, but the court held that limited disclosure is compelled of “only those matters which the patient himself has chosen to reveal by tendering them in litigation.” (*Id.* at p. 422.)

b. Written Authorizations

Without written authorization from their patients, there are very few times when the professional may legally waive the confidentiality of communications by releasing content or records about his or her patient. This leads to the appropriate, and all-but automatic, objection by those in the mental and medical health fields to subpoenas for records or testimony.

Family law lawyers who regularly handle cases involving medical and mental health issues, should have several authorizations on hand so that when appropriate and necessary, release of information is properly controlled to protect the client.

It is also possible to seek protective orders from the court or persuade opposing counsel to stipulate to a protective order as to the information being sought. This should ensure that the release of information from the professional is limited to exactly what is required and the protective order would provide limitations on the dissemination of the information to third parties and appropriate penalties for not abiding by the protective order.

TIP: However, beware of easy waiver even when there seems to be no other path to full custody rights. “I have nothing to hide” should be subject to the “verify then trust” process.

3. Waiver as a Poor Strategy?

Although technically a family law client has the right to keep much of his confidential medical or psychological history private, there are times when the best strategy may be a voluntary waiver.

A psychotherapist must assert the privilege on behalf of the patient and must refuse to disclose any confidential communication. Similarly, a physician must also assert physician/patient privilege on behalf of the patient, although there are more exceptions than there are with the psychotherapist/patient privilege. This leads to the appropriate, and all-but automatic, objection by those in the mental and medical health fields to subpoenas for records or testimony. In order for the treating psychotherapist or physician to be able to waive the privilege on behalf of the client, the client must sign the authorization or waiver form presented by that professional. Before waiving, and before having the client sign that authorization, a careful analysis should be made.

Further, a waiver, in the form of an authorization to release records or speak with either the minor’s counsel or the evaluator, should not be signed by the lawyer, but by the client. Of course, a fully-informed client, as discussed elsewhere, will not only understand the risks but will have less cause to tell the lawyer that the lawyer “lost him his kids.”

a. 5th Amendment Rights

A client whose past medical or psychological history is the subject of an ongoing criminal or administrative investigation should not be counseled, some would say never be counseled, to waive confidentiality by testifying in a civil court proceeding, including depositions and declarations, before the investigation is complete and criminal liability is closed. This is such basic law, that a request to the judge for a continuance will usually be granted without further question. Of course, at least temporary loss of most or all visitation during the continuance period is often a consequence. Good defensive argument, that the evidence presented by the accusing parent is insufficient to eliminate visitation may be the only recourse.

b. Contempt Risk

TIP: Another reason for being cautious about waiver, even through the authorization process for a minor's counsel or a child custody evaluator, is the risk that a release of records without knowing what is in them may open the litigant to contempt charges. If, for example, a patient reveals that she has done everything possible to thwart the court orders because the father of her children does not deserve to have equal access to the children, that once-private information will be shared by the therapist and will become part of the litigation process. The patient privately and honestly bearing her soul for purposes of treatment has just become the contemnor.

c. Move-away Problems

A wise lawyer will also see the damage that can be done by intimate information being shared during evaluation. For example, the "person most willing to share" test, *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, ended by Ms. LaMusga being uncovered as the parent least likely to share. Should a moving party's darkest secrets become the main evidence in the litigation process, the potential mover will not be going anywhere.

No lawyer should allow a client to go into the evaluation process without knowing what the records and statements of the treating therapists or doctors will reveal. Evaluation is not like a magician's "black box" from which to wait to pull a surprise result. Evaluation should be an opportunity to ethically help one's client.

If there is no choice but to release—and the authors believe that virtually NO move-away can be won by keeping therapeutic records away from the evaluator—at least by having advance warning of what dangers lurk in the doctor's or therapist's records or statements, major rehabilitation of the client's attitudes, character, habits, etc., may be started immediately to mitigate the damage.

TIP: The ultimate goal, not always possible, would be to have the client genuinely believe and act out her change of position.

"I used to hate my husband because he cheated on me, but I now realize that the children will always love him. To show I have changed, see that I have tried to fully involve him in their sports, ballet, chess and school. They make every phone call and are always ready for visitation exchange. Here is the proof."

4. Waiver as a Good Strategy?

As may be seen throughout this article, sometimes waiver of confidentiality is desired or necessary. Two instances are discussed here.

a. Special Master or In Camera Inspection

An early case found that the “bad moral character” claim by a father against wife’s new husband could not be proven merely by calling as a witness a licensed physician who had interviewed the new husband. (*Newell v. Newell* (1956) 146 Cal.App.2d 166.) This case held that the privilege is not waived by mere relevance, nor by the filing of a custody motion by wife, even if an offer of proof through an in camera inspection of a sealed report (or by a special master) was made. The doctor being forced to appear did not constitute a waiver.

b. Working with Minor’s Counsel

Often once a minor’s counsel is appointed, the therapists and doctors of both parents and the children will be interviewed. Minor’s counsel may only conduct these interviews by obtaining the authorizations of the parents. Once those authorizations are signed, a waiver has been created.

TIP: Although the standard authorization presented by minor’s counsel does not contain the following language, it is within the right of the parent to add in language stating that the records obtained by minor’s counsel will not be given to the other parent. Further, language should be added that if any of the relevant records will be brought to the court’s attention, that they will be examined by the court in camera, with both counsel present, and not on the public record.

5. Informed Consent—What Lawyers Should Tell Their Clients

For a privileged communication to be validly waived pursuant to **Evidence Code section 912**, any holder must disclose a significant part of the communication without coercion and must consent to the disclosure. In a family law case, an attorney may be asked to have the client execute a form authorization in order for his/her physician or psychotherapist to release records for purposes of a child custody evaluation or for other reasons. But, just signing a perfunctory authorization does not mean that the client has given “informed consent.” Because there is a power imbalance between the attorney and the client, and between the physician or psychotherapist and the patient, whom the client/patient views as having superior knowledge, there is even a risk that merely asking the client/patient to sign the authorization may have an element of coercion.

The attorney and client should have an intensive discussion as to possible repercussions before the attorney advises the client to sign an authorization for the evaluator to engage with his/her physician or psychotherapist and to release medical/psychotherapeutic records to the evaluator. The client is the one who knows what may be contained in those records, and the client must understand that he/she has the right to refuse to authorize such access and thereby waive his/her right to keep such communications private. Even though the

evaluator may later comment in a report that the party refused to sign the medical/psychotherapeutic authorization or release, the court should respect that decision and not hold it against the party as in a criminal trial where the jury is instructed not to consider the fact that a defendant does not testify as evidence of the guilt of the defendant. Because the attorney may not be fully aware of what is in the client's medical/psychotherapeutic records, he/she must exercise caution in encouraging a client to sign such an authorization. It may well open a proverbial "Pandora's Box." When the information is released, there is no way to contain what happens to it. (A custody evaluation is confidential, but typical expert testimony in open court is not.)

Part of the attorney's responsibility is to confer with the physician/therapist to find out the content of the records before advising the client to sign the release. Such a communication between the attorney and the physician/psychotherapist is covered by the attorney-client privilege. Borkosky has recommended a model consent form that the client should receive with a record of the materials to be released. (**Borkosky, B. and D.M. Smith, *The Risks and Benefits of Disclosing Psychotherapy Records to the Legal System: What Psychologists and Patients Need to Know for Informed Consent* (Sept.-Dec. 2015) 42-43 Internat. J. of Law and Psychiatry 19.)** That way, the client/patient has a better idea of what is at issue before signing the authorization to release the records to the opposing attorney.

E. Court-ordered Individual Examinations

1. Custody Evaluation

Custody evaluations in California are slightly different. Practically speaking, although child custody evaluators are almost always given access to psychotherapists and medical professionals and their records, such access is not mandated by the codes governing such evaluations. On the rare occasions when a person asserts the privilege to protect his or her mental and physical health records under either the Evidence Code (**EvC §730**) or the Family Code (**FC §3110 et seq.**), the child custody evaluator may comment on such denial of access, and may even communicate that without the records and access to the treating physicians and psychotherapists, the evaluation cannot go forward. Thus, these types of examinations in family law cases usually act as at least a partial waiver by the litigant.

TIP: Although an evaluator often is given unfettered access to psychological records by waiver, lawyers who know their clients have tangential, say embarrassing, information in the records that would not be of any use to the other side except for perhaps harassment purposes, should seek a protective order to have the records subject only to exam by the evaluator, not releasable even in deposition, and protected from exam by opposing counsel and her client. This will apply to minor's counsel as well, although "harassment" is usually not a good selection of reasons for extra privacy. Properly pled, this protection from full disclosure works. Although some information is releasable, parts of it can be kept out.

2. Court-ordered Independent Psychological or Medical Exam

Based on facts concerning a litigant's behavior that are relevant to the proceeding, a court may order, "for good cause shown," that either a physical or psychotherapeutic examination and evaluation of an individual will come into evidence. (CCP §2032.320.) This must be by court order, although a stipulated order is sufficient. (CCP §2032.310.) There is also a requirement for a mandatory meet and confer before going to court for all discovery motions, including this type. (CCP §2016.040.) If such an examination is ordered, then the privilege is waived as to what the physician or psychotherapist finds and reports. Note: This is not the same "defense medical exam" that is usually used without a court order in personal injury cases under **Code of Civil Procedure section 2032.220**.

Although this type of evaluation is not addressed in the family code, usage in custody disputes has long been established, for example, in *In re Marriage of Matthews* (1980) 101 Cal.App.3d 811 (using previous law) (disapproved for other reasons).

TIP: If multiple involuntary **5150** hospitalizations (**W&IC §5150**), or a previous detention by DCFS (**W&IC §300 et seq.**) for proven harm or neglect, or other obvious facts pointing to safety concerns for the child exist, these are the types of items the court will look at in making an order for an "Independent Medical or Psychological Exam."

3. Proof Required for "3190" Counseling

A fairly common type of order in disputed custody cases is the application of therapy in the hopes that the parents, or a parent and child, will benefit from therapy to "facilitate communication." This type of order may be made with specific findings that the treatment duration will be for one year or less, that the dispute poses a "substantial danger" to the child, and that a parent can afford it. (FC §§3190-3192.)

Although the language makes some say that the use of the statute is limited strictly to some form of express communications therapy, the remedy is used broadly to help improve communication. In the most recent example (*Stuard v. Stuard* (2016) 244 Cal.App.4th 768), the father was ordered to participate in anger management counseling for an indeterminate period of time. The trial court was reversed as follows, "Finally, we conclude the anger management counseling portion of the trial court's order did not include the findings required by section 3190 and did not limit the counseling to a period of not more than one year. Accordingly, we reverse this portion of the order and remand for the trial court to make the statutorily required findings and to limit counseling to one year if the counseling order is reimposed." (*Ibid.*)

For the court to have made orders for anger management counseling, the lawyers had to present their final proof, which may have included information on father's

anger. The court also considered a report from a court-affiliated mediator, in a “reporting county,” who noted both that father was “angry and controlling,” and that the child wanted to see her paternal grandparents. (As a reminder, Los Angeles County is a “non-reporting county.” The content of a court-affiliated mediation is not made known to the judicial officer, making the proof provided by the lawyers more crucial to the final outcome.)

V. CALIFORNIA’S LONG-STANDING CASE LAW INTERPRETATIONS

A. The Richness of the Conflict Explored

There are many important California family law cases related to issues of treatment privilege in child custody proceedings. The courts have been relatively consistent in their balance of patient privacy issues and public policy to encourage an individual to seek treatment on one side of the scale with the best interests of children on the other. Court of Appeal decisions have made it clear that, in California, one party cannot put the other party’s mental stability or physical health at issue simply by making allegations that require a denial. If one party tells the court, “my wife/husband is insane,” this alone is not going to compel the court to change custody or visitation or to order an evaluation or investigation.

B. Hospitalized Parent Confidentiality

1. Medical Patient’s Right to Tender or Not

In the *Koshman* case, *Koshman v. Superior Court (Koshman)* (1980) 111 Cal.App.3d 294, a seminal family law case that dealt with medical records concerning a narcotic overdose, the court upheld the privilege for the parent who had been hospitalized. The wife/mother had been previously awarded custody of the two children. Later, the father filed for a post-judgment modification of custody and served a subpoena duces tecum on the custodian of records for the mother’s medical records. The mother moved to quash, asserting the physician-patient privilege. The father claimed in his declaration that the mother had been hospitalized for treatment of an overdose of drugs and that the records were vital to a determination as to her fitness to continue to have custody of the children. The trial court denied the motion to quash and ordered the records to be delivered to the court for the court to decide whether the father or Family Court Services should be able to see the records. The mother filed a petition for a writ of mandate, contending that the court’s ruling was unconstitutional and an abuse of discretion and that there was no exception to the physician-patient privilege that justified such a release of the records. The Court of Appeal considered whether the mother’s condition had been “tendered” under **Evidence Code section 996**. The court held that the medical records sought were privileged, and that although some family law litigants might tender their medical records in some situations, generally, a defendant’s “denial” of allegations about his/her health did not “tender” the issue. (*Koshman, supra*, 111 Cal.App.3d at p. 298.)

2. *Relevancy is Not the Criterion*

“[R]elevancy is not a criterion in the protection afforded by the statutes. Unless waived or subject to a statutory exception, the privilege applies. The rules of privilege are designed to protect personal relationships and other interests where public policy deemed them more important than the need for evidence. (Citation omitted) There is no question but that the physician-patient privilege applies in custody disputes between parents.” (*Koshman*, *supra*, 111 Cal.App.3d at p. 297.)

The *Koshman* justices opined, by way of footnote, that the core issue to be decided was the best interest of the child, *not* the fitness of the parent. (*Koshman*, *supra*, 111 Cal.App.3d at p. 296, fn. 1.) The court went on to say that there might be future cases in which the best interests of the child should be considered to be paramount to the physician-patient privilege, but that decision should be a matter for the Legislature, not the court. (*Id.* at p. 299, fn. 5.)

3. *Forced Testing & Discovery*

The California Legislature has carved out limited forced **testing** of custody litigants *if* evidence already shows “continual illegal use of controlled substances or the habitual or continual abuse of alcohol.” (**FC §3041.5**.) The testing must be no more invasive than for federal employee screening (urine). If the litigant tests positive (for example, with elevated creatinine, which sometimes indicates a faked urine test), that person may demand a hearing to prove why the testing was faulty or that there are other reasons for the elevated test data (e.g., pregnancy).

A standard demand to exchange expert witnesses could be served (**CCP §2034.210**), and use of experts to affirm or rebut the tests is not prohibited by the privilege. Other evidence could also be presented at the litigant’s motion hearing, and a custody evaluation could be ordered to determine a parent’s current ability to function as a parent. However, there is no case yet that allows a court to open up a patient’s entire medical record in family law based on a positive drug or alcohol test. What is relevant in a child custody proceeding is a parent’s present ability to care for the children, not a past medical history that may no longer be pertinent.

C. *Simek Tendering Explored*

Simek is another family law case that dealt with the “tendering” issue, this time in the mental health arena. (*Simek v. Superior Court (Simek)* (1981) 117 Cal.App.3d 169.) That case held that a party who is merely seeking visitation with his/her children does not automatically “tender” his or her mental health. In *Simek*, the mother was awarded physical custody of the children in a marital dissolution. The court directed the parties to work out a visitation schedule, but they were not able to reach an agreement. The mother sought to have

the judgment entered and asked the court to terminate the father's visitation rights until it had been determined by "competent medical authority" that he was capable of having visitation. The mother asserted in a declaration that the father had been a patient in a psychiatric ward two years previous to the court proceedings and that he had had a "complete mental breakdown," and had attempted suicide. The mother had issued several subpoenas duces tecum for the records of the father's psychiatrist, psychologist, physician, and the records from the hospital where he had been treated. The father brought a motion to quash the records on the ground that they were protected under the psychotherapist-patient and physician-patient privileges and that the subpoenas were not limited in time or scope and were not supported by good cause. At the same time, the father moved for court approval of a visitation schedule. The trial court denied the motion to quash and ordered the records delivered to the court for inspection at the hearing on the order to show cause for visitation. The father filed a petition for a writ of mandate on the ground that the various records were statutorily privileged and to compel the court to enter an order quashing them.

The Court of Appeal held that the *Simek* case was an even stronger example for the application of the privilege than *Koshman*, *supra*, 111 Cal.App.3d 294. It held that the Legislature has declared it to be the public policy of the State of California to assure minor children frequent and continuing contact with both parents and that the father did not waive his privilege in the confidential communications with his physicians and psychiatrists simply by seeking his presumptive right to visitation. The justices opined that the intimate and sensitive nature of the communications called for by the patient-therapist relationship

"implicate constitutional as well as statutory rights of privacy. . . . To exact a waiver of a patient's privilege in the confidentiality of his communications to a psychotherapist as a price for asserting his right to visit his own child would pose problems of a particularly serious nature." (*Simek v. Superior Court (Simek)*, *supra*, 117 Cal.App.3d at pp. 176-177.)

D. Kreiss and Self-extending Waivers

A third case, *Kreiss, In re Marriage of Kreiss* (2004) 122 Cal.App.4th 1082, this time on the issue of waiver, stands for the proposition that once a waiver of privacy is agreed upon by stipulation, there can be a continuing waiver even as to post-judgment matters. In *Kreiss*, the mother had a history of alcohol and drug abuse as well as underlying mental health issues. The parties entered into a stipulated judgment awarding the father, Thomas, sole legal and physical custody of their only child and monitored visitation for the mother, Lisa. The order also provided that Lisa could take their son, Cameron, two weeks each year to Michigan to visit her mother. A few months later, Lisa asked to take Cameron to see her mother in accordance with that provision. Prior to the entry of the judgment, Lisa had entered a drug and alcohol rehab facility, and she was still living there when she made the request to take Cameron to Michigan. Thomas believed that Lisa's condition had deteriorated, and he requested appointment of a professional monitor by the court to accompany Lisa and Cameron, and to bolster his request, he sought discovery of Lisa's psychiatric records from UCLA

Neuropsychiatric Hospital. He based his post-judgment discovery request on a joint stipulation that he and Lisa had signed during their dissolution proceedings, allowing mutual discovery of “psychological” evidence. The stipulation and order stated, “(b)oth parties waive any privilege they may have or contend to have with respect to any mental health professionals or other therapists or medical providers with whom they have consulted or by whom they have been treated from June of 1998 through the ‘pendency of this action.’ ” Lisa countered that because the judgment had already been entered, there was no “action pending,” and she refused to comply.

The trial court agreed with her and said that the stipulation for the discovery had ended with the entry of the judgment. But, upon appeal, the Court of Appeal held that the waiver continued as to post-judgment proceedings, stating that a prior case, *In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, stood for the proposition that child support and child custody proceedings remained *pending* post-judgment so long as the child is a minor. It reversed the trial court and said that Lisa had to comply in allowing the release of her records because of the earlier waiver. This case clearly is a cautionary tale for those representing parties who have had mental health issues.

TIP: Lawyers should be careful that any waivers are drafted very precisely.

VI. THE MANELA TESTS

A. The Importance of the *Manela* Case

Manela is a recent major case dealing with privacy and privilege issues from a medical disorder perspective that lays out three levels of analysis. (*Manela v. Superior Court (Manela)* (2009) 177 Cal.App.4th 1139.) This case established what amounts to a three-pronged test separating the boundaries between a patient with “tics” or “seizures” who is protected by physician-patient privilege, and the best interests of his son in a custody determination. In *Manela*, the father requested joint custody of the couple’s four-year-old son. The mother alleged in her declarations that the father’s “seizure disorder” should require that he not be allowed overnight visits and not be allowed to drive a vehicle with the child in it. The court ordered joint legal custody of the child, with primary physical custody to the mother and secondary physical custody to the father. This led to a discovery dispute in which the mother subpoenaed medical records of two of the father’s physicians, a neurologist who had treated him for a “tic disorder,” and another of his former physicians who had treated him since he was eleven years old. The mother filed a petition for a writ of mandate after the trial court granted the father’s motion to quash all of the subpoenas on the ground that the documents were protected by the physician-patient privilege. The prongs of the test are (1) waiver by third party penetration of confidentiality; (2) traditional non-disclosure of confidential information; and (3) non-tender by mere denial without more.

B. Prong 1: Waiver Explored

Waiver: The mother had accompanied the father to one of his appointments to the neurologist. She sat in on the examination and heard the communications between the father and the physician. The Court of Appeal held that the father had waived the privilege with respect to that physician and that the communications were non-confidential and unprivileged. The father argued that his medical records should be protected by his constitutional right of privacy, but the Court of Appeal held that the right is not absolute, and that, in this instance, his privacy interests were outweighed by the State's compelling interest in protecting the child's best interests. It did uphold a partial protection. The justices said "determination of the nature of the compelling state interest does not complete the constitutional equation." (*Manela v. Superior Court (Manela)*, *supra*, 177 Cal.App.4th at p. 1150.)

The court ordered only the non-privileged documents relating to the father's tic/seizure disorder to be produced.

C. Prong 2: Non-disclosure

Traditional non-disclosure: The mother also argued that by waiving the privilege with the neurologist, that the father had also waived the privilege with the physician who had treated him when he was eleven years old and after. The Court of Appeal disagreed and refused to extend the waiver of privileges back to the former physician who had treated him many years earlier, when the father had reasonably believed he could fully and freely discuss his medical condition.

D. Prong 3: Denial is Not Tender

Denial does not trigger tender: The Court of Appeal relied on *Koshman* to hold that the father had not tendered his medical condition by simply denying the mother's allegations.

TIP: Although the *Manela* case dealt with the more limited physician-patient privilege, prong (3) applies, and logically, prongs (1) and (2) may apply as well, in cases involving the psychiatric-patient privilege when the issue comes before the court.

VII. COURTS RECOGNIZE NON-PROTECTED METHODS OF DISCOVERY

A. Discovery on Non-privileged Information

Merely because direct discovery of privileged records is prohibited, there is no prohibition to normal discovery of non-privileged information.

In 1968, an irascible temporary justice, denying a rehearing on admission of privileged information, made a plea for good lawyering. His comments about witnesses and evidence are still good advice today:

“It should be emphasized, . . . that nothing we have said in our opinion is intended to restrict plaintiff’s right to all proper discovery before trial as to all relevant facts and documents which are not privileged or as to the identity of all persons having knowledge of all relevant facts. . . . Much time would have been saved for all concerned if plaintiff had chosen to follow this course in the first instance.”
(*Carlton v. Superior Court* (1968) 261 Cal.App.2d 282, 297.)

B. Witness Testimony

For example, if witnesses have seen a litigant repeatedly and uncontrollably weeping in front of a child; or having a grand mal epileptic seizure while driving with a child; or if a litigant’s infant child was found wandering down the block while the litigant was witnessed in a marijuana-induced torpor for pain reduction; or if a parent makes a delusional statement requesting information on why a child is dissolving at the other parent’s home; or if a hoarder parent keeps the house in such a mess that children come back with cockroaches in their backpacks more than once; or if a litigant is seen by a neighbor repeatedly hitting a spouse on the front driveway with a kiddy baseball bat in one hand and a beer in the other (all real cases)—there is nothing preventing the use of such non-privileged witness testimony to prove potential harm to the child.

C. DCFS Records and Testimony

DCFS records are available using pre-established forms. See Appendix. Frequently, parents are asked to sign “waiver” or authorization forms for DCFS to have the parent’s medical or psychotherapeutic records released. These releases are typically very broad and general and virtually waive the confidentiality of almost any information of the parent. Also, typically, the parent signs this form when they have not had the opportunity to engage counsel or have counsel appointed, and they are in crisis, willing to agree to do anything in order not to lose custody of the children. Whether signing such a waiver complies with **Evidence Code section 912** is a question that we cannot answer as we could not find a specific case on that point.

D. Police and Other Official Records

Records from the police, which must be authenticated by live testimony, are available by subpoena, including 911 calls, case notes, and any evidence collected at the scene. However, as stated previously, police reports, 911 tapes, etc., must be authenticated by the officer who was the eye or ear witness and are inadmissible hearsay without such

authentication. Portions of a report that merely quote a litigant's comments that someone else did something or said something are always objectionable hearsay. However, the portions that merely refresh the recollection of an officer who saw or heard the offense, or lack of a problem, are useful to the court. (Always give notice for a live hearing under **California Rules of Court, rule 5.113**, if police evidence is to be brought in. (FC §217.)) See Appendix.

VIII. POST-MANELA APPLICATIONS

A. Waiver Issues Explored

After *Manela*, the courts have continued to wrestle with competing privileges in family law just as competing issues surface in other areas of law. A lawyer who has a waiver issue may need to analyze non-family law cases such as *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717 where disclosure of a medical issue to a nurse was deemed a waiver. (Remember, medical issues are less protected than mental health issues in California.)

B. “Affirmative Denial” Triggers Tender of Issue

Similarly, the juvenile dependency case, *In re R.R.* (2010) 187 Cal.App.4th 1264, should be studied for the principle that the issue of drug use was tendered by an *affirmative denial* of use after the court had ruled visitation would change if the father could prove a change of circumstances based on former drug use.

C. Burden of Proof of Psychotherapist/Patient Confidentiality

In *People v. Gonzales* (2013) 56 Cal.4th 353, the Supreme Court of California continued to wrestle with whether psychological records and other information incident to treatment should be admissible. Although *Gonzales* is a criminal case rather than a family law case, the exceptions to confidentiality are considered carefully, and some of the material, including the fact that the defendant did not miss his sessions, was found admissible.

The case discusses the burden of establishing confidentiality as follows,

“Past cases establish that a person seeking to invoke the psychotherapist-patient privilege has the initial burden of establishing the basic facts to show that the privilege is presumptively applicable—in general, that the person consulted constitutes a “psychotherapist” and that the communication in question constitutes a “confidential communication between patient and psychotherapist,” within the meaning of the privilege [Citations omitted]. Once the patient has met that burden, the burden shifts to the party who contends that the privilege is inapplicable because one or more of the statutory exceptions applies.” (*People v. Gonzales, supra*, 56 Cal.4th at p. 372.)

IX. HIPAA

Another body of law, the federal **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, also protects patient records, but is **beyond the scope** of this article. Family law courts have methods for dealing with non-privileged confidential records, including in camera inspections and the use of evaluators.

X. CHILDREN – PROTECTING PRIVACY AND PRIVILEGES OF CHILDREN

A. Clashing Priorities for Children—Privacy vs. Best Interests

Children are minors, and therefore have rights given to them by their parents. Because such intangibles as “stability,” “frequent and continuing contact,” “health, safety and welfare,” and whether a child is “well-bonded” with a parent are all the subjects of litigation, it is natural for custody litigation to center on children’s treatment records and advice of treating professionals.

However, like adults, children have at least some treatment rights independent of their parents. For example, treatment confidentiality, in situations of suspected abuse, is treated carefully by the treating professionals, other mandated reporters, and the courts.

1. *Karen P. and Protecting a Child’s Non-disclosure Rights*

A patient does not need to be a party to have a privilege not to disclose, nor to prevent others from disclosing confidential communications. Because there is a two-fold purpose for the non-disclosure of medical information, first, “to prevent humiliation . . .” and second, to “encourage . . . full disclosure . . .,” the court in *Karen P. v. Superior Court (Andres P.)* (2011) 200 Cal.App.4th 908, at p. 912, carefully considered the rights to confidentiality of information for a 14-year-old who was raped by her father.

When father subpoenaed medical records of the child, the child’s Department of Children and Family Services (DCFS) attorney filed a motion to quash the subpoenas. Although the father urged that the child had tendered her medical condition under **Evidence Code section 996** by disclosing the sexual abuse to a social worker, to police, and to a forensic medical examiner, the *Karen P.* court said father “misconstrued” the statute and was not entitled to have his daughter’s medical records. The court held that the patient-litigant exception “compels disclosure of only those matters that the patient himself has chosen to reveal by tendering them in litigation.” (*Karen P. v. Superior Court (Andres P.)*, *supra*, 200 Cal.App.4th at p. 913.) Here, the child’s disclosures to the social worker and the police were not part of litigation, because they pre-dated the juvenile dependency case, and importantly, because the child was not the litigant (she did not file the lawsuit, and she was not a party)

under **Evidence Code section 996(a)**. (*Id.* at p. 913.) Although **Karen P.** is a dependency case, where DCFS filed the petition, a child’s position in both dependency and family law is the same—the child is not a litigant and cannot be held to tender “in litigation” under **Evidence Code section 996(a)**.

However, subdivision (b) of that statute was also used by the father to state that the child was claiming “through or under” DCFS, which, if true, would have tendered the child’s records to the father despite her confidentiality rights under subdivision (a). Because the court reasoned that the child could not be held to be claiming under DCFS (or in family law, a child is not a litigant claiming through or under either of the parents), the case did not “extinguish the child’s physician-patient privilege vis-à-vis Evidence Code section 996, subdivision (b).” (**Karen P. v. Superior Court (Andres P.)**, *supra*, 200 Cal.App.4th at pp. 914-915.)

Some records still go to the parent: DCFS did not take steps to protect the forensic medical examination report, which in all likelihood relied at least partially on the child’s medical records. (This is similar to family law lawyers would usually not try to shield a court-ordered evaluation or examination.) DCFS was obligated to release the forensic report to the father. (**Karen P. v. Superior Court (Andres P.)**, *supra*, 200 Cal.App.4th at p. 915, fn. 3.)

B. Minor’s Counsel Rights and Responsibilities

1. Minor’s Counsel Holds the Privilege

If a child has a minor’s counsel appointed by the court, the minor’s counsel holds the privilege and can halt communications between parents and the providers in appropriate situations. (**FC §3150 et seq.**)

2. Minor’s Counsel Questionnaires and Authorizations

Minor’s counsel often ask for “Authorizations” from parents because the authorizations assist in communications with teachers, doctors, therapists, and others, under their statutory powers given them under **Family Code section 3151**. The signing of these authorizations and questionnaires by the parent often results in at least a partial waiver of confidential information, as is discussed elsewhere in this article. See Appendix.

3. Permissible Ex Parte Communications Between Evaluator and Minor’s Counsel

Ex parte communications by a child custody evaluator and any of the parents’ lawyers in the case is prohibited except for scheduling, etc. However, under **Family Code section 3151(c)(5)** and **California Rules of Court, rule 5.235(e)**, minor’s counsel may speak

to the evaluator, and rarely, this is a good idea, if court ordered under **Family Code section 216(b)**.

Careful thought must be given as to whether such a waiver is correct for the particular case because the potential for bias or perceived bias is always present. As *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116 highlighted, a father was deprived of his day in court for many procedural reasons during a move-away case, but partially because a minor's counsel, without the benefit of stipulation or court order, had unrestricted ex parte communications with an evaluator. This access gave the impression, at least, that the communications may have caused irreversible bias.

California Rules of Court, rule 5.235(e) shows that while it is true that ex parte communications are permitted by court order, there are additional but narrow exceptions including the need for the minor's counsel to inform the court that the evaluator believes harm to the child may be immediate. Lawyers should remember that no specific bar on the discussion of confidential or otherwise privileged information about the child or parents exists once the ex parte communication is allowed.

C. Children and Others Not Automatically Entitled to All Parents' Records by Waiver

1. Child Does Not Have Automatic Right to Parent Records

In a juvenile dependency case, the children's de facto parents wanted to see all of the biological mother's psychological records before she was allowed to have modified time with the children. The de facto parents, generalized as "litigants" were NOT allowed to see the mother's records, which became the subject for in camera examination by the evaluator. (*In re B.F.* (2010) 190 Cal.App.4th 811.) As a non-litigant, the child, through her minor's counsel, does NOT have the automatic right to see all of a parent's medical and therapeutic records.

2. Accused Parent's Admissions to Child's Therapist Not Automatically Releasable

Similarly, if a parent makes statements to the child's therapist about, say, an inability to cope with the child's rage issues, under *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, a personal injury case, the other litigant does not automatically have access to those records because of the confidential nature of how they were obtained. This is a different interpretation than in *Manela v. Superior Court (Manela)*, *supra*, 177 Cal.App.4th 1139, and the third-party-in-the-room issue appears to be handled differently because of the protection of the minor's confidentiality. In *Grosslight*, both parents were in alignment while in *Manela*, the husband and wife were at odds. But see cases cited in the remainder of this section regarding protection of child's confidentiality rights when opposed to their parents.

3. Parent Does Not Have Automatic Right to Child's Records

Although there are some good reasons for litigants not to want the child to have a minor's counsel, mostly because of the loss of control of the case, there is one instance where the appointment of a minor's counsel should always be considered. Minor's counsel holds the privilege for treatment confidentiality (**FC §3151**); thus the appointment of a minor's counsel keeps a parent from attempting to obtain those records, and further protects the non-litigation-savvy therapist from having to rebuff parental discovery demands.

In an early juvenile dependency case, *In re Fred J. et al.* (1979) 89 Cal.App.3d 168, a mother was held not to be allowed to assert the psychotherapist-patient privilege for the children partially because both the children and the mother had attorneys, and their interests diverged. Although minor's counsel now holds the children's privilege by statute, it is sometimes helpful to remind opposing counsel and the court that even unrepresented children have rights to treatment privacy. There are many cases that make this point, and a request to remove embarrassing information about the children from the public record usually is considered and at least partially granted by family court judges.

4. Child's Court-ordered Psychological Exam—Private Because of Child's Needs

Since 1983, in what was then a case of first impression, parents contesting the loss of custody to a guardian were excluded from their child's court-ordered psychological examination because of the possibility that their presence might be distracting or disrupting to the child. (*Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407.) The court determined that "the needs of the child remain paramount in the judicial monitoring of custody." (*Id.* at p. 412.)

D. Child Victims—Privilege vs. No Privilege

Although a child over 12 who is deemed in danger may independently consent to therapy (**FC §6924**), a child who is the victim of abuse and is under 16 has no right to have records protected from disclosure by the therapist (**EvC §1027**).

The mandated reporter statutes under the Penal code also force those covered by the codes to make reports. (**PenC § 11165.7 et seq.**)

On the other hand, a child's confidential records have been kept from parents despite claims of bias, etc., in the name of protecting the child. (*In re Daniel C.H.* (1990) 220 Cal.App.3d 814.) The *Daniel C.H.* case states, "We also point out that the patient generally is the holder of the privilege, unless the patient is dead or has a guardian or conservator. (Evid. Code, § 1013.) The statutes do not specifically mention who holds the privilege when the patient is a minor. *Case law does suggest, however, that a minor child is entitled to the privacy granted by the privilege.*" (Emphasis added.)

Also see *In re R.R.* (2010) 187 Cal.App.4th 1264, cited elsewhere, re father's tendering. In the *In re R.R.* case, the court cites extensively to *In re Daniel C.H.*, highlighting that the father had no fundamental right to Daniel's records. (*Id.* at p. 1283.)

TIP: An attorney does not have to be a minor's counsel to know that disclosure of a child's therapy records in a family law setting can be embarrassing, even mortifying to any child, especially the nine-year-old who has not gotten over her self-consciousness, a child dealing with his sexuality, or a child with a physical deformity or disease. An attorney for either parent who realizes the other parent is about to expose the child in court should consider whether to make at least an informal request for a protective order, citing *Daniel C.H.*

XI. CONCLUSION

The strong and competing public policies behind protection of children in custody disputes on the one hand, and the protection of the psychotherapeutic and medical privileges on the other, mandate that counsel need to navigate these waters with care. There are valid and important arguments supporting both needs of California residents. Of course, as a society, we want to protect children and make certain that child custody proceedings are determined in the child's best interests. But, we also want our citizens to seek medical and mental health treatment for the overall benefit of society, including themselves and their children. Certainly, encouraging a parent with a mental illness to continue in treatment and stay on medication is itself in the best interest of any child of that parent. This clash in public policies has been going on for generations, and there is no easy resolution to the competing interests. Counsel in these cases must be aware of the competing interests and must plan to deal with the facts of any particular case accordingly. Attorneys representing the accuser parent should make the most of non-privileged evidence to prove the potential harm to the child where it exists. The attorney representing the parent accused of having a debilitating physical or mental illness should be prepared to proactively seek to protect the client's private and privileged records, and to confront damaging non-privileged evidence to protect the client's child custody interests. Thoughtful planning to deal with these competing interests is imperative no matter which side the attorney is representing.

ENDNOTES

- 1 Lynette Berg Robe, J.D., M.A., is a Certified Family Law Specialist, certified by the State Bar of California Board of Legal Specialization, and has been practicing family law for 29 years. Her law firm is the Law & Mediation Offices of Lynette Berg Robe in Encino. She obtained her J.D. at UCLA School of Law, and her undergraduate and master's degrees from the University of Kansas. She is the current immediate past president of the state-wide board of the Association of Certified Family Law Specialists (ACFLS) and serves on its ACFLS Spring Seminar committee. She served as chair of the LACBA Family Law Section 2012-2013, and she received the 2012 LACBA Matthew Rae award for outstanding section chair. Lynette also served on the Board of AFCC-CA for five years, serving as chair of the 2012 AFCC-CA conference held in Los Angeles. In 2011 she received the Zephyr Ramsey Award for her commitment to access to justice for all from the Harriett Buhai Center for Family Law. She served on State Bar FLEXCOM from 2006-2009 and was editor of the State Bar Family Law News, 2007-2008. She has been a speaker in numerous continuing education programs involving child custody, mediation, and other issues and has written many articles, appearing in the State Bar Family Law News, in the ACFLS The Specialist, and the LACBA Family Law Section News and Review and E-News. Lynette is now focusing her practice on mediation and collaborative family law, involving all aspects of family law matters including premarital and post-marital agreements. She also belongs to Family Divorce Solutions, a collaborative law group. Lynette may be reached at: lynette@lynettebergrobelaw.com. Her website is: www.lynettebergrobelaw.com.
- 2 Christine D. Gille, Esq., M.B.A., CFLS is the family law partner with Goldberg and Gille in their Pasadena, CA office serving Los Angeles County, and has practiced family law since 1989. She mediates family law cases and represents both adults and children in high conflict and complex custody and asset cases. She is the current Associate Editor of the Family Law Specialist, a publication of the Association of Certified Family Law Specialists, and is on that organization's Board of Directors. She is also an Assistant Editor for LA Lawyer Magazine, published by Los Angeles County Bar Association. She is an author and speaker, and is a member of ACFLS, AFCC, NACC, CalBar, LACBA, AMC, & PBA. She obtained her B.A. in Economics at UCLA, her M.B.A. at UCLA, and her J.D. from Southwestern School of Law. She is certified by the California Board of Legal Specialization as a Family Law Specialist. Christine may be reached at: cdgille@gglawpas.com and through her website, www.goldberggille.com.

Appendix A – Police Subpoena for 911 Recordings, etc.

SUBP-002											
<p>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):</p> <p>Christine D. Gille, Esq. SBN 143838 LAW OFFICES OF GOLDBERG & GILLE 131 NORTH EL MOLINO AVE, SUITE 310 PASADENA, CA 91101 TELEPHONE NO.: 626/584-6700 FAX NO.: 626/584-6719 E-MAIL ADDRESS: ATTORNEY FOR (Name)</p> <p>NAME OF COURT: COURT STREET ADDRESS: ADDRESS MAILING ADDRESS: ADDRESS CITY AND ZIP CODE: CITY, STATE, ZIP BRANCH NAME:</p> <p>PLAINTIFF/PETITIONER: NAME</p> <p>DEFENDANT/RESPONDENT: NAME</p> <p>CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION</p>	<p style="text-align: center; font-size: small;">FOR COURT USE ONLY</p> <p>CASE NUMBER: CASE NO</p>										
<p>THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of witness, if known):</p> <p>NAME OF POLICE DEPARTMENT, ADDRESS, PHONE NUMBER</p>											
<p>1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%;">a. Date:</td> <td style="width: 20%;">Time:</td> <td style="width: 10%;"><input type="checkbox"/> Dept.:</td> <td style="width: 10%;"><input type="checkbox"/> Div.:</td> <td style="width: 30%;"><input type="checkbox"/> Room:</td> </tr> <tr> <td colspan="5">b. Address:</td> </tr> </table>		a. Date:	Time:	<input type="checkbox"/> Dept.:	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:	b. Address:				
a. Date:	Time:	<input type="checkbox"/> Dept.:	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:							
b. Address:											
<p>2. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.</p>											
<p>3. YOU ARE (item a or b must be checked):</p> <p>a. <input type="checkbox"/> Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.</p> <p>b. <input type="checkbox"/> Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.</p>											
<p>4. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:</p> <p>a. Name of subpoenaing party or attorney: b. Telephone number:</p>											
<p>5. Witness Fees: You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.</p>											
<p>DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.</p>											

Date issued:

<p style="font-size: small;">(TYPE OR PRINT NAME)</p>	<p style="font-size: small;">(SIGNATURE OF PERSON ISSUING SUBPOENA)</p>
<p>ATTORNEY FOR</p>	<p>(TITLE)</p>

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

The production of the documents, electronically stored information, or other things sought by the subpoena on page one is supported by (check one):

☐ the attached affidavit or ☒ the following declaration:

DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS AT TRIAL OR HEARING
(Code Civ. Proc., §§ 1985, 1987.5)

- I, the undersigned, declare I am the ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent
☒ attorney for (specify): _____
in the above-entitled action.
- The witness has possession or control of the documents, electronically stored information, or other things listed below, and shall produce them at the time and place specified in the Civil Subpoena for Personal Appearance and Production of Records at Trial or Hearing on page one of this form (specify the exact documents or other things to be produced; if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):
SEE ATTACHMENT 2

☒ Continued on Attachment 2.

- Good cause exists for the production of the documents, electronically stored information, or other things described in paragraph 2 for the following reasons:
SEE ATTACHMENT 3

☒ Continued on Attachment 3.

- The documents, electronically stored information, or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:
ALL DOCUMENTS RELATED ARE REQUIRED TO DETERMINE _____ (IE,
THE BEST INTEREST OF THE CHILDREN)

☐ Continued on Attachment 4.

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

Date:

_____ (TYPE OR PRINT NAME)	 (SIGNATURE OF <input checked="" type="checkbox"/> SUBPOENAING PARTY <input type="checkbox"/> ATTORNEY FOR SUBPOENAING PARTY)
-------------------------------	---

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the date on which you are to appear. Contact the clerk's office or go to www.courts.ca.gov/forms for Request for Accommodations by Persons With Disabilities and Response (form MC-410). (Civil Code, § 54.8.)



(Proof of service on page 3)

SUBP-002 [Rev. January 1, 2012]

CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION

Page 2 of 3



PLAINTIFF/PETITIONER: _____	CASE NUMBER: _____
DEFENDANT/RESPONDENT: _____	

PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION

1. I served this *Civil Subpoena (Duces Tecum)* for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and Declaration by personally delivering a copy to the person served as follows:
 - a. Person served (name): _____
 - b. Address where served: _____
 - c. Date of delivery: _____
 - d. Time of delivery: _____
 - e. Witness fees (check one):
 - (1) ☐ were offered or demanded and paid. Amount: _____ \$
 - (2) ☐ were not demanded or paid.
 - f. Fee for service: _____ \$
2. I received this subpoena for service on (date): _____
3. Person serving:
 - a. ☐ Not a registered California process server.
 - b. ☐ California sheriff or marshal.
 - c. ☐ Registered California process server.
 - d. ☐ Employee or independent contractor of a registered California process server.
 - e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
 - f. ☐ Registered professional photocopier.
 - g. ☐ Exempt from registration under Business and Professions Code section 22451.
 - h. Name, address, telephone number, and, if applicable, county of registration and number: _____

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

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date: _____

Date: _____



(SIGNATURE)



(SIGNATURE)

1 In Re Matter of:
2 _____
3 _____

4 **ATTACHMENT 2 TO CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and**
5 **Production of Documents, Electronically Stored Information, and Things**

6 **ITEMS REQUIRED FROM _____ POLICE DEPARTMENT**

- 7 1. Records of any Police reports, incident reports, transcripts, audio recordings, and
8 audio from 911 calls that involve _____ (name(s) of person of interest) on
_____ (date).

9 Incident Address: _____
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1 In Re Matter of:
2 _____
3 _____

4 **ATTACHMENT 3 TO CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and**
5 **Production of Documents, Electronically Stored Information, and Things**

6 **GOOD CAUSE EXISTS FOR THE PRODUCTION OF DOCUMENTS,**
7 **ELECTRONICALLY STORED INFORMATION, OR OTHER THINGS DESCRIBED IN**
8 **PARAGRAPH 2 FOR THE FOLLOWING REASONS**

9 I am the attorney of record for _____. The documents or other items requested cannot
10 be obtained in another manner and are material to the issues involved in this case.

11 REASON/GOOD CAUSE FOR PRODUCTION OF RECORDS:
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
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24 _____
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27 _____
28 _____

Appendix B – DCFS Records - Form 827.10

ATTORNEY, ATTORNEY DESIGNEE, OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Christine D. Gille, SBN: 143838 LAW OFFICES OF GOLDBERG & GILLE 131 N. El Molino Avenue, Suite 310 Pasadena, California 91101 TELEPHONE NO.: 626/584-6700 FAX NO.: 626/584-6719 E-MAIL ADDRESS (Optional): ATTORNEY OR ATTORNEY DESIGNEE FOR (Client's Name):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES Juvenile Division 201 Centre Plaza Drive Monterey Park, CA 91754	
CHILD'S NAME: _____ DOB: _____	
DECLARATION IN SUPPORT OF ACCESS TO AND COPIES OF JUVENILE RECORDS (WIC §827, CRC Rule 5.552; Local Rule 7.2)	Juvenile Case Number: Dependency Delinquency

A. Person/Agency Entitled to Access Pursuant to Welfare & Institutions Code (WIC) §827, California Rules of Court, Rule 5.552, and Los Angeles Superior Court (LASC) Local Rules, Rule 7.2:

- ☐ Subject child
- ☐ Subject child's parent or legal guardian
- ☐ Attorney for subject child (including appellate attorney) [continue to Section B below]
- ☐ Attorney for subject child's parent/legal guardian (including appellate attorney) [continue to Section B below]
- ☐ The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action. [Continue to Section B below]
- ☐ Attorney authorized to prosecute adult criminal or juvenile matters under California state law (district attorney, city attorney, city prosecutor) [Continue to Section B below]
- ☐ Person/agency actively participating in adult criminal or juvenile proceedings involving the minor (hearing officers, probation officers, law enforcement officers)
- ☐ State Department of Social Services staff for the purposes delineated in WIC §827(a)(1)(I)
- ☐ Member of child protective agencies per Penal Code §11165.9 (police, sheriff, county probation, county child welfare)
- ☐ Superintendent or designee of school district where child attends or is enrolled
- ☐ State Department of Social Services staff for the purposes delineated in WIC §827(a)(1)(J)
- ☐ Member of child's multi-disciplinary team
- ☐ Person/Agency currently providing supervision or treatment of child
- ☐ Title & Relationship to Child
- ☐ Family law judicial officer, or clerk acting on behalf of judicial officer; family law case #
- ☐ Family law mediator or evaluator (including person performing investigation or assessment)
- ☐ Court-appointed probate guardianship investigator
- ☐ Local child support agency
- ☐ Juvenile justice commission
- ☐ Other (including pursuant to court order; please attach copy of order)

NOTE: Attorney designees (including paralegals, investigators, and social workers) must check the appropriate box in Section A as to the attorney, and must fill out the attorney information in Section B.

B. Attorney

Name:	State Bar #:	Case No:
Court (criminal, juvenile, etc.)	Client Name:	
Client's relationship to subject of juvenile records:		

JUV010 - Revised 2/2014



**DECLARATION IN SUPPORT OF ACCESS TO
AND COPIES OF JUVENILE RECORDS**

Page 1 of 2

C. Type of Records

Please check the box corresponding to the records you wish to access (check all that apply):

- ☐ Juvenile Dependency - court file only
☐ Juvenile Delinquency - court file only
☐ Other (please specify below the type of records you seek, if not listed above)

If you are entitled and wish to access records from the Department of Child and Family Services (DCFS), please contact **Elo Ulloa or Marcy Stevenson – DCFS Records Unit/Office of County Counsel – address: 201 Centre Plaza Dr Ste. 1, Monterey Park, CA 91754 – phone number: (323) 526-6100.**

If you are entitled and wish to access records from the Probation Department, please contact the Custodian of Records, **Veronica Pawlowski, at (562) 940-2569.**

D. Reason for Request of Records

- ☐ Personal use
☐ Other (please specify below if you plan to re-disclose records to third parties)

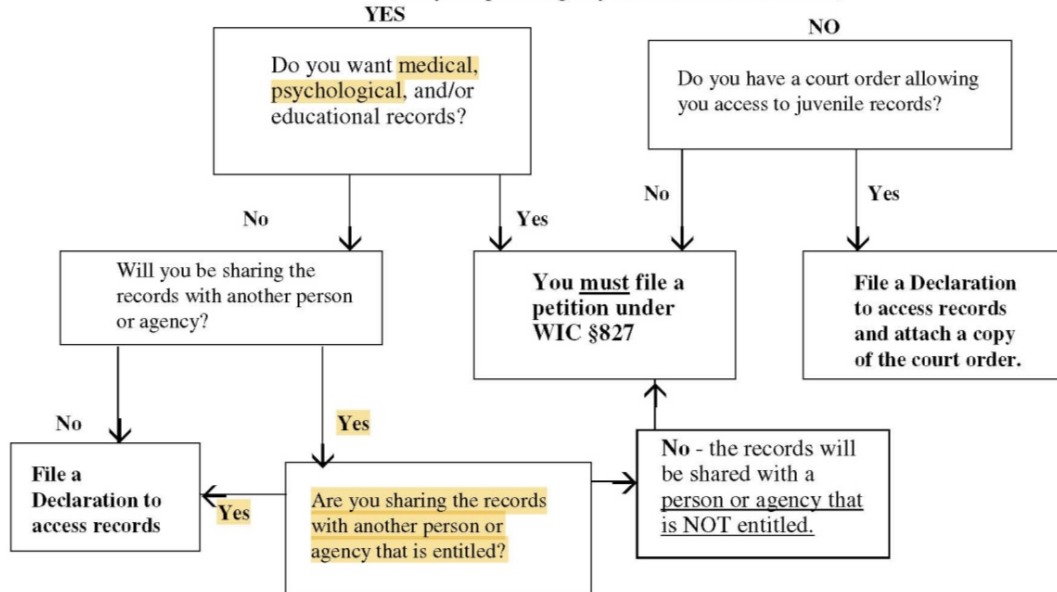
WARNING: Any records, reports or information obtained from the juvenile record(s) shall not be further released or disseminated to persons or agencies not otherwise entitled to access pursuant to WIC §827, CRC Rule 5.552, and LASC Local Rule 7.2 (i.e. agencies/individuals listed above). Further, juvenile records shall not be attached to any documents without prior approval of the Juvenile Court Presiding Judge, unless they are used in connection with a criminal investigation or juvenile court proceeding to declare a minor a dependent or ward of the Court.

I declare under penalty of perjury that the foregoing is true and correct and that I am aware of the above warning regarding dissemination of juvenile records.

Date: _____ Signature: _____

ARE YOU ENTITLED TO RECORDS?

(Are you a person/agency listed in Section A above?)



JUV010 - Revised 2/2014



DECLARATION IN SUPPORT OF ACCESS TO AND COPIES OF JUVENILE RECORDS

Page 2 of 2

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Christine D. Gille, Esq 143838 LAW OFFICES OF GOLDBERG & GILLE 131 NORTH EL MOLINO AVE, SUITE 310 PASADENA, CA 91101 TELEPHONE NO.: 626/584-6700 FAX NO.: 626/584-6719 ATTORNEY FOR (Name):		SUBP-001 FOR COURT USE ONLY
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:		
CIVIL SUBPOENA For Personal Appearance at Trial or Hearing		CASE NUMBER:

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS** in this action at the date, time, and place shown in the box below **UNLESS** you make an agreement with the person named in item 2:

a. Date: _____ Time: _____ Dept.: _____ Div.: _____ Room: _____

b. Address: _____

- DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

CHRISTINE D. GILLE
(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

ATTORNEY FOR _____ (TITLE)

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the date on which you are to appear. Contact the clerk's office or go to www.courtinfo.ca.gov/forms for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410) (Civil Code, § 54.8.)



Page 1 of 2



Martin Dean's
ESSENTIAL FORMS™

Code of Civil Procedure, §§ 1985, 1986, 1987
www.courtinfo.ca.gov

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

**PROOF OF SERVICE OF CIVIL SUBPOENA
FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

1. I served this *Civil Subpoena for Personal Appearance at Trial or Hearing* by personally delivering a copy to the person served as follows:
 - a. Person served (*name*): AS OF APRIL 2016, SUBPOENAS ARE SENT TO MARCI STEVENSON, LA COUNTY COUNSEL
 - b. Address where served: 201 CENTRE PLAZA DRIVE, SUITE ONE
MONTEREY PARK, CA 91754
 - c. Date of delivery:
 - d. Time of delivery:
 - e. Witness fees (*check one*):
 - (1) ☐ were offered or demanded
and paid. Amount:.....\$ _____
 - (2) ☐ were not demanded or paid.
 - f. Fee for service:\$ _____
2. I received this subpoena for service on (*date*):
3. Person serving:
 - a. ☐ Not a registered California process server.
 - b. ☐ California sheriff or marshal.
 - c. ☐ Registered California process server.
 - d. ☐ Employee or independent contractor of a registered California process server.
 - e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
 - f. ☐ Registered professional photocopier.
 - g. ☐ Exempt from registration under Business and Professions Code section 22451.
 - h. Name, address, telephone number, and, if applicable, county of registration and number:

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

Date:

(For California sheriff or marshal use only)

I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

▶ _____
(SIGNATURE)

Appendix D – Typical Custody Evaluator Consent Form

(Reprinted with permission of Lund & Strachan.)

Lund & Strachan

Mary Lund, Ph.D., Clinical Psychologist #PSY8995 ■

Evaluations ■ Mediation ■ Psychotherapy

■ Angus Strachan, Ph.D., Clinical Psychologist #PSY8929

INFORMED CONSENT TO PARTICIPATE IN CUSTODY EVALUATION

Introduction: Before beginning your custody evaluation, it is important that you understand the process. Please review the information below with your attorney. When we first meet, we will discuss the evaluation process described here and you can ask any questions you have and sign that you have read and understood this document.

Please review the stipulation your attorney and you have already signed. It covers fee arrangements and other issues, in addition to what is described below.

My curriculum vitae describes my education, professional experience, and membership in professional organizations and is available at our web site (www.lundstrachan.com). I am performing your evaluation as an independent clinical psychologist licensed in California, under the auspices of the Board of Psychology (800-633-2322).

Scheduling: My office will probably schedule a number of appointments with you in advance of our first meeting. This is done in order to try to complete the evaluation in a given time frame. I try to provide the evaluation results and recommendations approximately ten (10) to twelve (12) weeks from the time of the first appointment. Because I may already be committed to other cases, I cannot begin a new case until there is an opening in my schedule. Please consult with your attorney about the court date for which the evaluation report is needed to see if it needs to be continued.

It is very important that you try to make yourself and your children available for appointments as early as possible and avoid cancellations, because rescheduling may cause a serious delay. There may be other reasons for a delay in producing the report including the need for more extensive investigation, unanticipated personal or occupational interruptions in the parties' or the evaluator's schedules, or previously planned absences (such as summer vacations).

Overview of Evaluation Process: Please understand that my role as an evaluator is different from a psychotherapist. I am the court's neutral expert. My role is to investigate and assess psychological issues, using a number of different methods in

accordance with court guidelines. I gather information and provide the results, along with my opinion and recommendations, to the judge in your case, to the attorneys, and to you. People involved in custody evaluations often experience stress and there may be ongoing problems involving children. I will not be able to provide you with therapy or advice or intervene in personal crises or conflicts during the evaluation. If there is a life-threatening emergency during the evaluation, you should call the local police or 911. I could have a conference call with your attorneys to discuss whether you may want to see a therapist during the evaluation.

A custody evaluation involves getting information from a variety of sources over a specified period of time. There is a tension between being thorough versus containing costs and time. I will talk to you about the process along the way, but I am will make final decisions about procedures. Hopefully, your evaluation will have enough information from different sources that it can be used to make a decision about your children and your family can move forward.

Confidentiality: Since an evaluation is not psychotherapy, there is no psychotherapist-client privilege and the rules for protecting your confidentiality in healthcare and mental healthcare settings do not apply. The report and file in this case are “sealed court documents” only to be used in this family law case, according to the stipulation that you signed. This means that I will not provide the report to anyone except the court and the attorneys of record (or to you directly if you represent yourself). No one else should have access to the report or to the file except by court order. Children should not see the report. In order to protect your confidentiality, I advise you to leave the report in your attorney’s office. It has confidential information about both parties and the children, and you should not show it to others.

I may discuss the case with professional colleagues, without revealing identifying information, in order to promote careful and neutral analysis of results and appropriate recommendations. I also sometimes give case examples without identifying information when training other professionals. I will not reveal identifying information about this case to others except for the collaterals contacted as named in the report, the office staff who assist me with procedures and preparation of the report, consultants on the case as named in the report and, in some cases where I am required to make suspected child abuse reports or reports regarding danger to self or others, to child protective service or law enforcement officials. I may recommend in the report that psychotherapists review the report to understand goals of treatment and then return it to attorneys in order to protect your confidentiality.

In most cases, I include children’s statements in my report. When I meet with children, I inform them that I will be helping their mother and father make plans for how they are going to take care of them and how much time they will spend with each parent and that I need to find out how children think and feel to make a good plan. I

tell them I write a report that the parents will read. If children tell me they are worried about parents knowing what they say, if a parent is worried that a child is pressured, or if I believe a child appears unusually distressed, I will talk to the parents about signing a Waiver of Access to Children's Statements. If both parents sign the waiver, the children's statements are included as an attachment that only the judge and attorneys read.

I must and will inform the court if I have information indicating that a child wishes to address the court. The information may come from the child, a parent or others, including lawyers. I will not disclose further information about this during the course of the evaluation, as that could compromise my information-gathering. I will provide further details in the evaluation report or testimony.

Written Materials: Please complete the Custody Evaluation Questionnaire and the Potential Collateral Contact List, and gather the materials requested in the questionnaire. Bring the original and two copies to your first appointment. You will give these to the evaluator who will give the two copies to the other party. Each party is responsible for giving his/her attorney a copy of both parties' forms.

Any written materials (called ancillary materials) you or your attorney provide me, and your questionnaire, should also be provided to the other party's attorney (or if they are materials already exchanged, notice of what has been provided to the evaluator should be sent to the other party's attorney). Usually I do not accept written materials submitted more than six weeks after the first appointment for the evaluation. In order to contain costs, I read most ancillary material in detail once at the end of the evaluation while preparing for report of results. If there are particular documents you wish me to be aware of while I am conducting interviews, please bring this to my attention during one of our meetings.

Please provide me with the following materials: your children's most recent school report cards, the court orders for custody, restraining orders (if any). If there has been involvement by Department of Children and Family Services (DCFS) or police departments, or if there have been any criminal hearings, or any psychiatric hospitalizations, please arrange with your attorney to obtain those records and provide them to me.

Appointments: In most cases, I schedule the following appointments on the first day of evaluation:

- Orientation to procedures with both parties. (If children are brought to my office for the orientation with both parties, please bring another person to watch the children.)
- Initial individual interviews with each party regarding their requests to the court, issues and concerns.

- Separate interaction sessions with each party and the children. (The party who had custody of the children the previous night has the first interaction session.)
- Individual interview/assessment of each child. (I usually give children some psychological tests/interview aids concerning family relationships and children's psychological issues.)

These are the usual follow-up appointments:

- Each party has at least one more individual interview. If more are scheduled, I attempt to equalize time with each party or give each party the opportunity for equal time. If you wish to communicate more information after a session, give me information about events that happen during the time of the evaluation, or bring up issues that you believe require further sessions, please write or fax me. Do not leave lengthy phone messages, as all communication must be in written form for the file.
- Each party comes (on different days) with all members of his or her household including children at issue, step-parents, step-siblings or half-siblings, and other people who live in the home. (The adults will need to sign our consent forms to participate.)
- Children are interviewed/assessed individually after each parent's interaction sessions.
- Individual interviews with step-parents and other household members. (If step-children or half-siblings are part of interaction sessions, you must get signed consent from the other legal custodial parent for them to participate in the session.)
- Conjoint interviews with both parties together (or in some cases a conference call with both parties).

Some of the appointments call for both parties to be present in my office at the same time, but those appointments can be done in different ways if either party has concerns about safety. Please contact my office if there are restraining orders or concerns about safety. The parties may be asked to arrive at different times on the first day of appointments and to use separate waiting rooms. I do conduct an interview with both parents together, but this can be done by phone if there are safety concerns. If necessary, more security procedures can be provided.

Psychological Testing: Each party will be asked to do some psychological testing, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Psychological testing is used as a check (or second opinion) on my interview with parties in regard to psychological issues parties may bring up about each other. In addition, psychological testing gives information about a person's likely interpersonal

behavior and the way they think, which pertains to parenting. Sometimes I refer individuals to another psychologist for more extensive testing.

Third Parties: I will do telephone interviews with third-party “collaterals,” people who have information about the family. You have been provided a form to organize contact information for collaterals, but I may add collaterals during the evaluation. I usually interview between four and eight collaterals. I usually interview or get written information from children’s teachers, and, if applicable, day-care providers, and psychotherapists, family therapists, marital therapists, DCFS workers. Other collaterals depend on issues in the case. I will discuss collaterals with you, but the final determination will depend on trying to get needed information from neutral collaterals or the most balanced list of collaterals as possible. I cannot guarantee that you will be informed in advance about collaterals that will be interviewed. If there are people you strongly feel should have input in the evaluation, you may want to provide a letter from them (considered ancillary material), as I cannot guarantee everyone you request will be interviewed. Please be aware that some people may not make themselves available for interview or there may be logistical problems that prevent the interview. As part of the stipulation you signed for the evaluation, you gave permission for me to interview those whom I deem necessary. You will be asked to sign forms that show your consent to be interviewed. These forms can, in turn, be sent to the people interviewed as collaterals.

If you are remarried, or have a significant other who spends significant time with the children, I prefer to have an individual appointment with that person, and I must see them in interaction with the child. I may do phone appointments with significant others who spend little time around the children. If there are issues raised in the evaluation concerning another person’s interaction with the children, I will ask that person to consent to be evaluated along with the parties in the case. Otherwise that person is treated as a collateral.

Home Visits and Other Issues: Other procedures may be used in the evaluation (please refer to the signed stipulation). Home visits may be done, depending on the issues in the case and either party’s desire that one be done. If a home visit is scheduled, please ask about what will be expected of you. I may use consultants for other procedures or to provide needed information on issues in the evaluation.

Reporting Results: Usually, I write a full written report and do not meet with the parties and attorneys. The report is released simultaneously to the judge and the two attorneys. In some cases, I do an oral reporting of the details of results and a brief report with a summary discussion of results and my analysis with very detailed recommendations. The parties and their attorneys meet with me, separately review the brief written report, and come back together for questions and/or an oral

presentation of details of results by me. The file with all notes is there for inspection. Either party can afterward request that the details of results are provided in a written report.

Fees: After we have received your initial deposit and after both parties and their attorneys have signed the stipulation, we will schedule the initial appointment. As the evaluation progresses, we will request further deposits. As the report is being finalized, we will give you a final estimate of the total bill. We will release the report after the final bill has been paid.

After the Report: I will not communicate separately with you or your attorney after the report has been issued so that I preserve my role as the court's neutral expert witness. If you have complaints about the evaluation, you have the right to go to the Family Law Court and present your position to the judge. Your attorney can subpoena the file and have another expert review the report and the file. You can bring me to deposition or to the hearing in the case (please see stipulation for fee arrangements).

=====

I have read and understand this description of the custody evaluation procedures.

Signed

Print Name

Date

Appendix E – Typical Minor’s Counsel Questionnaire

Christine D. Gille, JD, MBA, CFLS*
Law Offices of Goldberg and Gille
131 N. El Molino Ave., Suite 310
Pasadena, California 91101

*Certified by CA State Board as Family Law Specialist

Phone: (626) 584-6700
Email: cdgille@gglawpas.com

Parent’s Minor Child Questionnaire & Declaration

Instructions:

- If you do not read English well, please call the office!
- If you need more space, add additional sheets of paper.

THANK YOU FOR HELPING ME UNDERSTAND YOUR CHILD’S CASE BETTER BY PROVIDING ME WITH THIS INFORMATION. IF YOU HAVE QUESTIONS, OR IF YOU NEED A FILLABLE WORD VERSION, PLEASE CONTACT MY OFFICE. Christine Gille.

YOUR PERSONAL INFORMATION:

Name _____ Other Names you use _____

Case Name _____ Case Number _____

Current Address _____ Own/Rent? _____

Current Employer _____ Former Employer _____

Date of Birth _____ Social Security # _____ Visa or
Green Card # _____

Driver’s License #, State _____ (**Please give me a copy of your license.
If no license, provide copy of I.D. you show for public transportation.)

Vehicle type, year _____ License #, State _____

**** For Restraining Orders, monitored visitation, or if one side has no visitation with the child(ren), please describe problem, give the date of any court orders, and give the name and contact info of any monitor (**provide copy of restraining orders):**

PARENT QUESTIONNAIRE & DECLARATION - PAGE 1

YOUR CHILD'S INFORMATION:

Name of Child #1 _____ Date of Birth _____

Social Security # of Child #1 _____

Brief Description of Child #1 _____

Name of Child #2 _____ Date of Birth _____

Social Security # of Child #2 _____

Brief Description of Child #2 _____

(More children? Please use another sheet of paper) +++

Is a child of yours a **special needs** child? If yes, describe the special needs and how your child copes: _____

Summary of the conflict that created the need for an attorney for your child or children.

Do you suspect/have **proof** that there is **domestic violence, substance abuse, neglect, sexual abuse or mental illness** in either parent's family that has impacted this child? Briefly describe your suspicions and proof:

PARENT QUESTIONNAIRE & DECLARATION - PAGE 2

Does the child have temperament or **mental health** issues, such as anxiety or depression, chronic illness, substance abuse issues, frequent trouble at school, or other issues that are affecting the child's behavior or well-being? Briefly describe:

Every family is different. When you were together, and now, who in your family primarily did/does the following things for the child?

1. Who feeds the child meals? _____
 2. Who takes care of most of the grooming issues? _____
 3. Who is the parent who takes care of clothing? _____
 4. Who schedules health care appointments? _____
 5. Who arranges social activities for the child? _____
 6. Who arranges after school care or preschool? _____
 7. Who arranges social activities, sports, music, other? _____
 8. Who is there when the child goes to sleep/wakes up? _____
 9. Who taught toilet training, manners, respect, etc.? _____
 10. Who educates the child about family customs/traditions? _____
-
11. Who teaches basic skills; reading, writing, or math? _____
 12. Who provides financially for the child? _____
 13. Who comforts the child when he or she is sad or angry? _____
 14. Who takes the child to school/takes home? _____

PARENT QUESTIONNAIRE & DECLARATION - PAGE 3

Schedule and School Information:

****Please provide copies of report cards or preschool progress notes for two years.**

Current School or Preschool: _____

Address _____ Phone No. _____

Previous School or Preschool _____

Address _____ Phone No. _____

Current Daycare or After-School Provider _____

Address _____ Phone No. _____

Previous Daycare or After-School Provider _____

Address _____ Phone No. _____

Check one. This school-age child attends school: _____ "Year-Round."

_____ Traditional schedule with summer break. _____ Is home-schooled.

_____ Independent study. _____ Child dropped out of school.

Current Week Day (school-time) Schedule: _____

Weekend Schedule & Activities: _____

Summer or Between Term Schedule:

Professional Information:

Child's **Pediatrician** or Other Doctor _____

Address _____ Phone No. _____

PARENT QUESTIONNAIRE & DECLARATION - PAGE 4

Child's **Dentist** _____

Address _____ Phone No. _____

Child's **Orthodontist** _____

Address _____ Phone No. _____

Child's **Mental Health Professional** _____

Address _____ Phone No. _____

Child's Other **Consulting Professional** _____

Address _____ Phone No. _____

Your Own **Mental Health Professional** _____

Address _____ Phone No. _____

Your Other **Doctor or Therapist** _____

Address _____ Phone No. _____

OTHER **WITNESSES** WITH IMPORTANT INFORMATION: List names, contact numbers and a brief description of what they saw on a separate sheet. Have the most knowledgeable witnesses call my office for an appointment.

More Information about your child or children

Gun Access in Either Home:

If the child knows how to use a gun or has access, please describe.

Leisure Activities:

Does your child have any regular scheduled activities such as sports or music? Does any activity cause conflict with the child's other parent?

Special Talents of Child:

PARENT QUESTIONNAIRE & DECLARATION - PAGE 5

Pets: If you have pets, describe. Explain whether these animals cause conflict with the other parent.

Chores: What responsibilities does your child have while in your custody?

Activities, Belongings: What activities or belongings make your child happiest? Do any of these cause conflicts with the other parent?

Religion: Does your child ever attend a religious institution? Does your choice of religion or no religion cause conflict with the child's other parent?

Strong Negative Emotions:

Does your child react with strong negative emotions to any event, person or other things? If so, describe:

**

More Information About You, the Parent

Your New Relationship: Do you have a new intimate relationship? Give name, address & phone number. Please have him or her contact me as a witness. If your new relationship is causing conflict for the child or the other parent, briefly describe the conflict and what may be done to correct.

PARENT QUESTIONNAIRE & DECLARATION - PAGE 6

Others who live in your home: Please list name, contact #, and relationship, including any children. List other languages spoken in the home. List those who know most about any conflicts affecting the child first.

Your Mental and Physical Health: Please describe physical or mental health issues that have either kept you from having a full relationship with your child in the past or that the other parent alleges have interfered with your parenting or communications abilities. If there was an issue in the past that is being treated or has changed, please describe. (Both parents' health is being studied because of the conflict about the children. If you cannot decide whether to reveal some of your information, for the best interests of the child, please contact an attorney.)

Citizenship Status:

If you are not a U.S. Citizen, does your citizenship status cause conflict? Describe:

Your Legal & Criminal Record: If you have DUIs or a suspended license, please list approximate dates. If you have had any other lawsuits, provide case numbers, County/State, and status of the case: Criminal, Divorce, Parentage, Guardianship, Adoption, Child Support, Domestic Violence Restraining Orders.

PARENT QUESTIONNAIRE & DECLARATION - PAGE 7

OTHER PARENT:

****On a separate sheet, using the above questions as a guide, describe the other parent's information, including difficulty in sharing the child, mental or physical health problems, substance abuse, criminal record, etc., to the best of your ability.**

MOVE-AWAY INFORMATION:

IF one or both parents have moved, or are deciding whether to move away from Los Angeles County, please give a brief description of any compromises that can be made about child custody and what issues have arisen or will arise based on the distance between the two parents' homes. Please also describe how the child will stay in touch with the other parent in the long run, and what parenting plan seems most logical for the next year to three years.

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

Your Signature_____ Date_____

Print your name_____

PARENT QUESTIONNAIRE & DECLARATION - PAGE 8

Appendix F – Typical Authorizations for Records Release
Appendix F-1

**AUTHORIZATION FOR
COMMUNICATION WITH MINOR CHILD'S
THERAPIST & RECORDS RELEASE**

I, PARENTS NAME having fully considered my child's rights, allow my minor child's therapist, CHILD THERAPIST NAME, to be interviewed by ATTORNEY NAME regarding child custody, and I allow the release of records relevant to child custody. This interview may be conducted in person or over the phone. [[LACBA: If you are a minor's counsel, 3151 authorizes contact, but therapists are usually more familiar with an authorization than the Family Code. See other Appendices for more samples. For other attorneys, an authorization is sometimes appropriate provided no other restrictions apply.]]

Photocopies of this Authorization will be considered as valid as the original Authorization, which shall be held by GOLDBERG & GILLE. I hereby state that this authorization is effective for a period of 6 months from this date.

I am the parent of the following minor(s):

Name(s): CHILD NAME(S)

My name: _____

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

Executed on _____, 2016 in _____, California.
(Date) City

Signature: _____

Appendix F-2

**AUTHORIZATION FOR
COMMUNICATION WITH THERAPIST AND
SUMMARY REPORT**

We, PARENTS, having fully considered our rights and obligations, allow OUR [conjoint, co-parent, parent/child, anger management, substance abuse] counselor or therapist, THERAPIST NAME, to be interviewed by CHRISTINE D. GILLE, Esq., regarding child custody and conjoint therapy. This interview may be conducted in person or over the phone.

We also authorize THERAPIST NAME to prepare a brief written summary, which may be used in court, containing the following:

- 1) Number of sessions scheduled/completed; and
- 2) Progress toward unified parenting plan/OR parent-child reunification/ OR anger management/ OR sobriety, etc. [[Adjust]]

Photocopies of this Authorization and multiple signature pages to accommodate each parent, shall be considered as valid as the original Authorization, which will be held by Goldberg & Gille.

I hereby state that this authorization is effective for a period of 6 months from this date.

Name(s): PARENT 1 & PARENT 2

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

Executed on _____, 2016 in _____, California.
(Date) City

Signature: _____
PARENT NAME

Executed on _____, 2016 in _____, California.
(Date) City

Signature: _____

Appendix F-3

AUTHORIZATION FOR COMMUNICATION WITH THERAPIST

I, PARTY NAME, having fully considered my rights and obligations, give my informed consent to allow my therapist, THERAPIST NAME, to be interviewed by THIRD PARTY (e.g., PARTY ATTORNEY, MINOR'S COUNSEL, EVALUATOR), regarding the following only:

RESTRICTED to information about the time period: _____

This interview may be conducted in person or over the phone.

Photocopies of this Authorization shall be considered as valid as the original Authorization, which shall be held by GOLDBERG & GILLE. I hereby state that this authorization is effective for a period of 6 months from this date.

Name: _____

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

Executed on _____, 2016 in _____, California.
(Date) City

Signature: _____

Authorization for School Official/Attorney Communications & Document Exchange

Please take note that Christine D. Gille, Attorney at Law, of the Law Offices of Goldberg and Gille, has been appointed by the Court as counsel to protect the legal rights of my child. I hereby request and authorize you to cooperate fully in answering and responding to Christine Gille's requests as if they were made by me.

This Authorization is directed to all **School Officials**, including but not limited to teachers, administrators, and school health professionals or counselors, who have information about my child's education, mental or physical health, or any other aspect of his life that is relevant to his legal rights.

I further authorize Christine D. Gille, and the Law Offices of Goldberg and Gille, to photograph, inspect, copy and/or receive copies of any and all relevant records in the custody and control of any **School Official**, as described above.

Photocopies of this Authorization shall be considered as valid as the original Authorization, which shall be held by Christine D. Gille, and the Law Offices of Goldberg and Gille. I hereby state that this Authorization is effective for a period of three (3) years from this date.

All records obtained by use of this authorization may be presented at Court without further proof of authenticity.

I am the Parent of the following minor(s):

Name(s):

My Name:

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

Executed on _____, 2016 in _____, California.
(Date) (City)

Signature: _____

Authorization for Law Enforcement & Government/Attorney Communications & Document Exchange

Please take note that Christine D. Gille, Attorney at Law, of the Law Offices of Goldberg and Gille, has been appointed by the Court as counsel to protect the legal rights of my child. I hereby request and authorize you to cooperate fully in answering and responding to Christine D. Gille's requests as if they were made by me.

This Authorization is directed to all **Law Enforcement & Government Professionals**, including but not limited to police, sheriffs, investigators, and any federal, state, county and city agencies who have information about any criminal or arrest records of mine, or any investigation involving my child, or any other aspect of my life or my life that is relevant to his legal rights.

I further authorize Christine D. Gille, and the Law Offices of Goldberg and Gille, to photograph, inspect, copy and/or receive copies of any and all relevant records in the custody and control of any **Law Enforcement & Government Professional**, as described above, as allowed by law.

Photocopies of this Authorization shall be considered as valid as the original Authorization, which shall be held by Christine D. Gille, and the Law Offices of Goldberg and Gille. I hereby state that this Authorization is effective for a period of three (3) years from this date.

All records obtained by using this authorization may be presented at Court without further proof of authenticity.

I am the Parent of the following minor(s):

Name(s):

My Name:

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

Executed on _____, 2016 in _____, California.
(Date) (City)

Signature: _____

Authorization for Medical Professional/Attorney Communications & Document Exchange

Please take note that Christine D. Gille, Attorney at Law, of the Law Offices of Goldberg and Gille, has been appointed by the Court as counsel to protect the legal rights of my child. I hereby request and authorize you to cooperate fully in answering and responding to Christine D. Gille's requests as if they were made by me.

This Authorization is directed to all **Medical Professionals**, including but not limited to doctors, hospitals, mental health professionals, therapists or counselors, dentists, orthodontists, chiropractors and their staffs, who have information about my child's mental or physical health, or any other aspect of his/her/their (indicate) life that is relevant to his legal rights.

I further authorize Christine D. Gille, and the Law Offices of Goldberg and Gille, to photograph, inspect, copy and/or receive copies of any and all relevant records in the custody and control of any **Medical Professional**, as described above.

Photocopies of this Authorization shall be considered as valid as the original Authorization, which shall be held by Christine D. Gille, and the Law Offices of Goldberg and Gille. I hereby state that this Authorization is effective for a period of three (3) years from this date.

All records obtained by using this authorization may be presented at Court without further proof of authenticity.

I am the Parent of the following minor(s):

Name(s):

My Name:

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

Executed on _____, 2016 in _____, California.
(Date) (City)

Signature: _____

Authorization to Obtain Exit Orders and DCFS Records Regarding My Minor Children

Please take note that Christine D. Gille, Attorney at Law, of the Law Offices of Goldberg and Gille, has been appointed by the Court as counsel to protect the legal rights of my children. I hereby request and authorize you to cooperate fully in answering and responding to Christine D. Gille's requests as if they were made by me.

This Authorization is directed to all **SOCIAL WORKERS, COUNTY COUNSEL, and DCFS**, who have information about my children's life that is relevant to their legal rights.

I further authorize Christine D. Gille, and the Law Offices of Goldberg and Gille, to photograph, inspect, copy and/or receive copies of any and all relevant records in the custody and control of any **DCFS, COUNTY COUNSEL** about my children.

Photocopies of this Authorization shall be considered as valid as the original Authorization, which shall be held by Christine D. Gille, and the Law Offices of Goldberg and Gille. I hereby state that this Authorization is effective for a period of three (3) years from this date.

All records obtained by using this authorization may be presented at Court without further proof of authenticity.

I am the Parent of the following minor(s):

Name(s):


My Name:

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

Executed on _____, 2016 in _____, California.
(Date) (City)

Signature: _____

Appendix G – Kaiser Permanente Authorization

 KAISER PERMANENTE® Kaiser Foundation Hospitals Permanente Medical Groups AUTHORIZATION FOR USE OR DISCLOSURE OF PATIENT HEALTH INFORMATION Note: Fees may apply to certain requests	Patient Name: _____ Kaiser # _____ Date of Birth: _____ Address: _____ City: _____ State: _____ Zip Code: _____ Phone #: () _____ Email: _____
Kaiser Permanente will not condition treatment, payment, enrollment or eligibility for benefits on providing, or refusing to provide this authorization.	
This authorizes the following Kaiser Permanente Medical Center(s): _____ to disclose information as specified below for the following purpose(s): _____ _____ _____	Kaiser Permanente may disclose this information to: <input type="checkbox"/> Check if same as above (disclosure to patient) Recipient Name: _____ Address: _____ City: _____ State: _____ Zip Code: _____ Phone #: () _____ Fax #: () _____ Email: _____
Copies of records or medical record information within the following dates: _____ to _____ <input type="checkbox"/> Both Hospital and Medical Office Records <input type="checkbox"/> Medical Office Records <input type="checkbox"/> Hospital Records <input type="checkbox"/> Records limited to a specific provider: _____ or department: _____ <input type="checkbox"/> X-Ray films <input type="checkbox"/> X-Ray Digital Images <input type="checkbox"/> Laboratory Results	
NOTE: Hospital and Medical Office records may include disclosure of information related to mental health, alcohol/drug, and HIV references contained within those records as part of this authorization.	
The actual treatment records from mental health, or alcohol/drug departments, or results of HIV antibody tests are specifically protected, and will not be disclosed unless you sign below. Mental Health department records → Signature: _____ Alcohol / Drug dependency treatment records → Signature: _____ HIV antibody test results → Signature: _____	
Media Type: <input type="checkbox"/> Electronic <input type="checkbox"/> Paper Delivery Preference: <input type="checkbox"/> Email/Secure Portal <input type="checkbox"/> Mail <input type="checkbox"/> Pickup	
DURATION: This authorization shall remain in effect for one year from the date of signature unless a different date is specified here _____ (date). REVOCATION: You or your representative can revoke this authorization upon written request. If you revoke, it will not affect information disclosed before the receipt of the written request. REDISCLASURE: Once this health information is disclosed, how the recipient further discloses it may no longer be protected under federal privacy law (HIPAA). California recipients are required to obtain your authorization before further disclosing this information. If you are requesting a form to be completed, we may substitute a standardized version of the form that provides the same or similar information requested. A copy of this authorization is as valid as an original. I have the right to receive a copy of this authorization.	
Date _____	Signature _____ <small>SCAL: NS-9934 (6-12) SPANISH-NS-1614; CHINESE-NS-6274 NCAL: 90258 (REV. 6-12) SPANISH 01782-000; CHINESE 01782-002</small>
If not patient, print your name and relationship _____ <small>ORIGINAL - DISCLOSING PARTY CANARY - PATIENT</small>	